Symposium for the Launch of the Academy of Law
Government House, Queensland
Tuesday, 17 July 2007

Remarks by the Hon Justice Robert Nicholson AO

Your Excellency, Chief Justice, Attorney-General and distinguished guests.

May I start by taking your minds back for a short time to the past, to August 1976. It is interesting that at that time the Law Council of Australia as the peak body of the practising profession instigated a conference on 'Legal Education in Australia'. It was very comprehensive in its scope. It dealt with pre-basic training, basic training in universities, basic training other than in universities, basic training for non-lawyers, external teaching and the role of para-legals. It then moved on to practical training, whether that was institutionalised, in service or clinical legal education and control of admission to practice, further legal education of a professional character and consideration of 'educating the educators'.

I outline that scope because it resulted in the Conference bringing together a cross-section of people in the legal community at the time who were concerned with all aspects of legal education. At the conclusion of the Conference Sir Zelman Cowan and Justice Brennan summed up.

Sir Zelman said that within the professions uneasy questions are asked about the preparation, role and performance of lawyers. The profession had felt the lash of public opinion and in some measure criticisms of law schools by the profession represented the profession's backlash reaction to these attacks. He said the efforts of the law schools to instil in young lawyers an appreciation of the dimensions of the social crisis and to bring intelligence and knowledge to bear in the solution of resulting problems have been pointed to by some bar spokesmen as evidence of the failure of professional education. This was reflected in an attack on current course offerings and the demand that certain courses be prescribed in the law schools as conditions of professional qualification. He supported the view of Justice McGarvie that the production

of a satisfactory curriculum is the responsibility of the whole profession, though naturally the teaching part of the profession should play a major role in it. He turned at the end of his remarks to a question which had been posed to the Conference, namely, whether some form of national body should be established in order to carry forward any cross-relationships which have emerged at that Conference. He thought it clear and beyond doubt that an effective hardworking and continuing national body was highly desirable. He envisaged its voice may be raised to say what is right and what is silly, what is good and what is pernicious. In his view if it was well constructed and organised it is likely to have influence and to be heard. It would be very unfortunate, he said, to lose the momentum obviously generated by a conference.

Justice Brennan observed three features of the Conference. First, that the legal profession was seeing itself increasingly as a national profession. Secondly, the success of the Conference illustrated that the legal profession is not to be misidentified as the privately practising profession. Thirdly, the Conference had done much to demonstrate that the academic and practical dichotomy was false. He felt that the Conference pointed to a new orientation. He said members of the legal profession may be employed or self-employed, an academic, a government official, a privately practising barrister or solicitor or a salaried legal aid officer. The body of knowledge which the professional would need to possess would vary according to the nature of the professional duties to be undertaken.

The point of going back to those observations is that at that time there was, by those who attended that Conference, a perception which I think was ahead of its time. That is, it brought together people across all the spectrums of the legal profession to examine common issues in education in much the same way as the Academy intends to bring the academic and practising professions into dialogue.

I was very influenced by my work in the Law Council of Australia by the outcome of that Conference and I always deliberately used the description

'the legal profession' to mean not only by the practitioners but also government lawyers, including legal aid lawyers, academic lawyers and corporation lawyers. That is, as an encompassing phrase not as a limited phrase. The Conference led on to the establishment of the Australian Legal Education Council. Those who were on it were not necessarily all people who had been at the Conference so they were not driven by the perspective that had emerged from the Conference. After a few years the Council fell into disuse.

It is important to take a lesson from that. The Academy, which has the added security of the models of an academy of respected structure already in existence, needs to make sure that there is an ongoing maintenance of awareness of its objectives and that it keeps in touch with the component parts of the legal profession which it wishes to interest in its work.

Since 1976 there have been many developments supportive of a notion of an Academy which make it much less subject to the vulnerabilities which affected the Australian Legal Education Council. Today, we had a number of those mentioned by the Chief Justice and subsequently by Professor Weisbrot. I add the following.

Firstly, many institutions now recognise the expanded concept of the profession on which the Academy is based. My own experience in the Australian Institute of Judicial Administration exemplifies the growth of the encompassing notion of the profession. I joined the Council, firstly, as a representative of the legal profession. While I was in private practice I became a Deputy President of the Australian Administrative Appeals Tribunal. Tribunals were not thought of as appropriate for representation in the AIJA in those years. However, I was not asked to retire from my membership of the Council. The AIJA moved on to adopt a wide encompassing approach so that it now has members from the Magistracy and Tribunals and seeks to embrace membership from all modes in which law is practised.

Secondly, the judiciary no longer stands alone in its relationship to the legal profession. There is very sound reason for that because when courts bring in new rules and new approaches in practice, they need the understanding and the cooperation of the profession. Chief Justices now invite the profession into their courts for the purpose of discussing with it, and with relevant committees of the professional bodies, how the Rules of Court can best be implemented. This is, of course, merely an expression of the total inter-relationship between courts and the profession in relation to the duties that are owed by the members of the legal profession to courts. Without a cooperative profession honouring those duties, there is no way the courts could properly function. Courts cannot collect evidence and at the same time perform the function which is assigned to them in our system.

Thirdly, the notion that judges are beyond requiring education is old hat, the National Judicial College being an expression of that change in attitude. It provides orientation training and ongoing training for judges. Education which originates in academia is now continued through practising life and into judicial life. Education is now entrenched as an important part within the whole of the legal profession. The pace of statutory change necessitates it.

Fourthly, the issues of judicial conduct and of professional conduct, the matters at the heart of ethics, are centre stage. The fact that the Chief Justices' Council published through the AIJA a Guide on Judicial Conduct and placed that Guide in the public arena is an expression of this. Law Schools now regularly teach ethics as a subject or as an integrated element across many units. There is an enhanced public interest in the debates about ethical issues that occur from time to time.

Fifthly, the divide between the common law and civil has narrowed in our lifetime. There is now a mutual understanding between the common law world and the civil law world where there was formerly a mutual suspicion. That is expressed in our administrative law innovations, particularly in relation to merits review. The impact of European law on the common law in England has, of course, inevitable lessons for Australia by bringing civil law thinking

(for instance on issues such as proportionality) to application in respect of common law concepts.

Sixthly, neither in academia or practice are we isolated from our region in the way we previously were, even 30 years ago. We now have regular contact through the practising profession, through the judiciary and otherwise with non-common law countries. Bodies such as LAWASIA and persons such as the late Professor Mal Smith of the University of Melbourne have brought new focus cross-culturally between Australian law and laws of other cultures.

Seventhly, at the recent 20th LAWASIA Conference, Chief Justice Elias of New Zealand, like our Chief Justice today, pinpointed the dichotomy between the need for professions to honour ethical values and at the same time to meet the demands of corporations and of being profitable. This is an issue on which I think that the Academy could very usefully provide an informed discussion.

All of these factors are ones which make timely the advent of the Academy and its comprehensive approach to issues affecting all persons in the law in Australia.

Turning to the questions posed to this session, the first is how to advance the Academy. I would say by identifying, researching and frankly debating key issues contributed from all parts of the legal profession. Secondly, I do not think that the Academy would be advanced if the choice of questions are overweighted in favour of considering only issues from any one component of the legal profession or not considering issues in an informed way, simply because of their contentious character. Thirdly, in an ideal world I think we would be required to put forward our perspectives which would benefit from Academy scrutiny. Fourthly, the components of the legal profession would need to do likewise. The Academy offers the prospect of bringing top minds in the legal profession to bear on issues which sometimes, viewed only from the perspective of one component, may seem impractical. The Academy will need an active secretariat, in my view. I do not mean an established paid

secretariat necessarily but an active secretariat, a wise board and an active membership. It will also need not to become isolated in relation to the law and to ascertain where it would benefit from inter-relationship with the other pre-existing Academies.