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ACADEMY OF THE SOCIAL SCIENCES IN AUSTRALIA

ASSA NEWSLETTER

THE VISION AND THE PRACTICE: LAW

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A TIME OF CHANGE

Anyone giving even passing attention to the local media would have gathered that the Australian legal profession and the Australian judiciary, are going through a period of significant change. In August 1997, the former Chief Justice and Governor of Western Australia (Sir Francis Burt) reportedly criticised lawyers for being "profit driven and discarding ethics in a bid to win at all costs"¹. His comments were made at the opening of the third Law School in Western Australia at Notre Dame University. Predictably enough, his opinions divided the audience. Sir Francis said:

* Justice of the High Court of Australia. Honorary Fellow of the Academy.

¹ G Meertens, "Lawyers 'too greedy'", *West Australian*, 4 August 1997 at 3.

"In many cases, a lawyer sees himself as the aggressive gladiatorial fighter for his client's perceived rights and for his price will join in and fight the good fight with all his might - in some cases with little regard for morality or ethics".

He appealed to the future lawyers to give a lead in creating a society "in which justice can be enjoyed by ordinary people".

On the other side of the continent, the New South Wales Director of Public Prosecutions, Mr Nicholas Cowdery QC, delivering a lecture in Sydney, said that many non-lawyers saw the members of the Australian legal profession as "expensive parasites". Lawyers risked losing one of the essential attributes of professional people, namely altruism²:

"As a general proposition ... in our system a lawyer with a client works hard to avoid justice being done or, even worse, the truth being discovered and orders being made accordingly - unless, of course, justice and truth coincide (as it does occasionally) with the selfish interests of the client".

Justice Geoff Davies, of the Queensland Court of Appeal told an Asian Pacific Courts conference³:

2 Quoted *Sydney Morning Herald*, 30 August 1997 at 44 (Editorial: "The greed of lawyers").

3 *Ibid.*

"Increasing economic pressure on litigants and lawyers is likely to result in a continuing decline of ethical standards of the latter".

It is in this context that changes are occurring which affect the vision and the practice of law in this country. Judges are becoming much more critical of lawyers who engage in what are effectively commercial arrangements with their clients leading sometimes, inevitably, to huge losses to investors⁴. Judges are proposing that courts be empowered to fine and otherwise penalize lawyers for inefficient performance such as stringing out court cases to make more money⁵. Some aspects of the monopoly enjoyed for particular legal work, by legal practitioners admitted to practice by the courts, have come in for reconsideration⁶. In several Australian States independent guardians have been established outside the courts and the organised legal profession to receive complaints against members of the profession. Their appointment appears to have produced

4 W Sanderson, "Judge raps lawyer over collapsed loans firm", *Courier Mail* (Brisbane) 9 September 1997 at 8.

5 C Merritt, "Judge gets tough on tardy lawyers", *Australian Financial Review*, 25 August 1997 at 7.

6 C Merritt, 'Debate over legal monopoly polarises lawyers', *Australian Financial Review*, 29 August 1997 at 25.

"a staggering number" of avoidable complaints - many of them produced by simple neglect of the needs of the client⁷.

However, even more fundamental changes are now being broached. The Australian Law Reform Commission is examining whether the adversarial procedures of the courts in Australia should be modified in recognition of the tendency of that labour intensive mode of court trial to produce heavy costs that put the system out of the reach of ordinary citizens⁸. With the recent reductions in federal allocations for legal aid and their substantial confinement to federal areas of responsibility, the States are also now re-examining their legal systems. The Attorney-General for Western Australia announced in September 1997 that he had asked the Law Reform Commission in that State to re-examine the legal system so as to reduce the delays and costs which presently burden it⁹.

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- 7 R Campbell, "Disciplinary plan for lawyers", *Canberra Times*, 30 August 1997 at 6.
- 8 Australian Law Reform Commission, Issues Paper 20, *Review of the Adversarial System of Litigation*, 1997. Cf W Zeidler, "Evaluation of the Adversary System: A Comparison, Some Remarks on the Investigatory System of Procedure" (1981) 55 *Aust Law JI* 390.
- 9 G Meertens, "Big shake-up for WA legal system", *West Australian*, 3 September 1997 at 1.

As for the judiciary, it has lately come under unprecedented attack by politicians and the media. I have suggested that some of the criticism derives from a fundamental misunderstanding of the role and duties of the courts and from a breakdown in the conventions which formerly governed political comment on the courts¹⁰. Chief Justice Brennan, in his speech on the State of the Australian Judicature in September 1997 also adverted to the changing culture within which the courts must operate today and the dangers of the changes for the independence of the judiciary¹¹.

Not all of the news is bad news. The courts themselves are in a constant process of change and renewal. Ongoing judicial education is now an accepted feature of the judicial life. Alternative dispute resolution is increasingly being used to divert cases from the formal court system to promote mediation and arbitration outside that system at a fraction of the cost¹². Case management is now a routine feature of the judicial function.

10 M D Kirby, "Teaching Australians Civics", Address Brisbane, 15 August 1997 published *Sydney Morning Herald*, 16 August 1997.

11 F G Brennan, "The State of the Judicature", 19 September 1997.

12 C Merritt, "In court of out, lawyers still win, *Australian Financial Review*, 29 August 1997 at 24.

Difficulties are sometimes presented in reconciling the efficient use of court time with the abiding obligation of judges to do manifest justice according to law¹³. In every court, judges now monitor the throughput of cases, watch the trends and place emphasis upon efficiency on the part of all involved.

Yet for all that, lawyers remain one of the chief objects of community criticism and cynicism. Judges, who not long ago were on a pedestal, have lately come under similar criticism. What can we do about this?

BASIC PROBLEMS

In looking to the future, it would be easy to say that the challenges to the Australian legal profession will be fully met. That cuts to legal aid will ensure a leaner more efficient legal profession. And that relatively few cases go to court and when they do they are liable to be handled by courts more concerned than in the past with speed and efficiency. Such remarks would be only partly true. They would not come to grips with some of the chief problems which face the Australian legal profession. Many of those problems are the same as those facing the legal

¹³ *J L Holdings v State of Queensland* (1997) 71 ALJR 232.

profession in the United States of America¹⁴ and in Britain¹⁵. The problems have been identified many times. They include:

- The decline of the small legal firm and the growth of large and impersonal businesses with an economic view of the law. This development has produced certain efficiencies. But it has also sometimes brought about an enfeebling mercantile attitude accompanied by the decline of idealism and professionalism¹⁶.
- The changing conventions of advocates with an increasing awareness of the business aspects of litigation eroding the reality of detachment which is essential to professionalism.
- The growing pressure of case loads on judges which, in the United States (but not yet Australia) has reduced many of them to mere editors of opinion drafts presented to them by their clerk¹⁷.

¹⁴ A T Kronman, *The Lost Lawyer - Failing Ideals of the Legal Profession* (1993) Harvard Uni Press, Cambridge.

¹⁵ J Carr, "Dollars chase lawyers", (London), *Times*, 15 July 1997 at 27.

¹⁶ Kronman, above n 14, chapter 5.

¹⁷ *Ibid*, chapter 6.

Some of these features of legal practice in the United States have been discerned by commentators in the Australian legal scene. The natural and desirable development of a "national market for legal services" has promoted a conception of legal practice in economic terms which would have offended the purists and professionals of past generations¹⁸.

Yet is all of this bad or is there hope at the end of the economic rainbow?

THE FUTURE OF LEGAL PRACTICE

Clearly, those looking to the future of legal practice in Australia must avoid nostalgia for the good old days. The hierarchal, traditionalist legal profession of the past had many defects. In any case, it is unsuitable to the changed Australian society which must now be served. It is inappropriate to the economic market for legal services and to the technology which continues to stimulate rapid change in all aspects of life.

¹⁸ D M Dawson, "The Legal Services Market" (1996) 5 *Jl Judicial Admin* at 147.

It is also important to keep changes of legal practice in perspective. Commentators, including older members of the legal profession, have always been critical of change which they see as attacking the fundamental dignity and honour of legal practice. This was occurring a hundred years ago. It is no different today¹⁹.

To some extent, change from the old ways is good. Thus, I believe that the principle established by the High Court of Australia in *Dietrich v The Queen*²⁰ was one in keeping with our society today. That case held that trial judges were empowered to adjourn or stay serious criminal proceedings if the accused were unable to get competent legal representation necessary to ensure that a trial was fair. This was a big change from old legal doctrine²¹. Its ramifications, including its economic ramifications, are still being explored²². However, I think the principle is one appropriate to a civilised country and I believe that most Australians would agree. Some things tolerated in the

19 M D Kirby, "Legal Professional Ethics in Times of Change" (1997) 3 *Judicial Review* 73 at 80-81.

20 (1992) 177 CLR 292.

21 *McInnis v The Queen* (1979) 143 CLR 575.

22 Cf *Attorney-General (NSW) v Milat* (1995) 37 NSWLR 370 (CA). Cf *Fruightnet v State of Victoria*, unreported, High Court, 17 September 1997 per Kirby J.

"good old days" seem today to be quite intolerable and uncivilized.

Some changes in legal practice are now well accepted, however strongly they were resisted at the time. The abolition of the two counsel rule or the two-thirds fee rule amongst barristers and the termination of the total ban on professional advertising and on the use of para-legals has worked to the public's benefit. Nor is idealism dead in the legal profession. A great deal of *pro bono* work is performed by many Australian lawyers - women lawyers blazing a trail for equal opportunity; Aboriginal lawyers (exemplified by Judge Robert Bellear) helping to change two centuries of community and professional attitudes; homosexual lawyers courageously breaking down ancient stereotypes; and Councils for Civil Liberties and other bodies fighting for the under-dog and the despised.

This is largely unsung work. But it continues into contemporary Australia. It is the mark of professionalism in the Australian legal profession.

Legal ethics are now being taught in law schools with a new angle. Instead of being regarded as a separate subject to be rushed through at the end of the course, ethics are now commonly being grafted onto virtually every topic. Lawyers in universities are receiving a healthy antidote to the commercialism of the time-charging which they are likely to find in their offices

as every hour is split into sections of time to be accounted for and charged to the client - a system bound to blow out the costs and to reward the slow worker.

CONCLUSIONS

There are forces at work in the law in Australia which increase the commercialism which was resisted in the past. To some extent, this is simply the outcome of a change produced by the search for efficiency throughout society and by the ascendancy of economic rationalism, competition for the provision all services and technology. The abiding challenge facing the Australian legal profession as it enters a new millennium is one of preserving the idealism and professionalism of a potentially noble calling dedicated to the attainment of justice whilst paying more attention to the realities of delivering justice to ordinary people as Sir Francis Burt demanded.

The legal profession is not simply another economic activity. Some, at least, of its activities (especially in the judiciary) have a profound impact on the self-image of society, on its standards of justice and civilisation and on its commitment to the rule of law and the defence of human rights. The fundamental question which is posed is whether the Australian legal profession can become more efficient, approachable and understandable to ordinary citizens whilst at the same time not losing its commitment to idealism and the pursuit of justice

according to law. Things are certainly changing in the legal profession of Australia. Most Australians would say: about time. It will be important, and not only for lawyers, to make sure that the changes move in the right direction. That lawyers and their essential services remain in the suburbs and small towns accessible to people there and not just in their city towers working for large corporations and the rich who can afford their services. That legal aid, *pro bono* work and cost sharing mean that all people with serious legal problems can get access to the law. That the courts are not marginalised in the pursuit of alternative dispute resolution. That the quest for efficiency does not become so obsessive that the legal profession's duty to justice is forgotten. And that the judiciary are not so battered by the constant barrage of political and media criticism that they lose their self-confidence, self-respect and vital sense of independence.

This is quite a challenge for the coming century. But in a profession with a tradition of a thousand years it seems reasonable to suggest that the Australian legal profession will survive and even flourish in the years ahead.