

New South Wales Young Lawyers
State of the Profession Address
3 September 2014

What's in a name?

Introduction

In my nearly six years as a judge and my 26 years as a solicitor before that, I have given many speeches: from the serious to the not-so-serious; from Plato to far less philosophical subjects; from the educational to the motivational; and to a variety of audiences. In my legal career I have written thousands of words: as a solicitor, they were for a far more limited audience than those I write in judgments today. Yet I must confess that tonight's address I have found somewhat daunting.

In the words of Professor Julius Sumner Miller, why is that so? At first, it was because the headline for tonight's address "State of the Profession Address" called to mind a Presidential "State of the Union" or Prime Ministerial "State of the Nation" address. I almost expected to see the trappings of a Congressional or Senate hearing when I arrived at the Law Society tonight. And I am not in a sufficiently authoritative position to purport to give a definitive rating on the state of the legal profession of that kind. I leave that for the heads of jurisdiction to make such a pronouncement.

But as I prepared these notes, I realised that the main difficulty was in determining how to sum up the myriad of issues facing the legal profession today and to assess their collective impact on the profession.

As we all know, in these global internet savvy times, there are pressures on all sections of society from numerous sources. In the legal profession, those include, in no particular order:

- the pressures on legal aid funding and access to justice for the less well off in the community;

- the mental health issues facing lawyers and particularly young lawyers;
- the difficulty of maintaining work-life balance in a 24/7 world, with the expectations of clients for immediate responses;
- the continuing gender imbalance at senior levels of the profession;
- the difficulties for indigenous lawyers and need for diversity within the ranks of the legal profession;
- the increasing cost of legal services;
- public criticism and diminishing respect for the legal profession; and
- the contraction in employment opportunities for graduates and the lengthening of the partnership track in law firms.

Some or all of those issues will affect you as young lawyers starting out your legal careers. All are being addressed in various ways with varying degrees of success.

Young lawyers are increasingly being involved in pro bono legal roles, sometimes as part of their undergraduate courses, sometimes as part of their role as graduate solicitors. Organisations such as the Public Interest Advocacy Centre and regional legal services offices seek to ameliorate the impact of reductions in governmental legal aid.

As to the mental health issues, this is a topic to which much attention has been drawn in recent years and there are programmes now in place specifically to address this issue.¹

¹ For further information on mental health generally see the NSW Young Lawyer's webpage "Mental Health and Wellbeing" <http://www.lawsociety.com.au/about/YoungLawyers/MentalHealth/index.htm>, the beyondblue webpage <http://www.beyondblue.org.au/> or Black Dog Institute webpage <http://www.blackdoginstitute.org.au/>. Lifeline's 24 hour crisis support is available by telephoning 13 11 14.

For an example of a programme addressing mental health issues in the profession see the Resilience@law programme, a collaboration between The College of Law and Allens Linklaters, Ashurst, Clayton Utz, Herbert Smith Freehills and King & Wood Mallesons <http://www.collaw.edu.au/about-us/education-philosophy/resiliencelaw/>.

Law firms are increasingly introducing measures aimed at assisting in managing work/life balance, such as flexible parental leave policies, part-time work arrangements and assistance with child care or other dependent care. The Bar Association has similarly introduced measures to assist in emergency care and child care.²

The Bar Association and other organisations have programmes in place to encourage indigenous lawyers and to promote the advancement of women at the bar;³ various law firms work with universities to facilitate mentoring programmes for women lawyers. The Law Society has since 2011 run a Thought Leadership programme aimed at the issue of advancement of women in the profession.⁴

The focus of the Courts on the just, quick and cheap resolution of legal disputes is part of the mandate under the Civil Procedure Act and measures to achieve the cost-efficient running of litigation are constantly being introduced and reviewed (such as the new rules applicable to discovery in the Equity Division).⁵ The legitimate public cry for affordable justice has placed the spotlight on billing regimes and practices.

Issues such as the aforementioned have been well documented and hardly need to be re-hashed tonight. Measured against the steps that the legal profession is taking to address such issues, one would have to conclude that the legal profession is acting responsibly and with a view to ensuring the proper provision of legal services consistent with the maintenance of that fundamental tenet of our society – the rule of law.

² New South Wales Bar Association, “Childcare”, <http://www.nswbar.asn.au/for-members/childcare>.

³ New South Wales Bar Association, “Equal Opportunity”, <http://www.nswbar.asn.au/for-members/equal-opportunity>.

⁴ The New South Wales Law Society, “Thought Leadership”, <http://www.lawsociety.com.au/ForSolicitors/advocacy/thoughtleadership/index.htm>.

⁵ *Civil Procedure Act 2005* (NSW) s56; *Practice Note SC Eq 11*.

So what can I usefully add to the debate as to the state of the legal profession?

It seemed to me what I could usefully add to the debate was to assess the differences in the legal profession over the past 30 odd years (the span of my legal career to date) and to ask whether, in light of those differences, we are still a “profession” upholding not just the traditions but the values of our predecessors in the law or whether we have become separate legal practices (“fee-earners” or groups of “fee-earners”) governed by bottom line profit. And if the latter, what should we do? Does this pose a threat to the public image of the legal profession? Does it matter? Should it matter?

What’s in a name? What do we understand by a Profession

Before attempting to answer those questions, I start by focussing on what we understand when we speak about the legal profession.

At the mid-year assembly of the Young Lawyers’ Association this year, your President referred jokingly to the legal profession as one of the three oldest “professions” (the other two being prostitution and espionage). An unholy trio, some might say. What they have in common is, fortunately, not necessary for me to surmise.

The definition of a profession is, however, by no means simple. Morris Cogan turned his mind to the question in 1955 when he wrote that “legal definitions of profession are almost always so closely related to the conditions of a specific case that they are rarely susceptible of wider applications”.⁶

His contemporary, Roscoe Pound, described professionalism as “pursuing a learned art as common calling in the spirit of public service” and considered that it was no less a public service because “it may incidentally be a means of

⁶ “The Problem of Defining a Profession” *Ethical Standards and Professional Conduct* (Jan 1955) vol 295 at 105.

livelihood”.⁷ That resonates with the motto of the NSW Bar Association, “servants of all yet of none”. It also calls to mind the observation of the former Chief Justice of Australia, the Hon Murray Gleeson AC QC, to the effect that as a judge he was a servant of the public, though not a public servant.⁸

Of course, one might question whether in many cases the financial remuneration earned by practising law can in this day and age be described as incidental to the provision of a public service, though certainly there are many instances of lawyers for whom that is the case.

Although resort to dictionaries raises judicial ire, or at least disapproval, in some quarters, I turn to the Oxford English Dictionary for a somewhat more workable definition of a profession in the modern context, that being broadly as “[a]n occupation in which a professed knowledge of some subject, field, or science is applied; a vocation or career, especially one that involves prolonged training and a formal qualification.”⁹ Certainly, entry to the legal profession requires (for most) lengthy training at University or through a professional admissions board course; the gaining of formal qualifications; and good character and repute.

In *Inland Revenue Commissioners v Maxse*, Lord Justice Scrutton said “a “profession” ... involves the idea of an occupation requiring either purely intellectual skill, or if any manual skill, as in painting or sculpture or surgery, skill controlled by the intellectual of the operator”.¹⁰

Again, lawyers can be distinguished from those in a number of other occupations by reference to their skills and expertise lying in the intellectual field – one surely does not go to a lawyer (except perhaps an IT lawyer) for their computer skills or dexterity in use of the Dictaphone. (Actually, today one may be hard pressed to find a young lawyer with any facility in the use of

⁷ *The Lawyer from Antiquity to Modern Times* (1953, West Publishing Co) at 5.

⁸ “The Role of the Judge and Becoming a Judge” speech delivered at the National Judicial Orientation Programme, Sydney, 16 August 1998.

⁹ *Oxford English Dictionary* <http://www.oed.com/>.

¹⁰ [1919] 1 KB 647 at 657.

a Dictaphone at all – such is the computer literate nature of our young lawyers that they tend to possess superior typing skills to those of my generation! That said, a client seeking legal advice is not looking for the lawyer who can type the fastest; but the lawyer whose expertise in the relevant area is perceived to be the best or most appropriate to provide the requisite advice or whose advocacy is perceived as the best for the particular case at hand.)

From the above, it can be accepted that a profession requires that its members have undertaken extensive training in a specific field dealing largely in intellectual matters, rather than purely manual labour, and that its members perform a public service. Leaving the ubiquitous lawyer jokes aside, that is a fair description of what lawyers do. They study long and hard (some perhaps harder than others); they are called upon to apply their intellect to what are often complex legal problems; and it is in the public interest that they provide objective and reasoned legal advice to assist in the many different aspects of the law which affect people's personal and commercial lives. Quite rightly, lawyers have been recognised as a paradigm example of those in a fiduciary relationship, owing what can be very onerous fiduciary duties to their clients.

But does that encapsulate what it means to be a member of the legal profession? I think not. Or at least, not expressly. Because what distinguishes members of the legal profession from other professions is the paramount duty of lawyers as officers of the Court – whether or not those lawyers ever step into Court once they have been admitted as lawyers of the Court. (I do not suggest that members of other professions do not owe similar duties above and beyond those to their clients – for example, doctors are bound by the Hippocratic oath. However, the overriding duty to the Court provides a ready illustration of the difference between law as a business and law as a profession.)

Then and now – the last 30 years

Some things have remained constant over the time I have been in practice; many have changed. The mode of dress at admission ceremonies in the

Banco Court has not changed as far as the bench is concerned but the same cannot be said for others at the ceremony. One wonders sometimes whether some of the young lawyers being admitted are dressed for the Court or for later celebrations. A similar comment can be made about recent graduation ceremonies I have attended!

Lawyer jokes have been around for ever; public criticism of lawyers has as well (read Dickens' Bleak House and the fictional *Jarndyce v Jarndyce* litigation if you think that is not the case).

There seem to have been a spate of television shows over recent years that variously glorify, denigrate or ridicule lawyers: from the personal morals or otherwise of the fictional Cleaver Greene in *Rake*, to the grittier portrayal of Counsel in *Silks*; from the fantasy of legal practice portrayed by *Ally McBeal* or *Boston Legal* to the equally unreal (though in a different context) portrayal of commercial law firms in *Suits*. All of that seems a far cry from the *Perry Mason* and *Rumpole* of yore.

The biggest change in the legal profession, to my observation, is in the expectations of clients as to the delivery of legal services and the manner in which the profession has dealt with the internationalisation of legal practice.

When I started work as a solicitor, the Golf Ball typewriter was a new innovation; bulky Wang computers ruled the legal offices; and the telex machine was a relatively new innovation. That meant that turnaround of legal advice was usually at least 24 hours and usually longer. Lawyers communicated with each other and their clients in writing, with carbon copies for the file. That meant that there was more time to consider legal issues and the implications of correspondence (less chance of intemperate "chatty" emails that could come back to haunt the writer; and no chance of "send all" disasters in the office).

Now, email and fax communications reign supreme; turnaround times are in the negative (you are expected to have provided everything yesterday); and

most of the commercial world operates on a world clock. That inevitably produces pressure for lawyers in terms of draconian deadlines; longer working hours; and the need to be on top of things so as to be able to provide near immediate considered advice (arguably a contradiction in terms). (For how far we have moved in the era of social media see Twitter - @NSWSupCt.)

There must always have been pressure on lawyers to get it right in terms of their legal advice. However, over recent years the spate of professional negligence cases seems to have increased and, at times, a propensity to see negligence as being explicable only by something far more serious – fraud. Just as there is a seemingly automatic allegation by many self-represented litigants of bias if the judge is against their application, so there have been instances where the theory seems to be that if the lawyers have got it wrong they must have been conspiring against their client so to do.

Pressure on costs has, I suspect, always been around. Certainly, as a litigator, I was constantly amazed by the alacrity with which clients would spend large sums on negotiating commercial deals only to begrudge spending money on enforcing or defending those deals – as if the lawyers were responsible for the default or non-compliance by the parties to the transaction. Complaints as to costs, however, according to the Legal Services Commissioner who spoke at the Young Lawyers' mid-year assembly this year, are overwhelmingly against the sole or small practitioners in suburban practice (and often due to problems in communication).

Law practices seem to have become more driven by the bottom line and less partnerships in the old sense. (Indeed many law firms are now incorporated practices – a move resisted by but the subject of considerable debate in recent years at the bar). The traditional model of revered practice leaders in their 60's or 70's has been challenged by the need to meet the expectations of the generation X or Y lawyers (I forget which generation we are up to – no doubt that is a function of an ailing baby boomer memory); at least some of whom will consider themselves to have been qualified for partnership from

day one! I cannot speak from personal experience of the bar, but the annual stories of the silk selection process suggest that there are the same pressures at play in terms of making room for those who consider themselves worthy of silk.

The emergence of litigation funding has been a major development in the litigious field, particularly when linked to the greater incidence of class actions. This brings with it increased access to the courts for individual claimants but with the inevitable complaints of the commercialisation of justice. There have been changes in the way joint liability is approached (with the introduction of the proportionate liability regime under the *Civil Liability Act 2002 (NSW)*) and changes in other areas to the way in which claims can be brought in matters such as personal injury disputes.

Alternative dispute resolution has become an integral feature of our legal system – and the instances where it is now mandatory as a pre-cursor to litigation have increased.

Commissions of inquiry have proliferated – indeed, hardly a news broadcast or newspaper is without updates on one or more of those presently running.

Those are but a few instances of the changing legal world in which, as young lawyers, you may be called to provide legal services.

Are we still a profession?

If the practice of law becomes no more than a business, how then can we truly claim to be a profession?

The answer to this lies in the overview of regulatory bodies and the Courts on the conduct of legal practice. As long as adherence to the high standards of the legal profession is enforced by the Courts and practitioners are called to account for conduct that does not meet those standards in an ethical sense, then the concept of a “profession” is maintained.

Whatever critics of the legal profession may think, it is not all about billing. The large numbers of the profession engaged in pro bono work is ample testament to that; as is the encouragement and recognition by those in the profession of the need for continuing legal development for lawyers and the need for lawyers to play a role in the law beyond the strictly billable roles that they also have (as part of what Roscoe Pound referred to as the incidental means of making a livelihood).

Lawyers do not simply have fiduciary and other duties to their clients; they owe duties to the Court. Part of those duties includes not misleading or assisting clients to mislead the Court. Those duties also include statutory duties in relation to the cost-efficient conduct of litigation. It behoves all members of the legal profession to uphold the rule of law and to maintain public confidence in the integrity of the profession and the law.

In that regard, from what I have seen on the bench, the “profession” part of legal practice is being reinforced. There are cases in which practitioners have been restrained from acting for clients in breach of duties of confidence; where personal costs orders are made to reflect the Court’s disapproval of practitioners’ conduct; and where the ethical obligations of lawyers are enforced. In every day in every court one can see judges who seek to enforce the observance by lawyers of the ethical requirements of their role.

Similarly, recognition is given (all too rarely, I accept) within the profession to those who seek to defend and uphold the rule of law – in this regard I note that Julian Burnside AO QC will shortly be the recipient of the Sydney Peace Foundation Prize for 2014 in honour of his unflinching defence of the rule of law, among other things.¹¹

¹¹ The Sydney Peace Foundation, “2014 Sydney Peace Prize Lecture and Award Ceremony” <http://sydneypeacefoundation.org.au/events/2014-sydney-peace-prize-lecture/>.

Measured by reference to the steps that the profession is taking, through its professional bodies, to address the current issues facing those in legal practice, I see the state of the profession as being positive.

Access to Justice

On a personal note, can I raise one issue. Recommendations for reform can often be a useful point of reference when seeking to gauge the state of a profession.

With that in mind, in preparation for this speech I reviewed again what was contained in the Australian Government Productivity Commission's draft report on Access to Justice Arrangements, which was released in April this year.¹² The Productivity Commission has received over 300 submissions from individuals and organisations and the report was prepared to enable further public consultation and input.¹³ It provides some insights into the challenges for the legal profession in the coming years.

The report was prepared in the context of what were seen to be widespread concerns that Australia's civil justice system is "too slow, too expensive and too adversarial".¹⁴ (Given that we have an adversarial, not inquisitorial, system of justice in this country, the last criticism can presumably best be understood as a criticism that the litigation process has become "too" confrontational or that its adversarial nature too aggressive; since otherwise the criticism is an attack on the foundation of our common law system of justice and that does not seem to be suggested by the balance of the report.)

I wish briefly to note two of the topics referred to in the report (one is the recommendation made as to the abolition of pleadings and the other is a concern as to the cost implications of self-represented litigants in the higher

¹² Australian Government, Productivity Commission, *Productivity Commission Draft Report*, (April 2014) ("Productivity Commission Report").

¹³ Australian Government, Productivity Commission, "Access to Justice Arrangements: Submissions" <http://www.pc.gov.au/projects/inquiry/access-justice/submissions>.

¹⁴ Productivity Commission Report at 2.

first instance and intermediate appellate courts). I hasten to add that these views are my own and should not be taken to represent the position of the Court of which I am a member.

Pleadings

One of the recommendations made by the Productivity Commission is for the abolition of formal pleadings.¹⁵ The context in which this was considered was that of overall case management.

In chapter 11 of the draft report, the Productivity Commission identifies a number of key factors contributing to unnecessary cost and delay in civil litigation.¹⁶ The first of those factors is:

a lack of early identification and narrowing of the issues, including problems with pleadings (for example, strict adherence to overly formalistic pleadings, disputes over pleadings, continual amendment of pleadings)¹⁷

In its consideration of case management models across Australia, the draft report notes that case management may involve “dispensing with pleadings in appropriate cases”.¹⁸ The report provides the example of the Federal Court Fast Track list, of which a key element is said to be the abolition of formal pleadings.¹⁹ The draft report goes on to consider the difficulties in evaluating the success of case management in Australian courts and the lack of empirical evidence in this area.²⁰ The draft report concludes that “it appears likely that well-targeted and appropriately employed case management can improve efficiency in the dispute resolution process.”²¹

This leads to draft recommendation 11.1 that:

¹⁵ Productivity Commission Report, draft recommendation 11.1 at 336.

¹⁶ Productivity Commission Report at 329-330.

¹⁷ Productivity Commission Report at 329.

¹⁸ Productivity Commission Report at 331.

¹⁹ Productivity Commission Report at 332.

²⁰ Productivity Commission Report at 333.

²¹ Productivity Commission Report at 334.

Courts should apply the following elements of the Federal Court's Fast Track model more broadly:

- the abolition of formal pleadings
- a focus on early identification of the real issues in dispute
- more tightly controlling the number of pre-trial appearances
- requiring strict observance of time limits.²²

The draft report notes the Australian Law Reform Commission and Victorian Law Reform Commission's recommendations that further consideration be given to reform of pleadings and the former Chief Justice of South Australia's criticisms of the current system of pleadings.²³

No one is likely to argue with the requirement for focus on early identification of the real issues in dispute. That is the aim of directions hearings in the specialised Court lists and before the Registrars of the Court and is the focus of existing case management.

However, I query whether the abolition of pleadings is the answer to complaints as to inefficiencies in Court process.

Certainly, the rules of pleading have been the subject of weighty tomes such as *Bullen & Leake's Precedents of Pleadings* and the less weighty but perhaps aptly named *Pleadings without Tears*.²⁴ But we have moved beyond the days of rejoinders and surrejoinders. What modern day pleadings focus on is an articulation of the case that the party is bringing or has to defend. What is required is that the material facts giving rise to the cause of action be pleaded, with appropriate particularisation.²⁵

²² Productivity Commission Report at 336.

²³ Productivity Commission Report at 335.

²⁴ Justice Blair et al, *Bullen & Leake & Jacob's Precedents of Pleadings*, (17th ed 2012, Sweet & Maxwell); The Hon Peter Young and Hugh Selby, *Rose's Pleadings Without Tears in Australia* (1997, Federation Press).

²⁵ *Bruce v Odhams Press Limited* [1936] 1 KB 697 at 712-713 per Scott LJ.

Pleadings define the issues in the case. Those, and no other issues (absent acquiescence by the other party or leave of the Court), are what the Court has to determine.²⁶ If the issues are not clearly identified, then the risk is that further cost and delay will ensue. (Whether the issues be identified in a document known as a pleading or in some other document is not to the point; what is required is that the parties be held to the issues as they have articulated them – it is not for the judge hearing the matter to reformulate the parties’ case to some other case that the party might have brought or might have been better advised to bring.)

Let me give an example. Take a proceeding commenced by summons in the equity division seeking relief including the imposition of a constructive trust over shares held in a small proprietary company. In support of the relief claimed in the summons, the plaintiff files a number of affidavits. Those affidavits depose to various matters relating to loans; an agreement to purchase shares; the signing of share transfers; and so on.

The difficulty that arises is in discerning from that material what precisely is the basis on which it is alleged that a constructive trust has arisen in equity or should be imposed in the circumstances of the case? Why is it said that a constructive trust was the appropriate remedy – the evidence being inconsistent as to what the nature of the arrangements had been; and there being an inconsistency between the evidence and the submissions in this regard. When pressed on this issue, the response I received was “Well we are in the equity division your Honour”. Perhaps what was being suggested was that I should have been able to divine the answer from the jurisdiction in which the claim had been made. That problem would have been clarified had the matter been pleaded at the outset. Moreover, when further pressed, it appeared that the argument for a constructive trust was based on receipt of shares as a result of alleged wrongdoing, akin to the receipt of stolen property

²⁶ See *Ingot Capital Investments Pty Limited v Macquarie Equity Capital Markets Limited* [2008] NSWCA 206; *Vines v ASIC* (2007) 62 ACSR 1 at 17 [57] per Spigelman CJ; *Banque Commerciale SA En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279 at 286 per Mason CJ and Gaudron J.

cases, which came suspiciously close to an allegation of fraud and which would have had to have been pleaded.

Much of the time consuming technical disputes in relation to pleadings have fallen by the wayside with the current case management regimes (perhaps an exception is in defamation proceedings but I will refrain from commenting on that). Where there are issues about pleadings, quite often they are justified in saving cost and expense (summary judgment applications where advocate's immunity is a complete defence for example). That is particularly the case where the complaint is that the pleading is embarrassing. How does one plead, for example, to an allegation that the defendant's position is much like the US applauding the Taliban for its role in urban renewal after 9/11 – you may laugh but that appeared in a pleading that I struck out a few years ago, along with other emotive and irrelevant allegations.

I have difficulty seeing how the wholesale abolition of pleadings is consistent with a defendant knowing the case he she or it must meet or a plaintiff understanding the basis on which a claim is defended in cases where, under the existing rules, a summons would not be the appropriate mode of commencing proceedings. My suggestion would be that, rather than the abolition of pleadings altogether, the laudable focus on identification of the real issues in dispute be dealt with by close case management. And that young lawyers learn the principles of pleading!

Self-represented litigants

The second topic that I wish to raise is that increasingly common phenomenon of the self-represented litigant.

There is an old saying that a person who appears for himself or herself has a fool for a lawyer. That is harsh but, as with many old sayings, has at least a kernel of truth. Not because self-represented litigants usually have no legal qualifications (though most of them do not); and not because self-represented litigants are not blessed with intelligence (since the variation in intelligence

amongst them as a group is probably comparable to the variation in ability in the legal representatives I have come across) – but because one needs to be able to approach matters with a high degree of objectivity in the litigious process. One needs to be able to see not only the case being propounded but the case against it – and to be able to weigh the strengths and weaknesses of each. That is the true value that an independent lawyer adds to the litigious process, quite apart from his or her legal knowledge.

The rising number of self-represented litigants is a trend which this generation of lawyers will have to come to terms with. Regardless of whether you work in family law where your clients are individuals, or in immigration law where your client is the government or in a commercial law firm with sophisticated corporate clients with their own in house legal teams, inevitably you will encounter self-represented litigants at some stage in the legal process.

Chapter 14 of the Productivity Commission’s report is directed at the challenges faced by self-represented litigants and the challenges for those dealing with them.²⁷ The draft report relevantly notes that “[c]ontext is important when considering the impacts of self-representation on the civil justice system. In some tribunals and lower courts, self-representation is the norm and poses few, if any, problems.”²⁸ Indeed in some tribunals, there is a presumption of self-representation which may only be overcome by seeking permission for legal representatives to appear.

In relation to higher courts, the draft report acknowledges that:

“[t]here are legitimate concerns about self-representation ... ranging from a reduced likelihood of a just outcome for the self-represented litigant, to the costs and obligations that self-represented litigants place on the courts and other parties.”²⁹

²⁷ Productivity Commission Report at 423.

²⁸ Productivity Commission Report at 423.

²⁹ Productivity Commission Report at 423.

A lack of knowledge of the law and court procedures is at the heart of the problems faced by self-represented litigants in higher courts.³⁰ Suggestions for how to respond to increased self-representation include simplifying the law (especially taxation and social security laws), simplifying court procedures and forms and shifting towards more active case management.³¹ As well as suggestions for making it easier for people who choose to represent themselves, the draft report also considers reforms for those working with self-represented litigants. Self-represented litigants take up more of the Court's time than represented litigants.³² It calls for the need for clearer guidelines for those who work with self-represented litigants (including for judges and for court staff).³³ Some such guidelines are already available.

A trial judge's duty when faced with self-represented litigants, was as explained in *Rajski v Scitec Corporation Pty Ltd*.³⁴ There, Samuels JA said:

In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored ... An unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient in the standard of compliance which it exacts.³⁵

It needs to be understood that it is not the duty of the judge to run the case for self-represented litigants; rather the duty is (as in any other case) to ensure a fair hearing. With self-represented litigants, that is likely to involve an

³⁰ Productivity Commission Report at 431.

³¹ Productivity Commission Report at 438-441.

³² Productivity Commission Report at 434.

³³ Productivity Commission Report at 442-443.

³⁴ Court of Appeal, 16 June 1986, unrep; see also *MacPherson v The Queen* [1981] HCA 46; (1981) 147 CLR 512; *King v The Queen* [2003] HCA 42; (2003) 215 CLR 150; *Uszok v Henley Properties (NSW) Pty Ltd* [2007] NSWCA 31.

³⁵ *Rajski v Scitec Corporation Pty Ltd* (Court of Appeal, 16 June 1986, unrep).

explanation of procedural matters but not the giving of judicial advice as to the case itself. It is also likely to require a lot of patience! That will not necessarily lead to greater costs, but if it does then that is the price for ensuring a fair hearing.

For the ways in which to deal with those who have become “querulent” litigants (to use the term coined by the psychologist, Grant Lester), I suggest you turn to some of the writings on this topic. The sad fact is that you will not be able to solve all of the problems or perceived problems of such litigants – and that, once litigation has become their all-consuming focus, they may not want you to try.

A last word

Finally, I wish to sound an encouraging note for those coming into the legal profession. There has been a lot of discussion within the profession and at times in the media about the number of students graduating from law and difficulty those graduates are having in quickly securing employment.³⁶ To those who are seeking their first job out of university, do not despair. The challenge of moving from university to the profession is not new. Contemporaries of mine faced the same obstacles. Broadening the job search beyond Sydney to other capital cities or regional New South Wales can be an excellent way to start your legal career. Keeping your options open is essential. Law is not a one-dimensional career.

Conclusion

Calls for reform of the legal profession demonstrate the self-critical nature of the profession. As long as lawyers continue critically to analyse the profession and their role in the profession, as they critically analyse their cases, and call for reform when they find the profession wanting, we can be

³⁶ See, for example, Edmund Tadros “Graduate glut: 12,000 new lawyers every year” *The Sydney Morning Herald* 14 February 2014, Judith Sloan “Studied Lessons in Career Suicide” *The Australian* 2 February 2014.

optimistic about the state of the profession and can be confident that, as an epithet, the word “profession” is well-earned.

From where I stand, or perhaps I should say, if you are standing in my shoes, the profession is in good shape. I take it as a positive sign that in the 2014 list of most trusted professions, the ranking of lawyers improved 3 places from last year (though it has been noted that we share the spot with tow-truck drivers, charity collectors and the clergy), ahead of real estate agents and politicians.³⁷

As the next generation of legal leaders, it will be your responsibility to maintain the core value of service and improve upon and reform the legal system to meet the challenges of the future.

Justice Julie Ward
3 September 2014

³⁷ See Australian Reader's digest, “Trusted People 2014”, <http://www.readersdigest.com.au/trusted-people-2014>; and commentary by Survive Law, “Australia’s Most Trusted Professions: How Lawyers Rate”, <http://survivelaw.com/index.php/news-list/1899-australia-s-most-trusted-professions-how-lawyers-rated>.