

LAW INSTITUTE OF VICTORIA

ANNUAL DINNER 1996

NATIONAL GALLERY OF VICTORIA, MELBOURNE

SATURDAY 22 JUNE 1996

WHY ARE LAWYERS SO UNHAPPY?

The Hon Justice Michael Kirby AC CMG

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THE PROBLEM

In a recent address to the Commencement ceremony of the Catholic University of America School of Law, the Chief Justice of the United States (the Hon William Rehnquist) asked a question which is also relevant to lawyers in Australia¹:

"I had a sense, based on ... anecdotal evidence ..., that the practice of law today has vastly changed from what it was in my time. I think probably the lawyering is of at least as high a quality, perhaps higher, as law firms today are certainly more

* Justice of the High Court of Australia. President of the International Commission of Jurists.

¹ W H Rehnquist, Remarks at the Catholic University School of Law Commencement, Catholic University of America, Washington DC, 25 May 1996 at 4.

efficient. I also think that similarly situated lawyers make more money now than they did a generation ago, even after adjusting for inflation. If this is true, why are there so many dissatisfied younger lawyers?"

The same symptoms are certainly to be found in Australia. They were recently remarked upon by Sir Daryl Dawson, one of the Justices of the High Court of Australia, in his address to the Australian Legal Convention in Sydney². Sir Daryl drew attention to a survey conducted by the Victorian Law Foundation which revealed that many lawyers are less than happy with their work. According to the survey, employed solicitors have large concerns about the conditions of their employment. They cite their concerns about the misuse of power by management, the lack of personal support from seniors, the slow rate of promotion or low career prospects and the lack of balance between work and personal life. The Foundation surveyed 2,180 solicitors in practice in Victoria and New South Wales. Of the employed solicitors who responded, 27% of males and 33% of females said that they were either "not very satisfied" or "not at all satisfied" with their lives in the law. A further 40% of males and 43% of females were merely satisfied with their working conditions. As well, 33% of males and 44% of females rated

² D M Dawson, "The Legal Services Market" (1965) 5 JJA at 147.

the "corporate environment" of their workplace as poor or only fair³.

These statistics reflect much the same problem as has been found in recent years in the United States, Britain, Canada and other like countries. Dean Anthony Kronman, Dean of the Law School of Yale University, in his notable book *The Lost Lawyer*⁴ analyses the changes which have occurred in his lifetime which diminish work satisfaction in the law. In the judiciary he mentions the overwhelming case-loads, particularly in appellate courts. In the High Court of Australia this problem has been controlled by the provision of the now universal requirement to obtain special leave to appeal to that Court⁵. But in other Australian courts the pressure has continued to rise

³ Victorian Law Foundation Survey extracted *Australian*, 11 March 1996 at 19. See also V Palestrant, "Lawyers, doctors are doing it tough" in *Sydney Morning Herald*, 19 September 1995 at 31.

⁴ A T Kronman, *The Lost Lawyer - Failing Ideals of the Legal Profession*, Harvard Uni Press, Cambridge, Massachusetts, 1993. See also Y Dezalay and D Sugerman (eds) *Professional Competition and Professional Power: Lawyers, Accountants and the Social Construction of Markets*, Routledge, New York, 1995; S Ross, *Ethics in Law - Lawyers' Responsibility and Accountability in Australia*, Butterworths, Sydney, 1995 reviewed (1996) 18 *Syd L Rev* at 249.

⁵ See generally *Carson v John Fairfax and Sons Ltd (Receivers and Managers Appointed)* (1991) 173 CLR 194.

without commensurate increase in the number of judges to cope with it. This has put enormous pressures on the judiciary in all branches but particularly upon the appellate judiciary in Australia⁶. Pressure of this kind reverberates through the entire legal profession, affecting barristers and solicitors who must deal with the courts, work within the pressure and accommodate to urgent and ever-changing procedures introduced just to cope with the case-load.

Kronman also pointed to the changing features of life as an attorney. He suggested that the growth of big and mega-firms had reduced many young lawyers to being a small cog in a large wheel without very much personal contact with clients or courtroom experience. The introduction of "billable hours" has been resented by clients, on the footing that it appeared to favour the ignorant or dim-witted as against the knowledgeable and swift. This has led, in turn, to two adverse consequences for lawyer-client relationships. Lawyers unable or unwilling to handle small problems which were "not worth the time", would send clients elsewhere where once they would have endeavoured to deal with all their problems. This had led to a breakdown of loyalty. The well positioned client had also lost

⁶ Supreme Court of New South Wales *Annual Review* 1995, Sydney at 27. See also comments at 1-2.

the loyalty to the firm which once endured over decades and longer. Now they demand quotations in bulk for legal work. The trend, according to Kronman, is towards a commercialisation of law: transforming its character from a profession to a business⁷.

Much the same commercialisation of the profession is called to notice by Chief Justice Rehnquist. He too criticises billable hours and its consequences for a loss of loyalty as between lawyers and clients. But he notes that the demise of loyalty is catching. The old loyalties within legal firms are also eroding. Those who cannot meet their billable targets are "let go", polite words for sacked. As the mercantile attitude pervades the law, young attorneys reject as old-fashioned notions of loyalty to their firm and to their clients. Chief Justice Rehnquist's concern is that the very character of the legal profession is in the throes of mutation in the United States⁸:

"Adam Smith, of course, would be pleased with all these developments. There is nothing like market capitalism to bring economic efficiency to any operation. But in the past the idea of a profession was subtly different, in both self-congratulatory respects, and in other more important respects, from that of a business. There was a personal relationship built up amongst lawyers in the same firm which meant that income-producing ability,

⁷ Kronman, above n 4, at 23ff.

⁸ Rehnquist, above n 2, at 7-8.

though a very important factor, was not the sole basis on which the status of a partner depended. It also meant that between clients and the law firms with whom the clients had a long relationship, there was an element of trust and understanding which may be diminishing today. Clients regarded lawyers as supplying a sort of service different in kind from that supplied by their vendor of office supplies or raw materials. But if the law firm simply counts the number of hours spent and sends a bill for that amount, perhaps there isn't any great difference between the law firm, on the one hand, and the office supply vendor who simply counts the number of pencils furnished and sends a bill for that amount, on the other."

Chief Justice Phillips of Victoria is reported as commenting that the findings of the Victorian Law Foundation as to the attitude of solicitors demonstrated "widespread difficulty in making inter-personal relations work in firms of all sizes". He said⁹:

"This must diminish productivity and adversely affect the perceptions and experiences of clients."

When I was in Queensland last week for the sitting of the High Court in Brisbane, many of the same problems were revealed to me in the discussions I had with the representatives of the legal profession, particularly the Law Society.

⁹ Phillips CJ cited *Australian*, 11 March 1996 at 19.

Anecdotal evidence supports the belief that lawyers today are less happy and less well motivated in the profession than their forebears were. The evidence is not particularly scientific, still less universal. There is no real differentiation between the evidence of the attitudes of solicitors and those of barristers in Australia. We should not make the mistake of believing that everything that happens to the legal profession in the United States will happen in Australia, given the different traditions and organisation of the profession in the two countries. Nor should we be particularly surprised that, in rapidly changing times, the legal profession (like other sectors of the community) is going through structural change and feeling the pains of that process. At a time of great social and technological change, such phenomena are, to some extent at least, to be expected.

But what are the causes of this apparent decline in professional self-esteem in the law and what can be done about it?

THE CAUSES

I would list at least ten basic causes for the current mood of anxiety and dissatisfaction in the legal profession:

1. First, there is the fact that the legal profession is now, and has always been, unpopular. It is no accident that in Cambodia, the Pol Pot regime literally followed the advice

which Shakespeare put into the mouth of one revolutionary. It killed all the lawyers. Some commentators suggest that the adversary system, which is such a feature of a common law country like Australia, puts lawyers into the position that they are usually at daggers drawn to another member of the community. Their task, within the law and professional ethics, is to represent their client. It is to win the case, not, as such, to contribute to the finding of the truth. Whilst lawyers understand that this motivated conduct can assist courts and tribunals to find the truth in an efficient and sure way, a lawyer's task, at least in litigation, is often to be disagreeable and even aggressive to another citizen. Thus, inherent in their role is the performance of functions which do not make them beloved. In this sense, their role is different from that of other professionals, such as medical practitioners, dentists, veterinarians and the like. Whereas in the past people would accept this, today an increasingly educated population sometimes feels resentment towards the adversarial activities of lawyers.

2. The same increase in education has made people resent the fact that their legal system often makes them a stranger to the courtroom where disputes are resolved. Litigants in person are often resented or condescendingly tolerated by legal practitioners. The necessity, in effect, to have a lawyer to get through the tangled path of the law is

frequently resented by educated and intelligent people who get embroiled in a legal problem. They look lovingly at the inquisitorial system in force in other societies without really understanding the defects involved in that alternative model. But whereas, in the past, educated critics of the law would hold their tongues, now they are full of vehement and sometimes well-targeted criticism of the law and its practitioners. They address much criticism to the institutional arrangements of the legal profession. They criticise the tendency of lawyers' associations to cling to an unacceptable combination of policing and trade union functions. They urge that the legal professional bodies should get out of the business of discipline where they have often been too close to those the subject of their scrutiny and too concerned with matters of etiquette and non-poaching rather than with standards of communication and professional competence. Criticism of this kind, including by other professionals, quite frequently hits a sensitive nerve amongst lawyers, aware of their function to uphold justice and to avoid conflicts of interest and duty.

3. Then there is the increasing competition in the law today. Much of this comes from the increasing flow of law graduates. There are now 23 law schools in Australia producing lawyers at a rate never before witnessed. The handful of law schools which existed in my day has been replaced with a large number and there are many schools

of legal studies as well. The *Mutual Recognition Act 1992* (Cth) has led to an influx of lawyers from other Australian jurisdictions. Reportedly, a large number of lawyers from common law countries are being admitted to practise in Australia¹⁰. In the United States there are 800,000 lawyers. They have contributed to a highly litigious and law-conscious society. A concern is voiced that we are going down the same track. Critics suggest that so many lawyers will seek out new territory for disputation, simply in order to survive and to maximise their legal skills. The social utility of avoiding disputation and providing neutral and dispassionate advice to clients may be maximised, but the motivation minimised, in a society with an over-supply of legal professionals.

4. As well, lawyers now face much more competition than in the past. In part, this is the product of new rules which, in most parts of Australia, permit advertising of an informative character concerning legal practice. But there is also competition from conveyancers and lay advocates in a number of fields. "Do it Yourself" kits, particularly in the field of family law, have proliferated in part in response to

¹⁰ R Callick, "Victorian lawyers decry foreign influx", *Australian Financial Review*, 11 June 1996 at 9.

the perceived over-charging by lawyers. Citizens who do not mind paying for health costs (or who have Medibank and other assistance) seem to resent paying for lawyers. They let this be known. It adds to the stress and diminishes the self-regard of the practitioner. Often they blame the lawyer for the predicament into which they have brought themselves. They do not see why a few honeyed words from the lawyer's mouth should cost them so much.

5. There has also been a fall-off in the staple work which provided the base income of many lawyers in the past. This work included land title conveyancing and personal injury work in the fields of employment injury and motor vehicle accidents. Much land conveyancing, in many parts of Australia, has been lost to conveyancers who are in competition with the legal profession. Limitations and caps have been put upon the recovery of damages in many personal injury accidents, effectively eliminating lawyers from a good proportion of these cases. The object of these changes is understandable enough. They have probably advantaged society as a whole. But the consequence is that the basic flow of income which existed in the past to sustain small legal firms in suburban and country districts in particular, has significantly dried up. It is true that this flow of income involved a degree of cross-subsidisation, such that the land title conveyancing work, which was performed by junior solicitors and

secretarial staff, provided profits which sustained the less profitable activities of representation in courts and other disputes. Economists and ethicists may be critical of this cross-subsidisation. The criticism may have a moral and economic point. But from a practical viewpoint, the drying up of this source of staple income has very significant consequences for small firms and sole practitioners. If they do not have this flow of income, the small firm and sole practitioner in the suburbs and the country districts may disappear. This will not be good for the rule of law. Confining lawyers to cities and to the service of big business and big government which can afford their fees will concentrate even more in the future than in the past the real availability of legal assistance. That would not be good for the rule of law in our country.

6. Then there is the cut-back in public legal aid. Since the advent of federally subsidised legal aid, there has been a substantial flow of funds, federal and state, generally in the ratio 55%:45%. About 30,000 grants for legal aid are made every year in Victoria. About 30,000 cases are handled by duty solicitors at court. More than 60,000

telephone enquiries are handled by public legal aid¹¹. This is a very large enterprise of legal assistance depending on public funds. But it tends to be concentrated in criminal cases and the concentration will not be reduced following the decision of the High Court of Australia in *Dietrich v The Queen*¹². The minuscule amounts of public funds that are made available in Australia for civil legal aid effectively reduces the capacity of many citizens to come at justice according to law. The legal talent is there but the citizens cannot afford to pay. In a time of substantial federal funding cuts it seems unlikely that the flow of public legal aid will increase. On the contrary, it seems probable that it will diminish proportionately in the years ahead.

7. The costs of setting up an office are much greater today they were in earlier generations. The investment in office equipment, the rental of city offices, engagement of junior professional staff and the payment to secretarial and other assistance all add up to large overheads. It is, in part, to meet this problem that the time-charging system became

¹¹ L Lasry "The Changing Face of Legal Aid: in *Prima Facie* (La Trobe Uni), June 1996 at 36.

¹² (1992) 177 CLR 292. See also *New South Wales v Canellis* (1994) 181 CLR 309; *Attorney-General for New South Wales v Milat* (1995) 37 NSWLR 370 (CA)..

so popular. When I was in Queensland I was told that about 25% of members of the legal profession now operate from their homes. This is, in turn, a response to the high cost overheads to which I have referred. Such isolation is not a good thing for a truly professional performance. I was also told that most of such practitioners rely upon their legal capital, dependent upon law school notes learned years or decades before. They take no legal texts or report series. They rely upon the public media to keep them generally abreast of developments in their profession. This is completely unacceptable. It helps to explain low standards of professional performance which sometimes come to the attention of the appellate courts.

8. On top of the foregoing are the persistent changes being introduced by governments of all political persuasions to the long-settled ways of the legal profession. Every new government seems to have a reason to establish an inquiry into the legal profession. Out of such inquiries come numerous proposals for legal change. This is unsettling to a profession which, of its nature tends to be conservative. It is conservative because the law is a conserving phenomenon. Its basic role is to provide a degree of stability and predictability in society. It therefore tends to attract people who find that function congenial. Such people are now assaulted every year by government

changes. Most of them seem designed to introduce new pressures of competition, new rigours of discipline and to close off old and long-established sources of income.

9. Some changes, such as those now foreshadowed in Victoria¹³, also increase the costs and overheads of the average solicitor. The costs of being licensed to practise law increase. The costs of professional indemnity insurance increase. The costs of contribution to the indemnity fund for the protection of those clients who are the victims of defalcation increase. In what are often marginal and only barely profitable practices, these additional costs may constitute the straw that finishes the practice off. Of course, many large firms can pass such costs on to the client. But it is the small firms and sole practitioners, serving impecunious clients, who are most vulnerable to changes of this sort.
10. Superimposed upon all of the foregoing changes is the constant barrage of criticism from the media. Putting it shortly, the media finds the legal profession fascinating.

¹³ Victoria, *Attorney General's Working Party into Reform of the Legal Profession* 1996. See comments, *Law Institute Journal* (Vic), June 1996 at 84-85.

Lawyers get themselves involved in the big cases involving the dramas of society. Especially if sport or sex are involved, the lawyer may attract personality attention for that is such a feature of the media of today. Sadly, spectacular defalcations on the part of solicitors (not least in Victoria) draw attention to the defects of individual practitioners. The shame of their conduct tends inevitably, to some extent, to spill over to the entire legal profession. The media regularly carry criticism of the legal profession and rarely, if ever, recount the fine work which lawyers do for clients in difficulties and people with problems. The constant battering by the media is disheartening to many lawyers who fondly hoped that they were entering a noble profession with an ancient tradition of service in the socially vital work of upholding rights and defending the rule of law.

SOLUTIONS

Neither Chief Justice Rehnquist¹⁴ nor Sir Daryl Dawson¹⁵ appear to have any easy solution to the malaise that is reported

¹⁴ Above n 1.

¹⁵ Above n 2.

in the legal profession, particularly amongst young lawyers. The best that Kronman can come up with is advice to explore the possibility of setting up a shingle in a country town where the pace may be slower, the quality of life higher and the income sufficient to ensure a reasonably contented life. But this is neither feasible nor desirable in Australia where country practice is particularly hard-hit by the developments which I have mentioned.

To some extent, the legal profession has to get used to the changes and ready for still more. Many of the changes are for the better and are simply the result of changing technology and new opportunities to provide lawyerly services¹⁶. The world does not owe lawyers a living. Lawyers have always been unpopular, until the citizen gets into difficulty and desperately needs one. Then, all too often, the lawyer has been unavailable, too expensive and sometimes unprofessional in work performance. At the same time, lawyers have to convince politicians, the media and the public that theirs is not just an ordinary occupation. It is not an occupation that can be reduced to purely economic or commercial standards. The will to do

¹⁶ S Nolan, "Mega practice in law with no borders" *The Age*, 3 June 1996 at 1; "Law Firms Overseas - Competitive Edge, Business Council of Australia, *Bulletin*, May 1996 at 23.

justice is not explicable entirely in economic terms. The requirement to put the clients' interests always above one's own economic advantage is one which derives, basically, from a moral principle. It is not governed, as such, by marketplace competition. It depends upon professional self-image and a high sense of duty that rests upon the conception of professional obligations.

The need to ensure the survival of sole practitioners, small legal firms, public defenders, community justice centres, special legal services for Aboriginal and Torres Strait Islander Australians and other minorities and *pro bono* work in the legal profession depends upon something larger than economics.

The challenge before the legal profession today is to make itself more accessible and affordable. To some extent this will be achieved by competition and by changes in the delivery of legal services and in the organisation of the legal profession. Yet we should not put all of our eggs in the basket of commercialism and free market competition, still less in the arid language of the *Trade Practices Act*. As Mark Twain once warned, if you have all your eggs in one basket, you had better be sure of the basket.

The basket of economic rationalism has not been so notably successful in the delivery of economic justice to the community. It seems to have produced an irreducible proportion of people who are discarded, unable to secure employment and

economic opportunities. It therefore seems unlikely that economic competition, alone, will solve all of the problems of accessibility and efficiency in the law. Still less will it solve those problems in a way compatible with the high objectives of the legal profession which is, or should be, motivated by something more than dollars and cents. The will to do justice, to serve the client with honesty, competence, fidelity, confidentiality and dispassion cannot be explained in economic language. It is like trying to explain the precious store which we place upon the life of an individual or the appreciation of the beauty of the environment in the language of the monetarists. The legal profession is a noble calling. The paradox which we must unravel is to ensure its relevance and accessibility in the coming millennium whilst preserving the best of its ideals which we have inherited from our forebears.

We will succeed in unravelling this paradox. But we need to address the dissatisfaction that exists in the legal profession of Australia today. It is from work satisfaction and an earned high self-image as a helping professional in an activity vital to society that the wellsprings of a well motivated legal profession will be found. That is why it is time that we should examine seriously the causes of the reported decline in professional satisfaction in legal practice in Australia. And turn our best minds to ensuring that these causes are addressed so that the ideals and motivation of the coming generation of lawyers can be

lifted to assure the best possible service of their clients and society.