

**A PAPER PRESENTED AT THE SYMPOSIUM FOR THE LAUNCH OF THE
ACADEMY OF LAW**

The Honourable Justice Kiefel
Federal Court of Australia
Tuesday, 17 July 2007

What do I do that advances the objectives of the AAL?

The position of the courts, and of judges, differs from the other two branches of the legal profession because it has an ongoing relationship with each of them. On occasions it also serves as a point of contact for all three.

I see the principal role of a judge, in relation to *legal practitioners*, as concerned with the maintenance of professional and ethical standards. The conduct and management of litigation involves a relationship between the practising profession and the courts and a discourse between them. It is the responsibility of judges to require standards of skill and competence in the presentation of cases before the courts and adherence by lawyers to their duties to the Court.

The dialogue between the courts and the practising profession has a co-operative element. Judges meet with the profession in liaison groups, to discuss problems encountered from time to time, improvements which the Court can make to its processes and those which the profession can contribute to the more efficient conduct of litigation, by better practices. Procedural reforms are discussed. Judges take part, to an extent, in the continuing legal education of practitioners. More recently, in Queensland, the bar has discussed our participation in seminars designed to promote a better quality of advocacy.

Judges have a different, but not less important, relationship with academic lawyers although its focus more often tends to be upon the students and not the academics. And, it must be said, judges do not always participate in a way designed to bridge the gap between the practising and the academic professions. Their role has principally been as an adjunct to legal

education - participating in the life of the law schools - providing both formal and occasional lectures, acting as moot judges. A number of us have participated in a more interactive role as a visiting judicial fellow to some law schools.

Some areas of specialty within law schools allows for a particular relationship between academic lawyers and the courts. As an Admiralty Panel Judge in Queensland I have had a connexion with the Marine and Shipping Law Unit at the University of Queensland. The panel judges have supported the students (and those of the QUT) in national moot competitions. Most recently, in conjunction with Dr Michael White of the unit, we provided a practice moot for the two university teams before their national final.

In turn the panel judges have sought the assistance of members of the Unit with respect to the continuing education of judges and magistrates. When I was a member of the Court's Judicial Education Committee, we often sought out academic lawyers for seminars and discussions in areas of special expertise or overviews on topics – something we do not always get in argument.

Law reform offers a rare, and welcome, opportunity of judges, practitioners and academics coming together to talk through legal issues. I have been the beneficiary of participation in a number of stimulating, if not challenging, advisory boards with the ALRC.

What do I not do to advance the objectives of the AAL?

What do I wish I had time to do to advance the objectives of the AAL?

I have rolled these two presentation points together - for the reason that there are obviously many things I do not do and many things I would wish to do, had I the time.

I do not regard it as a necessary function of judges to supplement the education of law students. It may be otherwise when a judge has a particular interest in teaching a subject. Our role, in connexion with the practising profession, should be more concerned with the maintenance of their professional and ethical standards. It may be as well to define any role for judges, apart from their core work, since they have precious little time to give to it.

Judges speak amongst themselves about perceived problems in the way litigation is conducted, notably how it is overdone. Sometimes they even speak out about it, in general terms. Perhaps the time has come for judges to give detailed consideration to their concerns and articulate them. I am not sure that solutions will be obvious; but clear statements about what is unacceptable in terms of case presentation must be a starting point. "Case Management" is not itself the solution. It is a rather over-worked term to describe what can only be a co-operative approach to litigation. Judges need to think about how to re-set standards.

The other aim which I, like many judges, have wished to pursue is the promotion of a better community understanding about our legal system, the rule of law and the role and independence of the judiciary. It is one which has been often discussed, programmes have been thought up, but very little achieved. I will return to this topic at the conclusion.

In an ideal world, what do I wish the other branches of the legal profession would do?

It will be seen that I have not as yet suggested what more *I should* do with respect to the academic branch of the profession. That is in part because I see them as the agents of their own change. If the three branches are to have a closer relationship it seems to me that the movement could come from academic quarters.

I am not speaking about the improvement in the role and status of our law professors. It is always to be hoped that our law professors will have something, or something more, to say about the direction that legal principle should take. They cannot be expected to assume the level of influence that, say, law professors in Germany do - where legal academics have historically had a different role, as have the judges and legal practitioners of that country. I shall leave it to academic speakers to suggest how their views should extend beyond comment and to encourage thought if not debate.

Our system does however provide an opportunity for academics to assume something of a dual role. The experience of law academics in the UK furnishes a valuable example. I am aware of academics taking the role of a junior in Court proceedings. In the past comparative

lawyers have been part of litigation teams in cases where it was sought to offer the courts a different direction in the development of common law principle. Some academics have progressed to lead in cases.

The most visible examples of the latter in recent times have been cases involving international law and human rights. People such as Professor Christopher Greenwood QC and Professor Ian Brownlee QC took part in the Pinochet proceedings. They appear from time to time in EU courts. The present Chair of the Cambridge Law Faculty sits as an external member of the Constitutional Court of Bosnia. Some chambers in London have legal academics as members, for example, Matrix Chambers, where Professor James Crawford can be found. He was counsel for Australia in the East Timor dispute in the ICJ.

True it is that we do not have the European models of rights-based law and non adversarial-based Court systems. But there are areas of expertise where academic lawyers could take part, to a greater extent than the present. Some are doing so already. The areas of competition and intellectual property law come readily to mind. In Queensland, we have the example of the centre for Maritime studies where some of the teachers have practiced to a senior level or are currently practising as barristers in admiralty or maritime matters.

It is likely that academics who do take this path will need to develop different skills. Litigation is more narrowly focused than academic discussion, less abstracted and more problem/solution driven (I suppose it could be viewed as a kind of reverse specialisation). An understanding of what is involved in litigation (and dare I add - the role of judges in it) must surely better inform law teaching?

So far I have discussed the role of the various branches of the legal profession. One of the aims of the AAL to which I have earlier made mention, is more *outward* looking. It seeks to promote a better understanding within the community of the rule of law and the legal system. It is a source of constant amazement to me that otherwise well educated people within our community have almost no understanding of our legal system and the role of judges let alone the Constitution. To bring an understanding to them however would require a co-ordinated and

longer term commitment than any of the branches have individually been able to provide to date.

What can the AAL do?

In relation to the *three branches* of the profession, the AAL could:

- Provide a forum for the discussion of litigation practices; the identification and maintenance of professional standards.
- Provide a forum for discussion about current challenges to ethical standards, one which could be independent of the profession.
- It could encourage a greater emphasis upon the teaching of litigation practice and the participation of academic lawyers in litigation.

Could I suggest that the AAL's role with respect to the three branches will need to be balanced; a greater concentration of effort on one could result in the loss of interest of the others. Lastly, could I suggest that perhaps the most important role for the AAL could be with respect to the education of the public. At least here the three branches would have a common cause.