GOULBURN VALLEY LAW ASSOCIATION

CONVENTION, SHAPPARTON, 1978

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PUTTING REFORM OF PROFESSIONAL DISCIPLINE INTO CONTEXT

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

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PUTTING IT IN CONTEXT

"Self-Regulation" is in the news. An entire report by the Australian Broadcasting Tribunal was last year directed at the concept of "self-regulation" for Australian broadcasters.[1] Here was a new industry, with a new group of participants enjoying considerable importance in our society, calling for "self-regulation" in the place of detailed and specific regulation by others. In its report, the Tribunal points out that many witnesses and submissions :

> "seemed to assume that we were canvassing the possibility of abolishing all rules for broadcasters. We had to constantly remind people that 'self-regulation' was not synonymous with 'no regulation' ... We defined 'self-regulation' as a system of participatory regulation under which broadcasters, through their industry bodies, would develop advertising and program codes which would be endorsed by the Tribunal and policed by the industry bodies with the Tribunal as the final court of appeal".[2]

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1. Australian Broadcasting Tribunal, *Self-regulation for Broad* 1977,
2. *Ibid*, 7.

* This is a modified version of an address delivered to a symposium in Sydney on 20 May 1978

In the end, the Tribunal came to the conclusion that :

> "A self-regulatory system could not be applied in all areas of broadcasting because of the natural conflict between the needs of commercial organisations and the interests of the public. The community could not reasonably expect the broadcasters to immediately regulate themselves in such areas as Australian content, children's programs or advertising, where their necessary and justifiable desire for profits could be in conflict with their acknowledged social responsibilities".[3] M.D. Kirby

Other reasons were referred to to explain why "self-regulation" in totality could not be accepted. Amongst these were the considerable and concentrated power of those controlling the media industry and the possibility that the "natural self-interest" of such persons "could be in conflict with the interests of the community".[4]

Having stated these and other reservations, the Broadcasting Tribunal nevertheless came to a conclusion that regardless of any detailed procedures laid down for the community' regulation of the industry, there must be "some means of establishing and maintaining a more direct accountability of broadcasters to the public" :

> "We concluded that if broadcasters are to be genuinely accountable it is essential that some performance criteria be formulated and made public. We have therefore recommended a measure of self-regulation in some areas where the industry will formulate codes of behaviour ... The Tribunal believes that total self-regulation for the broadcasting industry is a worthwhile and attainable gaol. However, there is some disagreement among the members as to the measure

3. Ibid, 7.
4. *loc cit.*

> of self-regulation which is acceptable to the Australian public at this time. In short, the majority ... do not believe that the broadcasting industry has shown itself, either through its past performances, or in its current submissions to us, capable of grasping the whole nettle of self-regulation at once. We do not believe that they have convinced the public that they are yet willing to put the public interest above their self-interest at all times. In other words, we are not persuaded that the broadcasters will always act in accordance with the concept of "the public good" if, by so doing, they cut across their own interests and diminish their profits. We have not heard any evidence to suggest that broadcasters have sought any changes to the broadcasting system in the past which would be wholly in the public interest and we do not believe that it would be in the public interest to give them, at the present time, all that they ask."[5]

In the result, the majority proposed the development of responsive self-regulation in many areas, whilst reserving other (such as children's programs, local content and advertising) to "binding obligations" laid down by external authority.

It will be observed that it was generally agreed that "self-regulation" was worthwhile and desirable. The alternative of "public regulation" by public authority of some kind, was regarded as less desirable. But the preferred system could only operate where it was a means to the attainment of the general "public good". The potential for conflict of interests and a poor perception of the public good was plainly recognised.

As will be seen, these concerns of the Broadcasting Tribunal are the recurrent concerns of those who in the past and at present, scrutinise the accountability of the profession. Even the "learned" and well established professions are not immune from this debate. The rapid development of other special

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5. *Ibid*, 8.

and highly trained employment groups in the community has simply expedited the consideration now being given to the accountability of the professions. It can no longer be assumed that the community will accept, without question, the degree of self-regulation afforded in the past. The same questions as those raised by the Broadcasting Tribunal, and others, must now be faced by all professions and all who call themselves "professions".

In the context of the legal profession the former Chief Justice of the High Court of Ontario, Mr. McRuer, put it this wa

> "The traditional justification for giving powers of self-regulation to any body is that members of the body are best qualified to ensure that proper standards of competence and ethics are set and maintained. There is a clear public interest in the creation and observance of such standards ... There is a real risk that the power may be exercised in the interests of the profession or occupation rather than in that of the public. This risk requires adequate safeguards to ensure that injury to the public does not arise".[6]

There are some who say that at least in respect of the "learned" professions, we should leave well alone. In a society in which claims are made by policeman, broadcasters, computer operators and others for "self-regulation" it is necessary to re-examine the arguments which have hitherto been thought sufficiently strong to warrant "self-regulation", in the established professic If "self-regulation" of some kind is to be allowed to the lawyer and medical practitioner, according to what principle is it to b denied to the grocer, the fruiterer or the taxi driver? If "self-regulation" is to be allowed to the broadcaster, in some respects, according to what principle is it to be denied to another, equally modern"profession", the computerist? The purpo of this paper is to examine this issue, to sketch some of the arguments for and against a measure of "self-regulation" for th professions and to indicate some overseas and local developments from which a number of themes begin to emerge.

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6. J. McRuer, *Report of the Royal Commission Inquiry into Civi Rights*, 1968, Vol. 3, 1165.

ARGUMENTS FOR SELF REGULATION

Let us leave aside, at the outset, the arguments of tradition, snob value and "leaving well alone". These doubtless must be given weight for "reform" does not necessarily imply change. Things well ordered ought not to be changed, unless they can be changed for the better. Those who support "self-regulation" generally seek to do so, nowadays, by reference to more vigorous arguments.

In the context of the legal profession, the one that interests us, the arguments generally proceed thus. The legal profession must be left to itself, so far as possible, because it is vital for society to foster and encourage a vigorously independent Bar. There is a danger in too much public and governmental interference in the organisation and discipline of the legal profession. Conceding a "public interest" in the fair impartial and rigorous pursuit of public complaints against members of the profession, we ought not to lose sight of the "public interest" which also exists in the maintenance of independent professions.

> "... There is ... a public interest in the dispersal of social, economic and political power throughout society. Political, social, economic and cultural pluralism all serve to inhibit centralised power ... Independent labour unions, churches ... newspapers ... universities ... and professions all represent power centres with which governments must reckon. To the extent that these groups are brought under tighter and tighter control by government, the potential for rallying opposition to the prevailing political philosophy of the day is diminished. Of course pluralism is purchased at a price. Such groups may mount resistance to governments which are forward looking, as well as to those which are reactionary ... Preserving the independence of the professions (and other groups) does help to assure the existence of a loyal opposition. ..."[7]

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7. H.W. Arthurs, 'Counsel, Clients and Community' (1973) 11 *Osgoode Hall L.J.* 437, 449

We are reminded that the judges who are, ultimately (especially in a federal system) the "impartial umpires", with the charge to uphold the rule of law comes from the independent legal profession. We must, so we are told, maintain the objectivity of the profession and emphasise the role of the independent lawyer as an "officer of the court", not simply a spokesman for the client or a toady of government power.[8]

Some defenders of the present measure of self-regulation in the legal profession assert that, by and large, the colleagues of a "professional" are generally his sternest critics. They are not reluctant to condemn wrongful conduct. On the contrary, they are more knowledgeable of proper ethical and professional standards than the layman and more severe on those who stray from such standards.

The complaint is made by some lawyers, who have had to submit to lay participation in the affairs of their professional society (including in discipline) that such participation is a failure. In California, for example, the State Bar has recently been riven by the addition, by legislation, of six "public representatives" on the twenty one member Board of Governors. The reason for the legislation was said to be the desire to achieve "public accountability" of the Bar. According to the *American Bar Association Journal* the experiment is an affront :

> "The experience in California has been unhappy, if not to say laced with dissention. The six public members, all of whom are laymen, have been charged with being obstructionists, with voting as a bloc and with politicising the Bar's governance. This year's President of the State Bar was elected by an 11-10 vote, with all the public members joining five lawyer members to make the majority. Many California lawyers feel that the public members should not usurp the Bar's right to elect its own President".[9]

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8. *Ibid.* 438.
9. *American Bar Association Journal*, Vol. 63 (Dec. 1977), 1677.

Critics of the system of "consumer representatives" on the governing body of professional groups, complained that their presence distorts the proper business of such groups :

> "The public members are primarily interested in social and political issues and ... 'when we deal with anything of a technical nature regarding the practice of the law they ask interminable questions and we have to educate them'."[10]

As a result of the enforced participation of laymen in professional bodies, the move is now afoot to seek an escape. Some, in the United States, propose a constitutional challenge. Others simply propose the "creation of an alternative and voluntary state association" which will leave the professional body, including the layman, with only a few basic functions, such as admissions and discipline.[12] There are some critics the profession who are not too upset at this prospect. An English commentator put it this way :

> "[T]he Law Society's dual role of trade union, in representing the interests of its members, and judge ... can no longer be tolerated. Indeed we would not be surprised if there were not a breath of relief in Chancery Lane were the Law Society allowed to act solely as the professional body for solicitors and no longer have to attempt to be all things to all men."[13]

Defenders of the present system say that it works well, has ser society adequately and ensures rigorous standards which can onl truly be imposed by those "in the know". Participation in self regulation has, ultimately, an educative effect that ensures responsibility and high standards that may be diluted by the ignorant, or ignored by those bent on political and social, rat than "professional", gaols.

THE ARGUMENTS AGAINST SELF-REGULATION

Until lately these arguments held sway. The California statute which I have mentioned is evidence that new demands are

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10. J. Cummins quoted "On the Defensive" in *The Wall Street Journ* 17 Aug. 1977, 9.
11. *Ibid.*
12. *A.B.A.J., op cit.* 1677
13. (1977) 127 *New L.J.* 48.

now being felt to permit some degree of "public participation" in the regulation of the professions, as a security to ensure that "injury to the public does not arise" from the introspectiv decisions of professional self-government. What has brought this legislation, and calls for similar legislation, about?

Some attribute the moves to the general decline in respect for institutions that marks our time. The discovery tha the professions are fallible increased with the extent of public access to their services. This access born of medical funds, legal aid and a general rise in community affluence, undoubtedly produced the degree of contempt that usually comes with greater familiarity. One writer put it this way :

> "According to polster Louis Harris, the percentage of the American public that has a "great deal of confidence" in medicine has declined from 73% in 1966 to 42% [in July 1976] ... This sharp drop is doubtless a reflection of the well-known decline in respect for all institutions since the late 1960s. But for medicine, the precipitous slide reflects what happens when an increasingly sophisticated public begins to detect fallibility in professionals once thought to border on the divine. "I don't see a deterioration in the quality of medicine, but a greater awareness of what our deficiencies are", says Cooper. Amongst these is the rising costs of health care, fueled by rapidly rising doctors' fees. "People aren't outraged when the quarterback holds out for what he can, but they expect different treatment when it comes to the doctors"."[14]

Other writers suggest that the moves for greater lay participatic in the government of the professions should be seen against the backdrop of similar moves in society as a whole. Just as society moves through a number of phases to democracy, so, it is said, "similar strains could be traced in the evolution of the governme of the legal profession".[15] Without embracing this analogy

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14. "The Troubled Professions"(16 August 1976) *Business Week*, 12(
15. H.W. Arthurs,"Authority, Accountability and Democracy in the Government of the Ontario Legal Profession (1971)"49 *Canadia Bar Review*, 1, 10.

unreservedly, the fact remains that higher standards of education and knowledge in the community inevitably lead to greater demand for community participation in activities previously reserved to the elite and informed few. The governmen of professional organisations and their exercise of discipline over their members probably represents nothing more than a minor species of this flourishing genus. After all, the practice of the professions is a public business. In the case of the "learned" and established professions it is usually supported, to some extent, by statutory monopolies designed to protect the public against unqualified charletans. Furthermore, the professions have themselves affected their claim to immunity from public involvement in their affairs by changes in their activities. More and more of them are salaried officers and do not enjoy the independence of sole practice. Increasing numbers are members of the public service. The move of lawyers into business, the expansion of the pharmacist's involvement in purely commercial activities and the "mass production" that sometimes marks medical practice today, all affect the degree to which the community is prepared to accept substantial self government of its "professional" people.

It has to be said that widely publicised cases of professional misconduct damage the standing of the professions and do a lasting harm which is difficult to measure but exists nonetheless. The large defalcations by lawyers in Victoria, the need to seek the extradition to Australia of a number of fleeing "professionals", stand out. But these instances are not confined to this country. In the United States the parade of lawyers involved in the Watergate scandal did nothing for the profession. The recent spectacle of the legal representatives of the "Son of Sam" selling information secured from the client undermines public confidence in the capacity and right of the profession to discipline its own. Such outrageous cases are not limited to the legal profession. They simply appear to attract the greatest notoriety doubtless because of the flamboyance of the default.

To all of this must be added a new factor. Increasingly, public funds are now being channeled into the traditional professions in order to ensure greater public access to them. The

consequence is an inevitable one. Speaking of the situation in England, Professor Michael Zander put it this way :

> "The importance of ... external controls is, of course, increased by the volume of public monies now applied to legal services. In 1975-76 the fees paid to private practitioners out of the public purse aggregated some £77m (£31m for civil legal aid and legal advice and assistance, £32m for criminal legal aid including magistrates' courts and £14m for prosecution fees). Sir Peter Rawlinson said recently that public monies now accounted for more than half of the income of barristers".[16]

Obviously, the point holds equally true in the medical and health care professions. As more government money is channeled into professional pockets, more demands will be made for a community say in the way those funds are spent. Such a say is not necessarily a bad thing. It is obviously not good enough to point out, in the case of the legal profession, that the Attorney-General is a member, *ex officio* of the professional governing body. He is one man and hard pressed and often unable to attend Bar Council meetings. Such a representation of the "public interest" is obviously inadequate. The issue is how much further we should go, and how. We are dealing here not with absolutes but with questions of degree. The concept of the court having some control of the fees arising out of litigation goes back to the fifteenth century. The client's right to ask for taxation of a solicitor's bill has existed by statute since 1729. The court already exerts important disciplinary powers over the professions. So the issue is not whether there should be public regulation, for that there is already, to some extent. Rather the issue is how much regulation there should be and how it should be exerted. In answering this question, it is important to keep steadily in mind the fact that we are talking here not simply of a few non-professionals observing disciplinary proceedings to see that they are justly and vigorously conducted. The issue is really the influence which non-professionals may bring to ensure that

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16. M. Zander "Representation of the Public Interest in the Management of Legal Services"(23 Feb. 1977), *The Law Soc. Gazette*, 167.

the professionsin truth respond to "the public interest". This includes assisting the professions to perceive the unmet needs that exist for their services. It is in this regard that the Californian complaint about the conduct of the lay governors is most instructive. The profession may have wanted to talk about its concerns as a club. The layman wanted to talk about the defaults of the club members in the services they were providing.

WHAT CAN BE DONE?

It seems obvious from a scrutiny of overseas moves that some degree of public participation in professional governme is on the way. A lay observer has been appointed in Britain by the *Solicitors (Amendment) Act* 1974. His function is to supervise complaints against solicitors. Lay members have also been introduced into the Disciplinary Tribunal. In 1975 in Engla laymen also became part of the English Bar's new machinery for handling disciplinary matters.[17] Following a report of the Law Reform Committee, New Zealand has now gone the same way and a Lay Observer, with similar functions, has been appointed in tha country. Now we see the same developments happening in Australia not without certain professional opposition. The catalyst is the Bill introduced into the Victorian Parliament titled the *Legal Profession Practice (Solicitors' Disciplinary Tribunal)* 1978. Originally the legislation was apparently intended to cover barristersas well as solicitors. However, the Bar Council, which had not been involved in the draft proposals, protested vigorously. The Victorian Government consequently agreed to limit the present Bill to solicitors only. The most significant feature of the Bill is the introduction, for the first time in an Australian statute, of lay members of the public, who will take part in the disciplinary procedures of the legal profession. Up to three public representatives are to be appointed to a new Solicitors' Disciplinary Tribunal. This tribunal will hear charges against solicitors. The hearings would be open to the public. The legislation also extends the definition of "misconduc

17. *Ibid*, 167.

In reaction to the Bill, some 350 Victorian solicitors have apparently signed requisitions seeking withdrawal of the Bill and a meeting of the professional society. A letter has been sent to about 2,500 solicitors throughout Victoria seeking their support in opposing the Bill. The Melbourne *Age* remarked on 9 May :

> "All professions, so observed one of George Bernard Shaw's characters, are conspiracies against the laity. And the legal profession, he could have added, is the most conspiratorial of all. ... It would be a pity if the government were to yield to the fears or narrow interests of a section of the profession and to withdraw or seriously weaken its legislation. Naturally, the government would prefer lawyers substantially to agree on the new disciplinary procedures proposed by the Law Institute to enhance the profession's ethical standards and public esteem. But the government's primary duty is not to please the legal profession or satisfy every shade of legal opinion. It is to protect the public interest and from this responsibility it must not allow itself to be swayed by sectional pressures".[18]

The Victorian Law Institute had actually introduced lay observers in disciplinary proceeedings, in advance of legislation. The controversy now promises to be a vigorous one with sharp differences of view within the profession reflecting, doubtless, differences of view in society as a whole. I do not propound the proposition that when the unthinkable becomes inevitable it should be embraced as desirable. Against the background of considerations that I have mentioned, it does seem to me that lay participation in many facets of professional activity is inevitable and may be desirable. Of course it depends upon the layman concerned. But the price of a continuing role in self-discipline would seem obviously to include some degree of lay scrutiny of the disciplinary process. If this is so, the inclusion of such a provision in

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18. *Age*, Editorial 9 May 1978, 11. See a similar debate on the proposed *Real Estate Bill* described in *Age*, 10 February 1978, 3, 9.

the statute would simply regularise what, in Victoria, had already begun as a voluntary practice. Let us consider these local Victorian moves in their international setting.

In Canada the participation of laymen in professional self government has taken an interesting course that obviously bears consideration in this country. The McRuer report, already mentioned, suggested that the government should appoint lay members to the governing bodies of all self governing professions and occupations. This recommendation was made in 1968. It has now begun to bear fruit.

In Quebec an *Office des Professions* was established in 1974. It appoints between two and four members to the governing bodies of a wide range of professions. The number of these "external directors" varies in accordance with the size of the profession involved. None of them are members of the profession. Half must not be members of any profession. They are appointed by the Office after consultation with an Interprofessional Council and a variety of community groups with relevant interests.[19] This is not the occasion to scrutinise the details of the Quebec experiment. What it is important to notice is that whilst each profession retains a substantial measure of self government, there is an infusion of laymen and non professionals, the establishment of new and clearer criteria for public accountability and the provision of widespread information to the community as to how a person, disaffected with professional service, can go about getting effective redress. The process has the strength of bringing the professions together in the common defence of "professionalism". It may have the weakness of excluding newer occupations not deemed worthy of the stamp of professionalism, encouraging exclusive pretentions and rendering vulnerable the small band of laymen who must take part in varied professional bodies.

In Ontario and other Provinces (such as Manitoba) steps have been taken to include a number of lay persons in the governing body of the legal profession, and not only for disciplinar

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19. J. Disney, *Progress Report on the New South Wales Law Reform Commission Inquiry into the Legal Profession, mimeo*, 4 February 1977, 13.

purposes.[20] The difficulties of securing appropriate and effective lay representation is nowhere underestimated. Need for assurances, on occasions, of confidentiality is strongly emphasised Some Canadian Law Societies (for example British Columbia) appear strongly to oppose lay representation. The proposal for the inclusion of four laymen, as well as a number of academics and students in the governing body of the Manitoba Law Society was justified on the McRuer principle :

> "Self government of the legal profession is essential in the public interest but at the same time the Law Society must be accountable to the public for the way in which it exercises its powers. In reconciling these two accepted principles, the Law Society of Manitoba has proposed the above changes".

WHERE IS IT ALL LEADING?

What conclusions flow from all this? Our society is in the midst of rapid changes. Institutions, including the professional organisations, can no longer command unquestioning respect and acceptance. Growing access to the professions has diminished their mystique and revealed their occasional faults and incompetence. Those who argue for continuing self-regulation in the name of tradition and leaving well alone, will not persuade the sceptics. The sceptics point to the need for greater community participation in professional affairs, not least because of the vast sums of public funds which now and in the future will find their way into professional pockets. But if the problem of professional myopia and self contented self-congratulation is a problem, so also is the prospect of excessive public regulation to uphold the public interest. Clearly what is needed is a proper balance between the self-educating discipline of self-regulation, on the one hand, and security and broader vision which some kind of lay participation can assuredly bring. Whether we follow the Quebec endeavour to harness together the established and recognised professions or satisfy ourselves with

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20. See Arthurs, note 15 above; M.H. Freedman, "Non Lawyers as Benchers of the Law Society of Manitoba (1974)" *International Bar Assn.* 68

the appointment of a few laymen to professional bodies, or resort only to a lay observer to keep a check on disciplinary proceedings, the writing for the professions is clearly on the wall. The community which is so profoundly affected by professional attitudes and the supply of professional services will increasingly, and in my view rightly, demand that its voice should be heard when the vital decisions affecting professions are made. The price for continuing self-regulation will be a community voice in the councils of the professional associations. The professions are not dinosaurs. Like society itself they must adapt to rapidly changing times.