FRAGMENTATION OR CONSOLIDATION? FOSTERING A COHERENT PROFESSIONAL IDENTITY FOR LAWYERS

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'In the Service of Society…': Lawyers and the Idea of a Profession

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Your Excellency, Chief Justice, Your Other Honours (of whom there are many), Mr Attorney, My Decanal Colleagues (whom I make a particular point of mentioning, as they do not usually feature, regrettably, in these honorific recitations), and Other Distinguished Guests (which clearly covers everyone else)—may I add my congratulations to all concerned on the birth of the Australian Academy of Law (AAL).

Having been told I would be the last of nine speakers, and deciding accordingly that it would make sense for me to extemporise and bounce off the preceding eight, I now find myself promoted up the batting order to number three, a position with high expectations of superior performance. So my apologies for not having a formal presentation and for not rigorously addressing the questions set for us. Let me instead give you my informal take on the essence of the concept of lawyering and on what the Academy might do, with all branches of the legal community working together, to promote that concept and to further our common goals.

May I first thank David Weisbrot for acknowledging the role of the Council of Australian Law Deans (CALD) in the development of the idea of the Australian Academy of Law. It was under discussion in CALD from around the mid-1990s, some five years before its endorsement by the Australian Law Reform Commission (ALRC) in its 2000 report on civil justice, and I take this opportunity to acknowledge the role of my predecessor as Chair of CALD, Professor David Barker, for his tenacity and perseverance in keeping the idea alive when it seemed like support for it was on the wane.

However, it was undoubtedly the recommendation of the ALRC in 2000 for the establishment of an Australian Academy of Law that gave the idea real impetus, and the recent efforts of ALRC Chair David Weisbrot, working with CALD, that have made it a reality. Moreover, it was the ALRC that posed in its report the key question that lies behind the title of this afternoon's symposium: is there such a thing as a unified legal profession, or is lawyering fragmented into merely a range of diverse legal occupations? To attempt at least a partial answer to this question, I begin, as the Attorney did this morning, with the concept of a profession.

A profession, as we know, is essentially a group of people with specialised knowledge and specialised skills (and certified as such), who then enjoy an exclusive or monopoly right to engage in the practice of those skills, and, moreover, enjoy a large degree of self-regulation in doing so. Why these privileges? What is the *quid pro quo*?

Put simply, the answer is that those monopoly rights are to be exercised not merely for personal reward but also in the service of society.

Those words are familiar, aren't they? They are familiar because you heard them this morning. They are taken from Object (e) in the Objects Clause of the AAL Constitution. They are particularly familiar to me because I wrote them!

Object (e) reads in full: 'To promote the highest standards of ethical conduct and professional responsibility amongst all members of the legal community, including the use of skills not merely for material personal reward but also in the service of society'. This is the object I want to focus on, and to try to tease out meaning of. That will lead me particularly to the objects that immediately precede and succeed object (e), namely objects (d) and (f); these objects deal with, respectively, and to put it in shorthand, promotion of law reform and promotion of the rule of law. It is this 'cluster' of objects that are the focus of my remarks, with emphasis on legal practice, though with an eye to the implications for legal education. I advert briefly to the other remaining objects—(a), (b), (c), and (g)—later.

What does it mean for lawyers to use their skills 'in the service of society'? In my view, the core of the answer lies in objects (d) and (f), the promotion of law reform and the rule of law, but can I say first, in case I am misunderstood, that lawyers serve society well if (and only if) they exercise their skills with core professional competence. This is absolutely foundational. All the ruminations in the world about law reform, and all the invocations in the world of the rule of law, are not worth a crumpet if they are not built on a solid platform of sound legal knowledge and the careful exercise of legal skills. That, of course, is why law schools endeavour to teach legal knowledge and to impart legal skills.

Unfortunately, law schools often get stuck at this point. Teaching the law—the law as it is—is a massive undertaking in itself, let alone worrying about what the law might or could or should be. But, of course, knowing the law, and having the skills, is not enough. It is necessary but not sufficient. Few law schools today would not incorporate a critical perspective, or seek to locate the law in its broader context, but what is largely missing is a commitment to promoting an ethos of lifelong use of one's legal knowledge and one's legal skills to, in the words of object (d) of the AAL Constitution, 'promote the continuous improvement of the law and of the operation of the legal system'. Likewise, law schools need more consciously to inculcate in future lawyers their obligation to explain and defend the rule of law in all of its various manifestations, or, in the words of object (f), to 'enhance understanding and observance of the rule of law, and community understanding of the role and function of law, lawyers, the legal profession, and the judiciary'.

As to object (d), I have written at some length about the evident disconnect between law reform and legal education, and suggested ways in which this might be addressed, so in the context of today's symposium I simply refer you to that (see Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (The Federation Press, 2005) at pp 388-403). The ethos of a reformist perspective can be injected into what law schools do to great advantage, and with no disadvantage to or inconsistency with the other goals of legal education.

As to object (f), we have seen outstanding leadership in recent times from the Law Council of Australia in relation to the importance of lawyers standing up to explain and defend the rule of law and the values that underpin it. The Law Council's criticism in the David Hicks case (supported by many other lawyers and organisations, including CALD) of prolonged detention without trial, and its articulation of the ingredients of a fair trial, are a good example.

Interestingly, there is a curious juxtaposition here between objects (d) and (f). Object (d) resonates with the idea of change, even activism for change. Object (f) is in many ways the exact opposite. It is about defending the fundamental principles and values of the legal system from attack or erosion. True, where that erosion has become embedded in our laws, as civil libertarians assert in relation, for example, to the new wave of anti-terrorism legislation, there will accordingly be a case for change or reform. But defending the rule of law is essentially deeply conservative. I mention this only to warn against the use of simplistic labels. If lawyers are to use their skills 'in the service of society', it may be in the cause of radical change, or, without inconsistency or contradiction, in the defence of long-standing tradition, according to the circumstances. I am not speaking here of the more confined role of the judiciary, which is another subject in itself, though I would warn equally in this context against the use of unhelpful labels, of which judicial activism is a leading contender.

In a nutshell, I am arguing for a broad view of the notion of professional responsibility, as that notion is used in object (e), which I think is the linchpin of the objects of the Academy. When object (e) speaks of promotion of 'the highest standards of ethical conduct and professional responsibility amongst all members of the legal community', it is not speaking just of the technical rules of legal ethics, important as they are. It is also picking up objects (d) and (f) and incorporating them into the notion of professional responsibility. When object (e) speaks of 'the use of legal skills not merely for personal reward but also in the service of society', it is defining the very core of what it means to be a lawyer. Professional responsibility—the responsibility that flows from being a member of a learned profession—encompasses competence, ethics, and service. And service connotes a degree of altruism or giving back—giving back to the society that has bestowed the privilege of certification and all that goes with it. It is this broad notion of professional responsibility that gives the idea of being a lawyer its essential unity, and should prevent lawyering from being characterised as fragmented into merely a range of diverse legal occupations.

This concept of a profession, which I think is not at all controversial but is just a matter of going back to basics, has implications for all of us. I have already touched on how it affects what we, as legal educators, might do in our law schools. It can play out in all kinds of ways for members of the practising profession, from *pro bono* practice, to service on representative bodies, to making submissions to enquiries or investigations in one's fields of expertise. The same goes for lawyers in occupations that might be thought to be outside mainstream legal practice. The point of the Academy is that it brings together all branches of the legal community, or of the legal profession if that term is understood in its broadest sense—the judges, the practitioners, and the academics—to work together for the promotion of these goals, as indicated in the AAL's emphatic final object, object (g): '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'.

The forum idea is key, and today is a good start. We have not previously had in Australia a forum that brings together all elements of the legal community, only peak bodies for those elements separately considered. In this respect, and also in relation to the particular objective of improving the law and the operation of the legal system, the AAL borrows from and builds on the example of the American Law Institute (ALI), a unique experiment in law reform begun in the US in the 1920s by such luminaries as Judge Benjamin Cardozo and Judge Learned Hand.

Interestingly, the AAL also has elements of the learned academy, akin to those of the humanities and social sciences; this is evident in objects (a), (b) and (c), particularly in the reference in object (c) to legal research and scholarship. Object (a) refers to 'individuals of exceptional distinction' who will advance the discipline; the nomination and election of those individuals resonates with the idea of the learned academy, whereas the additional inclusion of *ex officio* members, as identified in the AAL Constitution as leaders of their branch of the profession and thus deemed by their holding of office to be of exceptional distinction, resonates more with the model of the ALI.

In other words, the AAL is something of a hybrid, with elected and *ex officio* members, and with the category of elected members deliberately broad enough to encompass individuals of exceptional distinction 'from all parts of the legal community', who will 'work together' for the advancement of the discipline. So, as I said, it is the forum idea, the bringing together of the three branches of the profession, that I think is the key, and the element that will make the AAL distinctive and really enable it to add value.

It cannot be doubted that there is common interest amongst these branches, in relation to each and every one of the AAL's seven objects. May I conclude with a quote from something I said recently about common interest within one of these branches, namely, amongst the law schools. In my 'Letter from the Chair of CALD' in the *Australasian Law Teachers' Association Newsletter* (Summer Edition 2007, p 19), having made the point that there was considerable common interest in raising the profile overseas of Australian legal education before one even got to the point of competition amongst the law schools for international students (these days, apart from the many benefits of having

international students, an important source of revenue for the law schools), I concluded with a more general point:

> Even more importantly, at the end of the day, we are all striving to produce lawyers who are competent, ethical, and add value to society, and indeed to have a legal system which, despite the need for continuous improvement, we can be proud to defend. If that is not common interest, I don't know what is.

That quote can, I think, be equally invoked in support of the idea of bringing together all parts of the Australian legal community to form the Australian Academy of Law. I commend its establishment and its ambitiously comprehensive objects.

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