The following is an edited version of a seminar delivered by Bryan Pape at the Michael Kirby seminar series on socio-legal perspectives, at the School of Law, University of New England.

To specialise or not to specialise? That is the question

'I have been ruined twice by going to Court – once when I lost and again when I won'. *Voltaire.*

The cause of much litigation is brought about by ignorance of this wisdom. However the present volume of litigation is in part attributable to the growth in legislation, particularly in the length of statutes. Professor Paul Finn (as he then was) has described Australians as 'born to statutes'.[1] Here a great deal of the Federal Court's present work is in hearing immigration appeals arising under the lengthy *Migration Act 1958* (Cth).

An apparent result of this exponential increase in statute law, is a corresponding growth in specialisation at the Bar. It is reflected by the relatively recent establishment of specialist sections of the NSW Bar Association, such as the administrative law, constitutional law, and corporations and securities law sections. The Revenue Bar generally belongs to long standing taxation discussion groups, comprising lawyers and accountants such as the Challis Group, the Gunn Club and the Ratcliffe Society.

The Hon. Justice McHugh has said; 'the growth of legislation is to render it more difficult for legal practitioners to develop broad ranging practices.[2] He went on to say:

> My practice at the NSW Bar was a wide ranging one involving both trial and appellate work in fields ranging from the criminal law and industrial law at one end of the spectrum to fields like intellectual property and constitutional law at the other end. Practice in such diverse fields naturally forces a lawyer to seek to understand the general body of law as a coherent whole and to perceive and question the anomalies and inconsistencies generated by particular rules in particular fields. Moreover, you often find that ideas acquired in one branch of the law are transferable to other branches of the law. Practical examples of the working of the law in one of its branches frequently provide persuasive analogies in other branches. *The wider the scope of the lawyer's practice the better lawyer he or she is likely to be*[3](emphasis added).

There is a saying at the Bar, 'that you don't choose to specialise; the Bar specialises you'. Many barristers would not admit that they are specialists. For example, barristers who practise exclusively in the areas of workers compensation, family law or criminal law - where the province of prosecution work is entirely in the hands of the Directors of Public Prosecution. The reality is otherwise; most barristers are specialists. The generalist is rare, if not extinct, and to assert the contrary is to propound a myth.

'The idea of specialisation poses a paradox'

The idea of specialisation poses a paradox; on the one hand, specialisation has an attraction of confidence gained from the mastery of knowledge in a narrow field which brings in work and fees. On the other hand, this knowledge is often acquired at the cost of being unaware of relevant developments in other fields. This can only detract from the enhancement of the barrister's general skills and may even ultimately work against the development of the specialist practice.

> The true specialist skill of the barrister ought to be as an advocate and as an adviser, rather than as a specialist in a particular field of law.

A little over a century ago the eminent physician Sir William Osler in speaking against specialisation said:

> The man that, year in year out, examines eyes, palpates ovaries, or tunnels urethrae, without regard to the wide influence upon which his art rests, is likely, insensibly perhaps, but none the less surely, to acquire the attitude of mind of the old Scotch shoe maker, who in response to the Dominie's suggestion about the weightier matters of life, asked 'D'ye ken leather'? [4]

Once a barrister is recognised as a specialist, he or she finds it increasingly difficult to be briefed in other fields. Many will be thankful for this state of affairs and have no wish for it to be disturbed. Others, who wish to withdraw will find it impossible to do so. In the short term, specialisation is an attractive option; in the longer term it carries risks, which may impinge upon the professional development of the barrister and either work against appointment to judicial office or indeed diminish his or her practice. In the United

Kingdom it was until recent times apparently unusual for specialist patent barristers and revenue barristers to be appointed to the Bench. However, as always, there were notable exceptions such as Fletcher–Moulton L.J. (patent law) and Rowlatt L.J. (revenue law). Wisely, here in Australia this practice has never been followed. For example, The Hon. Justice Graham Hill of the Federal Court and earlier in the 1960's The Hon. Justice Lee of the Supreme Court of NSW. (Interestingly both authored works on stamp duty.) The Hon Justice Franki of the Federal Court was a specialist patent barrister.

The question asked, has been at best, fleetingly recognised. Generally, it has been met with indifference as to its long term implications. The Hon. Justice McHugh has remarked: 'To the extent that the growth and complexity of legislation is forcing practitioners to specialise, it is to be deplored'. [5]

'Is there a way to stop the growth of forced or over specialisation at the Bar?'

In opening the 1996 Australian Bar Conference The Hon. Sir Gerard Brennan elaborated on this point, when he said:

> From the viewpoint of the Bar as a whole, narrow specialisation brings the risk of transformation from a profession to a business. If specialist barristers were to lose the consciousness of the law as an entirety, the Bar would be a loose federation of specialist interest groups. Institutional cohesion would be weakened. [6]

Is there a way to stop the growth of forced or over specialisation at the Bar? If the root cause is the growth of legislation, the likelihood of it being reversed in the short term is remote.

Nevertheless, if law students were to be educated in the techniques of Problem Based Learning (PBL), this might engender greater confidence in tackling new fields. A promoter in the 1960s and 1970s of PBL was The Medical School of McMaster University in Canada. It is presently used as a teaching strategy in the School of Medicine in the University of Newcastle. Barrows and Tamblyn[10] identified six stages in the process of PBL. They are:

1. The problem is encountered first in the learning sequence before any preparation or study has occurred;
2. The problem situation is presented to the student in the same way as it would present in reality;
3. The student works with the problem in a manner that permits his ability to reason and apply knowledge to be challenged and evaluated, appropriate to the student's level of learning;
4. Needed areas of learning are identified in the process of work with the problem and used as a guide to individualized study;
5. The skills and knowledge acquired by this study are applied back to the problem, to evaluate the effectiveness of learning and to reinforce learning, and
6. The learning that has occurred in working with the problem and individualized study is summarized and integrated into the students existing knowledge and skill.

This sketch of PBL establishes that it is consistent with the way a barrister approaches the solution of problems. Its use as a teaching strategy in law schools is the very essence of 'learning how to learn'. '*Problem solving is the single intellectual skill on which all legal practice is based*'.[11] PBL has the potential to stop the growth in specialisation at the Bar.

It has been said, 'that a barrister writes his name in sand.' The Bar is a precarious profession. Even greater specialisation, contrary to received wisdom, is likely to make it more precarious and that can only work to erode its independence. It is also probable, that there will be a decline in the general level of legal skills. This can only impact on the suitability of candidates available for appointment to judicial office. And it is time spent in an active and long practice at the Bar, being time spent immersed in facts, which serves as the filtering process for the selection of judges. A matter, which mistakenly, the executive arm of government is increasingly choosing to disregard.

'The MacCrate report of the American Bar Association suggests that skills must be an integral part of law school, not something to be left to be developed haphazardly once law students are in practice.'[12] The education of law students in strategies such as Problem Based Learning has the potential to offer a long term solution to the problem of over specialisation. The beneficiaries of all this, are of course, the clients.

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1 Paul Finn, 'Statutes and the common law', (1992) 22 WALR 7 at 8.

2 The Hon. Justice M H McHugh A.C, 'The growth of legislation and litigation', The 1994 Sir Ninian Stephen Lecture, The University of Newcastle, 17 March 1994 at 14.

3 Ibid. at 15-16.

4 Michael Bliss,' William Osler: A life in medicine' (Oxford University Press, 1999), at 198; n55 at 528.

5 The Hon. Justice McHugh, above n2 at 17.

6 The Hon. Sir Gerard Brennan A.C., K.B.E., 'Profession or service industry: The choice': Opening address, Australian Bar Conference, San Francisco 18-21 August 1996.

7 (2000) 175 ALR 1 at 2-3.

8 The Rt Hon. Sir John Fletcher-Moulton P.C., 'Law and Manners' (1999) 73 ALJ 256 at 257.

9 Ibid. at 258.

10 H.S. Barrows and R M. Tamblyn, *Problem based learning: An approach to medical education* (New York, Springer, 1980), pp. 191-192.

11 Jos H.C. Moust, 'The problem based education approach at the Maastricht Law School,' *The Law Teacher: Journal of the Association of Law Teachers*, Vol 32(1) at 8, see n14.

12 Anita B. Szabo , 'Changing the way we educate law students; Research and development in problem based learning' – v2 (1994), Proceedings of PBL Conference 1994, The University of Newcastle, at 272.