The current state of the profession

On 18 September 2008 the Hon Justice Ruth McColl AO[1] delivered the following address to the New South Wales Young Lawyers

The title to this address, 'The Current State of the Profession', conceals more than it reveals. It assumes the 'state' of the profession is susceptible to general exposition. That, assuming that to be so, there is a 'current' state fixed in time, as it may be in an episode of *Dr Who*, readily susceptible to that exposition. And last, but I am sure by no means least, that the 'current state of the profession' can be understood in isolation from the past.

The NSW Young Lawyers' Civil Litigation Committee will no doubt be relieved to know that I made the first assumption. I am not about to act as if this were an application for leave to appeal, say there is no arguable point and let's get onto the drinks and canapés!

I am also prepared to approach the topic on the basis that 'current' is not confined to the 18 September 2008, but refers to a band of time, primarily but not limited to 2008.

Next, because, in my view, you cannot understand the present without understanding the past I have chosen a point with which to compare that 'current state', a matter to which I will return.

Finally, and in the interests of full disclosure, it is best to acknowledge that topic necessarily lends itself to subjective treatment. No doubt there are a myriad of issues which could be shoe-horned into the topic. The ones I have chosen strike me as matters of significance to your generation.

So this is what I am going to talk about by reference to those issues:

- Contextualising the profession.
- Then and now: where has it come from?
- Where is it at?
- And, doing some crystal - ball gazing, where is it going?

Contextualising the profession

Members of the legal profession operate at the coalface of the most important aspect of society: the rule of law, the concept that 'all authority is subject to, and constrained by, law',[2] or, as it has also been described, 'the supremacy of law, over naked power and unbridled discretion'.[3] As Sir Gerard Brennan said when chief justice of Australia:

'Lawyers are the engineers who operate the legal machinery that maintains social relationships and orders social activity.'[4]

It is the role of members of the legal profession to ensure that their clients' rights are exercised in a manner consistent with core principles of the rule of law. Now is not the time to elaborate on the discharge of that function. It is the time, however, to recall that the professional rules which govern members of the legal profession are designed to ensure those who operate within the legal system recognise they owe 'their paramount duty to the administration of justice'[5] which in itself is at the heart of the rule of law.[6]

Sometimes adherence to these principles means you may have to do something your client may not readily comprehend. A simple example is having to explain to a client why a document which appears to, or does, strike at the heart of their case has to be discovered. Another is the advocate's obligation not to allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless, inter alia, the advocate believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it. [7]

I appreciate that these concepts may seem remote for some young lawyers who may have just emerged from, or possibly are still immersed in, that part of your legal career which involves the preparation of vast lists of documents for discovery or other apparently mindless tasks, but keeping this core principle in view will help, in my view, provide the framework for all you do as a member of the legal profession.

The key point to absorb is that the legal profession works within a continuum. Everything you do, particularly in the litigious context, has immediate relevance to the parties, and, for example in the criminal context to the community. But the outcome may also have wider ramifications. Did Ms Donoghue, or her legal representatives, ever contemplate that a case brought to recover damages for injuries she suffered as a result of consuming part of the contents of a bottle of ginger-beer which contained the decomposed remains of a snail, would transform the law of tort? I think not!

The evolution of the current legal profession

As I said, a question about the 'current state' of something needs a comparator.

A comparator should provide a reasonably sharp contrast between the past and the present. The comparator I have selected is 1981. There were good reasons for that selection, necessarily inter-twined.

1981 was the year I decided to stand for election to the Bar Council. It was my second year at the bar. I made that decision because it was tolerably apparent in 1981 that the winds of change were blowing through the corridors of the legal profession. The New South Wales

Law Reform Commission was considering a reference from Attorney General Frank Walker, to enquire into, and review, the law and practice relating to the legal profession. It was tasked to consider whether any and, if so, what changes were desirable in relation to a number of matters which went to the heart of the structure, organisation and regulation of the profession as well as the functions, rights, privileges and obligations of all legal practitioners.

I wanted to become involved in the processes of change. Little did I know that I would remain on the Bar Council for 20 years!

The reference the Law Reform Commission was charged to examine included a long list of sub-issues relating to the reference. Among them were:

(a) the right of senior counsel to appear without junior counsel;

(b) the making, investigation and adjudication of complaints concerning the professional competence or conduct of legal practitioners and the effectiveness of the investigation and adjudication of such complaints by professional organisations;

(c) the making, investigation and adjudication of complaints concerning charges made for work done by legal practitioners;

(d) the fixing and recovery of charges for work done by legal practitioners, including the charging by junior counsel of two-thirds of his senior's fee and the fixing of barristers' fees in advance for work to be done;

(e) the liability of legal practitioners for professional negligence and compulsory insurance in respect thereof;

(f) advertising;

(g) the certification of legal practitioners as specialists in particular fields;

(h) the necessity for participation by legal practitioners in courses of continuing legal education.

As I ran through that list I am sure many of you thought 'what was the problem?' Virtually none of these structural matters are in issue now, nor have they been since successive Legal Profession Acts gave effect to the many recommendations which emerged from the commission. The *Legal Profession Act 1987* (NSW) and the substantial amendments effected to it in 1994 heralded the modern profession in which:

- all who wish to practise are required to hold a practising certificate;
- a practising certificate cannot be obtained unless the applicant holds a policy of indemnity insurance;
- clients have to be given an estimate of the legal costs involved in their matters;
- barristers as well as solicitors can enter into contractual relations with their clients;
- barristers can be briefed directly by clients.[8]

An independent disciplinary system was established, conducted by the legal services commissioner, which replaced the internal disciplinary systems conducted by the professional associations; lay members were to be invited to join the professional conduct committees which the associations maintained to conduct the investigations into complaints the Legal Profession Act permitted the legal services commissioner to delegate to the relevant association. As far as I am aware, certainly from the bar's point of view, this was an unmitigated success with members of the community from diverse walks of life volunteering to spend the hours perusing large tracts of documents the investigation of complaints could entail, and attending the lengthy meetings debating the outcomes. Their contributions were by and large insightful. Interestingly on many occasions they would have been far more benevolent to the subject of a complaint than the person's peers.

These reforms went a long way towards making the profession more accountable to its clients and the community. It made it more transparent too.

Perhaps as significantly, the winds of change blowing through the corridors led the profession itself to make structural changes.

Thus the bar itself abandoned the requirement that senior counsel could only appear with a junior, as well as the fact that juniors could charge two-thirds of whatever senior counsel did. Another practice which vanished was that which demanded that junior counsel carry the silk's red bag – these were pre-trolley days. That practice was 'abolished', it was said, when Michael McHugh QC shuddered at the sight of his slightly built female junior struggling under the burden!

One of the ironies of the 1980s reforms was the fate of those concerning advertising. The Law Reform Commission's third report on the legal profession was devoted to advertising and specialisation in the legal

profession.[9] In 1982 neither barristers or solicitors were permitted to advertise, or otherwise communicate publicly, any information or assertions about their fields of practice. This applied to communications about specialisation or willingness to accept work in particular fields. It also applied to publicising one's membership of a special interest association. The prohibition applied not only to advertisements in the mass media but even to entries in publications circulating mainly within the profession.[10]

The Law Reform Commission recommended that that rule prohibitions be abolished, a move vehemently opposed, as I recall, by both the Bar Association and the Law Society. Advertising was seen as an affront to the classic model of the profession.

However the Law Reform Commission's recommendations prevailed. Advertising was permitted, and once permitted was embraced with apparent glee by many practitioners.

This enthusiastic response came under fire, however, when the government decided there was too much advertising, or perhaps too much what I will call puffery than was good for the consumer. And too much too-clever positioning! Solicitors advertising their personal injury services on the ceiling of a hospital lift were seen as a bridge too far! The government cracked down on advertising a few years ago, on this occasion over the protests of the Bar Association concerned that such restrictions impeded their freedom of speech.

It is a rich irony now, in my view, that the *Legal Profession Act 2004* (NSW) contains a prohibition on lawyers' advertisements if they are, or might reasonably be regarded as either (a) false, misleading or deceptive, or (b) in contravention of the *Trade Practices Act 1974* (Cth), the *Fair Trading Act 1987* (NSW) or any similar legislation. Publishing an advertisement of that nature is capable of being professional misconduct or unsatisfactory professional conduct, whether or not the barrister or solicitor is convicted of an offence in relation to the contravention.[11] Why, it might be asked, do lawyers have to be told to obey the law!

One gets a sense from both these publications of a profession which is more outwardly focussed, which engages with the legal implications of political issues, indeed, that there are far more political issues with legal implications. In short, a profession which is engaging with the community far more closely than it did in the early 1980s.

The 1981 world

But back to the 1981 world briefly, at what I'll call a more domestic level. What did the professional journals of that year reveal about the state of the profession?

The 1981 *Law Society Journal* is a stolid tome in monochromatic black print on shiny paper. It is replete with messages from the president, a very serious looking Michael Gill, articles reporting the goings on of LawCover, the Solicitors Statutory Committee (the then solicitors' disciplinary body), costs rulings, practice notes, letters to the editor, book reviews and a couple of desultory articles tending to focus on black letter law subjects, usually conveyancing or wills, with the occasional tentative musings about entering the brave new world of computers.

An interesting note was an article about the Women Lawyers Association of NSW, setting out its history, some matters about the struggle women had had to enter the profession, including the necessity to have the *Women's Legal Status Act 1918* (NSW) passed to enable them to practise, and, significantly, advising that while hitherto the number of women entering the profession had been so small it was possible to rely on word of mouth to contact prospective new members, that task had become more difficult because of the increasing numbers.[12] You won't be surprised to know I'll be returning to that topic.

Another section dealing with Continuing Legal Education described a popular course to be given on 'Stress and the professional practice',[13] another topic to which I will return.

Perhaps most telling, given the Law Reform Commission's inquiry into the profession, was an address reproduced in the *Journal*, which had been given by Mr Jonathon Clarke, the president of the English Law Society at that society's national conference.[14] The speech discussed how the English legal profession had survived a Royal Commission on Legal Services established in the 1970s by the Labour prime minister, Harold Wilson, undoubtedly, I would infer, a precursor of the Walker reference.

The speech highlights the response of the profession to the close scrutiny to which it was being subjected. The speech is written as if the profession had been subjected to the most ferocious attack. Perhaps it was reproduced to give the solicitors of New South Wales a sense that their perception that the Law Reform Commission reference amounted to an assault on their tightly held professional enclave was misplaced. As an aside, I recall the bar at times thinking it was under attack, although that was most often by solicitors seeking to fuse the profession.

However you can gauge the extent to which the English profession felt it had been under attack when Mr Clarke says the profession had been 'exonerated'. Nevertheless the English profession was not going to rest on its laurels. Mr Clarke said, in words which resonate 27 years later:

> We must be seen as a profession to be willing to be even more self-critical, willing to examine ourselves even more closely and willing to adapt to the ever-changing demands of society which we exist to serve…we must always remember that we do serve society and that society is not there to support us.[15]

No matter how defensive Mr Clarke was being, this was sensible advice which should be taken to heart by all in the profession.

Bar News

I turn then to the state of the profession in the 1980s from the bar's point of view.

It's not possible to do a retrospective look at *Bar News* for 1981, because it did not exist then. I know because I was the first editor of that journal when it came into existence in winter 1985, at the instigation of the then bar president, Murray Gleeson QC.

The first edition, a collector's item dare I suggest, reproduced a speech by the then Roddy Meagher QC, which may be the first reported occasion our recently retired chief justice of Australia was described as 'The Smiler' in print. There was an article by Ian Callinan QC, then president of the Queensland Bar, entitled 'The view across the Dingo Fence', defending the refusal of the Queensland Bar to permit outsiders to practise in that state, a report of a speech given by Justice Kirby, only recently appointed the president of the Court of Appeal, outlining the 'Seven Deadly Sins of the bar', most of which I am grateful to observe are rarely committed and last, but clearly by no means least, a note that among those who had had their names removed at their own request from the Roll of Barristers to the Roll of Solicitors, was one Malcolm Bligh Turnbull!

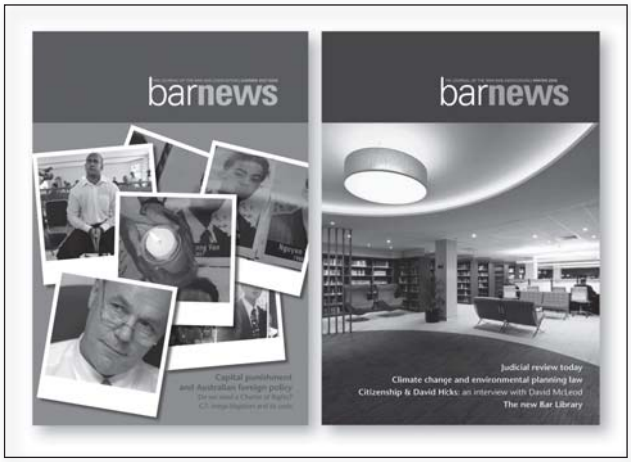
The journals of 2007-2008

Compare the picture of the legal profession conveyed by these 1980s journals with their contemporary, but far glossier and more colourful counterparts.

Take the *Law Society Journal* first. Sure, the president's message is still there, albeit now illustrated by a picture of a grinning incumbent. And so too are the core black letter practice articles. But, in 2007 for example, other articles looked at issues such as charters of rights, judicial independence, law and order campaigns, the release of David Hicks from Guantanamo Bay, international child abduction, counter-terrorism, the need for more flexible work practices, class actions and beating depression.

The *Bar News* of 2008 shows too that much has changed – and not just the editor. First, somehow the adjective 'Bar' and the noun 'News' have merged into one entirely lower case word – 'barnews'! Clearly the stylists have been at work. Articles deal with such issues as capital punishment and Australian foreign policy, Lex Lasry on the death penalty, the Northern Territory intervention and the ubiquitous Charter of Rights.

One gets a sense from both these publications of a profession which is more outwardly focussed, which engages with the legal implications of political issues, indeed, that there are far more political issues with legal implications. In short, a profession which is engaging with the community far more closely than it did in the early 1980s.



Covers from BarNews.

The twenty-first century practitioner

The topics I have referred to from the recent *Law Society Journal* and *Bar News* also give a telling insight into the different milieu in which law is now practised. The solicitor or barrister of the early 1980s was most likely to devote his or her practice to either conveyancing, estate or personal injury work. There were virtually no tribunals. Arbitrations were principally undertaken in relation to large contractual disputes. Otherwise litigation ended up in court, where, as I shall shortly explain, it often languished.

Today's legal profession is far more likely to have to cope with the plethora of administrative tribunals which have sprung up in part to make the law more accessible and affordable. Practice may also take the contemporary lawyer as often to a mediation, as to a court.

And areas of practice are likely to have substantially shifted. As we know personal injury work has been substantially affected by legislative reforms such as the *Motor Accidents Act 1999* (NSW), reforms to employees' rights through the *Workers Compensation Act 1987* (NSW) and the *Civil Liability Act 2002* (NSW). I do not pretend to know what, if anything, has taken that work's place. I know these reforms have had a substantial effect on the bar and it is difficult to see why it would not have had the same effect on the solicitors' branch.

One area where it is gratifying to see an increase in work is in the pro bono movement, which has achieved much prominence in the last decade or so. Organisations like the Public Interest Advocacy Centre and the Public Interest Law Clearing House perform invaluable work. As many of you may be aware, the Public Interest Law Clearing House relies, in part, on solicitors being seconded from legal firms for periods of 3-6 months to work on pro bono matters. Firms provide substantial pro bono services, many on referral from PIAC or PILCH as, too, does the bar. And the Supreme and Federal courts have both adopted rules giving effect to schemes designed to provide pro bono legal assistance to litigants.[16] The opportunity to work on a pro bono basis is an invaluable way of serving the community.

Trying to predict the practice of the future is difficult. In a small exercise of crystal-ball gazing, I do suspect that the profession will be concerned with climate change litigation,[17] and, depending on the success of the charter of rights movement, with matters concerning human rights.

Lawyers, particularly solicitors, have greatly increased opportunities to work overseas. Those opportunities used to be confined to the common law world, but are increasingly opening up in our immediate neighbourhood. Law firms have offices in China, Singapore, Cambodia, Indonesia, Papua New Guinea and Vietnam, to name a few sites. I would encourage all to embrace those opportunities if possible to broaden their perspective on legal practice and, it might be hoped, infuse the Australian profession with the good parts of that knowledge.

Some things have changed – the pace of practice

The pace of practice has increased exponentially since the somewhat languid days of the 1980s.

Chief Justice Gleeson ascertained just before his appointment as chief justice of the New South Wales Supreme Court in 1988, that by the end of 1990, two years into his term of office, 'in the absence of radical change, the average time from commencement to finalisation of cases in the Common Law Division of the court would be 10 years'. As his Honour later observed, '[s]uch news, received in such circumstances, concentrates the mind'.[18] The immediate response on his appointment was a wholesale assault on the backlog. Acting judges were used to an unprecedented extent to cope with the delays.[19]

At the same time, the 1980s saw the courts begin to manage closely the time and events involved in the movement of cases from commencement to disposition.[20]

In January 2000 'just, quick and cheap' became the catchcry of the Supreme Court. Chief Justice Spigelman announced amendments to the *Supreme Court Rules* intended to inaugurate a new standard for civil procedure.[21] He described the emergence of case management in place of the traditional hands-off approach to the conduct of litigation, as the judicial response to public expectations with regard to accountability for public funds, the restrictions on the availability of resources and the necessity that courts perform in a manner, which avoids imposing costs on litigants and third parties.

In 2005 New South Wales adopted the *Civil Procedure Act 2005* (NSW), Part 6 of which deals with case management. Section 56(1) explains that:

> (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

The court is obliged to give effect to that overriding purpose, parties are under a duty to assist the court to further it and legal practitioners must not, by their conduct, cause their client to be put in breach of that duty. Breach of that obligation can, at the minimum, expose the practitioner to the risk of an adverse personal costs order.[22]

These measures also undoubtedly have a profound effect on the way law is practised. Litigation lawyers of the twenty-first century operate in a high pressure environment, greatly different from the balmier days of the 1980s. I don't want you to think we just lolled around then, but the pressures were not as great.

That brings me to my next topic.

Work/life balance

I undertook some empirical research for this speech apart from reading volumes of the *Law Society Journal* and *Bar News*. I asked the president of the Law Society, Hugh Macken, and the executive director of the Bar Association, Philip Selth, what the biggest issue(s) confronting the profession were. Their responses were instant. 'Work/life balance' said Hugh. 'Depression' said Philip. Indeed a competing event this evening is the Tristan Jepson Memorial Lecture, a lecture commemorating the tragic death of a young lawyer who took his own life in 2004. You may have seen a report about it in this morning's *Sydney Morning Herald*.

This evening's lecture reports on the largest ever survey of legal practitioners and students in Australia, which found that almost a third of solicitors and one in five barristers suffer levels of depression associated with disability. It also discovered that more than 40 per cent of students reported psychological distress severe enough to justify clinical or medical assessment. The incidence of depression in the legal profession is four times higher than in the general population.

I earlier mentioned the small paragraph about a lecture on stress which appeared in the 1981 *Law Society Journal*. In the intervening period both the Law Society and the Bar Association developed schemes, LawCare and BarCare respectively, to afford practitioners confidential access to psychiatric counselling. A similar scheme exists for judges which I call JudgeCare, not, I am sure, its official title.

I do not pretend in any way to be an expert on these issues. The Black Dog Institute and beyondblue are two organisations I have heard mentioned which offer ready advice to those in need.

However, I think I can say with a degree of confidence that LawCare and BarCare depend on those involved (a) acknowledging they have a problem, and (b) being prepared to do something about it. One of the first and, in my view important, steps in this process is for the profession as a whole to acknowledge this is a problem. This has been and is being done.

Some years ago Paul Menzies QC, who is referred to in this morning's article, disclosed he had suffered from profound depression for a lengthy period and described the process by which he went about recovering. This was at the time I am sure an incredibly brave step on his part. But it was an important acknowledgment of the problems which can afflict the profession.

At last year's Tristan Jepson Memorial Lecture it was announced that four of Australia's largest law firms were uniting to tackle depression in the legal profession. Interestingly, and consistently with the theme I touched upon at the outset of this address, John Atkin, the managing partner of Blake Dawson Waldron, attributed the problem in part to law firms losing their sense of 'professional purpose', a trend his firm was seeking to counter by emphasising 'the professional values of the law… and the concomitant social obligation which took precedence over the obligation to the client.' Professor Gallop, the former West Australian premier who retired to deal with his own depression, tellingly asked why 'lawyers could be in the forefront of changing and improving society' but had so much difficulty dealing with depression.[23] These are eminently sensible questions.

The billable hours which drive law firms are recognised as both a cause of the pressure which brings on depression, and also an impediment to flexible work practices.

Some sense of the context in which this debate is occurring can be gleaned from a recent statement by Professor Larry Kramer, the dean of Stanford Law School who wrote last year:[24]

> Certainly our profession has changed profoundly in the past generation. The basic structure still looks the same: Most lawyers practise in firms, most firms are partnerships with cadres of associates, most work is performed for hourly fees, and so on. Yet it's the traditional model on steroids: Big firms employ thousands rather than hundreds of lawyers, with offices around the world. Partner/associate ratios have changed dramatically, particularly if we focus on equity partners, while legal work has become increasingly specialised and expectations or billable hours have soared.

Echoing Mr Atkin, he noted:

> Twenty years ago, most lawyers would have scoffed at the idea that profitability, much less profits-per-partner, should be the measure of success and prestige. Yet that is where we are. Law firms are run like businesses by managing partners and committees whose time is almost wholly occupied with, well, managing.

He added tellingly:

> Students say they want a better work/life balance, yet invariably choose the firm that ranks highest in *The American Lawyer's* list of the top 100 law firms. Having spent their lives learning to collect gold stars, they apparently find it impossible to stop…

This brings me to Hugh Macken's point: work/life balance. The billable hours which drive law firms are recognised as both a cause of the pressure which brings on depression, and also an impediment to flexible work practices. According to Federal Sex Discrimination Commissioner Elizabeth Broderick, a former partner at Blakes, 'the challenge [is] to mainstream flexibility and make it a real job, like being a full-time lawyer – to move away from the stereotype of the ideal worker being an unencumbered man, available 24/7'.[25] She described flexible work arrangements as not being part-time work, but arrangements whereby full-time workers could take work home and leave work early. Moreover, as she said:

> [T]ime-billing does not reward someone who's efficient and able to do it in half the time. Billable hours works for the lowest common denominator – but the knowledge business is about a high-performance work culture, and it shouldn't be all about hours. It's an outdated notion ... it should be about the quality of that time and outputs.

The cost of legal services has been an issue for time immemorial. For many of the reasons Ms Broderick described, time billing is a particularly vexing issue. It is apparent that operating in an environment where every minute must be accounted for, or, at least, a quota achieved to demonstrate performance, is another likely trigger of stress.

The profile of the profession

It is appropriate next to say something about the profile of the profession. I don't want to bore you with too many statistics, but I'll just rattle through a few. These figures tell us much about where the profession has come from, where it is today and where it might be in the future and what it might be doing – so bear with me.

According to a report prepared by Urbis Keys Young for the Law Society of NSW seeking to identify the profile of solicitors in practice in 2015,[26] between 1988 and 2003 solicitor numbers grew from 9,808 to 18,092, representing an average annual growth rate of 4.2 per cent. The report forecast the number of solicitors in NSW to grow at a faster rate than the NSW population over the coming decade.

Over the same period, there had also been a growth in women solicitors as a proportion of the whole profession. In 1988, 20.2 per cent of solicitors in New South Wales were female; by 2003 this figure had risen to 38.6 per cent, an increase of an average of 4.4 per cent per year since 1988.

The proportion of women in the profession was projected to increase so that by 2015 women would constitute 52.2 per cent of solicitors compared to 47.8 per cent men.

Where do people work now?

The report noted that between 1996 and 2003, the proportion of all solicitors working in private practice had dropped from 77.5 per cent to 72.7 per cent. Over the same period, the corporate sector had increased, from 10.1 per cent of all solicitors to 13.2 per cent. The government sector remained steady at around 10.4 per cent.

On this basis the report forecast over the period 2004 - 2015, the proportion of all solicitors working in private practice will drop to 68.4 per cent of the profession in 2015. The proportion of solicitors in the corporate sector was projected to rise to 19.9 per cent in 2015 while the government sector was assumed to remain steady.

If you were a woman solicitor in 2003, it seemed you were more likely to work in the corporate or government sector.

By 2015, the report suggested that women would dominate both the government and corporate sectors, although a majority of private practitioners in 2015 would still be men. It predicted that the gender breakdown in private practice in 2015 would be 52.3 per cent male and 47.7 per cent female. In the corporate sector, the split would be 39.5 per cent male and 60.5 per cent female. Among government solicitors, 36.0 per cent would be male and 64.0 per cent female in 2015.

The authors inferred, hardly surprisingly perhaps, that the preference for the corporate and private sectors lay in the fact that since 1998, corporate solicitors had reported higher incomes than private practitioners, while private practitioners had reported higher incomes than government solicitors.

Income

Female practitioners have apparently consistently reported lower incomes than males, a trend the report forecast would continue. Because, it was concluded, some of the differences between male and female incomes were attributable to the different rates of full-time and part-time work as well as to different lengths of time since admission, the authors of the report used data on full time solicitors only to calculate projections of average incomes by gender. Even on this basis women solicitors were behind. The report projected that in 2015 the average nominal income for full-time male solicitors would be $130,300, while that of full-time female solicitors would be $106,900.

So what does this tell us? Hearteningly, legal practice is going to continue to grow. Less encouragingly, even though women are projected to outnumber men by 2015, their incomes will still be lower. Something more must be done to determine why this is so and redress it. Last, but by no means least, the corporate and government sectors are more appealing workplaces for women. This suggests those two sectors offer more compatible work practices – a matter private firms may wish to address.

Solicitors - comings and goings

What about people leaving the profession? The Law Society kindly provided the following information.

As at 30 June 2008 there were 22,738 solicitors holding practising certificates. On average the Law Society receives about 300 new applications for practising certificates each month.

- 92.4 per cent of solicitors renewed their practising certificate this year. 1,737 did not renew. Of these, 45.8 per cent were male and 54.2 per cent were female.

Of the 548 who advised why they were not renewing, the following reasons were given:

- moving interstate - 15 per cent
- non-legal position - 13.5 per cent
- retired - 13 per cent
- no specific reason - 12.8 per cent
- overseas - 12.6 per cent
- family - 11.3 per cent (of which 98 per cent were female)
- transferred to the bar - 5.3 per cent
- ill health - 3.1 per cent
- study leave - 2.6 per cent
- travel - 2.2 per cent
- dissatisfaction - 1.5 per cent
- unemployed - 1.1 per cent
- financial - 0.7 per cent
- other - 5.3 per cent

Of these figures, the one that sticks out is the large number of women leaving the solicitors' ranks for family reasons – another indicator that work practices need examination.

Barristers – comings and goings

As far as I am aware, the bar does not have a comparable 2015 study. However I obtained some statistics from the Bar Association. They reveal that over the period 2003 - 2007, on average 90 new barristers went to the bar of whom approximately 24 per cent were women. By 2007, 17 per cent of the New South Wales Bar were women, up from 13 per cent in 2000.[27]

Over the four practising certificate years, 2005 - 2008, on average 48 people left the bar, the majority of whom were men, a proportion no doubt reflecting their proportion at the bar. Of these 48, approximately a third took out a solicitor's practising certificate, another third or so retired, a few left for maternity reasons, a few went overseas and a few were unexplained.

Some observations on the figures

I do not pretend to understand why full-time women solicitors earn less than men. One explanation may be the fact that, according to *The Australian's* 2007 partnership survey, the number of women attaining partnership was about 20, only 16 of whom were equity partners.[28] If a higher proportion of the solicitors surveyed in the Urbis Keys Young Report were reporting partnership income that might have skewed the figures. However, it is dispiriting to note the prediction that the differential will continue notwithstanding the forecast increase in the number of women in the profession.

Perhaps even more dispiriting is a report, with echoes of wartime pressures, that Western Australia's 'boom times' are helping shatter glass ceilings for women in professions.[29] What will happen to those 'last on' when the boom fizzles or fades? Will they be 'first off'?

Over the four practising certificate years, 2005-2008, on average 48, people left the bar, the majority of whom were men...[o]f these 48, approximately a third took out a solicitor's practising certificate, another third or so retired, a few left for maternity reasons, a few went overseas and a few were unexplained.

Michael Slattery QC, when president of the bar, wrote reassuringly that that upward trend of the proportion of women at the bar had increased in the period 2001 - 2007.[30] Yet, soberingly, as Professor Ross Buckley has noted, of the 29 counsel engaged in the recent C7 litigation, only two were female, (*Seven Network Limited v News Limited* [2007] FCA 1062), both being on the team for Channel Seven.[31] As Professor Buckley commented, '[i]f the gender of barristers on C7 had reflected the representation in the profession, there would have been five female counsel involved, not two.'

An Australian Women Lawyers Gender Appearance Survey of Australian Courts for late 2004 and 2005 revealed the following:[32]

> In the Federal Court only 5.8 per cent of appearances by senior counsel were by women, the average length of hearing for male senior counsel was 119.7 hours, compared to 2.7 hours for female senior counsel.
>
> In the Federal Court the average length of hearing for male counsel appearing as junior to senior counsel was 223.6, whereas for female junior counsel in the same role it was only 1.4 hours.
>
> In the NSW Supreme Court, 15.6 per cent of appearances were by women, compared to 84.4 per cent by men; women had a high briefing rate in criminal matters, 57.1 per cent compared to 16.3 per cent in civil matters.

These figures bear out my observations. In the five and a half years I have been on the Court of Appeal the disproportion between the numbers of female to male counsel appearing is staggering. Part of the explanation clearly lies in the fact that most appearances in the Court of Appeal are by silk, and women silk are few and far between. Nevertheless it is difficult to avoid the uncomfortable conclusion that despite firms ostensibly embracing the Law Council of Australia's Model Equal Opportunity Briefing Policy for Female Barristers and Advocates,[33] many are only paying it lip-service.

The same is true of the High Court. In 2006 Justice Kirby observed that of the 161 counsel who appeared before the High Court in 2004 in appeal hearings, seven were women, less than five per cent. On special leave applications, the figure was a little better, but still lamentable: eight per cent of counsel were female. As Kirby J said:

> One hundred years after the first woman was admitted to legal practice in Australia it is difficult to understand why there is still such a gap between the numbers of men and women appearing as advocates before the highest court. The reasons would seem to lie deep in legal cultural and professional attitudes and practice. [34]

It is difficult to disagree with his Honour.

Indigenous lawyers

It remains only to refer to one issue which has not really emerged on the radar yet, that of Indigenous lawyers. Last week I attended the National Indigenous Lawyers Conference in Melbourne, an inspiring event organised by Tarwirri, the Indigenous Law Students & Lawyers

Association of Victoria. The Victorian attorney-general, the Hon Rob Hulls, commented on the unequal representation of Indigenous people in the legal profession, a situation he observed would continue to hinder Indigenous legal appointments.

There are already many fine Indigenous lawyers. But there clearly should be more.

I am aware that many law societies and bar associations are working hard to support the Indigenous community, both those who are already members of the legal profession, and Indigenous law students.

When I went to the bar in 1980 there was no real consciousness of the need to support and encourage women to enter the profession. As recently as 1995 it was a struggle to persuade the Bar Council to adopt a rule discouraging discrimination against women barristers. Those days are long behind us. I do not suggest those attitudes exist now in relation to Indigenous lawyers. Yet in the light of our experience with women lawyers, it would be naïve to think we could ever lose sight of the importance of the support the legal profession is currently providing, nor the necessity to review such support programmes constantly to ensure their efficacy.

Intergenerational equity

You will recall my earlier reference to Mr Clarke, the president of the English Law Society. There is something else he said which has a contemporary resonance – of sorts.

He concluded his address by calling on his audience to pursue their practice 'with a determination that we shall hand on to those who follow an inheritance no less rich and no less worthwhile than that which we received from those who have gone before us'.[35] This was a prescient invocation of the concept of intergenerational equity.

I, too, encourage you to conduct your practices in a way you would be proud to pass on to those who will succeed you in the profession. However, in an era which places great weight on an egalitarian profession, what I have said should, I hope, encourage you that you cannot be as apparently complacent about the legal profession's heritage as could Mr Clarke.

There is much that is excellent about today's profession. The standards of professionalism I see every day in court are to be applauded. The standards of advocacy are almost without exception excellent. The amount of pro bono work the profession undertakes is inspiring.

The structural issues addressed by the NSW Law Reform Commission in the early 1980s have been largely redressed. But, as I hope I have explained, there are more difficult cultural issues which need to be addressed. Some such as depression affect the profession across the board. Others affect sectors of the profession: women and the Indigenous community.

I have touched on but a few of these issues. I have no doubt others could compile a long list of important matters which need to be addressed. But these are the matters which I discern presently trouble many in the profession, and I share their concern. As young lawyers, you are, or have the opportunity to be, the torchbearers of change, to be vigilant in ensuring the legal profession is open to all equally, to be alert to issues which may lead to discrimination. I encourage you not to squander that opportunity.

Endnotes

1. Judge of appeal, NSW Court of Appeal.
2. The Hon Murray Gleeson, 'Courts and the rule of law', 7 November 2001, http://www.hcourt.gov.au/speeches/cj/cj_ruleoflaw.htm#_edn1
3. K Mason, 'The rule of law' in P D Finn (ed), *Essays on Law and Government* (1995) Vol 1 at 114.
4. The Hon Sir Gerard Brennan AC KBE, former chief justice of Australia, 'Profession or service industry: the choice', 18 August 1996, http://www.hcourt.gov.au/speeches/brennanj/brennanj_aba.htm
5. See cl 1, Preamble to *The New South Wales Barristers' Rules*, http://www.nswbar.asn.au/docs/professional/rules/Rules_april2001_2.pdf
6. Mason, op cit, at 116.
7. Clause 37, *The New South Wales Barristers' Rules*.
8. Subject to the provisions of the *New South Wales Barristers' Rules*.
9. New South Wales, Law Reform Commission, *Third Report on the Legal Profession: Advertising and Specialisation* (1982).
10. Ibid., [3.17].
11. *Legal Profession Act 2004* (NSW), s84.
12. (1981) 19(5) *Law Society Journal* 349.
13. Ibid., 341.
14. J Clarke, 'The Royal Commission on Legal Services' (1981) 19 *Law Society Journal* 59.
15. Ibid., 60.
16. Part 66A, Supreme Court Rules 1970 (NSW); Order 80, Federal Court Rules (Cth).
17. See, for example, the Hon Brian J Preston, chief judge of the Land and Environment Court, 'The role of courts in relation to climate change', 19-20 June 2008, http://infolink/lawlink/lec/ll_lec.nsf/vwFiles/Paper_20June08_Preston_Adaptation_ANU.doc/$file/Paper_20June08_Preston_Adaptation_ANU.doc
18. The Hon Murray Gleeson AC, former chief justice of Australia, 'Outcome, process and the rule of law', 2 August 2006 at 7, http://www.hcourt.gov.au/speeches/cj/cj_2aug06.pdf
19. The Hon Murray Gleeson AC, former chief justice of Australia, 'Managing justice in the Australian context', 19 May 2000, http://www.hcourt.gov.au/speeches/cj/cj_alrc19may.htm; a similar blitz took place in October and November 1992 when judges of the Supreme Court of Victoria conducted

'the spring offensive' to get rid of as many simple cases as they possibly could in the space of two months: see *Sali v SPC Ltd* [1993] HCA 47; (1993) 67 ALJR 841.

20. Commonwealth, Australian Law Reform Commission, *Adversarial Background Paper 3: Judicial and case management* (1996), http://www.austlii.edu.au/au/other/alrc/publications/bp/3/management.html
21. The Hon J J Spigelman AC, chief justice of New South Wales, 'Just, quick and cheap – a standard for civil justice', 31 January 2000, http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_310100
22. *Civil Procedure Act 2005* (NSW), s56(5).
23. J Lewis, 'Firms join forces to fight depression' (2007) 45(9) *Law Society Journal* 14.
24. 'From the Dean' (2007) 77 Fall *Stanford Lawyer.*
25. 'Billable hours at odds with flexible work practices' (2008) 46 *Law Society Journal* 20.
26. Urbis Key Young, *The Solicitors of New South Wales in 2015 - Final Report J79-04*. I have not itemised each page of the report from which the following information was taken, but it should be acknowledged as the source of all this information about solicitors.
27. Michael Slattery QC, 'President's column' *Bar News* (2007) Winter 4, http://www.nswbar.asn.au/docs/resources/publications/bn/bn_winter07.pdf
28. S Moran, 'Tackling the system's inequalities' *The Australian*, 14 December 2007.
29. A O'Brien, 'Boom times fuel shift to more women leaders' *The Australian*, 19 December 2007.
30. Slattery, op cit at 5.
31. Professor Ross Buckley, 'Women at the Bar' *Bar News* (2007-2008) Summer 10, http://www.nswbar.asn.au/docs/resources/publications/bn/bn_summer0708/summer0708.pdf
32. See http://www.womenlawyers.org.au/documents/Final_Gender_Appearance_Survey-August_2006.pdf
33. See http://www.lawcouncil.asn.au/policy/2443254835.html
34. The Hon Michael Kirby AC CMG, 'Appellate advocacy – new challenges', 21 February 2006, http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_21feb06.pdf
35. Clarke, op cit at 66.

Verbatim

Perram J on his tutors

From Mr Pembroke I learnt the benefits of calm and order, from Mr Rares I learnt the benefits of off-piste advocacy and from Mr Higgs I learnt the value of the strategic deployment of drama.

Walker SC on corporate personality (from *Friend v Brooker* [2008] HCATrans 344)

GUMMOW J:
They did not have to read *Salomon v Salomon* to work that out.

MR WALKER:
Yes, but may I say *Salomon v Salomon* was neither tattooed on any part of their anatomy nor in their mentality.

Gageler SC on the generosity of the Commonwealth (from *Minister for Immigration and Citizenship v Kumar* [2008] HCATrans 341)

FRENCH CJ:
Mr Gageler, I note that the minister is prepared to submit to a condition of the grant of special leave to appeal that the minister pay Mr Kumar's costs of the appeal, regardless of the outcome.

MR GAGELER:
Yes, your Honour.

FRENCH CJ:
There is an extra condition 'at Commonwealth rates'. Why should we impose that limitation?

MR GAGELER:
It is a level playing field point.

FRENCH CJ:
I think we might dispense with that particular limitation.