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January 1, 2013

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Nickolas J James, *Bond University*



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2013

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### Recommended Citation

James, Nick (2013) "Dr John Kearney QC AM and the role of philanthropy in legal education," *Bond Law Review*: Vol. 25: Iss. 2, Article 5.

Available at: <http://epublications.bond.edu.au/blr/vol25/iss2/5>

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# Dr John Kearney QC AM and the role of philanthropy in legal education

## **Abstract**

The intent of this essay is to reflect appreciatively upon the impact on the teaching of law at Bond University of the generosity of Dr John Kearney QC, and to reflect critically upon the impact on legal education of philanthropy generally.

## **Keywords**

law faculty, law school, benefactor

## DR JOHN KEARNEY QC AM AND THE ROLE OF PHILANTHROPY IN LEGAL EDUCATION

PROFESSOR NICK JAMES\*

The intent of this essay is to reflect appreciatively upon the impact on the teaching of law at Bond University of the generosity of Dr John Kearney QC, and to reflect critically upon the impact on legal education of philanthropy generally.

I did not have the privilege of knowing Dr John Kearney QC personally. Prior to commencing my present academic position at Bond University I actually knew very little about him. However, when I arrived at Bond in January 2013 I very quickly became aware of the enormous contribution to the University made by Dr Kearney and his wife Alison. I discovered that the law library at Bond is named the John and Alison Kearney Law Library, in recognition of the Kearneys' support for the Bond Faculty of Law and the university generally;<sup>1</sup> that the main library at Bond is called the John and Alison Kearney Library;<sup>2</sup> that the most prestigious prize offered by the Faculty of Law is the John F Kearney Law Gold Medal, awarded each year to the student with the most meritorious academic performance across at least 20 law subjects;<sup>3</sup> that the John F Kearney Moot Court has provided countless Bond law students with a venue to hone their mooting and advocacy skills; and that the Kearney International Scholarships offers up to six Bond law students each year the opportunity to participate in an overseas exchange semester with one of the Faculty's partner law schools.<sup>4</sup>

The Kearneys have been supporters of Bond University since its inception. They were influential participants in the Gold Coast community's push for the establishment of the university, and they watched over construction of the campus at Robina in the

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<sup>1</sup> See Bond University, *John and Alison Kearney Library* <<http://www.bond.edu.au/library-and-online-resources/about/facilities/john-and-alison-kearney-library/>>.

<sup>2</sup> See Bond University, *Library* <<http://www.bond.edu.au/library-and-online-resources/about/library/>>.

<sup>3</sup> See Bond University, *Law Prizes* <<http://www.bond.edu.au/faculties/law/scholarships-and-prizes/prizes/index.htm>>.

<sup>4</sup> See Bond University, *Kearney International Scholarships* <<http://www.bond.edu.au/alumni-giving/grants-and-scholarships/kearney-student-exchange-grant/index.htm>>.

1980s.<sup>5</sup> Dr Kearney served as President of 'Friends of Bond University', and Dr Kearney and his wife were members of the 'Chancellor's Circle' every year, from the program's establishment in 2009 until Dr Kearney's tragic passing in 2013.<sup>6</sup>

Dr Kearney's contribution to education in Australia was not limited to his support for Bond University. He was a sponsor, patron and advisor to other universities including Griffith University and Melbourne University, as well as to Newman College, Marymount School, Somerset College, All Saints School and Xavier College.<sup>7</sup> He was a member of Griffith University Council and Chairman of the Griffith Gold Coast Campus Advisory Council. His appointment as a Member of the Order of Australia in 2005 was for his services to the community as, inter alia, an advisor and benefactor to numerous education organisations.<sup>8</sup>

Dr Kearney did not himself undertake a traditional law degree. Instead he completed the articulated clerks course in Victoria in the 1940s while working for his brother at Kearney, Kelly and Co,<sup>9</sup> and was admitted to practice in March 1949.<sup>10</sup> In 1968 he was awarded a Bachelor of Laws by thesis,<sup>11</sup> and in 2000 he was appointed an Honorary Doctor of Laws and Chancellor's Fellow by Bond University, and an honorary Doctor of the University by Griffith University.<sup>12</sup> Nor was Dr Kearney a legal academic, although he did tutor at Melbourne Law School in drafting and conveyancing for 15 years.<sup>13</sup> Dr Kearney's principal contribution to Australian legal education was an indirect, philanthropic contribution: his generous donation of time,

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<sup>5</sup> Vice-Chancellor Professor Tim Brailsford, quoted in Jessica Huxley, *Bond mourns passing of Dr John F Kearney* (5 October 2013) GoldCoast.com.au

<[http://prelive.goldcoast.com.au/article/2013/10/05/459409\\_gold-coast-lead-story.html](http://prelive.goldcoast.com.au/article/2013/10/05/459409_gold-coast-lead-story.html)>.

<sup>6</sup> See Bond University, *Chancellor's Circle* <<http://www.bond.edu.au/alumni-giving/giving-in-action/chancellors-circle/index.htm>>: The members of the Chancellor's Circle are key supporters of the University who have significantly contributed to the University's student resources, buildings and facilities in a given year.

<sup>7</sup> Megan Kearney, 'QC who acted on passions for education and historic buildings', *The Age* (online), 31 October 2013 <<http://www.theage.com.au/comment/obituaries/qc-who-acted-on-passions-for-education-and-historic-buildings-20131030-2whn9.html>>.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> Fiona McLeod, *Obituary and Service: John Fouhy Kearney AM, QC* (14 October 2013) Victorian Bar <[http://www.vicbar.com.au/GetFile.ashx?file=PeopleObituariesFiles%252F20131014\\_John\\_F\\_Kearney\\_AM\\_QC-Victorian\\_Bar\\_Obituary%2526Service\\_Notice.pdf](http://www.vicbar.com.au/GetFile.ashx?file=PeopleObituariesFiles%252F20131014_John_F_Kearney_AM_QC-Victorian_Bar_Obituary%2526Service_Notice.pdf)>.

<sup>11</sup> *Ibid.*

<sup>12</sup> Kearney, above n 7.

<sup>13</sup> McLeod, above n 10.

leadership and money, and his passion for education, social justice, and service to the community,<sup>14</sup> made it possible — and continues to make it possible — for numerous law students to complete engaging, effective and well-resourced law programs and progress to fulfilling legal careers.

Dr Kearney's support for legal education, and for educational institutions generally, is part of a long philanthropic tradition within the education sector.<sup>15</sup> Philanthropy Australia defines 'philanthropy' as:

the planned and structured giving of time, information, goods and services, voice and influence, as well as money, to improve the well-being of humanity and the community.<sup>16</sup>

Philanthropy has for a long time played an important role within the legal academy. Law firms and individual legal practitioners donate money to fund student prizes and awards, scholarships, chairs and capital projects. Legal practitioners and members of the judiciary donate their time, expertise and influence to participate in school, faculty and university governance structures including councils, committees, and working groups; to supervise internships and legal clinics; to judge and coach students participating in mootings and other legal skills competitions; and to deliver guest lectures and seminars to students. Legal academics, whether full time professors or part time tutors, by foregoing the potentially lucrative income from private legal practice in favour of a career in academia, donate their time, their expertise and in many cases their entire working lives to higher education.

Many educational institutions in Australia and around the world were established as a result of, or with the assistance of, the generosity of wealthy private individuals.<sup>17</sup> For example, RMIT began as a working men's college founded by Melbourne

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<sup>14</sup> Kearney, above n 7.

<sup>15</sup> Ben Gose, 'Strategic Philanthropy Comes to Higher Education' (2013) 59 *Chronicle of Higher Education* 26.

<sup>16</sup> Philanthropy Australia, 'A More Giving Australia': *Philanthropy Australia's Strategic Plan 2012-2014* (2012) <[http://www.philanthropy.org.au/images/site/misc/About\\_Us/Philanthropy\\_Australia\\_Strategic\\_Plan\\_2012\\_-\\_2014.pdf](http://www.philanthropy.org.au/images/site/misc/About_Us/Philanthropy_Australia_Strategic_Plan_2012_-_2014.pdf)>; There are estimated to be about 5000 philanthropic foundations in Australia: G Anderson, *Where the Money Goes: Private Wealth for Public Good* (Centre for Social Impact, 2013); The number of 'private ancillary funds' – private charitable foundations usually established by high net worth individuals, families or business - is currently 1,116, and has grown annually by 100 in the last three years: J McCleod, *The PAF Report – Private Ancillary Funds After 12 Years* (JB Were Ltd, 2013).

<sup>17</sup> Olivier Zunz, *Philanthropy in America: A History* (Princeton University Press, 2011).

philanthropist and grazier Francis Ormond,<sup>18</sup> and the University of Queensland's St Lucia campus was a bequest by James O'Neil Mayne and Mary Emelia Mayne.<sup>19</sup> And philanthropy in education is a tradition that is not showing any signs of decline despite the recent global financial crisis.<sup>20</sup> In October 2013, mining magnate Andrew Forrest and his wife Nicola donated \$65 million to the universities of Western Australia, one of Australia's single biggest philanthropic gifts. The donation led to the creation of the \$50 million Forrest Trust, which funds scholarships for students undertaking doctoral and post-doctoral studies at Western Australian universities.<sup>21</sup> Earlier that same year entrepreneur Graham Tuckwell donated \$50 million to the Australian National University, and property developer Clive Berghofer donated \$50.1 million to the Queensland Institute of Medical Research.<sup>22</sup>

In the United States the Bill and Melinda Gates Foundation, established by the famous Microsoft founder and with a total endowment of more than \$40 billion, has as one of its primary aims the expansion of educational opportunities.<sup>23</sup> The Foundation seeks to improve college attendance, graduation rates and employment outcomes for low-income students in the US. Money has been donated, for example, to the University of Washington School of Law to fund graduates to take relatively low-paid public service legal positions for the first five years following graduation, thereby encouraging more law graduates into public service careers.<sup>24</sup>

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<sup>18</sup> RMIT University, *Founded on Philanthropy* (2014)

<<http://www.rmit.edu.au/giving/founded-on-philanthropy>>.

<sup>19</sup> Pro Bono Australia, *Australia's Top 50 Philanthropic Bequests* (2013)

<<http://www.probonoaustralia.com.au/top-50-philanthropic-gifts/>>.

<sup>20</sup> Andrew Trounson and Victoria Laurie, 'Andrew Forrest's record \$65m gift boosts philanthropic stakes', *The Australian* (online), 16 October 2013

<<http://www.theaustralian.com.au/higher-education/andrew-forrests-record-65m-gift-boosts-philanthropic-stakes/story-e6frgcyj-1226740534383>>. In 2013, nearly \$400 million was distributed by 37 Australian philanthropists; 6% of this amount was for educational purposes: Michelle Anderson and Emma Curtin, 'Leading Learning in Education and Philanthropy – 2013 Survey Report' (Australian Council for Education Research, 2013)

<[http://www.acer.edu.au/documents/LLEAP\\_2013FullSurveyReport.pdf](http://www.acer.edu.au/documents/LLEAP_2013FullSurveyReport.pdf)>. See also Yojama Sharma, 'ASIA: The rise of higher education philanthropy', *University World News* (online), 24 April 2011

<<http://www.universityworldnews.com/article.php?story=20110421201619136>>.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> See Bill and Melinda Gates Foundation <<http://www.gatesfoundation.org>>.

<sup>24</sup> See University of Washington, *The William H. Gates Public Service Law Program* <<http://www.law.washington.edu/GatesScholar/Default.aspx>>.

In a climate of declining state financial support for higher education, many Australian universities are turning to private sector philanthropy to assist with making up the financial shortfall. The 2008 Bradley Review explicitly recommended that the Federal Government seek to stimulate higher education philanthropy by matching new donations in the sector with additional Federal funding (with input to each institution capped, and the total limited to \$200 million over three years).<sup>25</sup> Regarding this recommendation, in 2009 the Education Minister Christopher Pyne (then in opposition) said the following:

What level of support is feasible at this stage for such initiatives is again a matter for those occupying the Treasury benches. However it is clear to the opposition that we can no longer rest on our laurels when it comes to encouraging a culture of philanthropy – the existence of which puts so many of our international competitors at a distinct advantage to us in Australia.<sup>26</sup>

However, education philanthropy is not without its critics.<sup>27</sup> These critics claim that education philanthropy is rarely motivated purely by generosity, and is more likely to be primarily self-serving, with the philanthropist often benefitting from substantial tax deductions, public relations benefits from being closely associated with the educational institution, or, more insidiously, the opportunity to influence the form, content and objectives of the educational programs being delivered. The Bill and Melinda Gates Foundation, for example, has been criticised for its enormous influence over US public education policy without being accountable to votes and taxpayers.<sup>28</sup> The recent trend in philanthropy, referred to by some as 'philanthrocapitalism', is challenged as 'bring[ing] the tools and technologies of the market to non-profits', and seeking to use private funds to leverage public spending.<sup>29</sup> Satyajit Das argues that reliance upon philanthropy can serve to

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<sup>25</sup> Denise Bradley et al, *Review of Australian Higher Education – Final Report* (Commonwealth of Australia, 2008) 173 (Recommendation 39).

<sup>26</sup> Christopher Pyne, 'Speech – Australian Higher Education Congress' (25 March 2009) <<http://www.pyneonline.com.au/media/speeches-media/speech-australian-higher-education-congress>>. On this final point, see also Brian Caldwell, 'Foreword' in Michelle Anderson and Emma Curtin, *LLEAP Dialogue Series: A Practical Guide to Grow Your Ideas in Education for Maximum Impact* (Australian Council for Educational Research, 2013).

<sup>27</sup> Kenneth J Saltman, *The Gift of Education: Public Education and Venture Philanthropy* (Palgrave Macmillan, 2010).

<sup>28</sup> Philip E Kovacs, *The Gates Foundation and the Future of US 'Public' Schools* (Routledge, 2011).

<sup>29</sup> Robin Rogers, *The Price of Philanthropy* (14 July 2013) *The Chronicle of Higher Education* <<https://chronicle.com/article/The-Price-of-Philanthropy/140295/>>.

undermine social policy by reflecting the views of the benefactors rather than a rigorous analysis of the issues, and is 'ultimately ... unhealthy in a democracy'.<sup>30</sup> And according to Robin Rogers:

Philanthropy is no longer, if it ever was, benign and benevolent — it is powerful. This shift of power to the economic elite via philanthropy makes it even more important to our democracy's health that we support a viable public option in higher education that is not determined by the priorities and judgments of the very wealthy, however well-intentioned they may be.<sup>31</sup>

In relation to the teaching of law, I have earlier written about, and questioned, the rising influence by legal practitioners, corporate interests and employers over the delivery of legal education in Australia.

Practitioners contribute to course planning, judges and senior practitioners contribute to academic teaching and writing, and an increasing proportion of full-time academics have recent or current professional experience. Law firms are regularly invited to sponsor events such as mooting competitions, academic prizes, scholarships and law school functions. The employers are thereby placed in positions where they have the authority to be able to influence the general direction, if not the specific content, of the law school curriculum. The shift away from public funding and towards private funding of law schools has given the practising profession an opportunity to exercise even more influence upon the law school and its curriculum. The fact that law firms are providing the money to fund some of the law school's activities obliges the law school administrators to take heed of the profession's demands.<sup>32</sup>

Philanthropy by law firms and legal practitioners is one of the ways in which the legal profession exerts its influence over legal education. Law schools have the capacity to play a number of important roles within the community, beyond educating the next generation of legally qualified employees. They propagate and reinforce the rule of law; promote social justice and law reform; examine the law's historical, cultural and philosophical foundations; and question, challenge and critique existing laws, lawmakers, legal decisions and legal institutions. To play these

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<sup>30</sup> Satyajit Das, quoted in John Fitzgerald, *Philanthropy in Australia: It's what you do with it that counts* (27 February 2013) *The Conversation* <<http://theconversation.com/philanthropy-in-australia-its-what-you-do-with-it-that-counts-12473>>.

<sup>31</sup> Robin Rogers, *The Price of Philanthropy* (14 July 2013) *The Chronicle of Higher Education* <<https://chronicle.com/article/The-Price-of-Philanthropy/140295/>>.

<sup>32</sup> Nickolas James, 'Why has vocationalism propagated so successfully in Australian law schools?' (2004) 6 *University of Notre Dame Law Review* 41, 15.

roles effectively, law schools need to maintain a healthy ideological and economic distance from the institutions that they analyse and critique. If the relationship between the law school and other legal institutions becomes too close, and the influence exerted by the legal profession over the teaching of law becomes too powerful, the law school is unable to adequately fulfil the full range of its responsibilities to the wider community. Non-vocational academic activities may continue to take place within the law school, but the law school's resources and efforts are directed primarily towards fulfilment of the objective of most benefit to the practising profession: the education of law students with the legal knowledge and skills necessary to enable them upon graduation to immediately start earning money for their new employers.

Education philanthropy can thus be seen, and challenged, as contributing to the gradual shift by many law schools away from the traditional values of academia, and towards the increased vocationalisation of legal education. Law schools emphasise and privilege the vocational aspects of legal education to attract funding from legal employers and legal institutions, which then use their influence over the law school to encourage even more emphasis upon and privileging of the vocational aspects of legal education.

Philanthropists from the legal profession typically direct their largesse towards supporting some activities of the law school rather than others. Endowed chairs in fields of direct relevance to the private sector, such as commercial law and corporate law,<sup>33</sup> are more common than chairs in fields of indirect relevance or no relevance at all to commercial interests, such as feminist legal theory or human rights law.<sup>34</sup> Philanthropy can thus have an impact upon a Faculty's decisions regarding research and teaching specialisation. Philanthropy can also have an impact upon law student perceptions and choices: when the most lucrative prizes awarded by a law school are for academic performance in subjects such as corporate law or taxation law rather than legal ethics or jurisprudence, a compelling message is sent to the students that the former areas of law are more important and more valuable than the latter. When

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<sup>33</sup> For example, the Harold Ford Chair of Commercial Law at the University of Melbourne. See Harriet Alexander, 'When Business Pulls Up a Chair', *The Sydney Morning Herald* (online), 13 March 2007 <<http://www.smh.com.au/news/national/when-business-pulls-up-a-chair/2007/03/12/1173548109869.html>>.

<sup>34</sup> But not unknown: the University of Melbourne has recently appointed Professor Dianne Otto as the inaugural Francine V McNiff Chair in Human Rights Law. Lianne Hall, *New Chair in Human Rights Law* (13 December 2013) Melbourne Law School <<http://www.law.unimelb.edu.au/melbourne-law-school/news-and-events/news-and-events-details/diaryid/7671>>.

the most academically successful student is rewarded with an internship with a large commercial law firm, students are more likely to identify a career in commercial law as the best possible outcome of a legal education.

Many others have commented upon the recent turn by universities towards corporatism, managerialism, and the massification of education.<sup>35</sup> Law schools are no longer purely sites for the creation and dissemination of knowledge; they are now units within corporatized institutions with an obligation to minimise costs and maximise customer satisfaction and worker efficiency. The benefits to the law school of a close affiliation with wealthy individual donors and powerful institutional supporters include not only the direct financial benefits, but also the benefits to the law school's profile-raising activities and their efforts to market their product to new customers. They are benefits that can be very difficult for Vice-Chancellors, Deans and Heads of School to resist.

On the other hand, philanthropy is not necessarily inimical to the achievement of a law school's traditional obligations to the community. Philanthropy can be a way for the law school to shield itself from the pressures associated with being a corporatized, commercial entity obliged to prioritise economic efficiency and accountability over social justice and social critique. As a source of money, labour and expertise beyond that predicted and accounted for in the law school budget, philanthropy can allow the law school to engage in activities that are not necessarily profitable or popular, and facilitate fulfilment of the law school's responsibility to provide deeper insight into and critical perspectives upon contemporary legal issues and decisions.<sup>36</sup>

Importantly, philanthropy can also lead to improved access to legal education and increased diversity within the student cohort. This is a critical issue and a legitimate

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<sup>35</sup> See, eg, Margaret Thornton, 'Governing the Corporatised Academy' (2004) 1 *The Journal for the Public University* 1; Mark Olssen and Michael A Peters, 'Neoliberalism, higher education and the knowledge economy: From the free market to knowledge capitalism' (2005) 20(3) *Journal of Education Policy* 313; Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2007) 17 *Legal Education Review* 1; Joyce E Canaan and Wesley Shumar, 'Higher Education in the Era of Globalization and Neoliberalism' in Canaan, Joyce E and Shumar, Wesley, eds, *Structure and Agency in the Neoliberal University* (Routledge, 2008); Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012).

<sup>36</sup> For example, in 2012 Francine McNiff donated \$2 million to the University of Melbourne for the purpose of establishing and funding a chair in human rights law: Hall, above n 34.

concern within the discipline of law.<sup>37</sup> Legal education was traditionally and rightly seen as elitist in that only students from relatively affluent backgrounds were able to attend law school. Law students were — and often are — representative of a particular sector of the community: affluent, white, able-bodied and, at least historically, male. People from lower socio-economic backgrounds and non-white communities, the disabled and the disadvantaged were often underrepresented. This lack of diversity within the body of law students is a consequence of a variety of historical, cultural and economic contingencies including the relatively high cost of legal education, a lack of access to a university education generally by some members of the community, and a lack of awareness on the part of those community members of law as a viable and available career option. The consequence of this traditional lack of diversity in legal education is that the lawyers who represent the community are themselves non-representative. This in turn has an impact upon the ability of lawyers to offer effective representation. There are situations where a client will prefer to be represented by a lawyer from a similar cultural or socio-economic background; an ability to fully empathise and understand a client's circumstances can impede the effectiveness of legal representation; and legal services may be less accessible because of an unwillingness on the part of legal practitioners to represent clients from backgrounds or with worldviews markedly different to their own. And since many lawyers go on to become politicians, judges and community leaders, a lack of diversity amongst lawyers contributes to a lack of diversity amongst lawmakers and leaders, contributing to the ongoing marginalisation of various sectors of the community.

Ensuring equal access by members of the community to participation in lawmaking and community leadership begins by ensuring that legal education is accessible to all. Increasing diversity within legal education also ensures that traditionally marginalised groups have better access to legal presentation through the legally qualified members of their own social group. Increased diversity amongst the law student body can also enhance the education experience of the entire student body by providing more opportunities for interaction between students from different backgrounds. Education philanthropy directed towards improving participation by

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<sup>37</sup> See generally David Weisbrot, 'Access to Legal Education in Australia' in R Dhavan, N Kibble and W Twining (eds), *Access to Legal Education and the Legal Profession* (Butterworths, 1989); Gary Orfield and Dean Whitla, *Diversity in Legal Education: Student Experiences in Leading Law Schools* (1 August 1989) The Civil Rights Project <<http://escholarship.org/uc/item/5m39k8bq>>; Heather Douglas, 'Indigenous Legal Education: Towards Indigenisation' (2005) 6 *Indigenous Law Bulletin* 12; Elizabeth Sheehy and Sheila McIntyre (eds), *Calling for Change: Women, Law and the Legal Profession* (University of Ottawa Press, 2006).

students from diverse backgrounds is thus a positive and welcome interference by the private sector in public education.<sup>38</sup>

Concerns about the impact of increasing philanthropy upon the way legal education is delivered, and about the potential undermining of academic values and concern for social justice, diversity and inclusion, may be unwarranted or at least exaggerated. Philanthropy currently represents only about 1 per cent of total university revenue, with 60 per cent of all donations going to just five universities.<sup>39</sup> If school, faculty and university leaders remain vigilant, aware of the potential for misplacement of institutional gratitude for philanthropic generosity, and focused upon the use of donated funds for socially laudable purposes, there is little cause for alarm. The funds, resources and time donated to legal education by members of the legal profession and the legal community can ensure that law schools welcome students from all sections of the community and turn them into healthy, happy and broadly educated lawyers. This is an endeavor I am sure Dr John Kearney QC would proudly support.

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<sup>38</sup> For example, in 2011 social entrepreneur and novelist John M Green donated \$500,000 to the UNSW Law School to fund scholarships for students from disadvantaged backgrounds: *UNSW Law alumnus John M Green donates \$500,000 for scholarships* (27 September 2011) UNSW Law <<http://www.law.unsw.edu.au/news/2011/09/unsw-law-alumnus-john-m-green-donates-500000-scholarships#sthash.P9PZBK2J.dpuf>>.

<sup>39</sup> The University of Sydney, the University of Queensland, Monash University, the University of Melbourne and the University of Western Australia: *The Good Giving* (May 2009) Campus Review <<http://www.campusreview.com.au/2009/05/the-good-giving/>>.