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Swapping Ideas: The Academy, the Judiciary and the Profession

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- It is useful to remind ourselves of the genesis of the Academy in ALRC 89 *Managing Justice: A review of the Federal civil justice system*. That review asked the Australian Law Reform Commission to focus on a range of concerns including the causes of excessive costs and delay, case management, alternative dispute resolution in the civil justice system. The ALRC chose to adopt a systemic review commencing with the education of lawyers. Inter alia, ALRC 89 discussed the role of law schools and their relationship with the practising profession and the judiciary.

- One of several recommendations in chapter 2 of ALRC 89 dealing with education, training and accountability was that an Australian Academy of Law be established. (The suggestion for an Academy had been under discussion at the Council of Australian Law Deans for a number of years – where it was sometimes the subject of vigorous debate.)

- ALRC 89 identified a need for an institution that could draw together the various strands of the legal community to facilitate effective intellectual interchange of issues of concern and nurture coalitions of interest. ALRC 89 suggested that such an institution should have a special focus on issues of professionalism (including ethics) and professional identity, and on education and training. ALRC 89 foresaw the role of the Academy as serving as a means of involving all members of the legal profession—students, practitioners, academics and judges—in promoting high standards of learning and conduct and appropriate collegiality across the profession.

Key Points from Chief Justice French's paper

- Chief Justice French's papers echoes points made in ALRC 89 with suggestions for taking matters further.

- His Honour commenced by observing that the Rule of Law is an essential element of the infrastructure of our society but one that requires continual maintenance, upkeep and renovation. Integral to it is the work of legal academics, judges, legal practitioners and many other legal professionals. The Chief Justice noted that the Australian Academy of Law was established to bring together this diverse group in 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.

- There can be no argument that there is value in collegiality, co-operation, collaboration and debate, but ensuring that the Academy can achieve more than hopeful rhetoric is no trivial or likely quick task. The Chief Justice has suggested some form of inquiry that might help review developments in other jurisdictions. Necessarily that may take some time, hence his Honour has suggested that the Academy may be able to consider other means in the shorter term 'to foster and encourage cooperation, collaboration, constructive debate and the effective interchange of views'. Tonight's event indeed may be serving part of those aims.

- His Honour reminded us of the words of former Chief Justice Gleeson that there is a 'wide and deep gulf' between legal academics on one side and the practising profession on the other. Yet in case this is seen to be a purely Australian-phenomena, his Honour drew our attention to similar complaints in North America and the UK. There are two main strands to this on-going debate and tension: the role of law schools in training the next generation of legal practitioners and the place and function of legal research.

- His Honour's paper noted the debate and developments in the US during the 1990s. This debate led to the MacCrate report. That report that has been influential in Australian legal education and was influential in ALRC 89 which made observations about the then, and still, on-going debate about national standards and about who should set standards for Australian law schools (discussed further below).

- The second source of tension has been the nature and role of academic writing. His Honour quoted a complaint voiced in the *Virginia Law Review* in 1995 of 'academics who write for each other rather than the profession'. Citing a 1996 US study, his Honour noted complaints that 'elite' journals published works of greater utility to other academics while it was left to the 'lower tier journals' to publish articles for the profession.

    - This raises a current issue in Australian academia and one where the Academy may wish to play a more prominent role and certainly may wish to keep abreast of the developments and their implications. As part of the ERA (Excellence in Research for Australia) initiative, law (and other) journals have been ranked. Many law deans initially argued that law journal ranking was not integral to an assessment of quality research in law. After the Australian Research Council published its own draft list, the law deans agreed to submit a suggested ranking. The result may not please those who are looking for law journal articles to assist the profession. Jurisdiction-specific and specialist journals often rank as 'C' journals … not necessarily a problem until it is realised that the universities are recruiting and promoting staff who have a record of publication in A*, A or B ranked journals. There may be considerable implications for some consumers of academic writing including the judiciary, law reformers, policy-makers and the profession more broadly. Some of these may be beneficial—more comparative work and review of international developments—but the result may also be decreased focus on Australian legal developments. This remains to be seen but the Academy could keep this development under review.

- The Chief Justice's paper explores the relationship, or lack of it, between the profession and academia. It reminds us that whether law schools should be seen as an integral part of the practising profession is 'contested and contestable'. Nevertheless there is a history in the US, the UK and Australia of legal academics moving into and out of the profession, of some academics maintaining dual roles and of the law schools using the profession to supplement teaching. Very few, if any law schools, would not have a considerable number of staff who hold, or have held, practising certificates, as his Honour's paper recognises. His Honour reminded us too of a history—albeit a very small one—in the UK (and Australia) of legal academics being appointed to the bench.

- His Honour's paper discusses the debate in Australia around the role of law schools and their place in training for the profession. The paper reminds us of the Pearce Report and subsequent writing including that of Keys and Johnstone who noted in 2004 that legal education until the 1980s was characterised by five dominant features including *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*'.

    - I might venture to suggest that this remains an on-going issue within academia and I am going to venture that the Academy could have a useful role to play here. The Council of Australian Law Deans have been discussing the very strong suggestion emanating from the judiciary that law schools should be giving far greater emphasis to statutory interpretation. I do not believe that anyone takes issue with the central importance of statutory interpretation, but what troubles CALD, is the on-going issue (discussed in ALRC 89) of a top-down approach to legal education and the lack of a consultative process around curriculum development in relation to the mandatory admission requirements. Perhaps the Academy could have a role in facilitating discussion between the Deans and the judiciary about the *process* of curriculum development.

- Chief Justice French identified the contribution that can be made from academic research and writing. Perhaps, as his Honour identifies, the Academy could provide the venue where leading academics can come together with some of the major consumers of legal research: the judiciary, law reformers and legal policy makers, to discuss issues of common concern. Each may learn something of and from the perspective of the other. And if I may be permitted to conclude with a suggestion of my own. It is that law reform bodies may be a useful model for the Academy, especially the model of the advisory committee. Academics, judges, members of the profession and other stakeholders as relevant to an inquiry come together, generally in a strong spirit of collegiality, each learns from the other and hierarchies are put aside to some extent in search of solutions.