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## Occasional Address

### **UNIVERSITY OF WESTERN SYDNEY LAW ALUMNI OCCASIONAL ADDRESS 8 NOVEMBER 2013, DOLTONE HOUSE SYDNEY**

THE HONOURABLE JUSTICE TF BATHURST\*

#### I INTRODUCTION

A few months ago, when I received a letter from the Dean of Law and the President of the Alumni Association inviting me to speak at this dinner, I accepted with delight. I then put the letter onto one of the piles of papers on my desk, where it vanished for some time. When I finally found it again recently, two things I read caused me to come to a sobering realisation.

The first was reading that the University of Western Sydney has been providing high quality legal education for almost 20 years. I, on the other hand, have been attempting to provide moderate quality legal advice for some 40 years.

The second was learning that 3,000 students have graduated from UWS' LLB Program in those 20 years. That, I realised, is more than three times the number of barristers who were practising when I first came to the bar.

The conclusion I was forced to draw from these matters is that I really am quite old. That is probably not a huge revelation to anyone here tonight, but it came as quite a shock to me. Previous comparisons with the rest of my judicial colleagues had led me to believe I was early middle aged.

Having got over that shock, I thought I might take advantage of the situation, and reflect tonight on what has changed over the years since I began practicing. What value, you may ask, could this have, except for allowing me to indulge in reflections of the past that are probably best kept to myself?

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\* Chief Justice of New South Wales. I express my thanks to my Research Director, Ms Sienna Merope, for her assistance in the preparation of this address.

I don't know if you will find this a convincing answer, but to my mind considering what has changed over the last 40 years is relevant because it enables us, as a profession, to reflect, first, on how far we have come – both in providing legal services to the public, and in making legal practice more stimulating and interesting. Second, it allows us to identify changes to the legal landscape that have thrown up new challenges, and placed certain elements of professional life and dispute resolution under pressure – and perhaps even to suggest ways to meet those challenges.

Now rest assured, I'm not going to bore you by telling you how lucky you are to have graduated in the last twenty years on the one hand, or by talking endlessly about how good the good old days were on the other. Almost all members of the senior judiciary have had a go at the first type of speech, and no one would believe me if I began eulogising the past, least of all myself. Rather, I will try to simply reflect on some of the major changes of the last 40 years, and say a few words about the implications of some of those changes.

## II SUBSTANTIVE LEGAL CHANGE

Can I start at the mundane level? When I first started practising law as an articled clerk, although it had been 67 years since Federation and 26 years since the *Statute of Westminster Adoption Act 1942* (Cth), Australian courts were yet to declare their independence from the Privy Council and House of Lords. English law remained a towering influence on the development of Australian law. In fact, until the *Australia Acts 1986* (Cth) were passed in 1986, litigants continued to take appeals to the Privy Council, including directly from State Supreme Courts. In that way parties by-passed the High Court when it seemed advantageous to do so, for example because an existing decision seemed to be against them. In fact, the 'increased availability of air travel meant that the Privy Council was probably hearing more Australian appeals in the 1970's than in the 1930's'.<sup>1</sup> Cynics often suggested, of course, that the reason for the continuing popularity of the Privy Council, particularly in the months between May and October, had something to do with barristers' holiday plans. Nothing could be further from the truth.

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<sup>1</sup> The Hon Murray Gleeson, 'The Privy Council – An Australian Perspective' (Speech delivered at the Anglo-Australian Lawyers Society, Commercial Bar Association and Chancery Bar Association, London, 18 June 2008) 2.

At the time I entered the legal profession, there was minimal statutory intervention in the common law, with the possible exception of the Criminal Law. There was for example, no such thing as the *Trade Practice Act 1974* (Cth). The *Corporations Act 2001* (Cth), then known as the *Companies Act*, contained some 60 sections, mainly dealing with issues of ultra vires, reductions in capital and the relationship between the company and its shareholders. There was no *Evidence Act*. In fact I vividly remember when the *Evidence Act 1995* (NSW) came into force. I was appearing in Melbourne around the time, and in the course of argument I remarked to the judge 'now of course your Honour hasn't had the misfortune of dealing with the Evidence Act', to which his Honour replied, 'I was on the Commission that recommended that Act, Mr Bathurst'.

There was no *Supreme Court Act 1970* (NSW), certainly no Uniform Rules of Civil Procedure. There was however a *Common Law Procedure Act 1899* (NSW), carefully designed to trick people into commencing proceedings in the Equity as opposed to the Common Law division, at which point they were deemed non-suited and had to start again.

Rules of Pleading were fine in the extreme. At some point during my University career, I remember trying to memorise the 1845 edition of *Bullen and Leake on Pleadings*, to pass our pleadings exam. Yes, we had those. The exam was set by an extremely senior barrister who later went onto become a judge of the Supreme Court. He would generally start his lectures by waving a copy of *Bullen and Leake* around while proclaiming it 'the finest work of English literature known to history, save for King Lear and the King James Bible'. Each to their own I guess.

Much has changed since then. When I was preparing this speech I mentioned *Bullen and Leake* to my researcher, and she responded with the kind of dazed and confused stare more usually seen in clients emerging from a meeting with their tax accountant.

There have been other changes. Comprehensive tort reform in the early 2000s greatly decreased personal injury litigation resulting from motor accidents and work-related accidents - areas which had previously been a mainstay of the common law system. Commercial law is infinitely more complex today than even 20 years ago. Equitable principles have also increasingly expanded into the commercial sphere. The recognition of remedies for unconscionable conduct and misleading and deceptive conduct, and the expansion of fiduciary duties into commercial relationships, provide two of numerous examples.

Australian law has adopted an increasingly international outlook. No longer do we look only to the United Kingdom to assist with precedent. In fact as the influence of European Union law is increasingly felt there, it may be that judicial decisions from that jurisdiction will be increasingly less applicable to the Australian context. Rather, we now also seek guidance from other common law jurisdictions in our region, including New Zealand, Hong Kong and Singapore, as well as looking to United States authority.

A particularly notable development has been the increasing relevance of statute. As I mentioned, when I began practicing the common law operated relatively free of legislative intervention. That is no longer the case, to put it mildly. From the ever-expanding *Income Tax Assessment Act 1997* (Cth), to the introduction of the *Australian Consumer Law*, to continual amendments to Criminal legislation, statute is an overwhelming presence in the legal landscape.

There are many possible reasons for the greatly increased scope of legislative activity. It may be, as former Chief Justice Gleeson has put it, that citizens now look to legislators to intervene in many areas that were once the province of judges and lawyers 'partly as a consequence of the work of law reform agencies, partly as a consequence of expanding public and political interest in legal rights and obligations ... and partly as a consequence of an increased disposition to question and challenge all forms of authority'.<sup>2</sup> To that I would add a perception by governments that legislation will make the law simpler, and perhaps a view that change in the law is itself a sign of progress or improvement.

I would not want it to be thought that I am 'anti statute'. Legislation is certainly desirable in some areas and legislative intervention has achieved reforms that no doubt would have taken much longer, and may yet not have been completed, if left to the courts. However, I do have doubts about whether legislation simplifies the law. There seems at present to be a trend towards ever more specific and complex statutes, that aim to define and address every problem that may arise in a given legal area, rather than establish broad principles to guide judges. This creates difficulties, when inevitably, an unforeseen situation arises, and can impede the principled development of the law.

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<sup>2</sup> The Hon Murray Gleeson, 'Some Legal Scenery' (Speech delivered at the Judicial Conference of Australia, Sydney, 5 October 2007) 14.

Further, when common law principles are not only subsumed into but altered by statute, the result can be confusion rather than clarity, as courts lose the benefit of decades or centuries of accumulated common law guidance. It should be remembered that statutes must be interpreted by courts, and that not every issue will necessarily be improved by the sometimes unwieldy products of legislative drafting.

As a side note, there have been two rather quirky developments in the drafting of legislation over the last 40 years. The first is the new enthusiasm for giving statutes what I might describe as a 'happy title', designed to make the unsuspecting public think that what is in the legislation is a wonderful thing for them. So for example, instead of calling the legislation implementing the GST 'An act to levy a tax on goods and services' we had 'the New GST Act'. I guess calling it the 'New and Improved GST Act' was a bridge too far, but the implication is there. Similarly in industrial relations, friendly titles like WorkChoices and the Fairwork Act disguise the reality that the statute is an attempt to balance the rights of the employee and of the employer, the likely consequence being that everyone will think the legislation unfair to some degree.

The other development is the use of what legislative drafters describe with self-satisfaction as 'plain English'. I started speaking English when I was around two years old, which really was a long time ago. When I read some of these statutes however, I think that if this is plain English, I must have missed something important in primary school.

Legislation has certainly become more complex. Nevertheless, it is undeniable that it has and will continue to play an important role in the development of the law. In that context, it is imperative that law students and practitioners have expertise in statutory interpretation. Currently, I believe the subject is still treated as something of a side note in legal education. It will be interesting to see how that changes in coming years.

Another area of change, over the last 20 years in particular, has been the expanding importance and scope of administrative law. Arguably this is in part due to a growth in government decision-making that directly affects individuals, coupled with the introduction of legislation regulating the review of government decisions. It is also due to the increasing use of tribunals – a trend which can be seen most recently in the decision to establish the NSW Civil and Administrative Tribunal (NCAT). Tribunals have brought many benefits in terms of more accessible justice and innovations in judicial process. They have also

made review of administrative decisions one of the fastest growing areas of litigation, particularly since the High Court's decision in *Kirk*.<sup>3</sup>

### III DISPUTE RESOLUTION PROCESSES

These changes relate to what can be described loosely as substantive law. There have been equally significant if not greater changes in the process of dispute resolution, and not only in the sense that *Bullen and Leake* has fallen out of favour in legal education.

When I started practice, a long trial was one that went for two days. Cases were found by consulting books. LexisNexis had yet to be established. Briefs were shorter. Party autonomy was sacrosanct. The courts had almost total monopoly over dispute resolution.

Those days are hard to imagine now. The change was brought home to me when I assumed my present role. I had to clear out my old Chambers. In the dustiest corner, there were some old briefs, tied in frayed pink ribbon, which I could only hope I had in fact attended to. They reminded me fondly of the days when delivery of a brief was done by a solicitor's clerk, rather than by a professional removalist company.

Changes in technology, in commerce and in the complexity of the law have greatly altered the nature of litigation. The obvious example is discovery. In 2010, 1.9 billion email users sent 107 trillion emails. To be fair, a decent proportion of those were probably cat videos. Nonetheless, the amount of information generated and stored that is potentially relevant to a legal dispute has increased exponentially since I started practice. This has had serious implications for the cost of litigation - discovery in particular - and in turn for the accessibility of justice.

The legal system has responded to these challenges in a number of ways. For courts, the move towards judicial case management has been particularly significant. This change has been described by Justice Sackville as 'a transformation of the judicial role from the traditional model of passive decision-maker, little concerned with public perceptions of the judicial system, to one in which courts actively revise procedures and administrative processes in order to achieve defined objectives'.<sup>4</sup> Case management has allowed judges to supervise

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<sup>3</sup> *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

<sup>4</sup> The Hon Ronald Sackville, 'From Access to Justice to Managing Justice: The Transformation of the Judicial Role' (2002) 12 *Journal of Judicial Administration* 5, 19.

and manage pre-trial procedures and to ensure that trials are conducted efficiently with a focus on the real issues in dispute between the parties. This has had undeniable benefits in terms of reducing delay and improving efficiency, lessening not only the cost on litigants and pressure on judges, but the overall cost of justice on the community.

I should add however that case management it is not an end in itself. Cooperation between courts and the profession in determining what issues need to be addressed at case management hearings, and compliance with courts' directions, are needed to ensure that extensive case management does not end up *adding* costs to litigation.

Another fundamental development has been the growth of alternative dispute resolution (ADR). ADR emerged as a result of the recognition that both the financial and emotional costs of litigation were high, and that litigation did not always meet the needs of clients. Today ADR processes are utilised in all types of legal disputes. Arbitration for instance plays a particularly central role in commercial dispute resolution, due to the advantages of party control, efficiency, confidentiality, flexibility, industry expertise and, often, lower cost. Mediation has brought huge benefits in family law. Measures such as court-annexed mediation have also contributed significantly to the achievement of just, quick and cheap outcomes for litigants, courts and the community more generally.

Changes of this magnitude have of course brought their own challenges. For instance, there are concerns in some quarters that if private dispute resolution continues to expand, the transparency, procedural fairness and jurisprudential development that only courts can guarantee will be sidelined. There is no doubt that courts face challenges in determining how best to supervise ADR, so as to ensure that the fundamental tenets of the administration of justice are not compromised. For my own part however I think that while ADR will continue to complement traditional courts structures, it will not replace them. The importance of a transparent system of public justice will endure.

#### IV THE LEGAL PROFESSION

I have said something about the changes both in the substance and processes of the law. In the time I have remaining I would like to consider the legal profession – how it was when I started, and how it has evolved in the last 40 years. It is of course very dangerous to make

comparisons between then and now, precisely because things were so different.

Certainly professional conduct was different in some respects. When I began practicing, there was one very successful common law silk who was known to ask female plaintiffs for whom he was acting if they had a baby. If they replied no, he would advise them to borrow one from a neighbour or friend (babies could usually be found) and bring it to court. When the plaintiff was called to give evidence, the instructing solicitor – or more likely the solicitor’s unfortunate clerk – was made to hold the baby and to poke it discreetly at opportune moments so that it would cry. The barrister would then stop his examination, look at the woman with a mournful gaze and then, you guessed it, look at the jury. He apparently only did this on one or two occasions, but legend has it, he more than doubled the expected verdict in those cases.

There were of course other great jury advocates who never went to such extreme lengths. One of those was Chester Porter, who I understand spoke to you in 2008. He could convince a jury of just about anything. Those of you who heard him speak can probably understand why.

These days it is different and has to be. Litigation involves greater documentary material and is surrounded by complex legislative restraints. The case involving the woman and her stand-in baby would now be heard by a judge, and irrespective of how clever the attempts to manipulate were, she would be unlikely to overcome the statutory benchmark to receive any compensation.

The judiciary has also changed. I think as far as that is concerned, you people have the better end of the stick than graduates of my time. I don’t mean because you have me as Chief Justice. I was actually going to list that as one of the advantages, but my researchers told me not to delude myself.

There is, for one thing, a much greater degree of courtesy between counsel and the Bench than existed at that time. When I hear people, including distinguished jurists of a certain age talk about judicial bullying today, I smile to myself and wonder if they had an extraordinarily sheltered existence in their early career. It is probably more likely that they have managed to achieve amnesia in relation to the traumas of their youth.



In the 1970s and very early 1980s, the NSW Court of Appeal, whilst it lacked for nothing in intellectual ability and integrity, thought the idea of engaging with counsel meant engaging in cross-examination. At its most charitable, that cross-examination could be described as blunt. Even experienced silks got nervous going there. More than one barrister was reduced to tears. That has changed. I would not be bold enough to claim that judicial bullying never occurs, but it is universally recognised as unacceptable behaviour, as well it should be.

There have been other significant improvements. The increasing diversity in gender, professional and social background amongst the judiciary and the profession has greatly benefited the administration of justice. I hope and believe it will be followed in due course by greater ethnic diversity. The increasing tendency by judges to talk publicly about the role of the courts and the work of the judiciary is also to be welcomed. Judges should continue to speak primarily through their judgments, but public engagement also plays an important role in improving community understanding and with it confidence in the administration of justice.

While on the theme of courtesy though, one thing I have noticed in recent years is the increasing ferocity with which lawyers exchange correspondence. Forty years ago there were far fewer lawyers, and you often knew the person you were communicating with quite well. In those circumstances standards of courtesy applied as a general rule. Increasing pressures being put on the profession seems to be leading to a decline in that standard.

It is important we strive to retain professional courtesy. Whenever putting something in writing I think it is apt to remember what Justice Gummow once said to a particularly ferocious counsel who will remain nameless – ‘more light, less heat Mr X’. The other thing to keep in mind is that discovery being what it is, the letter or, more often, email, you write in the heat of the moment is likely to end up before the Bench one day.

I do have great sympathy for the pressures, many of them due to commercialism and technology, that are placed on legal professionals today however.

That is not to say that it was a walk in the park in my day. Under the older articles of clerkship system that operated when I first started legal practice, the employment of a young solicitor was a genteel form of slavery. Well, sometimes it was genteel. Graduating students would

sign a roll promising they would serve their *master* – I emphasise that term – solicitor faithfully for a period of up to five years. They were then worked to the bone and were expected to be seen but not heard. For the privilege they were paid something in the order of five dollars a week, or whatever lesser amount would enable them to catch public transport to and from their home to their master's place of employment.

Today, the role of young lawyers is, I think, generally more interesting. Graduate program training and the commitment by firms to supporting young lawyers to engage in pro bono work have played an important role in this respect.

There are however, undoubtedly new challenges for legal practitioners today. Technology, while it has had many benefits for legal practice - including making information vastly more accessible - has also heightened the pressure on lawyers. In the old days, you would write a letter to the other side, wait a day or two for the mail to reach them, and a day or two for them to reply. Today, instant communication means that lawyers are expected to be glued to their Blackberries at all times of the day and night.

The increasing commercialisation of legal practice has also raised new issues, both in relation to practitioners' wellbeing and to the maintenance of professional ethics. The structure and operation of 'mega firms', the use of international outsourcing, the incorporation of law firms, and the growing use of in-house counsel are all factors of relevance. I have spoken previously on this topic and won't bore you by repeating my comments tonight but I would just like to emphasise two points. First, ensuring that our enduring professional ethics are maintained in the face of increasing commercial pressure requires that law firms develop an ethical *legal* culture, and not simply *corporate* culture. That in turn requires an open discussion about how professional ethics are to be upheld and applied in ever-changing modern contexts.

Second, the legal profession must take its responsibility to educate and nurture young lawyers seriously, including in relation to personal wellbeing and professional ethics. A profession where young lawyers have little contact with clients and feel that their primary responsibility is to exceed their 'billables target' has a worrying future. Likewise when recent graduates feel that they cannot object to any of the work demanded of them because there is a 'long queue in the street willing

to take their place'. No amount of mental health seminars will replace the pressing need to address these issues.

There is no doubt that this is a difficult time to be a young lawyer, not only for those experiencing the pressures of legal practice, but for all the well qualified legal graduates who are struggling to find work in this incredibly competitive legal market. I dread to think what my own career prospects would have been if things had been as tough when I graduated as they are now.

It is important to remember however, that this is not the first time that alarming articles about a 'crisis in legal employment' have been written. The past is instructive in that respect. Every time there has been an economic downturn in the last 40 years, someone has said that there are simply too many lawyers. Eventually the market picks up and with it the demand for the skills of legal graduates. This downturn has lasted longer and been worse than most, but I have no doubt the same principle applies.

That said, it is important that thought be given to encouraging graduates to pursue a wide field of employment opportunities, rather than holding up employment in a large commercial law firm on the one hand, or a community legal centre on the other, as the ultimate goals of a law degree. This and other measures will be needed to respond to the changes to the legal profession that the next forty years will no doubt bring.

## V CONCLUSION

I have spoken about change. One thing that stands out however, when I consider the developments of the last 40 years, is that while lawyers and judges have changed the way we do things, we have not fundamentally changed the things we do. New challenges have emerged and new strategies have been adopted to respond to those challenges. However the fundamental goals of the justice system, namely impartiality, due process, accessible justice, equality before the law and the just and efficient resolution of disputes, remain largely unchanged. The essential obligations of legal practitioners, including duties of fidelity, candour, good faith and due care, a paramount obligation to the court and a duty to continue learning, remain universally accepted. The importance of an independent judiciary and of public confidence in the administration of justice continue to be widely recognised.

The manner in which legal practice changed in the past 40 years was, I think far more substantial and drastic than what had occurred between Federation and the late 1960s. I have occasionally tried to predict the future. Having no psychic ability, I have always been wrong, so I won't try again tonight. However, while we may not know what changes will occur in the next 40 years, what we can be sure of is that they will be significant and numerous. Lawyers such as yourselves will have a vital role to play in ensuring that such changes are accommodated in a way that maintains the fundamental principles which underpin the rule of law and the essential obligations of legal practitioners, to which I have just referred. For my own part, I have sufficient faith in the judiciary and legal profession to confidently predict that such accommodation will be achieved.