UQ Law School Prize Giving
Customs House, Brisbane

I

Introductory Remarks

Distinguished guests, ladies and gentleman,

May I commence by congratulating all of tonight's student prize winners , and those who have supported them in their endeavours? As you know, the University of Queensland's Law School is this State's leading law school; and, is ranked amongst the leading law schools of the world. Each year, it draws its intake from the best graduating high school students in the State. Indeed, the Dean of the Law School, Professor Sarah Derrington, tells me that every student in this year's intake has an OP 1. So, to win a prize in such company is very special. It ranks you at the top of the State's very best. Congratulations.

Of course, a law school is only as good as its teaching staff, and so it is fitting that tonight we also celebrate some of the School's outstanding teachers. Teaching is a noble career because it is a giving career. To win a prize for teaching excellence at a leading law school is not only a mark of professional excellence but is also a mark of dedication to giving. Congratulations also to the winners of prizes for teaching excellence, and to those who support them.

II

The topic

The topic I have been asked to speak to you about tonight is the change in the practice of law since I left the Law School in 1983. I am a solicitor who has, save for one year as a Judge's Associate, continuously practised in the Queensland office of a large law firm and so it is from this perspective that I speak.

The hardest thing about tonight's topic is selecting which of the numerous changes to mention. I have chosen four that I consider to be the most significant, but views could easily differ.

The four topics I will briefly take you to are:

1. the physical fitness of today's lawyers as compared with those of the past;
2. the advent of the computer age;
3. the increasing participation of women in the practice of law; and,
4. the emergence of the in-house lawyer.

In respect of each topic, I will briefly outline how things were in the mid 1980s, how they are now, and the challenges I think may lie ahead for you students - the generation who will carry us forward. If you hear undertones of 'things were better in the good ole days', please disregard them. Things are indisputably better now. That is a product of the foresight and efforts of those who have gone before us, and our overarching challenge is to live up to their examples.

III

Physical fitness

In most law firms offices in the mid 1980s, you could smoke throughout the day without leaving your desk. Not unusually, partners smoked small cigars ; solicitors smoked up to 80 cigarettes a day; secretaries smoked elegant white menthol cigarettes, and so on. Although it is set in the early 1960s, the award winning television series *Mad Men* gives you some idea of what I'm speaking about. At one point around the mid 1980s, my firm had to replace all of its plastic wastepaper bins with metal bins due to an increasing number of bin fires that were occurring when distracted lawyers failed to properly extinguish their cigarettes. Passive smoking was unavoidable. No one cycled to work; no one ran to work; and, those who walked to work only did so to bridge the gap between the points at which their public transport ended and the office began. Only boxers and narcissists frequented gyms, and there were almost no gyms (perhaps none at all) in the CBD. People drank alcohol at lunch; and sometimes in quantity. Anyone who ate a light salad lunch was suspect; and, sushi was literally unheard of.

Today, smoking anywhere in an office building is prohibited; most modern buildings have large bicycle storage areas, showers and locker facilities; save perhaps for the odd formal lunch, alcohol is largely not consumed during the

working week; and, free gym membership is a part of most modern solicitors' remuneration packages. Sushi and salad bars proliferate. In short, the physical fitness of the legal profession has considerably improved over the past 30 years. A brief comparison of group photographs then and now indicates that the legal profession has literally changed shape – for the better.

There is considerable medical evidence that physical wellbeing improves mental capacity, so physical fitness does matter to the way we operate as lawyers.

To my mind, the most significant challenge to this welcome increase in physical fitness is the rise of what are thought to be performance enhancing drugs. These are largely unknown to my generation so I speak of them only tentatively. In recent weeks, I have for the first time heard that the use of drugs generically known as Beta Blockers are on the rise amongst younger members of the profession. I am told that without impairing your cognitive ability whatsoever, Beta Blockers reduce emotion and anxiety associated with performing. However, in a profession that is daily engaged in making fine judgments about people, cognitive intelligence may not be sufficient. Emotional intelligence is also important. Even if Beta Blockers have no other side effects, it seems to me that they impair a necessary part of the a practising lawyer's experience and skill.

IV

Computers

Until about the mid 1990s, desktop computers were unknown in this State's legal offices. Outside communication was by immobile telephone or letter; and urgent communication was by facsimile transmission. This had the effect of inter-office engagement proceeding at a more leisurely pace than it does today.

Access to information was also slower. The law was to be found in physical books not on the net. To find the law involved physically finding the relevant book, persuing a topic from book to book, and photocopying as you went. Larger law firms had very significant physical libraries as a consequence. Lectures in the law were also physical things. You needed to attend and take notes; there were no podcasts nor video lectures, no electronically communicated summaries of cases and no virtual libraries.

Today, the majority of the communications between a law office and the outside world are by email; the majority of research is undertaken in one's own room via the computer and physical law libraries are on the decline. The main focus of the modern law library is not so much legislation and case law, most of which can now be found electronically, but text books, particularly monographs which are subject

specific. I imagine that in due course these text books will also be available electronically once service providers garner copyright to them.

There are two key challenges facing every law firm arising out of what is properly called the computer "revolution". First, the speed of communication has narrowed the response time expected of lawyers. Clients no longer send instructions by post, they email them. They know you have the instructions and they know you have the means of responding rapidly, so they expect you to do so. In just one matter that may be no problem, but if ten clients simultaneously expect a response to their distinct enquiry, the response time becomes somewhat oppressive. The pressure on solicitors has certainly been increased by the speed of electronic communications. So far, the only way out of this bind is to clearly communicate, and even negotiate, the expected time for a response; but, that carries with it the prospect of a disappointed client. Managing this pressure is important not only to avoid 'burn out' but also to properly discharge your obligations.

The second challenge is this:- because the internet gives such expansive access to information and because time and human capacity are limited, there is a real risk that legal reasoning becomes undesirably superficial. In broad terms, it is the difference between a breadth of knowledge and a depth of knowledge; and, between being able to find information about a problem and solving the problem with that information. The most significant problems lawyers face tend to be

resolved by the exercise of reason based judgment. Computers can get you a certain way, but they cannot form judgments. However, they can cause you to get lost in a morass of information.

Justice Michael Kirby has spoken of a third challenge that the computer age may also be throwing up for the profession. It is not dissimilar to the challenge I have previously mentioned, but if accurate, it is more fundamental. Drawing on studies of neuro-plasticity, he has wondered whether the modern legal brain is being directed towards the short term – to jumping from screen to screen and topic to topic – and so unable to concentrate on a single topic for a length of time. Justice Kirby wonders, in this environment, how complex jury trials will be conducted in the future if the jury, and for that matter, Counsel and the Judge, find it difficult to concentrate on a single subject for weeks or even months on end.

V

Women in the law

It is true that by the time I commenced to practice in 1984, no woman had been a Justice of the High Court of Australia nor a Justice of the Supreme Court of Queensland nor President of the Queensland Law Society nor President of the Queensland Bar Association; and, no woman had been the Dean of the University of Queensland Law School. None of that really registered with me at the time because (as I can now see in hindsight) my student cohort was towards the

vanguard of a significant increase in the participation of women in university education. Our cohort had a significant percentage of women, and we were taught by remarkable women such as Quentin Bryce who went on to become Australia's first female Governor General, Margaret White who went on to become the first woman appointed to the Supreme Court of Queensland and Patsy Wolfe who went on to become the first woman appointed Chief Judge of the District Court of Queensland. Amongst this group of academics and our cohort, it seemed to me unremarkable that a woman could and should hold whatever position she reasonably aspired to.

There are acceptable reasons why people in their 20s and 30s should not be Governors' General, Prime Ministers or High Court Judges. They lack the necessary judgment grounded in experience, amongst other things. But as time has gone by, the participation of women in university education has properly and inevitably led to women, at an appropriate age, filling roles at all levels of government. Indeed, there was a point in time not so long ago when the Head of State, the Governor General, the Prime Minister, the Governor of Queensland, the Premier of Queensland, the President of the Queensland Court of Appeal and the Chief Judge of the District Court of Queensland were all women. The presidencies of the Queensland Bar Association and Tattersalls aside, there are now not too many roles in law and in government that women have not held.

So what then of women in the law firm? In the mid 1980s, there was a very small minority of women partners and a slightly larger minority of woman solicitors in the profession. Now there is a significant minority of women partners and a majority of women solicitors in my firm at least. In the not too distant future, there is likely to be either a majority of woman partners or a near equality of male and female partners.

The key breakthrough in this transition from male dominated law firms was not so much the 'glass ceiling' being broken, as the addressing of the practical issues summarised by Dame Quentin Bryce's aphorism 'women can have it all but they can't have it all at once'. Stratagies for retaining women in the legal profession once they commence to have children, such as paid maternity leave, part time partnerships and electronic connectivity from outside the modern firm, have all facilitated this.

The obvious challenge for the next generation is to complete the movement towards full participation of women in the legal profession. We are not yet at that point but we are steadily approaching it due to the increased participation of women in university education.

I said the 'obvious' challenge for the next generation is to reach the goal of acceptable female participation in the legal profession, but there is a new and less obvious challenge that is also emerging. In the last US Presidential election, President Obama started to mention 'class' in his speeches. This profoundly shocked Americans because unlike in Australia, 'class divide' is almost never mentioned in aid of a political campaign. Apparently it had not been seriously mentioned in a presidential campaign since the early 1900s. However, it became clear that President Obama had a particular and relatively new issue in mind. He was not speaking of a deep financial divide – he was not speaking of the so called 'Robber Barrons'. Rather, he was referring to what he sees as a relatively new elite that has emerged as a result of an increased participation of women in university education commencing at about the same time as it did in Australia. It is an elite that is defined not so much by money as by power. It has emerged because, not unnaturally, men and women meet at university and become life partners. Both often become professionals, sometimes in similar areas of endeavour, and so a class emerges that becomes overly influential in areas of government, law and business. They in turn have children who in turn go to university and so on. As the President sees it, an aristocracy of power couples begins to emerge.

The President's observation was not a passing one. In January this year, under the title 'American Aristocracy', the Economist magazine considered the same point.

It will be your challenge to understand the force of this phenomenon. Does it matter? This much seems clear. If this trend were to impede a Mary Gaudron emerging from Moree to become Australia's first female High Court Judge it would be troubling. If it prevents someone emerging from relative obscurity to become President of the United States it would also be troubling. Perhaps this is why President Obama sees this trend ahead of others, and warns us of it.

VI

In- House Lawyers

In 1985, there was only a handful of in-house lawyer in private enterprise in Australia. An alumnus of the Law School, Neville McPherson, who worked for The Shell Company of Australia Limited, was amongst the first. His role was to facilitate the seeking and instructing of private law firms, and to interpret their advice for Shell's executives and board. That is to say, he did not undertake legal work himself. The legal work of private enterprise (as distinct from government) was entirely undertaken by private firms and the private bar.

As you would imagine, private enterprise needs legal services in relation to matters ranging from the very significant to the routine and less significant. Typically,

senior private lawyers in the mid 1980's would undertake the work of greater significance and junior lawyers would undertake the work of lesser significance. Junior lawyers were trained on the more routine and less significant work, until they acquired the skills to work on the more significant matters.

If you had said in 1985 to the leaders of Queensland's legal profession that a competitor for private enterprise legal work would enter the market and grow to a size in excess of the size of the seven largest Queensland law firms combined, they would have dismissed the idea, 'with prejudice' as the American's say. But that is exactly what has happened over the last 30 years. Now, there are at least 1000 in-house lawyers in private enterprise in Queensland alone. That exceeds the total number of lawyers in the seven largest firms in Queensland combined. The four major Australian banks, for example, each have around 200 in-house lawyers – they are significant law firms in themselves.

From about 2002 until the present day, the total number of billable hours worked at the seven largest law firms in Australia has remained basically static. That is remarkable, particularly because the GFC notwithstanding, Australia has not had a single quarter of negative growth during that period. Steadily, the in-house teams have moved into increasingly more complex areas of work. Initially, they undertook simple corporate and commercial work. Today, they are undertaking

work as complex as mergers and acquisitions. The cause of this has unquestionably been the bringing in-house of legal work by private enterprise.

No one can criticise private enterprise for trying to reduce its legal expenditure. However, for the legal profession this has consequences that raise challenges. The first challenge is the training of young lawyers. Generally speaking, in-house legal teams hire lawyers who have been trained in the private legal profession; they do not train those lawyers themselves. Yet, the type of work that young lawyers were trained on, more routine private enterprise work, is increasingly being undertaken in-house. That disconnect between who is training the young lawyers and who is doing the work that young lawyers are trained on, is not desirable. It leads to private law firms capping or reducing their intakes; and, the burden of training falling on private enterprise, which generally speaking it is not willing nor comprehensively able to do.

There is one other aspect of the provision of certain legal services in-house that troubles me at least. It is encapsulated in the word 'objectivity'. I am a frequent user and supporter of the private bar principally because barristers add a level of objectivity to matters. Solicitors get close to and dependant upon their clients, and in doing so lose a measure of objectivity. In-house lawyers are even more prone to losing objectivity since they are employees of the client. A recent and disturbing example of what I am taking about occurred at James Hardie. Faced with a

problem of growing liability for asbestos related claims, that company's General Counsel, along with others, devised an unlawful scheme to move its assets offshore. That ended for the General Counsel in the High Court's decision of *Shafron v Australian Securities and Investments Commission* [2012] HCA 18, where Mr Shafron was held liable for a breach of section 180 (1) of the *Corporations Act* 2001 (Cth) – a section which required him to discharge his duties with a degree of care and diligence that the High Court found he did not do.

VII

Concluding Remarks

In conclusion, may I say this about the change in the practice of law since I left the UQ Law School? Change is constant but incremental. On any one day, it is hard to notice, but its longer term effects can be profound. In one of the most prescient books ever written, *'Democracy in America'*, Alexis De Tocqueville in concluding his observations of the United States made between 1831 and 1833 says this:

> "A traveller, who has just left the walls of an immense city, climbs the neighbouring hill; as he goes further off he loses sight of the men whom he has so recently quitted; their dwellings are confused in a dense mass;

> he can no longer distinguish the public squares, and he can scarcely trace out the great thoroughfares; but his eye has less difficulty in following the boundaries of the city, and for the first time he sees the shape of the vast whole. Such is the future destiny of the British race in North America to my eye; the details of the stupendous picture are overhung with shade, but I conceive a clear idea of the entire subject."

Regrettably, I do not have the foresight of Alexis De Tocqueville, and I have not left the city, but I do hope tonight's observations from my hillock have at least interested you, and perhaps may even have helped. Thank you for listening.

David O'Brien

20 May 2015