



3.15. Legal Professional Ethics in Times of Change

The Hon Justice Michael Kirby AC CMG

The St James Ethics Centre Forum On Ethical Issues, Sydney 23 July 1996

Objectives

The object of this forum is to raise the consciousness of lawyers so that they may evaluate their role within the legal profession and in the broader community at a time of rapid social change. The object of this encounter is to promote a re-examination of what it means to be a member of a profession and a legal practitioner in our society today. Conformably with the objectives of the St James Ethics Centre, well positioned in the professional heartland of city and State, the aim is to challenge all of us to evaluate our conduct with a view to enhancing the level of service provided by the legal profession to a community which has larger expectations of us but a diminishing estimation of the likelihood that they will be fulfilled.

The organisers of this forum hope that it will provide an opportunity to examine the tension which they feel exists between the traditional features of the practice of the law in a learned profession, enjoying important privileges (on the one hand) and the dictates of modern business practices which impose on lawyers of today obligations to address cost factors and so-called "bottom line" considerations (on the other). Within the St James Ethics Centre, a fear has been expressed that an undue emphasis on economic factors has led, in recent times, to a lessening of sensitivity to, and the importance of, the old ethic and culture of professional service.

The basic questions which are posed are these: is such expressed anxiety nothing more than a nostalgic hankering for a return to "good old days" of legal practice, which were not so good for the consumer after all? Was the professionalism of the past merely a (self-deceiving) disguise to preserve a large hold on power in society? Or is our anxiety a last desperate effort to keep alive the flame of professionalism in the face of so much evidence that law is moving in the direction of a business and that the idealism and selflessness of professionalism is finally dying out?

The presence of so many people at this forum is a sign that these are certainly questions of concern to Australian lawyers today.

Problems

Three items assist in the appreciation of the problems that I intend to address.

The first is a book that was sent to me by a colleague of old (Professor David Partlett) who worked with me in the Australian Law Reform Commission. He is now teaching law in the United States of America. The book by Dean Anthony Kronman of the Yale Law School is titled *The Lost Lawyer: Failing Ideals of the Legal Profession*¹. It is said to be the most influential book on

¹ A T Kronman *The Lost Lawyer – Failing Ideals of the Legal Profession*, Harvard Uni Press, Cambridge, Massachusetts, 1993.



November 2002 - Examinations

the legal profession written in recent decades and the subject of great agitation in the United States. If you have read it, you will understand why. It takes attorneys, advocates, law teachers and judges to task. It contrasts the suggested idealism, self-discipline, public spirit, economy and wisdom of the lawyers of Kronman's early years with the scene he observes today as head of what is probably his nation's finest law school. He begins his book:

"This book is about a crisis in the American legal profession. Its message is that the profession now stands in danger of losing its soul. The crisis is, in essence, a crisis of morale. It is the product of growing doubts about the capacity of a lawyers' life to offer fulfilment to the person who takes it up. Disguised by the material well-being of lawyers, is a spiritual crisis that strikes at the heart of their professional pride."

Kronman considers that, in the hands of today's lawyers, the stewardship of the institutions of law in the United States has been extremely poor. They will not pass on a profession of quality and integrity such as they received from earlier generations. This is how he sums it up:

Attorneys practice law in a different way than did their forebears. The best graduates gravitate to huge and impersonal law firms where they are put in a corner and time charging is the rule. Original ideals of wise and dispassionate advice to clients are increasingly enfeebled by a mercantile attitude which effectively lets the client dictate the course of disputes, without the effective cautionary words which lawyers previously gave. The role of the lawyer in the old days involved compassion for the client's entire predicament, tempered by detachment and also a measure of concern for the public good. The growing ascendancy of the economic view of law and a decline of its self-image as a helping profession, will continue the decline of idealism and professionalism unless this is arrested. Advocates too, according to Kronman, are changing their ways. The old days of complete honesty with the courts and candour and honour in dealing with each other has given way to a more ruthless effort to win cases because larger profits which hang upon them, essential to the lawyer's "business". The client becomes a mere "punter". The lawyer becomes too much caught up in the client's speculation. Whereas, in the past, the advocate would conceive his or her role as being, akin to the judge, the maintenance of detachment, a shift to a business definition of the law embroils the lawyer in the client's cause. It erodes the reality of detachment essential to professionalism. Kronman is equally critical of law schools for fostering the teaching of law (and negating the teaching of legal ethics) in ways that pander to the demands which the market view of legal practice place upon the law schools. But Kronman's most scathing comments are reserved for the judges, especially appellate judges. He says that, in the United States, under the pressure of their case-loads, they have become mere editors of opinion drafts presented to them by their clerks. According to Kronman, very few judges in the United States still draft their own opinions. The consequence is discursive opinion writing, needless dissents and footnote battles as the clerks struggle for their place in the law-books with fuzzy reasoning which reflects a lack of traditional judicial wisdom and "horse sense"².

A reading of Kronman would leave any lawyer dispirited. In fact, it is a profoundly discouraging book, not least because its author cannot offer very much in the way of solution or many causes for optimism. The question which an Australian lawyer asks on putting it down is whether there is evidence in our country (with its somewhat different legal traditions) which makes

² Ibid, 23 quoting Karl Llewellyn.



November 2002 - Examinations

Kronman's analysis applicable to our own circumstances or whether it is, at least, a warning of what may be in store.

To answer this last question I called for the much publicised essay by my colleague, Sir Daryl Dawson "The Legal Services Market"³. It was delivered to the 29th Legal Convention in Brisbane in September 1995. Sir Daryl, himself a graduate of Yale Law School, must have been one of the first in Australia to receive Kronman's book. He acknowledges that the very changes which give rise to many of Kronman's concerns can already be detected in the Australian legal scene. Written soon after the publication of the Sackville Report⁴ and the Justice Statement of the Federal Attorney-General's Department⁵, Justice Dawson's essay disclaims a nostalgic hankering for the past that will not return. To talk of a "national market for legal services" is to conceive of the legal profession in economic terms in a way that would have offended the purists of past generations. But Sir Daryl Dawson accepts that the change of language results from a fundamental change in the ways in which the profession is now being practised in Australia. It is now increasingly conceived of as a "commercial activity", although one of a special kind. Such changes of approach will doubtless improve the accessibility, efficiency and costs of some legal services and even the rewards to some legal practitioners⁶. Anomalously, surveys performed of members of the Australian legal profession have shown very high levels of dissatisfaction with professional life⁷. Sir Dawson lists a number of reasons why this should be so. Many of them are connected with the growing concentration of legal practice in large firms. There is the increasingly narrowing effect of specialisation. There is diminished loyalty of partners to each other and to employed solicitors. There is a loss of objectivity consequent upon the employment of marketing managers to attract profitable clientele, a thing unheard of in the years past. The priority has changed in some places to the making of money rather than the provision of disinterested, yet sympathetic, legal advice. Vivid examples leap to every lawyer's mind:

The family company perhaps controlled by the lawyers' spouse with an exclusive sub-contract to supply photocopying and binders to the legal firm; the teams of lawyers who come in their serried droves to conferences and now to court, where in days gone by if two turned up it was a red-letter day; the lack of prudence in photocopying material, which prudence in earlier times was obligatory because secretaries had to retype only those documents truly necessary to the case. I am told that QC's today are sometimes ranked by the trolleys of binders wheeled to court in their train. To some, a signal of professional esteem is to be a "three-trolley silk". Eventually most of that material (all paid for by the client) ends up, largely undigested, in the lap of the judges.

³ (1965) 5 JJA at 147.

⁴ *Access to Justice – An Action Plan*, Report of the Inquiry by R Sackville, AGPS, 1994.

⁵ Attorney-General's Department (Cth) *Justice Statement*, May 1995.

⁶ D M Dawson, above n 3, at 148.

⁷ Victoria Law Foundation, *Job Satisfaction Survey-Interim Report*, June 1995, cited D M Dawson, above n 3, at 152.



November 2002 - Examinations

Unprofitable work is rebuffed by some as a waste of time. Longer and longer hours must be worked to the cost of quality of the lawyer's life. The social environment of the legal workplace has deteriorated. The work satisfaction which attended much legal practice in the past has been replaced by a "strictly commercial and entrepreneurial approach to the practice of the law"⁸.

Sir Daryl Dawson, like Kronman, could not offer much by way of solution to these trends. He was not even convinced that the one idea which Kronman advanced, viz. working in a right-sized country town, would work in Australia. He observed that "the attractions of a country life, apart from the practice of the law, are not for every lawyer"⁹.

Then, a month ago, I received a third item relevant to these remarks. It was an address of the Chief Justice of the United States of America (Chief Justice William Rehnquist) at the Commencement Ceremony of the Catholic University of America Law School on 25 May 1996. The Chief Justice reminisced about his own first graduation 54 years earlier and about his early faltering efforts to establish a legal practice in Phoenix, Arizona. He acknowledged that lawyering today was probably of a higher quality than in those days and that law firms were "certainly more efficient" today¹⁰. To some extent this is an inevitable product of new technology and new approaches to office management. He also acknowledged that young lawyers today generally make more money than they did in his day, even allowing for inflation. But then he asked the Kronman question:

"If all this is true, why are there so many dissatisfied young lawyers?"¹¹

Like Sir Daryl Dawson, Chief Justice Rehnquist resisted the yearning for the "good old days". He discounted the inevitable criticisms from "old timers" like himself¹². He came at once to the crunch:

"...The practise of law is today a business where once it was a profession...Market capitalism has come to dominate the legal profession in a way that is did not a generation ago. Law firms, whether in 1956 or 1996 have always had to turn a profit if they were to stay in business. But today the profit motive seems to be writ large in a way that it was not in the past. ..Perhaps nowhere in the profession is this tendency more developed than in the emphasis on billable hours. It appears that now clients are insisting on some changes in this form of billing, and perhaps it will not be as dominant in the future as it has been in the past....Hourly billing rewards inefficiency: the work of lawyer A, who spends 100 hours preparing a motion for summary judgment, costs the client 100 times the billing rate; the work of lawyer B whom it takes 200 hours to do the same work costs the client twice as much for the same service."¹³

⁸ D M Dawson, above n 3 at 153.

⁹ *Loc cit.*

¹⁰ W H Rehnquist, Remarks of the Chief Justice, Catholic University School of Law Commencement, 25 May 1996, unpublished at 4.

¹¹ *Loc cit.*

¹² *Ibid* at 5.

¹³ *Id* at 7.



November 2002 - Examinations

In these remarks Chief Justice Rehnquist was merely restating observations frequently made in Australia by Chief Justice Gleeson. The system of billable hours can reward the slow-witted lawyer. It can penalise the experienced, wise and efficient. But Chief Justice Rehnquist, not one generally adverse to the market economy and individual autonomy, described the eroding consequences of converting the legal profession to a business. Large firms simply cannot economically justify taking on small matters; so they end up with only large clients...[and] large cases...[with] an enormous amount of time devoted to relatively uninteresting work...[in cases] very few of [which] actually go to completed trial¹⁴.

There is also a loss of loyalty not only *within* firms but as *between* clients and legal firms. Chief Justice Rehnquist went on:

“Adam Smith, of course, would be pleased with all these developments. There is nothing like market capitalism to bring economic efficiency to any operation. But in the past the idea of a profession was subtly different, in both self-congratulatory respects, and in other more important respects, from that of a business. There was a personal relationship built up among lawyers in the same firm which meant that income producing ability, though a very important factor, was not the sole basis on which the status of a partner depended. It also meant that between clients, and law firms with whom the client had a long-term relationship, there was an element of trust and understanding which may be diminishing today. Clients regarded lawyers as supplying a sort of service different in kind from that supplied by their vendor of office supplies or raw materials. But if the law firm simply counts the number of hours spent and sends a bill for that amount, perhaps there isn't a great difference between the law firm, on the one hand, and the office supply vendor who simply counts the number of pencils furnished and sends a bill for that amount, on the other.”¹⁵

I have now said enough about the problem I wish to address. I have said it through the voices of other distinguished observers of the legal profession: two of them in the United States and one of them in Australia clearly affected by the diagnosis of American direction and the warning signals they present for us.

What should be our reaction to these trends? Will we, in far-away Australia, be immune from the most horrible of these mercantile developments which Chief Justice Rehnquist and Professor Kronman sketch in the United States? Or are we firmly positioned on the same path, urged on by economists and free market economic rationalists, who are contemptuous of the traditions of the legal profession, dismissive of its claim to a special place in the institutions of governments, derisory of its assertions of an aspiration to nobility and contemptuous of all attempts to appeal to non-economic principles as motive forces for a life in the law?

Lessons

In our response to these warnings, can we in Australia, do better than to adopt Kronman's idea of a life in country practice? In my view we can. Such a solution, although available to some, is neither practicable nor universally desirable.

¹⁴ *Id* at 8.

¹⁵ *Id* at 8-9.



November 2002 - Examinations

Avoid nostalgia: First we should, as Justice Dawson warns, avoid tiresome nostalgia for the past. The days when old duffers came to great legal occasions and talked lovingly of the good times when they were young have not entirely passed. It will always be the province of old timers, particularly in the hierarchical, traditionalist and historically conscious occupation such as the law to look to the past with more affection than, say, an aeronautical engineer or a computer salesman. But lawyers too, and their institutions, must move with fast changing times. Technology stimulates rapid change. Other factors are also at work. They include a better educated community; a much expanded legal profession; a less monochrome society which changing values and an era in which every institution, from the Crown down, is under the microscope of critical social scrutiny. In the case of the law, such scrutiny not only reveals the many wrongs in the substantive law which, in the good old days, too many lawyers accepted without complaint¹⁶. It also includes fresh perceptions of the imperfections of the system as presently organised to deliver justice to the ordinary citizen and new insights into the unsatisfactory features of the ethnic and class makeup of the legal profession itself¹⁷.

Avoid exaggeration: Secondly, we should avoid exaggeration of the extent of the change in the ideals of the legal profession, at least in Australia. Large firms, relative to the size of the profession, existed in my youth. What has changed has not been a mere matter of size but the national and even international operations of some firms. These changes are themselves responses to features of globalisation and the development of a national economy which requires a national response from the legal profession. I agree with Justice Dawson that *Street v Queensland Bar Association*¹⁸ probably hastened the belated advent of a national legal profession in Australia. But this was not inevitable and desirable at the present stage of Australia's development. If the practice of law were cocooned in small old-time personalised firms, lawyers would be criticised for failing to respond to national needs and international opportunities. We should not, at least in Australia, stereotype the responses of legal firms or individual practitioners to the growth of size and change of practice. If the supervising courts and other bodies hold fast to the high standards of individual service demanded in the past, some of the worst abuses which have occurred in the United States may be avoided here.

Even in the United States the big firm is not an entire novelty. In 1895 a writer in the *American Lawyer* was complaining:

"[T]he typical law office...is located in a maelstrom of business life...In its appointments and methods of work it resembles a great business concern ...The most successful and eminent at the Bar are the trained advisors of businessmen ... [The Bar] has allowed itself to lose, in large measure, the lofty independence, the genuine learning, the fine sense of professional dignity and honour ... [F]or the past thirty years it has been increasingly contaminated with the spirit of commerce which looks primarily to the financial value and recompense of every undertaking."¹⁹

¹⁶ M D Kirby, Speech on Swearing in as a Justice of the High Court of Australia (1996) 70 ALJ 274, at 276.

¹⁷ D Barker and A Maloney, "Access to Legal Education" cited M D Kirby, "Tomorrow's Lawyers", Address to a Graduation Ceremony of the University of Technology, Sydney, 2 May 1996 at 5.

¹⁸ (1989) 168 CLR 461. See also *Mutual Recognition Act 1993* (Cth).

¹⁹ Editorial in *American Lawyer*, May 1895, at 84-5.



November 2002 - Examinations

I remind you that this was written a hundred years ago. It tends to confirm that in our profession we constantly revisit the controversies of the past. In 1904, in an address to the New York State Bar Association, a lawyer observed:

“The law business is not what is used to be. The expression law business’ itself marks a certain change. This business side of the profession has assumed paramount importance and the profits of the business are our most practical concern.”²⁰

If all of this sounds familiar, it should make us pause before we accept, at face value, all of the criticisms directed at current conditions, at least in Australia.

Change is inevitable: Thirdly, we should accept that no institution, however gorgeous, is impervious to change. This is least of all so in a profession which repeatedly boasts of its adaptability and which rests upon the foundation of the common law which is truly one of history’s success stories in its capacity to adapt (sometimes quite rapidly) to changing times. Many sole practitioners continue to make a living in the law in Australia, especially in suburban and country districts: although apparently at levels lower than in the past. Organised legal aid, the growth of the institution of Public Defenders, combined with the decision of the High Court in *Dietrich v The Queen*²¹ have all stimulated, to some extent, a flow of public funds to individual solicitors, small firms and junior members of the Bar. True, this is apparently endangered in the present time of budget cuts. Further, the concentration on legal aid in criminal cases may be criticised when other important civil litigation, eg in family law cases, is considered. However, legal aid is a partial antidote at work in the Australian legal profession, to combat the worst excesses of employment concentration noted in United States writing. This should make us careful before we assume that we are necessarily on exactly the same track. To the extent that we are advancing in the same general direction, the forces of economics, technology and consumer awareness probably stimulate the changes and make many of them inevitable.

4. Change for the better: Fourthly, we lawyers should not be adverse to acknowledging that many changes, which alter somewhat the character and activities of the legal profession, often forced upon it reluctantly, have been for the better. Clinging to old ways, just because they are old, is not very rational, least of all in a profession which boasts of being “learned”. Sometimes we have to unlearn bad old habits which have outlived whatever usefulness they may have had such as the two counsel or the two-thirds fee rule amongst barristers; or the total ban on advertising; or the prohibition on the use of paralegals or of joint practices with other professionals. Sometimes too we have had to respond to the call for external security of the way we handle public and client complaints against members of the profession. One does not have to wholly embrace Richard Ackland’s view that lawyers are members of the Broederbond²², or criticism from within that the Bar is simply a cartel, to accept that external perceptions are actually often useful and legitimate. Lord Justice Staughton in England recently remarked that some of the profession’s ethical rules appeared to have been simply protectionist and not at all

²⁰ E P White, “Changed Conditions for the Practise of the Law” in *American Lawyer*, February 1904, at 52.

²¹ (1992) 177 CLR at 292. Cf *Attorney-General for New South Wales v Milat* (1995) 37 NSWLR 370 (CA).

²² R Ackland, “On a Silk Road to Status and Money” in *Australian Financial Review*, 31 May 1996, at 33.



November 2002 - Examinations

concerned with the public interest or the proper administration of justice.²³ We can now see that at least some of the ethical truisms of the past were less concerned with ensuring right behaviour to clients than with gathering and retaining clients from the ambitions of competitors or stamping a very high degree of conformity on professional behaviour and services²⁴. Mr Bennett, President of the Australian and New South Wales Bar Associations, has accepted that “some beneficial reforms to the provision of legal services have taken place in recent years.”²⁵ If this may seem to some to be an uncharacteristically muted, grudging, even reluctant concession, it is fair to observe that it is one that would probably not have been offered by many of his predecessors. It is still probably withheld by one of them, glowering gloomily in his chambers in the New South Wales Court of Appeal²⁶. But, alas, for him, the smallest change is anathema and *Jarndyce v Jarndyce* was an interesting equity case which took no more than an hour or so longer than it should have.

If changes, resisted at the time, are now seen to have been “beneficial reforms” members of the legal profession must keep their minds open to the possibility that other changes, urged today, will in due course come to be seen as beneficial to the ultimate objective of practising lawyers, which is to ensure that as many people as possible secure accurate advice and competent representation.²⁷

Legal idealism endures: Fifthly, it should be acknowledged, both within the legal profession and by its critics, that there remain many, possibly a majority, who are as committed to the ideals of service and dispassionate advice as existed in times gone by. One United States response to Kronman’s book was written by Mary Anne Glendon called *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society*²⁸. Glendon admits that, with more than 800,000 lawyers, the United States has become the most intensely lawyered society the world has ever seen. She concedes that a variety of beliefs and ideals are vying for dominance within the law and hence in the highly law-dependent culture of the United States. But she points to the recent heroes of the United States judicial and legal scenes, notably Archibald Cox, Judge John Sirica and the unanimous opinion of the Supreme Court which ultimately demonstrated that even the President of the United States, with the power of life and death over millions, was subject to the law in a society ruled by law²⁹. We have our heroes and role models in Australia. Fine leaders of the bar who daily accept the call to *pro bono* work, just

²³ *R v Visitors to the Inns of Court* [1994] QB 1 (CA) at 63.

²⁴ R Cranston (ed) *Legal Ethics and Professional Responsibility*, Clarendon, Oxford, 1995 at 1 citing B Abel-Smith and R Stevens, *Lawyers and the Courts* 1967, at 138-9, 160-1.

²⁵ D Bennett, “Legal Debate Delays Reform”, Letter, *Australian Financial Review*, 21 March 1996 at 16.

²⁶ Meagher JA.

²⁷ F G Brennan, Occasional Address to Law Graduation Ceremony, University of Queensland, 4 June 1996, at 5.

²⁸ Farrar, Straus and Giroux, New York, 1994.

²⁹ *United States v Nixon* 418 US 683 (1975). On the other hand, it is worth noting, as Derek Morgan “Doctoring Legal Ethics: Studies in Irony” in Cranston (ed) (above n 24), points out that virtually all of the main actors in Watergate were lawyers: President Richard Nixon; Vice-President Spiro Agnew; Attorney-General John Mitchell as well as G Gordon Liddy, John Dean, Charles Colson, Robert Mardian, Herbert Kalmbach, John Erlichman etc.



November 2002 - Examinations

as their predecessors did in earlier times. Women lawyers who blaze a trail for equal opportunity in the law. Aboriginal lawyers, now exemplified by Judge Robert Bellear, who will help to change two centuries of attitudes. Gay lawyers who courageously break down ancient stereotypes and refuse to accept prejudice from society, least of all from their colleagues. Councils for Civil Liberties and endless professional associations connected with the law and law reform such as the International Commission of Jurists, the International Bar Association, Amnesty and a myriad of other groups. Who says lawyers have wholly lost their idealism? Some may have. But obviously we mix in different circles, for many have not.

Issues ripe for attention: Sixthly, this said, some of the issues of professionalism which have been identified in the United States and Australia are certainly ripe for attention. Many of them derive from the growth of very large firms with their assignment of unrewarding work to the best and brightest graduates. Such firms themselves must address the growing evidence of lawyer dissatisfaction with their life and work. In part, they do by encouraging a little *pro bono* work and engagement in professional bodies. But unless a culture of loyalty and self-respect can be restored, the mercantile values of ruthless self-interest will permeate legal practice in Australia just as they have come to do in the United States. This will be to the destruction of the ethos of firm loyalty and client loyalty that has existed until now. Such loyalty had to be earned by reciprocal fidelity, honesty and dispassion. At the launch of her book *Legal Profiles*, containing client approbation of big firms in Australia, Andrea Warnecke reportedly said that the qualities of any good lawyer today include how much fast food they eat, the lack of a good tan and non-existence of erotic dreams.³⁰ Such deprivations are not good for lawyers. Australian lawyers have received a warning.

Teaching legal ethics: Seventhly, the revival of the public debate about what legal professional ethics should be, and the heart-searching within the legal profession itself, signaled by this occasion, make it timely to urge an intensified interest in law schools in the teaching of legal ethics. This is not just a rudimentary training in the provisions of the local professional statute, rules of etiquette and, where applicable, book-keeping and trust account requirements, offered in a few lectures thrown in at the end of the law course. It is a matter of infusing all law teaching with a consideration of the ethical quandaries that can be presented to lawyers in the course of their professional lives. Only in this way will law schools provide students with guidance on the professional responsibility and on the ethical issues they will face as they enter the profession.³¹ Once commentator has remarked, rightly in my view:

“[Law teachers] cannot avoid teaching ethics. By the very act of teaching, law teachers embody lawyering and the conduct of legal professionals. We create images of law and lawyering when we teach doctrine through cases and hypotheticals”³².

Professor Ross Cranston in his new book *Legal Ethics and Professional Responsibility*³³ accepts that the technical rules can be left to the practice course but asserts that:

³⁰ Quoted in R Ackland, “Glimpse of Vanity in Logies for Lawyers” in *Australian Financial Review*, 3 May 1996 at 3.

³¹ Cranston, above n 24, at 30.

³² C Menkel-Meadow “Can a Law Teacher Avoid Teaching Legal Ethics” (1991) 41 *J Leg Ed* 3.

³³ Cranston, above n 24.



November 2002 - Examinations

“...all law teachers have a responsibility to give attention to the ethical under-pinnings of legal practice. We have a responsibility to sensitise students to the ethical problems they will face as practitioners to provide them with some assistance in the task of resolving these problems, and to expose them to wider issues such as the unmet need for legal services”³⁴

Need for curial vigilance: Eighthly, the courts and bodies, supervising professional conduct, also have a duty to uphold high standards of honest, faithful, diligent, competent, and dispassionate legal advice and representation. In Australia, the courts rarely become involved in professional discipline except in the most serious cases. The establishment of the Legal Services Commissioner's office in New South Wales has seen an apparently significant increase in the number of complaints against lawyers. Whilst the report elicited some criticism about the statistics and approach of the Commissioner, the fact of an increase in complaints seems indisputable³⁵. It appears to bear out the conclusion that many clients and citizens feel more comfortable with the notion of complaining to a body unencumbered with representational and lobbying functions for the legal profession. This may actually be hard on the professional bodies which are often unyielding in their pursuit of a professional colleague accused of misconduct. But it seems to be the fact. Such professional bodies should look on external guardians not as enemies to be traduced but as supporters of the high standards which are vital if they are to earn the privileged position which the legal profession, at least, still enjoys in a society such as ours. It may be hoped that professional bodies and courts, faced with the variety of complaints made against legal practitioners, will have the imagination to devise remedies suitable to the wrongs when found. Dealing with defalcation, criminal offences and trust fund abuses may be easy. Over-charging may require new responses that involve a purgative obligation of honorary legal service to the poor or disadvantaged³⁶. Rudeness and non-communication may warrant a session of mediation with the complainant as the New South Wales Attorney-General has proposed. But how is incompetence, ignorance of the law and simple failure to attend to a case to be redressed for the protection of the clients who come after? Virtually every second Monday in the Court of Appeal, in motions, I saw shocking cases of practitioner neglect which, in my own youth, would have been brusquely refused relief. My usual solution was to provide relief but to refer the papers to the professional body and order the practitioner, not the party, to pay the costs. Rarely, if ever, did it seem appropriate to punish the client.

Gather data: Ninthly, we should be encouraging the gathering and analysis of data on ethical defaults so that we can derive from them lessons about the teaching of law and ethics, the provision of new professional regulations and the provision of example and instruction from the leaders of the legal profession. This is one good result flowing from the establishment of the office of the Legal Services Commissioner in New South Wales. Statistics are now being gathered, according to the formulae in the Commissioner's Act. They are published beyond the

³⁴ *Ibid* at 30.

³⁵ New South Wales Legal Services Commissioner, *Report*, 1994-5 noted *Australian Financial Review*, 27 March 1996 at 17.

³⁶ Cf *Law Society of New South Wales v Foreman* (1991) 24 NSWLR at 238 (CA); (1992) 34 NSWLR 408 (CA), at 419-420.



November 2002 - Examinations

legal profession to the community at large. A breakdown of the complaints against legal practitioners received by the Commissioner in the year 1994-5 shows³⁷:

The first step in law reform, indeed of any rational discussion on policy, is to establish the facts. All too often the debates about declining standards and problem areas have been carried on at a level of generality which defies specific well targeted responses. When the legal profession was smaller and everyone in a given locality knew everyone else, constraints and inhibitions were available that are simply not apt for the larger, more diverse, less homogenous profession and society of today. That is why new institutions, more rules and better teaching of legal ethics are essential. Reliance on the "good old ways" will simply not work for the future.

Spiritual values: Finally there is a deeper malaise which I believe underlines the problem revealed by Professor Kronman, Justice Dawson and Chief Justice Rehnquist. It is difficult to speak of it. In a secular society we feel rather uncomfortable in doing so, lest our words should be misinterpreted as inappropriate, hypocritical or self-righteous. I only mention it because I feel I must. I refer to the void which is left in many lives by the absence of any spiritual construct and by the increasingly general rejection of any spiritual dimension whatever to life. By a life in the law that has no reflection on the amazing fact of existence and its brevity. By a life in the law which is content with an annual trip to the Law Service at the beginning of Law Term or which even misses that, as the declining congregations witness a rising generation with "better things to do" on the first day of Term. Until now a spiritual dimension, provided to Western societies (including those of Britain, the United States of America and Australia) a framework of beliefs which have been important to sustaining and reinforcing ethical principles³⁸. The Judeo-Christian-Islamic belief in the sacredness of each individual human life, bearing a divine spark, provided an ultimate foundation for self-control and for respect for others. That foundation is certainly one of the *stimuli* to the global movement for universal human rights which continues after the spiritual sources have been rejected or abandoned in many societies³⁹.

In the course of this century we have seen an economy change, still going on. On a monument at the end of the park not far from this place, recording some of those who fell in a distant war, are the three words which expressed the bedrock of an earlier time when everything seemed more certain "For our God, King and country". Now God is doubted by many. Agnosticism is, according to the Australian census, the fastest growing (non) religious group. The King or his successor are denigrated in ways that would have been unthinkable on that sunny day in 1954 when the Queen first stepped ashore in Farm Cove, Sydney, not far away. And even country is rejected by many, except when a sporting event lets loose the contemporary cries of warlike nationalism. All forms of loyalty, within and outside the profession, seem dismissed as hopelessly outdated and even mildly ridiculous.

In a time when so many fundamentals are questioned, doubted, even rejected, it is hardly surprising that the ethics of the legal profession should also be doubted by some of its members

³⁷ The Table was reproduced in the Australian Financial Review, 27 March 1996 at 17.

³⁸ For some of the writer's view see *Kotowiz v The Law Society of New South Wales, Court of Appeal*, unreported, 7 August 1987, referred to in *Foreman* above 34 NSWLR 408, at 419.

³⁹ J E Bickenbach, "The Redemption of the Moral Mandate of the Profession of Law" (1996) 9 *Canadian J Law & Jurisprudence* 51.



November 2002 - Examinations

and attacked by its critics. It is easier to adopt a purely economic or mercantile view of the law if you have no concept of the nobility of the search for individual justice, of the essential dignity of each human being and the vital necessity of providing the law's protection, particularly to minorities, those who are hated, even demonised, and reviled. Without some kind of spiritual foundation for our society we can do little else than to reach back into the collective memory of our religious past or to rely on consensus declarations as to contemporary human values.

Conclusions

The challenge before the legal profession in Australia today is to resolve the basic paradoxes which it faces. To adapt to changing social values and revolutionary technology. To reorganise itself in such a way as to provide more effective, real and affordable access to legal advice and representation by ordinary citizens. To preserve and, where necessary, to defend the best of the old rules requiring honesty, fidelity, loyalty, diligence, competence and dispassion in the service of clients above mere self-interest and, specifically, above commercial self-advantage. Yet to move with the changing direction of legal services in a global and national market. To adapt to the growth and changing composition of our society and of its legal profession: beyond the monochrome club of Anglo Celtic males. And to mould itself to the fast changing content and complexity of substantive and procedural law. It is quite a tall order. Are we up to it?

The hope must be that some of the old-fashioned notions of selfless and faithful service will survive even these changing times. In the void left by the undoubted decline of belief in fundamentals, we must hope that a new foothold for idealism and selflessness will be found. Despite the beliefs of some of its critics, the Australian legal profession's guiding principles will not be found in economics alone. Still less will it be found in a dogma of free market competition or the arid language of the *Trade Practices Act*⁴⁰. Economics simply cannot explain the will to do justice, to be dutiful to courts and honest and dispassionate to clients. Modern economic theory, now put into widespread practice, has not done such a good job in terms of social engineering. The large pool of long-term unemployed, the rise in crime, drug use and increased stress within personal relationships all suggest the failure of unbridled economic rationalism as an alternative foundation principle for society. Indeed, in place of the old mateship of Australian society we see the steady growth of an underclass with grave dangers for social stability and traditional egalitarianism.

The great debate for lawyers in the coming century is not whether a separate *cardre* of advocates will survive. It is not even whether competition and consumer pressure will improve the delivery of some legal services. Of course they will. It is whether the ascendancy of economics, competition and technology, unrestrained, will snuff out what is left of the nobility of the legal calling and the idealism of those who are attracted to its service. We must certainly all hope that the basic ideal of the legal profession, as one of faithful service beyond pure economic self-interest, will survive. But whether it survives or not is up to us, the lawyers of today. We should use an occasion such as this to reflect upon the problems that we can see, looming, and to examine the sources of our deepest concerns. And then we should do what we can, whilst moving with the times, to revive and reinforce the best of the old professional ideals, to teach them rigorously and insistently to new recruits and to enforce them strictly where there is default. We cannot say that we have not been warned.

⁴⁰ See *Prestia v Aknar and Ors Supreme Court of New South Wales* (Santow J), unreported, 3 June 1996.