

THE ACADEMIC ENDEAVOUR: 1956— 2016—????

*KJ Keith**

Massive changes have occurred in the last 60 years in law teaching, legal practice and the law, and in the contexts, national and international, in which the law and legal processes operate. Further large changes are likely in the short as well as the long-term. What may be learned from the existing experience for law teaching and research and for the role of the academic as critic and conscience of society? This address was given at the Australasian Law Teachers Association (ALTA) 2016 Conference held in Wellington on 8 July 2016.

I look back 60 years to the beginning of my legal education at Auckland to give a sense of the massive changes in law teaching, legal practice and the law, nationally and internationally. Against that rapid survey, and in that wider context, I wish to have scholars think further about the challenges facing them individually, their students, their faculties, their universities, the law and the wider national and international societies in which law is to operate. Far too large a task, but 60 years on from that initial enrolment, I may be allowed to try to take that big view. I acknowledge at the outset that my full-time teaching ended halfway through those 60 years, in 1986, at the beginning of a period of major changes at home and abroad.

In 1956, New Zealand had seven full-time law teachers, all in the North Island, 1,900 lawyers with practicing certificates and 48 judges and magistrates – for a population of just over two million, a figure which has doubled. New Zealand now has about 170 full-time law teachers, a 12-fold per

* Professor Emeritus, Victoria University of Wellington. For more extensive and complementary discussions of legal education in New Zealand, see Richard Sutton "The Law Faculties: A Reminiscence" in Ian Barker and Graham Wear (eds) *Law Stories: Essays on the New Zealand Legal Profession 1969–2003* (LexisNexis, Wellington, 2003) 325; and Margaret Wilson and ATH Smith "Fifty Years of Legal Education in New Zealand: 1963–2013: Where to from Here?" (2013) 25 NZULR 801. See also the valuable collection of articles put together by Geoff McLay and his colleagues in the June 1999 special issue of the Victoria University of Wellington Law Review marking the centenary of the University with the earliest article dating back to 1901: (1999) 29 VUWLR 323–688. Each provides references to a range of other sources, running beyond legal education. Thanks to Conor Donohue for research assistance.

capita increase, 12,000 lawyers, a more than three-fold increase, and about 200 judges or a two-fold increase.¹

I do not pursue the possible reasons for each and every one of these changes but I do mention two. At least part of the increase in the law teacher numbers reflects the full-time character of law study, the offering of many more subjects and the development of honours and graduate courses.

The second explanation relates to the number of lawyers. Long experience shows that many of those qualifying and of those in practice move into other employment in the private and public sectors. Of those admitted in the past 35 years, only 47 per cent held practicing certificates this year; the percentages vary from 42 per cent for those admitted in the 1990s to 58 per cent for those admitted in the last five years. That evidence of movement is supported by a valuable study by a recent Otago law graduate, Josh Pemberton, based on a survey of 800 junior lawyers.² Of those surveyed, 76 per cent of them considered that their legal training had equipped them well for careers outside the law, instancing business, management, policy work, consulting, government and finance. Those in big firms and in-house counsel were the most likely of six categories of practitioners to leave.³ The main reason they gave for leaving legal practice was that they could make better use of their skills elsewhere. In addition, 61 per cent of that young lawyer group thought it more likely than not that they would spend time working overseas in the next 10 years.⁴

Three other figures are striking. The first is the massive increase in the number of women graduating, up to 56 per cent of the total graduates in 2014. However, the figures also show that in private law firms of all sizes women are significantly less likely to be partners. That is consistent with the findings in the recent survey that two-thirds of female respondents considered that their gender had a negative bearing on their prospects in the legal profession. The highest proportions of those holding that opinion were working in big firms and barristers' chambers.⁵

The second change is the large increases in members of minorities graduating with a LLB – in 2014, nine per cent Māori, five per cent Pasifika and 23 per cent Asian.⁶

-
- 1 I acknowledge here the excellent work of Geoff Adlam over the last five years in assembling these figures. The latest is in Geoff Adlam "Snapshot of the Profession" *LawTalk* (11 March 2016) at 17.
 - 2 Josh Pemberton *First Steps, The Experiences and Retention of New Zealand's Junior Lawyers* (The New Zealand Law Foundation, 2016).
 - 3 At 9–11.
 - 4 At 9.
 - 5 Adlam, above n 1, at 20 and 23.
 - 6 At 20.

My final figure concerns the number of law students. The percentages I have just given are shares of a figure of 1,390, or about one-tenth of those who now hold practicing certificates.⁷ The figures, especially the proportions and the big changes in them, raise very large questions which I leave to you to ponder. One is about the weight that those figures are being given in relation to proposals in at least two universities to increase the intake of new law students. Another important factor bearing on those proposals are the likely major changes in legal practice, which I mention later.

Enough of figures and back to 1956. By then, the law schools in which I studied—Victoria as well as Auckland—had moved on from the condemnation delivered 30 years earlier by the Royal Commission on University Education. It said that "unless a marked change is effected in the legal education provided in the Dominion, the term 'my learned friend' runs the risk of being regarded as a delicate sarcasm".⁸ But the emphasis in the late 1950s in Auckland was still on rules, on learning them and on regurgitating them in exam answers. I do not recall getting any real sense at that time of legal process, of the law-making enterprise.

In 1956, the New Zealand Law Journal did have articles on one aspect of legal process, namely precedent – should the courts follow the House of Lords or the Privy Council if they disagreed? For Professor AG Davis of Auckland, the issue was determined simply and solely by a rule – the alleged superior status of the House of Lords; for a young barrister, newly returned to Wellington from Cambridge, England, New Zealand courts should be looking for the more just result, a line he was later to follow as a most eminent judge.⁹ That very narrow dispute is remarkable when seen in a broader context. We were only 15 years on from Japan's military rampage into the Pacific, the disasters of Suez and Hungary were about to happen, and negotiations were well under way to establish the European Common Market, which the United Kingdom would inevitably join, with major challenges to New Zealand trade especially in agricultural products.¹⁰ But different more positive signs were appearing in legal writing. In addition to the refreshing view of the young barrister, the New Zealand Law Journal in 1956 also had BJ Cameron, one of our truly great law reformers, but scarcely acknowledged, castigating the courts for their timid and conservative attitude to law reform;¹¹ and, at the end of that year, after the disasters I have just mentioned, HJ Evans was calling

7 At 20.

8 "Report of Royal Commission on University Education in New Zealand" [1925] I AJHR E-7A at 44.

9 AG Davis "Judicial Precedent in New Zealand" [1955] NZLJ 42; RB Cooke "The Supreme Tribunal of the British Commonwealth?" [1956] NZLJ 233; and AG Davis "Judicial Precedent: The Authority of the House of Lords" [1956] NZLJ 296. See also EK Braybrooke "The Authority of the House of Lords in New Zealand Courts" [1956] NZLJ 347 (agreeing with the barrister).

10 See for instance "The European Economic Community" [1961] I AJHR A21.

11 BJ Cameron "Law Reform in New Zealand" [1956] NZLJ 72 at 73, 88 and 106. For one acknowledgement, see GS Orr "Law reform and the legislative process" (1980) 10 VUWLR 391 at 394–395.

for New Zealand contributions to a standing United Nations Peacekeeping Force.¹² The only university law review at that time was publishing articles by faculty members which also emphasised the "how" rather than the "what", addressing aspects of legal process, with pieces on the case method of teaching, legal writing and precedent.¹³

Against that background, those figures, what of the role of the law schools then and now?

For the universities, legislation enacted in 1961, and still on the statute book, provides valuable guidance in answering that question. It dates from the time when the University of New Zealand was disestablished and the four university colleges became universities. It helps answer the question: what are universities for? The universities, Parliament said, are established for the maintenance, dissemination and advancement of knowledge by teaching and research. Each university, the legislation continued, consists of the students, the graduates, the teaching faculty, the librarian and the council.¹⁴ No suggestion there of Crown "ownership". These straightforward provisions emphasise: (1) the human element – the universities consist of people, not buildings, not libraries and laboratories, not courses; (2) the centrality to their function of knowledge; and (3) the maintenance, dissemination and advancement of knowledge by teaching and research, activities seen as being interdependent. Nothing was said about academic freedom which had been sorely tested and breached in previous decades although it was subjected to some definition, and I hope some protection, through a visitatorial process in 1984.¹⁵ Institutional autonomy had, by contrast, received some protection from the existence of the University Grants Committee (UGC) and the establishment of a system of quinquennial grants.¹⁶

Since the late 1980s, there have been major changes to the law and central government administration of universities. I make here some summary points about the changes. Three are positive, at least at the level of legislation: the elaboration of the principle of academic freedom; the principle of institutional autonomy; and the distinguishing of the characteristics of universities from those of other tertiary institutions.¹⁷ However, on the negative side, are the abolition of the UGC, the

12 HJ Evans "International Law: United Nations Police Force" [1956] NZLJ 352.

13 RO McGechan "The Case Method of Teaching Law" (1953) 1(1) VUCLR 9; ID Campbell "Legal Writing" (1955) 1(3) VUCLR 7; and EK Braybrooke "Are the rules of precedent rules of law?" (1956) 1(4) VUCLR 7. The McGechan and Campbell articles are reproduced in the 1999 special issue of the VUWLR referred to in n *.

14 See for instance Victoria University of Wellington Act 1961, s 3.

15 See *Rigg v University of Waikato* [1984] 1 NZLR 149 (HC). See also KJ Keith "Why is academic freedom important in New Zealand?" in Rob Crozier (ed) *Troubled Times: Academic Freedom in New Zealand* (Dunmore Press, Palmerston North, 2000) 247.

16 See for instance CE Beeby *The Biography of an Idea: Beeby on Education* (New Zealand Council for Educational Research, Wellington, 1992) at ch 21.

17 Education Amendment Act 1990 inserting ss 161 and 162(4)(a) into the Education Act 1989.

ending of quinquennial grants, major reductions in proportionate terms in the public funding of universities, the Performance Based Research Fund and the creation of extensive and intrusive Ministerial and Tertiary Education Commission powers and related obligations of the tertiary institutions (one of the Minister's powers is to prepare periodically a Tertiary Education Strategy).¹⁸ Two very experienced academic lawyers concluded a recent study of legal education over the last 50 years with this worrying sentence: "there is little doubt that there are powerful forces at work that are potentially inimical to the health of legal education in New Zealand".¹⁹ They might also be concerned by the fact that the Productivity Commission in its recent lengthy issues paper on models of tertiary education, while declaring that the Education Act 1989 does not directly specify the purposes of tertiary institutions, makes no reference at all to the 1961 Acts and contains only very limited and incomplete references to the 1990 Act.²⁰ So, the parliamentary statements about institutional autonomy, academic freedom and the distinctive characteristics of universities and of the other institutions are essentially neglected. The last neglect is reflected by the fact that the document for the most part treats all the different types of tertiary educational bodies together. It is true that the paper does quote in full one lengthy provision which purports to state the objects of provisions relating to tertiary education. Enacted only in 2002, it appears to say very little.²¹ Those responsible for that issues paper appear to think that history began in the late 1980s when, according to one notable United States scholar, with the fall of the wall, we reached the end of history.²²

Since 1956, massive changes in science, technology (benign and malign), ideology, trading patterns, finance and much else have occurred. They have brought with them major changes in law,

18 See for instance Education Act 1989, ss 159AA, 159AB, 159F (which is inconsistent with s 159AB in the weight it gives to the Strategy), 159L, 159N–159Y, 159YA–159YO and 159ZC–159ZH. That assemblage of provisions (more than 60 sections in pts 13 and 13A alone), many of which are to be read with provisions in other statutes (although the 1961 Acts do not get a mention), raises questions about the quality of legislation, a matter considered by the Attorney-General in his opening address at the 2016 ALTA Conference. By contrast to the bulk and complexity of the recent tertiary legislation, consider the few pages of the Education Amendment Acts of 1936 and 1938 which reopened training colleges, reduced the school age from six to five, abolished the proficiency examination, allowed the appointment of married women as teachers and established the Council of Adult Education. They were steps on the way to the reorientation of the education system achieved by the first Labour Government towards the objective famously stated in 1938 by the then Minister of Education, the Hon Peter Fraser. See for instance Beeby, above n 16, at ch 6; and *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA) at 754–755.

19 Wilson and Smith, above n *, at 819.

20 New Zealand Productivity Commission *New models of tertiary education: Issues paper* (February 2016) at 9, 13 and 29.

21 At 28 quoting the Education Act, s 159AAA.

22 Francis Fukuyama *The End of History and the Last Man* (The Free Press, New York, 1992), developing an article published in 1989: Francis Fukuyama "The End of History?" (1989) 16 *National Interest* 3.

national and international.²³ Today, out of all those matters, I take just one: the huge changes in IT and their impact on the professions, particularly the legal profession. My primary source is Richard Susskind, joined now by his son Daniel.²⁴ In the long run, they say, increasingly capable machines will transform the work of professionals, giving rise to new ways of sharing practical expertise in society.²⁵ Richard Susskind, in writing of legal institutions and the practice of lawyers, claims that they are at a crossroads and are poised to change more radically over the next two decades than they have over the last two centuries.²⁶ The now dominant model of lawyering, he says, is face-to-face, consultative professional services by advisers who meet clients in their offices and dispense tailored counsel. That model will be challenged by new working methods, characterised by lower labour costs, mass customisation, recyclable legal knowledge, pervasive use of IT and more. He refers to advice given by Wayne Gretzky, one of the finest ice hockey players of all time: "skate to where the puck is going not where it has been".²⁷ He, Richard Susskind that is, raises real challenges at the end of the earlier book for law teaching. He asks of law schools, what should legal education be for? Next, he asks how should young lawyers be trained? He provides some very interesting answers.²⁸ They are to be related back to my earlier questions about the big increases in practicing lawyers and academics and the proposals for wider entry into law school.

In my first sentence and later, I mentioned massive changes in the law over the last 60 years. The extent of that change has long provided for me one reason to be much more interested in, and concerned with, how law gets made and developed, with legal method and with issues of principle and process rather than with the detailed content, as of today, of one of those changing areas of law.

A few years ago, on the 125th anniversary of the University of Auckland, I recalled relevant lessons learned from my teachers, mentors and colleagues over the years. They were that much law is made elsewhere, the law is to be understood in context including its historical context, real effort is

23 See KJ Keith "New Zealand and International Law: 1963–2013" (2013) 25 NZULR 718.

24 Richard Susskind *Tomorrow's Lawyers – An Introduction to Your Future* (Oxford University Press, Oxford, 2013); and Richard Susskind and Daniel Susskind *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, Oxford, 2015). See also the special reports on artificial intelligence in *The Economist* of 25 June 2016 and *The Scientific American* of June 2016; and Anthony J Casey and Anthony Niblett "The Death of Rules and Standards" *The Economist* (online ed, 16 July 2016) (concluding that the coming technological revolution will affect the very structure of legal commands and the way we as a society choose to govern the behaviour of citizens).

25 Susskind and Susskind, above n 24.

26 Susskind, above n 24, at xiii.

27 At xviii.

28 At ch 13 and ch 14.

to be put into asking the right question, facts must be taken seriously, as must statutes, we must search for relevant principles, values and policies and we must draw on related disciplines.²⁹

Two of the founding figures of Victoria University, Sir Robert Stout and Sir John Salmond, had a vision of the scholar active in the affairs of the State.³⁰ Consistently with that vision, Professor Ian Campbell some decades later spoke of the indispensable function of law academics in subjecting specific proposals to the acid test of motive, in analysing with calmness and detachment the emotional pleas which seem to sway the electorate, and employing in the discussion of projects and opinions a comparative technique which balances a narrow or parochial claim with considerations from a wider sphere of reference.

He instanced capital punishment, the adoption of the Statute of Westminster, the law of divorce and government by regulation. Lawyers in a university, he continued:³¹

... can rise to their full status by informed, impartial discussion of the issues, and can affect the shape of things to come, by the attitude which infuses the whole of its legal training.

One element of the definition of academic function included in the 1990 Act is the function of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions. A related provision requires the members of the universities to accept a role as critic and conscience of society.³² No doubt Professor Campbell would agree with those formulations. Over the years, I can recall members of the Law Faculty here at Victoria University, in exercise of that freedom, and in meeting that responsibility, in interviews, letters to the editor and newspaper stories, submissions to parliamentary committees and commissions and academic writings addressing, among very many matters, issues relating to bills of rights, written constitutions, second chambers, the Treaty of Waitangi and many other Māori matters, regulation making, legislation drafting, police conduct, workers' compensation and ministerial misbehaviour.³³

I conclude with a current matter in respect of which I would have expected more university commentary in exercise of that freedom and responsibility so clearly stated by Parliament in 1990.

29 KJ Keith "1883 to 2008: Law and Legal Education Then and Now" [2009] NZ L Rev 69.

30 Geoff McLay "Towards a History of New Zealand Legal Education" (1999) 30 VUWLR 333 at 340. See also for instance Rachel Barrowman *Victoria University of Wellington 1899~1999* (Victoria University Press, Wellington, 1999) at 13.

31 ID Campbell "Law & the University" in Ernest Beaglehole (ed) *The University & the Community: Essays in honour of Thomas Alexander Hunter* (Victoria University College, Wellington, 1946) 136 at 153.

32 Education Amendment Act 1990, s 36 introducing pts XIII and XIV into the Education Act 1989.

33 Professor John Burrows in a recent article, "Academics and Law Reform" (2013) 24 NZULR 667, calls attention to the limited role of academics in the law reform process and the possible reasons for that; but also see in the same issue Elisabeth McDonald and Yvette Tinsley "The Law as it Should Be' When Prosecuting Sexual Offences: The Contribution of Legal Academics to Law Reform" (2013) 25 NZULR 758.

My comment relates to the report of the Ombudsman, Professor Ron Paterson, on the State Services Commission inquiry and report into unauthorised disclosure of Ministry of Foreign Affairs and Trade information.³⁴ So far as my research goes, with just one exception,³⁵ not one lawyer, political scientist, school of government or public administration expert within the universities has commented on the reactions to the report given by the State Services Commissioner, the Prime Minister, the State Services Minister or the Foreign Minister. Rather, it has been for others beyond the academy to make the criticisms.³⁶ What I see as in issue is more modest than "advancing better government";³⁷ rather, it is maintaining or restoring good government. I see that gap in academic commentary as a serious failure of responsibility. I take just two issues from that unhappy affair of the many that call for comment: the place of the Ombudsman within the New Zealand system of government and the critical importance of good procedure. Sir Guy Powles, the first Ombudsman, in a special issue of the Victoria University of Wellington Law Review published on the first 20 years of the office, said this:³⁸

There is a story, probably apocryphal, that quite in the early days one of the ministers said in Cabinet that he had received a recommendation from the Ombudsman, his department objected to it, and he was not very sure about it himself. The Prime Minister [Keith Holyoake] is reported to have said "Well, what is it that the Ombudsman wants to do?". The minister explained and the Prime Minister said "Well, go away and do it — don't bother this Cabinet with recommendations from the Ombudsman". Whether this story is true or not, it is clear that this in a sense was the attitude which permeated from the prime ministerial level down to departments and which, of course, made the ombudsman much more confident in his work.

Against that standard, what is to be made of the very summary dismissive reactions of the Commissioner and the Ministers to the rigorously reasoned report of the Ombudsman I have mentioned?³⁹ The Prime Minister acknowledged that he had not read the report before providing his

34 Ron Paterson *Investigation into SSC conduct of MFAT leaks inquiry* (Ombudsman, June 2016).

35 Andrew Geddis, University of Otago. See Andrew Geddis "Paula Bennett's reading comprehension failure" (24 June 2016) Pundit <<http://pundit.co.nz>>.

36 See especially the commentary by a former Secretary of Foreign Affairs, Neil Walter, in Neil Walter "Top diplomat: Serious questions to be answered about the government's misuse of power" *The Dominion Post* (online ed, New Zealand, 23 June 2016). See also "Editorial: Lessons in shameful leak saga" *The Dominion Post* (online ed, New Zealand, 24 June 2016).

37 Victoria University of Wellington "Strategic Plan: Primary Strategies" <www.victoria.ac.nz>.

38 Guy Powles "The New Zealand Ombudsmen – the early days" (1982) 12 VUWLR 207 at 208–209. Sir Guy Powles emphasises that the legislation allowed him to find that the action being challenged was, among other things, "wrong". The State Services Commissioner in his press release referred to in the next footnote appears not to understand that.

39 The State Services Commissioner in a press statement "accept[ed] that the way in which the investigation dealt with Mr Leask could have been better" but then, while disagreeing with one substantive finding, he made no comment on the other findings: State Services Commission "Response to Ombudsman's Report" (press release, 23 June 2016). The Prime Minister said that the inquiry had made one mistake. According to the State Services Minister, the report, if read carefully, said that there were certainly some procedural matters that we

comment. And none of those reactions began to reflect the whole range of the Ombudsman's critical findings on matters of substance as well as of process. Further, the belittling by the Commissioner and Ministers of errors of procedure ignores the long established wisdom that can be traced back to Magna Carta, and indeed earlier, that the history of liberty has largely been the history of observance of procedural safeguards.⁴⁰ Sir John Chilcot and his colleagues have provided strong support for that proposition in the much wider context of the disaster of the Iraq War in their findings about shocking failures of process in the lead-up to the invasion and actions afterwards.⁴¹ The obverse of the long established wisdom is that poor process may lead to disastrous consequences.

should be learning from and that should not have happened that way. The Foreign Minister recalled that when the inquiry report was released in 2013, he referred to the finding that "some disreputable conduct" had occurred. "My statement was undoubtedly correct." But no finding in those terms was made. And the Ombudsman did find that the evidence relied upon by the inquiry did not reasonably support some of the criticisms made about Mr Leask in the Final Report and that some highly relevant evidence was not properly addressed. Benedict Collins "Rebstock MFAT inquiry errors not terminal, says PM" (24 June 2016) Radio New Zealand <www.rnz.co.nz>; and Tracy Watkins "Damning inquiry points finger at the Government, State Services Commissioner" (23 June 2016) Stuff <www.stuff.co.nz>.

40 *McNabb v United States* 318 US 332 (1943) at 342 per Frankfurter J. See also *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2004] 1 NZLR 462 (CA) at 467; *R v Te Kira* [1993] 3 NZLR 257 (CA) at 272; and *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Merits)* [2010] ICJ Rep 639 at 719.

41 John Chilcot and others *The Report of the Iraq Inquiry: Executive Summary* (July 2016) at for instance [390]–[430] (decision making, including collective responsibility), [431]–[495] (advice on the legal basis for military action), [496]–[570] (Iraq weapons of mass destruction assessments, pre-July 2002) and [590]–[637] (the failure to plan for a post-Saddam Hussein Iraq).

