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Swapping Ideas: The Academy, the Judiciary and the Profession

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Introduction

The Rule of Law is an essential element of the infrastructure of Australian society. It does not guarantee social justice but at the level of the Constitution it supports the distribution of governmental powers – legislative, executive and judicial – within the federation. It supports limits on the power of the State over the citizen. More broadly, it provides a framework within which people can live in relative security and yet enjoy the freedom necessary for individuals and groups to seek happiness, give expression to their skills and talents and develop their potential and benefit the community in a variety of ways.

Like most infrastructure projects the Rule of Law requires continual maintenance, upkeep and renovation. This applies to the ways in which laws are conceived and drafted, their comprehensibility, their practical effects, their adequacy to meet the purposes for which they are framed and their interaction with each other and with the great body of unwritten or judge-made law.

Working upon and within that infrastructure, observing and theorising about it, are legal academics, judges, legal practitioners and the great variety of other law

professionals. They represent diverse, yet overlapping groups, with a variety of different occupational and organisational cultures, world views, purposes and methodologies. The existence of differences of outlook and approach between some branches of the legal community was highlighted by former Chief Justice Gleeson in 2002 when he launched the Oxford Companion to the High Court of Australia. He referred to some of the impressions he had formed from reading that book, which is the work of some 225 different authors. He said:

"What is fascinating is the contrast between the approaches of different authors to similar topics. There is a good deal of overlap between the various subjects addressed in the book, and I have enjoyed comparing what different people have had to say about the same, or closely related topic. Some of the authors are law teachers and others are legal practitioners. Some are both. One thing that struck me is the gulf that exists between the view of legal institutions and of the Court from within the Universities, and the view from within the practising legal profession ... I do not suggest that one point of view is more or less valid than the other. Each side has much to learn from the other. But I wonder if people on either side of the gulf realise how wide and deep it is. It suggests to me the need for some bridge-building."¹

The Australian Academy of Law (the Academy) was established to bring together elements of what are referred to in its Constitution as "the legal community". The purpose of that bringing together is expressed in the substantive objects of the Academy. They include the promotion of excellence in legal scholarship, research, education, practice, the administration of justice, law reform, ethical conduct and professional responsibility and enhancement of the understanding and the observance of the Rule of Law. To those ends the Academy seeks:

"To provide a forum for cooperation, collaboration, constructive debate, and the effective interchange of views amongst all branches of the legal community on all matters relating to the achievement of these objects."

1 Gleeson AM, The Oxford Companion to the High Court of Australia Launch, Canberra, 13 February 2002, <http://www.hcourt.gov.au/speeches/cj/cj-oxford.htm> viewed 4 December 2008.

In considering how best to pursue that objective some preliminary questions must be asked. One is about the nature and extent of differences between the different elements of "the legal community". Another is about the extent to which cooperation, collaboration, constructive debate and interchange of views already occur. Framing these questions adequately and obtaining useful answers to them may not be trivial exercises. Nor may they be quick. But answers, even if only provisional, may assist the Academy in determining its future directions. There is implicit in this proposition a proposal for some form of inquiry even if it only be, to begin with, the assembly of relevant literature and research within Australia. A consideration of similar phenomena in other jurisdictions, their trends and responses to them, may also assist in helping the Academy to define its future directions.

In the short term the Academy should be looking to things it can do in a practical way to foster and encourage cooperation, collaboration, constructive debate and the effective interchange of views.

Before considering what particular things the Academy can do in pursuit of its "forum" objective in this regard, it is useful to review some of the literature in the other jurisdictions where perceptions have existed of gaps between legal academics, practitioners and judges to the detriment of society². In this respect the United States and the United Kingdom are instructive.

The United States

In 1992, Judge Harry T Edwards published an influential article in the Michigan Law Review entitled "The Growing Disjunction between Legal Education

2 In this connection I acknowledge the considerable assistance derived from a research memorandum prepared by Lara Rabiee and Shane Taylor of the Federal Court Research Directorate.

and the Legal Profession"³. He argued that law schools were out of touch with the practice of law, producing impractical scholarship and failing to impart to students the ethics, values and respect for the profession necessary to maintain the professionalism of law practice. He said:

"I fear that our law schools and law firms are moving in opposite directions. The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use ... But many law schools - especially the so-called "elite" ones - have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy."⁴

The Edwards' article elicited much commentary⁵. In August 1993 an entire Symposium edition of the Michigan Law Review was devoted to it.

In the same year that the Edwards' article was published, the American Bar Association set up a taskforce chaired by Robert MacCrate which reported under the title "Taskforce on Law Schools and the Profession: Narrowing the Gap". The report highlighted the perceived gap between academia and legal practice. The Bar was frustrated with law graduates who were unable to draft contracts or to write well and who were unfamiliar with court procedure. Academic scholarship was seen by practitioners as increasingly irrelevant to their day-to-day concerns particularly when compared with the great treatises of an earlier era. The report found, however, that law schools were undeserving of the criticism. They could not reasonably be expected to shoulder the task of converting their students into full-fledged lawyers licensed to handle legal matters. While recommending improvements in legal education and particularly increased instruction in the skills and values necessary to the profession, that education was a life-long process to be shouldered by the entire profession. The

3 (1992) 91 Mich L Rev 34.

4 (1992) 91 Mich L Rev 34 at 34.

5 Westlaw shows 603 secondary source citations to Judge Edwards' article.

Edwards' article and the MacCrate Report, not surprisingly, elicited responses from academia defending the teaching of theory and arguing that legal theory has both instrumental value in better lawyering and intrinsic value as necessary to an understanding of the law⁶.

Another typical complaint about legal education and legal scholarship in the law reviews appeared in the *Virginia Law Review* in 1995. The author lamented that law schools used to have "a decidedly professional character" and said:

"This orientation - the primacy of law as a subject of study - kept the law schools close to the materials of the profession (such as cases, statutes, *legal* history, *legal* philosophy), and also kept the schools close to the business of solving the most persistent and vexing problems faced by the profession."⁷ [Emphasis in original]

There was a tendency for academics to write for each other rather than the profession. This, it was said, had led to a fraying of once strong bonds between academia and the bar.

An empirical study by Saks, Larsen and Hodne of law review articles published in 1960 and 1985, found a shift in scholarship in the "elite" journals towards topics of greater utility to academics than to practitioners and authored increasingly by academics as opposed to judges and lawyers⁸. The authors noted, however, that because the overall number of journals and articles had significantly increased and because lower tier journals continued to publish articles for practitioners, there was no

6 Coleman JL, "Legal Theory and Practice" (1995) 83 *Geo LJ* 2579.

7 Lilly GC "Law Schools without Lawyers? Winds of Change in Legal Education" (1995) 81 *Virginia Law Review* 1421 at 1458.

8 Saks MJ, Larsen H and Hodne CJ, "Is there a growing gap among law, law practice, and legal scholarship?: A systematic comparison of law review articles one generation apart" (1996) 30 *Suffolk UL Rev* 353 at 374.

shortage of materials from the academy which would be of relevance to judges and lawyers.

Thomas Ulen, writing in 2004, acknowledged that the transition to a more "scientific" method of examining the law, as exemplified by the law and economics movement, had created a distance between the academy and practitioners. A doctrinal scholar might strive to have an impact on judges and lawyers and ultimately to reform the law. However, scholars applying a scientific approach were more likely to be writing for one another than for practitioners and judges. Citations of one's work by other scholars now figure much more prominently in faculty evaluations than citation to that work by courts⁹.

In 2007 the Carnegie Foundation for the Advancement of Teaching published a book entitled "Educating Lawyers: Preparation for the Profession of Law" edited by William M Sullivan and others. In the book it was noted that calls for greater skills training in law schools did not anticipate its resource intensity nor were they necessarily based on a clear pedagogy. Nevertheless the report concluded that the many efforts to tie legal education to practice had "coalesced into a wider pattern"¹⁰.

US literature has not focussed solely on the rights and wrongs of the academy. It has also discussed concerning trends within the practising profession and, in particular, a perceived decline of professionalism. The term "professionalism" was defined by Roscoe Pound as "a group - pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a

9 Ulen TS, "The Unexpected Guest: Law and Economics, Law and Other Cognate Disciplines, and the Future of Legal Scholarship (2004) 79 Chi-Kent L Rev 403 at 414.

10 Sullivan WM and Others: *Educating Lawyers: Preparation for the Profession of Law* at 94.

means of livelihood"¹¹. The decline in professionalism has been attributed to such matters as lawyers' preoccupation with money-making over participation in civic life¹², declining ethical behaviour as evidenced by scandals such as Watergate¹³, and a perception that lawyers had become increasingly uncivil in litigation¹⁴, misusing civil procedure, and advertising their services in unseemly ways¹⁵. Some writers have held law firms partly responsible for this perceived decline in professionalism referring to their commercial character and preoccupation with the bottom line which has decreased the emphasis on ethics training leaving law schools to fill the gap¹⁶. The American Bar Association's concern about the need to educate for professionalism was reflected in its 1996 Report of the Professionalism Committee "Teaching and Learning Professionalism".

Not surprisingly increased interaction and mobility between the branches of the legal community has been proposed in the United States as a way of overcoming the gap between the legal academy and practitioners and the perceived decline in professionalism.

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- 11 Weidner DJ "The Common Quest for Professionalism" (2004) 78-MAR Fla BJ 18 at 18 citing Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (1953, West Publishing) at 5.
 - 12 Kessler DA, "Professional Asphyxiation: Why the Legal Profession is Gasping for Breath" (1997) 10 Geo J Legal Ethics 455 at 468.
 - 13 Dodekam AM, "Canadian Legal Ethics: A Subject in Search of Scholarship" (2000) 50 U Toronto LJ 115 at 117.
 - 14 Kimmel S, "Setting the Stage for Solutions: The PBA's Legal Education Conclave" (1996) 18 – FEB Pen Lawyer 22 at 23.
 - 15 Stein RA, "What the Legal Profession Expects of Law Schools: A Response" (2000) 34 Ind L Rev 15 at 19.
 - ¹⁶ Stein at 18-19.

The MacCrate Report said that the gap between the academy and practitioners was accentuated by the apparent lack of participation by law professors in the activities of the organised Bar. It said:

"Both communities are part of one profession. The skills and values of the competent lawyer are developed along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer's professional career. Legal educators and practising lawyers should stop viewing themselves as separated by a "gap" and recognize that they are engaged in a common enterprise – the education and professional development of the members of a great profession."¹⁷

Some of the American commentary appears to rest upon the assumption which is contested and contestable that law schools are an integral part of the practising legal profession¹⁸. There have been proposals for practitioners to participate in law school panel discussions, student clubs and mentorship programs with students through the Bar and other lawyer associations. Engagement by practitioners in teaching in law schools as adjunct faculty and in clinical or ethical courses has been promoted. The MacCrate Report proposed the use of practitioners in law schools although ultimately it recommended that instructions on skills be given by fulltime, as opposed to adjunct teachers, having regard to the greater time available to the former. The ABA Professionalism Committee Report suggested that law schools should be assigning only those faculty with significant practice experience to teach ethics courses which, the report asserted, requires actual law practice experience¹⁹. Proposals have also been

17 MacCrate Report at 3.

18 Hellman LK, "Conceptualizing a Law School as an Integral Part of the Legal Profession" (2004) 36 U Tol L Rev 73 at 75.

19 American Bar Association, Section of Legal Education and Admissions to the Bar, "Teaching and Learning Professionalism: Report of the Professionalism Committee" (1996, American Bar Association) at 18.

advanced for the interaction of judges with law schools in activities such as presiding over Moot Courts and Moot Trials and in teaching²⁰.

Jurists-in-Residence programs involving visits of several days to one week at law schools by serving judges to teach and counsel students was another initiative in the direction of greater interaction²¹. The ABA Professionalism Committee also recommended the use of highly respected judges as adjunct professors.

The American literature also refers to the movement of academics into practice, either on a short term or more permanent basis. The MacCrate Report noted that some law schools and employers had experimented with leaves of absence allowing practitioners to teach or faculty to practice. The Report observed:

"This can help expose students, in the classroom, to the practical perspective of experienced practitioners and enable faculty to benefit from a period of practice."²²

By way of example of academic movement, Professor Amy Cohen of Western New England College School of Law after 20 years of teaching sought a sabbatical in order to reacquaint herself with the practice of law. She wrote an article on her experience raising the question whether law professors have a professional obligation to keep current with the practice of law by actually engaging in such practice on some limited or occasional basis. She observed that such a practice runs counter to many of the underlying assumptions of legal educators²³.

20 Lanzinger JA, "Judges Teaching in Law Schools: Who, What, Where, and Why Not?" (1993) 43 J Legal Educ 96.

21 Bright MH, "Jurists-in-Residence Programs" (2007) 54-JAN Fed Lawyer 38.

22 MacCrate Report at 271-272.

23 Cohen AB, "The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law" (2004) 50 Loy L Rev 623 at 625.

The United Kingdom

There has been recent high level consideration in the United Kingdom of exchange and interaction between the branches of the legal community.

In 2005, the Arts and Humanities Research Council of the United Kingdom (AHRC) and the Economic and Social Research Council (ESRC) produced a report entitled "Legal Professions Sector Interaction Study". In that report it was said:

"The relationship between academic lawyers and the judiciary in England has traditionally been remarkably distant. With few exceptions the status of the academic lawyer was, at least until the mid-late C20th, generally low, and until recently it would have been rare for a judge to cite the work of a living academic author."²⁴

The report is the only recent study of interaction between legal academics and the legal profession published in the United Kingdom. The supporting research was undertaken by the University of Edinburgh. It built upon work by Professor Martin Partington published in 1988 which itself discussed the results of a 1982 survey²⁵.

The AHRC and ESRC study involved sending a questionnaire, in 2004, to all legal academics who had received AHRC grants in the previous five years. A similar exercise took place in 2005 for academics who had received ESRC grants. The questions drew heavily upon the Partington conclusions. Interviews were also held

24 Arts and Humanities Research Council and Economic and Social Research Council, "Legal Professions Sector Interaction Study" (2005, Arts and Humanities Research Council and Economic and Social Research Council)
<http://www.ahrc.ac.uk/About/Policy/Documents/Sec%20interatcion%20lega.pdf> viewed 8 December 2008.

25 Partington M, "Academic Lawyers and "Legal Practice" in Britain: A Preliminary Reappraisal" (1988) 15(4) J L & Soc'y 374.

with Heads of Research in government departments and representatives of government agencies including the Judicial Studies Board.

Case studies were undertaken on non-government organisations such as Liberty, Oxfam and Human Rights Watch. The Bar Council of England and Wales and some sets of barristers' chambers were contacted about the work of academics in the legal profession. The study reported that almost 50% of academics had backgrounds in legal practice before entering academia.

As to interaction between academics and the judiciary, the AHRC-ESRC Report disclosed more than 250 cases in which the work of academic lawyers had been used in reasons for judgment. The Report also offered a broad overview of the history of the involvement of academic lawyers in the legal system relying on a study by Professor Neil Duxbury²⁶.

There has been an increasing number of appointments to judicial office of individuals who had been legal academics. These include Baroness Hale of Richmond, who was appointed to the House of Lords in 2004 and Justice Beatson who was appointed to the High Court of England and Wales in April 2003. Baroness Hale began her academic career as a law lecturer at the Victoria University of Manchester in 1966 but practised occasionally at the Bar. In the course of an appearance before the Select Committee on Constitutional Affairs in the House of Commons, she said, of academic lawyers:

"Do not let us say that they are very different. Academic lawyers are lawyers too; rather expert lawyers. They have often had a much wider range of experience of people and society than have the people who have spent all their lives in the Temple and the Royal Courts of Justice. My 18 years teaching 18 to 21 year olds at Manchester University gave me a very considerable experience of the real world and I found it

26 Duxbury N, "Jurists and Judges: An Essay on Influence" (2001) Hart Publishing.

extremely useful as a judge. Also, the thing that people from a different range of experience have got is a knowledge of how things fit into the bigger picture. When I was in the Law Commission making proposals for the reform of the law, one did tend to find that it was the academic members who had a much firmer grasp of how changing that might or might not affect this, that or the other. In other words, they could see the bigger picture. Practitioners are often so focussed on the bit of the law they know a lot about that they can sometimes find it hard to translate that knowledge across fields."²⁷

There is also considerable interaction between the legal profession and academia in some of the more prominent sets of barristers' chambers in England and Wales. Matrix Chambers was one of the first sets of chambers to allow membership by academics. On its website it refers to that class of membership stating:

"The expertise of our academic colleagues now ranges across the whole of the legal spectrum, from international and EU law on the one hand, to employment, public law, human rights and criminal on the other.

The relationship that Matrix seeks to have with its academic members is innovative in a number of ways. Such members are fully integrated, handled by the practice management teams in exactly the same way as other members. They are available to be instructed, and to pursue cases on which they are instructed in the normal way. Our academic members play a full role in the organisational life of Matrix, sitting on committees as full voting members.

Our academic members are not 'door tenants' but nor are they fulltime barristers, and, importantly, neither do they aspire to be. They are academics for whom practice is an additional aspect of their professional lives, a dimension which adds much of benefit to their academic career, but which in no way supplants it."²⁸

Essex Court Chambers divides its membership into barristers, academics, overseas lawyers and mediators. In the "academics" category are found practising

27 www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/48/311807.htm viewed 8 December 2008

28 http://www.matrixlaw.co.uk/WhoWeAre_AcademicMembers.aspx viewed 8 December 2008

barristers who occasionally work in academia and legal academics associated with the Chambers. Other examples are to be found in Doughty Street Chambers and in Kings Chambers which operates in Leeds and Manchester.

The Australian debate

From at least the mid 1960s there has been debate in Australia about the law school curriculum, approaches to teaching and interdisciplinary approaches to legal scholarship²⁹. The Pearce Report, published in 1987, addressed issues similar to those raised in the MacCrate Report in the United States³⁰. It referred to a "tension" between the role of law schools encouraging critical thought and the provision of a professional education. Its authors, not unlike the authors of the MacCrate Report, regarded the expectation that law schools produced trained lawyers as unrealistic, saying:

"It is evident that some members of the profession tend to expect law schools to 'cover' far too great a range of the law. Law schools cannot hope to teach all areas of the law particularly as legal regulation has vastly expanded and some areas can adequately be mastered at a later state in a career as a lawyer."³¹

The report was generally supportive of a broader legal education not solely focussed on skills training. It said:

29 McInnis C and Marginson S, "Australian law schools after the 1987 Pearce Report" (1994), Centre for the Study of Higher Education, University of Melbourne at 33-48.

30 Pearce D, Campbell E and Harding D, "Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (A Summary)" (1987), Australian Government Publishing Service.

31 Pearce et al above at 25.

"[L]aw schools no longer accept that they are simply training students for entry to the private practising legal profession but rather, that law students may move into a wide range of possible careers"³²

It also acknowledged the need for law schools to impart basic intellectual skills and supported the teaching of theory courses relating to the place of law in society and policy and ethical issues. It favoured empirical research by law faculties reflecting a growing recognition that legal research needed to be diversified beyond doctrinal research³³.

The report accepted however that law schools bear some responsibility for developing practical legal skills. It observed that "the community is providing the law schools with significant funds because they are expected to educate students for careers involving full legal qualifications"³⁴. It criticised the teaching of "a very narrow concern with the criticism of law and production of persons able to talk critically of law but not really to work towards careers involving legal qualifications"³⁵. It recommended that law schools teach skills such as legal analysis, legal reasoning, legal writing and legal research³⁶.

In its Report No 89 titled "Managing Justice" the Australian Law Reform Commission (the Commission) pointed to the growth and fragmentation of the legal profession. This, it said, presented serious challenges to the maintenance of a coherent professional identity and rendered the maintenance of traditional collegiate approaches difficult. Without positive action the single "legal profession" could become a

32 Ibid 25.

33 Ibid 51.

34 Ibid 26.

35 Ibid 26.

36 Ibid 27.

multiplicity of "legal occupations" none of which would see itself as part of a larger whole. It also referred to a submission by Professor Ralph Simmonds on the critical need for research to support improvements in legal education and the legal process. Professor Simmonds had proposed a "partnership" model which would involve university law schools, the profession, the judiciary and government. This included the possibility of an Academy of Law.

The Commission agreed that there was a need for an institution that would draw together the various strands of the legal community to facilitate effective intellectual interchange of discussion and research upon issues of concern and to nurture coalitions of interest. It would have a special focus on issues of professionalism (including ethics) and professional identity and on education and training³⁷. The Commission considered a number of models and precedents for an Academy. It referred to the learned societies already existing in Australia³⁸.

One model proposed by the Council of Australian Law Deans was based upon the American Law Institute. However, while there were some features of that model which were attractive and adaptable to Australian circumstances, its membership structure and its focus on law reform by codification expressed in the Restatements of American Law were not seen as suiting the imperative for a more comprehensive and collegially minded body³⁹.

37 Australian Law Reform Commission Report No 89 "Managing Justice: A review of the federal civil justice system" (2000) at 2.117-2.118.

38 The Academy of the Social Sciences in Australia (ASSA), the Australian Academy of Humanities (AAH), the Australian Academy of Science (AAS) and the Academy of Technological Sciences and Engineering (ATSE).

39 Ibid 2.123.

On the other hand the Singapore Academy of Law, which was established in 1988, was seen as providing a point of departure for customising an institution best suited to Australian interests⁴⁰. The Commission recommendation arising out of this consideration was in the following terms:

"Recommendation 6. The federal Attorney-General should facilitate a process bringing together the major stakeholders (including the Council of Chief Justices, the Law Council of Australia, the Council of Australian Law Deans, the Australasian Professional Legal Education Council, and the Australian Law Students Association) to establish an Australian Academy of Law. The Academy would serve as a means of involving all members of the legal profession - students, practitioners and judges - in promoting high standards of learning and conduct and appropriate collegiality across the profession."

It is that recommendation which has led to the formation of the Academy.

More recent Australian debate was well reflected in a number of papers published in the Sydney Law Review in 2004. In one of them, written by Keyes and Johnstone, the traditional model of legal education was contested⁴¹. The authors described the key characteristics of the traditional model of legal education which they said dominated many Australian law schools until the 1980s. They identified five dominant characteristics of the traditional model of legal education:

1. A teacher focussed education in which the role of the teacher is to transmit his or her own expertise in some specific and narrow subject matter area of law to students conceived as empty vessels to be filled.
2. Concern with the transmission of content knowledge and more particularly with teaching legal rules, especially those drawn from case law.

40 Ibid 2.128.

41 Keyes M and Johnstone R, "Changing Legal Education: Rhetoric, Reality, and Prospects for the Future". (2004) 26 Syd L R 537.

3. A strong conviction that the law is an autonomous discipline, quasi-scientific in nature and that lawyers have little, if anything, to learn from other disciplines and interdisciplinary studies.
4. A close relationship between academia and legal practitioners to the extent that the former is subservient to the latter. In the traditional model legal practice exerts a very large degree of control over curriculum. The dominant consideration in curriculum design is the responsibility of the academy to prepare students to work in the private legal profession. This has the effect of uncritically endorsing and perpetuating the status quo.
5. An individualised and isolating experience for both teachers and students⁴².

Keyes and Johnstone referred to significant impediments to change in Australian law schools in the form of the demands of students and the legal profession and the unwillingness of many academics to look beyond protecting their own subjects to engage in broader collective curriculum development and with the educational literature. Another impediment was the inadequate resourcing of law schools.

Australian law schools were challenged to rethink their relationship with the legal profession, to ensure that they asserted their autonomy in matters of curriculum teaching, learning and research so that legal education would do more than prepare students for work in private legal practice. The authors also proposed "a collective, law school-wide, approach to integrate matters such as legal theory, interdisciplinarity, ethics, general and legal skills, and issues of internationalisation, gender and indigeneity, so that law students are provided with a co-ordinated and incremental approach to developing knowledge, skills and attitudes"⁴³. They identified a need for

42 See (2004) 26 Syd L R 537 at 539-554.

43 (2004) 26 Syd LR 537 at 538.

law schools collectively to engage with educational theory to develop approaches to structured and activity-based teaching and to cooperative and collaborative learning.

In the same edition of the Sydney Law Review in 2004, Professor Jeremy Webber published a paper entitled: "Legal Research, the Law Schools and the Profession"⁴⁴. He responded to the observation quoted earlier by former Chief Justice Murray Gleeson about the existence of a gulf between the view of legal institutions and of the Court from within the universities and the view from within the practising legal profession.

Professor Webber acknowledged the real and proper differences that exist between the law schools and the profession. He observed that law schools are not mere appendages to the profession. He said:

"The law faculties have a responsibility to bring the kind of investigation to law that other disciplines bring to their areas of study ... Legal academics have a responsibility to do more than act as the extended research departments of law firms ... They should include within their purview law's broader themes – themes that are present in professional practice, but that tend to be submerged by the demands of the moment, and the effects of which are evident only in the long term."⁴⁵

Recognition of the contribution of this kind of investigation to the practice of law is evidenced by the reference to academic writings in the judgments of the courts⁴⁶. Indeed it may now be a matter of complaint from the English Bench that counsel has failed to refer to academic writings in the relevant area. So in 1995, Lord

44 (2004) 26 Syd L R 565.

45 (2004) 26 Syd L R 565 at 567.

46 See p 11 of this Paper.

Steyn in *White v Jones*⁴⁷ complained that the judges "were not referred to a single piece of academic writing on *Ross v. Caunters*"⁴⁸.

The rationale for judicial reference to academic writings was enunciated by Justice Bastarache of the Supreme Court of Canada in a passage quoted by Justice Kirby in his 2002 paper "Welcome to Law Reviews":

"[T]he contribution of academics is invaluable to the development of legal principles and coherent judicial decisions. The nature of the law itself is being transformed. The work of academics serves to provide a contextual social background for legal disputes, helps to make judges aware of the underlying reasons for the decisions that they make and offers useful suggestions for reform. No principled approach to decision-making can ignore the role of academics."⁴⁹

This endorsement of judicial reference to academic writings has been criticised, not surprisingly by an academic, John Gava, who wrote that:

"[J]udges are making more use of academic writing because many of them have forsaken the traditional common law method in favour of an ill-advised move to instrumentalist decision-making."⁵⁰

At another level there is also ongoing debate about the potential use of legal academics as a pool for judicial appointment. Former Chief Justice Murray Gleeson wrote about this issue in 2003 and contrasted the situation in Australia with that of the

47 [1995] 2 AC 207.

48 [1995] 2 AC 207 at 235.

49 Kirby M, "Welcome to Law Reviews" (2002) 26 Melbourne University Law Review 1 at 7 citing Justice Michael Bastarache, "The Role of Academics and Legal Theory in Judicial Decision-Making" (1999) 37 Alberta Law Review 739 at 746.

50 Gava J, "Law Reviews: Good for Judges, Bad for Law Schools?" (2002) 26 Melbourne University Law Review 560 at 564.

United States where academics are frequently appointed to the bench⁵¹. There has been ongoing debate about broadening the base for judicial selection, particularly in relation to solicitors and academics⁵².

Although some of the Australian literature has referred to a marked decline in the number of practitioners and judges teaching in law schools by comparison with the earlier years of legal education in Australia, my own informal inquiries indicate that today there is a very substantial involvement of the practicing legal profession and the judiciary in at least a number of law faculties around Australia⁵³. Professor David Weisbrot has pointed out that Australian universities are in a good position to hire faculty members in respect of a skills focussed curriculum because, unlike the United States, many of Australia's law schools are relatively new and lack the entrenched interests that might tend against hiring such skills-focussed faculty⁵⁴.

The debate referred to in the Australian literature reflects, to a degree, that in the United States. I express no concluded view upon it. It may be that there is and always should be a degree of tension between the perspectives of legal academics and those of legal practitioners and the judiciary.

The academic who is able to stand back from the quotidian decision-making pressures upon judges and practitioners to offer to them a larger view of the landscape of the law in which their decision-making in particular cases may be located, offers a

51 Geeson A M, "Judicial selection and training: Two sides of the one coin" (2003) 77 ALJ 591.

52 Gawler M "Who is to Judge?" (2000) (April) 74 LIJ 3 at 3.

53 See Martin L, "From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales" (1986) 9 (2) UNSWLJ 11 at 141-143 and Webber J, *op cit* at 575.

54 Weisbrot D, "What Lawyers Need to Know, What Lawyers Need to be Able to Do: An Australian Experience" (2002) J Ass'n Legal Writing Directors 21 at 41.

valuable service to the law. Those who offer a broader social context using the tools of interdisciplinary inquiry enable judges and practitioners and others to re-examine the assumptions upon which they operate and to reflect upon their own work from the perspective of external observers.

On the other hand, in my opinion, the law schools should impart to students who wish to become legal practitioners, not only broad perspectives but also those skills which will help them to be effective members of their profession. This is not limited to practitioners of the kind who will rise quickly to become senior associates in large national law firms. It extends to those practitioners with a sense of social justice and a wish to make a difference in the world. I do not suggest that the two categories are necessarily mutually exclusive.

Thinking about those who emerge from law school with their ideals intact and a determination to work for the benefit of society, and their need for technical skills, I am reminded of a sermon on the life of St Paul which I heard at Gray's Inn in 2006. It was preached by an erudite chaplain with much experience of commercial life and the world before he took holy orders. He concluded his sermon with these words:

"What the life in St Paul teaches us is that God helps the meek and the humble but also the articulate and the pushy and particularly the competent."

Those who would improve society should be equipped with the tools for that work.

Next steps

The literature to which I have referred and the debate which it reflects raise questions, some of a fairly fundamental nature, about the respective roles and methodologies of the different sections of the legal community. They provide an indication of things the Academy might do in the pursuit of its objectives.

I would offer the following for consideration:

1. A project to identify more comprehensively, and with more precision than I have been able to do in this paper, the perspectives within and between each of the sections of the legal community as to their own proper roles and those of the other sections.
2. A project to determine the variety and extent of continuing legal education for judges and legal practitioners in which legal academics participate. In this respect the work of the National Judicial College and the Judicial Commission of New South Wales and other bodies, as well as those of particular courts, would have to be considered.
3. An empirical study of the extent of interaction and movement between each of the elements of the legal community and trends in that regard. I should add that this assumes a fairly broad definition of the concept of legal community not limited to academics, legal practitioners and judges, but extending to people engaged in law reform, regulatory work and in-house lawyers employed in corporations, public authorities and government departments.
4. Development of a national system for judges and senior practitioners to spend periods of time as visiting Academy Fellows at university law schools around Australia. Such a program has been in existence for some years between the Law School at Flinders University and the Federal Court. I participated in it as a Visiting Judge and undertook a similar exercise with Adelaide University. In each case I attended at the University for a week. I was provided with office accommodation and gave a couple of lectures, including one public lecture, participated in a staff seminar and otherwise engaged in informal discussions with staff and students. It was a rewarding and enjoyable experience in both cases.
5. Development of a system under which academics could be visitors to particular courts or particular judge's chambers for a suitable period of a week or so. The

visitor would have the opportunity to observe court cases and, subject to appropriate protocols, to talk with judges and associates about questions arising in the cases. The protocols would have to be formulated with some care to deal with issues of confidentiality and conflict of interest.

These are but some modest suggestions for things that the Academy might undertake. It cannot be part of the Academy's objective to homogenise the legal community or any part of it. There will always be diversity of approach and at times tension and debate about the interaction of the various elements as there always has been. That is to be welcomed.