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THE LEGAL PROFESSION – WHAT DOES THE FUTURE HOLD FOR ME?

PAPER BY G N WILLIAMS JA
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This is an important, and exciting, time for most of you. Some of you have recently graduated and are beginning to find your way in the practicing legal profession. Others of you are close to graduation, and undoubtedly looking forward with anticipation to climbing the professional ladder. I would be surprised if many of you did not have expectations of reaching lofty heights in the foreseeable future. Without wanting unnecessarily to dampen your spirits there are a few observations which an "old hand" can make which might help to ease the pain which undoubtedly all of you will incur whilst climbing that ladder at some point of time.

Sir John Donaldson, in 1984 Master of the Rolls in England, delivered a paper to a national conference of The Law Society. He began his address as follows; whether true or anecdotal it does not matter.

> "Some years ago a judge was walking through Trafalgar Square. Above his head hovered a pigeon, intent upon discharge. 'Go on', said the judge, 'don't mind me. Everyone else is doing it'."

Nothing much has changed in the last 16 years, either in Great Britain or Australia. I leave to others to determine whether it is justifiable or not, but there can be no doubt that the judiciary is not held in the same high esteem as it was for a century or more prior to about 1970. I suspect that one of the main reasons for the change in media attitude is that judicial reasoning is not amenable to the "30 second grab" around which television news reporting is based. Careful judicial reasoning is made newsworthy by denigrating it as out of touch with community expectations, and giving prominence to emotional outbursts from persons who see themselves as adversely affected by the decision.

It is not my intention to dwell on the position of the judges. Generally the judiciary is so conditioned by such attacks as to be relatively immune from them. I mention the position of the judiciary merely to emphasise that it is the whole of the legal profession from the most senior judge to the most junior practitioner who is currently in the community spotlight and subject to a depth of scrutiny which would have been regarded as surprising a few decades ago.

It will not be long before each of you is subjected in some way to the sort of criticism I am referring to. Whether we like it or not, we are judged by the company we keep. We all suffer the consequences of the conduct of our professional colleagues.

I had not considered speaking to you along these lines until a few days ago. Much of what I am saying today is no doubt affected by my revulsion and astonishment at the conduct of senior members of the legal profession exposed by the Sydney Morning Herald over recent weeks. Every member of the legal profession when being formally admitted to practice, either as a barrister or solicitor, takes an oath to well and truly conduct himself or herself as a member of the profession. As a member of a long-standing honourable profession that, to my mind, obliges the person taking that oath to uphold the law – to abide by the law. I hope it is not now too idealistic to consider that one of the aims of our profession is to ensure that our society is governed by the law and to encourage people to live and act in accordance with laws which are properly enacted by our parliaments or created by the long-standing tradition of the common law. It is absolutely contrary to that concept of the profession, and the oath to

which I have referred, for lawyers to defraud fellow members of the wider community by deliberately avoiding the payment of lawful taxes. Let me make no bones about it. It is my view, and one that I know is shared by many of my colleagues and other eminent lawyers, that the failure to obtain a tax file number, and the failure to lodge tax returns over many years, particularly where hundreds of thousands of dollars are in fact being earned each year, is so scandalous as to demand automatic strike off. There is no room in our profession for people who act in that way.

The profession as a whole is under such community scrutiny that illegal conduct can only denigrate further the profession in the eyes of the public as a whole. As someone who has endeavoured to serve the profession loyally over some 40 years it is disturbing to see substance being given to the often quoted statements that all lawyers are sharks whose only interest is in taking money from deserving clients.

I wrote those words three days ago. Yesterday I received a copy of a statement by Jack Straw, the British Home Secretary issued late February dealing with proposed reforms of the legal profession to be introduced by the Blair government. It was disturbing to read the third most senior Cabinet Minister, and a former practicing lawyer, saying:

> "The reason why there are so many lawyers in our society, and the numbers have quadrupled in the last 25 years, is because lawyers never agree, except about taking money off clients".

That proves I am not sparring at shadows. The profession is facing a crisis which must be addressed.

Because of the conduct, virtual criminal conduct, on the part of a few high-flyers at the Sydney bar all of you, and I, will be subject to scrutiny over the ensuing months which we do not deserve.

The lesson is there for us all to learn. If the good name of the legal profession is to be restored then it is up to each member of the profession to do his or her part to bring that about. It is particularly important for the younger members of the profession to become familiar with the principles of ethics which govern our profession and take all necessary steps to see they are followed.

The pigeons will continue to fly over the heads of members of the legal profession, some will still from time to time aim their discharge at particular members of the profession, some of it will stick, but most of us can avoid the fallout. If practitioners take good counsel, follow the rules of ethics, and abide by one of the fundamental rules of all professions, namely serving ones fellow human beings with honesty and integrity, the future for lawyers will be bright.

But enough of that. Let me move on to some other topics.

There has been much debate in recent times as to what should be included in legal education. Should the student have a broad, liberal education, or should a law course be designed to impart specialised technical competence.

These days very few lawyers study philosophy. Some who study subjects involving government or political science at least touch upon political philosophy. Apart from what is termed "legal ethics", there is virtually no study these days of ethics in the broader sense. Yet the indications are that the greatest challenges to lawyers in the next 50 years will require a

deeper understanding of philosophy and ethics than the average lawyer has had over the past 50 years.

The real challenges over the next 50 years will be in the area of bioethics. The unravelling of the human genome will initially create a minefield for lawyers. When *Marion's* case was heard by the High Court in 1991, reported 175 CLR 218, the lawyers, and the wider community began to appreciate even more deeply how a decision of judges could impact on human life. There the question as to whether or not an intellectually disabled child could be sterilised was determined by applying legal principles which had evolved over centuries, during a time when medical knowledge was far less sophisticated than it is today. That was thought to be the high water mark of the courts' involvement in medical ethical issues, but the issues then raised pale into insignificance beside the matters the Court of Appeal had to consider in the case of Jodie and Mary, the siamese twins. The judgments are interesting if only because they expose the efforts of the judges involved to rationalise and justify what each regarded as the appropriate decision in conformity with past, accepted legal principle. In that regard it is interesting to note how recourse was had to the doctrine of necessity, an approach rejected for many years by liberal minded judges as a proper basis of legal reasoning, in order to arrive at the desired conclusion.

It is not surprising in cases such as this that there is a wide disparity in judicial reasoning. *McFarlane v Tayside Health Board* [2000] 2 AC 59, involved the question of assessing damages for maintenance of a child conceived after a failed vasectomy. The case progressed through the Scottish system, initially being heard by a single judge of the Court of Session and then by an appellate court of four. It then went to the House of Lords where five members sat. Some nine judgments in all were delivered, and it is difficult to find much common ground. It was obvious that the social background of the judges impacted significantly in the decision-making process with respect to the "unwanted child". That issue is now before the Queensland Court of Appeal.

In addition judges have already had to grapple with issues such as the right of a wife to take sperm from her deceased husband in order to be artificially inseminated. Then there are the cases involving same-sex couples and their asserted legal right to have a child.

Whether we like it or not these are the type of cases which are going to be at the forefront of the development of law over the next couple of decades. The issues are so politically sensitive that the legislatures are in all probability not going to make relevant law. Our politicians have the easy way out – do nothing. That solution is not available though to lawyers. The problems will not go away, particularly for the courts. When the issue is raised it has to be addressed, and moreover reasons have to be given for the particular decision.

This is why it is vitally important for the young lawyers of today to acquire a greater knowledge and understanding of the moral and ethical issues which cases of the type in question throw up for decision. More and more the courts will be asked to make such decisions. The courts' capacity to arrive at acceptable decisions will to a large extent be dependent upon the input into submissions by members of the legal profession.

Because of such considerations it is important that legal practitioners do not become too dependent on computers for legal research. Computers have no capacity to present the type of reasoning that cases such as those I have been talking about require. It is no use putting before the court the list of cases in which some aspect of the topic has been considered. What is required is a detailed consideration of the social and moral issues involved and the way in which legal principle impacts on such issues. In many instances

there will be no established relevant legal principle. The judges called upon to make the decisions in such circumstances will be developing the common law. That will present a real challenge. Hopefully the legal profession will be able to meet the challenge.

Regrettably, but understandably, such decisions will generate acrimonious public debate and the decision-maker will have to bear the burden of public criticism from at least a significant group in society. As you know the judges will not enter into the public debate about their decisions. That is where members of the legal profession can play an important role. As already noted the media are disinclined to publish fully reasons for judgment. That is understandable, particularly when the reasons may be quite lengthy, but the failure to give extensive exposure to the judge's published reasons for his decision often means that the public debate is conducted in ignorance of those reasons. In those circumstances it is often a minority interest group which is able to get the ear of the media and put its slant on the judgment; the reasons for judgment are not criticised but rather the criticism is directed at a particular interpretation the commentator places on the judgment.

Because of those considerations, particularly where important cases affecting the community at large are involved, the legal profession has in my view an obligation to enter the debate and to ensure, or at least do its best to ensure, that the real issues are fully aired in public. Even if members of the legal profession believe that in a particular case the judges got it wrong, then nevertheless they are under an obligation to do their best to ensure that the debate is conducted on a rational basis and that it does not degenerate into an exercise to see who can best denigrate the judges.

Looked at objectively it was disturbing to note the conduct of many in the legal profession in California in 1986 with regards to the election of judges. Justice Rose Bird had been appointed to the Californian Supreme Court in 1977 and had become its first female Chief Justice. Because a significant section of the voting population of California considered that she was not ordering the hanging of enough criminals there was a move to have her voted off the court. Many members of the legal profession, for a variety of reasons, went along with that. There was no concerted outcry from the legal profession that the independence of the judiciary was at risk. The upshot was that an eminent lawyer lost her seat on the court because of irrational, emotional beliefs spread through the community by minor, but powerful, interest groups. That is an illustration of what can happen if the profession as a whole does not support the system.

Much of what I have been saying reflects the fact that both barristers and solicitors are truly members of one of the great and original professions. I hope that always remains so. A profession has been defined as a calling, admission to which requires special training, education and character, and which has an ideal of public service. Allied with that are the concepts of independence and dedication to the ideals of the profession.

Independence, particularly of the Bar, is a central pillar of our system of administration of justice. It is well to recall the words of Sir Owen Dixon, one of Australia's greatest Chief Justices, on his swearing in.

> "The Bar has traditionally been, over the centuries, one of the four original learned professions. It occupied that position in tradition because it formed part of the use and the service of the Crown in the administration of justice. But because it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the Bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely

> as an individual, drawing on his own resources of learning, ability and intelligence, and owing allegiance to none."

Last week on his retirement from the Supreme Court of Queensland Justice Pincus echoed those words and exhorted members of the Bar to maintain their independence, and allegiance to none, in the face of pressures emanating from our modern social conditions. Many now see the practice of the law as the carrying on of a business. If that is the practitioner's attitude then the job, for it will be no more than that, will not be rewarding.

While Sir Own Dixon perhaps emphasised the role of the Bar he nevertheless made some important observations of the role of solicitors. With respect to them he said:

> "The work of solicitors in the administration of justice has the greatest possible importance, but their allegiance is perhaps more to their clients who have a more permanent or at all events a longer relation with them than the transitory relations between the client and counsel when the full enthusiasms in force of the advocate are attached to the individual for a short space of time".

But even with solicitors it is important to emphasise that they are truly members of a profession to be distinguished from persons carrying out normal commercial business activities. It does disturb me to hear government bodies such as the Trade Practice Commission referring to the business activities of lawyers. If professional responsibility is discharged as it should be, then there is no room for bureaucratic intervention. Solicitors in particular should, in my view, think long and hard before accepting incorporation as a desirable vehicle through which to carry out their professional activities. There may be some taxation advantages, but there are pitfalls. There has already been speculation in financial columns as to which of the big firms in Australia is likely to be first listed on the Stock Exchange. Perish the thought. Leaving aside questions of duty to the court in litigious matters, a lawyer's only duties and obligations are to the law and to the client. If the stage should be reached when in giving advice a lawyer has to have regard to the impact on the price of the firm shares on the stockmarket then we will have said goodbye to the legal profession as it has existed to date.

In the end it is your own ability which will set the level of achievement and satisfaction. Work hard, be ethical, be loyal to the law, develop good relations with your fellow practitioners and the courts, and above all enjoy what you are doing. If you follow that advice then after 40 years in practice you will be able to say, as I can, that I have enjoyed my career in the law.