

CHALLENGES TO LEGAL EDUCATION: THE WAIKATO LAW SCHOOL EXPERIENCE

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I. INTRODUCTION

On 1 July 1990 the Waikato Law School was formally established. On 19 December 1990, the then Minister of Education, Dr Lockwood Smith, faxed the University of Waikato notifying it that the Government had withdrawn the \$10 million funding for the establishment of New Zealand's new Law School. In March 1991, the Waikato Law School admitted its first students for the LLB degree, who graduated in 1994. These simple facts belie the traumatic events that accompanied the establishment of New Zealand's fifth Law School, some of which have been recorded elsewhere.¹ Regardless of the circumstances surrounding the foundation of the School, it has survived and thrived and this year celebrates its 20th anniversary. Although in legal institutional terms, 20 years represents infancy, it is appropriate to assess how the Law School has survived the challenges of the past 20 years that has seen almost continuous changes in both tertiary education policy and the delivery of legal services.

The School was established at a time when the neo-liberal policy paradigm of substitution of funding of public institutions with private sector funding was being introduced. The withdrawal of funding for the Waikato Law School signalled the intention of the Government to withdraw from the responsibility of totally funding tertiary institutions and to introduce private sector funding, primarily through increasing fees and enabling loans to students to fund their education. The policy shift has also been accompanied by the commercialisation and commodification of tertiary education. The emphasis on research for profit and courses that contribute to economic growth are examples of this trend. These developments have taken place over the past 20 years, the life of the Law School, and have been well documented and analysed so it is not the intention of this article to re-tread that territory.² It should be noted however that the policy continues today with the recent announcement of the extension of the policy of performance based funding for tertiary institutions.³

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1 Margaret Wilson "The Making of a New Legal Education in New Zealand: Waikato Law School" (1993) 1 Wai L Rev at 1; Margaret Wilson "Waikato Law School: A New Beginning" (1990) 14 New Universities Law Review at 103.

2 Rob Crozier (ed) *Troubled Times: Academic Freedom in New Zealand* (Dunmore Press, Palmerston North, 2000); Ruth Butterworth and Nicholas Tarling *A Shakeup Anyway: Government and the Universities in New Zealand in a Decade of Reform* (Auckland University Press, Auckland, 1994); Wilf Malcolm and Nicholas Tarling *Crisis of Identity? The Mission and Management of Universities in New Zealand* (Dunmore Press, Wellington, 2007).

3 Steven Joyce, Minister of Tertiary Education "Tertiary Tuition Funding to be Linked to Performance" (Press release, 9 March 2010).

An understanding of the evolving public policy context within which the Waikato Law School has developed is the focus of this article. I shall first briefly analyse the original purpose for the founding of the Law School, which was mainly to fulfil the demand for legal professionals in the region. The article will then outline the original mission of the School to achieve three primary objectives, namely: to deliver a professional legal education that would qualify students for the practice of law; to teach law within the legal, social, economic and political context of the time; and to develop a bi-cultural approach to legal education. The considered statement of intent for the new Law School reflected the interest and circumstances surrounding its establishment. It is also a distinctive feature of the School and defines its identity of a distinctive provider of legal education. The article will then analyse the changes in the public policy environment on the delivery of a legal education that is consistent with the original objectives of the School. For example, the neo-liberal public policy paradigm has influenced the practice of law as is reflected in the Lawyers and Conveyancers Act 2006 which requires not only the professional studies programmes but also for it to be reflected in law school courses. The policy paradigm is also reflected in regulatory frameworks that govern every aspect of legal studies. Finally I shall consider the impact of the performance-based model of funding on the delivery of legal education at the Waikato Law School.

II. WHY A FIFTH LAW SCHOOL?

Since the establishment of the University of Waikato in 1964, there had been a lobby led by members of the legal profession in the region to establish a law school. It is sometimes easy to forget the value provincial New Zealanders place on education. It is not only a way to increase the prosperity of the region but it also makes a contribution to the cultural and intellectual life of the community. The dedication of a few advocates in Hamilton for a law school started to be rewarded when the unfulfilled market demand for lawyers in the region in the 1980s became too obvious to ignore. The Waikato/Bay of Plenty region had found it difficult to attract young lawyers to legal practice. The case for a fifth law school at Waikato University was formalised in a report prepared by a committee representing Waikato and Auckland Universities and the Auckland and Hamilton District Law Societies.

*Te Mātāhauriki: The Report of the Law School Committee*⁴ sets out the case for a new law school and foreshadows the character of the future Waikato Law School. The title *Te Mātāhauriki*:⁵

conveys in a literal sense, the horizon where earth meets the sky; in a practical sense, a meeting place of people and their ideas and ideals; in a spiritual or metaphysical sense, aspiring towards justice and social equity.

The Report itself addressed four questions: the demand and supply of lawyers in New Zealand; the role a law school would play in enabling the University to serve more adequately the needs of the people of its region; the character and philosophy of the Law School; and the resource issues associated with the creation of a law school. It not only established that there was a demand for more legal practitioners in the region, but also highlighted the developments in the law that reflected changes in society, such as the importance of the Treaty of Waitangi, the development

⁴ University of Waikato, February 1988.

⁵ *Ibid*, at 1.

of administrative law, environment law, labour law, human rights, commercial practice, and international trade law. Apart from the local demand for law graduates, it also identified the rise of the mega law firm that created a demand for new legal specialists in banking, finance, intellectual property and computer and information technology.

The Report also described the University of Waikato region as having the lowest proportions of retention, matriculation and participation rates of any university region – 4.1 per cent of males and 4.2 per cent of females aged between 18 and 24 years – yet it was one of New Zealand’s fastest growing areas. Of those students from the region attending universities, only 54 per cent are enrolled at the University of Waikato because of the limited range of professional programmes. The low participation rate was also attributed to both the rural nature of the region and the high proportion of residents of Māori descent. In 1986, 21.7 per cent of the population of the region identified as Māori and 30 per cent of the New Zealand Māori population lived in the University of Waikato region. The University of Waikato had deliberately attempted to create a cultural and intellectual environment that was supportive of Māori tertiary study so the Report noted the establishment of a Law School would enable the University to “...reaffirm its commitment to biculturalism and will have an opportunity to give new meaning to the notion of partnership of good faith, a concept central to the Treaty of Waitangi.”⁶

The Report also endorsed the notion of the new Law School adopting a new approach to legal education and the structure of the law degree. All the law degrees at that time required a first year course of legal system and a selection of non-law courses, with the succeeding three years consisting of the core subjects of contracts, torts, criminal law, public law and property law and a selection of optional law courses that varied from law school to law school. The Council of Legal Education determined the courses required for admission as barristers and solicitors so any Waikato law degree would need to gain the approval of the Council. Although acknowledging the final structure of the degree was a matter for the foundation Dean and the Council of Legal Education, the Report stated a preference for any degree to include extra-legal subjects at not only stage one level but also stage two and three level. This preference was advocated to ensure the Waikato law degree enabled students to study law in the context of the society in which it functioned. The Report stated:

We understand the law and society perspective to be an approach that recognises that law and the personnel of the legal system operate not in vacuo but within a social, political and economic environment, and can only be understood as such. Law is both a product of these forces and a force in its own right affecting their development. ...In this context, we would note that a law and society perspective is both a consequence of a commitment to establishing a law school that seeks to become bi-cultural as well as a further reinforcement of the importance of that desire.⁷

When making the case for the new Law School, the Report acknowledged the need for the school to be well resourced, particularly the Library. It is interesting to observe that a total student enrolment of 460 with a teaching staff of 19 was projected for the Law School once fully established. Twenty years later the Law School has graduated over 2500 students, and in July 2009 enrolment exceeded 600 EFTS with a staff of 25.⁸ The Library was of particular concern to the Committee that prepared the Report because while law is considered relatively inexpensive to produce as a university degree, the mark of a credible law school has been its Library. While then the

6 Ibid, at 17.

7 Ibid, at 23-24.

8 Faculty of Law – Current Position and Future Vision, April 2010.

Report concluded that the case for a law school at the University of Waikato was unanswerable, it required a commitment of public funds. This meant a case had to be made to convince the University Grants Committee, the funding agency, and the Government to allocate the funds for the purpose.

The Report was referred to the University Grants Committee (UGC), the funding agency that negotiated with governments for university funding. Progress in the case was made in 1989 when the Government announced it would ask the Council of Legal Education to advise it on the issue. While the Government funded the university system through the UGC, the Council had control over the professional curriculum to be taught by the law schools so this was the appropriate process. The Council was asked to address the following issues: whether there was a need for funding of more places at universities for law students; whether the existing four law schools could accommodate increased demand; and an assessment of the bids from Massey University and the University of Waikato for a new school. Both universities presented very different proposals – Massey sought a business focus to its law degree, while Waikato sought a law in context approach to its degree. Both intended to provide a professional qualification however.

The Council of Legal Education concluded that the demand for student places in all law schools substantially exceeded the places available; that the existing law schools had no plans to increase places for law students; and identified the issues that would need to be addressed by any law school that was awarded the funding for a new law school, including: adequate funding for staff and a library; the need for a multipurpose degree that fulfilled professional qualification standards but also prepared students for careers outside the legal profession (it estimates a third of law graduates did not remain in legal practice); and the need to ensure there were more opportunities for woman and Māori to study law. The Report is worth rereading because most of its observations remain relevant today, including the relatively inexpensive cost of a law degree. The Report was referred to the Government and the UGC, and the Government announced on 30 October 1989 that funding of \$10million over four years had been awarded for a new law school at the University of Waikato.

From its beginning then, the Waikato Law School was intended to challenge the existing traditional approaches to legal education. It recognised that a law degree had to prepare the student for a changing profession and society and that many students would pursue careers outside the law. As the Foundation Dean I was conscious when I took up the appointment in July 1990 of the need to fulfil the expectations expressed in the Te Mātāhauariki Report. In this task assistance was sought from a group of legal academics and law practitioners to ensure the degree met the competing expectations of the Council of Legal Education, and the local legal profession.⁹ The wider community's concern focussed on access to the opportunity for a legal education not only for school leavers but also those older people, especially women, who for a variety of reasons had

⁹ The meeting was held on 24 March 1990 and attended by myself as Dean of the School but convened by Sir Kenneth Keith, then Law Commissioner, now Justice of the International Court of Justice, Professor Richard Sutton, Otago Law School, Professor Grant Hammond, then Dean of Auckland Law School, now President of the New Zealand Law Commission, Margaret Mulgan (now Margaret Bedggood), then Chief Human Rights Commissioner, later Dean of Waikato Law School, Professor Don Gilling, School of Management and long term advocate of the School, Mr Gerald Bailey, Waikato Law Practitioner and member of Waikato University Council, Denise Henare, law practitioner, Georgina Te Heu Heu, then law practitioner and now Minister of Courts, Sian Elias QC, now Chief Justice and President of Supreme Court, Ruth Busch, then and now member of the School academic staff, Graham Lamont, then Academic Registrar, University of Waikato, and Don Kerr, Law School Administrator.

been denied the opportunity of a legal education.¹⁰ There was also an expectation that the first students would be admitted at the beginning of the 1991 academic year. This required the process of degree approval and hiring of staff and preparation of classes by the end of 1990.

The end of 1990 saw the completion of preparations for commencement of the degree programme, but it was external events that intervened to place the whole project at risk. The 1990 general election returned a National Government and a new tertiary education policy. Among the early Government announcements was the withdrawal of the \$10 million allocated to establish the new Waikato Law School. Several other tertiary institutions also had withdrawal of funding at the time that clearly signalled a change in policy. Although the Government had removed the capital funding from the University of Waikato, the income from student fees remained and enabled the University to fund the law school. The final decision was therefore left to the institution to determine if it would continue with the project. The commitment of the Vice Chancellor and support from key staff and the community leaders ensured the necessary support and the focus returned to preparations for receiving the first students.

At the time it was an interesting legal and constitutional question whether such government action was legitimate and whether liability had been incurred and compensation should be paid. There was no question that a new government is not bound constitutionally by the decisions of a previous government. This principle lies at the heart of New Zealand's constitutional arrangements and accounts for radical swings in policy with the election of new governments. The question of liability and compensation for actions taken in reliance on a previous government's decision is a more interesting one. Unfortunately in this instance the University decided not to pursue legal action and settled for a payout of \$1million. The decision of the University was understandable in the context. Universities generally are reluctant to have direct confrontations with governments because they fund them. There had also recently been a clash between the universities and the previous Government over amendments to the Education Act 1990 that were designed to bring universities into conformity with the neo-liberal public policy paradigm introduced by the Fourth Labour Government.¹¹ Both institutions have generally tried to respect each other's jurisdiction, though governments have the greater power through its control of funding to influence what is taught or not taught in universities.

III. TERTIARY PUBLIC POLICY

The challenge faced by the universities in an age of economic rationalism and market theories is how to reconcile the reality of decreasing public funding with the delivery of a university education that is open to all who are qualified to enter and which teaches its students not only specific professional skills but the capability to think independently, or as Butterworth and Tarling have expressed it "Universities are for thinking."¹² The Waikato law degree was designed to achieve both a market objective, that is, prepare students for employment, and an intellectual objective, that is, teaching students to think analytically and independently which are professional characteristic of the lawyer. Ironically then although the Waikato approach to legal education was criticised by some in 1990, it was well suited to prepare the students for the new environment. Teaching law in context and placing an emphasis on emerging areas such as environmental law and the Treaty

¹⁰ The structure of the degree is set out in Margaret Wilson above n 1 at 6.

¹¹ See Butterworth and Tarling above n 2.

¹² *Ibid.*, at 251.

of Waitangi, and making courses such as corporate entities and dispute resolution compulsory prepared students for the reality of the consequences of the new policy environment.

As public funding was withdrawn from public services and previously regulated services were de-regulated people sought new ways to resolve their disputes and new advice and how to negotiate their way through a constantly changing regulatory environment. For example, employment law became part of mainstream legal practice after the Employment Contracts Act 1991; the decision in 1986 to recognise land claims under the Treaty of Waitangi from 1840 created a new area of legal practice as public funds were made available to fund the claims; the regulation 'lite' approach to the construction industry contributed to a leaky building problem that consumes many legal services; the changing nature of relationships and the incorporation of all relationships within a legal regime such as the Property Relationships Act 1976 has changed the nature of family law; and so the list could continue as New Zealand has experienced a period of rapid legal change to accommodate the changing economic, social and cultural environment. This accommodation is evidenced in the rise of courses on human rights, reflecting the increasing emphasis on individual rights as the state redefines its responsibility as being primarily economic management; courses relating to international trade and institutions as New Zealand endeavours to compete internationally to improve economic growth; and intellectual property courses that highlight the dominance of technology in restructuring relationships.

While more than a knowledge of legal rules was always expected from lawyers, the regulatory scrutiny of legal services now requires a much more professional approach by lawyers, as is seen in the provisions of the Lawyers and Conveyancers Act 2006. The events surrounding the passage of this legislation that took over ten years are an interesting case study of the struggle between traditional notions of professionalism and the new managerial practices that are now required in all law firms. The recent Government inquiry into legal aid and the provision of legal services is another example of more changes to come that will impact on the delivery of legal services.¹³ The changing nature of the legal profession itself is reflected in the number of students who undertake double degrees to prepare themselves for an ever changing market place.

Overall the objectives of the Waikato Law School as outlined in *Te Mātāhauariki* as it relates to the character of the Law School are still reflected in the degree programmes that are offered 20 years later. The School has endeavoured to reflect the changes in demand that are part of studying law in its economic, social and cultural context. This is seen in both the content and delivery of the programmes. The academic staff are still primarily responsible for the courses offered and the content of those courses. It is their academic experience and judgement that enables some level of intellectual independence to remain. In this context the Council of Legal Education is an important element of quality control in the teaching of law.

The delivery and structure of the programmes however is more directly affected by changes in funding and policy. As the universities are funded less to do more, compromises must be made in the delivery of the courses. An early example of this process was the requirement to teach full year core legal courses in three semesters. This practice is now taken as normal as are the intensive courses of two to three weeks. Lack of resources has also been a factor in the reduction of the number of small group teaching and the encouragement of staff to substitute their teaching with casual practitioner teachers to enable them to publish which brings in money for the School.

13 Dame Margaret Bazley "Transforming the Legal Aid System – Final Report and Recommendations" (prepared for the Ministry of Justice, April 2010 and Simon Power, Minister of Justice) "Government Details Further Changes to Legal Aid" (press release, April 2010).

From the outset the School had placed a great deal of emphasis on the quality of its teaching programme. The focus of the programme was small group teaching, with an emphasis on oral and written skills training. Advocacy, negotiation and technology skills were seen of particular importance. The reason for the emphasis on quality teaching was twofold. First, it was a branding strategy to attract students and prepare them for practice. It was recognised that there would be reluctance by some law firms to employ Waikato law students so in many ways they had to be better than other students. The programme was new and innovative and therefore within a conservative profession it was sensible to anticipate a suspicion to embrace the new product.

Second, it was anticipated that most of the students would be recruited from the local region and that many of those students would be Māori. The Waikato Law School was also the only law school not to have a quota for Māori students. There was also a strategy to attract Pacific students, especially those funded by the government. It was therefore realistic to expect most students would not come from tertiary educated families or a professional environment. Also the country was experiencing redundancies and high unemployment in the early and mid 1990s which resulted in an influx of mature students either seeking retraining, or new skills to re-enter the labour market. The result was a great diversity of students who required special teaching skills to ensure that the necessary technical legal skills were imparted as well as ensure the law in context approach to their education was intellectually well grounded and integrated into the degree programme. Face to face direct contact with students was seen in the 1990s as the preferred method to deliver quality legal education and that was the approach adopted by the new law school.

The method of teaching from the beginning was also influenced by the early adoption of technology. Waikato was the first law school to establish a computer laboratory within the School with the assistance of funding from the local law society. From the beginning then it had positioned itself to be a leader in law and technology in recognition of the fact that technology would increasingly influence the delivery of legal services. This emphasis has been maintained by the School but the decline in funding is now influencing the delivery of legal education in ways that were not anticipated in 1990.

Students today who under the pressure of servicing student loans are working part or full-time while studying full-time. The result has been they now turn up less for classes and rely more on the online materials and occasional one to one sessions with their teachers, often through email. While traditional academic teachers may not consider this practice desirable, the student behaviour is consistent with the economic rationalist approach to tertiary education. It also raises the question of what is the real value of the teacher to the delivery of knowledge and more importantly under the current policy, how can this value be judged?¹⁴

Traditionally it has been the legal professional employers generally and clients who judge whether the graduates meet the market demand for qualified legal services. Apart from the ups and downs of the economy, there is no evidence that Waikato Law School graduates have any more difficulty than others in obtaining employment. The recording of more accurate information on the destination of graduates would be useful however in these times where proof of performance is required for funding. On the traditional measure then it could be argued that the business case for the Law School has been vindicated. This however is not the current test for satisfactory performance.

14 See Emeritus Professor David Barker AM, "Learning and Teaching in the Discipline of Law", (Paper presented to ALTA, Australia, 2010).

Since the establishment of the Law School in 1990, tertiary policy has developed to make it explicit that the primary objective of economic growth is reflected in the funding of tertiary institutions, including universities. There are some who may argue that this policy could conflict with the objectives of the Education Act 1989 in particular s 161 relating to academic freedom. It is clear however from a series of amendments to the Act that the shift towards greater economic accountability and objectives has been incorporated in the legislation. The role of the university is now set out in the Tertiary Education Strategy 2010 - 2015. The Strategy clearly identifies the core roles of the universities in New Zealand as follows:¹⁵

Universities

Universities have three core roles:

To undertake research that adds to the store of knowledge

To provide a wide range of research-led degree and post-graduate education that is of an international standard

To act as sources of critical thinking and intellectual talent.

The Government expects universities to:

Enable a wide range of students to successfully complete degree and post-graduate qualifications

Undertake internationally recognised original research

Create and share new knowledge that contributes to New Zealand's economic and social development and environment management.

While there is little to disagree with in the academic or intellectual intent of the above statement, the reality is that the overall purpose of the Strategy makes it clear that public funding of tertiary education is to be seen as an investment for the purpose of promoting New Zealand's economic growth. The language, values and techniques of economic management pervade the strategy. This is clear in the Strategy's concluding statement: "In the long term, we would expect that shifts in these indicators would lead to innovation and productivity improvements that drive economic growth."¹⁶ The indicators in the statement are the key performance indicators to determine the level of funding for each tertiary institution.

Before the performance indicators are discussed, it may be useful to describe briefly the tertiary education funding policy. Funding is allocated on an annual basis in the budget. There are two public sources of funding – one for funding research, including performance-based research funding (PBRF), the Foundation for Science Research and Technology (FoRST), and the Marsden Fund; and one that essentially funds activities relating to students, the Student Achievement Component (SAC). A system of performance indicators and review is already in place for research funding. The Government has announced a system of performance indicators for funding related to students and the Tertiary Education Commission (TEC) is currently in the process of finalising the implementation of that policy. The TEC is the agency responsible for devising the key

15 Tertiary Education Strategy 2010 – 2015, Ministry of Education 2010. <<http://www.minedu.govt.nz/theMinistry/Policy/AndStrategy/TertiaryEducationStrategy/PartThreeExpectations.aspx>>.

16 Ibid.

performance indicators and after a round of consultation with the tertiary institutions has recently reported as follows:¹⁷

The educational performance indicators for SAC funding are:

- *Successful course completion*: measure by the EFTS-weighted successful course completion rate.
- *Student retention*: measured by the student continuation or completion rate.
- *Qualification completion*: measured by the EFTS-weighted qualification completion rate.
- *Student progression*: measured by the completion progression rate.

Although it is too early to judge the impact of these performance indicators on the Law School's ability to deliver a professional legal education, it is apparent that the quantitative nature of the indicators means little credit will be given to the quality of the teaching received by students. Undoubtedly the implication of the policy will be followed by the need for a review similar to that which occurred with the PBRF funding policy.

The PBRF system of research funding was introduced in 2002 and has had a significant influence on the delivery of academic research including legal research. The primary purpose is "to ensure that excellent research in the tertiary education sector is encouraged and rewarded."¹⁸ The method employed to achieve this objective was to allocate 15 per cent of the funding amongst the institutions on the basis of external research income; 25 per cent on the basis of weighted research degree completions; and 60 per cent on the basis of the quality evaluation of academics. Briefly, eligible staff are assessed individually on the basis of an evidence portfolio containing information on their research that was assessed in 2003 and 2006 and will be assessed again in 2012. Each staff member is individually graded by a peer review panel and graded from R (research inactive) to A (highly innovative or original research that ranks amongst the best in the world and esteemed by the international academic community).¹⁹

Few academics would argue with the encouragement to produce excellence in research or that it is appropriate there should be accountability by academics to fulfill this part of their contracts. Concern has been expressed however over aspects of the scheme including what qualifies as being within the definition of research, the implementation of the system of the assessment system through the peer review panels, and unintended consequences of the use of PBRF as a staff appraisal substitute. A review of the quality evaluation was set up by the TEC with the appointment of the PBRF Sector Reference Group in 2008; an independent review of PBRF undertaken by Dr Jonathan Adams; and a series of consultations with the tertiary institutions. The independent review of PBRF concluded that the Government's objectives for PBRF were being met on most counts, though some improvements could be made.²⁰ The final results of this process are awaited later in 2010 in time for preparation for the 2012 PBRF process.

Although the PBRF system of research funding has only been in force for seven years, it is having an impact on the research practices of academics. As part of the evaluation of PBRF a symposium was held by the Institute of Policy Studies at Victoria University of Wellington in

17 "Revised Educational Performance Indicators for SAC Funded Tertiary Education Organisations" (Tertiary Education Commission, March 2010) at 3.

18 *Performance-Based Research Fund* Tertiary Education Commission <www.tec.govt.nz/Funding/Fund-finder/Performance-Based-Research-Fund-PBRF/>.

19 *Ibid*, see *Performance-Based Research Fund User Manual*.

20 A summary of the Independent Report is found on the TEC website <www.tec.govt.nz>.

collaboration with the Ministry of Education and the Tertiary Education Commission to examine the most recent research available on the PBRF.²¹ Although all aspects of the scheme were considered, in this context it is the impact on the teaching-research nexus that is of interest because in professional schools there is an emphasis on teaching to prepare students for entry to the profession. It was also apparent that such an emphasis financially disadvantaged professional schools unless they could find a way to accommodate the professional demands with the requirements to publish within the criteria set out in PBRF.

Sue Middleton, whose research on the impact of PBRF on the tension between education academics' construction of their identity as "researchers" under PBRF and that of "teacher-educator" as required by the regulatory framework to qualify teachers, is of relevance to other professional schools such as law. She notes that:²²

But teaching (and other professional) degrees *must* include practical curriculum courses to gain accreditation as qualifications, and to be credible with student teachers and their employers. A professional degree's practicum or clinical components are intrinsic parts of the degree qualification and to maintain professional credibility they and their teachers must be given status.

It is also of relevance in the context of the Waikato Law School to note the concerns of Māori academics on the effect PBRF has on the construction of knowledge and intellectual autonomy of Māori scholars. In a recently published article Māori academics identified 14 problems that stem from PBRF for Māori scholars and noted "We believe that an unintended consequence of PBRF is the creation of significant barriers to increasing the volume, scope and quality of environmental research for Māori."²³ The most insightful and considered assessment of PBRF for legal education was written by the late Professor Michael Taggart who concluded that "The PBRF push to publish in international fora has the potential to disengage legal scholars from the needs and concerns of the local legal community and the broader society, and to discourage research and writing aimed at practical law reform or that speaks directly to practitioners."²⁴ He identified not only the threat to local legal scholarship because its publication is not rewarded in career terms for the scholar, but also the perils of rewarding a short term view to research that prefers the quantity of publications over the enduring quality of legal scholarship that comes from experience. The rewarding of what he terms "selfish and self-regarding behaviour" also has the potential to weaken not only the teaching programme but also the academic institution. Hopefully the current review of PBRF will address many of these concerns for professional schools.

Of greater concern however is the current policy's primary focus on economic growth and the undervaluing of a liberal tertiary education on the quality of the public and private sector governance. A balance of objectives is required if serious damage is not to be done to democratic institutions. Martha Nussbaum, Professor of Law and Ethics at the University of Chicago, recently

21 The research presented at the symposium was published in Leon Bakker, Jonathan Boston, Lesley Campbell and Roger Smyth (eds) *Evaluating the Performance-Based Research Fund: Framing the Debate* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 2006).

22 Sue Middleton "Researching Identities: Impact of the Performance-Base Research Fund on the Subject(s) of Education" in Leon Bakker, Jonathan Boston, Lesley Campbell and Roger Smyth (eds), *ibid* at 493.

23 Tom Roa, Jacqueline R Beggs, Jim Williams and Henrik Moller "New Zealand's Performance Based Research Funding (PBRF) Model Undermines Māori Research" (2009) 39 (4) *Journal of the Royal Society of New Zealand* at 233.

24 Michael Taggart "Some Impacts of PBRF on Legal Education" in Claudia Geiringer and Dean F Knight (eds) *Seeing the Whole World: Essays in Honour of Sir Kenneth Keith* (Victoria University Press in association with NZ Centre of Public Law, Wellington, 2008) 250 at 259.

commented in the context of similar research funding schemes in the United Kingdom and the United States that: “Resistance to the bureaucratisation of academic scholarship and teaching will be difficult, but it is essential if the culture of the mind and heart that protects both knowledge and citizenship is to survive.”²⁵ It may be some comfort to New Zealand legal academics to know they are not alone in facing the constant pressure of reconciling the demands to publish in terms of PBRF values and at the same time delivering a high quality professional education and service the legal profession. The challenge is for the universities and their academic and administrative managers to create the environment that produces both quality research and teaching while negotiating with governments a funding policy for universities that is accountable to governments and the people. This is the reality of the struggle to preserve academic freedom and independence. A greater challenge may lie for governments achieving their objectives of economic growth under such policy regimes. A recent analysis of the relationship between economic growth and a variety of well being factors revealed the limits of economic growth to achieve social well being.²⁶ It may be time not only to develop evidence based policy but also “Evidence-based Politics”.

IV. CONCLUSION

Given the fundamental public policy and consequential managerial changes within the universities, the Waikato Law School has survived not only a traumatic birth and the curse of being born in interesting times. The School has had the advantage from the outset of a clear vision and purpose of the type of legal education it was committed to deliver. The consultation that accompanied the formation of the School was forward looking in terms of the needs of various communities for legal services. The fact that many of those needs have become more obvious over the past 20 years would indicate the benefit of an inclusive community approach to constructing a legal education programme. The challenge for the School is to continue in this innovative tradition however difficult it may be in the current policy environment. For better or worse the persona of the School was formed at birth and its fate and survival will depend on its capacity to take an independent, edgy, innovative approach to legal education.

25 Martha Nussbaum “Critical Faculties” *New Statesman* 31 May 2010 at 40.

26 Richard Wilkinson and Kate Pickett *The Spirit Level: Why Equality is Better for Everyone* (Penguin Books, London, 2010).