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Tuesday, 31 March 2015

And now for something completely different: Statutory interpretation

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I started my LLM thesis when I was still in private practice. My thesis was designed to tackle a very practical black-letter law problem I had encountered in my practice as a property lawyer. In analysing the issues however, I branched out way beyond my comfort zone into some theoretical areas - law and economics, feminist legal theory and critical legal studies. Before developing my thesis proposal I had not even known that such things existed. This was a product of my largely doctrinal undergraduate experience and my immersion in commercial law practice.

During this time however I read Nick James' 'Brief History of Critique in Legal Education' - before I knew that legal education was even a thing. Now that I know a little more about legal education, Nick's paper continues to inform my thinking. It is a useful reminder to me that despite the monolithic appearance of the law and the appearance of solidity of the term 'the profession', that they are subject to change. As Nick's paper makes clear also, Australian legal education has been characterised by shifts between the practical and the academic, culminating in the ascendancy of the professional legal academic.

The degree remains subject to judicial oversight through the Law Admissions Consultative Committee ('LACC'). Its structure, moreover, must conform with the so-called Priestley 11, the 11 core subjects considered to represent the cohesive body of discipline knowledge requisite for legal practice.

Since the Priestleys were mandated in 1992 there have been a number of seismic shifts that have generated debate about their utility and relevance. There are greater numbers of law students not going on to practice; increasing globalisation of legal practice; increasing specialisation of practitioners; and growing emphasis on legal skills and soft skills rather than doctrinal content alone. LACC is presently considering whether to do a small adjustment to the Priestleys, but the question I'm interested in pursuing here is possibility of a Priestley 12 - the inclusion of statutory interpretation.

Statutory Interpretation

The statutory interpretation issue has arisen out of judicial concern as to practitioners' capability in the field. Apparently, senior judges are concerned to see it as a skill given

About Me

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I lecture in land law at James Cook University and I write and think about the nature of property and its representations in the law; about issues affecting women; about justice generally; and about legal education

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prominence in the law degree beyond a foundations approach in first year. LACC itself has published a statement on statutory interpretation.

The issue has been kept alive now for many years. There has been ongoing discussion between LACC and the Council of Australian Law Deans ('CALD'). Legal academics have been hearing for some time of the possibility of a mandated 12th Priestley subject. While all law schools cover statutory interpretation in a foundation subject, some law schools have pre-empted any mandated subject by introducing a capstone compulsory statutory interpretation subject. Generally though, law schools seem to resist the imposition of a further mandated subject.

For me the biggest challenge has been to understand what has been meant by 'statutory interpretation'. In foundation subjects it is dealt with through an understanding of the legislative process; and the rules of textual interpretation. For the rest of the degree, I think it is probably fair to say that interpretation has traditionally been implicit in legal education - without an explicit statement to students that 'what you are doing now is actually statutory interpretation'.

In recent years I have become more explicit in my teaching of statute law. I no longer merely address sections of an Act - which was certainly the way that I was taught and which is largely reflected even in contemporary texts - but take students through the Act in its entirety. We look at its purpose, its enactment, its framework and key definitional and application provisions before we go into any detail.

To give meaning to 'statutory interpretation' in the context of this area of the law, I call this 'working with statutes'. It is not a highly theoretical approach. It is entirely derived from my own experience as a transactional lawyer, navigating statutes on a daily basis and attempting to make meaning. A practitioner needs to answer questions: What is the source of this power? What is the process required for lawful activity? What is the source of this right? What is the meaning of this word? And so on.

A new discipline area

At a meeting on 27 March of the Legal Education Associate Deans ('LEAD') hosted at UNSW, we discussed an iterative draft of new guidelines for statutory interpretation. In response to ongoing judicial concern about the state of statutory interpretation teaching in Australian law schools, CALD is presently building on the LACC statement on statutory interpretation. My understanding is that it is hoped that this will demonstrate law schools' effective engagement in statutory interpretation.

My own view of the draft is that it is an impressive and valuable work. It has clarified for me, what the judges really mean by 'statutory interpretation'. The draft highlights that this is a discrete legal discipline. It is significantly more than 'simply' an essential skill. But it also highlights to me that there are a number of implications.

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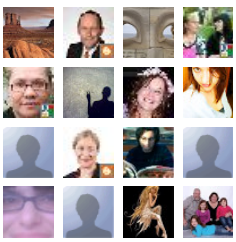

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First, legal academics with expertise in particular discipline areas may need to expand their expertise in the discipline of statutory interpretation - even where they may have the *skill*, it seems that this may not be sufficient.

Secondly, as a transactional lawyer I remain unclear about the relationship between the judicial understanding of statutory interpretation as a discrete discipline - a component of public law - and private law. In particular, private law as transaction. As Howarth points out, the vast majority of law is transactional. Judges' experiences are obviously important but they exist in a realm that is quite different from the way in which law, including statute law, is experienced and practised. This is not to diminish the role of public law, or the role of statutory interpretation as a discipline. But as a private lawyer I need to find a way to understand what I do 'working with statutes' as public. I recognise that the distinction between public and private law is porous, but my first impression is that this introduces a different way of challenging the public/private law taxonomy.

Thirdly, and following from this idea, is that if a new framework of statutory interpretation is adopted, the curriculum must inevitably look different. The subject areas will remain the same, but learning outcomes, the way doctrine is taught, and assessment will all need to respond to the discipline area of statutory interpretation. No longer a skill, doctrinal areas will need to be reshaped to accommodate a more explicitly deeply theoretical and (public) law based approach to statute. My 'working with statutes' approach must be more securely grounded in the discipline of statutory interpretation.

Fourthly, and somewhat paradoxically, there is an existing critique of the domination of appellate case law in legal education. The case law method largely excludes students from experiencing the reality of law, particularly transactional law and alternative dispute resolution. It suggests that law exists via litigation; the role of the lawyer is as litigator; and the higher appellate courts are where the law is at. The latter point is, of course, at least partly correct in terms of the court's role as the third arm of government. But I would disagree that this *is* the law. The oversight of legal education by the judges, drawn almost entirely from the ranks of the bar, may suggest why the case law emphasis exists in legal education.

Thus it is the doctrine of precedent that is taught first in law school. Followed by the largely abstract, to students, foundational statutory interpretation. When we teach other subjects, the common law evolution of legal concepts - such as land title, mortgages and leases - tends then be followed by the statutory regulation. There is a tendency towards a 'lexical priority' of the common law over statute, that infuses the fabric of legal education. The hidden message of this, despite the reality of the huge increase in statutory regulation of our lives, is that Courts Rule OK. The statute - paramount, ever present - is secondary. Furthermore, it is subject to court scrutiny under a public law framework.

Swing?

And finally, returning to Nick James' history, I perceive there to be a swing afoot. Law schools, always cognisant of the professional regulatory environment and keen to respect the institutions of the law, at the same time want to be free to design their courses. Law schools operate with a foot in the camp of the profession (represented largely through LACC and the considerable influence of the judiciary) and of the higher education environment.

Universities are demanding greater emphasis on skills, including soft skills; on moving away from content; on grasping new technologies and innovating in teaching; on marketing a distinctive degree; on attracting international students - and so it goes. Less money for permanent academic lawyers means more sessional lecturers - often from the ranks of the profession.

The profession apparently seeks work-ready graduates, skilled up and ready to earn on day one. The existing professional regulatory framework however focusses on content, on doctrine, although the Priestley 11 has been complemented by the Discipline Standards for Law which call for the embedding of a range of skills within the existing Priestley doctrinal framework. Does the present discussion surrounding statutory interpretation, even without a resultant 12th mandatory subject, represent an implicit rearrangement of legal education from outside the ranks of the academy? Is the suggestion of statutory interpretation's discrete discipline focus, a shift away from the practical towards the academic?

*The title 'A Brief History of Critique in Legal Education' for some reason always brings to mind Terry Gilliam's absurdist cartoons. [This is no reflection on the author. Or the subject matter.]

Posted by Kate Galloway at 10:09

Labels: legal education, legal profession, statutory interpretation, teaching