THE ROLE OF THE LEGAL PROFESSION IN MEETING CHANGE

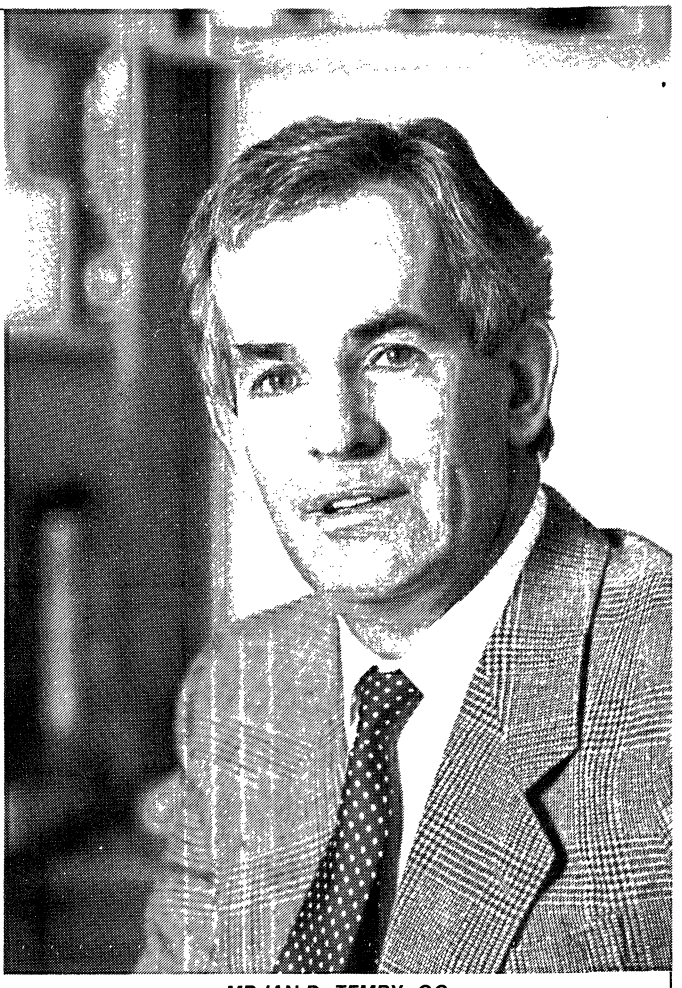
IAN Douglas Temby, QC, has become well known to Australians since his appointment as Director of Public Prosecutions for the Commonwealth in 1984. He came to that position with high qualifications. He was born in Perth and received his education in that city. He was awarded the degree of Bachelor of Laws, with Honours, from the University of Western Australia in 1964. He practised as a solicitor for some years before deciding to become a specialist barrister in 1978. He was appointed a Queen's Counsel only two years later.

He has taken great interest in all aspects of the law during his career. He taught in the Law School in Perth on a part-time basis for many years. He served as a member of the Council of the WA Law Society and became president of that body in 1983. He served a term as a commissioner with the WA Legal Aid Commission. He was one of the founders of the Legal Advice Bureau in Perth. He served upon the Council and then became president of the Law Council of Australia, the Australia-wide body which represents both barristers and solicitors.

He has also found time to participate in local government being a member of the Subiaco City Council for nine years, during which period he served a term as Deputy Mayor.

Mr Temby's appointment as Director of Public Prosecutions has seen him in the forefront of the fight against organised crime. It can safely be said that that fight is now being waged with much greater tenacity than ever it was before.

Mr Temby has been much in demand as a speaker and as a writer in the years which have followed his appointment. The criminal justice conference gained in stature when he agreed to address it. We are grateful to him for his permission to reproduce his address here.



MR IAN D. TEMBY, QC

WHEN I was a law student we were taught, in effect, that lawyers were technicians. It was for them to accept the law as laid down by the Parliament and the courts, and to participate in its application. Over the past 20 years or so there has been a change in that attitude. Most lawyers today, and especially the younger members of the profession, do not doubt that we have a substantial capacity to affect the content of the law: the substantive and procedural rules which govern much of the way in which society functions. Given that capacity, in my assertion, lawyers have a responsibility to work towards beneficial reforms.

The main difficulty lies in identifying and agreeing upon the changes that should be made. That, which I see as good, will be anathema to the next fellow.

In a pluralist society, we encourage expression of a wide range of views, and law reform proposals will often be finely balanced: topics upon which people of good sense and goodwill can legitimately differ.

I am a reformist, but others are not, and who is to say that they are necessarily wrong? Let us start by examining the common perception of lawyers as being conservative: upholders of the status quo, and resistant to change. The charge cannot be dismissed summarily. We have a case to answer.

The first defence plea is by way of confession and avoidance, and it stems from the nature of lawyers' roles in society. I use the plural deliberately because, as a class, we perform disparate, even conflicting, functions. So there are lawyers in community centres who practise poverty law while others, for their sins, toil away in drawing leases for landlords, advising on company takeovers and serving the needs of stockbrokers. Despite this disparity, all lawyers can be seen to work within society as it is presently organised, and to perform tasks which reduce the risk of social or individual conflict, or help to solve disputes when they arise. That short statement covers conveyancers as well

as litigious lawyers, and the judiciary as well as the mass of practitioners.

While some lawyers will reject the notion, it seems to me inescapable that we lawyers are servants of the society of which we form part. If that is right then we cannot be expected to be distinctly more radical, as a group, than are the Australian people as a whole. A dispassionate view of Australians as a whole today — early in the last quarter of the 20th century — surely compels the conclusion that radicalism is not flourishing. Even those of us who are unashamed reformists must take care not to get too far ahead of public attitudes.

The second defence plea is by way of denial. There is much that the Australian legal profession has done, over the past decade or so, by way of reformation. Most of what has been done has been internally generated, not prompted from outside. And most of the major changes have been very much in the public interest.

Let me instance some of the changes that have been made in my State of original admission, Western Australia. I speak of that place because I know it best, and also because it has a most forward thinking legal profession, but most of the reforms to be mentioned have happened throughout the country by now.

Firstly, there is the question of advertising. The legal profession cannot properly serve society if a large section of that society is wholly or partly unaware of the services that it provides. And no profession could be said to serve its society properly if it makes itself inaccessible to anyone who may have legitimate need of its services. Much of the distrust, and many of the baseless criticisms, of the legal profession would vanish were its members to become more accessible. The vulture-like imagery, so often used by critics, thrives upon the facelessness which the legal profession presents to so many.

The traditional approach was to say that advertising was inconsistent with the concept of a profession. That is to look at the matter only from the viewpoint of lawyers, whereas what matters is the interests of the public. It is in any event nonsense, given that lawyers, as a vocational group,comprise a service industry, and that the advertising in question is designed to be informative and required to be accurate. Such advertising is now permitted in most parts of Australia.

LAWYERS are still precluded or discouraged from boasting that the service they offer is superior to or cheaper than that of competitors. What must be and is avoided is the sort of advertising which results in people acquiring things they don't need, from others whom they should not trust, at prices that are unreasonable. But it is now perfectly proper for a firm to inform the public as to its areas of speciality, to advise if it has lawyers who are fluent in different languages, or if it offers a free initial consultation. All of this can now be done, and a thorougly good thing it is too.

Another traditional belief is that the amounts charged by lawyers should be controlled, not just by setting maximum fees, but also by stipulating minimum fees. The former may be seen as justified because the relationship between solicitor and client is perhaps uniquely close, and based upon a high degree of trust which can be abused. Unhappily that occurs from time to time. We work in an esoteric field, and may be seen as witch doctors by simple lay people who are unlettered in the law and lack knowledge of its intricacies. I therefore favour retention of the right of clients to have their lawyer's account taxed, that is to say checked by an officer of the court.

However, so far as the customary rule against undercharging is concerned, it has always operated in the interests of the profession and generally against the interests of clients. At least in Western Australia it is now proper for lawyers to charge their clients fees which are as low as they see fit, consistent with the delivery of a proper service.

This approach has not been replicated in all parts of the country, but it is gaining increasing acceptance. The time has come for the legal profession throughout Australia to implement this reform.

The next example requires me to go back in history. It has always been the case that some people cannot afford the services of lawyers. The legal profession itself took the initial steps in ensuring that those in serious need of legal services and who could not pay were not denied access to the courts. South Australia can claim credit for first establishing a voluntary legal aid scheme. They were followed by Western Australia, and both States enjoyed rudimentary legal aid schemes long ago. I am talking in terms of half a century or so.

These initiatives came to be matched elsewhere. They were followed later by free or cheap legal advice centres, duty counsel schemes, and so on.

Legal aid in all parts of Australia is now administered on a statutory basis. The various schemes have their imperfections — most of them are inadequately funded — and it cannot be said that all in need of legal services can obtain them despite impecuniosity.

Despite these reservations, my observation and assertion is that legal aid and legal advice are generally available to those in serious need, and the situation in this country is good relative to the civilised world generally. It is lawyers, not governments, who can claim credit for initiating the various reforms to which I have referred.

What I am saying is by way of brief overview only.

In moving to a fourth area, I stress that many other claims similar to those mentioned can be made by the legal

profession. There is much that we have done to achieve beneficial reforms in the interests of the public.

The next matter concerns the development of a national legal profession. Lay people could be excused for thinking that a properly qualified lawyer is so qualified, irrespective of the State or Territory in which he or she first became admitted to practice. Unfortunately that is not the case in Australia today, but over the past decade or two there have been significant moves in the right direction.

There is tucked away in the Constitution a provision which, at first blush, would seem to prohibit discrimination against a person on the basis of his residence in a particular State. Section 117 provides:

> *"A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."*

NOW it has repeatedly been stated by the High Court that in interpreting the Constitution we should avoid pedantic and narrow constructions[1]. We should instead, it is said, always lean to the broader interpretation[2]. With these exhortations in mind, the majority decision of the High Court in *Henry* v *Boehm*[3] comes as a rude shock. Mr Edward Henry had been a barrister and solicitor of the Supreme Court of Victoria for some 15 years when he sought admission to practise in South Australia. The South Australian Rules of Court then required that an applicant who had previously been admitted elsewhere must reside continuously in South Australia for at least three months immediately prior to filing his notice of application for admission. This rule did not apply to persons who were ordinarily domiciled in South Australia. Another rule provided that a person previously admitted to practise elsewhere and, who satisfied the above requirements, could only be conditionally admitted in South Australia.

The conditional admission ran only for a year. After a year, unless the applicant could satisfy the Supreme Court that he had continuously resided in South Australia for that year, the admission lapsed and the applicant was no longer entitled to practise. It is in ways such as this that monopolies have always protected their position.

Mr Henry challenged these rules. They were, he submitted, unconstitutional. The majority of the High Court disagreed with him. The admission rules, and by analogy similar rules in other States, were upheld as constitutional. It was said that they did not constitute a disability or discrimination which would not be equally applicable to Mr Henry if he were a subject of the Queen resident in South Australia. Why was this? Because, the majority of the court said, the rule that one had to reside in South Australia applied to everyone who was not domiciled in South Australia, including those who resided in South Australia. Using this sophistry, a State law will not discriminate on the basis of residence if, for example, it provides that a person shall not be employed in that State unless he has resided there for the previous 10 years: the State law applies to residents and non-residents, alike. But for the dissenting judgement of Stephen J., one could be excused for thinking that the High Court was trying to emulate Lewis Carroll's masterpiece.

To this day, admission as a solicitor or barrister remains on a State-by-State basis. To obtain admission in each other State requires a considerable amount of time and trouble. Needless to say, those in favour of retention of barriers against admission camouflage their narrow self-interest behind altruism and high principle. The most common agrument trotted out in favour of retention is that a lawyer admitted in, say, New South Wales does not know the law in, say, Victoria and ought not therefore be allowed to practise there. The argument does not bear close analysis. First, it ignores the fact that there are great similarities between the laws of the States. Company law, which provides an enormous amount of work, is a prime example.

Secondly, the argument ignores that most fundamental skill in the armoury of any good lawyer, wherever he or she be admitted: the ability to research and discover the law in any field. It is a skill that can be utilised anywhere. Finally, the argument sits at odds with the status quo. In most States, the current procedure for reciprocal admission does not require one to familiarise oneself with the laws of that State. All that is required is a lengthy series of documents relating to character, proof of admission, proof of graduation and so on, which must be lodged in a certain order, by certain times and accompanied by certain fees. The procedure is cumbersome and time-consuming, but it does not guarantee knowledge of the laws of the State.

Those who suffer from this anachronism are not just lawyers — that could hardly matter — but also the public. The community interest is harmed because rules such as these dilute their basic right of representation by whomsoever they choose.

As I said earlier, there have been moves in the right direction. In Western Australia, and later in most other parts of the country, changes were made such that barriers to the admission of foreign lawyers have been done away with. Subject to complying with some tedious formal requirements, lawyers from most parts of Australia can practise the law elsewhere in the country, without satisfying a residential requirement. The notable and deplorable exception is Queensland. It is to be hoped that current legal challenges to the rules in that State will succeed. In the longer term, it is to be hoped that admission in any part of the country will come to carry with it an automatic right to practise the law throughout Australia. This is a question of profound importance. The ability of lawyers to respond to social change is greatly reduced by their inability to think and speak as members of a single, national profession.

More importantly, the present position positively contributes to the narrow and cringing responses to which parochial people are prone.

NOTE: There are three references listed here, but were not mentioned at the end of his address and therefore not printed in the Journal.

I now turn to a separate, but related topic. The basic proposition is that while Parliaments make laws, there generally remains much to be done in putting flesh on the bones of the legislation. The Statute can be looked on as a skeleton, to which muscle and sinews must be added. That is done by lawyers, chiefly Judges, but also advocates in argument, solicitors in preparing advices and briefs, and government lawyers in developing policy. At the moment I work as the head of a prosecuting agency, and you will forgive me if I give instances from that area. You will appreciate it is very dear to me, and it is always as well to speak on topics with which one is conversant.

The Director of Public Prosecutions Act, 1983, set up the office of DPP, enabled appointment of a statutory law officer as its head, made satisfactory provision for both independence and accountability, and conferred necessary functions and powers on the Director and his officers.

While the Act is the prime source document, there have been a number of steps taken which go beyond its terms and which are also of fundamental importance. It matters not whether they be categorised as law, or as legal policy. Those that I mention are now, or will shortly be, in the public domain. They represent changes, and because they relate to the criminal justice system, they will be of particular interest to you.

The first is well known. Early last year the Attorney General tabled in the Commonwealth Parliament the Prosecution Policy of the Commonwealth — the set of guidelines for the making of decisions in the prosecution process. Many of you will be generally aware of what they contain, and anyone can obtain copies.

What we have sought to do is tell the public, and the lawyers who look after their interests, how we go about making key decisions relative to prosecutions. The most important of them is when prosecutions should be started and stopped, but the guidelines also deal with matters such as granting immunity to witnesses who may have themselves committed offences, charge bargaining, and the entire topic of control of Commonwealth prosecutions. I am not aware of any generally similar document which has anything like the same scope.

Two other important sets of guidelines have been prepared and will be made public when the DPP Annual Report for 1986-87 is tabled in the Parliament. It is hoped that will happen later this year.

The first of them relates to the prosecutor's role in the sentencing process. When the Office of DPP came into existence, we found that practices in that regard varied widely as between the various Australian jurisdictions. There had to be a correct approach which was capable of universal application, and an Office with national responsibilities could not countenance the then existing situation. We quickly decided that two factors compelled the conclusion that the traditional disdain of prosecutors towards sentencing was inappropriate. One is the fact that in all parts of Australia the Crown can, and does, appeal against sentence. To stand back silently while a Judge falls into error, and then take an appeal, seems unsporting at best. The second factor is that the community surely has an interest in sentencing practices and outcomes, and prosecutors may be seen to represent the community.

Over the past three years we have seen a gradual change in judicial attitudes, particularly in the eastern seaboard States, such that most Judges throughout the country now see it as appropriate for the prosecution lawyer to make restrained and helpful submissions to the Court with a view to imposition of an appropriate sentence.

To regulate the position, we have laid down guidelines, which contain a deal of detail. They may shock some traditionalists, but most will welcome them. In any event, we are at least prepared to show our hand and say how this aspect of our functions will be attended to.

A matter of greater difficulty, but of less practical significance, concerns the selection of juries. In the superior courts the jury is the central institution in the criminal justice system. It is a body which should be representative of the community generally, but unfortunately it is not, particularly because exemptions and disqualifications from jury service are absurdly widespread. There is little we can do about that, save to urge change, but at least we can try and ensure that the role played by the prosecution in selecting a jury is generally consistent throughout Australia. It is again the case that three years ago practices varied widely and were shrouded in secrecy. We will be disclosing publicly what we do and why we do it.

Before I close, could I say that others who occupy different positions would of course have different viewpoints, identify different problems, suggest different solutions and give different examples of ways in which improvements have been made. It is not my purpose to assert that the Office I head represents the sum of all that is good. As I said before, the chief reasons these examples have been given are that they are best known and most dear to me.

I have sought to identify and explain certain important changes to the law and legal practice which have taken place in recent times, through the efforts of lawyers. Many others could be mentioned. However that does not mean that any of us can rest on our laurels. Much remains to be done. In the next few minutes I will put forward some broad suggestions — and broad they are indeed are.

It is commonly said that modern society has too much law, and too little justice. The adage is a trite one, but nonetheless true.

Every step possible should be taken to reduce the number of criminal offences to those which are truly necessary. The criminal law should be brought back to basics, although of course adapted to fit the needs of modern society. We cannot revert to the Ten Commandments, but even that would be preferable to the situation in which the majority of Australian Statutes — which keep being passed in record numbers — create offences of one sort or another. Very many of them can be looked on as being interrorum — there to control by threat, without any expectation that prosecutions will occur.

This is old and tired stuff. What can be done, in the real world, to tackle this vexed problem?

As it seems to me, there should be a shift away from the criminal law and towards administrative penalties with respect to many areas of Government control. This is by

now commonplace in relation to federal taxes. There are still some prosecutions, eg for conspiracy to defraud — which are very serious offences — and for failure to lodge taxation returns, which are quite minor but generally lead to a court order that this fundamental step be taken. For all sorts of misconduct, including late payment, the telling of untruths in returns, and failures to disclose, people can be required to pay tax at penalty rates. They have rights of challenge, and that is important. The penalties are monetary only, and imprisonment is not an available option when the Commissioner of Taxation and his delegates exercise their statutory powers.

As it seems to me, this could serve as a model in other areas. That is not to say it is an ideal — the system administered by the Australian Taxation Office might have its flaws but we need to get away from a headlong rush to create more and more offences.

The point can be made in this way. Each citizen is deemed to know the law. Nobody in this hall, myself included, has even a general grasp of all offences created by Commonwealth Statute. I doubt that anyone could have. The result is unsatisfactory.

There are practical, as well as principled, points that can be called in aid. In the two most populous States of Australia, concerns are being expressed by reason of delays in the disposition of criminal cases. Especially in NSW, but also in Victoria, the situation is grave, and in each place it seems to be getting worse. Some solution must be found. That which I have outlined, with admittedly sparse detail, provides an available solution. If it is to be availed of, then it is lawyers who should make the running.

AS will be abundantly clear, I have no instinctive aversion to change in the law or in the legal profession. Indeed I reject the notion that how things are, is likely to be how they should be. At the same time, it must be acknowledged that much of our law and many of the better traditions of the legal profession have come from centuries of careful consideration by the finest minds. They have refined a body of principles that are a bulwark of our civilisation. While this should make one jealous to guard against pollution of these principles, it should not be used to found an arrogant complacency. Such an attitude was the target of W. S. Gilbert's barb when he put those words into the mouth of a fictional Lord Chancellor of England. For the uninitiated, they are taken from Act 1 of Iolanthe:

"The Law is the true embodiment
of everything that's excellent.
It has no kind of fault or flaw,
and I, my Lords, embody the Law".

Such a complacency is, of course, very convenient: it requires no thinking, no soul-searching and no upsetting of the established order. But it also fails to recognise that the function of both the law and the profession is to serve the needs of the society in which they operate. If that society or the needs of that society change, then those changes must be recognised and accommodated. Viewed as such, a change to the law or to the profession is not tantamount to the admission and excision of a long-standing defect.