Simon Rice, address to the National Indigenous Law Conference, 1 October 2010

Acknowledgement of country

When I taught at Macquarie University, each graduation ceremony was preceded by a welcome to country from an elder of the Darug people, on whose land the University sits.

Each time he spoke, he drew a parallel between our ceremony, which celebrated the learning of a new cohort of graduates, and the deep and ancient culture of learning and understanding among his own people, and indeed all Australia's indigenous peoples. The elder's welcome was a simple and powerful reminder of a connection: between our use of the land and its traditional use.

It is in that spirit that I acknowledge tonight the traditional custodians of the land on which we now meet, their learning, wisdom and understanding, and their willingness to share that knowledge, to teach us, if we will listen.

A broad idea of legal education

Earlier this week, I was at one of those conferences – like this one – which are good to be at, effectively a large meeting of like-minded people sharing perspectives, listening, learning, and resolving to keep working together.

During the week, looking ahead to tonight, I realised that that conference was only the most recent stage in my legal education.

My legal education began about 50 years ago, when my first sibling was born.

After the happy anarchy of being an only child, the arrival of another small person in my life brought with it the hard reality of rules, obligations, and responsibilities. It also triggered in me the emergence of values, of respect, and of an understanding of perspectives – a realisation that I was not always right. Perhaps most importantly, and problematically, I began to deal with, if never fully understand, ideas of justice.

Of course I am not alone in this experience. In different ways, and for different reasons, we are all exposed to the idea – and the fact –of laws and justice in this broad, loose informal sense.

To see law this way is to see it as, variously and collectively, customs, protocols, practices, conventions, prejudice, biases, assumptions, norms, as well as rules and regulations. Law is all that either condones or condemns our conduct.

In that sense we all grapple with law all the time, and our legal education is indeed perennial.

But the term 'legal education' is more usually understood to refer to formal tertiary education, the few years dedicated to being awarded a law degree from a university. Which, by the way, is a relatively recent phenomenon. One statistic I enjoy trotting out is that it was not until the 1970s that the number of lawyers in Australia with a law degree outnumbered those without one – the relatively recent conversion of legal apprenticeships into tertiary legal study is a significant part of why legal education looks as it does today, and that's not a compliment.

My legal education

Legal education is an intense few years of study, which unfold as if nothing went before, as if nothing goes on at the same time, and as if the only thing that will go on afterwards is life in private commercial legal practice.

At this point I should offer, quite genuinely, the usual qualifications and disclaimers to what I am about to say: I say it with the greatest respect, generalising for the sake of argument, with errors and omissions excepted, and I should probably throw in 'without prejudice'. I can't and won't, however, hide behind the ubiquitous shield of 'commercial in confidence'.

The law degree course of study is a discrete, self-contained, isolated, inward-looking, quarantined and, it seems, depressive activity, confident that within its bounds, all that needs to be known about law will be made known.

I am, as I say, generalising. But I do so with confidence. I know from experience that there are examples that run counter to my arguments. But in relation to legal education, the exception truly does prove the rule.

My own legal education was, in memory, principally taking part in law revues and volunteering at Redfern Legal Centre. By law revues I mean not the-journal-to-be-edited kind, but the song-and-dance-and-lame-joke kind.

As a first year student I was unhappy, as research now tells us that law students are often unhappy. I did as many still do, and dropped out. After a year wandering around and working I returned, for want of something better to do. Stumbling into volunteering at Redfern Legal Centre changed my approach to my law degree and, as it transpired, the direction of my life. I took no greater interest in the study of law than I had before, but I did see a reason for going through the process of study; there was a point to my getting the degree.

Little has changed; the actual conduct of legal education continues to fail to offer students inspiring, or even engaging, reasons for doing it.

Legal education as rules and ethos

In what could be a wide ranging critique of legal education, I focus tonight on a couple of its principal weaknesses: its lack of perspective and context, which might be summed up as its irrelevance.

First I should acknowledge what legal education does well: it teaches rules, and it instils an ethos.

The rules are the rules of today, and often of yesterday, but not of tomorrow. Law rarely anticipates; if it moves at all it usually reacts, and this backward-looking approach, distinctive of the common law, is reflected in legal education.

The rules are taught as doctrine – as legal truth – to be recited as if a catechism, and applied to circumstances as if a tailor-made suit on a mannequin. Teachers will tell you how little time they have to convey all the rules in a single semester.

The instilled ethos is in two parts. One is an ethos of acceptance, veneration, stability and entrenchment.

No surprises there. What else would the institution of law teach, but its own validity? What else would the institution of law invest in, but the security of its own future?

It is one of the great strengths of liberalism that it moves just enough to encompass change, but only as much change as it chooses to tolerate, and never as much as would threaten its own existence.

A second ethos instilled in legal education is a broader and more generous one, an ethos of service, of justice according to law, and of the defence of liberty and property

This ethos is less obviously self-interested on the part of law as an institution, though it happens to support best the interests of those who are entitled, by the rules, to service, who have access to justice according to law, who have property, and whose liberty is valued.

The rules and the ethos which are the essence of legal education serve the greater part of a liberal, democratic, market-based society well.

They do not challenge the assumptions of society.

They are not the basis for change in society.

They do not include many citizens of society.

On this score, legal education is wholly inadequate in its preparation of lawyers who can engage constructively with the needs of society, other than to serve – largely unconsciously and unaware – those in positions of security, property and power.

Perspective

This inadequacy, this failure to engage critically and constructively with the wider scope of society, is what I call the irrelevance of legal education. It is at the root of the dissatisfaction, and the widely documented high rate of depression, among both law students and practising lawyers.

How might it be different? How might legal education be made relevant? Tonight I suggest a few necessary changes in both content and method.

One such change is in perspective.

When I was a law student, attending the NSW College of Law to be admitted to practice, we role-played various court processes. We were assigned scripted roles, to perform in front of visiting magistrates (one of whom was, as it happens, the since notorious Murray Farquhar).

We were given a script to appear in eviction proceedings, and one to appear in bankruptcy proceedings. The scripted roles were for the landlord, and for the creditor respectively; in the scripted proceedings neither the tenant nor the debtor entered an appearance.

Some of us rebelled. We refused to write the required submissions for the landlord and for the creditor unless we were given the option of writing submissions for the tenant and debtor. The concession we achieved was that if we wanted to, we could write submissions for the tenant and the debtor as well as for the landlord and the creditor.

When the scripted proceedings were called in the mock court, we played the roles of tenant and debtor, and made an unscripted personal appearance in the proceedings. I remember in the bankruptcy hearing I produced a $2.00 note – which only people who remember Murray Farquhar would remember – and offered the court I would repay the debt by instalments.

Little has changed in the narrow focus of legal education.

Despite the claimed neutrality of legal rules, we all know that they affect different people differently. It is astonishing that the teaching of legal rules continues to look no further than the formal equality of their application, paying little regard to their subjective realities.

Today some of you will have been at a session on integration of indigenous topics into the curriculum. Teaching indigenous topics is important. Teaching indigenous perspectives on ordinary legal topics is as important.

I do not have to detail for you how the criminal law, applied equally to all under the rule of law, is seen, felt and understood very differently from an indigenous perspective. Similarly family law and land law, and for example intellectual property law, constitutional law, corporations law and trust law.

In the literature, feminist perspectives have perhaps made the greatest in-roads into the way conventional legal topics are understood, but that is in the literature far more than in the classroom. Other perspectives – those of non-Christian religions, of non-Western cultures, of the poor, of the unpropertied – are not only available, but represent the reality of law in society, and should be taught.

Context

After perspective, a second necessary change in legal education is context.

When I first taught my law reform course I found that later year law students really don't know how law is made. It's hard to talk about law reform when you don't know how it happens in the first place. They know about Bills and second reading speeches, but nothing of the politics, the interests, the pressures, and the complex processes which lead to the proliferation of posited law. It is a sign of how archaic the norms of legal education are, that the students are much better versed in the relatively rare process of law making by courts than in the daily process of law making by the legislature and the executive.

At the conference earlier in the week, a panel of bureaucrats and ministerial staff described the processes by which lobbying takes place as a recognised part of the law-making process. I was struck by how glib their presentation was, as if a simple description of the formal processes would honestly convey the reality of getting access to the law-makers, of influencing power, of countering other interests in the making of law.

That panel did only what legal education does all the time: mask the processes, the interests, the power that is behind – and is manifest in – the law.

Legal education teaches law as if it simply exists, or comes into existence, and its provenance is irrelevant to understanding. It is as if the *Native Title Act* were taught as a piece of mechanical legislation that sets requirement for property recognition – which is essentially what it does – as if its very terms don't at the same time represent politics, trade-offs and compromises; values, assumptions and vested interests; history, struggle, triumph and defeat. A lawyer cannot – and sadly many lawyers do not – credibly conduct a matter under the *Native Title Act* in ignorance of its context.

Legal education could tell the same contextual stories for all law, creating the opportunity to learn what law really is, how law works and for whom, how law can be used and by whom, how law can be changed, challenged.

Many of you will recognise this call for perspective and context as reflecting the longstanding views of the legal realists of the early 20th century, and their successors the critical legal scholars. Their assault on the formal neutrality and acontextual teaching of law had little lasting effect, I take as a measure of the intransigence of the self-interest of the institutions in a liberal democratic market-based state.

But there is a resurgence now, a reassertion of the need for law both to serve the needs of all society, and to open itself to scrutiny and criticism against contemporary standards of social – not merely legal – justice.

Legal ethics

With that resurgence has come a call for professional legal ethics which support the teaching and practice of law for social justice.

This too is a change to content: to teach an ethic of care, an ethic of moral agency. A contemporary legal ethic would move away from the value-neutral, functional role of classical lawyering, to a morally aware and accountable role, one that honestly acknowledges the central and powerful place that a lawyer has in social relations.

Teaching method

Let me turn from content to method. To establish its relevance legal education needs to change not only what it teaches, but how it teaches.

The lawyers among us learnt our law – as it is still being learnt – from appellate cases. The appellate case method is designed to strip a case of its context so as to reveal the law. In doing so the law is distilled, and is reinforced as formally neutral.

Also reinforced is the limiting and damaging idea that law is generated by – and is made relevant by – disputes, and worse, by the adversarial resolution of disputes.

The appellate case method is well suited to the stand-and-deliver, master-apprentice style of legal education – and, to be fair, of much tertiary education – that takes place in the lecture theatre.

The relevance of lectures was fundamentally undermined by the photocopier. It was once the case that the lecturer had access to cases, books and articles which were, for reasons of cost and distance, largely inaccessible or unknown to students. But the easy replication and distribution of those source books and articles (leaving aside copyright issues) gave students pretty much the same access to what the lecturer had.

Lecturers needed to establish a different dynamic with students, but many have not. They continue to instil rules by expounding on materials which the students have read (or should have read) for themselves. Effective teaching offers what cannot be read: perspective and context, insight, experience, wisdom. Effective teaching is

facilitation and support for students' own inquiry, not mere recitation of the printed word.

In his 50th year of teaching, the great legal philosopher Julius Stone taught a course during my own law degree. I joined about 20 others to sit in a room with the great man and to listen. He spoke, and we listened. And then he stunned us by asking us, and being prepared to listen to us. He posed a question and waited for answer. And waited. I was unable to bear the lengthening, squirming silence, and I offered an answer. Looking at me over his bow tie, through sparkling eyes, Julius Stone, in his 50th year of teaching, said to me, with only the gentlest hint of ambiguity, 'I've never thought of it that way before'.

That's what I call legal education.

Law reform and social justice

Having outlined how legal education could be different I come to the promise and the burden of my role as director of law reform and social justice at the ANU College of Law.

What is legal education about, if it is not about law reform and social justice?

For the reasons I've described, it is in fact about law, not law reform or even law making, and it is about legal justice, not social justice.

Students need no encouragement or additional opportunity to be aware of the prospects of a career in commercial legal practice. It is implicit in the topics they are required to study, the cases they are given to read, the problems they are asked to solve, the exam and assignment questions they are set to answer. It is explicit in the corporate sponsorship of lecture theatres, meeting rooms, libraries, publications and campus activities. It is openly acknowledged in the fact that as well as a law career fair there is an alternative law career fair.

In content, focus, appearance, language, and branding: legal education draws a distorted picture for the students of what is possible for them in law. Despite student demand and popular expectation, legal education points almost exclusively to law and legal justice, and scarcely at all to law reform and social justice.

This distortion is addressed by, for example, inserting some optional courses into the curriculum, much like running the alternative career fair. But these compensatory elective courses do not address the pervasive, systemic, structural imbalance in legal education.

It will be a long time before perspective and context characterise legal education in Australia, or even in a single law school. In that time it will be principally the compensatory elective courses in an alternative curriculum, that mark out some territory for a socially relevant legal education.

To complement this alternative curriculum I have been creating opportunities for extra curricular activity for law students, so they can bring a social context to their studies, if their studies won't bring it to them.

When I first approached social service agencies in Canberra to consider taking on law student volunteers, they didn't get it. 'We don't have any legal work for them.' 'What would they do?' Of course, that wasn't the point. Law students will get legal work soon enough. I want them to see other perspectives on law, to understand the contexts in which law works. I want them to be – and I am pleased to say that after less than a year of this program many are – working with and for indigenous people, migrants, refugees, young people, older people, homeless people and prisoners. Just working with them. Not as baby lawyers, but as people who are learning about the world, and about the lived experience of law.

I encourage the students to take these new understandings back to the class room, to ask questions about the rules that explore perspective, to write assignments on law in context, to propose issues of not only legal justice but of social justice.

I think it's pretty straightforward If their law degrees are to take them to a job where they advise on public policy, then I want them to have some experience of the places the policies operate, and of the people the policies affect.

If their law degrees are take them to a job where they advise and represent employers, industry and commerce, then I want them to have some experience of the world of workers, families and consumers, affected by the conduct of their clients.

Conclude

I should not need to have my title of director of law reform and social justice. But such a role is clearly necessary when one thinks of how little sense it would make to have instead a director of 'law, stability and the status quo'.

The students say it, the community says it, and it seems that it's only the lawyers who run the show who won't see it: law is not static, and lawyers must deal with change and law reform, and legal justice is not all that law can deliver, and lawyers can work too towards social justice.

The law that affects people will be what these students, as lawyers, make of it, and in legal education we have a responsibility to prepare lawyers for the power that we are putting in their hands.