EASTERN SOLICITORS' ASSOCIATION OF VICTORIA

FIRST ANNUAL CONVENTION

PENINSULA MOTOR INN, TYABB, VICTORIA

SATURDAY 14 NOVEMBER 1981, 2 p.m.

THE FUTURE OF LEGAL PRACTICE

OR DOES IT HAVE ONE?

The Hon. Mr. Justice M. D. Kirby
Chairman of the Australian Law Reform Commission

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FUTUROLOGY

Any exercise in futurology is problematical. In fact, Kenneth Clark, in his notable book on Civilisation, declared that futurology was the most disreputable form of public utterance. My assigned talk relates to new areas of practice in the law. I must therefore venture, to some extent, upon the disreputable. Doubtless my predictions will be proved unreliable in many respects. However, in the business of reform, it is important to consider forward planning. Mr. J.J. Carlton MP recently told the Age that less than 5% of Ministers' time was spent on future planning. Ministers at least have the excuse of three year parliaments. We in the legal profession have no such excuse for limiting our endeavours to peer into our future. The exercise is legitimate, even if partly disreputable. To plan for the future, we must have some concept of what the future will be like.

ACCIDENT COMPENSATION

There are many prophets of doom and gloom concerning the legal profession in Australia. A great part of the work of the Bar in our country involves accident litigation and family law disputes. What is the future of these areas of work? Looking abroad, and indeed looking at developments at home, he would be a bold man who predicted that accident compensation litigation would remain unchanged in the decades immediately ahead. Strong calls for reform have already been made in this area. They did not begin with the report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia, chaired by Sir Owen Woodhouse in 1974. But they did receive

an enormous impetus from that report. For all its faults, it remains the touchstone for possible future change in our way of compensating the victims of accidents. There is evidence that it is being brought out of its dusty pigeon-hole, as a result, in part, of the growing number of accident awards of more than $1 million compensation. Mr. J.L. Sher QC of the Victorian Bar told the recent Legal Convention in Hobart that awards of this magnitude would lead to pressure for a new system of providing compensation, including annual awards which could allow a more accurate assessment of the compensation payable and could take the place of the 'sophisticated guesswork' which goes into current once-and-for-all calculations.[1]

In a recent address to a jury after it brought in a verdict of $2.6 million, Mr. Justice Lee in the Supreme Court of New South Wales had this to say:

> There is, I believe, grave disquiet in the community in regard to verdicts in favour of severely disabled persons arrived at by the application of Common Law principles. ... Many people think that [the calculation required] goes dangerously close to playing God. But whether it may be viewed in that way or not it can, at the best, only be regarded as an exercise in sheer fantasy. ... Many people believe that it is not in the interests of the community to continue with the present system and it may be seriously doubted whether even a large verdict is in the plaintiff's interest either. Only Parliament can alter the present system but the need for a system which, whilst attending to the injured person's requirements arising from his injuries, avoids placing huge sums of money in his hands, is pressing.[2]

In response to criticisms of this kind, the Sydney Morning Herald[3] and the Age[4] urged various reforms. Each journal asserted that a provision for annual awards would not remove the need for a comprehensive national compensation scheme. Professor Harold Luntz of the Melbourne Law School scarcely loses the opportunity of a public forum to call attention to the need for the introduction of a national compensation scheme. Professor Luntz points to the serious defaults of the current negligence and statutory compensation systems. He points to the statistics in England which show that fewer than 10% of persons injured recover any compensation under current systems and fewer then 25% of seriously injured people ever receive compensation. He urges that similar defects exist in the Australian system of compensating the victims of accidents. His cure is a more comprehensive scheme, akin to social security or national insurance. This, whilst providing lower average levels of compensation, would nevertheless assure everyone injured that he would be compensated to some extent and not have to rely upon chance considerations such as proof of negligence or the risk factors inherent in litigation.

In a recent article Mr. Alan Tyree, Lecturer in Law in the University of New South Wales, points to the successful operation of the Woodhouse scheme in New Zealand[5]. He urges that studies have shown that 45% of the current compensation fund is lost in legal fees and costs to lawyers, compared to a much lower percentage, less than 10%, payable for administration of the New Zealand scheme. That scheme has been criticised for the low benefits provided and its susceptibility to government interference. But the attraction of a more universal, social security, non-litigious approach to dealing with the social problem of accidents, will continue in the mind of politicians. The announcement this week of a reference to the New South Wales Law Reform Commission on the topic is, perhaps, especially significant because of that Commission's work on the future of the legal profession. A number of States have instituted no-fault compensation schemes for limited classes of case, such as for the victims of employment injuries, work journeys, motor vehicle injuries, sporting injuries, crime injuries and so on. Legal history will record these measures as staging posts on the way to a more comprehensive system of community accident compensation. It is probable that legal history will reproach our generation for struggling on so long with legal causes of action, many of them developed in village England, seeking thereby to solve the tremendous social and personal problems caused by accidents involving the internal combustion engine and the mass production factory. In a sense, it is a tribute to the remarkable ingenuity of lawyers that the fault tort system has survived so long. In default of anything better it was their imagination that adapted remedies designed for earlier times to the necessities of the 20th century. It seems doubtful to me that these ingenious legal improvisations will survive into the 21st century, as enormous verdicts, the injustice of many uncompensated people and the labour-intensive nature of the recovery system become more and more plain to the lawmakers. The Small Claims and Consumer Tribunals, the Small Debts Courts, many government entitlement tribunals and the Motor Accidents Board stand as a warning that simplifying conflict resolution rules and processes usually involves minimising the role of highly trained and therefore expensive lawyers.

DIVORCE LITIGATION

An area where there has been a distinct growth in litigation, frequently involving suburban practitioners, is family law. The establishment of the Family Court of Australia, the greater ease of securing dissolution of marriage and the changing social mores have resulted, so we are told, in the breakdown of an average of one in three marriages. To some extent, this has meant more work for the legal profession. The pattern in the fall-off of divorces seems even to have been reversed by the figures of last year. But here, too, there are worrying signs for the lawyers on the horizon.

The changes in social mores are resulting in an increasing pattern of de facto married relationships which, of their nature, can never come before the Family Court of Australia. Legal pundits in the popular press urge people in a de facto relationship to seek legal clarification of their respective legal rights upon entering the relationship. However, as it is of the nature of such relationships that people will normally disdain (or be unable to agree about) legal indicia, it seems unlikely to me that the new forms of personal relationship are going to give rise to much work for lawyers. A number of law reform bodies in Australia are examining the subject of the law and de facto relationships.[6] The need for changes in the law has been called to attention by a number of decisions, particularly in the Supreme Court of New South Wales.[7] The New South Wales Law Reform Commission's inquiry may propose new substantive rights for de facto couples which will put them back into the class of persons with a legal interest in litigation. I shall have to leave it to Mr. Disney to expand on this. But it does not seem likely to be a growth area of prosperous litigation.

Within the Federal Family Court talk is continuing about 'divorce by post'. Already special facilities exist in the Family Court to instruct people in the presentation of simple divorces without the intervention of a lawyer. A videotape for this purpose has been produced. It was criticised in the recent Annual Report of the NSW Bar Association. Although some of the churches have opposed the notion of divorce by post as being the ultimate destruction of respect for the permanency of marriage, it seems likely to me that the general pressures that exist in the Federal sphere to reduce the costs of public administration, including in the courts, will put pressure on simplification of non-contentious litigation of a routine kind and result in quasi administrative procedures which, whilst keeping the litigious forms, will effectively exclude lawyers from the operation. In fact proposed amendments to the Family Law Act currently before Parliament contemplate the making of Rules which will allow divorce to be granted without the attendance of any party.

LAND CONVEYANCING

I now come to perhaps the most worrying prediction of all. I mentioned it in my paper for the Australian Legal Convention in Hobart this year.[8] I refer to the possibility that computerisation of land titles and development of a land use data base, will, in due course of time, take over a great deal of the routine work currently done by solicitors, including suburban solicitors, in the business of land conveyancing.

As a result of an appointment I had to the OECD, I know something about the potential for society of computers, especially now linked by telecommunications. In comparison with the remarkable capacities of informatics, now in being or in contemplation, the computerisation of much of the land conveyancing system of Australia is neither prohibitively complex nor prohibitively expensive. Most lawyers who stop and reflect upon it will agree that some at least of the routine work of land conveyancing — especially conveyancing of ordinary domestic dwellings — lends itself to computerisation. It is not only the car worker who will be affected by growing automation of society. Professional people too will be profoundly affected. The effects will be in part for the good (as in the better delivery of legal information, the monitoring of the efficiency of lawyers, the delivery of cost and accounting information and other like material). But they will also pose problems.

I have called attention to the particular problem for the legal profession of computerised land conveyancing. I have not done so with any special relish. My observations have been criticised in some quarters as disloyal to the legal profession. More gently, a past President of the New South Wales Law Society once described them as a 'misty-eyed dream'. I remain unrepentant. My reason for repeating the prediction is my knowledge of something of the potential of computers and my concern that lawyers of today's generation should recognise what will come and start planning ahead for greater diversification.

The prospect of computerisation of land conveyancing is a very serious one in a profession which depends as to 50% of its work upon the work of land conveyancing. Fifty percent of the fee income of Australian solicitors is said to derive from this professional activity. Anything which affects so much lawyerly activity is of very great significance for the present and future prosperity of the legal profession. Moreover, it is of special significance for the distribution of lawyers throughout the country, especially in a continental country with the need, if anything, to redress the disproportion of lawyers serving in the city, when compared to those who practise in the suburbs.

Despite the Dawson report in Victoria, it seems likely to me that lawyers will, in those States where the monopoly in paid legal conveyancing persists, lose that monopoly protection and have to compete, as they do in Western Australia and South Australia, with land agents. This likelihood becomes irresistible as computerisation is introduced and the high quality training in a wide range of legal disciplines becomes unnecessary for at least some of the activities of computerised land conveyancing.

One ought, at this moment, to mention a number of comforting words. First, even in Western Australia and South Australia, lawyers have not been entirely excluded from the area of land conveyancing by land agents. Particularly in country areas, much of the work of land conveyancing in those States is still done by legal practitioners. The lawyer exists in the country town. There is no room for two persons engaged in land conveyancing. Accordingly conveyancing tends to coalesce around the legal practitioner. Furthermore, even if change were to come, it would not come overnight. In the Eastern States, a new group of para-legals, land agents or terminal operators would have to be trained, to some extent for the high levels of accuracy needed in land transfers. Alternatively, effective administrative procedures would have to be set up by the government. All of this would take time. Furthermore the solution of one problem always poses new and different problems. The introduction of computerised land conveyancing will bring in its train special new difficulties which will attend a virtually instantaneous system of land conveyancing. At least in the present system there is time, often a great deal of time, to sort out problems and disputes : even to negotiate changes and sometimes to escape the contract altogether. This will be much less easy in a system of electronic land conveyancing. Such a system will make even more vital the decisions made at the point of sale. The need for lawyers to be involved in the advice to clients at that time could not be under-estimated. In short, the lawyer's involvement in land conveyancing may change somewhat. It will not evaporate entirely. It will probably persist longer in the suburbs and in the country than in the city. New duties will descend upon lawyers of an advisory nature. In all probability, new substantive and procedural rights will be required for land purchasers and vendors, to protect them against sharp practice that may be encouraged by the possibility of virtually instantaneous conveyancing technology.

So far, I have been dealing with problem areas : likely areas for the loss of current routine legal work relevant to the suburban practitioner. Is this to be an unrelieved tale of woe? Are lawyers in the suburbs, as we approach the 21st century, really to lose their staple work? Are they to lose land title conveyancing (said to be 50% and more of their fee income)? Are they to lose litigious accident compensation, as the lawyers of New Zealand have lost it? Are they to lose much divorce litigation to divorce by post or to a growing tendency to opt for de facto relationships? If all of these changes take place, is there no silver lining? Lawyers are a resilient breed. The balance of this paper points in the direction of possible growth areas for legal practice. The history of our profession suggests that as one door shuts, another door usually opens.

FOUR FORCES FOR CHANGE

In order to identify, with greater accuracy, the areas in which it is likely that lawyerly work will increase, it may be useful to identify, briefly, the chief forces that are at work for change in the law. In the operation of these forces, there may well be opportunities to be explored.

The first, that I would mention, is the growth of the role of government and the importance of the decisions made by administrators affecting all of us. The legal system developed in a world of small government. In the criminal law, it paid a great deal of attention to the rules that should regulate the relationships of authority to citizen. But it is only lately, through enhanced judicial review, through the operations of the ombudsmen, the activities of the Administrative Appeals Tribunal, the Administrative Review Council and many other statutory tribunals that new remedies are being designed, apt for a world of big government. Lawyers will have a relevant role in these new remedies.

A second relevant force for change is the growth of business and new ways of doing business. I refer to the mass-produced product, with its mass-produced legal consequences, when things go wrong. I refer to the consumer revolution and to the rapid expansion of credit. Are there opportunities here for the expansion of the lawyer's role?

A third force for change involves the changing moral and social values that have accompanied a society which is better educated, better informed and more assertive of its rights. What opportunities are there here for the lawyer's craft?

Finally, there is the greatest dynamic of our time : the impact on the law of science and technology. The new problems of a bio-ethical character; the new problems posed by information science are but two of the areas provided by the engine of science. What opportunities are opened up by science and technology for the suburban practitioner?

BIG GOVERNMENT

Protecting Citizens. It has often been said that lawyers, and indeed the law itself, offer protection to the propertied class[9] and give insufficient attention to the unmet legal needs of very large numbers in our community. The proliferation of legislation, conferring rights and privileges in respect of pensions, environmental protection and other governmental entitlements has sometimes amounted to a dead letter either because beneficiaries do not know of their rights or, knowing of them, were not able or were too timid to enforce them. Sometimes lawyers have accepted obligations to

help such people, frequently without fee. Sometimes, by procedures of judicial review or otherwise, ministers and departments of State have been challenged and illegal or unfair conduct prohibited by the courts. Our legal history boasts a number of leading cases of this kind. They help set the tone of a society in which individual rights can be upheld by the uncommitted and independent judicial arm of government against the enthusiastic actions of the bureaucracy. The fact must be faced that review procedures of this kind are slow, expensive, frequently highly technical and frightening for the ordinary citizen who becomes involved in them. Unless that citizen is supported by a corporation, trade union, political party or a lawyer specially fired with the justice of his cause, proceedings will not get far.

New Administrative Law. There have been moves, of late, to reform the substantive and procedural laws in this area. Every suburban lawyer, every citizen, should know of these changes. In the Federal sphere, they include:

- New judicial review. A new, simplified system of judicial review, with the grounds of review and the procedures collected in a single, short, simple Act of the Federal Parliament.[10] Compliance with the simplified procedures of this Act in proceedings brought in the Federal Court, diminishes the chance of a 'technical knockout' — ever a risk in the old proceedings for mandamus, prohibition or certiorari.

- Right to reasons. The same Act confers on a very wide class of persons the entitlement, as against a Commonwealth administrator making a discretionary decision under a law of the Commonwealth affecting him, written reasons for the decision and reference to findings and supporting material.[11] The value of this development, which should be known by every solicitor in the country having dealings with Commonwealth administrators, cannot be over-stressed. It will enhance the utility of judicial review : no longer confined to the bureaucrat's self-made record.

- The AAT. The general Administrative Appeals Tribunal has been established with extremely wide powers to substitute its decision, on the merits, for the decision of the administrator. Typically, cases before this tribunal have involved legal representation. The jurisdiction of the tribunal continues to expand. Lately it has been given jurisdiction in certain social security appeals : an area in which, until now, lawyers have been excluded.

- Ombudsman. The Ombudsman has been appointed and receives numerous representations by solicitors on behalf of clients.

Continuing Review. An Administrative Review Council has been established, of which I am a member. This Council receives numerous suggestions from solicitors and others concerning injustices perceived in current Commonwealth law and practice. It makes suggestions to the Federal Attorney-General concerning change. Many of these suggestions have been adopted.

F.O.I. Freedom of information legislation is on the way. Reformed procedures of Federal tribunals is promised. Other matters being examined by the Administrative Review Council include the entitlement to damages from the Commonwealth for unlawful or unfair administrative action, as well as the reform of the procedures and the constitution of numerous Federal tribunals.

Reforms of administrative law and procedure have been adopted in Victoria and more are promised. The reforms at a Federal level are, however, most comprehensive. They promise very important future-opportunities for lawyers, in work where their training and talents will be specially relevant. It is not good enough for lawyers to cling desperately to areas of activity developed in earlier times, often protected by monopoly laws. They must find new areas of work relevant to their training. If ever an area of activity was relevant for the 20th and 21st century lawyer, it is the protection of the individual in his dealings with the State and its agencies.[12]

Tax Planning. One of the effects of inflation and of changing work patterns of more women in the workforce, has been the rise in the number of persons for whom tax planning has relevance. Whether tax avoidance has a big future depends upon the determination and skill with which the Parliament and the Tax Commissioner successfully stamp out manipulation of the tax laws. Whereas, with the gradual decline and abolition of death duty, estate planning seems unlikely to be a big growth area for lawyers, high level income taxation (and the prospect of capital gains taxes) make it probable that lawyers will find increasing work in this area, affecting an increasing segment of the population, able to pay for advice. This will be true quite apart from schemes specifically for tax avoidance. Certainly, in the survey of Victoria's lawyers performed by Margaret Hetherton, tax law and estate planning was seen as an area in which there would be a 'substantial' increase in work. Of the 245 Melbourne solicitors who responded that they practised in this area, 11.4% reported that they spent 30% or more of their time thus. Fifty percent of the group reported a 'substantial' increase in this work. This was an area in which solicitors rather than barristers seemed to have cornered the market. The interest in this work is demonstrated by the attraction it has, whenever it is offered in courses of continuing legal education.

Exclusion of Lawyers. One issue that will have to be closely watched by the legal profession is the extent to which lawyers are entirely excluded, sometimes by legislation, from tribunals and other bodies dealing with claims against the government. Probably in no other area of legal activity has our profession come under more persistent criticism than in its role before administrative tribunals. Professor de Smith, the doyen of administrative law, saw the presence of trial lawyers as one reason for the increase in formality and length of hearings, for the disturbance of witnesses and inexpert tribunal members by the asking of awkward questions and by the taking of complex 'technical' points. Lawyers are blamed for the increased likelihood of proceedings in the courts, divorced from the substantial merits of the case.[13] Where provision exists for costs to be awarded, it is said lawyers merely add to the burden of administrative proceedings ultimately borne by taxpayers . Other writers have claimed that barristers in particular seem to suffer from an inflexibility of mind which limits their ability to adapt courtroom styles of advocacy to the different needs and circumstances of a tribunal.[14] Often it is said that lawyers appearing before tribunals seem to have little idea of the concepts under discussion, of the social policies involved and, even, of the law being administered. The lawyer's training concentrates his professional mind upon analytical concepts. The technique of cross examination, which Wigmore called 'the greatest engine for truth' is often seen by laymen as a tedious, time-consuming display of virtuosity and an extremely expensive and inefficient way of getting to the real issues in a dispute. On the other hand, lawyers can offer the assurance that the law of the land will actually be complied with, including by powerful and opinionated administrators. Lawyers can act as a deterrent to the summary dismissal of a case. They can bridge possible hostilities between a party and tribunal members. They can clear up vagaries and inconsistencies in testimony. They can synthesise great matters of detail for simple presentation. They can help marshall whatever prior decisions exist to assure consistency in the administration of the law. Specialist lawyers can acquire skills in the rapid dispatch of business before particular tribunals.

Yet for all that, resistance to the presence of lawyers in those tribunals is endemic. For example, the Repatriation Act 1920 precludes a person being represented by a legal practitioner before the Repatriation Commission or the Repatriation Review Tribunal. It is only when a matter gets to the Administrative Appeals Tribunal (on reference) or to the Federal Court or the High Court (on appeal) that legal representation becomes possible. Lawyers must search their collective consciences for the reason for this discrimination against lawyers in fields where some of them, at least, may have relevant skills to offer. Is it merely a matter of containing costs? Or is there something in the way lawyers of the past have done things that is frequently considered by the lawmakers to be positively disruptive of the efficient and just dispatch of business warranting lawyers' exclusion?

I have dwelt on this subject at some length because I do see administrative law as an area for the significant expansion of lawyerly involvement. But unless lawyers are sensitive to the resistance that is reflected in the Repatriation Act[15], and like statutes lawyers may find themselves closed out of administrative tribunals. Likewise administrative tribunals constituted by lawyers, must as it seems to me, be sensitive to the policy considerations contained in legislation, as well as the dictates of the letter of the law.[16]

BIG BUSINESS

Great Expectations. The changing face of business operations will undoubtedly provide many opportunities for lawyers in activities entirely familiar and congenial to them. In the same survey of Victorian lawyers, there was a consistent prediction that a likely area of increased practice would come from commercial and company law. It accounts for a high proportion of the areas of likely expansion mentioned by Melbourne lawyers, both barristers (23.9% of responses) and solicitors (15.3%). But it had limited prominence in the country solicitors' list (6.2% of responses).[17]

The long-awaited uniform credit laws appear to be making some progress with the announcement this week by the New South Wales Minister for Consumer Affairs that the legislation should be in operation in that State before Christmas. It will probably take a decade or more, and much legal advice and some litigation, before the new laws are fully understood and absorbed by the community. Meanwhile, other areas of legal practice will expand with the changing face of business. The consumer protection field has partly excluded the legal profession, in part because of the cost-intensive nature of legal activity and the fact that the disputed value of many consumer claims, whether about a car, refrigerator or other domestic product, simply do not warrant the expense of litigation in courts. It is for this reason that consumer claims tribunals have been established, with much more informal procedures and sometimes excluding legal representation.

Unfair Contracts. Two areas can be watched here. The first is the development of unfair contract legislation, reflected in the New South Wales legislation of that name.[18] The legislation is now in force in New South Wales and permits the courts to set aside or vary certain contracts shown to be unfair. The legislation reaches a point to which the common law has been struggling. So far, there have been no reported cases on the New South Wales Act. But these are early days. What is needed is the pathfinding lawyer who will demonstrate the utility of the legislation. And then I would not be surprised to see a great deal of litigation seeking the courts' intervention in setting aside unjust contracts or resisting unfair contractual terms.

Class Actions. Another area to watch is the class action. The Law Reform Committee of South Australia has recommended that class actions should be introduced.[19] The Australian Law Reform Commission also has a reference on this topic. Its discussion paper proposed a form of class actions, to permit the aggregation of claims for damages where it could be shown that there were common issues of law and fact. In a world of mass production, it is inevitable that mass-produced legal problems will be raised. If the law insists that claims for damages be brought, in a craftsman-like way, individually, they will no doubt be respected for the high quality of individualised justice dispensed. But the result will be that many people, having legal rights, will effectively be unable to enforce them. The class action has developed in the United States as a so-called 'free enterprise answer to legal aid'. It has the disadvantage of sometimes promoting virtual blackmail litigation and being heavily reliant upon the contingency fee system that has never been adopted in Australia. On the other hand, it has been a procedure for adapting the machinery of justice to an age in which legal problems come, like goods and services, in multiple numbers. I believe we will probably see a form of expanded representative actions in Australia.[20] I also believe we will see further changes in the law relating to standing.[21] The combination of these developments, in concert with enhanced substantive rights, would open up opportunities for important litigation for the enforcement of civic duties and rights, in ways that have become a commonplace in the United States.

BIG MORAL AND SOCIAL CHANGES

Family Law. The changing patterns of personal relationships have already been mentioned as one factor that will alter legal practice. But other considerations are relevant. They include greater sensitivity to discrimination, greater interest in the environment and historical buildings, greater concern about the Aboriginal and other ethnic members of the Australian community and greater attention to the rights of those accused of criminal offences.

Criminal Investigation. A number of the tasks of the Australian Law Reform Commission are relevant to these changing social and moral forces. One that should be mentioned, as relevant, is the project on criminal investigation. Our report on this topic led to the introduction by Attorney-General Ellicott of a Criminal Investigation Bill in 1977. I understand that a revised version of the Bill will be introduced in 1981. The Bill collects and lays down the rules that govern the rights and duties of police and suspects. The collection of these principles in a single Australian Act will itself be a major contribution to assisting lawyers to understand their proper role in the delicate process of

criminal investigation. Central to the Australian Law Reform Commission's report, and strongly supported by the Law Council of Australia, was the provision requiring Federal Police to make facilities available to a suspect to communicate with a lawyer and forbidding investigative action until the suspect has had a reasonable opportunity to communicate with the lawyer of his choice, within a limit of two hours.[22] Provision was also made for furnishing lists of legal practitioners. It is now well established by the most reliable research that the availability of legal advice greatly enhances the integrity of the criminal trial process and the chances that the defendant's legal rights will be protected. If the Criminal Investigation Bill is reintroduced into Federal Parliament, I hope it will have the attention and support of the legal profession. Although provisions for legal assistance may need to be expanded to make effective the legal rights conferred by new legislation, it will be equally important that lawyers keep themselves abreast of these new rights and ensure that they are well organised to meet what may be an expected increase in demand for their services when, perhaps, they most count in the criminal justice area.

BIG SCIENCE

Telephone Conferencing. Scientific developments will provide means by which the lawyer's services can be more efficiently delivered and hence, one may hope, available to a wider range of people. I do not need to expand about word processors and information retrieval systems. However, it may be of interest to refer to one development which has already started. In the Administrative Appeals Tribunal, dealing with administrative claims involving witnesses in various parts of this large country, telephone conferences have already been commenced, to save costs of witnesses, whilst at the same time to ensure that vital evidence is heard. One hundred years after the invention by Alexander Graham Bell, we are beginning to see the greater use of telecommunications in the justice system. The Australian Law Reform Commission recommended this in the Criminal Investigation report. To keep the independent scrutiny by the judicial arm of government of police decisions, it was proposed that warrants for arrest and search should be permitted by telphone. Now, we are seeing the beginning of telephone conferencing and hearings. I am sure that in Australia we will see much more of this.

In fact, in the United States a start has been made on telephone conferences to permit judicial determination of motions in civil trials.

> In Baltimore, Judge Frank Kaufman of the United States Federal District Court has used 'telemotions' for more than five years. He is quoted as saying that 'whenever the issue is reasonably simple, I prefer to settle the matter by phone'.[24]

. In Los Angeles, the State Superior Court Judge Goebel has combined telephone motions with a tentative ruling procedure to reduce in-court arguments substantially. In 40% of the cases, the lawyers submit written briefs. In more than 70% of those having an oral argument, the telephone is used by one or more of the parties linked together with the judge.

. In Spokane, Chief Judge Dale Green of the Washington Court of Appeal (Division III) has reported that approximately 50% of all motions in his court now use telephone conferences under procedures established by rule of court in 1976.

The Australian legal profession is likely to be resistant to developments of this kind, at least initially. It is to change the curial way of doing things that has existed for as long as our legal system has been in place, and indeed before. There is thought to be great value in non-verbal means of communication. Persuasion is not simply a verbal phenomenon. On the other hand, ours is a country of continental size. Lawyers spend considerable time and expense travelling to court to argue matters, often quite short. This is especially true of suburban and country lawyers. Once at court, lawyers frequently have to wait for hours to be heard. Furthermore, their clients and often witnesses must wait for long periods, involving very great expenses to the parties and to the community. Whether the time and travel are paid for by the client or absorbed by the lawyer or by the community, in the end 'someone pays'. It is a substantial factor in litigation costs.

The United States Bar Association Journal comments on legal argument by telephone conferences in these terms:

> Recent innovations in communications technology make conference calls easier to set up and conduct. The deepening energy shortage also highlights the telephone alternative. ... Under a grant from the National Science Foundation [a commission] will work with the Denver-based Institute for Court Management and hopes to experiment with telemotions in a variety of courts in Colorado, New Jersey and Maine.[25]

I predict that before too long we in Australia will see experimentation with 'telemotions'. In a sense, they have long been available for securing urgent injunctions, ex parte. The issue now is one of expanding the efficient use of telecommunications in the justice system. Lawyers in Australia, much more than their United States colleagues, have a deep faith in oral argumentation and a strong resistance to written briefs of argument. It may be that telecommunications will permit the continuance of oral argumentation, whilst at the same time facilititating in some cases (especially simple motions) the efficient use of scarce, expensive court time.

Bioethnics. Quite apart from procedural changes that will come with science and technology, substantive laws will have to be developed to meet the new problems. In the area of bio-ethics, there is a suggestion of the development of living wills, to permit people in their lifetime to forbid extraordinary medical procedures in a terminal condition. Already in one case to my knowledge, in Canberra, a father turned up at the birth of a child expected to be deformed, with a solicitor, seeking to enforce such rights as he had to prevent extraordinary means of sustaining the life of the child. The trial of Dr. Arthur in England for the attempted murder of a retarded child, indicates the complex problems of bio-ethics that await the attention of lawyers.[26]

Computers. New computer technology will present new areas of law : including on privacy (data protection and data security)[27], changed laws of evidence[28], new laws for computer crime, new laws on the vulnerability of computerised society. It will be difficult to keep up with these new laws, although the new information technology will itself provide means of doing so. Within a decade or so, every lawyer will become used to interrogating a console linked to a legal data bank. Courtrooms of the next century will certainly have video display units on the Bench and at the Bar table. This is not the world of science fiction. The technology of which I speak is with us now and is rapidly penetrating other areas of activity in Australia. The justice system will certainly not be immune.

OTHER POINTERS FOR THE FUTURE

Unmet Needs. A number of organisational modifications seem likely as the legal profession confronts the changes of which I have been speaking. It seems clear, for example, that the rule governing advertising by the legal profession will be modified. Advertising designed to inform people of the services which lawyers can offer has already been started in Australia, led by the Law Institute of Victoria. The initiative of Law Week is designed to help people overcome the inhibitions and fears of costs that sometimes stand in the way of ordinary citizens coming to the lawyer's office. The notion of a legal check-up and of the development of preventive legal services needs to be developed. I am told that the introduction of the 'legal check-up' in Victoria during Law Week was regarded as a great success. Many people do not recognise their legal rights or problems and hence do not enforce them. Many such people are simply afraid of the suspected costs of going to a lawyer and unaware of the expansion of legal aid and of other means of funding the enforcement of rights. Provision of a simple facility, whether it is a system of legal check-up, free initial interviews, telephone advice services, talkback radio programs or otherwise, help many good citizens to cross the threshold into the lawyer's office.

If we are concerned about responding to the unmet needs for legal services, we must do everything we can, as a profession, to reduce that barrier. To some extent store-front services, neighbourhood justice centres, legal services for the disadvantaged, the Aboriginal Legal Service, law school training centres and the like will fill the gap. But it would be my hope that the private legal profession will find a role in this expansion of legal services to the broader community.

Specialisation. Because the law and society are becoming increasingly complicated, it seems likely that we must face continuing moves towards specialisation and the continuing decline of the sole practitioner. One United States writer, debating specialisation, put the pros and cons thus:

> Specialisation among lawyers affects not only marketing approaches but also internal economics. Lawyers who are specialists may have more difficulty in staying billable as client demands fluctuate than would lawyers who perform several functions. On the other hand specialisation offers an opportunity to employ standardised, efficient approaches to each matter, including the use of standardised forms, the employment of proved methodologies and savings in legal research.[29]

The very pressures to which this author referred apply equally in the direction of merges, partnerships, amalgamations and the big firm.

Prepaid Services. The development of group legal services, including prepaid legal services, is not an entirely new phenomenon in Australia. Trade unions have frequently funded accident litigation for their members. Some unions go beyond this and provide a more comprehensive service as, for example, the teachers' unions tend to do. Now, a more significant development has been the interest of bar associations and law societies in prepaid legal service schemes. Leadership in this area has come from Canada where it was discovered that 77% of the population had never retained the services of a lawyer. Only 10% were found to be wealthy enough to bear the expenses of legal services. Only 20% qualified for legal aid. Prepaid legal service plans are financial mechanisms by which an individual client pays in advance for legal services which he may need to use in the future. They are modelled on health insurance and are proving popular and successful in Canada and in parts of the United States.[30] I believe we will see developments of this kind in Australia.

Joint Practices. Other developments that should be watched include the facility of inter-professional partnerships, as for example between lawyers and engineers, lawyers and architects, lawyers and accountants and even lawyers and medical practitioners. Such partnerships are not possible under present law. Discussions have been taking place in various parts of Canada concerning such interprofessional service facilities. It must be conceded that specialised joint practices of these kinds would be more likely to be of benefit in large city establishments than in the suburbs. However, the fact that discussions are taking place in Canada is a reflection of the increasing mobility and flexibility of the legal profession in that country. Another development we may see in Australia is that of legal clinics. Many medical practices constitute individual practitioners who work together in order to share overheads and reduce capital costs, but who are not in partnership. Developments of this kind are likely to be of relevance to the suburban practitioner seeking to survive against the increasing overheads and the competition of large, specialised firms. The Law Institute of Victoria expressed interest in this development some years ago. I am not sure whether it has been taken any further.

CONCLUSIONS

This brief survey has done no more than to touch the surface of the changes that are taking place in our profession. It is the fate of today's generation of lawyers to be exercising their profession in a world whose watchword is change. Our profession will not be immune from the processes of change. We will be profoundly affected by it. Some of the routine activities that have constituted a great part of the lawyers' craft will fall victim to new technology and new social attitudes.

But out of the processes of change, new opportunities will arise. Lawyers are an ingenious profession. The law continues to expand and with it new legal difficulties expand too. A particular growth area exists in the new administrative law. New business methods provide opportunities which are already recognised by the legal profession. Changing moral and social values will promote new laws, some of which will have implications for the lawyer, sensitive to opportunities. The new technology will require us to be more adaptable in the way we do things. But it will also promote new rights and duties and complex new roles for the legal profession. The organisation and traditions of the profession will change in many ways. I hope that amidst all this change, we will not lose sight of the strengths of our profession : its role as officers of the law, its sense of independence, its devotion to the interests of the client and its honesty, diligence and competence. Though these high standards are not always met, they remain the tradition that has been passed down to us over 800 years. Though times change, some things must remain the same.

FOOTNOTES

1. J.L. Sher, 'Damages for Personal Injuries', (1981) 55 ALJ 458.

2. Skow v. Public Transport Commission of NSW, unreported, see [1981] Reform 134.

3. Sydney Morning Herald, 10 July 1981.

4. The Age, 14 July 1981.

5. A. Tyree, Sydney Morning Herald, 18 May 1981.

6. The New South Wales Law Reform Commission and the Northern Territory Law Review Committee are presently examining the legal implications of de facto married relationships.

7. See Allen v. Snyder [1977] 2 NSWLR 685 and later cases.

8. M.D. Kirby, 'The Computer, The Individual and the Law' (1981) 55 ALJ 443, 454ff.

9. S.D. Ross, 'The Role of Lawyers in Society', (1966) 48 The Australian Quarterly, 61. See also R. Tomasic (ed), Understanding Lawyers, 1978.

10. Administrative Decisions (Judicial Review) Act 1977 (Cwlth).

11. id., s.13.

12. M. Freeman, The Legal Structure, 1974, 97. See also M. Hetherton, Victoria's Lawyers, 1978, 2.

13. Professor S.A. de Smith, Judicial Review of Administrative Action, 3rd ed., 1973, 157.

14. See K.C. Davis, 61 Col.L.Rev. 201 (1961); [1962] Public Law 139; L.J. Jaffe, [1962] Public Law 407.

15. Repatriation Act, 1920 (Cwlth), s.107VU.

16. Cf. M.D. Kirby, 'Administrative Review on the Merits : The Right or Preferable Decision', (1980) 6 Monash Uni L.Rev. 171, 183ff.

17. Hetherton, 73.

18. Contracts Review Act 1980 (NSW).

19. South Australian Law Reform Committee, 36th Report, Relating to Class Actions, 1977.

20. Australian Law Reform Commission, Discussion Paper 11, Access to the Courts - II, Class Actions, 1979.

21. Australian Law Reform Commission, Access to the Courts - I, Standing : Public Interest Suits. See now Onus and Frankland v. Alcoa of Australia Limited, High Court of Australia, unreported, 18 September 1981.

22. Criminal Investigation Bill in Australian Law Reform Commission, Criminal Investigation (ALRC 2), Interim, 1975, 176.

23. The Criminal Investigation Bill 1981 (Cwlth) was introduced into the Senate on 18 November 1981.

24. S. Hufstedler and P. Nejelski, 'A.B.A. Action Commission Challenges Litigation Cost and Delay', 66 American Bar Association Journal, 965, 967 (1980).

25. ibid.

26. The Queen v. Arthur, reported in Sydney Morning Herald, 7 November 1981.

27. Australian Law Reform Commission, Discussion Paper 13, Privacy and Intrusions; Discussion Paper 14, Privacy and Personal Information 1980.

28. Australian Law Reform Commission, Discussion Paper 16, Reform of Evidence Law, 1980.

29. B.D. Heintz, 'Changes in the Economy, the Legal Environment and the Role of the Lawyer are Reshaping Law Firms' Managements', 67 American Bar Association Journal, 447, 448 (1981).

30. L.C. Wilson and B.N. Mazer, 'Prepaid Legal Services Come to Canada', (1978) 12 The Law Society Gazette 366. See also T.S. Johnson, 'Legal Services for the Average Citizen', 64 American Bar Association Journal 979 (1978). Cf. J. Disney, 'New Areas and Styles of Practice', (1979) 53 ALJ 348.