

The inaugural Tasmanian Tristan Jepson Memorial Foundation lecture*

LEGAL PRACTICE: A CAREER IN CONFLICT

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*Woe to you lawyers also! For you load people with burdens hard to bear,
and you yourselves do not touch the burdens with one of your fingers.*

*Woe unto you, lawyers! For ye have taken away the key of knowledge: ye
entered not in yourselves, and them that were entering in, ye hindered.*

You may think you have come on the wrong night, or you may just think I have taken leave of my senses, but as I will show, these passages from the Bible have relevance to my topic; a career in conflict. That title was suggested by tonight's organiser, Alex McKenzie, after I spoke to him about the subject matter of my talk. I thank him most sincerely for his cleverly ambiguous suggestion. It was much better than my first thought which was, using something famous US baseballer Yogi Berra said, *Practising the Law: If You Come to a Fork in the Road, Take It.*

There is now a considerable body of credible research, here¹ and in the USA², showing that levels of depression and mental health issues among the legal

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¹ Beaton Consulting, *Beyond Blue Survey 2006*; N Kelk, G Luscombe, S Medlow & I Hickey, *Courting the Blues: Attitudes towards depression in Australian law students and lawyers*, University

profession are higher than those found in the general population, and that such levels are quite high when compared to the members of other professions and occupations. The research includes law students as part of the profession. There is no reason to think that the same problems do not exist in the judiciary, and I include all judicial officers in that term. In the late 1990's, a New South Wales Supreme Court judge revealed his depression in defence of an attempt to remove him from office.³ Recently, and before his retirement, a Federal Court judge publicly discussed his battles with the illness.⁴ More generally, a survey of judges done by the Australasian Institute of Judicial Administration (AIJA) in 2012⁵ showed high levels of stress. This problem of depression and mental health issues in the profession is a serious one. Those affected are reluctant to speak about their problems and seek help. Levels of psychological distress are associated with high levels of alcohol and substance abuse. These things have undoubtedly taken a heavy toll. The Tristan Jepson Memorial Foundation has responded by the publication of detailed guidelines to assist in addressing psychological health and safety within the profession. Professional bodies have implemented strategies to raise awareness, and to manage the risk. So what is the *reason* for the comparatively high levels of depression in the legal profession. In the *Courting the Blues* report of 2009⁶,

of Sydney, 2009; S Medlow, N Kelk & I Hickie *Depression and the Law: Experiences of Australian Barristers and Solicitors* (2011) 37 Sydney Law Review 771.

² W Eaton & Ors, *Occupations and the Prevalence of Major Depressive Disorder* (1990) 32 Journal of Occupational Medicine 1079.

³ The Hon Justice V Bruce. See Parliament of New South Wales, Legislative Council, Hansard, 27 May 1998 at 5206-5208, 2 June 1998 at 5502-5506, 25 June 1998 at 6525-6588. The attempt was unsuccessful. He resigned on 8 March 1999.

⁴ The Hon Justice S Marshall, *Judge tells of depression struggle in bid to help many in legal circles*, The Age, 14 September 2013; Marshall J, *Depression: an issue in the study of law* [2015] Fed J Schol 1; ABC Radio National, Background Briefing, *Caught in the stigma trap: the cost of mental illness in the workplace*, 22 February 2015.

⁵ K Mack & S R Anlew, *Judicial Workload: Time, Tasks and Work Organisation*, AIJA, Melbourne 2012 at 38-39.

⁶ See fn 1.

an initiative of the Foundation, the authors noted a few possible factors; the competitive nature of lawyers and a stressful working environment being among them. The main purpose of that research however, was not to investigate the reasons; but to gauge the nature and extent of the problem, and I have not been able to find detailed surveys or anything comprehensive on the subject.

My purpose in this address is to explore further the question of causation. I will examine the situation of law students, practising lawyers by which term I mean to include lawyers working in government, and also that of the judiciary. I hope to demonstrate that the simultaneous presence of various forms of conflict is an environmental factor that does not exist, at least to the same extent, in other professions. Although a rewarding career on many levels, a career in law is a career in conflict. I should define the term. By the use of the word 'conflict' I mean, depending on context, a disagreement, argument, quarrel or state of tension; inner turmoil or personal discord, or the existence of factors and influences that are incompatible. My starting point is not to look at the lawyer in the workplace, but the lawyer in the community. First, although some may question this, a point to which I will return, lawyers are ordinary human beings. They bring into the legal workplace the same sensitivities and vulnerabilities as those in the general community. This is the base line when considering the role of conflict. Lawyers face the same issues that make all community members vulnerable to depression. It is worth pausing to reflect on the nature of those issues.

As analysed by Tanner & Ball in the helpful publication *Beating the Blues*⁷, there are three groups of factors. The first group consists of social and psychological factors. These include developmental crises and life events such as the death of a family member or friend, relationship breakup, serious illness and job loss. This group also includes stress levels. Low levels of stimulation can lead to low mood and lack of self-esteem. Prolonged high levels can lead to entrenched anxiety and other ill effects. The last factor in this group is lifestyle. The optimum one for good mental health is one that balances time across work, family and recreational and other interests.

The second group can be described as biological in nature. Some people may be predisposed to depression or other mental illness. The third group, linked to the first, relates to protective factors, the presence or absence of which may cause vulnerability. Such things as low self-esteem, an inability to express feelings, and the lack of a support network increase the risk of mental health problems, or hinder in their recognition and management. And so, lawyers, as typical members of the community, with those potentialities, go into the practice of the law. The person becomes a lawyer, but does not shed the characteristics of the ordinary person.

It is here where we encounter my first suggested area of conflict. The lawyer is a person who is part of the profession, often a matter of personal pride. That person may well have a feeling of conflict with non-lawyers, arising from a discernible adverse public attitude to lawyers. That attitude manifests itself in statements of derision about the profession, derogatory lawyer jokes, and by more focused criticisms and insinuations by politicians and journalists.

⁷ S Tanner & J Ball, Doubleday, 1989.

Popular opinion is one of dislike and distrust. Comparisons are invidious but generally, although lawyers are not the lowest on the list of the most trusted occupations in Australia, they are a fair way from the top. The annual Roy Morgan survey of 30 occupations showed that lawyers ranked 15th in 2015, and *rocketed* to 13th in 2016. Interestingly, High Court and Supreme Court judges are each, as groups, separately dealt with. In 2015, they were ranked 9th and 7th respectively, separated by the police. In 2016, police no longer separated the two, having moved above them, with the judges being ranked respectively in 8th and 9th places, thus swapping their previous relative positions. In each year, lawyers ranked slightly more highly than talk-back radio hosts, while real estate agents, advertising people and car sales people languished at the bottom ... but perhaps I digress.

The history of public denigration of lawyers is a long one. Criticism of lawyers can be found in the Old Testament, see Isaiah, Ch 59, v 4, and in the New Testament, Luke Ch 11. vs 46 & 52 which, as you all know of course, are the passages I started with. It seems accepted that in those passages the subject was not lawyers as we know them. Those spoken of were more akin to clerics who taught religious law, but that does not prevent the use of such references to deride and demean. Attacks on the profession can be found throughout the ages; some from unlikely sources. One of the romantic poets, John Keats, suggested that lawyers could be classed in the natural history of monsters.⁸ One well known saying often used against lawyers comes from Shakespeare, Henry VI, Part 2, Act IV, Scene 2. The full quotation is '*The first thing we do, let's kill all the lawyers*', but it is the exhortation in the second part that is mostly used. Used *against* lawyers, it is a misuse. The line is spoken by Dick the

⁸ K Reddern, *Modern Legal Glossary*, Michie Co, 1980.

Butcher, a member of a band of would be usurpers of Crown authority, led by Jack Cade. His suggestion was that the way forward was to get rid of lawyers, seen as obstacles because of their role in maintaining order and justice according to the laws of the time. So understood, it acknowledges an *important* role of lawyers that has continued to this day. More of that later.

The circulation of a large number of vitriolic lawyer jokes is undeniable; it is not a figment of a collective paranoid imagination. It is a phenomenon that has been the subject of study and debate. It is beyond my present reach to examine the reason for the proliferation of ant-lawyer jokes, but I mention an article by Matthew Storey, then president of the Northern Territory Law Society, published in 2009⁹. He suggested that lawyers are the targets of dissatisfaction with the general state of the law and with the institutions of government, as well as with the quality and cost of services. The ABC radio program *Law Report*¹⁰, devoted a program to lawyer jokes in January 2006. A guest on the program, Professor Marc Galanter, had written a book on the subject, called *Lowering the Bar: Lawyer Jokes and Legal Culture*¹¹. He said that over much time the themes were ones of greed and trickiness, but more recently, themes had emerged of lawyers being morally defective and objects of scorn. He suggested that it had become politically correct to deride lawyers as a group. However, his view was that most lawyers enjoyed lawyer jokes, and he did not think it was a great problem for the profession. With respect, I think the producer of the program, Anita Barraud, described the situation

⁹ *Balance*, Journal of the Northern Territory Law Society, edition 6/2009 at 2.

¹⁰ *Lawyer Jokes*, 24 January 2006. Transcript available at www.abc.net.au/radionational/programs/lawreport/lawyer-jokes/3396972.

¹¹ University of Wisconsin Press, 2005.

much more accurately. She said, *'Lawyers don't think they're funny, and no one else thinks they're jokes'*.

No one would pretend there are not individual cases that justifiably attract criticism. I do not speak to defend the profession. My point is that lawyers are part of a professional group that is the subject of long-standing general scorn and derision in literature and through the medium of jokes. Objectively speaking, the extent and nature of this is hard to justify. As an aside I add that lawyers have to suffer frequent misrepresentations in television programs and movies of their daily working life and consequent lifestyle; to say nothing of the excruciatingly 'wrong' court room scenes. It is possible that being part of such a targeted group can create overt or subconscious feelings of resentment, isolation from the rest of the community and even anxiety. This may in part explain why lawyers tend to school; like fish. Legal functions are frequently not open to accompanying persons, and I should observe that these schooling habits may be a potential source of conflict with non-lawyer spouses and partners. Conversely, partners may be quite happy to stay away from lawyers' gatherings; another potential source of tension.

Returning to my theme, lawyers, as a group, are often the subject of express or implied criticism by politicians, journalists, mainly of course in criminal matters and other matters of controversial public interest, such as immigration. Prominent lawyers who speak out on behalf of clients or in defence of basic human rights are criticised, and some have been the subject of publicly made gratuitous insults. There seems to be an underlying view that lawyers who act for persons charged with serious criminal offences, particularly sex and terrorism offences, are acting contrary to the interests of the community. In

this context, the proper use of legal aid funding is sometimes questioned. This view conveniently overlooks the presumption of innocence and other fundamental rights. It also conveniently overlooks the basic reality that if the critics, or members of their families, were wrongly charged or otherwise dealt with by authority, they would demand the same level of representation. What is also more generally overlooked is the fact that the legal profession stands on the first line of defence against the erosion of the rule of law and of fundamental human rights as recognised in this country, a task for which it is rarely, if ever, acknowledged outside the profession. All of this adds to the potential for feelings of alienation.

Judges have to deal with the frustrations of uninformed public criticism of their sentences and other decisions, and grossly improper and unfair politically motivated attacks, without being able to defend themselves.¹² As a group they are unwillingly made part of advertising material in law and order auctions about bail and sentencing conducted by political parties, sometimes attracting offensive and unjustified generalisations about the loss of community's faith in them. That may reinforce negative feelings in the community. At the same time, judges may struggle with the feeling that what is proposed in the name of reform is simply for political purposes with no real advantage or value in reality.

Before leaving this aspect of public perception, and given my mention of Biblical passages, I will recount to you a true story of events that happened in this State. Quite a few years ago there were merger talks between two firms,

¹² The issue of political attacks on the judiciary is the subject of academic study; see T Josev, *The Campaign against the Courts*, Federation Press, 2017.

conducted by a representative of each. There was a large firm in the North and a small one in the South. Preliminary due diligence having been done, a crucial point was reached. The large firm person asked the small firm person if they could proceed to merge. Being a man fond of using literary references, the small firm person sent a cryptic message. He simply wrote '*Proverbs: Chapter 1 verse 14*'. He had the King James version, in which the verse reads:

'Cast in thy lot among us; let us all have one purse'.

He received no response, but in due course things seemed to be moving forward, and ultimately, the merger went ahead.¹³ He wondered about the fate of what he thought was his clever message. A little later, he discovered that the library of the large firm contained the plain English version of the Bible known as *The Good News Bible*. In that version, the verse reads:

'Come and join us, and we'll all share what we steal'.

Being a lawyer can also create conflict with those to whom they are close, or with whom they come in contact socially. Both work practices and the identity itself are sources of conflict. Obviously, long hours and behavioural manifestations of stress have an adverse impact on home life. Simply being a lawyer can create difficulties. My first example is that of the lawyer who is the subject of great family pride; possibly the first tertiary educated professional person in the family. The level of expectation to succeed can be unbearably high. The phenomenon of the lawyer doing unethical or illegal things in practice in an attempt to appear much more successful and to fulfil family expectations is not uncommon. Other examples of this more personal level of conflict arising from being a lawyer include the following. Family members

¹³ The small firm person was Peter Barker, then of Barker & Barker and now a barrister and Senior Counsel. Barker & Barker merged with Archer Bushby in 1989.

often ask the lawyer member to have a "quick look" at something and give advice. Often this is in fact a second opinion, sometimes not revealed, and often the explanation that accompanies the request is seriously inadequate. Declining these requests or attempting to help by seeking further information so as to steer the person in the right direction often creates resentment. Acting for family members in non-contentious matters can create tension and disharmony. I have to report that one of my worst clients was my brother for whom, as a young lawyer, I naively agreed to do a simple conveyance. He became a daily caller who closely questioned everything I did; sometimes in a challenging way.

On a lighter note, I think all lawyers, even students and I suspect those who do not practice criminal law, are often asked how lawyers can act for a client who they know is guilty. It took me a while to realize that this is not a question but a statement. I usually embarked on an explanation of the distinction between "knowledge" as a suspicion, and actual knowledge from an admission by the client to the lawyer, and of the ethical constraints of conducting a trial where there has been such an admission. On one occasion of this question, having tired of my proper explanation which caused eyes to glaze over, I tried answering by casually saying, 'We just do it for the money'. I was a little taken aback when this seemed to completely satisfy my questioner. Another example of possible personal conflict stemming from being a lawyer relates to discussion or argument with non-lawyers, even about domestic and personal matters. During the course of such things lawyers are often accused of:

1. cross-examining, when they are merely trying to establish facts;
2. using clever lawyer tactics when it is only logic being deployed;

3. using "lawyer speak", when merely trying to choose words carefully to properly convey their meaning.

I hasten to say that is not my personal experience at home.

In relation to judges on this personal level, there is the possible conflict between maintaining the public decorum expected of a judicial officer, and the continued involvement in previous personal activities. The AIJA Guide to Judicial Conduct¹⁴ devotes a lengthy chapter to non-judicial activities and conduct. The cessation or moderation of activities pursued before appointment can create personal conflict, and conflict within the judge's family and friends. Friends may be lost or become more distant. The behaviour of a judge engaged in non-judicial activities might be rather public, particularly through the use of social media. That could create conflict with the judge's head of jurisdiction, tension with fellow judges, and might even create a level of agitation amongst practising lawyers.

I now turn from the lawyer in the community to the lawyer in the workplace. I will begin with students. In his article published in 2015, *Depression: An Issue in the Study of Law*¹⁵, Justice Shane Marshall referred to a biography of Abraham Lincoln which focussed on Lincoln's depression¹⁶. In the biography, the author noted early steaks of sadness and worry in Lincoln that may have been minor depressions, and said that it was not until 1835 that serious concerns emerged about Lincoln's health, with the first sign of trouble coming with his intense study of the law. The *Courting the Blues* report noted 1983

¹⁴ AIJA, 2nd ed, 2007, Ch 6.

¹⁵ See fn 2.

¹⁶ J W Shenk, *Lincoln's Melancholy*, Mariner Books, 2006.

research¹⁷ suggesting that law education was far more competitive than other forms of tertiary education. The report described law students as a cohort of clever, competitive, perfectionist persons with high expectations. It was said that competition might work to reduce the level of support that sub-groups of students gave each other. In turn, the 1983 research mentions high levels of self-doubt, along with fear of failure related to high expectations. Of interest, harking back to my earlier comments, is a reference in the 1983 research to a survey identifying alienation as a prominent factor.

The *Courting the Blues* report suggests that the type of person a law student needs to be, is a contributing factor. This type is said to be one who constantly strives for precision, if not perfection, and at the same time always carefully analyses things for flaws and errors. I will come back to this point when I deal with practising lawyers. Before leaving law students, I simply note student participation in moots and in client interview and witness examination exercises. This participation may extend to national competitions. Mooting pitches students against each other in conflict, the precursor to the majority of legal work. Both areas provide increased levels of competition. The experience of teaching advocacy to practical legal training students shows that while the aim of having them perform in advocacy roles is to provide constructive feedback, where this occurs in a team setting so that there is a number on each side of a fictional matter, the question of who won often seems far more important to them.

¹⁷ M Heins, S Fahey & R C Henderson, *Law Students and Medical Students: A comparison of perceived stress*, (1983) *Journal of Legal Education* (33): 511-25.

That brings me to practising lawyers. I will divide this part of the discussion into three sections. The first relates to common personal characteristics of lawyers, the second is the nature of the work itself, and the third relates to the players in the lawyers' working life. Starting then with personal characteristics, my point is that there is conflict within the personal characteristics of many lawyers; an internal tension. I have already mentioned the reference in the *Courting the Blues* report to the orientation of looking for flaws and errors; things that can go wrong. The authors suggest this orientation makes practitioners suspicious and perhaps even paranoid about everyday affairs. The point of conflict emerges when it is recognised that lawyers generally as a group are high performers who strive for perfection. This makes them perfectionists as well as pessimists. This characteristic of lawyers has been discussed a number of times on ABC's radio *Law Report*. It was first mentioned in a program in April 2011¹⁸, some of the participants in which were lawyers who had experienced depression. In a follow-up program in October 2015¹⁹, one of the speakers was the widow of a lawyer who was on the 2011 program and who had very sadly committed suicide since. She used the expression, '*a perfect storm of a pessimistic perfectionist*'. She said the characteristics that make a good lawyer are the same that unfortunately tend to lead to depression, and when that is combined with a driven, highly competitive personality, the characteristic is exacerbated. I think that cynicism, sometimes unhealthy, would seem to be part of this overall picture, as it is part of the required analytical and assessment processes.

¹⁸ *Lawyers and Depression*, 5 April 2011. See www.abc.net.au/radionational/programs/lawreport/lawyers-and-depression/3008044.

¹⁹ *The Legal Community's Struggle with Mental Health*, 6 October 2015. See www.abc.net.au/radionational/programs/lawreport/mental-health-in-law/6828762.

As a further consideration, as speakers on the ABC *Law Report* program in 2011 noted, with these characteristics, the lawyer does work that is very isolating. Charles Waterstreet, who some suggest is the inspiration for the ABC series *Rake*, in a newspaper article in 2009²⁰ he wrote following the suicide of a colleague, said that although lawyers gather in firms and chambers, the work is really that of the individual. The agonies of decisions, contradictions, choices, clashes and, he added, taxes, are all for the lawyer's own head to work out.

I turn to the essential nature of the work. This aspect assumes some significance in my theory of the career in conflict, although it can be shortly outlined. An American proverb²¹ has it that two attorneys can live in a town, when one cannot. That is rather eloquent. My point is that the lawyers' work entails involvement with, and dealing in, conflict. That is obvious in contentious matters. Lawyers speak of being "against" another lawyer, or the other lawyer being "on the other side". That underpins the environment of the workplace. Lawyers act as agents; they argue and do battle for their clients, against other lawyers and their clients. Letters and emails are constructed, conversations had and arguments made, all designed to advance a cause, gain an advantage over the opposition; ultimately to win or succeed in getting what was wanted. There is close vicarious involvement in the client's affairs. Wins are celebrated; losses are felt and mourned. Within that continuing environment of conflict, there is often conflict with the client, whose demands and expectations may be unreasonably high or ill-founded. The same can be said for many non-contentious legal matters, such as commercial dealings and

²⁰ *Beaten Black and Blue*, Sydney Morning Herald, 8 April 2009.

²¹ Noted in *The Facts on File Dictionary of Proverbs*, R Fergusson, Facts on File Inc, 1983.

even property transactions. Charles Waterstreet described the nature of the work as '*combative, nit-picking and negative*'. Law is a career in which direct conflict or battle with opposing forces is the nature of the job, and what lawyers are paid to do. That is the whole work environment. The work creates high demands, high expectations, and often a high level of anxiety or fear about the consequences for the client of failure, and in turn how that reflects on the lawyer involved. Lawyers are imbued with a combative attitude embracing offence and defence; perhaps a general siege mentality. It is almost impossible to shed this persona. Turning the key in the front door of home at night might open the door but does not necessarily turn off that underlying feeling of involvement in conflict.

Within this constant environment of conflict, other work issues lurk. The *Courting the Blues* report, in addition to competition, style of legal thinking, and particularly stressful work, refers to short-term billing as a constant preoccupation and an ongoing source of high levels of stress. To achieve set targets of billable hours, many long hours are needed. Lifestyle suffers as a consequence, and there is further internal conflict because lawyers have to make many decisions as to what should be billed to the client and what should be ascribed as professional development. Additionally, and more generally, the nature of practice is changing. There is now a conflict between old fiduciary-based ethical principles on which the profession is based, and modern mercantile profit-driven business objectives. This tension has been more acute as firms grow larger and more profitable; some with international reach. Some firms have become listed companies. This tension, not totally confined to large law firms, raises a number of ethical questions. The general issue is one which has gained attention from regulators and ethicists, and I

note that the Australian Academy of Law is to hold a forum next month, entitled *Ethics in the practice of law: a profession, a business or both*.

I should make particular mention of the position, in all of this, of new lawyers. Their position was succinctly put by Lewis and Kyrou in their underrated book with the understated title, *Handy Hints on Legal Practice*, first published in 1985²². They observe that many new lawyers believe, amongst other things, that they were nigh on illiterate when it came to drafting correspondence or documents, that partners never made mistakes, that the junior office staff knew more than they did, that if a matter had the potential to go wrong, then it would, and they would never really find out what legal practice was all about. Helpfully, the authors set out what they call a 'survival kit' to assist in the early days of practice.²³

There is no doubt that the early days of practice can give rise to greater feelings of conflict. At a general level, there can be a feeling of bewilderment. There can be a sense of disconnection between so many years of academic studies and what practice requires. Being constantly given very routine and boring tasks is common. New lawyers are often given the bottom file in someone else's too hard basket. As to this file, borrowing somewhat from what Sealy SC²⁴ warned Legal Practice Course students about some years ago, inevitably, the client is a frequent telephone caller who is very particular about the pronunciation of his inevitably unusually spelt name. The file is inevitably tattered, bulging at the seams, torn, and festooned with sticky tape. Inevitably

²² G Lewis & E Kyrou, Law Book Co, 1985.

²³ G Lewis, E Kyrou & A Dinelli, *Handy Hints on Legal Practice*, 3rd ed, Law Book Co, 2004, at 449-451.

²⁴ Leigh Sealy SC, barrister; Solicitor-General for the State of Tasmania 3 March 2008 – 16 May 2014.

there is evidence of many practitioners having looked at it over the years, without the matter being advanced. Inevitably the pleadings were signed by someone who is dead, or a Supreme Court judge, and inevitably the claim is for a trifling amount, with the applicable law seemingly impenetrable. I add that the delivery of this file is often accompanied by a look of amusement, and the conduct of the file is seen by the giver as a rite of passage.

The final section in this part relates to the players in the legal workplace. I have already mentioned clients. It has often been said that legal practice would be very enjoyable without them. I say no more. To a large extent, lawyers are no different than many other workers. There are the usual workplace issues. On a daily basis, lawyers can be in conflict with their employers or partners, and with fellow employees about work-related issues. The usual type of personal issues can intrude, such as harassment, bullying, gender equality and the like. But I want to focus on lawyers not within the same workplace; those who are on the other side of matters. I do not restrict this to litigious files. This arises in many areas of practice, be it private, government or corporate. You might think that the external pressures on the profession would make lawyers a close and supportive group. As I mentioned earlier, to an *extent* that is correct. At the same time however, when support might be expected, not much is forthcoming.

In 2014, the prominent Melbourne barrister, Robert Richter QC, when speaking about depression in the profession, and his own struggles with anxiety, said that the Bar was a 'cesspit of gossip', an observation with which I have to

agree. He also said²⁵ that it was a 'war zone', the profession being a combative one where no one is permitted to show anything but invincibility. I think it must be said that there is an appearance of the profession being something of a wolf pack, turning on the apparently weak and vulnerable among its members. More particularly, a by-product of the nature of the work – acting against other lawyers – is that it provides the opportunity for some lawyers to demean, belittle and bully others in exchanges over the matter in which they act. This conduct is mostly confined to older lawyers, but not exclusively so. The perpetrators are usually serial offenders, and become well known. This additional conflict can have serious consequences for the victim in terms of career and mental health. Reluctant to speak out and appear weak, they suffer in silence. Some are able to ignore it, some seek shelter in less contentious areas in the law, others leave the profession altogether. There is no doubt that this problem exists, and it is largely ignored beyond story telling in bars and at legal dinners.

In this State, the definitions of 'unsatisfactory professional conduct' and 'professional misconduct' both refer to standards of competence and diligence. It is accordingly very doubtful whether this type of conduct is amenable to disciplinary proceedings on those bases. It may be that the common law definition of professional misconduct, disgraceful or dishonourable conduct as a practitioner²⁶, could be satisfied in a very serious instance, but I have not been able to find any cases where the issue has arisen. Bullying of clients has been mentioned in connection with allegations of misleading conduct, but bullying of other lawyers does not seem to have been

²⁵ *Judge tells of depression struggle in bid to help many in legal circles*, The Age, 14 September 2013.

²⁶ See for example *Law Society of Tasmania v Turner* (2011) 11 Tas R 1 at [44].

dealt with as such. In any event, the factor adds an unnecessary level of conflict to the conflict inherent in the work environment.

A similar problem exists in the form of judicial bullying. Performance anxiety is something that can affect lawyers who are involved in face to face presentations and negotiations, but no doubt far more often occurs in the context of appearing in court. That is bad enough to deal with, without fear of a verbal battering from the Bench. In an article in the *QUT Law Review* in 2014²⁷, former Justice Michael Kirby, spoke of judicial stress and judicial bullying. He did so in the context of the increasing attention to, and concern about stress and depression among law students and legal practitioners. He set out a number of examples of bullying by named judges that occurred in the High Court and in the New South Wales Court of Appeal in the 1950's & 60's. I would mention the case of a Tasmanian judge in the 1960s and 70s, Sir Peter Crisp, who became quite well known for ill-treating lawyers appearing before him. Former Tasmanian Chief Justice and later Governor, William Cox, alluded to this in two speeches, one in 1993, and another in 2001.²⁸ Although a light hearted address, in the second speech he referred to the judge's apoplectic responses to counsels' blunders. The counsel he referred to were Peter Underwood²⁹ and himself. Sir Peter Crisp retired a few years before I started practice, but stories still abounded. It was something of a standing joke that Sir Peter had turned many good young aspiring advocates into very good commercial lawyers.

²⁷ The Hon Michael Kirby AC CMG, *Judicial Stress and Judicial Bullying*, (2014) 14 *QUT Law Review* (No 1) 1.

²⁸ The Hon William Cox AC RFD ED, *Crossing the Bar: Legal bric-a-brac and other oddities*, WJE Cox, 2012 at 42, 80.

²⁹ The Hon Peter Underwood AC, former Chief Justice and Governor of the State of Tasmania.

Michael Kirby's article, along with anecdotal evidence, would suggest that the problem of judicial bullying is not now as bad as it once was, although Kirby detailed steps which might be taken to deal with it. I think judges are now more conscious of the issue. The AJIA's Guide to Judicial Conduct³⁰ stresses the importance of judges to maintain a standard of behaviour in court that is consistent with the status of judicial office, and the desirability of personal attributes such as courtesy, patience and tolerance. Nonetheless judicial bullying or perceived bullying is an aspect of conflict that needs to be borne in mind.

I have spoken of law students, and of practising lawyers; I speak now of judges. Although not in the direct conflict experienced by practising lawyers, and above the fray, they do have to decide who wins and who loses. That is very often decided by an assessment of credibility; often a difficult task. More broadly, there is always the conflict created by reserved decisions. There is the pressure to produce the judgment within a reasonable time, and the conflict that produces in relation to time management and the desirable depth of research and analysis needed for the decision. Judicial officers in lower courts are under great pressure to deal with many matters quickly. There are other aspects of conflict in judicial life. An inequality or perceived inequality of workload can create resentment and frustration. I have spoken of judicial bullying of lawyers. Of course, I do not speak in relation to the Court of which I am a part-time acting member, but there has been public discussion of a form of bullying of judges by other judges. In an interview on his retirement in 2008³¹, Justice Ron Sackville spoke of the personally offensive language

³⁰ Fn 14, at [4.1], 17.

³¹ The Australian, 18 April 2008.

used by the High Court and other appeal courts when dealing with judgments of courts below. This issue had been raised the previous year by the then president of the New South Wales Court of Appeal, Justice Keith Mason.

Justice Sackville observed that what was not needed were gratuitous insults directed to trial judges or judges of intermediate appellate courts, something he said that all courts, including the High Court, needed to bear in mind. I think that must be particularly so where the appeal court is drawn from the same judges who act as trial judges. In addition to this form of intellectual snobbery, no doubt there are other perhaps more subtle forms of conduct by a judge directed to a member or members of the same court that might create conflict or tension. I will leave you with an example of the sort of thing I have been talking about. It is from the New South Wales Court of Appeal; a judgment of Meagher JA, or 'Roddy' Meagher as he was known; now deceased. The matter related to the costs of an appeal which had been resolved by majority decision, Meagher JA dissenting. His Honour said:³²

In this matter my brethren allowed the appeal. The parties do not understand what they meant. Everyone is now wallowing in a state of confusion which would not have arisen had the appeal been dismissed, as it should have been. I do not care what (if any) further orders are made, but will acquiesce in any order which appeals to my brethren.

³² *Acron Securities Ltd v Iliffe (No 2)*, unreported, New South Wales Court of Appeal, 26 June 1997.

The guidelines of the Tristan Jepson Memorial Foundation are intended to support lawyers and others working within the profession to raise awareness of mental health issues, and to understand initiatives and methods of management that assist in the creation and maintenance of psychologically healthy and supportive workplaces. In defining a psychologically safe workplace, the guidelines highlight the need for managerial and collegial respect and support for those who suffer, for the encouragement to speak about one's suffering, and for the provision of facilitation of treatment and remediation. The work of the Foundation can only be wholeheartedly endorsed.

As I have indicated, I do not contend that some of the types of conflicts I have mentioned do not exist within other occupations. But it seems to me that with the legal profession, it is the presence of multiple areas of conflict and the cumulative effect of those that is important. I trust that this hopefully not too random collection of thoughts might assist in highlighting the importance of the work of the Foundation, and of the use of its guidelines.

Thank you Your Excellency and Mr Warner for being our hosts. Thank you to the Foundation for asking me to speak, and thank you very much for coming, and for your attention.