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The Australian Bar – Change and Future Relevance

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This Conference will examine ways in which the legal profession can remain 'relevant', 'resilient' and 'respected' in a changing society. It will discuss the legal profession's ability to adapt to change which, of course, is a test of its resilience. It will discuss how to foster respect for the profession and the judiciary which is essential to the maintenance of the rule of law. Whether or how the profession is able to garner that respect and the support of the community may answer the question of its continuing relevance.

There is always the concern that a profession as old as the Bar might one day lose its relevance to society. And it may be thought that future technology, including some forms of artificial intelligence, may render many of the services of the Bar redundant. Similar concerns have been expressed about the future of Courts.

In 2016 Professor Richard Susskind predicted that the legal profession will experience more change 'in less than two decades' than it has 'over the last two centuries' and that traditional legal businesses will fail unless they are able to adapt[1]. A claim of change of this magnitude may warrant reflection. There have been periods in the past when the Bar has been faced with challenges, different in nature but nevertheless serious in their potential impact.

It is as well to recall that the opening for a class of laymen to practise as advocates was itself created by change. That opening was brought about as a result of the prohibition placed by the church in England upon clerks in holy orders appearing as advocates in secular Courts[2]. These new advocates were known as pleaders, along with some other titles, and were trained in law by their Inns. It was necessary for the Inns to provide legal training to their apprentices because the degrees offered by universities at Oxford and Cambridge at this time were useful only if one intended to practise in the ecclesiastical Courts. The burgeoning profession effectively trained itself.

The legal profession, in the sense of an 'occupation professed'[3] is considered to have first become organised with the establishment of the Order of Serjeants in or around the time of Edward I[4]. The Serjeants were a small, elite society of specialist advocates, appointed by royal warrant, who appeared principally in the main common law Court of that time, the Court of Common Pleas, where they had an exclusive right of appearance.

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The office of Serjeant was a public one and they took an oath of office accordingly. There is evidence of the standard of professional conduct required of Serjeants from the exhortations of Chief Justices to the order in the reign of Henry VIII[5]. The standard of conduct expected of them reflected their public office. It was high. They were obliged to assist the poor and oppressed and to give counsel to those who sought it. They were to be truthful at all times in the conduct of their profession and do nothing to the wrong of good conscience. It was their duty to 'deal with business expeditiously and not prolong it for gain'.

And they were subject to a duty, which remains just as important today, to dissuade clients from pursuing unjust causes and to advise them to abandon causes if it appeared that they were in the wrong[6].

The history of the Serjeants teaches us many lessons. Chief among them is the respect which may be gained by a profession which has an evident sense of public duty and which demands of its members high standards of conduct and ethics. Their history also teaches us that one cannot assume that things will continue as they are.

It has been said[7] that it was the destiny of the Serjeants to decline with the Court to which they belonged, the aforesaid Court of Common Pleas. The competition from the lower ranks of barristers was also a factor. The demise of the Serjeants coincided with the ascendancy of barristers and the new office of King's Counsel.

The end of the era of the Serjeants commenced with another change – a change in pleading practice. Cases were no longer to be orally pleaded, which was their forté. They were now reduced to writing. At the same time, the Serjeants lost their elite status and exclusive character, not the least, by the excessive number of Serjeants who came to be appointed[8] (a factor which might be borne in mind by those responsible for the appointment of Silk today).

The Inns of Court themselves fell into something of a decline so far as concerns their role in legal education. By the early 19th century the public teaching of English law had essentially come to a halt[9]. The universities were regarded as faculties of Roman law, with English law only being taught as an optional subject[10]. By the 1820s however the number of lawyers in England was growing rapidly no doubt in response to the Industri-

al Revolution and population growth which fuelled an increasing amount of litigation[11]. This period was to mark a critical turning point in the history of the legal profession. It was faced with a decline in the reputation of lawyers amid criticism of high fees and a lack of professional competence and integrity on the part of some lawyers[12].

The profession responded by forming the Law Society which was to advocate for improvements in legal education and the standards of the legal profession[13]. As one author observes[14], lawyers became 'concerned about the behaviour of other attorneys and solicitors, believing that it inevitably reflected upon their own status and reputation'. Reform was necessary in order for the profession to remain relevant and respected.

In the decades which followed, the Law Society began to provide lectures for articled clerks[15], introduced examinations for solicitors and attorneys[16] and published materials on ethics[17]. It played a significant role in drafting the Solicitors Act of 1843, which consolidated laws relating to solicitors and established the Law Society as the regulatory body for solicitors[18].

Barristers in England also took steps towards reform. The Council of Legal Education was formed in 1852 to regulate the education of barristers and mandatory bar examinations were introduced in 1872[19]. In 1894 the Bar Council was established to regulate professional conduct and etiquette[20].

These developments influenced the legal profession which was developing in the Australian colonies. Beginning in the 1840s, law societies were formed to promote professional standards and public confidence in the profession[21].

Legislation established admission boards to regulate the admission of lawyers. English law was first taught at the University of Melbourne in 1857 and later at the University of Sydney[22]. Towards the end of the 19th century, bar associations were established in Victoria and New South Wales and by the turn of the century the bar associations and law societies of the States had begun to bring disciplinary proceedings against 'rogue' lawyers in the Courts[23].

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One example was the admission of women to the profession. By the end of the first decade of the 20th Century women had gained the right to vote in all Australian jurisdictions, but admissions boards and Courts ruled that women could not be admitted to the profession on the basis that they were not 'persons' for the purpose of legal practitioners' legislation. This year marks the centenary of the legislation introduced in New South Wales to remedy that position (for which there will be appropriate celebration). Between 1903 and 1923 similar legislation was introduced in all States.

Another example was the problem of defaulting solicitors. As the Great Depression took hold, a 'spate of misappropriations of trust funds and other financial improprieties' by solicitors in the 1920s and 1930s prompted calls for greater accountability within the profession[24]. Legislation was introduced in most States which required solicitors to keep clients' money in separate trust accounts and granted law societies disciplinary power over their members. Fidelity guarantee funds were established.

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The latter half of the 20th century brought calls for reform of the legal profession. They may be seen to reflect a certain degree of disillusionment with the profession in an age which was concerned with consumers and access to justice. In 1976 the Attorney General of New South Wales referred the New South Wales Law Reform Commission to examine 'the law and practice relating to the legal profession' and to consider whether reforms were desirable[25]. Over the next two decades, various reports were published by law reform commissions and government committees[26]. Common themes were the need for reforms in relation to complaint handling, legal education and restrictive practices.

It was to be expected that there would be differences of views within the profession about proposals for change. Some members of the profession expressed concern that increasing government regulation would undermine lawyers' independence[27]; while others argued that it was imperative that the profession embrace change or argue its case where it considers change inappropriate[28]. The reports and inquiries ultimately led to a range of legislative reforms in the late 1980s to early 2000s which marked a shift away from self-regulation and towards co-regulation. Multidisciplinary practices and incorporated legal practices were now permitted.

The growth of national law firms and in some cases the internationalisation of large law firms together with multidisciplinary practices were expected to reduce the work of the Bar. The reality is perhaps more complex. And the development of a global market for legal services, facilitated by increasing trade and developments in technology, has enabled some Australian lawyers to practice internationally[29], particularly in the South East Asian and European markets[30].

The production of reports about the legal profession has continued unabated in recent years. They have sought to identify the drivers of change and ways in which the profession might adapt to such change[31]. One of the key drivers is said to be the globalisation of the legal services markets. Another, unsurprisingly, is technological advances. Professor Susskind suggests that advances in areas such as artificial intelligence and machine learning will fundamentally change the way that lawyers work[32].

It may be accepted that the way in which lawyers and the Courts work will be changed, perhaps even fundamentally, by advances in these areas. It has already started in some legal procedures such as discovery where questions as to whether 'predictive coding' should be used in cases involving large numbers of documents have been raised[33]. (A simpler question might be whether the process has real utility).

Justice Nettle has suggested that there are at least two aspects of legal work that are likely to survive the effects of computational law. The first is litigation involving disputed facts. He suggests that the intellectual processes involved in the evaluation of evidence 'are so complex and so much informed by human intuition and experience as to defy synthesisation by any presently available artificial intelligence system'[34]. Even if future advances in technology make such

synthesis possible, Justice Nettle considers that it is questionable whether society would accept the use of computers to assess oral evidence. The other aspect his Honour identified is litigation involving 'the application of open-textured laws'.

There is a difference, he observes, between the scientific reasoning employed by computers and legal reasoning: scientific reasoning assumes there can only ever be one proper outcome, whereas where a law is open-textured, 'logic and reason (as applied under the rubric of legal reasoning) will often yield more than one possible outcome'[35].

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In order to survive, the legal profession, and the Bar in particular, may need to readjust its focus to skills such as critical thinking and persuasion that cannot easily be replaced by technological innovation. These are not new skills. They are those which were practised and honed by the early advocates.

Having skills which are marketable may not be enough to ensure the continuing relevance of the Bar. Its relevance will depend largely upon society's perception of it and what it stands for. This has always been the case. It is those special characteristics of a barrister which sets the Bar apart as a profession which may command the respect of society. Integrity, independence, and intellectual rigour, obedience to their duty to the Courts and a strong sense of public duty, which the Serjeants understood so well; these are the characteristics which must be maintained if the Bar is to remain relevant. It should not be overlooked that the rule of law, which is essential to our society, depends in large part on the existence of a strong Bar.

ENDNOTES

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10 Sir John Baker, *Collected Papers on English Legal History*, vol 1 (2013) 291.
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14 David Sugarman, 'Bourgeois Collectivism, Professional Power and the Boundaries of the State – The Private and Public Life of the Law Society, 1825 to 1914' (1996) 3 *International Journal of the Legal Profession* 81 at 88.
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16 Richard Abel, *The Making of the English Legal Profession 1800-1988* (1998) 156.
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22 David Barker, *A History of Australian Legal Education* (2017) 34.
23 Francesca Bartlett and Linda Haller, 'Australia: Legal Services Regulation in Australia – Innovative Co-regulation' in Andrew Boon (ed), *International Perspectives on the Regulation of Lawyers and Legal Services* (2017) 161 at 166.
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34 Justice Nettle, 'Technology and the Law' (Speech presented at Bar Association of Queensland Annual Conference, 27 February 2016) 9.
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