WOMEN LAWYERS' ASSOCIATION OF NEW SOUTH WALES

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THE CHANGING PARADIGM

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In speaking to a group of women lawyers about the changing paradigm of a lawyer, I mean to be strictly gender-neutral. There is, however, a reason why the subject ought to be of special interest to women.

One concern of your Association is access of women to the legal profession. There are many women who now play an active role in the affairs of the two major professional associations in this State. The current President of the Law Society is a woman. Of the 21 members of the Council of the Law Society, 9 are women. It is likely that the next President of the New South Wales Bar Association will be a woman. Six members of the Bar Council are women. One of them is my daughter. I assume that they, and many other women lawyers, wish to understand, and influence, changes that are taking place in the nature of the profession to which they are seeking greater access. The group in which you

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seek equitable participation is changing, and women should seek to be part of that process of change. It would be an injustice if, by the time women attain a fully equal opportunity to engage in the work and life of the legal profession, they find that all they have achieved is the right of any citizen to carry on a business.

What will it mean to be a lawyer twenty years from now? What will be the nature, and structure, of the profession?

The model of the lawyer as a legal practitioner, barrister or solicitor, in private practice, has never been completely representative, and is becoming less representative. Law teachers, for example, have greatly increased in number and professional importance in recent years. When I attended Sydney University Law School in the late 50's and early 60's, it was the only law school in New South Wales, and most of the teaching was done by part-time lecturers, who were either judges or practitioners. I doubt that there would have been a dozen law teachers in New South Wales. Consider, now, the number of universities and other institutions throughout Australia which teach law or legal subjects, and the number of teachers involved in that form of professional activity. Again, it has always been the case that lawyers have worked in government departments, or as employees of corporations, including banks, insurance companies and many other forms of enterprise. Their numbers have increased greatly.

There are many people, including some highly qualified and skilled in the law, who, although they have law degrees, would describe themselves primarily as members of other vocational groups: such as accountants, merchant bankers, financial advisers, tax consultants, parliamentarians, or trade union officials.

Even so, when most people think of the legal profession, they think of the lawyer in private practice as a barrister or solicitor. For reasons I am about to examine, that image may come to require adjustment.

What is it that distinguishes lawyers from other occupational groups, and justifies public perception of them, and their perception of themselves, as members of a profession, in the narrower sense of that term? Their qualifications show that they have undergone a course of study in an organised body of specialist knowledge, but in that respect they are no different from many other groups in the community. They are required to observe certain standards of behaviour, and are subject to systematic discipline, but so are stockbrokers and racehorse trainers.

Lawyers are given, by statute, a monopoly upon the right to provide, for reward, certain kinds of service to the public, but there is a question as to what should be scope of that monopoly. Many of the services provided by legal practitioners are also provided by the members of other occupational groups, such as accountants,

tax agents, conveyancers, real estate agents, and consultants of various kinds. In many rural areas, it is not uncommon for a local solicitor to prepare income tax returns for clients; a task which might be, and often is, performed with equal facility by an accountant. In some parts of Australia it is at least as common for conveyancers as for lawyers to attend to what is involved in passing or taking title upon the sale of real estate. Drafting a commercial contract, or organising a business structure, or planning and executing a corporate takeover, might involve the combined skills of a number of people, including a lawyer. In truth, it is not easy to identify any form of service provided by lawyers that cannot be, and is not, provided by non-lawyers, with one important exception. The exception is the provision of services related to the administration of justice and, in particular, legal representation in civil and criminal court proceedings. That has always been the core activity of the legal profession. The profession needs to be reminded of that, from time to time. It is only as agents in the administration of justice that lawyers can claim to be different from the other groups I had mentioned. That is the distinctive, and definitive, feature of their calling.

This should not come as a surprise to anyone who is familiar with a history of the legal profession. Originally, barristers were those advocates to whom the courts in England were willing to give audience. In exchange for this privilege, the courts controlled their education and their discipline. To this day, barristers in London are

organized in Inns of Court. Attorneys and solicitors were the people who were licensed by the Courts of Kings Bench and Chancery to attend to the written work necessarily associated with the presentation of cases in those courts. This division of function is not peculiar to the common law system. It is reflected to this day in France in the distinction between the avocat and the avoué.

Some people are surprised to learn that lawyers originally saw it as beneath their dignity to charge for their services. It is only in recent years, indeed, since I ceased to practise at the New South Wales Bar, that barristers in this State have had the legal capacity to enter into binding contractual arrangements in relation to their fees. Until then, barristers could not sue for their fees. This was an anachronism, but the underlying idea was of more than merely historical interest. The defining characteristic of a barrister or a solicitor was that he or she was an officer of the court, admitted by the court to participate in the administration of justice, and owing obligations to the court which overrode the obligations to a particular client, or considerations of self interest. In each Australian State, the Supreme Court of the State exercised formal, and ultimate, control over the education and discipline of legal practitioners, and their right to appear in other courts, and in other jurisdictions, existed by virtue of their admission as barristers or solicitors of the Supreme Court of their home state. This consideration is still reflected in the practice of the High Court of Australia in relation to the formal dress worn by advocates in that

court. There is now some variety in relation to court dress in the various jurisdictions. We require advocates who appear in the High Court to follow the dress requirements of the Supreme Court of the State or Territory in which they were primarily admitted to practise, regardless of the jurisdiction from which an appeal comes to us. This results in a superficial lack of uniformity, but it is based upon an underlying consistency of principle. We regard that principle as important. It defines the relationship between members of the Australian legal profession and the courts of this nation. They are officers of the courts which admitted them to practice.

The point may be emphasised by considering a principle of law which treats confidential communications between lawyers and their clients differently from communications between other professional or business people and their clients or customers. The principle is known to the common law as legal professional privilege: a somewhat misleading description, as it suggests, erroneously, that the privilege is that of the lawyer. The 1995 *Evidence Act* describes it more accurately as client legal privilege. It marks out a very significant distinction between the role of lawyers and that of other advisers. The origin of the distinction is the part played by lawyers, as officers of the court, in the administration of justice.

If the legal profession were to cut itself off from its association with the courts, and the administration of justice, then the profession would lose its defining characteristic.

The role of a lawyer as an officer of a court is the primary basis upon which lawyers can claim to share in the principal attribute which distinguishes a profession from a business. In *Shapero v Kentucky Bar Association* (1988) 486 US 466 at 488, Justice Sandra Day O'Connor of the United States Supreme Court said:

> "One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market."

The source of the ethical obligations of a lawyer is the role he or she plays in the administration of justice. These obligations, in a variety of ways, are supposed to temper their selfish pursuit of economic success. Current developments in relation to professional behaviour, discipline and organisation, driven to a large extent by the demands of competition policy, present some challenges to this theory.

We are about to enter an era of multi-disciplinary practices and of corporatisation. This has been accepted as government policy, and as the policy of a number of the major professional

associations. Some issues of detail remain unresolved. It is not my purpose to seek to argue against this policy, or to comment on the unresolved issues. My object, however, is to draw attention to the challenges the policy presents, in the hope that ways may be found of addressing them.

Consider, for example, the relationship between a corporatised, multi-disciplinary, legal practice, and what was referred to earlier as the paradigm of the private legal practitioner. In such an organisation, a majority, perhaps all, of the directors and the shareholders, may be non-lawyers. The corporation may employ lawyers, accountants, financial advisers, and a range of other people exercising various skills. Presumably, in accordance with standard doctrines of company law, the duty of the directors of such a corporation will be to act for the benefit of the shareholders. Presumably, in accordance with accepted principles of employment law, the duties of the employees will be to obey the lawful instructions given to them and to act faithfully to serve the corporation.

Let me return to the observation of Justice O'Connor. She spoke of an obligation to temper the pursuit of economic success by adhering to standards of conduct that are not capable of being enforced either by legal compulsion or through the discipline of the market. This she described as a distinguishing feature of professionalism. What are the arrangements that will ensure, in the

corporate context I have just described, the observance by the lawyers employed by the corporation of that fundamental obligation? What is a typical commercial corporation, under its Memorandum and Articles of Association, capable of pursuing, except economic success?

In discussion of this subject a formula that is commonly used is that the professional associations will continue to regulate the professional conduct of the lawyers in question, without seeking to regulate the business behaviour of the entity by which they are employed. If this a reference to negative professional obligations, such as not stealing trust funds, not permitting conflicts of interest to arise, or not breaching obligations of confidentiality, then I understand, I think, how it will work. But it is far from a complete description of the ethical obligations of a lawyer to say that he or she must not steal a client's money, or breach confidentiality, or permit conflicts of interest to arise. What about the fundamental obligation, referred to by Justice O'Connor, without which lawyers are not entitled to regard themselves as members of the profession? How does a person, in the service of a multi disciplinary business corporation, temper the pursuit of economic success?

The professional associations, if they are to preserve the characteristic of professionalism, will need to ensure that the standards of behaviour they seek to impose and enforce will

include such matters as not encouraging fruitless or merely tactical litigation, however profitable it may be to the corporate employer, accepting an obligation to undertake a reasonable share of pro bono work, and insisting uupon full observance of duties to the court, as well as to clients, in all aspects of the administration of justice. Of course, there are already lawyers whose observance of professional obligations of this kind is, to say the least, imperfect, but that is a reason for emphasising the obligations, not for relaxing them.

One possible outcome is that the essential legal profession will contract in size. Perhaps there will develop a gap between those lawyers, barristers or solicitors, whose work is principally concerned with the administration of justice, and other legally skilled persons whose principal expertise is in areas more readily compatible with the services of accountants or merchant bankers, or the business practices of entrepreneurs. Perhaps the new multi disciplinary partnerships and corporations will find that their structures are difficult to adapt to the provision of some aspects of legal services; especially those concerned with the conduct of litigation. Perhaps courts will find that they need to assert their control over lawyers in ways that may come as a surprise to some of their more entrepreneurial associates. The competitive forces to which the profession is responding may ultimately force a reconsideration of the nature of the profession.

On the other hand, as things work out in practice, there may be less to these proposed changes than meets the eye.

It may be that lawyers who work for multi disciplinary corporations will be in a position not much different from that of lawyers who now work for banks, or are companies, or insurers. It may also be that most corporations concerned with the provision of legal services will, in practice, not be materially different from the legal partnerships with which we are familiar. Lawyers may simply have an opportunity to adopt more flexible, and advantageous, operating structures. Medical practitioners have been doing this for decades, and, with the significant exception of diagnostic services, (a capital intensive activity), it does not seem to have made much difference to the relationship between the profession and the public. It is not easy to predict the future shape of the legal profession, or the extent of practical change that will occur.

A popular phrase now employed in this context is "harmonisation of commercialism and professionalism". I would wish to reserve my judgment on that kind of harmonisation until I see it at work.

There are changes taking place in the legal profession, and you had better make sure you, or your representatives, are working to influence their direction. Women lawyers who value the idea of a profession have a large stake in that.