I look ahead

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Introduction

It is an honour to have been invited to deliver the Sir Ninian Stephen Lecture for 2015, the year which marks the University of Newcastle's 50th anniversary as an autonomous institution.

The inaugural Sir Ninian Stephen Lecture was delivered by Sir Ninian himself in 1993 - the year in which the Law School first offered its Bachelor of Laws program. I remember the occasion well and recently re-read Sir Ninian's lecture – 'Our Demotic Constitution' – which was subsequently published in the Australian Law Journal.[1] Since Sir Ninian was here in this auditorium over two decades ago an extraordinarily talented array of speakers has delivered the Lecture which bears his name. I am privileged to join their ranks this evening.

Before I say a little about Sir Ninian, I should take this opportunity in the University's 50th year to mention some of the people who played a key role in the establishment of the Law School during its very long gestation period. Regrettably some of the most significant people are no longer with us. Both the Vice-Chancellor and Deputy Vice-Chancellor of the time – Professor Keith Morgan and Professor Michael (Mick) Carter – died some years ago. Another important contributor, David Mitchell, died recently. David, who was a stalwart of both the original Department of Law and later the Faculty of Law, was the Acting Head of the Law School in the period between the first two professors of law, Kevin Lindgren and Frank Bates. I take this opportunity to publicly acknowledge David Mitchell's important contribution to the discipline of law at the University of Newcastle, particularly in his chosen fields of administrative law and jurisprudence.

I am pleased to say that three people who were instrumental in setting the stage for the establishment of the Law School – Kevin Lindgren, Frank Bates and the Hon Elizabeth Evatt AC, who was the Chancellor at the time the Law School burst into life – are still with us.

This Law School was conceived in the shadow of two important events in Australian higher education: the Pearce Report into legal education delivered in 1987[2] and the 'Dawkins

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[1] (1994) 68 ALJ 706

[2] D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, AGPS, 1987.

reforms' of the late 1980's. At the time Professor Dennis Pearce's committee delivered its legal education report there were 12 Law Schools in Australia. One of the more interesting recommendations of the Pearce Committee was that no new Law Schools be established and it specifically rejected the suggestion that there be a new Law School at the University of Newcastle.

Shortly after that negative recommendation was made, Newcastle Law School emerged as part of the 'third wave' of Australian law schools. That wave soon became a tsunami because Newcastle is one of 29 new Law Schools which have been created in the past 29 years. One new Law School a year for nearly three decades is an extraordinary achievement for any country. This expansion has occurred because of the 'Dawkins reforms' which de-regulated tertiary education in numerous ways, including permitting individual universities to decide which academic programs (other than medicine) they would offer. Not surprisingly, this University, like many others, chose to establish a Law School for the obvious reasons that there was, and is, a strong demand for legal education and it can be offered at a very moderate cost, especially when compared to other professional disciplines. Indeed, universities invariably make a substantial 'profit' from their law schools for students pay far more for their education than law schools are given to teach them.

Sir Ninian Stephen

Back in 1992 we decided to name this lecture after Sir Ninian Stephen because he embodies so many things about the law and lawyers which are admirable. Sir Ninian has enjoyed a diverse and glittering career. His many professional roles include barrister, Supreme Court judge, High Court judge, Governor-General, judge of the International Court of Justice and Yugoslav War Crimes Tribunal, roving ambassador for the environment, and diplomat come-mediator in some of the world's more intractable disputes in Northern Ireland, Cambodia and Bangladesh. He has brought great learning, dignity and grace to everything he has done in these roles.

In his 10 years as a justice of the High Court of Australia Sir Ninian was a voice of moderation who sometimes played a central role in stimulating change or avoiding disaster. During his time on the Court Sir Ninian epitomised how enduring change often occurs in the law: gradually and unobtrusively. Two cases involving significant constitutional issues spring to mind: *Koowarta v Bjelke-Petersen*[3] and *R v Joske; ex parte Shop Distributive and Allied Employees' Association*.[4] In *Koowarta,* which involved at a very practical level the Bjelke-Petersen government's attempt to stifle the growing Indigenous land rights movement, the High Court was called upon to consider the extent of the Commonwealth's power to legislate for 'external affairs' under section 51(xxix) of the Constitution when deciding whether the *Racial Discrimination Act 1975* (Cth) was a valid law. At that time the High

[3] (1982) 153 CLR 168
[4] (1976) 135 CLR 194

Court was split on the issue of the capacity to use the 'external affairs' power, which is now the source of so much important Commonwealth legislation, to make laws which implement treaty or convention obligations entered into by the executive government.[5] At one level the case was really a battle about the distribution of law-making power between the Commonwealth and the states, with a decision in favour of the validity of the Act likely to result in a significant shift of power from the states to Canberra. Sir Ninian was the middle man who upheld the validity of the *Racial Discrimination Act* with deft reasoning drawing attention to international developments rather than domestic politics in order to justify an expansion of the 'external affairs' power. Sir Ninian referred to the 'new global concern for human rights and the international acknowledgment of the need for universally recognised norms of conduct, particularly in relation to the suppression of racial discrimination…'[6] Shortly afterwards, following a change in membership,[7] the High Court confirmed its new and expanded approach to the Commonwealth's capacity to legislate for 'external affairs' in the famous *Tasmanian Dams case*.[8]

The second case in which Sir Ninian played a decisive role, *R v Joske; ex parte Shop Distributive and Allied Employees' Association,*[9] does not appear upon first reading to be a decision of any great significance. This was a case, however, in which Sir Ninian quietly, but effectively, stifled a challenge to what has turned out to be one of the High Court's most important decisions, the *Boilermakers' case*.[10] *Boilermakers'* established the Constitutional principle of the separation of judicial power which means that only courts can exercise Commonwealth judicial power and that Commonwealth courts can exercise judicial power only. This important decision, which constructed a metaphorical wall around the Commonwealth judiciary, has strengthened the rule of law in our community by ensuring that the courts are largely removed from the rough and tumble of daily politics giving us an independent arbiter which determines the meaning of the law when it must be applied in individual cases to determine the responsibilities, rights and obligations in dispute. This symbolic wall—which does much to guarantee the independence and impartiality of the judiciary—is still growing as the state judiciary now enjoys its protection following the High Court's decision in *Kable's* case.[11]

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[5] As the current Chief Justice, Robert French, pointed out in a recent speech: 'Laws giving effect to treaties and conventions in Australia now cover a large variety of topics from human rights protection in the fields of race, sex, age and disability discrimination, environmental law, criminal law, commercial law, transnational insolvency, intellectual property, maritime law including maritime pollution, and a large variety of other topics' (R French, 'If they could see us now – what would the founders say?' *John Curtin Prime Ministerial Library 2013 Anniversary Lecture*, 18 July 2013, 18)

[6] (1982) 153 CLR 168, 220.

[7] Sir Ninian had left the High Court by this time to become Governor-General. He was succeeded on the Court by Sir William Deane who joined Mason, Murphy and Brennan JJ in taking an expansive view of section 51(xxix).

[8] *Commonwealth v Tasmania* (1983) 158 CLR 1

[9] (1976) 135 CLR 194

[10] *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254

[11] *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51

Back in the 1970s some High Court justices—and especially Chief Justice Barwick who had been both a member of parliament and a Commonwealth Minister before his appointment to the bench—saw the *Boilermakers'* doctrine as unnecessarily limiting the capacity of the Commonwealth government to manage its affairs and, consequently, sought to prepare the ground for a direct challenge to the correctness of the decision.[12] *R v Joske; ex parte Shop Distributive and Allied Employees' Association*[13] was seen by many as an appropriate vehicle to challenge the *Boilermakers'* doctrine of separation of judicial power. As luck would have it, Sir Ninian Stephen was the judge handling the interlocutory stages of this case. By quiet and deft handling Sir Ninian ensured that the case came before a full bench of seven justices rather than five as originally planned. This meant that the proposed challenge to the correctness of the *Boilermakers'* decision evaporated because of uncertainty about how the numbers would fall. Now, 40 years later, I suspect most informed commentators would agree that the Australian system of governance is both stronger and fairer because—as a result of the *Boilermakers' case*—the judiciary is, and is seen to be, independent of the other branches of government. Contemporary judges fiercely protect that independence. I suspect most ordinary members of the community have faith in the integrity of the judiciary because they see it as a strong body which sits outside day-to-day politics making fair decisions according to law and safeguarding the community against abuse of power by the executive government.

Sir Ninian is now 92 years of age. He lives quietly in Melbourne with Lady Valery Stephen surrounded by a large extended family many of whom are lawyers making significant contributions to Australian life. I have had the opportunity to meet Sir Ninian on a number of occasions. He is in private as one would expect from his public persona - a modest man who has the gifts of grace, charm and a quick wit. He is a great role model for people starting a career in the law.

I look ahead

Today I intend to accept the challenge posed by the University's motto – 'I look ahead' – and say something about what I think the law, the legal profession and legal education might look like in 20 years' time. Indeed I had to look back some distance to discover what had happened to the University's motto which formed part of the original coat of arms where the seahorse was looking backward rather than forward. It appears that when the coat of arms was modernised in the early part of the 21st century, and the seahorse righted itself by looking forward, the motto disappeared. I am reliably informed, however, that 'I look ahead' remains the University's motto.

[12] See e.g. *R v Joske; Ex Parte Australian Building Construction Employees & Builders' Labourers' Federation* (1974) 130 CLR 87 (Barwick CJ at [90]).
[13] (1976) 135 CLR 194

The original plan for the Stephen lecture was that an experienced lawyer, perhaps one in the twilight of his or her career, would talk to new, prospective lawyers about what might lie ahead. But Sir Ninian, as well as most who have delivered his eponymous lecture, was too smart to take the risk of gazing into the crystal ball hoping to see a vision of what the future might bring. Soothsaying is a notoriously risky business. Most of the Stephen lecturers have considered contemporary issues, or they have given us excellent accounts of important historical events through a contemporary lens as Sir Ninian did in his first lecture in which he recounted the deeply democratic origins of the Commonwealth Constitution.

Because, however, it was my idea that the Stephen Lecture should be a metaphorical passing of the baton from one generation of lawyers to the next, because in the twilight of my career I am willing to risk ridicule if my prophesies turn out to be wrong, and because I have always preferred to look forward rather than back, I will try to paint a picture of what I believe the law, the legal profession and legal education might look like in 2035. I emphasise *might* because much of what I am about to say will appear to some as being little more than the highly speculative hopes of an ageing optimist. My three topics—the law, the legal profession and legal education—are, of course, inextricably linked because developments in the law will affect the way the legal profession goes about its work which will, eventually, influence the content and delivery of legal education.

But, first, let me give some historical context. My life in the law has been relatively brief, especially when one looks at the huge span of history which has shaped the body of law people study in 2015. I graduated from law school 42 years ago. Other than the arrival of the Internet which has changed almost every facet of modern life—and will continue to exert a huge influence over the law, the legal profession and legal education—the three most significant legal developments over the past four decades have been, in my opinion, first, the sheer volume of law that now exists, secondly, the diminishing role of the courts in both dispute resolution and the creation of new law through development of the common law and thirdly, the extraordinary growth in the number of law schools and law graduates. These developments clearly inform my thinking about what lies ahead, especially as there is no evidence to suggest that any of them will cease—or even slow down—in the foreseeable future.

The law

The accessibility of statutes

The first thing to say about the law is that we have far too much of it, particularly unnecessarily complex legislation. Statutes have taken over the Australian legal landscape just as prickly pear and rabbits took over the land in the 19th century. Like those excesses of flora and fauna, the runaway growth of the law threatens our well-being as a community. By

2035 we will be a country 'planted too thick with laws'[14] unless we do something bold about curtailing the amount and dramatically improving the comprehensibility of the legislation our parliaments produce each year.

The sheer volume of inaccessible legislation adds greatly to the cost of legal services, it renders legal education more and more difficult—because it expands the content of the canon which all fledging lawyers must learn—and, perhaps most importantly, it undermines the rule of law because it becomes increasingly difficult for people to respect and obey the law if a reasonably intelligent layperson cannot understand what it means. Businesses and the wealthy now pay lawyers large sums of money to explain the law in advices which are often hedged with numerous caveats or qualifications because the lawyers themselves find it difficult to give definitive advice about a person's legal rights and obligations in particular circumstances.

I am neither the first Stephen lecturer nor the first former law dean to comment upon either the amount of legislation we now produce or its lack of clarity. Twenty-one years ago former High Court justice Michael McHugh spoke of the great increase in the volume of legislation in his 1994 lecture.[15] Michael McHugh deplored the fact that the growing complexity of legislation was forcing lawyers to become more specialised which, in his view and mine, had numerous negative effects upon development of the law. McHugh went on to quote one of the English speaking world's experts on statutory drafting, Francis Bennion, who said more than 40 years ago: 'Our treatment of statute law remains where medicine stood when the leech was the universal remedy'.[16] To continue Bennion's analogy, I doubt whether the legal equivalent of penicillin has even reached the horizon of those people with ultimate responsibility for the state of our statute books.

More recently Justice Mark Weinberg of the Victorian Court of Appeal, a former Dean of Melbourne Law School, Federal Court judge and Commonwealth Director of Public Prosecutions, spoke of his frustrations when dealing with much modern legislation. In an address to the National Judicial College a few years ago, Justice Weinberg complained of legislation being drafted 'in a manner that almost defies comprehension'.[17] He described the Commonwealth *Social Security Act*, which is a piece of legislation likely to affect most Australians at some point in their lives, as an 'excrescence'. More recently Justice Weinberg has said that 'the criminal law today is too complex and quite unnecessarily so'.[18] These are

[14] The first of Chief Justice Gleeson's Boyer Lectures in 2000 was titled 'A Country Planted Thick with Laws'. This expression was drawn from Robert Bolt's play, *A Man for all Seasons*, concerning Sir Thomas More's clash with Henry VIII over his divorce from Catherine of Aragon.
[15] M McHugh, 'The growth of legislation and litigation' (1995) 69 *ALJ* 37.
[16] Quoted in The Right Hon P Mayhew, 'Can Legislation Ever be Clear, Simple and Certain?' (1990) 11 *Statute Law Review* 1.
[17] Justice Mark Weinberg, 'The Australian Justice System – what is right and what is wrong with it?' National Judicial College of Australia, *Conference on the Australian Justice System in 2020*, 25 October 2008.
[18] Justice Mark Weinberg, *'The Criminal Law – A "Mildly Vituperative" Critique'*, Peter Brett Memorial Lecture, Melbourne Law School, 10 August 2011.

damning indictments from one of the country's leading lawyers who is certainly not a person given to hyperbole.

Let me give a few rather crude numerical comparisons in order to illustrate my points. In 1912 the Commonwealth parliament passed 43 Acts; in 2012 it passed 206 Acts. In 1914 the NSW parliament passed 33 Acts; last year the number was 88. The size of individual pieces of legislation has also grown dramatically over the years. One of the first pieces of legislation passed by the federal parliament was the *Commonwealth Conciliation and Arbitration Act 1904*. It has been reliably reported that one of the actual authors of the legislation was the Attorney-General who introduced it into parliament, Alfred Deakin.[19] The 1904 Act, which comprises 92 sections and occupies a mere 36 pages of the Commonwealth statute book, is both clear and brief, drafted in a style that is almost elegant. Its modern counterpart is the *Fair Work Act 2009*. Even those who drafted it would not be brave enough to describe it as elegant, clear or concise.

The *Fair Work Act* contains more than 800 sections and occupies nearly 1000 pages of the Commonwealth statute book. Reading and understanding it are not tasks for the feint-hearted especially because two of the central terms—'employer' and 'employee'—have meanings which change quite often as the reader progresses through the six chapters of the Act. In order to understand the meaning of numerous provisions within the *Fair Work Act* it is necessary to follow cross references to other legislation and to have a sound understanding of the common law. The meaning of such central terms as 'employer with its ordinary meaning' or 'employee with its ordinary meaning' can be known only by reading a series of High Court decisions. How are ordinary people who are not trained in deciphering complex statutes, but who are likely to be an employer or an employee at some stage of their life, supposed to know their rights and obligations in the workplace without paying large sums of money to specialist employment lawyers?

The *Social Security Act 1991* is another piece of Commonwealth legislation that touches the lives of many, many Australians. That Act, which contains more than 1200 sections, has a numbering system which almost defies belief. To give a frightening example: section 1233ABAAB deals with debts arising in relation to training and learning bonuses. In order to understand the effect of section 1233ABAAB it is necessary to follow the cross-references in that section to various other provisions in the Act and two other separate Acts. I understand that the *Social Security Act* is read by a few aficionados only while most people use the Guide to Social Security Law published by the Commonwealth Department of Social Services in order to discover what the law says about social security entitlements. What happens if the Department has not correctly understood the legislation and the Guide is wrong?

By way of contrast, the courts have been rather modest contributors to the burgeoning body of law in Australia. In fact, the High Court has not increased its output over the past

[19] J A La Nauze, *Alfred Deakin: A Biography*, MUP, 1965, 316-318.

century, although judgments are invariably much longer than they were in earlier times. In 1914 the High Court delivered 94 decisions; last year it managed only 52. However, a consequence of the Internet is the availability of practically every decision delivered by every Australian court and tribunal thereby rendering redundant the earlier 'filtering device' of reported cases.

Of course it is much easier to describe the problems associated with too much incomprehensible legislation than it is to identify a solution. In the course of preparing this lecture I came across a fascinating piece in an Australian law journal headed 'Reform on a Grand Scale'. It contained a quote from a Government White Paper:

> '[I]t is today extremely difficult for anyone without special training to discover what the law is on any given topic; and when the law is finally ascertained, it is found in many cases to be obsolete and in some cases to be unjust. This is plainly wrong. [The] law should be capable of being recast in a form which is accessible, intelligible, and in accordance with modern needs…There is at present nobody charged with the duty of keeping the law as a whole under review and making recommendations for its systematic reform.'[20]

The article was published in the January 1965 edition of the *Australian Law Journal*. It referred to a White Paper published in 1964 by the British Government when Harold Wilson was the Prime Minister. The Lord Chancellor in the Wilson Government, Lord Gardiner, used the White Paper as the springboard to establish the United Kingdom Law Commission, the British forerunner of the Australian Law Reform Commission and the various state commissions. While UK Law Commission has had many considerable achievements over the past 50 years, and the ALRC has contributed greatly to the Australian community throughout its forty-year existence, I doubt whether the staunchest supporter of either Commission would suggest that the law is more accessible and intelligible today than it was prior to their creation.

Indeed the situation has become so difficult in the United Kingdom that people other than lawyers are effectively discouraged from reading Acts of the Westminster parliament. Many modern pieces of legislation are accompanied by a document called a 'Code of Practice' which is a detailed, lay person's guide to the Act in question. A good example of an intelligible Code of Practice is the one made pursuant to the *Mental Capacity Act 2005*. This Code does some truly novel things: it explains the law in plain English, it gives examples to illustrate how the law operates in particular common circumstances, it explains the policy which underpins the law and it describes how this body of law interacts with other relevant laws. It almost goes without saying that the Code is much easier to read than the Act itself.

[20] Current topics, 'Reform on a Grand Scale' (1965) 38 ALJ 301

While the British Codes of Practice are laudable because they make statutes accessible to the people who are directly affected by them, they appear to represent an unfortunate concession that it has become too hard to prepare comprehensible legislation and they also erode an important, protective tension between the various branches of government in the Westminster system.

I hope we do not give up on the task of preparing laws that are capable of being understood by ordinary people and start, like the British, to rely upon a parallel set of documents in order to allow ordinary people to discover the content of the law. Also, under the Westminster system of government, parliament is supposed to make the law and the courts are supposed to tell us what it means and how it applies in particular circumstances. That separation of responsibilities provides important safeguards against abuses of power. But Codes of Practice are yet another example of a de facto shift of power to the executive branch of government. Codes are prepared by the Lord Chancellor who, following the reforms brought about by the *Constitutional Reform Act 2005*, has a role which is broadly similar to the Attorney-General in Australia. The Lord Chancellor, who also carries the title Secretary of State for Justice, is a member of parliament and a member of Cabinet who operates with support of a large government department, the Ministry of Justice. When people rely upon Codes prepared by the Lord Chancellor to tell them what the law really means the ultimate outcome is that a branch of the executive government both drafts the law and then interprets its own drafting handiwork.

There is no easy fix at a technical level for the problem I have described: the complexities of modern life sometimes demand intricate regulation; there a few exemplars of clear and concise modern legislation anywhere in the world; drafting of legislation is a 'closed shop' guarded by the various offices of Parliamentary Counsel; and there are few people in the university sector, or in the legal profession, exploring new ways of doing things and offering courses to aspiring drafters on how to improve upon the work of previous generations of draftsmen and women.

There is also no easy fix at a political level for change of this nature because it is difficult to identify champions for a cause which will be time-consuming, expensive and unlikely to cause people to change their voting intentions. At the moment the most conspicuous critics of modern legislation are judges and legal academics. Both groups have little political clout. The practising legal profession is in a difficult bind. While members might privately rail against the worst examples of legislative drafting, there are strong disincentives for law societies and bar associations to criticise the way in which the law is presented because, self-evidently, the more complex the law the greater the need for people and businesses to seek professional legal advice about a transaction or a dispute.

If we are to bring about change in the presentation of legislation I suggest that the impetus must come, in the first instance, from outside government. I believe it is necessary for a group of experienced lawyers with a breadth of expertise to initiate a process for re-

examining the way in which we present the law in statutes. A new structure could include matters ranging from a detailed narrative which describes the policy which underpins the various components of the legislation, a description of the rationale for and intent of each provision in the legislation, a sensible numbering protocol and a ban upon the mindless use of cross-references which send the reader scurrying far and wide in order to understand the meaning of a particular provision. I would hope that this group would engage the services of professional writers and editors to prepare some early templates. The inaugural group could devise interim general principles about the presentation of legislation and then commission projects to re-write some existing legislation in a new format in order to test its effectiveness.

If a process like the one described gains support from some leaders of the legal profession, as well as the interest of a few reforming attorneys-general, it might have the capacity to generate considerable change in the longer term. While it is highly unlikely that modern governments will slow the pace of legislating—because new laws are such a powerful and relatively cheap (in the short term) means of convincing the electorate that the government is in fact governing—all political parties have a vested interest in improving the quality of legislation. Perhaps one of the greatest benefits to government in joining a project of this nature, especially once it has gained some momentum, is that it provides an opportunity to actually do something about enhancing productivity by reducing the regulatory burden.

Who is well placed to undertake the role of kick starting this process? I suggest a consortium comprising perhaps the Australian Academy of Law, law reform commissions and interested academics. Even the Judicial Conference of Australia might give the project its blessing. The Australian Academy of Law, a learned society comprising lawyers from the various branches of the profession, is a wonderful concept in need of something really useful to do. The Academy is well-placed to play an important role in stimulating a project of this nature: its objects include promoting the rule of law and encouraging continuous improvement of the law. Because of its membership the Academy has the standing to encourage the process of reforming the way in which we present the law in statutes, but not the funds or the infrastructure, to initiate it. Australia's law reform commissions are drifting more and more into the background. They are engaged in a constant search for meaningful activities as governments strive to find 'safe' things for them to do and commission's struggle to produce reports about important topics which are capable of implementation. Legal academics face increasing pressures to win research grants and work collaboratively with others. I suspect that research funding bodies, such as the Australian Research Council, would find it difficult to ignore requests for grants to enable academic lawyers to work collaboratively with the other organisations I have identified to devise new and better ways of expressing and presenting laws made by parliament. These three groups might come together to pool their significant intellectual resources in order to start the process I have described.

Lest this suggested course of action be quickly dismissed as the mindless ramblings of a perpetual reformer who has recently spent too much time in the tropics I remind the sceptics of the history of that extraordinary organisation now beloved of all Australian lawyers—the Australasian Legal Information Institute (AUSTLII)—which struggled to find supporters in its early days. AUSTLII, which still operates on a surprisingly modest budget, was conceived by some wonderfully creative legal academics in the 1980s and started life in the mid-1990s with funding from the Australian Research Council and the Law Foundation of NSW. Together with like-minded colleagues at Cornell University, the founders of AUSTLII have promoted the free access to law movement worldwide spawning similar organisations in numerous countries. Clearly, as they tell us in an oft-repeated television advertisement, 'from little things big things grow'.

Some of us can remember life before AUSTLII and how time-consuming it was to find the law, especially when dealing with common things such as statutes which had been amended on numerous occasions without being consolidated into one print, or important decisions of appellate courts which had not yet completed the long process of publication in the authorised reports. Let us hope that by 2035 when you are reading statutes which are simple, clear, and concise you might remind law students of the 'olden days' when Acts of parliament were often incomprehensible to an intelligent layperson and extremely hard work for the most experienced of lawyers.

Charters of Rights

The second thing which I hope might be remedied by 2035 is the lack of a bill or charter of rights in Australia. Despite some reasonable attempts back in the 1970s and the 1980s to enact a Commonwealth bill of rights, little national progress has been made largely because of the strategies of strong political opponents of charters, such as former NSW Premier Bob Carr, which have been far more effective than those of the various proponents of developments of this nature. I exclude from my list of ineffective proponents of charters of rights the godfather of the Victorian Charter of Rights, former Attorney-General Rob Hulls. As both the Victorian and ACT experience demonstrate, charters can operate effectively without creating havoc within the communities where they apply.

Most of the arguments for and against charters of rights are well known and need not be set out in any great detail. They were well described by the President of the Queensland Court of Appeal, Justice Margaret McMurdo, in the 2010 Michael Kirby Lecture at Southern Cross University.[21] As Justice McMurdo points out, some of the arguments usually advanced in opposition to charters are that Australia's existing governmental institutions adequately protect human rights, any moves towards a charter would undermine parliamentary sovereignty and unnecessarily politicise the judiciary, any statement of protected rights is

[21] The Hon Justice Margaret McMurdo AC, 'An Australian Human Rights Act: Quixotic Impossible Dream or Inevitable Natural Progression?' (2010) 13 *Southern Cross University Law Review* 37.

both difficult (because one right can sometimes conflict with another) and dangerous (because rights can become frozen and outdated), and history teaches us that charters of rights don't protect people against tyrannical governments.[22]

The arguments usually advanced in favour of an Australia Charter of Rights include the following: surveys demonstrate that Australian people want a Charter especially as we are the only western democracy without one; a Charter would give us an opportunity to declare those values which bind the nation together; the marginalised, the disadvantaged and the disempowered people who might benefit from a Charter are not protected by our democratic institutions; a dialogue model Charter such as that which exists in Victoria and the ACT would improve the quality of government; and Australia will become jurisprudentially isolated without a Charter because the other countries to which we have turned historically for ideas about developing our law all have charters or bills of rights which inform the content of their laws.[23]

There are, however, two additional arguments which support the introduction of a charter of rights in Australia. One of them was identified recently by the President of the United Kingdom Supreme Court, Lord David Neuberger, in an address marking the 800th anniversary of the Magna Carta.[24] After referring to a number of issues which have chipped away at the notion of parliamentary sovereignty in the United Kingdom, such as the need for United Kingdom legislation to comply with European Union law and the obligations cast upon the courts by the *Human Rights Act 2008* to determine whether any UK laws infringe the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, Lord Neuberger referred to another good reason in favour of asking courts to make decisions about contentious issues as they are sometimes asked to do in jurisdictions which have charters of rights:

> '[T]he legislature is sometimes too divided or too uncertain to take difficult or unpopular decisions and the courts therefore may be tempted to feel that they ought to step in. So, on some controversial issues where something needs to be done, it may be that legislative indecision is starting to become a reason for increased judicial activism… The need to offer oneself for re-election sometimes makes it hard to make unpopular, but correct, decisions. At times it can be an advantage to have an independent body of people who do not have to worry about short term popularity. And, of course, if the elected judges reach a decision which the elected MPs do not like, they can overrule it by statute.'[25]

[22] Ibid 46-47
[23] Ibid 47-49.
[24] Lord Neuberger, 'Magna Carta: The Bible of the English Constitution or a disgrace to the English nation?' Address at Guilford Cathedral, 18 June 2015.
[25] Ibid [61]

Let me give two examples of contentious issues where the political process in Australia is essentially frozen for the reasons given by Lord Neuberger and contrast this Australian inactivity with developments in the United States and Canada where the courts have paved the way for change. The two issues are same-sex marriage and physician-assisted suicide. Even though opinion polls indicate that a significant majority of Australians support change in relation to both matters, our Commonwealth and State parliaments have chosen not to amend the law probably because of fears that a small but influential group of voters will shift their electoral support, or stop contributing financially to a particular political party, or do both things if the law is changed.

In June this year the United States' Supreme Court considered the issue of same-sex marriage in *Obergefell v Hodges.*[26] By a majority of 5-4 the Court found that states with laws which failed to recognise same sex marriage were in breach of the due process and equal protection clauses in the 14th Amendment to the US Constitution. The case starkly exposed the tension between judicial protection of minority interests and majoritarian rule by democratically elected legislatures. The minority justices argued that the decision about whether people of the same sex could marry was one for state legislatures rather than the courts. For instance, Roberts CJ said:

> The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments"…That respect flows from the perception—and the reality—that we exercise humility and restraint in deciding cases according to the Constitution and the law. The role of the Court envisioned by the majority today is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change…
>
> The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate about same sex marriage…But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision.'[27]

This is an impressive argument, at least until one examines the majority opinion and an earlier case, *Loving v Virginia*[28]*,* upon which the majority relied to support its decision. As the majority said in *Obergefell*: 'The nature of injustice is that we may not always see it in our own times'.[29] The majority supported that observation by referring to the aptly named *Loving* case, decided by the US Supreme Court in 1967, in which a black woman and a white man were sentenced to jail for one year under a Virginia law which prohibited interracial marriage. The Supreme Court overturned that law because it found that the right to marry

[26] 576 US __ (2015)
[27] 576 US __ (2015) (Slip op 24-27)
[28] 388 US 1 (1967)
[29] 576 US __ (2015) (Slip op 11)

is a fundamental right inherent in the liberty of the person protected by the due process and equal protection clauses in the 14th amendment to the US Constitution. [30]

Back in the 1960s the democratic process in Virginia had decided that interracial unions were so wrong they merited criminal convictions and jail sentences. I suspect that few people today would have wanted the Supreme Court of 1967 to defer to the democratic process in Virginia thereby causing Mildred and Richard Loving to spend a year in jail, along with numerous other couples, for the shocking crime of being a black person and a white person who decided to marry. Despite the decision in *Loving v Virginia* many southern states actually kept the so-called anti-miscegenation laws on their statute books for many years with Alabama being the last state to repeal these laws in 2000. The democratic process can sometimes cause great harm to innocent people who lack power at the ballot box.

Under the US Constitution the decision in *Obergefell v Hodges* is final and binding. Any state laws which are inconsistent with the judgement in that case are invalid. The only way the decision could be reversed is by Constitutional amendment, which is almost as difficult in the United States as it is in Australia, or by the Supreme Court overturning its decision in the case which is a very rare event. This outcome is a flaw in the design of the United States' Constitution.

In February this year the nine justices of the Canadian Supreme Court decided unanimously in *Carter v Canada*[31] that section 7 of the *Canadian Charter of Rights and Freedoms* effectively permits physician-assisted suicide for mentally competent people who are suffering from a grievous and irremediable medical condition which they find intolerable. The Court invalidated provisions in the federal Criminal Code which provided that no one can consent to their own death and made it an indictable offence to aid or abet a person to commit suicide. These laws were found to contravene section 7 of the Charter which provides that 'everyone has the right to life, liberty and justice'. In brief, the Canadian Supreme Court decided that laws prohibiting physician-assisted suicide infringed this right because they interfered with people's dignity and autonomy by requiring the people in question to take their own lives or endure intolerable suffering.

The effect of a Supreme Court finding that a law violates a protected right differs between the United States and Canada. In Canada a law which contravenes one of the Charter rights remains valid if it can be shown, pursuant to section 1 of the Charter, that 'the law has a pressing and substantial object and that the means chosen are a proportional response to that object'. In this case the Supreme Court found that the laws in question were not saved by section 1 of the Charter. However, the Court delayed the operation of its invalidation

[30] 388 US 1, 12 (1967)
[31] [2015] 1 SRC 331

order for one year in order to permit federal and provincial legislatures to redesign relevant laws in the light of its decision in *Carter*.

The issue of the legality of physician-assisted suicide in Canada did not end with the Supreme Court's decision earlier this year. Section 33 of the Canadian Charter—known as the 'notwithstanding clause'—permits the federal parliament or a provincial legislature to pass a law which is inconsistent with a Charter right if that law expressly declares that it operates notwithstanding inconsistency with the Charter. Thus, the Canadian parliament can overrule the Court's decision in *Carter* if it so chooses.

Whatever one thinks of the outcomes produced by the US and Canadian Supreme Courts in these difficult cases, the hearings provided an opportunity for public, principled argument about important contemporary social issues which legislatures throughout Australia have found impossible to confront. The judgments delivered by the Courts also gave the public the benefit of detailed explanations for the ultimate decisions. With one exception the various judgments are balanced—they generally acknowledge and seek to fairly describe opposing views—and intellectually rigorous in that the various justices rely upon clearly expressed principles in support of the conclusions reached. The one exception will come as no surprise to those who follow the activities of the US Supreme Court. In what could be seen as a new low in judicial abuse, Justice Scalia, who was in the minority in *Obergefell*, quoted the rather flowery opening sentence in the majority opinion and then said 'if I ever joined an opinion of the Court [which contained an opening sentence like this] I would hide my head in a bag'.[32]

A second additional argument in favour of an Australian Charter of Rights is that a development of this nature is likely to be an effective means of responding to the widespread alienation from public life demonstrated by a growing number of Australians, especially highly intelligent younger people. Unless we do something about this rapidly growing disaffection with our system of government, Australia will not have the benefit of leadership by those who are most able to govern and the Australian community will continue to splinter because it lacks any shared commitment to the well-being of all. The opportunity to participate in principled discussion about some of the challenging issues of the day—such as abortion, euthanasia and same-sex marriage—through debate about whether 'old' laws might need to be changed because they interfere with fundamental rights has the capacity to encourage a new generation of potential leaders to view participation in public life as something worthwhile rather than an activity where one does little more than hone skills as a 'backroom operator' in order to accumulate the power and reap the financial opportunities which can flow from occupying public office.

This argument overlaps with Lord Neuberger's suggestion that Charters of Rights can advance the public interest because they allow some particularly difficult and controversial

[32] 576 US __ (2015) (Scalia J dissenting) (Slip op at 7-8 fn 22)

issues to be resolved by courts in a principled way rather than being side-lined by politicians who fear the electoral consequences of offending people who are strenuously opposed to legal change. Indeed in some instances—such as in the recent US and Canadian cases I have briefly described—law-makers, be they legislatures or courts, are often being asked to give formal recognition to changes in practices and community attitudes which have already occurred.

One of the great challenges when designing Charters of Rights is deciding what should happen when a court finds that a law or an act of the executive government contravenes a Charter right. At one extreme there are 'dialogue model' Charters, like those which exist in Victoria and the ACT, where a finding of inconsistency with a Charter right does not invalidate the law in question or give an aggrieved person a cause of action against the government.[33] Under these Charters the Minister responsible for the legislation is required to make a written response to parliament.[34] That response could be that the government proposes to do nothing about the court finding. At the other extreme there are Bills or Charters of Rights, such as that within the US Constitution, where a finding that a law contravenes a protected right invalidates that law. The only way of overturning the US Supreme Court's finding is to change the Constitution.

A half-way house is a system, such as that which exists in Canada, which permits the legislative branch of government to overcome a Charter outcome it finds unacceptable by passing a law in which openly acknowledges the Charter decision but returns the law to its former position notwithstanding the court's finding. Such a system might be very attractive in a country such as Australia which, to use the words of Sir Ninian Stephen, has a 'demotic Constitution'. It also has the capacity to strike the right 'Australian balance' between the proper role of the courts and the legislature in determining difficult issues of social policy.

At first blush the most powerful argument against an enforceable Charter of Rights is that it is anti-democratic because it gives unelected judges rather than elected parliamentarians the right to make decisions about contested issues of social policy. Upon reflection, however, it is simplistic to suggest that we cannot involve unelected judges in making decisions about important events of the day because this would somehow usurp the role of our democratically elected parliaments. We would not have a huge body of case law, known as the common law, which has been developed over hundreds of years if unelected judges could not be involved in shaping the content of our laws. In many important areas of life, such as contracts and torts, our democratically elected parliaments are more than happy, in most instances, to leave the development of public policy to the unelected judges who make the common law.

[33] *Victorian Charter of Rights and Freedoms Act 2006* (Vic), s 36; *Human Rights Act 2004* (ACT), s 32.
[34] *Victorian Charter of Rights and Freedoms Act 2006* (Vic), s 37; *Human Rights Act 2004* (ACT), s 33.

It is also simplistic to suggest that every vote cast in parliament is an expression of the democratic will of the people who elect the members of parliament. One vote by each elector at the ballot box every few years is not sufficient to give the member elected the right to say that he or she fairly represents the views of a majority of the member's electorate in relation to every vote cast in parliament. Indeed our system does not equally weight every vote cast in parliament for, as Paul Keating reminded us some years ago, the Senate is a grossly unrepresentative body. There is one NSW senator for every 630,000 people resident in NSW whereas every Tasmanian Senator represents only 43,000 Taswegians. Thus, the people of Tasmania will have vastly more say than the people of NSW in determining whether we recognise same-sex marriage in Australia if a Bill to amend the *Marriage Act 1961* (Cth) ever proceeds far enough in the Commonwealth parliament to demand a vote.

The most significant danger to our governmental structures from a federal Charter of Rights is the possibility of over-politicising appointments to the judiciary. While it was common in earlier times for people to move fairly freely between parliament and the judiciary, that trend has slowed as the talent pool for judicial appointments has expanded and we have become more aware of the benefits of our Constitutional separation of judicial power. As recent events in Queensland demonstrate, however, it is easy for an executive government to convince itself that its powers are so great that it can make appointments to the bench which are not supportable on the grounds of merit.

The British responded to this issue of actual or perceived partisan judicial appointments a few years ago when it established a new judicial appointments process as part of the great constitutional reforms of the early years of the 21st century. The Judicial Appointments Commission now provides a fair and transparent process for selecting people for judicial office in England and Wales. A similar body is long overdue in Australia. If established it would play an important role in ensuring that a federal Charter of Rights was interpreted and applied by people who were selected for judicial office primarily because of their legal ability rather than their propensity to favour particular political views.

The legal profession

In view of the extraordinary number of people entering the legal profession, the high cost of legal services, the increasing demand for more price competition in those services and the rapidly growing specialisation in legal practice I doubt whether the legal profession will look the same as it now does in 20 years' time. At present, while legal practitioners are trained and licensed to perform all legal work, few people have the ability and the nerve to operate successful general practices. Most lawyers simply find it too hard and too dangerous to operate general practices. This state of affairs is unlikely to change as it becomes more and more difficult to remain abreast of changes across the entire legal landscape.

The legal profession enjoys a statutory monopoly over the provision of legal services by virtue of section 10 of the *Legal Profession Uniform Law (NSW)* which makes it an offence for an unqualified person to engage in legal practice. The profession also has the capacity to limit, indirectly, the number of legal practitioners who enter the market for legal services by opening their own practices because of the requirement that a person must have ordinarily worked under the supervision of another legal practitioner for two years before being eligible for a practising certificate which allows them to be a principal in their own practice.[35] This means that it takes a person who enters a graduate law program (other than at the University of Newcastle) six years to reach the point where they could open their own practice. This is a long time to wait—and a lot of income to sacrifice—for a person who might be interested in pursuing a career in a specialist area of practice such as family law, wills and estates, or criminal law.

I believe it is highly possible that there will some fragmentation of the licensing of people to perform legal work by 2035. At present, while people other than admitted legal practitioners offer legal services in their capacities as conveyancers, migration agents, industrial advocates, patent attorneys and tax advisors, there is little formal recognition of the fact that legal practitioners are not the only people who perform legal work.

Change might be on the horizon. The number of lawyers in Australia has grown significantly in recent years and there is no evidence that the rate of growth will slow. There are now over 70,000 legal practitioners in Australia and well over 20,000 law students in Australia's many law schools. In NSW there are now almost 30,000 legal practitioners with practising certificates. The number of new entrants is startling. In 2013, 2555 people graduated from law schools in NSW and 2267 were admitted to practice. Nearly 3000 people took out practising certificates as solicitors for the first time. Around 78% of law graduates reported that they were employed four months after completing their studies.[36] I suspect that a growing number of unemployed law graduates will fuel calls for changes to the way in which we license people to practise law.

One of the more interesting recommendations in the Productivity Commission's 2014 'Access to Justice Arrangements' report[37] concerns limited licences to practise law—in effect a practising certificate limited to a particular branch of the law. The Productivity Commission identified increased access to justice and price competition as major reasons for considering the introduction of limited licences. While the Productivity Commission chose family law as the vehicle for investigating the introduction of limited licences, it might be possible to extend this concept to many other areas of legal practice such as summary criminal and traffic matters, small civil claims, and wills and estates.

[35] See sections 47 and 49 *Legal Profession Uniform Law (NSW).*

[36] All of this data is drawn from a recent report prepared by the NSW Law Society, *Future Prospects of Law Graduates: Report and Recommendations*, February 2015.

[37] Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72, Canberra, 2014.

Limited licences to practise law are now available in the state of Washington in the United States and the province of Ontario in Canada. The Washington experience is very new for the first Limited License Legal Technicians in Family Law passed an exam administered by the Washington State Bar Exam in May this year after earlier graduating from an accredited course conducted by the School of Law at the University of Washington. This first step towards opening-up licences to practise law in the United States could not be described as anything other than cautious. Prospective licence-holders must complete a number of introductory courses in legal studies before taking three specialist courses delightfully named *Family Law I*, *Family Law II* and *Family Law III*. Before being eligible to take out a licence it is also necessary to complete 3000 hours of paralegal work under the supervision of a qualified lawyer. Limited Licence Legal Technicians are not permitted to appear in court. Other areas under consideration for limited licences in Washington include elder law, immigration, and landlord and tenant disputes. It was reported a few months ago that the states of California, Oregon, Colorado and New Mexico might follow Washington's lead.[38]

The Ontario experience is a little different. There, limited licence holders are known as paralegals. Under a scheme administered by the Law Society of Upper Canada paralegals are licensed to provide full legal services—including court and tribunal appearances—in specific areas of practice which include minor crime and traffic matters, small civil claims and landlord and tenant disputes. Like their Washington counterparts, Ontario's paralegals must complete both accredited tertiary courses in law and many supervised hours in practice before being eligible for their licences to practise law in a limited, nominated area.

If one considers other well-protected areas of professional specialisation, such as medicine, it seems almost inevitable that we will introduce limited licences to practise law at some stage. Twenty years ago it was unthinkable that nurse practitioners and paramedics would become primary health care practitioners licensed to undertake activities then performed only by medical practitioners. Now these allied health professionals are permitted to do things ranging from prescribing dangerous drugs to certifying people under mental health legislation in various parts of the country. No doubt there will be further inroads into the domain previously occupied by medical practitioners alone as health costs continue to soar and the knowledge and skills of allied health professionals grow.

How quickly we move from 'general practitioner only' lawyers to limited licensing depends, in part I suspect, on developments in the field of legal education and, in particular, on private enterprise entry into the field. There are few incentives for public universities to lead the charge for the introduction of limited licenses to practise law and none for legal professional organisations to do so. I imagine, however, that private enterprise providers will be attracted to the profits to be made from offering targeted programs to people who

[38] *The Washington Post*, 13 March 2015

wish to practise in a single field of law, particularly once they have established a presence in the area of generalist legal education.

Legal education

As I mentioned earlier, there are now 41 law schools in Australia and, I suspect, more are on the way. Only one Australian university—Federation University—lacks an accredited law school. Some, such as Australian Catholic University and Notre Dame, have law schools in more than location. Others such as Central Queensland University don't have a bricks and mortar law school anywhere—the entire program is offered online. There are two non-university providers: the NSW Legal Practitioners' Admission Board continues to offer its course despite the burgeoning number of law schools in this state and a private enterprise provider, the TOP Education Institute, now offers an accredited law program at its Sydney City School of Law. I suspect that we might soon see significant fragmentation in the field of legal education, with TOP the first of a new and 'disruptive' wave of private enterprise, legal education providers.

Despite the extraordinary growth in the number of Australian law schools all offer, perhaps with the notable exception of Newcastle, remarkably similar programs. Prospective lawyers generally undertake what are known as the academic component of legal education, practical legal training and experiential learning sequentially. University law schools usually limit themselves to academic legal education which involves students learning about legal institutions, the role of law in society, the content of legal rules in various branches of the law deemed to be important, and the shortcomings of some of those rules in standard courses with names drawn from the subject areas in the 'Prescribed Areas of Knowledge' or 'Priestley 11' as they commonly known.

While there are numerous possible explanations for this homogenous approach to legal education, it is useful to consider two matters which are directly related to some of my predictions about what lies ahead. They are, first, the prescribed academic content of legal education and, secondly, its cost. At present it is very hard for a law school to offer anything that is novel when it is faced with the dual strictures of accreditation requirements which are desperately in need of modernisation and numerous demands—most notably those concerned with research output—on very limited resources.

Let me consider matters of finance first because I suggest that private enterprise is on the brink of discovering that there are handsome profits to be made from legal education, particularly in an environment where regulators might be willing, or might be pushed, to license a more diverse range of legal education products.

Australian universities have changed markedly since this Law School accepted its first students in 1993. Significant amounts of power and money have moved from discipline-

based faculties to central management as universities have become more focussed upon a 'science research model' which emphasises grant-funded research and higher degree research students rather than undergraduate or graduate professional education. This profound change of emphasis has caused the discipline of law to be one of the great losers, both in terms of financial support and bargaining power within universities.

Law is now one of the significant 'cash cows' of Australian universities because the fees are high and the cost of delivery is usually low. The fees paid by Australian law students for their education at a university varies from around $11,000 per annum to somewhere near $40,000 each year. Most of this money comes from students because the level of Commonwealth support for legal education is low – now under $2000 per annum for those students in Commonwealth supported places.

In most instances domestic students are able to defer payment for tuition by using the FEE-HELP scheme administered by the Commonwealth government. The effect of this scheme is that tertiary institutions receive immediate payment from the Commonwealth government for the educational services they offer while students incur a debt to the Commonwealth which they repay over time through the taxation system. Despite the significant sums of money which people pay for legal education, the way in which universities now operate is one of the great disincentives to innovation in legal education. While the distribution of student fees between the centre of the university and the law school which actually provides the courses for its students clearly varies from institution to institution, I doubt whether any law school receives much more than 50% of the fees paid by its students in order to educate them. Obviously, legal education providers without these significant 'whole of university' costs will be well placed to provide higher quality education while also generating reasonable profits if that is their ultimate objective.

The recent accreditation of TOP's Sydney City School of Law by both the NSW Legal Practitioners' Admission Board and the Tertiary Education Quality Standards Authority—which therefore renders its domestic students eligible for FEE-HELP—might be the harbinger of great change in Australian legal education paving the way for more private enterprise providers. One of the most significant aspects of this development is that TOP is not a university. A small non-university tertiary education provider such as TOP, or even a stand-alone private law school, is in a position to direct a much higher proportion of student fees to law teaching if it is not trying to maintain an expensive university infrastructure, or cross-subsidise other activities from law student fees, or gain an international ranking for its research performance. A legal education provider of this nature could also direct its staff to expend most of their energies on teaching rather than preparing research grant applications and writing law journal articles.

With a little competition in terms of salaries, a private law school could attract some of Australia's best law teachers as Bond Law School did a generation ago. Greater use of technology could mean that the leaders in particular fields of law could produce high quality

pre-recorded series of lectures which are supplemented by intensive skills training and testing undertaken by more junior legal educators who are paid to concentrate on teaching rather research. So long as students of a private law school have access to the FEE-HELP scheme and a sufficient number of 'big names' can be persuaded to join the ranks—retired judges who were legal academics earlier in their careers or authors of leading textbooks seem particularly attractive lecturers—private enterprise law schools might revolutionise legal education in Australia. Businesses of this nature could attract significant returns upon a reasonably modest investment particularly because it is no longer necessary to make a substantial investment in a paper-based law library. Sydney City School of Law advises prospective students about its collection of ebooks and of their access rights—no doubt negotiated for a fee—to the law library facilities at the University of Sydney.

Additions to the ranks of legal education providers might also be the catalyst for significant change in the content of law school programs. In the longer term, private enterprise law schools are far more likely to challenge the current outdated uniform content rules under which all 41 law schools operate than the law schools at public universities which, quite understandably, fear rocking the boat because new rules might be more prescriptive than the 'Priestley 11', or more relaxed rules might be accompanied by US-style bar exams in which law graduates must pass a mega-exam which covers the content of the entire law degree program.

Many years ago I referred to the 'dead hand' of the 'Priestley 11' when describing the mandatory core of Australian legal education. Fifteen years later those rules still govern law schools, purporting to provide law students with the essential content for something which really no longer exists—a career as a solicitor in general practice. The list of subject areas and topics which comprise the 'Priestley 11' is a thinly veiled re-write of the Victorian 'McGarvie 12' which was a 1980s response to concerns that a couple of Australian law schools were more intent on educating people to be socio-legal scholars than suburban legal practitioners. That concern disappeared quickly as graduates of those law schools demonstrated their talents as lawyers soon after graduation.

Despite widespread acknowledgment that the 'Priestley 11' is no longer fit for purpose, I believe there is considerable room for innovation should a new private law school wish to offer very different law programs which could be tailored to particular areas of practice. The relevant rules make it quite clear that it is unnecessary to offer 11 'stand-alone' Priestley courses.[39] The content could be pushed into a far smaller core group of courses leaving more space within a standard law degree program for specialist areas of practice and practical legal training, which may or may not incorporate experiential learning. Perhaps, like Newcastle, new providers might be attracted to the notion of integrating all three

[39] See cl 2 Schedule 1, *Legal Profession Uniform Admission Rules 2015* (NSW)

elements of legal education at the one institution, thereby enabling people to graduate from law school with all of the qualifications which are necessary for admission to practice.

An allied educational product for a private enterprise provider would be programs for people seeking to practise law with limited licences as paralegals. Once there are educational institutions willing and able to offer training programs similar to those on offer in Washington and Ontario, I suspect it will be very difficult for regulatory authorities to ignore calls for the fragmentation of licences to practise law.

Conclusion

Both legal education and the manner of delivering legal services are ripe for change. There is too much money to be made from legal education for it to remain the sole province of public universities which have shown little flair for innovation. There are too many potential consumers of legal services who are unable or unwilling to pay the fees charged by lawyers for 'full-service' legal practitioners to remain the only people who are licensed to provide those services.

Change might also be in the air among those people responsible for making our laws. We cannot continue piling more and more incomprehensible legislation into our statute books without jeopardising the rule of law. There is also too much at stake in the future governance of our community for us not to include a charter of rights among the tools available for responding to the difficult issues of the times.

Thank you again for inviting me here this evening to look ahead. I shall be happy to return for a second outing in 2035 should any of my predictions turn out to be true. In the meantime, good luck in your careers in the law.