

FOREWORD

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I graduated from the University of New South Wales in 1980. At the time, Ron Sackville, then Professor Sackville, was Dean of the Law Faculty. Our paths have crossed several times since. It is no small irony that he has contributed to this edition of the *Journal*. But more of him later.

Nineteen per cent of my graduating class were women. When I was admitted to the bar the following year, I joined fewer than 40 other women. All were junior counsel. There had never been a woman at the senior bar.¹ While there were a few female magistrates in New South Wales ('NSW'), no women sat on either the District or the Supreme Court in NSW, there were no female judges on the High Court or the newly established Federal Court, and there was only one female federal judge.² One of my contemporaries, who is now the Chief Justice of the Supreme Court of the Australian Capital Territory, joked at a recent admission ceremony that the only place you could then find a female judge was at a Country Women's Association lamington competition. Indigenous, Asian and African lawyers were practically invisible. Practitioners who came from a non-Anglo-Celtic background generally traced their heritage to Europe.

We have come a long way since then. The face of the profession has changed considerably. So, too, has its size.

When I graduated, there were two law faculties in NSW. Now, there are 11.³ Competition for legal jobs is consequently fierce. That, combined with the simultaneous advances in technology and the commercialisation and internationalisation of legal practice, has given rise to a very different legal environment.

Litigation is markedly different from what it was in the 1980s. Fewer settlements take place at the door of the court. These days, there is a heavy emphasis on case management and alternative dispute resolution. The latter, in

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1 Mary Gaudron was appointed Queen's Counsel in 1981, the first woman to hold the office.

2 The Hon Elizabeth Evatt AC, the first Chief Justice of the Family Court of Australia.

3 *Legal Profession Admission Rules 2005* (NSW) sch 2.

particular, has contributed to a change in the nature of barristers' practices and, for many barristers, a reduction in their real incomes.

Yet, many of the issues facing the Australian legal profession today are no different from the issues the profession has always faced. Some are more or less acute than they were. Some, the profession is belatedly confronting when they were previously ignored or undervalued.

For example, both gender discrimination and sexual harassment persist in the profession as in the community at large, despite the passage of 30 years since the enactment of the *Sex Discrimination Act 1984* (Cth) and 37 years since the *Anti-Discrimination Act 1977* (NSW) came into force. In a recent survey of female practising lawyers conducted by the Law Council of Australia, one in four women said that they had experienced sexual harassment at work,⁴ and all women, regardless of age or time in practice, reported experiencing similar degrees of sexual harassment.⁵ One in two women reported experiencing discrimination on the ground of their sex (compared to one in ten men).⁶ In the same survey, one in two women and more than one in three men reported that they had been bullied or intimidated in their current workplace.⁷

Further, despite the substantial inroads women have made into legal practice in the last 50 years, as Suzanne Le Mire and Rosemary Owens observe in their important article on workplace bullying ('A Propitious Moment? Workplace Bullying and Regulation of the Legal Profession'), there remains a gender imbalance in the upper echelons of the profession. The Law Council of Australia developed an equitable briefing policy to try to address this imbalance.⁸ The policy, which is scarcely radical or demanding,⁹ has often been difficult to sell.¹⁰

4 Law Council of Australia, 'National Attrition and Re-engagement Study Report' (Final Report, March 2014) 76 ('NARS Report').

5 Ibid 129.

6 Ibid 76.

7 Ibid.

8 Law Council of Australia, *Equitable Briefing Policy for Female Barristers and Advocates* (June 2009) <<http://www.lawcouncil.asn.au/lawcouncil/index.php/current-issues/equitable-briefing-policy>>.

9 Though it does provide for a level of oversight, in substance it calls upon solicitors to make 'all reasonable endeavours' to 'genuinely consider' briefing a woman. If you can't work out how to do this yourself, the Law Council offers some tips and has developed an implementation kit: Law Council of Australia, *Model Equal Opportunity Briefing Policy for Female Barristers and Advocates: Implementation Kit* (November 2009) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/corporate/Model%20Equal%20Opportunity%20briefing%20policy.pdf>>.

10 Governments are a notable exception. Both the Commonwealth and the NSW governments and many statutory authorities have enthusiastically embraced equitable briefing. The only entities that have publicly registered their adoption of the policy with the Law Council are the NSW Bar Association, the NSW Office of the Director of Public Prosecutions and the Public Interest Advocacy Centre: Law Council of Australia, *Public Register of Briefing Entities: Adoption of the Policy by Briefing Entities* <<http://www.lawcouncil.asn.au/lawcouncil/index.php/ct-menu-item-62/ct-menu-item-64/ct-menu-item-94>>.

While for decades the numbers of female law graduates have exceeded male law graduates, and while great strides have been made since I was admitted to practice, women continue to hold a minority of leadership positions in the profession, whether it be in partnerships in law firms, as senior counsel, or in the judiciary. Currently, 20 per cent of practising barristers in NSW are female, but women make up only 10 per cent of the silks.¹¹ At the junior bar, clever women are often overshadowed by mediocre men.

Moreover, notwithstanding the reported position at the NSW Bar in 2012,¹² there is general acceptance that there is a higher attrition rate for women.¹³ Unsurprisingly, perhaps, this is not a uniquely Australian problem.¹⁴

But possibly the biggest issue presently confronting the profession is the one it refused to acknowledge for far too long. That issue is the impact of our working conditions on our mental health. It is the one issue that touches every branch of the profession and every member of it, not to mention the members' families. And it is not just an issue for the individuals affected and their loved ones; it is an issue for the whole profession. The importance of the issue is reflected in the fact that the editor has selected three articles for this edition of the *Journal* which, in various ways, deal with it.

In her article, 'The "Moral Panic" Over Psychological Well-Being in the Legal Profession: A Personal or Political Ethical Response?', Professor Christine Parker refers to two 'large scale' Australian studies conducted in 2007¹⁵ and 2009,¹⁶ which revealed alarming levels of clinical depression, anxiety and other stress-related illnesses in lawyers and law students, consistent, I might add, with

11 New South Wales Bar Association, *Statistics* <<http://www.nswbar.asn.au/the-bar-association/statistics>>.

12 Nicola Berkovic, 'Men and Women Are Leaving the Profession in Equal Numbers', *The Australian* (online), 28 September 2012 <http://www.australianwomenlawyers.com.au/uploads/publications/AWL_Interview_with_The_Australian_28_Sep_2012.pdf>.

13 This was the premise for the Law Council's research on attrition and there is no suggestion in the *NARS Report*, above n 4, that the premise might have been wrong.

14 See, eg, Roberta D Liebenberg, 'Plugging the "Leaky Pipeline" of Women Attorney Attrition' (2011) 15(9) *Young Lawyer* 1.

15 Beaton Consulting, 'Annual Professions Survey' (Research Summary, beyondblue, April 2007) <http://www.beatonglobal.com/pdfs/Depression_in_the_professions_survey.pdf>.

16 Norm Kelk et al, 'Courting the Blues: Attitudes towards Depression in Australian Law Students and Lawyers' (Report, Brain and Mind Research Institute, University of Sydney, January 2009) <<http://www.cald.asn.au/docs/Law%20Report%20Website%20version%204%20May%2009.pdf>> ('*BRMI Report*').

the position elsewhere, in particular, Canada and the United States.¹⁷ Although she has reservations about the reliability of the studies and the conclusions that should be drawn from them, Professor Parker accepts that there is evidence of widespread psychological distress among lawyers and academics.

In their article, 'Lawyering Stress and Work Culture', Janet Chan, Suzanne Poynton and Jasmine Bruce report on the results of their recent survey into the relationship between work stress and the structure and culture of legal practice – said to be the first Australian study of its kind. They reveal a 'high level of self-reported stress and negative emotional states' in all respondents regardless of demography or role. They highlight as factors correlating with poorer mental health outcomes '[e]xcessive job demands, minimal control over workload and spillover of work commitments into personal life'. As the authors candidly confess, however, there are a number of difficulties with the survey and its results. The sample was self-selected, rather than random. The response rate was pitiful – about 1000 lawyers or less than two per cent of the profession¹⁸ – and worse among solicitors than barristers with a participation rate of only one per cent of solicitors in NSW, where the highest concentration of lawyers may be found.¹⁹ This had two important consequences. First, the sample size is very small. Second, female lawyers are over-represented to a substantial degree.

Yet despite these difficulties, I am not at all surprised by the survey's findings. From my own experience over 35 years in the practice of the law, at different levels of the profession including 10 years as an office-bearer of the NSW Bar Association, I feel sure that the results are illustrative of a significant problem.

To some extent, support for this view may be drawn from the Law Council's recent study of national attrition and retention in the profession.²⁰ In that study of 4000 lawyers, long working hours, the pressure of billable commitments and the

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- 17 Some of the research, including the study by the *BRMI Report* is accessible from the website of the Tristan Jepson Memorial Foundation: Tristan Jepson Memorial Foundation, *Research* <<http://www.tjmf.org.au/raise-the-standard/research/>>. In her Tristan Jepson Memorial Foundation lecture in 2006, the Canadian psychiatrist Associate Professor Mamta Gautam declared that most lawyers have three times the risk of depression than the general population: Mamta Gautam, 'Towards Managing Mental Wellness in the Legal Profession' (Speech delivered at the Tristan Jepson Memorial Foundation Annual Lecture, University of New South Wales, Sydney, 26 September 2006). Fifteen per cent of lawyers, she said, meet the criteria for alcoholism. She said there is a disproportionate number of lawyers taking their own lives. One study she mentioned showed that 11 per cent of lawyers contemplate suicide on a monthly basis.
- 18 The Law Council of Australia, which is the peak national representative body of the Australian legal profession, claims to represent about 60 000 lawyers: Law Council of Australia, *About the Law Council* <<http://www.lawcouncil.asn.au/lawcouncil/index.php/about-the-law-council-of-australia>>.
- 19 While the low response rate may reflect the persistence of the ostrich-like attitude to the issue which dogged the profession for so long, I doubt that any reliable conclusion can be drawn from it. It may simply reflect survey fatigue, apathy or even disdain, entirely unrelated to the subject-matter. It may also be an indication that lawyers consider they are too busy to spend time on such an endeavour.
- 20 *NARS Report*, above n 4.

impact of poor work-life balance were listed as common drivers of dissatisfaction for men and women alike.

The legal profession has been slow to face up to the problem. For far too long we buried our heads in the sand in a misguided and futile attempt to protect our image of invulnerability and self-control. In recent years, however, there has been a slow and sometimes reluctant acceptance that this is an important issue which requires attention at every level of legal practice.²¹

There are numerous reasons for the change of heart. In part, no doubt, it is due to the efforts of community organisations like beyondblue and the Black Dog Institute; in part, to the leadership of Marie and George Jepson and to the work of the Tristan Jepson Memorial Foundation; and, in part, to the other courageous individuals who have publicly shared the stories of their personal struggles.

Lawyers who place unreasonable demands on their staff do so at their peril. Some of those perils are the subject of the article by Dr Le Mire and Professor Owens. Dr Le Mire and Professor Owens only touch upon occupational health and safety laws but it is appropriate to say something more about them at this point.

The common law has long required employers to take reasonable care to avoid the risk of injuring their employees. Since the 19th century, parliaments have passed laws designed to improve the safety of the workplace and the health of the workforce. Until relatively recently, however, the focus has always been on physical health and safety. While the *Occupational Health and Safety Act 2000* (NSW) imposed statutory duties to ensure the health and safety of employees and others attending a workplace, the recently enacted uniform occupational health and safety laws, based on the Model Work Health and Safety Act (2011),²² expressly provide that ‘health’ means ‘physical and psychological health’.²³ They make it abundantly clear that these duties (imposed on officers, managers and workers alike) are directed to the removal of all risks, whether physical or psychological.

The duties are extensive. Those managing and controlling workplaces have a duty to eliminate, ‘so far as is reasonably practical’, risks to the health and safety of any person.²⁴ Officers must exercise due diligence to ensure that the person

21 NSW Young Lawyers has been commendably active in this space. They have a Mental Health Working Group and have developed a Mental Health and Wellbeing website, which includes tips for prevention, detection and observation, information about lawyer assistance schemes, and statistical and other information about mental health and profiles of young lawyers who have suffered from depression but are now managing their wellbeing: Law Society of New South Wales, *Mental Health and Wellbeing* <<https://www.lawsociety.com.au/about/YoungLawyers/MentalHealth/index.htm>>. This year, they held their second annual Wellness Seminar.

22 The laws commenced in all states and territories in 2012–13, except Victoria and WA. See Safe Work Australia, *Jurisdictional Progress on the Model Work Health and Safety Laws* <<http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/pages/jurisdictional-progress-whs-laws>>.

23 *Work Health and Safety Act 2011* (NSW) s 4.

24 *Work Health and Safety Act 2011* (NSW) s 20.

conducting the business or undertaking complies with that duty.²⁵ That includes ensuring that there are processes for complying with such a duty, which are implemented, and verifying the provision and use of those processes. Whilst at work, all employees must take reasonable care that their acts or omissions do not adversely affect the health and safety of others.²⁶ They must also take reasonable care to protect their own health.²⁷ Those conducting a business or undertaking are required, as far as is reasonably practicable, to consult with the workers who are, or are likely to be, directly affected by a work health or safety matter.²⁸

Moreover, there are substantial penalties for breach of these duties, including hefty fines and, in some instances, imprisonment.²⁹ Adverse publicity orders may be made, whether on the application of the prosecutor or on the court's own initiative.³⁰ For a lawyer, a conviction may have professional implications, too, in that it may very well result in a finding of unsatisfactory professional conduct, if not professional misconduct.³¹

It is the responsibility of, and the challenge for, every member of the profession, regardless of the position he or she holds, to foster a workplace in which we are respectful and considerate of each other, where the inevitable pressures of work are continuously monitored and managed, where frank dialogue about methods of work and the impact of unreasonable demands is encouraged, and where the practice of law is rewarding for non-financial reasons – where, in short, the notion of a happy lawyer is not an oxymoron.

To this end, the Tristan Jepson Memorial Foundation has published a set of best practice guidelines, adapted from the more generic guidelines developed by the Canadian Mental Health Commission. The *TJMF Psychological Wellbeing: Best Practice Guidelines for the Legal Profession* identify the psychosocial factors that contribute to psychologically healthy workplaces and provide suggestions about how they can be addressed as well as a framework for implementing improvements (from basic to best practice).³² Although they were only launched during Law Week this year, so far over 70 organisations have become signatories, including some of the nation's largest law firms and corporations, several university law faculties and student organisations across Australia, the Council of Australian Law Deans, Legal Aid NSW, the Office of

25 *Work Health and Safety Act 2011* (NSW) s 27.

26 *Work Health and Safety Act 2011* (NSW) s 28(b).

27 *Work Health and Safety Act 2011* (NSW) s 28(a).

28 *Work Health and Safety Act 2011* (NSW) s 47.

29 See *Work Health and Safety Act 2011* (NSW) ss 30–4.

30 *Work Health and Safety Act 2011* (NSW) s 236.

31 See *Legal Profession Uniform Law* (NSW) s 298(e)(i), which includes in the definition of 'conduct capable of constituting unsatisfactory professional conduct or professional misconduct' conduct in respect of which there is a conviction for a serious offence.

32 The *TJMF Psychological Wellbeing: Best Practice Guidelines for the Legal Profession* can be downloaded from the Foundation's website: see Tristan Jepson Memorial Foundation, *The Guidelines* <<http://www.tjmf.org.au/raise-the-standard/>>.

the NSW Director of Public Prosecutions, the NSW Public Defenders Chambers, the Victorian Bar and law societies across the country.³³ We can only hope that this small but important initiative is a catalyst for change throughout the profession.

Before I conclude, let me return to where I began.

Justice Sackville's reflections on the injustices of his youth and those he exposed in his maturity enable us to clearly see how far we have come as a nation in the last 50 years but also how much further we have to go before the injustice of arbitrary inequality, to which he refers, is eradicated.

In 'Law and Justice: Do They Meet?', Justice Sackville emphasises the central place of justice in the work of lawyers, in contrast with other professions. He highlights both the just and unjust outcomes produced by the Australian legal system for individuals in our community. He correctly observes that law can be a force for the elimination of injustice, but it can also be an instrument of injustice. As I reflect on the issues thrown up by the theme of this Issue of the *Law Journal*, it seems to me that this observation is apt to apply to lawyers themselves. As it has long been said of liberty, it might well be said of justice that the price is eternal vigilance.

33 For a complete list of signatories, see Tristan Jepson Memorial Foundation, *Signatories to the Guidelines* <<http://www.tjmf.org.au/raise-the-standard/signatories/>>.