FINAL ADDRESS OF THE BAR PRACTICE COURSE
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THE LEGAL PROFESSION, ADVOCACY AND INDEPENDENCE IN 21ST CENTURY AUSTRALIA

by the Hon Justice Margaret McMurdo*

It is a pleasure for me to share this evening with you and to deliver tonight's Address. I understand from those who have successfully completed other recent Bar Practice courses that listening to this address, regardless of its content and presentation, is also a pleasurable experience for the audience of readers. That is because after six gruelling weeks of relentless instruction, research, preparation, practice and critique, the readers can now at last relax, sit back and assess the performance of another, safe in the knowledge that they have successfully run their race and are on track to achieve that yearned-for goal: the Certificate of Satisfactory Completion of the Practice Training Course. No more testing questions from lateral-thinking academics, practitioners or judges. Or so you thought. The beginning of the 21st century, like the end of the last, is marked by change. It has been decided that an additional mandatory requirement to complete this course is that each reader must correctly answer the questions posed by me at the end of this address. Your furrowed brows betray a hint of concern. Is she serious or just a bad comedian? You'll know by the time we leave for dinner.

In the context of this address, *The Legal Profession, Advocacy and Independence in 21st Century Australia*, I use the term "advocacy" primarily to mean lawyers pleading and arguing a case, usually in courts or tribunals, on behalf of clients but lawyers also have a leadership role in social and system advocacy in the areas of law, professional and institutional reform and legal and community education.

Historians contend that to understand the present and to hope to accurately predict the future, we must first understand the past. That is why I want to briefly traverse the history of the legal profession, its advocates and our Westminster-style democracy before turning to the institutional significance of an independent legal profession in a democracy and the likely future role of the profession and its advocates in Australia.

Some Legal History

In undertaking and completing this Practice Training Course you aspire to join the Queensland legal profession as a barrister or specialist advocate. Our profession has its origins in the English common law, especially the achievements of King Henry II who amalgamated Norman and Anglo-Saxon laws with some Roman influences into a recognizable body of national law[1] and established a centralized court system to interpret

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1 Dowsett J "The Law and the Legal Profession - Expectations and Reality" (The 2004 Mayo Lecture, 21 October 2004, Cairns Campus, James Cook University) 11 JCULR 4, 7.

them. At about this time in the 13th century, lawyers first emerged as an organized group of men (the law was not then a woman's place). Specialist advocates called senior pleaders became known as sergeants-at-law and the young men training under them as pleaders were known as apprentices. By the 14th century judges were appointed from the ranks of sergeants. The apprentices became members of one of the Inns of Court, the largest of which were the Temple, the Inner Temple, Gray's Inn and Lincoln's Inn, all of which still flourish in London today. Most lawyers were not pleaders but attorneys. Up until the mid-16th century attorneys, like pleaders, were also entitled to appear in court as well as to give legal advice, draw legal documents and manage the financial affairs of their clients. In the late 16th and early 17th centuries the roles of attorney and pleader became more distinct with different legal training. The attorneys developed into a new group of specialist practitioners, solicitors. The solicitor was apprenticed to a practitioner during which time he learnt the common forms and processes of the law whilst the barrister was educated in mooting and discussion, reading and reporting. The solicitor had more contact with the lay client whilst the barrister was consulted through the solicitor. During the 18th century, practising attorneys or solicitors were excluded from the Inns of Court. They formed their own association, The Society of Gentlemen Practisers in the Courts of Law and Equity, the precursor of the modern Law Society. Barristers appeared in court only when instructed by a solicitor and were not generally permitted to accept work directly from clients.[2] Barristers and solicitors had separate and exclusive admission and movement between the two branches of the profession was not encouraged.[3] Barristers had an exclusive right of audience before the superior courts, the judges of which, after the *Act of Settlement* 1701, had security of tenure.

This was the legal system adopted and adapted by the colony of New South Wales with the arrival of the First Fleet in 1788, although Australian Indigenous communities had their own established system of law and dispute resolution.[4] Necessity meant that convict attorneys were given the right to practise until the establishment in 1814 of the Supreme Court of New South Wales in Civil Judicature and the appointment of Australia's first Supreme Court judge, a man with the unfortunate name of Bent. Australia inherited the divided profession, though this was the subject of vigorous debate during the formative years of the legal profession and beyond. Mr Justice Bent was reluctant to allow the admission of emancipist lawyers, former solicitors from England and Ireland who had been convicted of offences involving dishonesty such as fraud, forgery and perjury. I do not know whether this was out of genuine concern for the quality of the profession or because of a heightened sensitivity from bad jokes about his name! At least one English solicitor arrived in the colony of New South Wales in 1815 and was admitted to practise. At first, only emigrant lawyers who were admitted to practise in Britain were admitted as lawyers but gradually lawyers qualified by service under articles of clerkship in New South Wales. In 1824 a new Supreme Court was established and the first English barristers arrived in the colony. They were admitted separately as either barristers or solicitors but in practice they had equal rights of audience in the court.

That same year the penal station of Moreton Bay was established on the Brisbane River in the colony of New South Wales. In an early 19th century prison, the prison commandant and

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2 *Doe dem.Bennett v Hale* (1850) 15 QB 171.

3 Disney J, Basten J, Redmond P and Ross S *Lawyers*, 2nd ed, Law Book Company, 1986, 24.

4 Purdon S and Rahemtula A *A Woman's Place: 100 Years of Queensland Women Lawyers* Supreme Court of Queensland Library, 2005, 3.

superintendent had wide summary powers so that there was initially no demand for lawyers. In February 1842 Moreton Bay, then known as Brisbane, ceased to be a penal settlement and with its first free settlers came the lawyers. By 1850 Brisbane was serviced biannually by a circuit court from Sydney until increased work finally justified a resident judge. When Queensland separated from New South Wales in 1859, out of a population of 25,000 settlers there were, apart from the Supreme Court judge, two barristers and six or seven solicitors.[5] Barristers were admitted to practise in Queensland if they had already been admitted in England, Ireland, Victoria or New South Wales. As there was no equivalent to the English Inns of Court, separate boards were established for examining persons applying for admission as barristers or solicitors who had not previously been admitted elsewhere. It was not until 1905 with the passing of the *Legal Practitioners Act* 1905 (Qld) that women were eligible to be admitted as barristers or solicitors. Queensland barristers were required to reside in Queensland until *Street*'s case in 1989[6] when the High Court held unconstitutional residency conditions, or conditions requiring Queensland to be the principal place of practice.

Since the *Legal Profession Act* 2004 (Qld) came into operation, admission to the profession for both barristers and solicitors has been through the Supreme Court of Queensland as legal practitioners.[7] Those wishing to practise as barristers in Queensland courts and whose principal place of practice is Queensland must also hold a Queensland Barrister's Practising Certificate, conditions of which include professional indemnity insurance, 12 months pupillage, the completion of this course and satisfaction of continuing professional development requirements.

The Development of Democracy

As the role of lawyers changed and developed, England moved from an absolute monarchy to a constitutional monarchy with an elected parliament as the major source of law-making. Over centuries, the right of British citizens to vote for members of Parliament was finally extended to all male citizens and in the early 20th century to women.

The colony of Queensland and, after Federation, the State of Queensland and the Commonwealth of Australia have adopted and adapted that Westminster system of government but universal suffrage for Queenslanders is a surprisingly recent development. Indigenous men were specifically excluded in 1885 from voting in the colony of Queensland.[8] In January 1905 non-Indigenous women obtained the right to vote in Queensland elections. A few years earlier in the year following Federation, franchise was extended to many women in Federal elections but "aboriginal native[s] of Australia Asia Africa or the Islands of the Pacific except New Zealand" were not entitled to have their names placed on a Commonwealth electoral roll.[9] Section 41 of the *Constitution* provided that at least those Indigenous people entitled to enrol to vote at State level prior to Federation could vote federally. This section was narrowly construed by the then Commonwealth Solicitor-General, Sir Robert Garran, to mean that Indigenous people turning 21 and becoming eligible to vote in a State election after Federation were not entitled to vote federally.

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5 McPherson B *Supreme Court of Queensland* Butterworths, 1989, 79.

6 *Street v Queensland Bar Association* (1989) 168 CLR 461.

7 This requires a practising certificate: see *Legal Profession Act* 2004 (Qld) s 52.

8 Australian Electoral Commission "History of the Indigenous Vote" (2002) 4, 13.

9 *Commonwealth Franchise Act* 1902 (Cth) s 4.

The High Court of Australia in 1922 rejected that narrow approach to s 41 of the *Constitution* but that did not help Japanese-born Jiro Muramats.[10] Muramats came to Australia in 1893, was naturalized in Victoria in 1899 and resided in Western Australia from 1900. He sought to enrol to vote federally. The High Court found that his Japanese origins meant he was an "aboriginal native of ... Asia ... or the Islands of the Pacific" so that he was statutorily prohibited from voting in Western Australia and so was ineligible to enrol to vote federally.

The following year an Indian born British subject, Mitta Bullosh, who was enrolled to vote in Victoria, was refused enrolment by the Commonwealth Electoral Office but a magistrate upheld Bullosh's eligibility to vote federally.[11] The Commonwealth government then passed legislation giving all Indian born citizens the right to vote in federal elections[12] but continued to deny that right to many Indigenous Australians and other applicants of colour.

It was not until 1949 in recognition of the war service of many Indigenous Australians, that the Commonwealth government gave Indigenous people, who had completed military service as well as those who had the right to vote at State level, the right to vote in federal elections.[13] In 1962 all Indigenous people were at last given the right to vote in federal elections if they wished. But whilst for other Australians enrolment was compulsory, it remained an option for Indigenous citizens; indeed, it was an offence to encourage Indigenous people to enrol to vote.[14] Compulsory voting in federal elections for Indigenous Australians did not come into effect until 1984.[15] Indigenous Queenslanders were not given the right to vote until 1965 with enrolment becoming compulsory only in 1971.[16]

The widening of membership of the legal profession from the English gentlemen-only organizations of the 18th and 19th centuries to the 21st century Queensland Law Society and Queensland Bar Association, organizations of men and women from diverse cultural backgrounds, was a natural democratic development from the granting of universal suffrage in the 20th century. That is because the legal profession has an institutional role in a democracy and, like all institutions, the community is more likely to have confidence in it if its membership broadly reflects the society in which it operates.

An independent legal profession and judiciary

The government of the State of Queensland and of the Commonwealth of Australia comprises three arms, the legislature, the executive and the judiciary. Effective democratic government is reliant on the concept of the separation of those powers, of checks and balances, so that no one arm of government can exercise or abuse total power. The government through the legislature, elected by universal suffrage, makes the majority of its laws. An independent judiciary interprets those laws and ensures citizens' rights against other citizens or against the State are recognized. An independent executive ensures that orders of courts in respect of those rights are enforced. As Justice Stevens of the US Supreme Court

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10 *Muramats v Commonwealth Electoral Officer (WA)* (1923) 32 CLR 500.

11 Summers J "The Parliament of the Commonwealth of Australia and Indigenous Peoples 1901-1967", Parliamentary Library, Commonwealth of Australia, Research Paper No 10 (2000), 13.

12 *Commonwealth Electoral Act* 1925 (Cth) s 2.

13 *Commonwealth Electoral Act* 1949 (Cth) s 3.

14 See *Commonwealth Electoral Act* 1962 (Cth).

15 *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth) s 28.

16 *Elections Act Amendment Act* 1971 (Qld) s 6.

recently noted in delivering the majority opinion in *Hamdan v Rumsfeld*:[17] "[t]he accumulation of all powers legislative, executive and judiciary in the same hands ... may justly be pronounced the very definition of tyranny".

In a democracy like Australia, an independent legal profession has a duty to ensure that every citizen has access to the rule of law which provides equal justice for all, regardless of gender, race, skin colour, religion, power or wealth. The High Court of Australia recognized in 1951 in the *Australian Communist Party* case[18] that the essence of a modern democracy is the observance of the rule of law. Reassuringly, the recent US Supreme Court majority decision in *Hamdan v Rumsfeld* was similarly based on adherence to the rule of law.

Independent lawyers have a fiduciary duty to protect and pursue their clients' rights, unswayed by the power, privilege or wealth of others and subject only to their duty to the court as officers of the court. This will sometimes involve advocacy on behalf of the least popular and least attractive members of society against governments, the rich and powerful and in defiance of populist views and media and public harassment. Ultimately a lawyer will pursue those rights in independent courts, presided over by judges who determine disputes according to their oath or affirmation to at all times and in all things do equal justice to all persons and discharge the duties and responsibilities of office according to law to the best of their knowledge and ability without fear, favour or affection.[19] On rare occasions it may involve conflict with those judges who would attempt to deflect counsel from their duty to their client. Independence is not the sole province of barristers in private practice. In-house advocates who conduct legal aid cases, prosecutors who must exercise an important independent discretion on behalf of the community, legal academics and lawyers in community legal services often have the greatest call on legal professional independence.

In the words of New South Wales Chief Justice Spigelman:

> "The independence and integrity of the legal profession, with professional standards and professional means of enforcement, is of institutional significance in our society. It is an essential adjunct to the independence of the judiciary ... a bulwark of personal freedom, particularly against the hydra-headed Executive arm of government, which history suggests is the most likely threat to that freedom. The profession, no less than the judiciary, operates as a check on Executive power. Indeed, if there should ever be an indication that a member of the judiciary was unduly favouring the Executive, the profession would play a primary role in preventing such conduct."[20]

As Justice Kirby explained to the Presidents of Law Associations in Asia Conference:[21] "The rule of law will not prevail without assuring the law's principal actors - judges and practising lawyers and also legal academics - a very high measure of independence of mind and action." The concept of judicial independence requires that judges exercising judicial functions be free from any interference or external influence that may seek to reduce their objectivity and

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17 No 05-184, June 29, 2006, 12.

18 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

19 *Constitution of Queensland* 2001 (Qld) Sch 1.

20 "Extra-Judicial Notes" (1998) 17 Aust Bar Rev 105, 106, 108.

21 Kirby J "Independence of the legal profession: Global and regional challenges" (2005) 26 Aust Bar Rev 133.

impartiality. It also requires independence from other judges involved in decision-making. As an institution, the judiciary must be respected as a distinct, separate and independent branch of government. Considerations such as competent appointments, security of tenure, adequate remuneration and resources and administrative independence from other arms of government are minimum requirements.

Justice Kirby emphasized that:

> "An independent legal profession also requires that lawyers be free to carry out their work without interference or fear of reprisal. Lawyers have a duty, within the law, to advance the interests of their clients fearlessly and to assist the courts in upholding the law. ... Challenges to such independence can arise where lawyers are not able to form independent professional organizations; are limited in the clients whom they may represent; are threatened with disciplinary action, prosecution or sanctions for undertaking their professional duties; are in any other way intimidated or harassed because of their clients or the work that they undertake; or are subjected to unreasonable interference in the way they perform their duties.
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> Independence is not provided for the benefit or protection of judges or lawyers ... Nor is it intended to shield them from being held accountable in the performance of their professional duties and to the general law. ... [I]ts purpose is the protection of the people, affording them an independent judiciary and legal profession as 'the bulwark of a free and democratic society'.
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> ...
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> The principle of an independent legal profession is recognized internationally ... in numerous international and regional treaties, United Nations resolutions and international statements ... [including] [t]he *Beijing Statement of Principles of the Independence of the Judiciary* [which] evidences the universality of this concept as a core value of international law.
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> ... If *all* people are to be entitled to equal protection under law, without exception, lawyers must be able to represent unpopular clients fearlessly and to advocate on behalf of unpopular causes, so as to uphold legal rights. To ensure the supremacy of the law over the arbitrary exercise of power a strong and independent legal profession is therefore essential.
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> In this way, an independent legal profession is an essential guardian of human and other rights. By ensuring that no person is beyond the reach of the law, the legal profession can operate as a check upon the arbitrary or excessive exercise of power by the government and its agents or by other powerful parties. By basing advocacy and judgments upon the rule of law, as opposed to the wealth or power of relevant interests or the transient popularity of the decision or of the interests affected, both judges and lawyers are indispensable instruments for the protection of minority and individual rights.
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> ... [I]t is important that our [society remains] united in the underlying commitment to the principle of the independence of the legal profession and to practical measures to ensure that it is upheld.
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> This means that judges and lawyers must explain why independence is important. Sometimes, to do so, they must reach over the heads of antagonistic sources of power in government, the community and the media, jealous of the law's independence."[22]

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[22] Above, 133 - 137.

The Privy Council has recently stated that the independence of judges is "all but universally recognized as a necessary feature of the rule of law": *Independent Jamaica Council for Human Rights (1998) Ltd & Ors v Marshall-Burnett*.[23]

The institutional role of an independent legal profession and the need for public confidence in it is the very reason why it is desirable in a democracy that the legal profession and the judiciary chosen from it (both necessarily an elite in terms of education, training and professional experience) are where possible reflective of the whole community and include appropriately qualified men and women from diverse backgrounds.

Meeting threats to professional and judicial independence

Threats to professional and judicial independence continue to occur throughout the world and include the following examples. In Nepal in early 2005 the King dismissed his government and assumed direct rule, declaring a state of national emergency. He ordered the arrest of human rights lawyers including the former president of the Nepal Bar Association, who was finally released shortly before the Supreme Court was to hear his petition for *habeas corpus*.[24]

In November 2002 the Swaziland government declined to release citizens who had been granted bail by the High Court of Appeal, claiming the judges were influenced by "external forces"; as a result the entire Bench resigned. The International Commission of Jurists' fact-finding mission in January 2003 concluded that: "threats to judicial independence are deeply rooted and routine in Swaziland and that periodic attacks on the judiciary by the Executive have given way to an Executive attitude that holds the judiciary, the rule of law, and the separation of powers in virtual contempt, in particular when they conflict with entrenched interests." The crisis ended in August 2004 when the new prime minister unequivocally withdrew the statement that had triggered the crisis, introduced legislation to reconstitute the High Court of Appeal and released those who had been granted bail by the court.[25]

In Venezuela, the ruling coalition government expanded the size of the Supreme Court in December 2004 by more than 50 per cent, appointing 12 new justices and purporting to give the government power to remove judges without the two-thirds majority vote required by the Constitution.[26]

In Zimbabwe, the government's refusal to abide by judicial rulings which do not suit it and its intimidation of lawyers and judges through arrest and criminal prosecution has constituted a chilling attack on legal independence. The United Nations Special Rapporteur on the Independence of Judges and Lawyers considers that in Zimbabwe the rule of law is "in tatters".[27] Curiously when democracy, the rule of law and professional legal and judicial independence are threatened, as in Zimbabwe, the independence of the media is often also

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23 [2005] UKPC 3, 3 February 2005, [12].
24 Above, 138.
25 Above, 138 - 139.
26 Above, 139.
27 Above, 139 - 140.

threatened; yet in western liberal democracies attacks by the media on judicial and legal professional independence are commonplace.

In Australia as in most jurisdictions the judiciary is unelected so that it is, uniquely, the arm of government neither directly responsible to the people nor, because of its independence, to the elected legislature. In some jurisdictions, including many in the USA, the judiciary is elected. Chief Justice Gleeson questions the wisdom of election to select an impartial and independent judiciary. He points out that judicial elections are fortunately unlikely to appeal to Australian politicians who would not wish to compete against democratically elected judges claiming a democratic mandate to oppose legislative policy.[28] He considers that in the Australian context, an elected Chief Justice would be a "constitutional monstrosity".[29] Justice Kirby also rejects the principle of an elected judiciary as a systemic attack on judicial independence, citing Deborah Goldberg, the director of the Democracy Programme at the US Brennan Centre for Justice:

> "High spending by candidates means that special interest groups are giving substantial amounts directly to judicial candidates, furthering the impression that justice is for sale."[30]

Earlier this year I was privileged, together with hundreds of other women judges from 43 countries to attend in Sydney the 8th Biennial Conference of the International Association of Women Judges. The theme of the conference was "An Independent Judiciary". In a session entitled "The Appointment and Removal of Judges" Justice Bea Ann Smith of the Third Court of Appeals in Texas, who has been an unopposed elected judge in three elections, spoke convincingly against the concept of an elected judiciary because of the threat it poses to judicial independence. There are contrary views. An elected African-American woman judge from Chicago, Illinois spoke strongly in favour of the elected system, claiming it greatly widened the pool from which judges were chosen and contributed to a more diverse and representative judiciary. For my part, I embrace the views of Chief Justice Gleeson, Justice Kirby and Justice Smith. I am content to see the pool from which judges are appointed widened by less anarchistic methods, such as the occasional appointment of suitably highly qualified practitioners from outside the ranks of practising barristers who can add their varied life and work experiences to the Bench, thereby helping to maintain public confidence in the judiciary.

Another session at the Conference of the International Association of Women Judges was dedicated to the topic "Maintaining Judicial Independence". We Australian judges listened with shocked admiration to stories from Justice Carmen Argibay of the Supreme Court of Argentina, Justice Nazhat Shameem of the High Court of Fiji and Kenyan judge Mary Ang'awa of how they dealt with threats to judicial independence. We thought, almost smugly, how fortunate we are in Australia. A few days later I read in *The Australian* newspaper[31] that South Australian premier Mike Rann had attacked his State's highly respected Chief Justice over comments Chief Justice Doyle had made about the dangers of

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[28] Gleeson CJ *The State of the Judicature*, 19th Biennial Conference of LAWASIA, Gold Coast, 24 March 2005.

[29] Gleeson CJ *Out of Touch or Out of Reach?* Judicial Conference of Australia Colloquium, Adelaide, 2 October 2004.

[30] Above, 140.

[31] Tuesday May 9, 2006.

the legislature dumping social problems on the courts and prisons through populist legislative changes requiring tougher sentences from courts. It is entirely proper for judges, especially Chief Justices, to speak out from time to time on such matters affecting the administration of the criminal justice system. *The Australian* reported that Mr Rann's "criticism of Justice Doyle escalates a row with the State's legal fraternity, whom he has attacked as 'enemies of the State' and described as a 'snobbish closed shop'.
... Mr Rann said sentences that did not reflect community expectations 'undermine public confidence in the administration of justice'." The President of the Law Society of South Australia, Ms Eszenyi, rightly spoke in defence of the Chief Justice, supporting his call for greater emphasis on crime prevention and rehabilitation and noting that the Premier's focus on higher penalties was "not the best thing for victims of crime or the State".

Tensions between the legislature and the judiciary in South Australia appear ongoing. Earlier this month the *Adelaide Advertiser* reported that the Attorney-General, Michael Atkinson, had written a letter of apology to Chief Justice Doyle over comments Atkinson made about a Full Court decision on drink-driving which allowed an offender to keep her licence as "merely a pretext for the Supreme Court to strike down a law it thinks Parliament shouldn't have passed", comments Chief Justice Doyle described as "unfounded".[32]

Such attacks on judges' sentencing by the media, politicians or lobby groups like the Queensland Police Union are frequent. After one such attack in the *Courier Mail* in early January this year, when many judges and lawyers were on annual leave, the President of the Queensland Law Society, Rob Davis, responded:

> "The attack on the integrity and independence of Queensland's judiciary by Queensland Police Union president Gary Wilkinson was as gratuitous as it was regrettable (C-M, Jan 4). Describing the judiciary as he did as 'chardonnay-sipping lawyers who don't understand the system and have more sympathy for the offenders than they do with the victims' adds nothing to informed community debate ... Every case has its distinctive characteristics and courts have the advantage of being able to consider all of the facts. The fundamental strengths of our justice system include the independence of the judiciary and the discretionary sentencing powers of magistrates and judges. Any slavish adherence to a simplistic 'one size fits all' policy would compromise those strengths. [The] claim that allegedly lenient sentences imposed by the courts are somehow symptomatic of 'Labor's failure to protect our community' is populist nonsense. ... There must be ongoing debate about the best strategies to reduce crime and punish convicted offenders but attacks on the integrity and professionalism of judges and magistrates ... are not conducive to that."[33]

US Supreme Court Justice Ruth Bader Ginsburg recently spoke extra-curially to the American Bar Association of her concerns about a senior Republican proposal in Congress to set up a watchdog over federal courts to investigate and report to the Justice Department on allegations of judicial misconduct. She encouraged lawyers to speak out to support judges when criticized by members of Congress, explaining that judges cannot lobby on their own

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[32] *Adelaide Advertiser* Wednesday 5 July 2006.
[33] *Courier Mail* January 4, 2005.

behalf, and noting "[m]y sense now is that the judiciary is under assault in a way that I haven't seen before".[34]

Legal practitioners like Melbourne barrister Julian Burnside QC, who was awarded the Law Council of Australia's Human Rights Award in 2004 for his advocacy on behalf of asylum seekers, and the many other unsung lawyer heroes who work pro bono on behalf of the disempowered and disadvantaged without public recognition or fanfare are great examples to us all of legal professional dedication and independence.

The Future

There are many soothsayers prepared to prophesy the future of the legal profession in Australia. In 2001 the Law Council of Australia prepared a thoughtful discussion paper on the likely challenges for the legal profession in 2010. It predicts that the 21st century will be driven by globalization with internationalization at the top end of commercial legal practice. A small number of large multinational firms will handle major commercial transactions world-wide. Deregulation will lead to increased competition in Australia from overseas and from non-traditional providers of legal services. Consumer awareness of legal rights will lead to highly educated legal consumers with matching expectations. Less wealthy consumers will have increased difficulty accessing the courts to enforce their rights as legal aid budgets shrink and direct court funding decreases. There will be a greater public expectation of pro bono services from the profession and continued tension between business and professional ethical aspects of legal practice. The challenges for barristers will include the extent to which practitioners can balance general and specialist skills; the need to adapt to changes to legal business structures whilst preserving the collegiate foundation that sustains the independent Bar's professional ethical values; the likely modification or abolition of advocate's immunity; and finding methods to assist barristers with parenting responsibilities. A lawyer admitted to practice in any State or Territory will be able to practise law throughout Australia with few restrictions and there will be a harmonization of the regulatory structures on legal practitioners in all jurisdictions. The varied segments of the legal profession remain bound by their core commitment to legal ethical principles, one of the most important issues facing the profession. Ethics should be integrated in all subjects in undergraduate programmes (something I am pleased to note has recently been implemented by the Law Faculty at Griffith University). Challenges for professional bodies will include ensuring that the fundamental values of the legal profession are not affected by new business structures such as incorporation or multidisciplinary practices (MDPs); to further develop ethical standards to meet new or changing needs; to develop strategies to assist part-time practice at the Bar and to continue lobbying and liaising with overseas professional associations to improve market share and access to foreign legal markets. Professional associations must develop strategies to ensure that those lawyers working outside traditional professional structures are adequately represented by constituent bodies and remain part of the legal profession.

Anne Trimmer, President of the Law Council of Australia at the time of that report, considers that a key issue in the discussion paper is the need to remedy the acute lack of funding of university law schools so that law schools can respond to future challenges in legal practice

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[34] "Supreme Court justice criticizes Congress on judicial oversight plan", May 2, 2006, American Bar Association: http://www.abanet.org; http://news.findlaw.com, as at 4 May 2006.

by educating lawyers to meet those challenges.[35] I hope universities will nurture a gender balanced culturally diverse 21st century legal profession with advocates educated not merely to cope with new challenges but to initiate and lead positive change.

I expect the 21st century will see a continued shift in advocacy from the oral tradition to more written and technology-based argument, for example PowerPoint, as practitioners, clients, judges and juries become more accustomed to absorbing information technologically.[36] As appearances by video-link or telephone (already commonplace in Queensland courts in an effort to improve affordable access to justice) increase, advocates will adapt their style accordingly. Computerized legal information retrieval, especially via the internet, will mean that advocates will increasingly refer to international law and decisions from overseas jurisdictions in legal argument.[37] The use of searchable real-time transcripts, laptops, electronic courts and electronic appeal records will increase. In my Court, appeal record books in criminal matters are now available electronically in easily searchable form. We hope to have civil appeal record books similarly available shortly. The electronic filing of court documents will become the norm, perhaps even compulsory, as in Singapore. Care must be taken, however, to ensure the protection of the rights of those who are not computer-literate or do not have access to the internet, especially unrepresented litigants.

Professor Richard Susskind considers that the 21st century will be dominated by exponential growth of technology and its use by the community and the profession. Computers will problem-solve by way of "perfect retrieval": type a question into the computer and it will provide the answer. The combination of global email, the world-wide web and the online community will change the face of information processing and knowledge-sharing as the profession becomes dominated, not by those who can remember a pre-internet world, but by those who have grown up with this technology, which is second nature to them, their socializing and their work practices. Lawyers will have legal information retrieval systems which directly focus on their relevant areas of expertize so that each morning they will turn on their computers to find displayed all relevant legal updates. Lawyers will help clients manage risk and compliance by automatically updating their clients' computers with relevant changes to the law and the ensuing implications affecting their clients' problem or document. Professor Susskind refers to the adage, "the best way to predict the future is to invent it", and invites us to use the emerging technologies for maximum personal, professional and community benefit.[38]

Whilst these optimistic predictions about technological advances are exciting, I will be content if they shorten, rather than lengthen, the working day and make us use less instead of more paper!

Another issue in which advocates can expect to take a leadership role is whether Queensland or the Commonwealth should adopt a Bill of Rights and if so its form. Although that does not presently seem imminent, the experiences of the ACT with its *Human Rights Act* 2004

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35 Trimmer A "The Legal Profession in 2010 - Issues for Legal Education" (2001) 3 UTSLR 9.

36 Kirby J *The Future of Appellate Advocacy* (2006) 27 Aust Bar Rev 141.

37 Kirby J *The Future of Appellate Advocacy* (2006) 27 Aust Bar Rev 141, 153 - 155.

38 Susskind R "The Next Ten Years" Society for Computers and Law 2006 Lecture, April/May 2006: www.scl.org, as at 17 July 2006.

and Victoria with its *Charter of Human Rights and Responsibilities Act* 2006, will be watched with interest by Queensland lawyers, legislators and community.

It is probably a question of not if, but when, Australia changes its present constitutional system to become a republic. As lawyers, you will be expected to take a leadership role in guiding the public debate on the issue and ensuring that, whatever system is chosen, it works as effectively for the people as that instituted at Federation.

The Chief Executive of Middletons Lawyers, John Chisholm, predicted in 2004 that by 2010 there would be a move away from time-based billing and electronic time-sheets with greater use of estimators; a more national or at least eastern seaboard based legal profession; the slow re-emergence of MDPs; a growth in Asia Pacific rim mega firms; a greater polarization of law firms between those servicing corporate Australia and those dealing with private client services, with the mid-tier generalist practices becoming largely extinct; an increase in women in senior positions in law firms but still nowhere near representative of the percentage of women commencing in private legal practice.[39]

An ongoing challenge for the legal profession in the 21st century will be to ensure best practice in the continuing education and regulation of its members. A commitment to participation in continuing legal education and law reform from practising lawyers and judges is an important professional responsibility, as is a commitment to the search for solutions to the increasing cost to the public of legal services.[40]

The after-shocks of September 11, 2001 will impact upon the role of the legal profession, advocacy and independence in Australia well into the 21st century. Kirby J notes that "[t]he challenge ... is, within constitutionally valid laws, to continue insisting upon the application of the rule of law and the protection of civil liberties, even in circumstances of heightened security concerns".[41] There are encouraging precedents in other jurisdictions. In 2004 the Supreme Court of Israel in *Beit Sourik Village Council v Government of Israel*[42] upheld in part a challenge by Palestinian complainants concerning the erection of the separation fence constructed through Palestinian land, stating:

> "We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security."

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39 Chisholm J "Practising Law in Australia in 2010" (Deakin Law Review Dinner Address 2004), (2004) 9 Deakin Law Review 301.

40 See fn 1, 19.

41 See fn 21, 143.

42 Unreported, Israel SC sitting as the High Court of Justice, HCJ 2056/04, 2 May 2004, Barak P, Mazza VP and Cheshin J concurring, [86].

I earlier referred to recent observations made by US Supreme Court Justice Stevens delivering the majority judgment in *Hamdan v Rumsfeld*.[43] Hamdan, a Yemeni national captured and turned over to the US military in Afghanistan during hostilities between the US and the Taliban in November 2001. He was transported to Guantanamo Bay in 2002. Over a year later he was deemed eligible by the US President for trial by military commission for then unspecified crimes. A year later again he was charged with one count of conspiracy "to commit ... offences triable by military commission". Hamdan petitioned for writs of *habeas corpus* and *mandamus*, challenging the executive's intended means of prosecuting his case. The majority concluded that the military commission convened to try Hamdan lacked power to proceed because its structures and procedures violated both the *Uniform Code of Military Justice* (UCMJ) and the Geneva Conventions. Four of the eight justices who constituted the court (Chief Justice Roberts did not sit) also concluded that the offence with which Hamdan was charged was not one "that by ... the law of war may be tried by military commissions". The majority referred with approval to its earlier decision in *Quirin*,[44] where a military commission was convened by the then US President during the Second World War to try seven German saboteurs, who were captured upon arrival by submarine in New York and Florida and who filed *habeas corpus* petitions in US courts challenging their trial by commission. The US Supreme Court granted the saboteurs' petition for *certiorari* and convened a special term to hear the case, explaining it was warranted "[i]n view of the public importance of the question raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, ...".[45] The majority pointed out that Hamdan's tribunal was appointed, not by a military commander in the field of battle under circumstances of military necessity, but by a retired Major-General stationed away from any active hostility, circumstances which did not warrant trial by a military commission established by executive order under the authority of the UCMJ to lawfully try persons and subject them to punishment.[46]

The majority expressed concern over some aspects of the proposed trial process: the accused and his civilian counsel may be excluded from hearing, and precluded from ever learning, the evidence presented during any part of the proceeding that the appointing authority or the presiding officer decides to "close"; testimonial hearsay and evidence obtained through coercion was fully admissible; neither testimony nor written statements need be sworn; and the accused and his or her civilian counsel may be denied access to evidence which is deemed "protected information".[47]

Stevens J concluded:

> "But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction".[48]

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43 See fn 17.
44 *Ex parte Quirin* (1942) 317 US 1, 19.
45 *Hamdan*, 8.
46 Above, 15.
47 Above, 16 and 22.
48 Above, 23.

The reaction of the executive was intriguing. Steven G Bradbury, Acting Assistant Attorney-General, in his address to the United States Senate Committee on the Judiciary concerning *Hamdan v Rumsfeld* described the decision as:

> "[W]ithout historical analogue ... surprising and disappointing ... Of course, the terrorists who fight for al Qaeda have nothing but contempt for the laws of war. They have killed thousands of innocent civilians in New York, Washington, and Pennsylvania - and thousands more in London, Madrid, Kenya, Tanzania, Yemen, Jordan, Indonesia, Iraq, and Afghanistan. They advocate unrestrained violence and chaos. As a matter of course, they kidnap relief aid workers, behead contractors, journalists, and US military personnel, and bomb shrines, wedding parties, restaurants, and nightclubs. They openly mock the rule of law, the Geneva Conventions and the standards of civilized people everywhere, and they will attack us again if given the chance.
>
> ... [T]he Geneva Conventions ... were not designed as a framework for addressing the kind of conflict we are in with al Qaeda.
>
> ... Notwithstanding the problematic aspects of the Court's opinion ..., the decision in *Hamdan* gives the political Branches an opportunity to work as one to re-establish the legitimate authority of the United States to rely on military commissions to bring the terrorists to justice. It is also an opportunity to come together to reaffirm our values as a Nation and our faith in the rule of law.
>
> We in the Administration look forward to working with Congress to protect the American people and to ensure that unlawful terrorist combatants can be brought to justice, consistent with the Supreme Court's guidance."[49]

I fear that, throughout the world, Justice Ginsburg's apprehension that the judiciary will be likely to be the subject of future unprecedented attack is well-founded.[50]

Conclusion

We have been displaced tonight from our rightful position in the Banco Court by the World Shakespeare Congress. Although the Bard lived before the *Act of Settlement* and democratic universal suffrage, some themes from his works are relevant to this discussion. Dick the Butcher in *Henry VI* said: "The first thing we do, let's kill all the lawyers". My response to Dick is "Only if you want to kill democracy".

Practising as a barrister is one of the most exciting and rewarding of careers. Shakespeare's Rosalind in *As You Like It* said: "[Time stays still] With lawyers in the vacation; for they sleep between term and term, and then they perceive not how Time moves". I predict, Rosalind, that the flexibility of working hours at the Bar will be increasingly used to the advantage of male and female practitioners to achieve a work-life-family balance. Tranio in *The Taming of the Shrew* identified another of the pleasurable aspects of life as a barrister,

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[49] Bradbury S G, Acting Assistant Attorney-General, Office of Legal Counsel, Department of Justice, Statement before the United States Senate Committee on the Judiciary concerning the Supreme Court's decision in *Hamdan v Rumsfeld*, July 11, 2006.

[50] Since delivering this speech, the US Congress has passed the Military Commissions Act of 2006. For further commentary see Abrams N, "The Response to Terrorism in Some Western Countries" (Journal of International Criminal Justice, November 2006); Amnesty International, "USA: Military Commissions Act of 2006 – Turning bad policy into bad law" (Amnesty International, 29 September 2006); and Becker J D, "Getting habeas wrong" (New Jersey Law Journal, 2 February 2007).

the special relationship between colleagues, when he said: "... do as adversaries do in law, Strive mightily, but eat and drink as friends". And so we shall shortly.

As specialist advocate lawyers in 21st century Australia, you are part of an ancient and noble profession but you have the modern skills, intellect and flexibility to not only respond to future challenges but also to initiate and embrace positive change. You will have your core responsibilities of ensuring competence and protecting your clients' rights, subject only to your overriding duty to the court. You may also be called on to protect legal professional independence and the rule of law by acting for or supporting other lawyers acting for unpopular clients. The need may arise to speak out on behalf of judges who come under attack for unpopular decisions, perhaps relating to terrorism, constitutional interpretation, human rights issues or, that hoary chestnut, sentencing. You have a duty to educate the public about the importance in a democracy of the rule of law and an independent legal profession, including an independent judiciary. You also have a responsibility to contribute to undergraduate legal education, to contribute and participate in continuing legal education, to initiate and contribute to appropriate law reform and positive institutional and professional change. Shakespeare's Second Fisherman in *Pericles*, said: "here's a fish hangs in the net, like a poor man's right in the law; 'twill hardly come out". Show the Bard that, in 21st century Australia, the legal rights of the poor are enforced by playing your part in ensuring access to justice for the impecunious.

These then are the questions for you, which I foreshadowed at the commencement of this address. Will you speak and act to protect legal professional, including judicial, independence? Will you do what you can to ensure that needy individuals and organizations have access to that independent legal profession? Will you make your contribution to ensure proper standards of undergraduate and continuing legal education? Will you use your intellectual, technological and advocacy skills to encourage appropriate law reform, community education and professional and institutional change?

If your answer to each of these questions is "yes", then, having successfully completed the Bar Practice Course - and the feedback booklet - your Certificate will be sent on Monday.