THE LAW FOUNDATION OF NEW SOUTH WALES

PERSPECTIVES ON THE LEGAL PROFESSION IN AUSTRALIA

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FUTUROLOGY

Hon Justice M D Kirby

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M.D. Kirby**

The future you shall know when it has come, before then, forget it.

Aeschylus, Agamemnon

REFORM AND FUTUROLOGY

Who would predict the future of the law and its practitioners in a time of great change? It is a hazardous business, looking into the future.[1] Prognostications inevitably look pathetically inadequate when they are measured against events as they unfold. Futurologists must face the sobering warning :

> "Our conjectures about ... the year 2000 will turn out by hindsight to have been naive and inaccurate in many respects".[2]

The perils are more obvious, when, as now, the law and legal practitioners find themselves in an era of rapid change : what Scarman has called a new age of reform.[3] Amongst the reforms afoot are moves to reform the legal profession itself. In Australia and overseas inquiries are proceeding which are designed to identify the problems of and for the legal profession. A Royal Commission on the Legal Profession and Legal Services was established in England in 1976.[4] A parallel inquiry has begun in Scotland. In Canada an inquiry has also commenced. Closer to home, the South Australian Government and Opposition have each proposed legislation to effect significant reforms in the legal profession of that State.[5] In New Zealand, a working paper has been distributed by one of the law reform committees, containing proposals to change the disciplinary and complaints procedures of the legal profession.[6] In New South Wales, a major reference has been given to the New South Wales

Law Reform Commission. It raises for report a wide range of matters critically important for the future of the legal profession in that State.[7] The New South Wales inquiry will obviously have implications for the future of the profession in other States. The Victorian Law Institute, representing the solicitors of that State, has acknowledged the importance of the New South Wales inquiry. It proposes to make submissions to the New South Wales Commission, using it as a major vehicle to press views on the reform of the legal profession across the border.[8]

In time, we will have the informed reports of these inquiries. They will chart the future of the legal profession. The most that can be done now is to identify some of the problem areas and to suggest some of the developments that may take place. Before doing this, let us consider some fundamental criticisms.

FUNDAMENTALS

There are critics who are sceptical that anything significan will come out of the numerous inquiries into reform of the legal profession. Reasons for the scepticism differ. Professor Sackville is dubious[9] that law reform bodies can do much to redress laws which operate in practice to the advantage of powerful groups in the community and against the interests of the relatively powerless : the poor, the ignorant, the non-English speaking migrant population and other disadvantaged groups.[10] Sackville and others express pessimism that the profession, the courts, governments and the"system" will allow fundamental changes.

It must be admitted that many obstacles stand in the path of reform. This is not the time to catalogue them; but it is useful to list a few, relevant to the present context.

Zenon Bankowski and Geoff Mungham in their radical book *Images of Law* perceive the legal profession through a dark glass and from an avowedly political indeed Marxist point of view.[11] They claim that the law and lawyers cannot be understood except in the context of a"theory about society". Whilst lawyers may

see themselves as priests of freedom and skilled manipulators of somebody else's system[12] these authors see them rather as the props supporting the capitalist system. They are profoundly pessimistic that any real reform of the legal profession is possible. This pessimism arises not only because of the background of practitioners[13] but because of the necessary commitment which lawyers have to the system which their skills allow them to operate:

> "[T]he radical lawyer is granted a licence to be a bolshevik in the legal world ... [I]n the last resort, the beleaguered radical professional can defend himself by retiring behind the same institutional apparatus that his radicalism would seek to subvert. To put this another way, the radical lawyer (like any other radical professional) is entangled in a situation where he is committed to undermining the very structure that provides his own power base in the world". [14]

Marc Galanter, from a different perspective, identifies other problems. One, he describes, as the lawyers "preference for complex and finely tuned bodies of rules, for adversary proceedings, for individualised case-by-case decision-making".[15] He also calls attention to the fact that certain work within the profession undoubtedly enjoys low prestige, which itself acts as a deterrent, within the professional culture of lawyers.

According to these "fundamentalists", the major problem for reform is to be found in the inherent resistance of "the system". In Galanter's view, the rules of law themselves inevitably tend to favour an older culture.[16] They tend to be devised in a previous time and therefore to enshrine established values.[17] One suspects that the massive growth in legislation in recent years diminishes the force of this argument. Galanter says that lawyers have a self-interest in the trial system with its problematic recovery.[18] Bankowski and Mungham add to the attack, criticism of the degrading aspects of the adversary system. The advantage of the "repeat players" and the disadvantage of first performers in the adversary situation are matters emphasised by many writers.[19] Palliatives such as extension of legal education, provisior

of legal aid and ensuring access to the courts are seen by them as sops : falling far short of the fundamental reforms of society and the profession that are needed. Changes in legal education dictated by altruism, cannot, according to this view, compete with the demands of those who control the economy. Schemes of legal aid are described by Bankowski and Mungham as the "tiny crosses" which the legal profession has rather tardily agreed to bear. Even then, the authors take to task the corruption and mismanagement they perceive in the provision of legal aid services in Britain.[20] Nor is "access" to the law seen as being much use when the law to which access is to be granted is unjust or irrelevant. Poor people are not simply rich people without money. They have discrete problems upon which traditional property-based laws are frequently silent.

If these cautionary words were not enough to plunge us into gloom, these critics then refer to the actual resistance of the legal profession and the law to reform. The very overload of work upon courts and lawyers increases the costs and risks of adjudication and prevents consideration of change. It encourages neglect of reform in favour of those who are "in possession".[21] Sometimes, when reforms are devised they run headlong into institutional resistance[22] or even disobedience.[23] The limited resources that are devoted to systematic reform of the law and of the legal profession itself must severely diminish the chances of getting things done.[24] These impediments are not listed to discourage the reformer. Many of them would not be universally accepted. A healthy scepticism and practical realism should always be weapons in the armoury of reformers. Fundamental changes in our society and in the profession which services it may well come. It is unlikely, in a settled, reasonably homogeneous and self-contented society such as Australia is, that it will come in the last quarter of this century. Without debating the need for fundamental change, there are some reforms which are urgent and will probably occur in the foreseeable future. Doubtless Bankowski and Mungham would see them as no more than "bandaids". Perhaps that is all that Australian society as a whole would want at this stage. More drastic reform may have to abide the Millennium.

PRACTICAL PROBLEMS

In 1976 the Law Foundation of New South Wales published the results of a study conducted by the Foundation designed to ascertain public attitudes to the legal profession and legal institutions. The book by Roman Tomasic is titled *Law, Lawyers and the Community.*[25] It recognises the fact that it is essential that accurate data should be available to those whose function it is to ensure that the legal profession meets society's needs and demands.[26] I take it to be agreed that the profession should have this object as one of its guiding stars. Of course, after a period of application to study, it is entirely appropriate that an above-average income should be expected, together with satisfactory opportunities of self advancement and self fulfilment. But in the end, few lawyers today would support a view that the law and the legal profession exist simply to serve their own interests. The profession is not and ought not to be a continuing self-congratulation society. It provides particular services to the community. Its utility can be measured against the degree to which the services offered are those which society needs as well as the efficiency and probity with which the profession performs its work.

According to some the requirements of change are such that we must abandon entirely all lawyers' monopolies, overthrow the adversary system, drastically modify the trial process, change fundamentally the content of the work lawyers do and commit the profession to service to the community in a State-run legal corporation. We may come to that. Some futurologists predict it.[27] Setting my sights on more immediate possibilities, there are some practical problems that can be identified. These are capable of fairly rapid treatment, without altering the basic role and organisation of the profession. Futurology must have limits. This paper will therefore address itself only to a number of limited subjects : entry to the profession, legal education, admission to practise, the structure of the profession, its work methods and self-discipline.

ENTRY TO THE PROFESSION

On the basis of empirical studies, there seems little doubt that the average lawyer in Australia does not have an average background. A study by Anderson and Western in 1965 showed, amongst other things, that a disproportionate number of students came from high-income families. In comparison with students in medicine, engineering and teaching, law had the highest proportion from families in the top income bracket. Twenty percent came from homes with an income, then, of over-$8,000. In engineering, only 10% came from such homes and in teaching 6%. The same survey disclosed that law students were the most politically conservative.[28] Twenty nine percent of their fathers were professional men, 6% had fathers-in the legal profession. Only 19% came from working class backgrounds. Law students had a substantially higher percentage who had attended non-State schools than other groups tested.[29]

Now, these figures are much out of date. They may well be affected by the limits imposed by university quotas and the like. Plainly they are significant. An individual's value system may be well entrenched by the time he gets to university. If the machinery of the legal system is worked by a constantly self perpetuating group chosen from an unrepresentative sample of the community, this is bound to have an effect that distances the law from the community which it ultimately serves. In an important address in May 1968, Mr. Justice Jacobs put it this way :

> "A lawyer is naturally conservative. His training almost inevitably makes him so and it is proper that he should be. However conservatism must have its limits".[30]

The "limits" of which his Honour spoke are now being plumbed. Australian society is changing rapidly. If the legal profession is to maintain, let alone expand its relevancy, it must be alert to these changes and able to meet the challenge of change. If a great proportion of its members suffer attitudinal blinkers, they will miss the signs of change.

One thing is sure and it is that women are playing an increasing role in the profession. The disproportion of women is being corrected at every level. This trend is likely to continue. In 1940 there were 2 women practising as barristers in New South Wales (0.7% of all barristers) and 15 solicitors (1%). In 1975 there were 28 barristers (5%) and 304 solicitors (6%). During the period from 1960 to 1974, the percentage of females among Australian law students rose from 11% to 22%. Yet in 1974 the equivalent percentage in medicine and science was about 33% and the overall university percentage, 35%.[31] The trend is certainly in the direction of increase. The appointment of women to the Bench and their general advancement in the profession will not abate.

Allied to this profile of the background of Australian lawyers is the inevitable question of supply and demand. In the 1971 Census, 10,300 Australians described their employment in a way that was subsequently classified as "law professional".[32] This produced a ratio of practising lawyers to population that varied from 1:860 in N.S.W. to 1:2330 in W.A. The figures tend to suggest a disproportionately great number of lawyers centred in the city of Sydney and Melbourne, a disinclination to practise in country or remote districts and, because of the dramatic increases in the numerical strength of the legal profession in recent years, a preponderance of young laywers. Even the present preponderance of very young lawyers is unlikely to decline.[33] The statistics are interesting :

Age	Percentage of respondents	Period since admission	Percentage of respondents 1973	1967 (est)
Under 25 years	11%	Under 5 years	39%	(21%)
25-34 years	43%	5-9 years	19%	(13%)
35-44 years	23%	10-19 years	22%	(30%)
45 years	23%	20 years or more	20%	(35%)

I cannot comment upon whether there is an over-supply of lawyers either now or potentially. In New South Wales, the

number of persons graduating annually will treble between 1970 and 1980. At least it can be said that there is a "strong possibility" of an over-supply.[34] This phenomenon is most acute in New South Wales. It may not be present in South Australia and Western Australia. But the explosion in numbers unfortunately coincides with an economic downturn which, putting it at its lowest, make the position for prospective law graduates within the practising profession, more doubtful than has been the case for decades.

The outcome of over-supply of lawyers in some parts of Australia may not be an unrelieved disaster. Indeed it may have some advantages. It may encourage lawyers in this country to be more adventurous in their professional careers.[35] It may set them upon the process, well established and developing in the United States, by which lawyers work in decreasing numbers in private practice and increasingly take their talents into business, the unions and others as "house counsel".[36] It may make government practice more attractive.[37] It may encourage the next generation of lawyers to turn their attention to activities where there is a social need but which are neglected because other work is more remunerative,[38] has more "snob value" or is otherwise presently considered more congenial.

LEGAL EDUCATION

There is not a shadow of doubt that legal education both in content and method will change rapidly in the last quarter of this century. In his *overview* of legal education in Australia, Professor Derham told the Conference in 1976 :

> "We are now ... in a period of profound and rapid change in our society ... The work of bringing our 'black letter law' into tune with the needs of the time is arduous and exacting work calling for high scholarship and developed legal skills ... If it is not done, not only lawyers but the law itself will fall into disrepute". [39]

I believe that this perception is shared in law schools and colleges of law throughout the country.

There is, of course, a potential conflict between the function of law to provide stability, predictability and certainty and its function to react flexibly to changes in society and changes imposed by science and technology. Legal education has hitherto laid excessive emphasis upon the first feature of the law. Increasingly it will put emphasis upon the second. This will impose upon law teachers the obligation to teach new skills. At the moment, in the analysis of decisions of appellate courts, too often discussion ends "at the very point where it should properly begin".[40] A scrutiny of the interests at stake in judicial decisionmaking and in the framing of legislation is a proper function of the lawyer. He is trusted, with touching faith, to help to resolve social conflicts, many of which will be intense, new and lacking in clear analogous guidance.[41]

It is not so long ago that constitutional law was taught as if it was and should be a mere matter of statutory construction. I am confident that this view will not survive the present century, even if it does not suffer an earlier death. It is important that when we deprive lawyers of resort to such an important myth as "complete and absolute legalism" we should arm the next generation with the tools that will be necessary to replace that myth. They must be helped to identify and articulate the interests they are dealing with. Self deception and not hypocrisy, is the enemy here. David Riesman and Julius Stone have been teaching this for successive generations of law students since the 1940s. The law moves in tardy, as well as mysterious ways. Only now have the first glimmerings of Stone's perceptions begun to show in judicial decisions. Legal education has a long fuse. If lawyers are to meet the challenge of relevancy, it is important, in my view, that universities develop the optional courses that will prepare the profession of the future for its tasks. Courses on environmental law, trade unions and the law, law and medicine, poverty law, civil rights, consumer law and so on sound curious to the ear of those trained in a rigid curriculum. But when

it is seen that that curriculum, with its emphasis upon property rights protection, serve only a part of the community, and when it is remembered that legal aid will offer the opportunity of access to the law to different interests in the community, it is vital that those who are coming through should acquire multiple skills in directions that were unthinkable even a generation ago.[42]

ADMISSION TO PRACTISE

The rules governing admission to practise have come under scrutiny of late. Steps have been taken which show the way of the future. The President of the Victorian Law Institute points the way :

> "There is a growing need for the profession to be more nationally minded. We are members of the one profession whether in practice in Queensland, Western Australia or Victoria. Why should there not be a common code of ethics, a common system of costing and a common professional indemnity scheme?"[43]

One of the far-seeing provisions introduced by the *Judiciary Act (Amendment) Bill 1976* was that which would permit the appearance of practitioners admitted in any State to appear before a State court of another State when exercising Commonwealth jurisdiction.[44] This will begin the process of eroding the protective requirements of residence by which the smaller States have previously excluded practitioners from Sydney and Melbourne.

There is no future in this kind of limitation upon the right to practice within Australia. Already steps have been taken in Europe, within the markedly different legal systems of the Continent and the United Kingdom, to abolish discrimination based on frontiers and to ensure reciprocity of legal representation.[45] When the differences of language, culture and history, to say nothing of legal tradition in that context are measured against the Australian scene, it makes the justification of State impediments to practise hard to perceive. The presence of Federal Courts, the admission of

some practitioners in State courts, the growth of Commonwealth law and the prescience of State law societies clearly point the way of the future. Although there are obvious difficulties, given the present organisation of discipline of the profession by the Judges of the Supreme Courts of the several States, I predict that the Law Council will give fresh attention to this problem. By the turn of the century, I would expect a truly national profession enjoying complete reciprocity, at least before the courts and tribunals in every part of the country. United States writers are pessimistic about the emergence of a national Bar in the United States.[46] Some Australian writers share this pessimism. I do not. Forces are at work which will not go into reverse[47] I have suggested some of them. I would only add the general relaxation in technical requirements such as nationality which are evidenced in recent Australian decisions.[48] We have fewer impediments to achieving a national profession than exist in the United States. The increasing contact between lawyers in all parts of the country will diminish the remaining barriers in the way of complete reciprocity.

[illegible] as that which would permit [illegible] admitted in any state to appear before a

STRUCTURE OF THE PROFESSION

One of the critical questions before the New South Wales Law Reform Commission is whether the separation of the profession between barristers and solicitors should persist and, if not, whether some form of fusion could or should be permitted or enforced. That the distinction is not entirely historical and can have practical implications can be seen from some at least of the reasons for judgment in the High Court of Australia in *Re Neil; ex parte Cinema International Corporation Pty. Limited.*[49]

This is not the occasion to rehearse the arguments for and against a separate Bar. It is worth noting that whilst there is a strong feeling in some quarters in Australia that separation unduly adds to legal costs and duplicates highly paid work, in the United States, the contrary feeling is abroad. The Chief Justice of the United States has specifically lamented the absence of a separate, specialised Bar.

Various suggestions have been made to permit or encourage a changed organisation of the profession. Certainly it must be acknowledged that attempts or proposals in the past to enforce fusion where it did not exist have come to nothing : running into judicial opposition[50] or professional preferences.[51]

In his 1968 lecture, Mr. Justice Jacobs suggested that a better organisation of the profession was that adopted by the medical profession, namely a division between those in general practice and those engaged in special practice.[52] There seems to be a widespread view that a greater degree of specialisation would advantage the courts and the community.[53]

The Young Solicitors' Group of the Law Society of England and Wales proposed a three-tier structure made up of :

(a) A legal administrator who dealt with ancillary administrative work called "The Legal Executive"

(b) The practitioner to whom the client can go direct for advice and assistance called "The Lawyer"

(c) The practitioner of exceptional ability and experience who is consulted by "lawyers" to assist in cases of unusual difficulty or importance, called "Counsel". [54]

This organisation parallels that proposed by Mr. Justice Jacobs, with the addition of a support group of para-legals who could no doubt do routine work currently reserved to lawyers.

Associated with these proposals for change are proposals for incorporation amongst legal practitioners. Such a proposal was put forward by the Victorian Law Institute but apparently

withdrawn when the implications of the *Trade Practices Act* were considered.[55]

It seems unthinkable to me that lawyers should be *forced* into partnership. The trend in the United States is certainly towards eroding the role of the sole practitioner.[56] Indeed the trend in the United States is distinctly away from private practice and towards business and government engagement.[57] Any solution will have to accommodate itself to the substantive law and court systems which the profession has to operate. As it is unlikely that we will abandon entirely the adversary system, there will be a need for the foreseeable future for trained advocates. Already the Bar is tending to specialise and, by a process of evolution rather than imposition, is tending to move in the direction predicted by Mr. Justice Jacobs in 1968 and the *Young Solicitors* in 1972. There are, of course, ancillary matters that must be clarified. We must consider, for example, whether certificates of specialisation are needed, advertising of specialties permitted, the two-counsel rule abolished and so on. Given the adversary system, the talents and inclinations of a limited number of the profession towards advocacy, the history of the development of a separate Bar and the other arguments pro and con, my own feeling is that a separate Bar will survive current scrutiny. At the same time there is no doubt that peripheral abuses which mar the present system will disappear, to adapt Mr. Justice Jacobs, at the end of "a golden autumn".

WORK OF THE PROFESSION

Use of the Law. We are not likely to live to see the removal of all of the impediments which stand in the way of use of the law and lawyers by all citizens. Ignorance, fear, apathy, indifference, an inability to afford fees and a conviction that the law is "stacked up against" the ordinary individual are not likely to disappear by the turn of the century. Nevertheless, changes are occurring which will tend to promote a closer approximation to the ideal of true equality before the law. These forces include the rapidly increasing levels of education in the Australian community, the provision

of special services for particular disadvantaged groups (as for example the Aboriginal Legal Service), the expansion of legal aid generally and the design of new machinery to resolve disputes which, though important to those involved, do not warrant in money terms the engagement of a lawyer. In this last category must be included Ombudsmen, consumer protection authorities, debt counselling services, small claims tribunals and so on.[58]

The provision of such facilities, allied with the expansion in numbers, changes of attitudes and additions to the curricula in legal education, will undoubtedly propel the legal profession into new areas of activity.[59] It is to be hoped that this occurs because the signs are definitely out that the profession is going to lose at least its monopoly in the volume work which has for long provided the great part of its income. If one examines the areas in which until now the ordinary member of the community has used a lawyer, they would tend to contract to the following: real estate transactions, especially the purchase of a block of land or home; matrimonial disputes (especially divorce); drawing a will and administering an estate.[60]

In some parts of Australia only lawyers are permitted to prepare for reward documents for land conveyancing, probate administration and the like. Estimates vary but it seems a fair assumption that work of this kind produces about 60% of the income of lawyers in the Eastern States.[61] Neither in Western Australia nor South Australia do lawyers enjoy a monopoly of this work. Consequently, in South Australia lawyers share only 20% of the conveyancing work, the remainder being carried on by registered "landbrokers". Lawyers tend to be utilised where the transaction is large, associated with other dealings or if personal factors are involved. The scale of charges for landbrokers, with whom lawyers must compete, in South Australia, are well below those levied by lawyers in the Eastern States. On a purchase of a house of $40,000 the comparative fees are

S.A.	$146	V.	$485
W.A.	$128	N.S.W.	$351
		Q.	$364

There may, of course, be other relevant market factors. Forty thousand dollars purchases a good property in Adelaide but a very modest one indeed in Sydney. The land market is more vigorous in the Eastern States and the communities marginally more prosperous. The difference is still significant. It cannot be scoffed away. There is no use hiding the fact that many conveyancing transactions are *de facto* performed from first to last by trained typists. This automaticity is likely to increase rather than diminish with the growing spread of the Torrens System, the use of computerisation and the development of insurance schemes to protect against loss. I think it very likely that lawyers will lose their monopoly on land conveyancing and that this part of their practice will severely contract to roughly the proportions of South Australia. Clearly the loss of such volume work will have marked implications for the future activity and income levels of the profession.

That is not all. In the Family Law area significant changes have commenced. The object of the *Family Law Act* is to reduce to an absolute minimum the impediments in the way of dissolution of marriages. The great increase in the divorce rate and in the numbers awaiting divorce, demonstrate the effectiveness of the Act in securing this object. Simplification of the law reduces the need for "lawyering".[62] It makes possible the "do-it-yourself" kit which has enjoyed some success in the Family Law area already and is likely to expand rapidly into other activities including real estate, probate, appearances before proliferating tribunals and so on.[63]

If one turns from the work traditionally done by solicitors, to the work of advocates, it must be admitted that the "evil hour" was averted when the *National Compensation Bill* was forestalled. However, even in recent weeks the Opposition has reintroduced the *National Compensation and Rehabilitation Bill 1977*.[64] The Government has made it plain that the issue is not dead but that discussions are being had with the States with a view to procuring a "national compensation policy".[65] A Royal Commission is looking into the matter in England, a Board of Inquiry under Sir John Minogue is examining the no-fault

motor vehicle accident compensation scheme in Victoria. It would be a bold man who predicted that compensation litigation would survive in its present form to the end of the century. It is a labour-intensive, costly and unsatisfactory machinery which impedes reform of the substantive law. I have little doubt, for my own part, that governments of both political persuasions will move gradually toward a social services-type solution in which the role of the advocate will be severely circumscribed. Similar predictions are made in the United States[66] although there the leap to social security is likely to pause for a time at the stop of "no-fault liability".

Alternatives. If these predictions come true, the legal profession is in the midst of a period of radical change in its work patterns. The bulk work presently producing the great proportion of its income will fall away or be substantially performed by other interests. Banks, insurance companies, trust companies, real estate brokers, debt collectors and lay advocates will make marked inroads into the activities of the legal profession.[67] What will happen to the lawyers released by such developments? Will there be work for them?

I am an optimist. I believe that we can already see the way of the future. Legal aid will redress the bias of lawyers as "protectors of the propertied class"[68] and direct increasing numbers into "public interest" areas.[69] The common law has been a poor protector of the environment. Legislation, particularly armed with changes in the laws governing standing[70] (a matter currently before the Law Reform Commission) will ensure that lawyers of the future become involved in national resources litigation. Likewise, I predict, those concerned with consumer interests, perhaps armed with a facility of class actions (also a matter before the Law Reform Commission) will look increasingly to the legal profession to advance their arguments.

Special groups, Aboriginals, ethnic communities and reform groups will look to lawyers in this country to perform the reforming work in courtrooms done by the civil liberties and coloured people's organisations in the United States. We should

not be afraid of these developments. It is preferable that social disputes and tensions should be resolved in courtrooms rather than elsewhere. Obviously changes of this kind will raise for consideration the extent to which it is right for lawyers to go beyond mere articulation of their clients' causes. Is it necessary for the lawyer to advise clients about lobbying, political and media contacts and so on? How far should the lawyer have to adopt a passive "service" role?[71]

I think it is also clear that lawyers will play an increasing role in government service and private business at the expense of private practice. This is already the trend in the United States. I think we will see increasing numbers working in the social welfare area using skills of negotiation, advice and manipulation of government machinery rather than the adversary skills of conflict.[72] If the American expenience is any guide we will probably see an increase in so-called "pre-paid" legal services.[73] Although this has been challenged four times before the Supreme Court of the United States the Bar has four times been rebuffed. Certainly it is difficult to see the future of legal aid. However one of the prime problems which the private profession will have to grapple with is the extent to which the middle income earner, unable himself to afford access to the law and disqualified from assistance by legal aid schemes, is left in a disadvantageous position short of true equality before the law.[74]

Australian studies plainly show the utility of legal representation before the courts. Although I predict a growing number of lay advocates, I have no doubt that legal aid will ensure that an increasing number of persons are fairly represented, especially in criminal matters. Given the intensive training at a high level which the profession requires, the re-alignment of the profession from routine conveyancing into assisting the resolution of the *real* disputes of our society, is nothing less than a precondition of survival. Retreat behind monopoly walls to overpriced routine work is the kind of "feather-bedding" which members of the legal profession would be the first to condemn in other occupations, and rightly so.

METHODS

The use of labour-saving equipment has begun in the legal profession but in this country as in the United States, it has a long way to go to catch up to business.[75] The use of computers, particularly for office management and the retrieval of legal information[76] has only just commenced. There is no evidence yet about whether photocopiers and like equipment have been used to *reduce* the cost of delivering services to the community, although it seems doubtful to me that it has.

I hope that a few leaders and the professional societies can take the profession into the computer age. They must do battle with the conservatism of lawyers, planted by their background and fed by the very nature of their profession. There does not yet seem to be abroad the conviction that the profession must use to the full costs-saving devices, not only machinery but paralegal personnel. In the courts structure we see the beginning of the movement in the appointment of court administrators and suggestions for a national judicial administration.[77] I hope that after the present economic trough is passed, sufficient funds will be made available to take further the Mullin Committee's inquiry into the computerisation of legal data. No system lends itself more readily to computer retrieval than the common law system. In a relatively small legal community, the provision of computer terminals would also assist in the movement towards uniformity of laws in appropriate areas.[78]

ETHICS AND DISCIPLINE

New Ethics. I fully realise that any discussion of ethical standards in the law distresses many lawyers. Why should this be so? One recent article in the United States suggests an answer :

> "They view a challenge to their ethics as equivalent to a challenge to their honesty and believe that, in the final analysis, ethical judgments involve highly personal, even semi-religious decisions as to what is right and wrong". [79]

Events, however, will force a reconsideration of lawyers' ethics. In the first place, it is hardly likely, in a community learning to live with the *Trade Practices Act* and where there are stringent limits on monopolisation, prohibitions on resale price maintenance and general discouragement of anti-competitive activity, that the legal profession will emerge unscathed whilst others are submitted to legal discipline. The debate about the appointment and privileges of Queen's Counsel is not confined to this country.[80] In Canada the coinage has been debased in some parts, leading to a call for abolition of the title, as misleading. More important, it seems to me, than matters of title are matters of substance. The rules that require, as a matter of ethics, the presence of Junior Counsel and the so-called "two-thirds" rule for the fees of Junior Counsel plainly require revision, if not abolition. The Monopolies and Mergers Commission in England has struck down the two-counsel rule.[81] I predict a similar fate in this country. Even if a separate Bar survives, as seems to me likely, it should survive on the services provided and not artificially fixed minimum fees.

[illegible] Committee's inquiry into the computer bar

Allied to this is the debate about lawyers' advertising. Modesty, gentlemanly conduct and the theory of equal professional skill proscribe advertising by lawyers. But should this be so? Some evidence suggests that when professional people are permitted to advertise, the cost of services provided falls. It was so in the case of optometrists in the United States.[82] The absolute prohibition on professional advertising would appear to be in its last days. This is a universal debate embracing the English profession,[83] the United States profession and the profession in Australia.

The Law Foundation's survey certainly appears to indicate that many people believe that lawyers are specialised but do not know how to go about finding a person with the appropriate specialty. In England, the Monopolies Commission recommended, putting it generally, that solicitors should be free to advertise as they wished, including publicly, concerning their specialties, fees and speed of service. The only proviso

was that the advertisements should not "claim superiority in any respect" over other solicitors nor contain "inaccuracies or misleading statements".[84] The Commission did propose a power in the Law Society to prohibit advertising "likely to bring the profession into disrepute". Certainly this ruling heralds a change which I believe we are likely to see in this country.

Associated with advertising is the question of personal publicity. One author at least believes that the limits on lawyers' speaking out have tended to suppress the role which they might play as representatives of non-propertied interests.[85] Without embracing that view entirely, and without exaggerating the limits imposed on lawyers, it must be acknowledged that the widespread advent of legal aid does raise a critical question about the lawyers' involvement in the affairs of his client. Will it be enough to take a passive role? To what extent should lawyers helping the poor, the Aboriginals or other disadvantaged groups stick strictly to preparing documents and arguing cases dispassionately in court? Some authors sincerely feel that this view of legal ethics is one designed by propertied interests to uphold the status quo in the distribution of wealth in our community. For good or ill, I believe that we will see the distant, dispassionate, remote role of the lawyer give way to a more active involvement in the client's affairs. It really seems the inevitable consequence of providing funded legal assistance to disadvantaged groups whose litigation sometimes may transcend the parties to a particular case. Clearly there are limits. The adversary system is particularly exposed to the potential for abuse.[86] As more and more non-lawyers gain access as advocates to tribunals and courts, the issue will be starkly posed. Lawyers, who are trained to be conscious of their duty to the court and to the system of the administration of justice and who are subject to discipline for breach, may feel it unfair that lay advocates, who do not feel bound by the same rules, are not subject to the same discipline.

Fees and Costs. Legal aid will not be the whole answer to the problem of bringing law within the reach of everybody who has a serious dispute, susceptible to reasoned resolution. One disadvantaged class is the middle income earner who does not qualify for legal aid but could not afford to become embroiled in lengthy litigation. Lord Denning has lately suggested that it is time that we started to think about contingency fees for lawyers. He explained the system thus :

> "If we win, I get a percentage of the damages. If we lose, I will charge you nothing".[87]

Writers are already beginning to urge consideration of this method of funding litigation, a suggestion that would have been regarded as little short of scandalous only a few years ago.[88] The reference before the Law Reform Commission relating to standing to sue and class actions obviously raises for critical consideration the implications of group actions for our cost rules. One of the principal objections to cost sharing was associated with the view concerning a lawyer's proper distance from his client and his client's interests. But as that view itself comes under new scrutiny, so, I believe, will contingency fees. In practical terms, as we all know, much litigation is already conducted on a semi-speculative basis. The introduction of contingency fees, openly negotiated, might regularise this conduct and at the same time open court doors for the resolution of serious disputes.

Discipline. In all parts of the common law world radical changes are occurring in the machinery for and rules of discipline of the legal profession. In England a Lay Observer has been appointed to represent community interest in internal disciplinary procedures of the Law Society.[89] A similar provision has now been introduced in Scotland.[90] A Law Reform Committee in New Zealand has proposed a similar system there.[91] The matter is now before the New South Wales Law Reform Commission but meanwhile, in Victoria, changes have been introduced, in advance of legislation, in controls over disciplinary procedure. One change is that the hearing of charges against lawyers is now conducted in the open.[92]

Perhaps the most important developments are occurring in Canada. In British Columbia a *Competency Bill* has been introduced to allow discipline of lawyers who are found incompetent.[93] In my view the moves to open up disciplinary proceedings, to infuse an independent element in them and to expand the concept of professional misconduct to include incompetency and neglect, would go a long way towards meeting the numerous complaints voiced about the legal profession in the Law Foundation's survey. Delay, indifference to the client, lack of sensitivity to his problem and ordeal[94] and incompetence represent the major problems for ethics and discipline. Although, unhappily, fraud and default hit the headlines, it is the less publicised human failings that I have mentioned that poison the relationships between the legal profession and the community. Retraining, including compulsory retraining of judges, seems scarcely avoidable at a time when the law and legal machinery are changing so rapidly. I realise that this proposal, recently made in the United Kingdom, attracted almost unanimous opposition from the judiciary. I expect there would be similar opposition from the profession. But the days are gone when we can rely upon a certificate of competency in the law to endure a lifetime. Nor can we be sure that the holder of that certificate will assiduously read legal material so that he can adequately serve the community. I entertain little doubt that in the 21st century those entitled to call themselves lawyers will be required constantly to renew their skills and not merely their practising certificates.

CONCLUSIONS

If this sounds like a prescription for radical change, it is not. The adversary system will survive. Come 10 o'clock, somebody will have to rise to speak for the client. Government service and legal aid will surely expand. But with reasonable prospects of continuing general prosperity, I predict that the legal profession will continue to enjoy a significantly affluent future. Its tasks will change. The present bulk business will be replaced by new work that is more relevant to modern times. Legal education will become more diverse. The profession will openly embrace specialisation as its mode of

organisation. The anti-competitive rules will wither. There will be greater openness and accountability to the community. The challenge before us is one of relevancy. Those who know the history of the profession, stretching as it does, in our civilisation, over nearly eight centuries, will have no doubt that it will answer the challenge.

* This is a revised version of an address *Lawyers' Futurology* delivered at the Young Lawyers' Forum, 19th Australian Legal Convention, Sydney, 4 July 1977. It will be published shortly by the Law Foundation of N.S.W. in a book, *Perspectives* on the Legal Profession in Australia.

** The Hon. Mr. Justice M.D. Kirby, B.A., LL.M., B.Ec. Chairman of the Law Reform Commission of Australia.

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51. Basten and Disney, p.3.

52. Jacobs, p.11.

53. Hangar C.J. cited in Disney, pp.67-8; Johnstone, p.14.

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60. See Table 4A, Tomasic, p.79.

61. Basten and Disney, p.12.

62. Ehrlich and Schwartz, p.589.

63. Morgan, p.707.

64. *Commonwealth Parliamentary Debates (H of R)*, 24 Feb. 1977, p.425.

65. *Ibid, (Senate)*, 9 Nov. 1976, p.1708.

66. Ehrlich and Schwartz, p.589.

67. Johnstone, p.13.

68. Ross, p.61; Bankowski and Mungham, p.6

69. Nader, p.23.

70. The reference on standing to sue and class actions was given to the Australian Law Reform Commission on 1 February 1977.

71. Ross, p.75. This problem has been raised with the Law Reform Commission by the Aboriginal Legal Service in the Northern Territory.

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73. Morgan, p.722.

74. Ehrlich and Schwartz, p.586.

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85. Ross, p.67, 73; Bankowski and Mungham, p.125.

86. M.H. Freedman, "*Lawyers' Ethics in an Adversary System*". See review 51 *N.Y.U.L.Rev.* 348 (1976).

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