COMPETITION, COOPERATION AND LEGAL CHANGE

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INTRODUCTION

There are a number of trends in the development of the contemporary Australian legal profession which have been widely remarked upon, among them:

- the growth in size of the profession;
- the increasingly boundary-free nature of legal practice;
- the imperatives for private legal practice to become more competitive and "business-like";
- the deprofessionalisation of certain formerly lucrative areas of legal practice, such as residential conveyancing;
- the crisis in legal education caused by the very poor level of resources available to the university law schools;
- the inaccessibility of the courts for reasons of cost and delay, and
- the consequent growth of Alternative (or preferably "Additional") Dispute Resolution (ADR).

The inter-relationship between these phenomena, however, has been much less often explored. In this article I have attempted to do this, with some trepidation, focussing particularly on the ways in which legal change[1] may be promoted through the development of a more cooperative relationship between academic lawyers and the private legal profession.

THE CHANGING FACE OF AUSTRALIAN LEGAL PRACTICE

When the New South Wales Law Reform Commission was established by executive order in 1966 (legislation followed in 1967), the first batch of nine references included a project to review the State's old and oft-amended *Legal Practitioners Act* 1898. The Commission's brief was to respond to proposed amendments put forward by the Council of the Law Society of New South Wales.

The concerns of that time as expressed in the Commission's second report[2] are interesting now, indicating both the changes that have since occurred and the timelessness of some of the other controversies. These major concerns included: the effect of the trend to university legal training on admission requirements and articles; the attempt to restrict the activities of so-called "non-practising barristers";[3] the need to abolish the category of licensed lay conveyancers,[4] and the strengthening of the solicitors' monopoly over certain types of work, such as conveyancing, legal drafting, and probate;[5] rights of audience for solicitors;[6] increased powers to investigate the trust accounts and financial affairs of solicitors;[7] and the level of detail required of solicitors' Bills of Costs.[8]

The attitude of the initial members of the Commission to its reform project also is interesting, in its suggestion that law reform is mainly a technical legal exercise, divorced from issues of "policy":

> The Commission has at all times exercised the greatest care to concern itself only with strictly legal problems. You [the Attorney General] have already indicated your agreement with the Commission's considered view that it should not in any way intrude into the field of policy. However, in the special circumstances of this case, where the draft bills are concerned with the conduct and control of the members of the legal profession, the Commission is prepared to make an exception … only because it is dealing with a special field of which it has particular knowledge and that such comments are intended only for the assistance of the Government …[9]

Since the Commission's first, tentative foray into professional regulation, the legal professions in New South Wales and elsewhere in Australia have undergone a major transformation, and we find ourselves now in a dynamic period of quite radical change by institutional standards.

The number of lawyers and the lawyer-population ratio have increased greatly in a short time, with the average age and experience of the profession declining, and competition for jobs and work increasing, accordingly.[10] In the 1911 national census, women comprised only 0.2% of the legal profession; as late as 1971, women only made up 6% of the profession, but the figure would now be about 20%.[11] The remarkable growth in numbers and the more modest feminisation of the profession are both, in part, products of the shift from the apprenticeship mode of entry to the tertiary mode, with university law schools becoming central to both the academic and professional training of new lawyers.

Until the 1970s, the profession was almost entirely a private one, with few lawyers acting in a salaried, public capacity and with limited public funding for legal aid. Legal Aid Commissions are now major employers of legal services, however, and the growth of legal jobs in the public service and the advent of the community legal centres movement has meant that it is now quite possible to enjoy a satisfying career in public sector lawyering.

It may be, however, that the gap between public and private legal practice will narrow quite considerably in the 1990s, with the outright privatisation of some public legal services, and the operation of others along private sector lines and sensibilities. For example, the Commonwealth Attorney-General's Department has moved to re-constitute some of its operations in the form of an "Australian Legal Practice" which will compete directly with the private profession for government and para-governmental (Telecom, Australia Post) work.[12] Similarly, the Crown Solicitor's offices in many States now routinely "bill" (genuinely or notionally) other government departments for legal work.

The separate Bar has thus far survived political threats of fusion and accusations of restrictive work practices, but one of the most salient developments has been the rise of the "mega-firm" of solicitors, which challenge the Bar's previous monopoly on specialist expertise, prestige and intellectual and financial reward. The other major division in Australia — geography — has closed in recent times. Whereas there was not a single major firm that bridged the Sydney-Melbourne divide through the mid-1970s, and Queensland and South Australia virtually prohibited the admission of out-of-state lawyers, inter-state (and, indeed, international)

practice[13] is now accepted as appropriate and inevitable, and we will soon have uniform, national admission to practice.

THE ERA OF INQUIRIES INTO THE PROFESSION

In the face of all of this change, it is notable that the profession has thus far remained remarkably autonomous, withstanding or co-opting a number of significant attempts to impose a greater degree of public regulation and accountability. For example, the long inquiry into professional regulation conducted by the New South Wales Law Reform Commission (1976–1984) initially promised dramatic change, but ultimately resulted in legislation which actually increased the powers of the Councils of the Law Society and Bar Association and maintained most of the restrictive trade practices which had been identified and questioned.[14]

One of the reasons for the successful preservation of professional autonomy was the maintenance of professional *unity*, despite the considerable degree of fragmentation of working styles and the stratification of income and prestige levels. Unity was able to be maintained because of shared adherence to the principles of the rule of law (which traditionally include the "independence of the profession", among other things); a large measure of social homogeneity; and shared self-interest in the perpetuation of monopolies over various lucrative areas of legal work.[15] Thus, the submissions of the Law Society of NSW to the NSW Law Reform Commission in the late 1970s hinted at a degree of rivalry, but were carefully drawn so as not to threaten the Bar's traditional preserve.

However, less than one decade later, we have entered another "era of inquiries" into the legal profession. This push is far more likely to result in fundamental changes to the organisation and regulation of legal work in Australia. In large part this is because the changes are driven by the same *conservative* interests which have previously identified with and protected the legal profession from reformist efforts from the political and legal Left, and also because professional unity appears to be declining in the face of economic and other pressures.

Social expectations also have changed considerably in the past decade. There is an increased awareness of the rights of consumers, and an extension of these principles into the public sector, with calls for increased openness, fairness and accountability of public

institutions and officials. The recent emphasis on "micro-economic reform" has reached the professions, with the attendant concerns about the elimination of restrictive trade practices and the promotion of increased competition within and between markets for goods and services — including professional services.

The English Precedent for Market-driven Reform

In the United Kingdom, there were six major public inquiries and two major privately-commissioned inquiries between 1970 and 1990 into the organisation of legal work and the structure and regulation of the profession. The Monopolies and Mergers Commission conducted inquiries into the provision of legal services in 1970 and (two in) 1976, with little result in the face of professional opposition to free market reform proposals.[16] The Royal Commission on Legal Services (the "Benson Commission") conducted a major inquiry and presented its report to Parliament in 1979.[17] (A separate royal commission on legal services in Scotland reported to Parliament in 1980.)[18] The Government responded with its own White Paper in 1983.[19]

In 1986, a Committee of Inquiry into the Future of the Legal Profession was established under the convenorship of Lady Marre, with representation from both branches of the legal profession as well as independent members. The resulting Report[20] had only been available for discussion for six months in 1988 when the Lord Chancellor, Lord Mackay of Clashfern, was asked by the Thatcher Government to, in effect, apply the free market principles it espoused generally to the delivery of legal services, with an eye to reducing the cost of legal services (to individuals and, importantly, to the Government). In January 1989, Lord Mackay released a series of three Green Papers on: the work and organisation of the legal profession,[21] conveyancing;[22] and contingency fees.[23]

Following submissions, the Lord Chancellor produced a White Paper later in 1989 on Legal Services.[24] The key recommendations were:

- the abolition of the solicitors' monopoly over conveyancing and probate work;
- the abolition over the barristers' monopoly over higher court advocacy;
- the establishment of the office of Legal Services Ombudsman to

monitor the handling of complaints against lawyers; and

- the establishment of a Lord Chancellor's Advisory Committee on Legal Education and Conduct.

Legislation giving effect to most of the recommendations in the White Paper followed in 1990, with the passage of the *Courts and Legal Services Act* 1990 *(UK).*

Current Trends in Australia

The Australian legal professions are presently the subject of an extraordinary number and range of public inquiries. There are major inquiries in train at the State level into at least some aspect of professional regulation in New South Wales, Queensland, Victoria, South Australia, and Tasmania. The Western Australian Parliament is about to consider reform legislation based on an earlier inquiry into the future organisation of the profession.

The Senate Standing Committee on Legal and Constitutional Affairs is in the midst of its major inquiry into the Costs of Justice, and the Federal Trade Practices Commission (TPC) is about to examine "the legal services industry", with the stated aim of eliminating anti-competitive strictures. From the initial publicity it certainly does not appear that the TPC will proceed from the traditional presumption that there is something different and special about the market for *professional* services which exempts that market from the usual free market techniques of cost reduction through the promotion of more intense internal and external competition.

Quite apart from the TPC inquiry, the New South Wales Government recently approved — over the bitter opposition of the Law Society — the licensing of lay conveyancers.[25] Combined with the recent relaxation of restrictions on the advertising of fees by solicitors, the market for conveyancing services has become extremely competitive, both from within and from outside. Fees for routine residential conveyances have already dropped markedly, judging from the newspaper ads — and it may well be that had the Law Society permitted advertising at an earlier time this would have taken most of the steam out of the campaign to terminate the solicitors' monopoly.

In late 1992, the NSW Attorney General's Department released an Issues Paper[26] canvassing a number of fundamental issues

relating to reform of the structure and regulation of the legal profession, drawn mainly from the Law Reform Commission's earlier work as well as the other recent inquiries. Among other things, the Paper reconsiders the division-fusion question; the possibility of more flexible "business structures" for barristers and solicitors; advertising; specialisation; appointment of Queen's Counsel; the "two counsel rule"; barristers' relationship with solicitors; court dress; and the regulatory framework.

COMPETITION AND THE SERVICE IDEAL

Differing Perceptions of the Service Ideal

No doubt one of the major reasons for the profession's current placement under the microscope is the public perception of an irritating gap between the "service ideal" which the profession espouses (and uses as the main justification for self-regulation and immunity from the normal controls on business and commerce), and the reality of the provision of legal services. The "service ideal" maintains that the distinction between a profession, such as law, and a mere business or occupation, is that in the former case there is "a tradition of devoted and disinterested service" such that "normal commercial imperatives are subordinated to altruistic concerns of service to the client and to the community".[27]

Not least among the legal profession's problems in convincing the general public that the "service ideal" is not simply "self-serving" is the fact that surveys demonstrate that the majority of *lawyers* do not appear to accept this proposition themselves![28] The public perception is reinforced by the common portrayal (often, but not always, accurate) in the mass media and in popular culture of the massive incomes of some lawyers and the consequent inaccessibility of legal services and litigation to all but a few wealthy individuals, corporations, and a small segment of the poor (through legal aid). The bans on advertising by lawyers, as noted above, have been counterproductive in recent times, preventing the widespread advertising of reasonably priced legal services which may have provided some factual balance.

Surveys of popular attitudes indicate that in Australia, as in many other cultures, lawyers consistently rate very poorly in terms of ethics and honesty.[29] Lawyers tend to be grouped with other

occupations — such as company directors, business executives, and stockbrokers — who aim to maximise wealth and make no pretence towards upholding a service ideal. Health care professionals, academics and school teachers, and (for reasons that elude me) engineers, invariably rank much more highly. Lawyers only receive respectability upon their elevation to the Bench when, apparently, their previous activities are overshadowed by the reverence for the public office. It is cold comfort that lawyers out-rate the likes of politicians, journalists, advertising executives and car sales people.[30]

Some of this public cynicism is unfair. The legal profession as a whole tends to be more introspective and self-critical than most other professions and occupations, and there is a tradition of pro bono work. The Community Legal Centres movement[31] the Alternative Dispute Resolution Movement, the Lawyers' Reform Association and other similar progressive legal institutions are largely without parallel in most other professions, while lawyers probably also have been disproportionately involved in other social movements in Australia, such as those relating to Aboriginal land rights, environmental protection, human rights and anti-discrimination.

Further, some of the antipathy caused by dissatisfaction with the legal system — such as the lengthy delays, the absence of needed substantive and procedural reforms, and the non-availability of legal aid — are transferred onto the legal profession, although some of the problems may be caused wholly or in part by the actions or priorities of others.

The New Competitive Pressures

By their own standards, the mega-firms of solicitors have suffered some reverses in the past few years after a period of enormous growth and profit. In part this is due to the willingness of their corporate clients to shed old loyalties in search of more attractive deals (both in terms of fees and services). However, the diminished income of the megafirms is probably due at least as much to the general economic recession as to the particular competitive pressures in the market for their form of legal services. These new competitive pressures are more likely to impinge upon the multitude of small firms, with the challenges to the traditional

solicitors' monopoly over property conveyancing work and changes to the system for compensating personal injury victims.

The conventional wisdom always has been that the trinity of residential conveyancing, probate, and accident compensation accounted for the great bulk of solicitors' work and incomes, at least in the large Eastern States with divided professions and statutory monopolies. Indeed, the solicitors' monopoly over this area of routine and lucrative work has been aptly described as one of the "central pillars upon which the divided profession rests".[32]

This position has been confirmed by census surveys undertaken by the Australian Bureau of Statistics, which indicate that in New South Wales:[33] fewer than one in five persons (18.8%) reported having one of the designated "legal matters" in a given year; only just over half (57.5%) of those persons who believed that they had a legal matter actually sought professional legal advice; but that persons with conveyancing and will-making needs almost always (93.2% and 90.2% respectively) consulted a solicitor. (By way of contrast, only 17.4% of persons who believed that they were unlawfully denied employment or a service because of racial or other prohibited discrimination sought legal advice.) Taken together, accident compensation, probate and conveyancing accounted for fully 85% of the consultations with lawyers. An earlier ABS survey provided roughly similar data for Queensland.[34]

In 1985, the then President of the Law Society of New South Wales predicted, with considerable accuracy and foreboding, that two different classes of solicitor were emerging: "those that *are* successful" — being "those that have the commercial strand of work — and "then a whole mass of them that *are* battling away like corner stores for a limited market share and making very modest incomes".[35]

The changing patterns of legal work are unlikely to threaten the existence of the Bar in the short term, but there are signs that the new competitive pressures *are* beginning to affect the Bar. The leading firms of solicitors, for example, now possess sufficient in-house specialised expertise such that they *are* becoming increasingly less likely to refer matters to the Bar for an opinion. There are also signs that the leading firms *are* intending to retain an increasing share of the advocacy work that to date has been routinely briefed to the Bar.

In the divided professions of the Eastern States, solicitors are, for the first time, becoming publicly critical of the work practices of the Bar. For example, the Law Society of New South Wales recently hosted two meetings of the 30 largest large firms in Sydney, which produced a long list of complaints and allegations of "unacceptable Bar practices" and inefficiencies.[36] It appears that the growing restiveness stems from two different sources: first, the longstanding resentment of the superior status and perquisites of the Bar; and second, pressure from corporate clients to rationalise the cost structure of legal services. Specific complaints related to: the "two counsel rule"; the refusal of barristers to appear with solicitor-advocates; the refusal of barristers to attend solicitors' offices for conferences; the growing practice of barristers charging substantial "cancellation fees"; and special court dress (wigs and gowns), which emphasises the difference in status between barristers and solicitors.

The NSW Attorney General's current review of the regulation and structure of the legal profession, discussed above, has heightened the tension between the branches of the profession in that State. The President of the NSW Bar Association, Mr John Coombs QC, recently took the extraordinary step of writing to all *solicitors,* attaching a copy of the *Law Society's* submission to the Attorney General to a cover letter which is very critical of the positions taken by the Law Society. The Bar and the Law Society also are in direct conflict over the provision of advocacy services to the financially starved NSW Legal Aid Commission, with the Law Society promoting the suggestion that solicitors could provide these services as effectively but more inexpensively.

THE CORPORATISATION OF LEGAL SERVICES

Increased emphasis is now being placed upon the advertising and marketing of legal services, and law firms of all sizes are enjoined to operate in a more "business-like" fashion, despite the traditional distinction between a "service- oriented profession" and other occupations and commercial ventures. The Law Societies now offer a range of services and CLE courses for solicitors which emphasise the commercial, small business, nature of most practices and the consequent need for business plans, marketing strategies, strict billing and debt recovery practices, and so on.

In the past few years we have witnessed the increasing inter-changeability of legal and corporate personnel. A number of the mega-firms have hired managing partners who, while admitted to practice as lawyers, are principally experienced in, and made their reputations in, corporate management. For example, James Strong, who had been a senior executive in the mining and airline industries, was made "Chief Executive" of the law firm Corrs. (Strong has since left Corrs to pursue other corporate opportunities). Blake Dawson Waldron hired as its managing partner Graham Bradley, from the corporate consulting firm Mc-Kinseys. Freehills recently appointed Michael Cannon- Brookes as managing director, after his 22 years of experience in the banking industry, including a period as executive chairman of Citibank Australia.

The law firm Dunhill Madden and Butler recently has announced the establishment of an "advisory board of directors" comprised of non-lawyers with commercial, marketing or financial expertise. These directors include senior executives from CSR, ANI, Consolidated Press, LendLease and AUSSAT. Movements in the other direction include Corrs senior partner Peter Bobeff, who has recently become director of corporate affairs for the Fosters Brewing Group Ltd after serving for many years as a legal adviser to the brewer.

It should be said that there is nothing at all improper in the formal movement between the corporate and legal sectors; indeed, there is probably much to be learned from the distinctive techniques and analyses applied to problems by the different sectors. What is somewhat more worrying is the *blurring* of the distinction between legal adviser and corporate executive in some cases. In the spate of major corporate collapses in recent times, it is apparent that there was sometimes a high degree of identification with corporate aims and interests (and personalities) by legal advisers, rather than the provision of "disinterested" advice in which "normal commercial imperatives are subordinated to altruistic concerns".

Effects on Legal Change

There are some ironies in the timing of the decline of the service ideal and the impetus towards the deprofessionalisation of

many areas of traditional legal work. During the long period when the professional paradigm and its practical consequences (professional autonomy, monopoly work, etc) *were* readily accepted in Australia, many or most legal practitioners actually had qualified through the apprenticeship route[37] and performed relatively routine tasks. In a sense, the only "professional" aspect of much of the work done by solicitors was the level of the fee.

In recent times, however, Australian lawyers have acquired more of the idealised attributes of the "professional". Lawyers now are better educated, and capable of providing more highly specialised advice, often across a number of disciplines (and at an even higher level of fees). Nevertheless, the other pressures referred to above are leading to the diminution of professional autonomy.

These more "professional" lawyers also may be in a poorer position to achieve significant legal change. Some work will simply be lost to other service-providers, as the present demarcations are eroded. As discussed above, the general pressure to be more "business-like", to be more commercially competitive, will severely strain the service ideal and limit the time and resources available for efforts to promote legal change.

In Australia we still rely in large measure on the common law delineation of our rights and development of our jurisprudence. Thus, the pressures on the judicial system to move cases through much more expeditiously also must be considered. The greater the caseload of the courts, the lesser the opportunity to explore difficult philosophical issues whose determination are not absolutely necessary to the conclusion, but which may serve to develop the law. The increasing tribunalisation of our judicial system also has limited to the opportunities of the courts.

While ADR is generally a good thing, promoting quicker, cheaper and often more appropriate forms of conflict resolution, the trend away from formal adjudication means that a smaller number and range of cases will be judicially considered and reported. (One of the weaknesses of ADR is the absence of any developed theory of conflict.) In sum, it may be that lawyers will have less practical opportunity, less altruistic motivation and less commercial incentive to pursue legal change.

THE EMERGENCE OF THE AUSTRALIAN LEGAL ACADEMY

In 1946, there were only 15 full-time legal academics in Australia, scattered among the original six law schools. By 1984, the number had risen to 380, including 67 at Monash University and 56 at the University of New South Wales (the two largest faculties) alone. Including legal studies teachers at universities and colleges, the total number of full-time legal academics is now approximately 800, and growing.[38] This is substantially larger than the practising professions in Tasmania, the ACT, or the Northern Territory. Taking into account all of those academics who work in legal studies departments and other faculties within universities, and those who work in the practical legal training courses, the numbers are probably beginning to approach the size of the legal professions in South Australia and in Western Australia.

While the size (staff and student population) of the established law schools (12 at the time of the Pearce Report) has remained relatively stable in the past decade, the current "third wave" expansion in the number of law schools in Australia will result in another surge in the numbers of students and full-time legal academics. Australia and the United States appear to be the only countries in the Western world which have undergone a significant rise in the number of law schools in recent times,[39] and Australia clearly stands out in this regard in relative terms. In the United States, only one private and two public (ABA accredited) law schools have been established in the past decade;[40] in the much smaller Australian market over the same period, the figures are one private and ten new public law schools, with several more in the planning stages.

The emergence of a significant and distinct class of legal academics, freed from narrow vocational concerns, creates the conditions for a systematic and comprehensive review of areas of legal doctrine and practice which incorporates theory, empirical research, comparative analysis and interdisciplinary approaches. As Weber has noted, this "far-reaching emancipation of legal thinking from the everyday needs of the public"[41] promotes a shift in focus from what the Romans called "cautelary jurisprudence" (law developed through the pragmatic resolution of individual disputes)

toward the systematic elaboration and rationalisation of law, but at a more theoretical or abstract level.

Unfortunately, the widespread (and partly accurate) perception that Australian law schools were merely adjuncts to the legal profession rather than true academic faculties dedicated to liberal education was accompanied by the limited recurrent funding, high staff-student ratios, small libraries, scant research funds and assistance, lack of post-graduate programs and students, and poor infrastructure and support services. This legacy — and the continued lack of resources despite some changed perceptions, still severely restrains the development of legal scholarship and pedagogy in this country.[42]

It is generally true that in the dual world that legal academics now inhabit, their primary allegiance and identification is with the methods, aims, traditions and values of the university teacher and scholar and not with those of legal practitioners. Even the so-called "formalists" in Australian legal education, whose ideology is less hostile to professional practice, tend faithfully to reproduce the work patterns of academics. Indeed, lacking interest in clinical approaches and in empirical inquiry, the formalists are the most divorced from the practices and processes of law and most reliant on abstraction.

The law school curriculum also has been substantially liberalised and made more flexible, eclectic, specialised and inter-disciplinary, although it must be said that most courses still have a distinctively professional or rule-manipulative orientation. Ironically, most law courses are distinctively "unprofessional" in one sense as they only provide anecdotal and atheoretical insights into the various behaviour patterns of "professional" lawyers. Nevertheless, the legal academy has begun to build up a body of descriptive and critical secondary legal literature which largely was lacking. Among other things, empirical portraits of various aspects of the legal system have begun to be drawn, and there is a welcome (if belated) recognition of the pluralist nature of Australian society which was not reflected in the earlier common law or social orthodoxies.

THE RELATIONSHIP BETWEEN ACADEMICS AND THE PROFESSION

The Other Division

Although some legal academics do, or did, carry on practices and some practitioners teach part-time or occasionally, there is a very noticeable distance between the two. The Pearce Report described the relationship between legal academics and practitioners as "uneasy",[43] and the Australian law deans have said that it contains "an element of tension".[44] In truth, the relationship is sometimes even less healthy, and has been characterised as "the most significant division within the profession",[45] surpassing even the division between barristers and solicitors.

As a general matter, practitioners do not seem to regard academic skills and expertise as transferable to practice, since "except in the rarest of circumstances in Australia, there is no pattern of consultation of academics by practitioners."[46] In the words of one senior New South Wales Queens Counsel, the attitude of the private profession is that "academic lawyers are primarily professional teachers rather than professional lawyers. They have the time, skill and assiduousness to produce surveys of law and to teach. Practitioners do not have the time to do this."[47]

The Unwelcome Conscience

Australian legal academics have been far more actively involved in progressive legal and social issues than the profession at large because of, among other things, a more flexible work structure, a somewhat different political orientation, and freedom from the pragmatic interests and restrictive "ethical" rules of practitioners. The critical function of legal education and legal scholarship has in recent years been applied to the profession itself, with legal academics often being critical of the self-regulation of the legal profession, standards of professional responsibility and the delivery of legal services.[48]

This critical function has been positively recognised by the recently retired NSW Court of Appeal judge, Mr Justice Gordon Samuels (who is also the Chancellor of the University of New South Wales):

> [Academics] have increasingly assumed the character of social conscience to the profession and the judiciary. It is a role for which they are well cast, since they are neither influenced by professional self-interest nor trammelled by professional responsibility. Academics are no more immune than others from eventual intellectual sclerosis; but their work keeps them aware of the wider ranging currents of legal thought and experiment, and they are constantly exposed to the irreverent reactions of students first encountering the more opaque areas of the law. So their contribution ought to be a generally critical one.[49]

However, other judges and practitioners have been less willing to assign to academics the role of "conscience of the profession", at least without some return criticism. Justice Daryl Dawson of the High Court of Australia gave a paper at a legal education conference in 1976 (prior to his appointment to the judiciary) in which he expressed displeasure at the "rejection by law teachers of the values of the practitioner and hence the relevance of any views which the practitioner might have on the subject of legal education", and the fact that legal academics regard themselves "not as a member of the legal fraternity, but as a member of the academic community, who is entitled, in the exercise of academic freedom, to insulate himself from the views of the practising profession".[50] The Law Council of Australia also has complained that some law schools prefer to hire a tutor one year out of law school to a legal practitioner with 20 years experience.[51]

Recently, the Law School of the University of New South Wales had a private firm conduct some market research to help formulate strategies for external fundraising. This exercise principally targeted the large Sydney law firms. The researchers found that while the Law School's staff and students were generally held in high esteem, the Law School was still associated in the minds of some senior partners with the NSW Law Reform Commission's inquiry into (and criticism of) the legal profession of a decade earlier. This was offered as a factor which might well militate against future donations to the Law School.

The Practical Consequences of the Great Divide

The placement of academic lawyers outside the legal professional paradigm has important adverse consequences.

First, this attitude contributes (along with a number of structural factors) to the relative lack of mobility between the different

sectors of lawyering, particularly as compared with the American experience. It is true that many academics have left the university law schools for the private profession in recent times, attracted by the much higher rates of remuneration as well as by the intellectual challenge. Despite the profession's view that legal academics do not do "legal work", it seems that those academics who have made the leap have been quite successful in practice, both in the big firms as well as at the Bar. It may be too early to tell, but it appears that few of these lapsed academics will return to the universities, so the brain drain is largely in one direction.

Secondly, practising certificates may be denied to academic lawyers who do not "practice", as interpreted by the professional associations. (This, of course, has the knock-on effect of limiting professional mobility.) For example, the NSW Legal Profession Act 1987 established for the first time the requirement that a barrister possess a current practising certificate, and granted power to the Bar Council to administer the system. The Act provides that an unrestricted certificate be given to an admitted barrister who "is practising as a barrister immediately before" the legislation commenced (in 1988).[52] The Bar Council has interpreted that phrase plainly, with the result that large numbers of fulltime academics and government lawyers have been designated as "non-practising barristers", even though they previously held full rights of practice consequent upon admission. Whereas virtually every other industry faced with new occupational licensing laws has ensured that existing practitioners are included in a "grandfather clause", the Bar used the changing regime as an opportunity to severely limit the practice rights of those who do not practice entirely in the professionally accepted, traditional way.

Following an amendment to the new Act sought by the Bar Council, academic lawyers and others in a similar position (such as government lawyers, in-house corporation counsel, and legal publishers) may be granted a restricted practising certificate, which allows for opinion or advisory work but does not permit advocacy in the courts without the presence of a leader.[53] Regaining unrestricted rights of practice would require undertaking a year's pupillage program, which has been designed to be impractical for anyone not at the Bar full-time. Thus the new regime has resulted in the retrospective removal of rights of practice for lawyers in this

position, with the substitution of a form of second-class citizenship in the profession.

Thirdly, academics (as well as government lawyers and others outside of private practice) are effectively cut off from consideration for professional honoraria (such as appointment as Queen's Counsel) and more importantly for judicial appointment.

Most critically, the divide serves to marginalise the legal academy and its ideas and perspectives. In their fascinating exploration of the differences between English and American legal cultures, Atiyah and Summers have pointed out that in the United States, "the ethos of the leading law schools has played a major role in shaping the substantive character of the modern American legal system";[54] the "American law schools have been the source of the dominant general theory of law in America … [called] 'instrumentalism' because it conceives of law essentially as a pragmatic instrument of social improvement."[55] American legal scholarship is regularly cited by the courts in written judgments, and relied upon by practitioners "for imaginative and innovative ideas, for new lines of argument, and sometimes for social scientific and statistical data that can buttress policy arguments."[56] Law professors also are consulted by the practising profession, especially in relation to appellate matters. By contrast, Atiyah and Summers conclude that in England:

> [the] common legal culture … does not really include the law schools at all. That culture is, of course, centred in the Inns of Court and the Law Courts in London where the judiciary, the bar and much of the rest of the profession are centred. It is easier for a culture that thus excludes academics to develop where most academics have not themselves practised law, and are viewed as outsiders, both geographically and intellectually … Thus English law schools are the least important of the major legal institutions competing to influence the legal order as a whole; whereas in America, the leading law schools are the most important.[57]

Unfortunately, the Australian situation more closely resembles the English experience than the American. Although the position is beginning to change, Australian courts traditionally have not cited law review articles or texts written by academics even where well-respected scholarship existed. Practitioners do utilise texts written by academics, but these are works primarily aimed at and marketed for the profession and consist of annotated legislation, case law exposition, and forms and precedents rather than more innovative

scholarly perspectives.[58] Although some individual academics have had their expertise recognised and relied upon by the profession, there is nevertheless no formal pattern of consultation of academics by practitioners in Australia[59] which acknowledges (intellectually and materially) the academic contribution, as regularly happens in the United States and in most of continental Europe.[60]

Where politicians and corporate leaders in Australia will seek (and publicly parade) a "QC's opinion" to validate certain conduct or a proposed course of action, there is less cache to be found in flaunting a "law professor's opinion" — the cultural assumption is that the senior Bar is the sole repository of all professional wisdom (at least outside of the Bench).

Thus, the law schools and legal academics in Australia, as in England, have not been central to the national legal culture in the same way that barristers and judges, especially, have been. It is to be hoped that the strong growth and development of the university law schools in the past 25 years, and the "coming of age" of a more creative Australian legal scholarship, coupled with a generation or more of graduates more receptive to this sort of innovation, means that the legal academy is likely to exert a broadening influence.[61] It is pleasing to know that, according to the President of the NSW Court of Appeal, Justice Michael Kirby,[62] most judges no longer believe that the only academic that it is proper to cite in a judgment is a dead one.

SOME IDEAS FOR A COOPERATIVE WAY FORWARD

Judicial Recognition of Academic Expertise

As discussed above, academic writing traditionally has not been widely utilised or acknowledged in judicial opinions. This has begun to change, and it is an important advance, not only for the contribution which such work may make to the development of Australian jurisprudence, but also for the encouragement which it provides for legal scholarship — assuming in both cases that the material relied upon is thoughtful and innovative, rather than mere summaries of positive law.

As the Chief Justice of Australia, Sir Anthony Mason, said at the inauguration ceremony for the University of Wollongong's law faculty:

> a law school should aim to be a constructive participant in the dynamic life of the common law. It has been said from time to time that in Australia, in contrast to the United States, in the field of judge-made law, it is the judges rather than counsel or academic lawyers who have taken the initiative in constructively developing the law. Unquestionably that statement is true. In Australia, academic lawyers over many years failed to match the contribution made by their counterparts in the United States and, to a lesser extent, the United Kingdom. That position is changing perceptibly … There is now available a vast range of textbooks and monographs on almost every conceivable topic and, in addition, many university and specialist law journals which provide many opportunities for constructive examination of Australian law with a view to promoting its principled development. We should aim to follow the United States example in this respect. But we will succeed in doing so only if we give greater emphasis to the study of law as an intellectual discipline which is responsive to the needs of society. That entails greater emphasis on jurisprudence and the philosophy of law so that graduates emerge from a university with a panoramic view of the law as an entire discipline rather than as a series of discrete and unrelated pigeon-holes … And it requires active cultivation of that spirit of inquiry which has been the touchstone of academic life.[63]

Apart from including more references to academic writing in their judgments, it is also pleasing to see that the Australian Institute of Judicial Administration (AIJA), has commissioned a series of studies on various aspects of the Australian legal system, using legal and non-legal academic consultants.[64]

It is to be hoped that the integration of academic and judicial writing also will highlight the similarity of the intellectual task, smoothing the way for the appointment of senior academics to specialised tribunals and appellate courts. In the United States, there has been a strong tradition of appointing distinguished academic lawyers (Pound, Brandeis, Cardozo, Frankfurter and others) to the senior appellate courts, including the US Supreme Court, where many have made significant contributions to the development of American jurisprudence.

Professional (institutional) Support for the University Law Schools

Lobbying efforts and better consultation

While the professional associations representing accountants, engineers and others have been active for some time in promoting the interests of the academics in their discipline, this sort of activity

has come late to the legal professional associations. Indeed, as discussed above, the legal profession has sometimes acted positively *contrary* to the interests of legal academics.

There are some indications that this may be changing, although the signals are mixed. At the Law Council of Australia's conference at Bond University in February 1991 on "Producing the Compleat Lawyer", the Council's officers were genuinely shocked to discover the financial plight of the university law schools.[65] Following the conference, the Council's President, Alex Chernov QC, and others did strenuously lobby the relevant ministers and senior bureaucrats in Canberra (Dawkins, Baldwin, Chubb). This effort did not result in the immediate free flow of funds, but it must be useful for politicians and bureaucrats to be made aware that the profession is maintaining an interest in these issues.

Given the professional-academic *rapprochement* which appeared to come out of the Bond conference, it is disappointing that the involvement of the legal academy in the profession's policy-making process is still patchy. The Law Council of Australia did consult with the Law Dean's Group in the formulation of the Council's Policy on Legal Education, with the result that the Policy is now more flexible, ameliorating the strict "common core group: approach of the 1982 McGarvie Report, which was specifically rejected in New South Wales in 1984 as being unnecessarily prescriptive and inflexible.[66] The Council's Policy, in turn, has influenced the Consultative Committee of State and Territory Admitting Authorities (the "Priestley Committee") which is preparing draft uniform admission rules for Australia.

By way of contrast, the New South Wales Law Society recently announced major changes to the organisation of the College of Law practical legal training regime, which in effect alters the requirements for admission to practice as a solicitor. The Law Society failed to consult with either legal academics or law students before approving these changes.

Direct funding

At the Australian Legal Convention in Adelaide in 1991, Professor Dennis Pearce suggested the possibility of imposing an "education levy" of, say, $100 on each of the approximately 26,000 holders of practising certificates in Australia to raise funds for the

university law schools. It is fair to say that the professional reaction was somewhat unenthusiastic. Nevertheless, the idea could be refined (the amount of the levy could be progressive, for example, with exemptions for lawyers with low incomes) and should be pushed at every opportunity. The individual levy would not be oppressive, but would result in a substantial pool of funds for designated uses, such as research, curriculum design, clinical programs and so on.

Another benefit of this form of fundraising is that the funding would be not be skewed in favour of certain subject areas or approaches. This is in contrast to the creation of endowed chairs by the major law firms, for example, which tend to focus on the commercial areas with consequences down the track for staffing profiles, research focuses, and curriculum design.

Financial assistance from the private profession — individually and corporately — also is of obvious need for such necessary or desirable things as libraries, research, visitorships, physical plant, clinical programs, student scholarships, and so on.

Professional accreditation

Another of the initiatives which attracted some attention at the Law Council's conference at Bond University was the establishment of a system of professional accreditation of university law schools. This already occurs in Australia in the area of accounting, but the more important model is the American Bar Association's program for (full or provisional) accreditation of law schools based on published standards and policies.

The attraction of this scheme to impoverished law schools is that the threat of withdrawal of professional accreditation may force governments and university administrations to provide sufficient resources to meet the minimum standards. The Pearce Report suggested that very few, if any, Australian law schools would meet the likely criteria for staffing, library, physical plant, and so on.[67]

The dangers in this high-stakes poker game are also obvious, with the threat of increased professional control over legal education and the possibility of actual losses of accreditation. The Pearce Report's own misguided recommendations about the closure of Macquarie Law School indicate that select committees on

accreditation may sometimes make strange decisions.

Collaborative Work Arrangements

In my view, legal work is becoming more "academic" than ever before. This is not to suggest that the work is of less "practical" relevance or application — for this would be to approve of the perverse but unfortunately common connotation of "academic" being the equivalent of "moot" or positively "irrelevant". There probably never has been that much difference in technique between an academic's journal article and a barrister's opinion (except for the proper recognition and attribution of sources in academic writing). However, such factors as:

- the deprofessionalisation of routine legal work (such as conveyancing);
- the increasingly specialised and creative nature of solicitors' work;
- the trend towards written pleadings and submissions in the courts, especially the higher courts; and
- the increasing need for international and comparative perspectives,

have substantially narrowed the gap between what academics and practitioners actually do.

The level of consultation of academics by practitioners probably has increased as a result, although it is still largely informal from the practitioners' point of view. Academics are seen as a free and limitlessly patient source of specialised expertise — a kind of "legal aid" for harassed lawyers. There is now the need and the opportunity to establish more evenly reciprocal collaborative working arrangements between practitioners and academics. Perhaps the first issue which must be addressed is the restriction on the rights of academic lawyers to "practice", which imposes a barrier to effective cooperation. (It is interesting to note that in the US, academics at accredited law schools are often granted enhanced rights to practice, with the waiver of certain requirements.) These restrictions were never calculated to serve the public interest, and are now even more clearly anomalous. For example, when national admission becomes a reality in the near future, it will be very hard to justify out-of-state generalist lawyers having practice rights denied to in-state academic specialists in

respect of particular matters. Similarly, the Law Society of New South Wales has just approved a specialist accreditation scheme for practitioners — for which academics will sometimes serve as examiners. Once that barrier is breached, it will be possible for academic lawyers to appear and to assist more regularly as advocates in appellate matters within their areas of expertise, and to be retained as consultants by law firms engaged in major research, planning and writing exercises.

Chief Justice Mason recently has predicted that:

> it is … in the growing cross-fertilisation between academic and practising lawyers that the real prospect of future and productive law reform truly lies.[68]

I tend to agree, although the Chief Justice saw this cross-fertilisation occurring in the present reality of senior academic lawyers deserting "the groves of Academe for the topless towers of the Central Business District."[69]

There are some problems with this present reality, however. First, the university law schools may come to be seen as the "Reserve Grade" for the major law firms, with those academics who establish a sufficiently high level of expertise becoming eligible for "promotion". This may be good for the firms, but the benefits would flow in only one direction. For the law schools, it means that the very persons who are expected to provide academic leadership in teaching and re- search are those who will face the greatest temptations to leave, and at the most productive point in their academic careers.

From the perspective of progressive legal change, this phenomenon also would be unhealthy. Academic lawyers are privileged to enjoy that "far-reaching emancipation of legal thinking from the everyday needs of the public" which permits systematic, rational and critical analysis of the law, which allows them to serve as the "conscience" of the profession, and, ironically, which puts them closer to fulfilling the "service ideal" of the profession.

Legal change, as I have defined it, would be best served by a more cooperative, collaborative model. Such a model would make academic work sufficiently attractive for law schools to be able to recruit and retain good people, and would give legal academics sufficient contact with — but freedom from — the imperatives of

daily practice to make a real contribution to reform.

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 (1993) 4 *Legal Educ Rev*, 1.

1 "Legal change" is taken to mean reform in the direction of achieving a greater measure of social justice. I accept that not everyone would use this definition.

2 New South Wales Law Reform Commission, *Proposed Amendments to the Legal Practitioners Act, 1898–1960* (LRC 2, 1966).

3 This proposal was rejected by the Commission on the basis that the Supreme Court had provided adequate supervision, *id* at 3, and 5–6.

4 The Commission agreed, writing: "The conveyancer has become an anachronism. The sooner he is abolished the better," *id* at 5.

5 *Id*. at 7–9 and Appendix B. The proposals called for increased penalties for work by unqualified practitioners, among other things.

6 The extension of rights of audience to solicitors who were not principals or partners was rejected because the Commission felt that the duty of an employed solicitor to a master solicitor would interfere with that solicitor's other duties to the client and the court, *id* at 6–7.

7 *Id* at 12–14, 20–21.

8 *Id* Appendix A.

9 *Id* at 1.

10 See D Weisbrot, *Australian Lawyers* (Melbourne: Longman Cheshire, 1990) Ch 3.

11 *Id* at *85*.

12 See N Hooper, "Lawyers Prepare for the New Order", (26 June 1992) *Business* Review *Weekly* 54–55.

13 Weisbrot, *supra* note 10 at 262–263 and 270.

14 Under the *Legal Profession Act* 1987 (NSW).

15 Weisbrot, *supra* note 10 at 4–7,9,43–44,101 and 273.

16 United Kingdom Monopolies Commission, *Report on the general effect on the public interest of certain restrictive practices so far as they prevail in relation to supply of professional services* (1970); United Kingdom Monopolies and Mergers Commission, *Barristers Services* (1976) and *Services of Solicitors in England and Wales* (1976).

17 Royal Commission on Legal Services, *Final Report* (1979) (the "Benson Report").

18 Royal Commission on Legal Services in Scotland, Report (1980) (the "Hughes Report").

19 Lord Chancellor's Department, *The Government Response to the Report of the Royal Commission on Legal Studies* (1983).

20 *Report of the Committee on the Future of the Legal Profession* (1988) (the "Marre Report").

21 Lord Chancellor's Department, *The Work and Organisation of the Legal Profession* (Cmnd 570, January 1989).

22 Lord Chancellor's Department, *Conveyancing* by *Authorised Practitioners* (Cmnd 572, 1989).

[23] Lord Chancellor's Department, *Contingency Fees* (Cmnd 571,1989).

[24] Lord Chancellor's Department, *Legal Services: A Framework for the Future* (Cmnd 740,1989).

[25] See the *Conveyancers Licensing Act* l992 *(NSW).*

[26] New South Wales Attorney General's Department, The *Structure and Regulation of the Legal Profession* (Issues Paper, November 1992).

[27] Weisbrot, *supra* note 10 at 4 and 196.

[28] See Weisbrot, *supra* note 10 at 9 and 196, quoting the survey of NSW lawyers by Tomasic and Bullard.

[29] *Id* at 17–19. The most recent Morgan Poll in Australia appeared in *Time,* May 18,1992 at 11.

[30] *Id.*

[31] *See* J Basten, R Graycar and D Neal, Legal Centres in Australia (1985) 7 *Law & Policy* 113.

[32] J R Forbes, *The Divided Legal Profession in Australia* (Sydney: Law *Book* Company, 1979) 226.

[33] Australian Bureau of Statistics, *Usage* of *Legal Services, New South Wales, October 1990* (May 1991). See esp Table 1.

[34] Australian Bureau of Statistics, *Usage of Legal Services, Queensland, October 1986* (Dec 1987).

[35] Interview with Rod McGeoch in "Towards Two Different Classes of Solicitor" (1985) *Law Soc J* 357, at 362.

[36] K Gosman, 'Rumpole' vs 'LA Law', *The Sun-Herald,* May 10, 1992 at 33.

[37] That is, through articles and Admission Board programs.

[38] D Pearce, E Campbell & D Harding, *Australian Law Schools: A discipline Assessment for the Commonwealth Tertiary Education Commission* (Canberra: AGPS, 1987) (hereafter, the "Pearce Report") put the figure at 439 in 1984, but this counted only those academics who worked in the recognised law schools. The Australasian Law Teachers' Association provided the estimate of 800 legal academics.

[39] See H M Kritzer, Abel and the Professional Project: The Institutional Analysis of the Legal Profession (1991) 16 *Law and Social Inquiry* 529, at 548.

[40] The private law school is St Thomas, in Miami, Florida; the public law schools are at Georgia State University and the City University of New York. Going back 15 years, seven new private law schools and four new public law schools (with ABA accreditation) have opened in the US (although one of the private law schools closed in 1992).

[41] M Weber, *Economy and Society* (G Roth and C Wittich, eds (Berkeley: University of California Press, 1978) vol 2, at 789.

[42] *See* D Weisbrot, Recent Statistical Trends in Australian Legal Education (1991) 2 *Leg Educ Rev* 219, *at* 242–251.

[43] Pearce Report, *supra* note 38 at 991.

[44] *Id* statement of the Australian Law Deans, Appendix 3, para 71.

[45] T Halliday, "The Fractured Profession: Structural Impediments to Collective Action by the Australian Legal Profession" (Paper delivered to the American Sociological Association Annual Meeting, Toronto, 1981) 26.

[46] *Id* at *27.*

[47] Weisbrot, *supra* note 10, interview reported at 62.

[48] *Id,* at 27–28, 30.

[49] G Samuels, "Control of Admission to Practice — Its Effect on Legal Education" in R Balmford ed, *Legal Education* in *Australia* (Melbourne: Australian Law Council Foundation, 1978) 679.

[50] Pearce Report, *supra* note 38 at 991.

[51] J R Forbes, The Study of Lawyers by Lawyers: Obstacles to Re search and Some Suggestions in R Tomasic ed, *Understanding Lawyers* (Sydney: George Allen & Unwin and Law Foundation of NSW, 1978) 122.

[52] Section 32(1).

[53] Section 32(3)(b).

[54] P Atiyah and R S Summers, *Form and Substance in Anglo-Australian Law* (Oxford and New York: Clarendon Press Oxford University Press, 1987) 384.

[55] *Id* at 404.

[56] *Id* at 374.

[57] *Id* at 407.

[58] M Chesterman & D Weisbrot, Legal Scholarship in Australia (1987) 50 *Mod L Rev* 709 at 714,723.

[59] Halliday, *supra* note 45 at 27.

[60] E Blankenburg and U Schultz, German Advocates: A Highly Regulated Profession in R L Abel and P S C Lewis eds, *Lawyers in Society — The Civil Law World* (Berkley: University of California Press, 1988) 134–135.

[61] Chesterman & Weisbot, *supra* note 58 at 724.

[62] From Justice Kirby's address to the 47th Annual Conference of the Australasian Law Teachers' Association, Brisbane, 11 July 1992.

[63] Sir Anthony Mason, Inaugural Address, University of Wollongong Faculty of Law, 19 February 1991, at 6–7.

[64] *Id* at 11.

[65] See the report of conference proceedings in the April 1991 edition of *Australian Law News*, at 9–21.

[66] Weisbrot, *supra* note 10 at 143–146.

[67] For example, see the Pearce Report, *supra* note 38 at 55–56.

[68] Sir Anthony Mason, "Changing the Law in a Changing Society", an address to the 27th Australian Legal Convention, Adelaide, 9 September 1991, at 21–22.

[69] *Id* at 2l.