



QLS Senior Counsellors' Conference 2016
Law Society House
Friday 19 August 2016, 9 am

**The Hon Catherine Holmes
Chief Justice**

This address has been put on the program as considering the relationship of the profession to the judiciary, and lawyers' responsibilities as officers of the court. I can say all I need to about those things fairly quickly. Elements of those obligations to the court or to the law as they can alternatively be described have existed since the thirteenth century. They can be summed up as candour, integrity, which covers a number of things, and independence of judgement.

The judiciary, as we all appreciate, is an arm of government, but the functioning of the court in turn depends on its officers and their observation of the obligations which they assume as legal practitioners. Judges are in no position to make their own inquiries, to ascertain the facts except through what is presented to them. Without our being able to rely on your integrity and honesty in doing so, the administration of justice would become unworkable. The independence of the courts, which is critical in a democracy, requires also the underpinning of a profession independent from the expectations of clients and the aims of the executive.

But I'm actually not so concerned to tell you about your responsibilities as officers of the court, because I think at this stage of your progress through the profession, you hardly need it. What I am more concerned about is the



difficulty for members of the profession generally in keeping those obligations paramount in an increasingly pressured legal environment.

This definition of a professional is, I think, pretty accurate: "...those having: expertise based on theoretical knowledge and extended education; practices and organization to test the competence of members; an ethical code of conduct; and altruistic service".¹ That looks also a pretty good description of legal practice, but there are concerns about the impacts of the pressures under which we practise in the 21st century on those qualities. Lawyers are subject to external regulation of course, the Australian Solicitors Conduct Rules and the Barristers Conduct Rules, but there is also the need for self-regulation by a set of internal values.

I think we all have to be alert to how those pressures may affect practitioners' attitudes to ethical questions. What I have to say to you about them is probably not news to you, but that doesn't mean we can put it out of our consciousness.

The first is the increasing move over the last three decades to treat the practice of law like any other business. In 2010, Lillian Corbin, an academic at Griffith published a study of legal practitioners in Queensland. According to it, 75% of practitioners, when asked whether they considered the practice of law a business or a profession, answered that it was a business and its focus was the generation of profit.² I hope there's something fundamentally wrong

¹ Geoffrey Millerson, *The Qualifying Associations: A Study in Professionalization* (London: Routledge & Kegan Paul, 1964)

² Lillian Corbin, *Redefining Professionalism in the Legal and Accounting Marketplace: An Empirical Study of Students, Graduates and Experienced Legal and Accounting Participants in South-east Queensland, Australia* (Lambert Publishing, 2010)



with her sample. Or that the participants were being disingenuous, not wanting to appear unworldly, but in their hearts knowing better.

I don't quite know where it all began, but I remember that in the 80's and 90's the Trade Practices Commissioner took a lot of interest in the legal profession and its supposed anti-competitive practices. The Commission was certainly not prepared to treat legal practice as anything but the conduct of a business like any other. That push to greater competitiveness manifested itself in various ways, but one was the abolition of the rules against solicitors' advertising. That is a development about which I have always been dubious, particularly when I see some manifestations of it on my television or on the backs of buses. I also query whether it in fact has produced greater competitiveness.

When I talk to solicitors in regional cities and towns, I often hear that they can't compete with the capacity of large national firms, particularly those who operate in the personal injuries area on a no-win/no-fee basis, to market themselves. As a result, their smaller operations are becoming less viable, so that in reality the long-term tendency may be to monopoly, not competition, none of which is healthy for the culture of this profession. And of course the difficulties of remaining profitable are increased by competition with other occupations, such as real estate agents and accountants, who are not constrained by obligations owed to the Court.

The demands of a competitive market clearly may conflict with ethical standards. Former Chief Justice Spigelman has made these observations:



“A profession has an ethical dimension and values justice, truth and fairness. The market recognizes self-interest and self-interest alone...the operation of a market gives absolute priority to a client’s interest. A profession gives those interests substantial weight, as it is not an absolute weight.”³

Lillian Corbin, the Griffith academic I mentioned earlier, has done some qualitative research into Queensland lawyers’ perceptions of professionalism. She interviewed a group of newly-admitted practitioners, who had been practising law for two years, and another group of experienced practitioners who’d been practising for more than 15 years.⁴ Mostly, I should say, they seem to have been male. The new practitioners felt pressured by what they regarded as firm culture and in particular budgetary policies: they complained about the emphasis on budgetary goals, the pressure on them to achieve more billable hours, the use of budgeting targets as a performance measure, and the demand for them to be able to bring in clients, which they felt limited their ability to provide a quality service.

The experienced practitioners were more concerned with managerial problems and, interestingly, in the difficulties in socialising newly-admitted practitioners into the firm’s culture, particularly in their understanding of professional courtesies. What was encompassed by professional courtesy seems to have been an array of things, from recognising that a junior practitioner should offer to meet at a more senior practitioner’s office to things which go beyond mere courtesy to the ethically obligatory, such as not commencing and maintaining proceedings without proper basis. It would be

³ James Spigelman, ‘The Value of an Independent Bench and Bar’ (1998) 17 *Australian Bar Review* 105, 106.

⁴ Lillian Corbin, ‘How “Firm” are Lawyers’ Perceptions of Professionalism?’ (2005) 8(2) *Legal Ethics* 265.



interesting to know if that generational difference, in which the newer practitioners seem to have both regarded firm culture as revolving around budget and felt pressured accordingly, while the older practitioners seem to have seen that culture quite differently and to have been concerned with perceived deficiencies in their juniors' values, is the product of fundamentally different priorities or a function of the conditions under which lawyers at the bottom of the pecking order have to work.

A study by Joanne Bagust published in the *Sydney Law Review*,⁵ in which she interviewed 50 lawyers working in ten major commercial law firms in Melbourne, certainly suggests that greater commercial pressures were having an impact on lawyers' attitudes in that context. One lawyer said, "You are effectively only as good as the last transaction". Another complained of the emphasis on rain-making skills, saying: "You do sometimes feel like a bit of snake oil salesman which doesn't quite tie up with your own self-image of what you do". Bagust refers to the pressures of global competition, better informed clients and the rise of corporations' in-house counsel, which in itself had led to significant firm downsizing. I don't think that there can be any argument but that client loyalty is diminishing, and large corporations as clients have considerable power to dictate how their work is done. It is difficult to operate by reference to ethical obligations in a world where, in almost every other sphere of commercial activity, the client's interests are regarded as paramount.

And of course there are the more recent developments, litigation funders who are driven by profit-making, owe no duty to the court, and look to control

⁵ Joanne Bagust, 'The Legal Profession and the Business of Law' (2013) 35(1) *Sydney Law Review* 27.



decision-making, particularly in relation to settlements. And the publicly-listed companies which practise law face all the issues that that raises about duties to shareholders as well as clients and the court. It is difficult not to be anxious about how all those conditions may affect lawyers' performance of their obligations to the court.

Compounding all these problems is the massively expanding number of law graduates on the market. Last financial year, in Brisbane alone, almost 1,000 new practitioners were admitted. That kind of massive expansion of the legal profession makes it harder to preserve both the culture and the values of the profession. Connections between legal practitioners are not as they were in the days when everyone graduated from one university and knew each other from law school. That loosening of cohesiveness in the profession is another force against maintenance of standards. Connectedness with your peers is, in my view, an essential element – you can call it peer group pressure – in keeping practitioners within the norms of the profession.

At the other end of the spectrum from the stresses and pressures of practising in large firms is the fact that the surplus of lawyers and the shortage of places for them may lead to the setting up of one-person firms run on a shoe-string, with all the problems of isolation from the mainstream of the legal profession. I should note here that the Law Society has recently set up a practice support consultancy service for start-ups and single practitioner firms, which is an admirable development. But whether it be the loneliness of sole practice or the pressures of meeting budgetary requirements in a highly commercialised environment you have conditions ripe for poor choices made



through stress and the risk of departure from the rules of professional conduct.

I spoke at the Symposium, and I won't repeat what I said there, about the real problems of distress and depression at all levels of this profession from law students to senior practitioners. But I will mention this again: John Briton, former Legal Services Commissioner, some years ago gave a paper to the Bar Association⁶ in which he estimated that emotional distress featured in 30% of the disciplinary matters with which the Commission had to deal.

It isn't, I should say, all gloom and doom. There is a great deal else that is encouraging in the profession. Many firms now do a thing which would not have been considered for a moment a couple of decades ago, which is to provide pro bono assistance, often to community legal services. QPILCH in particular is the beneficiary of great assistance from private firms. Last week, I addressed the Gold Coast District Law Association which provides a stellar example of having set up a community legal centre which is staffed by local practitioners. Not only are activities like that in the best traditions of altruism, which I mentioned earlier as a hallmark of a profession but they are a great morale-booster for those involved, and a way, particularly, of enabling younger practitioners to stick with their ideals.

But the point of raising all those worries is to emphasise the importance of the role you play. Firstly, it's more essential than ever in times of greater pressure that there be mentors who can guide those who do find themselves in

⁶ "Lawyers emotional distress and regulation", paper delivered to Bar Association of Queensland 2009 Annual Conference.



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uncertainty or worse. Secondly, the fact that you give your services through collegiality and a sense of responsibility to and for the maintenance of the profession's ethical standards is a sign that its values are, despite all the things I have just said, still thriving.