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PARRAMATTA & DISTRICT LAW SOCIETY

ANNUAL DINNER, PARRAMATTA, 14 AUGUST 1984

ECONOMISTS OF JUSTICE

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Hon Justice MD Kirby CMG
Chairman of the Australian Law Reform Commission

CENTURY OF THE PACIFIC

In today's edition of the Australian newspaper, it is recorded that the Economist has declared that the 21st century will be the Century of the Pacific. For the 'jurisprudential cousins'[1] around the Pacific rim, the problems of the future of our profession are well identified. Chief Justice Brian Dickson, on taking office as the fifteenth Chief Justice of Canada, in May 1984, declared that 'The two things that concern me are, one, delays in the law and two, increasing cost, to the extent that you're pricing the legal profession and the service they perform out of the range of a large number of Canadians ...'[2] President Bok of Harvard University, in his 1982 Cardozo Lecture, drew a comparison between the United States legal system and the health care system 20 years ago. 'Access to the courts may be open in principle', he declared. But 'in practice ... most people find their legal rights severely compromised by the cost of legal services, the baffling complications of existing rules and procedures and the long, frustrating delays involved in bringing proceedings to a conclusion. From afar, therefore, the legal system looks grossly inequitable and inefficient'.[3] In his annual report to the American Bar Association in February 1984, just six months ago, Chief Justice Burger reminded the delegates of the address 78 years earlier by the young Roscoe Pound on 'The Causes of Popular Dissatisfaction with the Administration of Justice'.[4] At least nowadays we do not run the risk that criticisms of the Bar will not be published. Indeed, some say that we have become almost obsessively self-critical.

The New Zealand Law Conference held in Rotorua in April 1984 addressed much of its attention to access to justice and the future of the legal profession. The lead paper on 'Access to the Courts' was offered by Justice Tom Eichelbaum.[5] He began his paper with the reminder:

The twin curses of the law are expense and delay. It has probably been so ever since there were courts and lawyers. Hamlet thought the law's delay sufficiently important to mention it in his soliloquy. And nothing has changed.[6]

In Australia, as you know, there have been similar themes. The Federal Attorney-General, Senator Gareth Evans QC, told a recent conference on 'The Challenge of Legal Aid' that, unless radical changes were introduced in the legal aid system, it would soon be unavailable to any but the very poor. In a financial sense, he declared, the system was 'reaching breaking point'.[7] He pointed out that in the previous three years Federal expenditure on legal aid in Australia had risen by 52.2% in real terms. However, the number of people assisted had increased by only 20.3%.[8] The common feature in these and numerous other statements of self-criticism in Australia and abroad is a growing recognition throughout the common law world of a need for increased concern about the efficiency with which lawyers deliver their product to the community. And that is the essence of this address. Everyone agrees that times are changing. The problems confronting the legal profession in the 21st century will, in many ways, be different from those that have been around for a long time. Technology, alone, will ensure this.[9] It is healthy that there is an increasing concern about the efficiency of legal practice, the business of law and the administration of justice. There is much more candour in acknowledging the limitations of the justice system. For a long time, we lived in the dream world that the law and lawyers could provide solutions for all of society's problems and disputes. Now, with increasing clarity, we are perceiving our limitations:

> The inescapable fact is that no society is likely to provide a lawyer and a formal judicial proceeding to anyone with a tenable legal claim, and it is even less likely that a society will encourage lawyers to reach out affirmatively to mobilise rights-enforcing litigation among all such individuals. Even if that were a desirable goal, it would be inconceivable to commit enough resources to provide 'Rolls Royce justice' to everyone and every legal claim.[10]

Books are now being written about the economics of justice.[11] Courts of the highest authority are considering frankly cost/benefit analysis of a rudimentary kind, in their judgments.[12] Law reform agencies, in recommending improvements to the legal system, are approaching their suggestions with a candid endeavour to itemise, or at least identify, the major costs and benefits.[13] All of this is thoroughly desirable, if somewhat belated. It requires us to address much more directly than in the past, the deployment of the scarce resources that

society can make available to the law and lawyers for their role in society. Defining what that role is and then ensuring the greatest efficiency in the performance of consequential functions, is a major issue before the legal profession as it approaches the 21st century.

NEW INITIATIVES

In response to the early perceptions of the above simple truths, important reforms have begun to appear in the legal systems of the common law world. Time and space permit only a summary of some of these. But the catalogue includes the following:

(1) Prevention of legal problems. Just as in medicine where more attention is now being addressed to preventative measures, so in the law. Using the law, or redefining the law, to keep people out of legal trouble, is a major thrust of law reform today. In the Australian Law Reform Commission's (ALRC) first report on insolvency law reform[14] attention was paid to the underlying problem of people who get into debt, rather than dealing exclusively with the latest symptom, such as the failure to pay a debt in due time. The Commission recommended legal machinery to facilitate credit counselling in certain circumstances. The basic scheme proposed by the Commission has recently been accepted by the Government.[15]

(2) Community legal education. Another way to make the legal system work better may be to educate our citizens more systematically in its rules. Legal studies is now one of the most popular secondary courses in Australian high schools, led by Victoria.[16] In the past, law reformers have traditionally focused on proposals for change in substantive rules of law, the creation of new tribunals and changes in legal procedures. Much less attention has been paid to education, including community legal education. Yet alerting people to the existence and purpose of at least basic rules may be the beginning of the prevention of legal conflicts or of their orderly resolution. Community legal education may promote a greater measure of assertiveness in the enforcement of just legal claims. It may help overcome the obstacle race which the poor, the inarticulate, the ignorant and the disadvantaged have to run in securing and asserting legal rights. Reforms in Australia have lately paid more attention to this issue. Legislation nowadays commonly requires the notification of rights and the entitlements to reasons for administrative[17] and even private sector decisions.[18] The suggestion by the ALRC that insurers should have to give reasons for the cancellation of insurance policies and for the refusal to write insurance has now been accepted by the Australian Parliament.[19]

(3) Professional legal education. Legal education needs improvement in the profession as well as in the community. This point was made effectively by Chief Justice Burger of the United States in his recent address to the ABA:

> We know that a poorly trained, poorly prepared lawyer often takes a week to try a one- or two-day case.[20]

Chief Justice Burger has repeatedly asserted that 25 to 30% of lawyers presenting cases in United States courts are 'incompetent' and that this is not a tolerable figure.[21] Ten years ago he suggested that up to a third or one-half of the lawyers coming into United States courts were not really qualified to render fully adequate representation and that this contributed to the large cost and delays in the courts. If this figure is even partly accurate, and if it applies to Australia (as it partly does) it suggests that something is going wrong in the selection of lawyers and in their preparation and training for professional life. Nor do I exempt the judiciary from the need for training and retraining. In the Boyer Lectures I called attention to the well established system of judicial training in the United States.[22] In Australia it was suggested that formal training of this kind was not necessary because of the appointment of judges from the separate Bar. But, though our problems may be less acute, the rapid changes in the law and the new tasks daily being imposed upon judges for which their training and experience do not well equip them, all suggest the need for more systematic institutions, procedures and obligations of judicial education, if only in the name of efficiency.

(4) Specialist tribunals. In that name, most legal jurisdictions have set about the creation of specialist tribunals to deal expeditiously and cheaply with routine or specialist legal problems. We have seen the creation in the last decade of a number of Federal Courts, including the Federal Court of Australia[23] and the Family Court of Australia.[24] The Family Court was established only after negotiations with the States made it plain that the State Supreme Courts (which could have been vested with Federal jurisdiction) would not wholeheartedly embrace the innovative reforms of procedures insisted upon by the Federal Parliament. The interaction between Federal Courts and State Courts and courts and tribunals promises inefficiencies in the overlap of jurisdiction which may become a major source of concern about diseconomy and inefficiency in the law in Australia in the decades ahead.[25]

Without creating separate, specialised courts or tribunals, there are distinct advantages in the division of court business in a specialised way. The appointment of specialist judges to deal with commercial disputes is now well established in Australia.[26] It has recently been proposed for New Zealand.[27]

Although there is a problem in over-categorisation and over-specialisation, the fact has now to be faced that specialist bodies served by specialist lawyers can process routine problems in a much more cost-effective and speedy way. We will see more of it.

(5) Inquisitorial techniques. Another suggestion heard with increasing insistence is that judges should pay a more active part in the trial to move things along and to get lawyers quickly to the essential issues. Summing up the recent New Zealand conference, Chief Justice Sir Ronald Davison acknowledged that, at least in commercial adjudication, the judge must 'take control of the proceedings almost from the outset' and direct the course of the interlocutory steps up to the trial.[28] Within the legal profession, views differ about the desirability of the activist judge. But the growing concern with efficiency and the realisation of the very large public investment that is involved in the use of judge time, are now forcing the reconsideration of the conception of our judges as 'neutral umpires'. Sir Richard Eggleston has even suggested that by the turn of the century judges will afford lawyers a given time within which to refine their evidence and argument. The skill of the lawyer will then be maximisation of the available time for oral evidence and argument.

(6) Arbitration. The growing use of arbitration is likely to continue, as one response to the delays and costs of courts and tribunals. Arbitration has been around for a long time, though now new attention is being paid, at least in Australia, to improving its procedures.[29] Sometimes commercial arbitration is infinitely preferable to determination by the courts, as a means of achieving speedy and commonsense resolution of commercial and other disputes. By and large businesses, at least in Australia, regard the courts as a place of last resort. They look elsewhere for extra-judicial mechanisms which are quicker, cheaper, less technical, less stressful and less time-consuming for the business people involved. In New South Wales, an innovative use of expert arbitrators to deal with particularly technical questions that arise in commercial cases has now been introduced by Justice Rogers of the State Supreme Court. He made it plain that arbitration and the use of court-appointed experts had to be 'moulded to the requirements of the moment'.[30]

An even more interesting use of arbitration has been introduced by which 150 barristers and solicitors have been appointed arbitrators. They are nominated by the Law Society and the Bar Association. Most matters are dealt with in their own offices or chambers. Of 1 450 contested cases referred out to arbitrators in the first six months of the operation of the scheme, about 830 were determined. There were requests for rehearing in court in 35 cases. The Past President of the NSW Law Society considered that the results were 'excellent'. The cost of disposing of the cases referred to arbitration in this informal way was a 'fraction' of what it would have been if the matters had been dealt with in court. Experience has also shown that between a half and two-thirds of the cases referred out to arbitration under this scheme are scheme 'in fact settled before the hearing of the arbitration or on the day of the hearing'.[31] I believe this idea will spread throughout Australia and will involve more and more of our lawyers in a cost-effective way. But it will call on new skills and talents.

(7) Legal aid. Legal aid has existed in various forms in common law countries for centuries. However, the 1970s saw the birth and growth in Australia of a large network of private and public legal aid facilities.[32] Side by side with the Federal initiatives came the flowering of numerous 'legal centres'. They included the initiatives of private lawyers in the suburbs of the major cities, such as the Fitzroy and Redfern Legal Centres, and later the establishment of the Aboriginal Legal Service to provide direct assistance to the disadvantaged Aboriginal population of Australia.[33] In the private legal profession, suggestions have been made for the introduction of contingency fees as the 'free enterprise answer to legal aid'. In connection with the ALRC project on class actions in Australia, it has been said that, without such contingency fees, the class action would not be effective.[34] Indeed, that is a criticism of the recent Victorian legislation on representative actions for damages, namely that it will not work without contingency fees.

(8) Reform of legal profession. Another suggested means of identifying unmet needs for legal services and getting people across the threshold of the lawyer's office has been the reform of the rules governing the legal profession. A number of the States of Australia have now permitted informative advertising, including fee advertising. In Australia, professional advertising by lawyers is now permitted, under certain conditions, in Western Australia, South Australia, Victoria, New South Wales and, most recently, the Australian Capital Territory.

In Canada it is permitted in British Columbia, Alberta and Manitoba. However, it is being resisted by the professional organisation in Ontario. In the United States, it is permitted, as a result of a Supreme Court decision, in every State of the Union. In the United Kingdom it was announced in June 1984 that the ban on advertising by solicitors in England and Wales will end on 1 October 1984.

However, much more radical reforms are proposed in the reports of the New South Wales Law Reform Commission on reform of the legal profession in that State.[35]
The proposals include the abolition or modification of monopolistic practices and land title conveyancing, change in the two-counsel rule, fusion of the Bar and solicitors' branches of the profession, changes in the handling of complaints and changes in the organisation and government of the legal profession. The reforms in New South Wales, upon which legislation has been promised, are seen as setting the pace for the rest of Australia and, commendably, some of them have been welcomed by the legal profession.

(9) Technology and efficiency. The concern about efficiency has led to new attention to the use of technology and the improvement of dispute resolution procedures. The use of the telephone for taking evidence is now common in a number of Federal tribunals in Australia, notably in social security claims.[36] The satellite has been used in Canada to beam oral argument across the continent to the highest court.[37] Such a facility has been talked about in Australia. The use of computers to monitor court workflows and the introduction of word processors is now common in the courts. Special attention is being paid to the use of written argumentation to reduce oral advocacy. When I put them forward in my Boyer Lectures[38] in Australia on the judiciary, it was roundly criticised by members of the judiciary and the legal profession.[39] But a number of judges of our tradition are now making this same point. Sir Anthony Mason recently predicted an end to the availability of unlimited time for argument, especially in courts of appeal. He pointed out that 'the delivery of a written case or submission is a more effective and helpful means of putting a court in possession of the issue and of the basic contentions, even if it is to be followed by oral elaboration'. I do not expect that the legal profession in Australia will embrace the idea of written argumentation with enthusiasm. However its manifest efficiency and the pressure on the courts will certainly produce moves in this direction in the not too distant future.

Clearly it will affect the work of solicitors. Perhaps it will facilitate the greater involvement of solicitors in appeals on legal questions, in the past, the special province of the Bar.

(10) <u>Conciliation and healing</u>. All of this discussion leaves the fundamental question about the role of the legal profession to last. Our self-conception has been, overwhelmingly, that of mercenaries in the business of conflict. The new Deputy Prime Minister of New Zealand, and former Law Professor, Dr Geoffrey Palmer, told an audience at the Faculty of Law in the University of Windsor in Canada in March 1984, of the difficulty he had, as a law teacher, in introducing to the University of Iowa in 1969, an 'anti-torts' course.[40]

> To concentrate upon disputes and their resolution it is not necessary to concentrate upon the law and courts. The task of resolving conflicts may not be served best or most efficiency by dealing with legal rules and courts. There are other ways. If negotiation is a better way than litigation, how does one negotiate? Law students should be taught how to negotiate. What sort of disputes could be dealt with by mediation? Who can mediate? How do they do it? How does arbitration work? ... It was a great deal easier to state the conception of the courses than to execute them in a manner which kept up the level of student interest and provided scope for reasonable examination. Both these courses were unpopular and ultimately they were abandoned at Iowa. I often wonder, if an empirical survey were taken of practitioners who were subjected to those courses, what they would think of them after ten years of practising law.[41]

In like vein, and probably with a similar reaction, Chief Justice Burger's recent address called on lawyers to be healers:

> Our distant forebears moved slowly from trial by battle and other barbaric means of resolving conflicts and disputes, and we must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trials will be the only means, but for many, trials by the adversary contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilised people. To rely on the adversary process as the principal means of resolving conflicting claims is a mistake that must be corrected.

> We lawyers are creatures -- even slaves -- of precedent, which is habit. We tend to do things in a certain way 'because we have always done it that way'. But when we must constantly witness spectacular expansions of court dockets, requiring more and more judges, something is wrong. When we see costs of justice rising, when we see our standing in public esteem falling, something is wrong. If we ask the question 'Who is responsible?' the answer must be : We are. I am. You are.
>
> The entire legal profession — lawyers, judges, law teachers — has become so mesmirised with the stimulation of the courtroom contest that we tend to forget that we ought to be healers — healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?[42]

In Australia appropriate initiatives are now being taken. Community justice centres are being established to provide mediation.[43] They are still to be evaluated. But they pick up the theme constantly urged by Geoffrey Palmer, and with increasing insistence by leaders of the legal profession in our own country. We should not be locked by legal history into the ways of the past. We should look to our role in society and then set about reforming our institutions, laws and procedures in order to fulfil that role.

Above all we should be more concerned in our professional activities : in our courts, in chambers, in offices and as citizens, with the greater efficiency of the law, with costs and benefits of legal rules and procedures. We must all become economists of justice. It is for that reason that I warmly welcomed this seminar on the business of law. If we are to bring justice more economically to more people, we must be more concerned about the business of law as a business. This does not just mean law for business people. It means law for as many of our fellow citizens as have a serious problem and as turned to lawyers and to the Rule of Law for help and protection. We should test the papers presented in this seminar by these criteria. Do advertising, amalgamation of firms, changes of professional style, more aggressive attraction of clients, poaching of other people's partners and so on enhance efficiency in a way compatible with the professional ideal?

At a critical moment in the history of the legal profession, when much routine work is under challenge, will we measure up to the age of nuclear fusion, the microchip, biotech and interplanetary travel? Will our newfound concern with efficiency help us meet the enormous pool of unmet needs for legal services in the Australian community? These are the questions which all members of the legal profession should reflect upon.

FOOTNOTES

1. Justice Estey, 'Who Needs Courts?' (1981) 1 The Windsor Yearbook of Access to Justice, 263, 264.

2. Chief Justice Dickson, Interview with W Monopoli, in CBA National, May 1984, 47.

3. D Bok, 37th Annual Cardozo Lecture, November 1983, New York Bar.

4. Chief Justice Burger, 'The State of Justice', in American Bar Association Journal (April 1984), 63. Cf similar comments in American Bar Association Journal, October 1983, 1356.

5. Justice T Eichelbaum, 'Access to the Courts', Paper for the New Zealand Law Conference in Papers, 3.

6. ibid.

7. GJ Evans, cited Sydney Morning Herald, 28 May 1984, 11.

8. The figures were quoted by Senator Evans and are cited Australian Financial Review, 20 May 1984, 4.

9. For a few predictions, see the paper by Justice A Rogers, 'Dispute Resolution in Australia in the Year 2000', a paper delivered at the Australian Bar Association Conference, Surfers' Paradise, Queensland, July 1984, mimeo.

10. M Cappelletti and B Garth, 'Access to Justice as a Focus of Research', Foreword to (1981) 1 Windsor Yearbook of Access to Justice, xxii.

11. R Posner, Economic Analysis of Law (2 ed) Boston, 1977. Cf JL Mashaw, 'The Supreme Court's Due Process Calculus for Administrative Adjudication', 44 University of Chicago Law Rev, 28 (1976); DC Williams, 'Benefit Cost in Natural Resources and Decision-making : an Economic and Legal Overview', (1979) 11 National Resources Lawyer, 761, 794; HP Green, 'Cost-Risk-Benefit Assessment and the Law : Introduction and Perspective', 45 George Washington Uni Law Rev [illegible], [illegible] (1977) and many articles since.

12. The leading case is Mathews v Eldridge, 424 US 319 (1976).

13. Australian Law Reform Commission, Annual Report, 1981 (ALRC 19) 1—5; Australian Law Reform Commission, Annual Report 1982 (ALRC 21) 1--2; Australian Law Reform Commission, Insurance Contracts (ALRC 20), 20ff.

14. Australian Law Reform Commission, Insolvency : The Regular Payment of Debts (ALRC 6), 1977.

15. See announcement by Senator GJ Evans, Federal Attorney-General, 3 June 1984, reported [1984] Reform 90.

16. MD Kirby, Reform the Law, Oxford, 1983, 70.

17. Administrative Decisions (Judicial Review) Act 1977 (Aust) s 13.

18. See eg Insurance Contracts Act 1984.

19. ibid, s 75.

20. Burger, 64.

21. ibid.

22. MD Kirby, 'The Judges', Australian Broadcasting Corporation Boyer Lectures, 1983, 24. Cf England, Home Office and Lord Chancellor's Office, Judicial Studies and Information, Report of Working Party (Lord Justice Bridge), 1978, 32.

23. Federal Court of Australia Act 1976 (Aust).

24. Family Court of Australia Act 1975 (Aust).

25. Chief Justice Street (NSW) has made comments to this effect in Law Society of New South Wales, Law Society Journal, Vol 22, No 5 (June 1984), [illegible].

26. Dr L Sealy, 'The Business Community : Is It Being Served?' in 1984 New Zealand Law Conference, Papers, 21, 24.

27. Eichelbaum, 8.

28. Chief Justice Davison, Closing Address to the Triennial Law Conference, Rotorua, New Zealand, mimeo, 4.

29. Almost every law reform agency in Australia has delivered a report on arbitration law and practice. For summaries see Australian Law Reform Commission, The Law Reform Digest, AGPS, Canberra, 1983, 71. The Australian Standing Committee of Attorneys-General is expected shortly to propose a model Uniform Arbitration Bill.

30. Maschinenfabrik Augsberg—Nurnberg Aktiengesellschaft v Altikar Pty Limited, unreported, Rogers J, 4 August 1983. For discussion see MD Kirby, 'Law, Business and CER', Paper for the New Zealand Law Conference, mimeo.

31. D McLachlan, Comments at the NZ Law Conference, reported Triennial Times (NZ Law Society), 26 April 1984, 4.

32. For a summary of earlier state systems in Australia see J Basten, R Graycar and D Neal, 'Legal Centres in Australia', (1983) 6 Uni of NSWLJ 163, 164. Cf 'Legal Centres in Australia 1972—82', Special issue of the Legal Service Bulletin (On Tap, Not on Top), editor D Neal, 1984.

33. See Basten, et al; M Chapman, 'Aboriginal Legal Service :D A Black Perspective', in Neil (ed) 35.

34. See the discussion of this issue in Australian Law Reform Commission, Discussion Paper 11, 'Access to the Courts — II, Class Actions', 26, 28, 40.

35. New South Wales Law Reform Commission, First, Second and Third Reports on the Legal Profession, Sydney, 1982.

36. The Administrative Appeals Tribunal has pioneered the use of the telephone in Australia. See R Balmford, 'The Administrative Appeals Tribunal in Practice' in Law Institute of Victoria, Law Institute Journal, July 1984, Vol 58 No 7, 799, 803.

37. Reported Canadian Bar Association National, July 1983, 3.

38. MD Kirby, The Judges, 75.

39. Sir Anthony Mason, 'Jurisdictional and Procedural Constraints on the Evolution of Australian Law' (1984) 10 Sydney Law Rev, 253, 258.

40. G Palmer 'The Growing Irrelevance of the Civil Courts', Annual Lecture, University of Windsor, Canada, mimeo, 12 March 1984, 4 (hereafter 'Palmer, Civil Courts').

41. Palmer, Civil Courts, 6.

42. Burger, 66.

43. Community Justice Centres (Pilot Project) Act 1982 (NSW) ???; Community Mediation Service (Pilot Project) Act 1983 (NZ). A like scheme has now been proposed for Victoria. See Palmer, 'Civil Courts', 39.