Talk to Final Year Law Students End of Year Dinner for 2006 [1]

20 October 2006

Dean Ron McCallum and Mary Crock
Oliver Jones
Faculty
Graduates to be

In returning to the University at Camperdown for this the End of Year Dinner, you re-enter our intellectual heartland, soon to house the new Law School. Imagine it! That luminous building, light and open, sits Janus-faced. It looks outward to the city where you pursue your professional lives, not all in law. Inward to the old Medical School where law engages with sciences and humanities at a deeper level. In the city, that essential trilogy of law, business and government will find its extraversion. A vital hub linking music at the Conservatorium, art at the Art Gallery, government at the Lowy Centre, science at the Museum. At the very centre, Sydney's old Law School housing a city presence for the US Studies Centre. There teaching those professional courses that are your future; business, banking and post-graduate law with close connection to our Camperdown campus.

Tonight you have a sense both of prospect and retrospect. Of the characters of our year of 1963, I specially recall Frank Nugan. He wrote an essay in jurisprudence entitled "Jurisprudence is bunk". Not being Henry Ford, but a boy from Griffith, when Professor Julius Stone confronted him, like Galileo faced with the inquisition he quickly recanted. Julius Stone forgave him with a reference that took him to Harvard, describing him as a "prairie lad". Sadly Frank fell into dangerous company. His mysterious death, as principal of the notorious Nugan Hand Group, led him to be the only one in our year (so far) to be disinterred.

I myself left Law School to spend the first 30 years of professional life practising as a commercial solicitor at the firm then known as Freehill, Hollingdale & Page, now Freehills. I joined it in 1960, when sectarian and gender bias had not disappeared. If you were a Roman Catholic or a Jew there were firms that would not look favourably at your application. And women had not yet broken into the ranks of partnership at any of the leading city firms. Freehills was an upstart Catholic firm who welcomed non-Catholics, and embraced women. I think of Rod McLeod, the Changi survivor whose idea of technology was to shout at his articled clerk who in turn shouted into the dictaphone, Freehills made itself open to all-comers, the first big city-firm with female partners. I was particularly pleased when I applied that no one asked me my school, whether I had been a prefect or what sport I had played, let alone my religion. Just as well. The then senior partner, Brian Page, now aged 94, looked simply for character, ability and a creative edge.

The professional world you are now entering has largely swept away those barriers and prejudices. Yet each generation has its own issues. One of the most difficult today is retaining professional independence. As barriers to entry into the legal profession have broken down, it is a disturbing paradox that many legal practitioners have created their own self-imposed barriers. They do so by willingly submitting to constraints on their independence — by an excessive desire to please the predilections of whoever gives them legal instructions and those they perceive behind them. Their perceptions may do their client no service. Recent events surrounding the Australian Wheat Board highlight for me that fundamental question my late father-in-law Irving Frankel used to pose; "Just who is your client?" he would ask. By that he meant, does the person instructing you really represent and appreciate your client's interests and not just short term, shorn of the expedience of the moment?

The Wheat Board story is not just about why the lawyers concerned did not until the death produce the documents Commissioner Cole was entitled to receive. The question was rather, who among the

[1] This is a slightly expanded version of the after-dinner talk.

many lawyers ever gave objective advice? Who insisted upon being briefed with the real facts, probing them? Some lawyers of integrity undoubtedly did. Cassandras, I concede, are not always popular. Yet if we lawyers value our reputation, we may have to risk losing a client or two in the short term if the client cannot cope with a truthful opinion. Longer term they will be the gainer; particularly if as lawyers or (I add) as merchant bankers or financial advisers you have the creative flair to circumvent properly understood risks and difficulties with sound solutions.

When our current Chief Justice of the High Court Murray Gleeson was the leading barrister in Australia, people went to him for an objective opinion in depth, valuing his advice accordingly. Nor did his advice lack resourcefulness or creativity, but above all it was sound and had integrity.

Remember, clients may not want to cut corners to achieve a legally risky outcome, especially if the desired commercial result can be achieved by a more creative approach that is legitimate. Clients will thank you for that, even if some are used to operating at the sharp end. No one gratuitously takes a risk they can avoid, not even Alan Bond. Just occasionally, you actually have to say no, that can't be done legally; or the risks are unacceptable — just so long as this is not the product of your own limitations.

After 30 years at Freehills I went to the Bench, happy that I was occasionally engaging in the social work my wife Lee had practiced. Mind you I preferred it when she was a marriage guidance counsellor. Not being a litigator, I actually had to get someone to tell me on my first day whether the plaintiff sits on the left or the right! But what I learnt is that issues of character and integrity count no less for a judge, even protected as we are from losing our jobs, save for the kind of misconduct that would move both Houses of Parliament!

A striking example of judicial integrity and a proper independence from the executive is the recent decision of the Supreme Court of the United States in *Hamdan v Rumsfeld*. By a majority of 5 to 3 (the Chief Justice did not participate) the court held that Congress had not authorised the President to create military commissions of the kind which had been set up to deal with charges of conspiracy laid against Hamdan, following his detention at Guantanamo Bay. At the conclusion of the majority opinion, written I might add by an 87 year old member of the Supreme Court, Justice Stevens, the following was said:

> "We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge – viz, that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasising that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. 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." (at 72)

Recently the Victorian Court of Appeal were vilified and held to ridicule for ordering the release of the individual known as Jihad Jack. They did so for a reason which, in an age of terrorism, is no longer unquestioned; that confessions obtained by duress can be no basis for conviction; *R v Thomas* [2006] VSCA 165 (18 August 2006). More recently Chief Justice Gleeson gave a seminal paper on "A Core Value" as to the use of evidence obtained by torture, or, and more difficult, where there is doubt as to whether or not so obtained.[2]

[2] Paper given by Chief Justice Murray Gleeson to Judicial Conference of Australia, Canberra 6 October 2006 "A Core Value", commenting on Lord Hope's judgment in *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 at 283.

It is now recognised that judges make contestable decisions on moral and policy issues. Not always are these issues easy to resolve. Nor are they capable of a black and white answer. As the Chief Justice observed "*unfortunately, the high moral ground does not provide a refuge from the necessity of making hard practical decisions*". It is a sign of maturity, that we accept that judges can be confronted by legislation or factual situations which compel them to make decisions of a normative kind. The difference is that today, judges are expected to lay open the factors which weighed in those decisions including the judge's perception of community values. We can thank the late Julius Stone for his pioneering insights and influence in this process of making explicit what once lay hidden.

There is one aspect of our judicial craft I have especially enjoyed, particularly as a trial judge in Equity. As law students, you get the facts cut and dried; as a trial judge you have to find them through the adversary system, recognising its limitations as a means to discover truth. The following dialogue occurred in cross-examination between a feisty elderly lady who claimed to be deaf. She was being questioned about whether she had had an affair with a cleric whose housekeeper she was. The cross-examination began inauspiciously:

> "Witness: God, here's this old bloke now".

The barrister so described did his best to press on questioning this combative person — old enough to be his grandmother:

> "Q. What was your relationship with X?
> A. I've been waiting for that wonderful question. My relationship with Mr X was one of friendship and don't insinuate anything else.
> Q. Your Honour, might the witness be reminded of her function as a witness in this court?"
> Witness: "What?"

As I finally approached the witness to try and restore some order, she said to me loudly to put me off my stroke "I can't hear you". When I said to her that, "They are entitled to ask you about your private life" Her tart riposte was "I know my rights".

The final denouement was when the barrister pressed her about the discrepancy between her oral evidence and her affidavit. She exploded: "God! You are absolutely the end. I don't remember every special word we said. This is 1992 and I'm 89. How I am I going to remember every blooming word that was said? I bet you couldn't remember what you said in 1992."

Why do I mention humour in the law? Because it is the capacity to see the incongruities of things; for that is the key to perspective and good judgment.

Let me conclude, drawing these disparate strands together. The professional world you are entering no longer has the barriers that stand in the way of ability. Yet women in the law are still under-represented at the Bar and in the Judiciary though that is changing, as it should. If Sydney University retains your affections it will be because of extraordinary teachers and leaders like Ron McCallum. He to me epitomises a capacity to listen intently, pick the nuances below the surface and project the excitement of what is to come for this great Law School. My message to each of you is to balance your intellectual ability with humanity and commonsense. Stay grounded. Seek your place in the sun but don't be driven by money. Dare I say it at the precipice of tonight's festivities, have fun too!

And now a toast to the graduating class of 2006!

G F K Santow
Chancellor
The University of Sydney