# TRISTAN JEPSON MEMORIAL FOUNDATION LECTURE

23 October 2014

VIRGINIA BELL

Professor Mason, members of the Board of the Foundation, ladies and gentlemen, it is a privilege to be invited to deliver the 2014 Tristan Jepson Memorial Foundation Lecture. May I start by acknowledging Marie and George Jepson for their work in setting up the Foundation and for the energy and commitment that they continue to devote to making our profession address one of its most besetting problems - the unacceptably high rate of mental illness among law students and practitioners alike.

Judges tend not to advertise but I make an exception in the case of Bottled Snail Productions: the Melbourne-based theatrical company made up of working lawyers whose aim is to introduce balance into their professional lives and to make their contribution to the community in a different way. The Bottled Snail is a sponsor of tonight's lecture, a circumstance that Tristan with his comedic talent would have thought fitting. Lawyers within the Bottled Snail set their management targets in number of "creative hours" worked. It is an idea that may be worthy of wider consideration.

The importance of the work of the Foundation was brought home to me on the weekend when I received an email from a friend. He apologised for the fact that he would not be able to attend tonight's lecture. He told me that he still had the notes that he had taken at the lecture a few years ago. Then he mentioned that at the time he had been suicidal and that it had taken him more than two years to recover from this difficult period in his life. He said he was pleased to see that I was supporting the Foundation because he thought its work so valuable. He and I are the same age and our careers at the Bar pursued much the same course. Statistically, the high risk years for the onset of mental illness are the late teens and twenties[1]. My friend's illness came in the mid-50s and was provoked by a "relatively minor matter" that got out of control. Throughout our working lives we are all at risk of the disabling experience of depression.

I am conscious that I do not have the credentials in terms of lived experience or in psychiatry that have qualified the speakers who have delivered this lecture in past years. Up until this year, the work of the Foundation had been directed to raising awareness of the high levels of mental illness within the legal profession. This included commissioning the Sydney Mind and Brain Institute to undertake a survey of the mental health profile of law students and

---

[1] Kelk, Luscombe, Medlow and Hickie, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Lawyers*, (2009) at v, 37.

legal practitioners. The results of the research published in the 2009 "Courting the Blues" report confirmed what I suspect many of us knew intuitively as to the unhealthily high levels of anxiety and depression within our profession.

More generally, as a society we have made progress in acknowledging the incidence of mental illness. The ABC's recent extensive coverage throughout Mental Health Week is a testament to the increased awareness of, and interest in, mental health. Nonetheless, I am conscious that research confirms John Brogden's *cri de coeur* at last year's lecture of the continuing need to overcome the stigma associated with depression and to recognise it as a treatable illness like any other[2].

This year the Foundation has shifted its focus. Having mapped the metes and bounds of the problem, it now wishes to promote practical measures to address it. It has developed a set of Guidelines for psychological well-being based on the combined research of the Canadian Standards Association and the Mental Health Commission of Canada. They are assessed as applicable to

---

[2] Beyond Blue, "Stigma and Discrimination Associated with Depression and Anxiety", Position Statement, (August 2012); Reavley and Jorm, *National Health Survey of Mental Health Literacy and Stigma*, Commonwealth Department of Health and Ageing, (December 2011); Thompson, Fisher, Purcal, Deeming and Sawrikar, "Community Attitudes to People with Disability: Scoping Project", Occasional Paper No 39, Social Policy Research Centre, University of New South Wales, (2011).

conditions in Australian workplaces and they are tailored to the 13 psychological factors that are recognised as critical to workplace mental health. They set out measures at each of four levels from "basic" through to "best practice". Best practice is the level achieved when the organisation has in place a means of monitoring the effectiveness of the particular measure.

The purpose of tonight's lecture is to publicise the Guidelines and to encourage organisations to sign-up and implement them at a level, and a pace, that the organisation judges is right for it. They are non-prescriptive and flexible so that they can usefully be applied by boutique firms as much as by the large firms that have departments of human resources. Nonetheless, to return to my credentials, as a person responsible for a staff of three, I am conscious that my knowledge of effective implementation of workplace health initiatives may be less robust than that of other members of this audience.

It occurred to me that I may have been invited to deliver this lecture because of the idiosyncratic views of Professor McKeough, a former member of the Foundation's Board and one of the Committee members responsible for driving the development of the Guidelines. At the 2008 lecture, Professor McKeough instanced Justices of the High Court as people with busy workloads, stamina, good health and emotional stability. Exemplars, as I understood the thrust of her remarks, of the Guidelines in action. As far as I am aware,

Professor McKeough is the only member of the wider legal community to have had this rather striking insight.

By way of contrast, at the time of the celebrations marking the High Court's centenary, Professor Coper delivered a paper addressing what he saw as its successes and failures over the first 100 years. Professor Coper selected as his standard for measurement a book written by an American author, Stephen Covey, titled *The Seven Habits of Highly Effective Families*. The reference to seven habits Professor Coper thought resonated with the number of Justices. And Professor Coper posed the question, "What is the Court if it is not a family?", albeit a family thrown together with a lesser degree of choice than the average family, but a family nevertheless – one living and working together, sometimes achieving consensus, often living with dissent, if not recalcitrance[3]. Applying the measures in Mr Covey's book, Professor Coper concluded that "Australia's number one legal family, the High Court, is almost entirely dysfunctional"[4]. The analysis, I observe in passing, was undertaken in April 2003 during the brief period following the retirement of Mary Gaudron, when the Court reverted to being an all-male preserve.

---

[3] Coper, "The Seven Habits of a Highly Effective High Court", (2003) 28 *Alternative Law Journal* 59 at 60.

[4] Coper, "The Seven Habits of a Highly Effective High Court", (2003) 28 *Alternative Law Journal* 59 at 62.

Against this background of what I must acknowledge are mixed academic views of the suitability of a member of the Court to deliver this Lecture, I would offer the following observations.

Most members of this audience would be aware that the relationship of employee and employer imposes on the employer a duty to take reasonable care to avoid injury to the employee. Some members of this audience may have noted McHugh J's observation in *Tame v New South Wales* that the duty is covered by the same rules and has the same content regardless of the kind of injury or damage that can reasonably be foreseen[5]. Employers and their insurers have an interest in the provision of a workplace that does not expose the employee to the risk of psychological harm. The legislation governing work health and safety defines "health" as including psychological health[6]. The law now recognises that repeated, unreasonable behaviour directed towards a person or group of persons in the workplace may create a risk to health. That behaviour where it creates that risk is now subject to redress[7].

The Foundation's Guidelines seek to go beyond the minimum requirements that the law imposes on employers of legal practitioners. The acknowledged high incidence of anxiety and

---

[5] (2002) 211 CLR 317 at 365 [140]; [2002] HCA 35.

[6] *Work Health and Safety Act* 2011 (Cth), s 4.

[7] *Fair Work Act* 2009 (Cth), Pt 6-4B.

depression among legal practitioners suggests that the benefits of adopting the Guidelines are likely to be greater than a mere reduction in an organisation's risk of liability to an injured employee. The failure to address psychological risk factors is likely to be evidenced by absenteeism, disability claims based on "stress", decreased levels of job satisfaction and performance, and high staff turnover[8]. Concern for the psychological health of staff is reasonably expected to enhance employee engagement and overall effectiveness.

The Guidelines can be downloaded from the Foundation's website. One of their charms is that they are free. They provide a means for an organisation to review how adequately it provides for the psychological health of its staff. It is accepted that not all organisations can be expected to adopt all of the guidelines, much less achieve best practice in all. How much or how little each organisation chooses to adopt and implement is a matter for it. As far as the Foundation is concerned, any positive step forward is encouraged whether it is large or small.

---

[8] See, eg, Knudsen, Harvey, Mykleton and Øverland, "Common Mental Disorders and Long-Term Sickness Absence in a General Working Population", (2012) 127(4) *Acta Psychiatrica Scandinavica* 287; Australian Human Rights Commission, *Workers with Mental Illness: A Practical Guide for Managers*, (2010) at 4-6; Law Society of Western Australia and Women Lawyers of Western Australia, *Report on the Retention of Legal Practitioners*, (1999).

The decision to sign up to the Guidelines is a step towards effecting cultural change within an organisation. Of course, it may be said that adoption of the Foundation Guidelines, rather like articulating an organisation's mission or vision, may be part of its public face but reflect little change on the ground. That concern is fair. However, it needs to be balanced by the recognition that cultural change takes place over time and follows acknowledgement that a state of affairs is simply wrong.

We now accept as a given that the workplace is to be free of sexual harassment. That idea is relatively new. In my early days at the Bar, the notion that it was inappropriate for senior barristers to engage in sexual banter with women juniors would have struck the senior barristers and the women juniors alike as a surprising one.

It is easy to forget how great have been the changes in employment relations brought about by the enactment of anti-discrimination legislation at the State and Federal level commencing in earnest in the mid-1970s[9]. *O'Callaghan v Loder*[10], the first major sexual harassment case (run as a claim of discrimination on the ground of sex under the *Anti-Discrimination Act* 1977 (NSW))

---

[9] *Prohibition of Discrimination Act* 1966 (SA); *Racial Discrimination Act* 1975 (Cth); *Sex Discrimination Act* 1975 (SA); *Racial Discrimination Act* 1976 (SA); *Anti-Discrimination Act* 1977 (NSW); *Equal Opportunity Act* 1977 (Vic).

[10] [1983] 3 NSWLR 89.

heralded a seismic change in appreciation of the scope of employers' obligations. Of course, that appreciation took time to spread. In 1995, the Victorian Law Institute's journal carried an article on sexual harassment, which commenced with the inquiry, "Do you know that as an employer you have a responsibility to prevent sexual harassment occurring in your workplace?"[11] Not quite 20 years later that opening paragraph speaks from another age.

Looking at the texts on employment law that were available to me when I was a student, the only concept of discrimination with which the law was concerned was Federal and State legislation that imposed liability on employers for dismissing or penalising an employee by reason of the employee's union membership or entitlement to the benefit of an award[12]. And the discussion of work safety was confined to physical injury[13].

On 1 January this year, the provisions of the *Fair Work Act* 2009 (Cth) governing workplace bullying came into effect[14]. An

---

[11] Will, "Sexual Harassment in the Workplace", (1995) 69(3) *Law Institute Journal* 216, at 216.

[12] See, eg, Sykes, *The Employer, the Employee and the Law*, (1960) at 88-89, with relatively identical content in 2nd ed (1964) and 3rd ed (1973).

[13] See, eg, *Sykes*, *The Employer, the Employee and the Law*, (1960) at 99, with relatively identical content in 2nd ed (1964) and 3rd ed (1973).

[14] *Fair Work Act*, Pt 6-4B.

employee who claims to have been bullied at work may apply to the Fair Work Commission for remedial orders[15]. The impetus behind this change was the outpouring of public concern over the suicide of Brodie Panlock, the young woman who was severely bullied in her workplace, a café in Victoria. That public concern led to changes to the criminal law in Victoria[16] and to the establishment of a House of Representatives Standing Committee on Education and Employment inquiry. The amendments to the *Fair Work Act* were based on the Committee's report *Workplace Bullying: We Just Want It to Stop*[17]. Workplace bullying is behaviour that is repeated, unreasonable, and that creates a risk to health and safety. Conduct once accepted as the *droit du seigneur* of the senior solicitor in his dealings with junior staff may no longer be lawful.

We should accept as a profession that we have an obligation to address those aspects of our professional culture that have led to practitioners and law students alike reporting significantly higher levels of psychological distress than is found in other occupations[18].

---

15 *Fair Work Act*, s 789FC(1).

16 *Crimes Amendment (Bullying) Act* 2011 (Vic).

17 Commonwealth, House of Representatives Standing Committee on Education and Employment, *Workplace Bullying: We Just Want It to Stop*, (2012). See also Kelly, "An Inquiry into Workplace Bullying in Australia: Report of the Standing Committee on Education and Employment – *Workplace Bullying: We Just Want It to Stop*", (2013) 26 *Australian Journal of Labour Law* 224.

18 Beaton Consulting, *Annual Professions Study*, (2007).

It is not as though we have been slow to impose high standards on other professions.

Some of the Guidelines state values that one would hope would go without saying in any legal practice: Guideline Four, for example, is concerned with "civility and respect". It proposes that "people treat each other with respect and consideration" and "treat people from all backgrounds fairly". The requirement of civility is a requirement of the Australian Solicitors' Conduct Rules[19]. More fundamentally, the stipulation that solicitors treat one another with civility is inherent in the ethical obligations that are assumed on admission to professional practice. Nonetheless, it is notable that a theme in focus group discussions carried out by the Law Institute of Victoria in response to the *Courting the Blues* report is the need to improve the way lawyers treat each other. The report identified this need as particularly applying to those engaged in litigation practice. The Law Institute, a signatory to the Guidelines, has identified the need to reduce destructive competitive behaviour within firms and between firms. It calls on lawyers to take responsibility for the way they treat their fellow professionals with the stated intention of changing the legal culture in Victoria[20]. I have no reason to think the legal culture in New South Wales or other of the Australian

---

[19] Rule 4.1.2.

[20] Law Institute of Victoria, *Mental Health and the Legal Profession: A Preventative Strategy*, Final Report, (11 September 2014) at 15.

jurisdictions is any more refined. The requirement that a solicitor act diligently in the best interests of the client is not, and has never been, a licence for aggression or discourtesy.

Fifteen years ago, Gleeson CJ addressed the Women Lawyers' Association of New South Wales. His Honour reflected on the changing role of the lawyer in the context of increasing numbers of law graduates, the emergence of the multi-disciplinary practice and the corporatisation of legal practice[21]. Given his audience, the focus of his remarks was on the opportunities for women lawyers to achieve equal participation in the profession. In this connection, he observed that it would be an injustice if, by the time women attain a fully equal opportunity to engage in the work and life of the legal profession, they find that all they have achieved is the right of any citizen to carry on a business[22]. As his Honour pointed out, many aspects of the work done by lawyers may be done by people with other qualifications. He reminded his audience that the feature of the profession of the law that distinguishes it from other occupations

---

[21] Gleeson, "The Changing Paradigm", speech delivered to the Women Lawyers' Association of New South Wales, 26 October 1999.

[22] Gleeson, "The Changing Paradigm", speech delivered to the Women Lawyers' Association of New South Wales, 26 October 1999 at 2.

is the provision of services related to the administration of justice in civil and criminal proceedings[23].

Professor Hickie expanded on the results of the research undertaken by the Brain and Mind Institute on behalf of the Foundation in his 2008 lecture. He commented on the difference in the levels of psychological distress between lawyers and doctors. No doubt young doctors are still required to work long hours and often they must have to make decisions for which they feel ill-prepared. Yet the incidence of anxiety and depression among young doctors does not compare with the incidence of anxiety and depression among young lawyers. Professor Hickie suggested one reason for that difference: young doctors know that their work is valued and worthwhile.

By contrast, many young lawyers report the unsatisfying nature of their work in a time-billing environment[24]. For many it would seem there is a perceived disconnect between professional values and the experience of practice.

---

[23] Gleeson, "The Changing Paradigm", speech delivered to the Women Lawyers' Association of New South Wales, 26 October 1999 at 2.

[24] The Law Society of Western Australia, *Report on Psychological Distress and Depression in the Legal Profession*, (March 2011) at 12-13.

Chief Justice Bathurst is critical of a culture in which young lawyers are left with the impression that the be-all and end-all of legal practice is the billable hour. His Honour is concerned about the emergence of a culture in which professional duties may be subordinated to personal gain[25]. Chief Justice Bathurst takes his place in a line of Chief Justices who have doubted the legitimacy of a system that rewards inefficiency with higher remuneration[26]. Quite apart from the ethics of time-costing from the client's perspective is consideration of its use as a management tool. The pressure of billing targets that impose unrealistic deadlines and unreasonable demands is prominent in the surveys undertaken by the professional bodies that address the cause of psychological distress in the profession[27]. Chief Justice Martin's criticisms of time-costing

---

[25] Bathurst, "Commercialisation of Legal Practice: Conflict Ab Initio; Conflict De Futuro", speech delivered to the Commonwealth Law Association Regional Conference, 21 April 2012 at 7.

[26] Spigelman, speech delivered at the Opening of Law Term Dinner, 2 February 2004 at 5.

[27] The Law Society of Western Australia, *Report on Psychological Distress and Depression in the Legal Profession*, (March 2011) at 8; Law Institute of Victoria, *Mental Health and the Legal Profession: A Preventative Strategy*, Final Report, (11 September 2014) at 27. See also Campbell, Malone and Charlesworth, "'The Elephant in the Room': Working-Time Patterns of Solicitors in Private Practice in Melbourne", Working Paper No 43, Centre for Employment and Labour Relations Law, University of Melbourne, (May 2008); Alfini and Van Vooren, "Is There a Solution to the Problem of Lawyer Stress? The Law School Perspective", (1995) 10 *Journal of Law and Health* 61.

take up its link to the high levels of depression and substance abuse within the profession[28].

I am well aware that calls from the judiciary to re-think time-costing fall on deaf ears. One by-product of the global financial crisis, as reported by the legal affairs pages of the national press, is said to be the client driven demand to shift the costs risk to the firms under fixed costs arrangements. Whether these arrangements lessen the reported pressure on junior legal staff is not reported. I will assume for the moment that young solicitors are likely to continue working long hours.

My work as a solicitor was a central and important part of my life as a young practitioner and gave me a deal of satisfaction and sense of self-worth. I worked long hours but I did not see work as leaching my life from me. The law that I had been taught at university proved to be surprisingly relevant in day-to-day practice. I may have thought that the entire term that Professor Woodman devoted to the more arcane aspects of the rule against perpetuities might have been reduced in favour of closer attention to provisions of the *Landlord and Tenant Act* 1899 (NSW) but that is a quibble. There was no disconnect between my expectations of legal practice

---

[28] Martin, "Billable Hours – Past Their Use-By Date", speech delivered to the Perth Press Club, 17 May 2010.

and the experience of it. In the language of Guideline Ten, I was engaged by my work and motivated to do my job well.

I am speaking of the heady days of the establishment of the community legal centre movement in New South Wales. All of us were engaged by our work and by a Quixotic desire to address the unmet legal needs of the economically disadvantaged across the State. We were hampered by our lack of experience and acute awareness of that lack was a source a stress. A number of solicitors from the large firms were supportive of our endeavours and made themselves available for much needed advice. So, too, did members of the Bar. Looking back, I think that we could have made more use of the goodwill of senior solicitors in the larger firms.

Nonetheless, the development of pro bono practices within all of the major firms, some corporations[29] and even some government departments and agencies is a phenomenon that was unimaginable in the early days of the community legal centre movement. Of course, solicitors firms large and small have traditionally done pro bono work. It is the integration of the pro bono work into the structure of the firms and the recognition of those practices as a valued part of the work of the firm that has been so fruitful. The

---

[29] Note the recent changes to professional indemnity insurance and practising certificates to allow in-house lawyers to perform pro bono work: see, eg, *Legal Profession and Public Notaries Amendment Act* 2012 (Vic) s 4.

goodwill and experience of a large pool of talented lawyers has been made available to work in partnership with specialist legal centres enabling test case and other litigation to be taken on which would not have been possible in the past.

The larger firms undertake a range of specialised, intellectually demanding work for which they rarely need to call on the Bar. Specialist knowledge and its application to new situations has its own peculiar charm. I suspect "engagement" is not such a problem for the more senior staff in large firms. However, to return to Guideline Ten, an incidental but important by-product of the creation of pro bono practices within the firms is likely to be the opportunity for young lawyers to do work that is self-evidently worthwhile and which has an evident connection to the core business of being a legal practitioner.

The firms are to be congratulated for their substantial commitment to pro bono work – one which in many cases exceeds the requirements of government tender arrangements for the provision of legal services[30] and in several cases exceeds the National Pro Bono Aspirational Target[31]. The firms are also to be

---

[30] National Pro Bono Resource Centre, "Pro Bono Provisions in Government Tender Arrangements for Legal Services", available at <http://www.nationalprobono.org.au/>.

[31] National Pro Bono Resource Centre, *Fourth National Law Firm Pro Bono Survey*, Interim Report, (October 2014) at 6-8. The National Pro Bono Aspirational Target is currently 35 hours of pro bono legal services per lawyer per year.

commended for their uptake of the Guidelines. I would offer one suggestion to them, and to other relatively well resourced organisations, that when it comes to the "best practice" level, thought is given to independent evaluation. The continued stigma of depression makes me think that it would take a young lawyer of more than ordinary fortitude to be frank in responding to an in-house survey.

May I end with Guideline Eleven? It is titled "Balance". The opening sentence reads "A work environment where there is recognition of the need for balance between the demands of work, family and personal life". Marie Jepson will tell anyone who asks her that one gauges the commitment of an organisation to the psychological well-being of its staff by looking at how the key people in the organisation conduct themselves.

I was a judge of the New South Wales Court of Appeal when the Chairman of the Foundation, Keith Mason, was its President, perhaps the most demanding judicial job in Australia. President Mason set an example that for those of us without his gifts was not easy to emulate. He did not work excessive hours and he always left chambers in time to be home for dinner with his family. He embodied Guideline Ten and this informed the occasional remarks that he made at admission ceremonies. These ceremonies mark an important milepost in the lives of newly admitted lawyers. They provide the opportunity for the Court to instil in new practitioners an

awareness of the importance of the ethical obligations that they are assuming in becoming members of this profession. On an occasion when I was one of the judges constituting the Court at an admission ceremony at which President Mason was presiding, he spoke of the practitioner's duties in conventional terms and then he went on to say this:

> "You will experience considerable pressure to conform to the cultures of the firm, the set of chambers, the government department, the faculty. This collective embrace is appropriate insofar as it educates, encourages and helps maintain proper professional standards. But never forget that, as individuals, you have the opportunity to project your values and your ideals into your chosen calling. Conversely, your personal well-being and the integrity of your life and belief system are vital to your ability to function as a legal practitioner. You are a person first and a lawyer second. The law is a demanding and exacting profession, but do not let it squeeze out your relationships with communities beyond the law and with those near and dear to you."

Marie and George Jepson have found a perfect fit in the Hon Keith Mason AC as the Chair of this Foundation.

The work of the Foundation, initially through its research and now through the adoption of the Guidelines, has given us a tangible way of reducing the risk of psychological injury within our profession. I am pleased to see that it is so well supported by young lawyers across Australia. I await with interest the arrival of Bottled Snail Productions in Canberra.