

QUT GRADUATION CEREMONY FOR LAW AND BUSINESS ⁱ

5 APRIL 2005

John Briton

Legal Services Commissioner

Chancellor, Major General Peter Arnison

Acting Vice Chancellor, Professor Arun Sharma

Other members of the official party

Distinguished guests

Graduates

Ladies and Gentlemen

This is a significant occasion especially for the graduates among you and your significant others. Let me say at the outset how privileged and pleased I am to have been given the opportunity to speak to you.

My job is to deal with complaints about the conduct of solicitors, barristers and law practice employees. The Commission investigates alleged unsatisfactory professional conduct and professional misconduct and, when the evidence warrants it, prosecutes apparent offenders. Practitioners who are found guilty can find themselves subject to penalties ranging from reprimands through fines and the like to being suspended or barred from practice.

It's a job that gives me an interesting window on the profession, all the more so given that I am not myself a lawyer. That is neither a good thing nor a bad thing in itself but it means I am looking in from the outside as it were, naively perhaps but uncluttered by allegiance. I want to share with you some of what I see and to develop some themes that are as relevant to graduates in business as they are to graduates in law.

I am struck, firstly, by the way lawyers talk about themselves and, frankly, wrap their profession in glory and by implication of course themselves. Consider the following

characteristic examples, all of which I've taken from a recent speech by the Hon. Justice Paul de Jersey, Chief Justice of the Supreme Court of Queensland. He is a person for whom, I might add, I have a deep respect and not just for his position but for his intelligence, integrity and generosity.

The Chief Justice reminded his audience that the *Legal Profession Act 2004* says 'a person is suitable for admission... as a legal practitioner only if the person is a fit and proper person' and he noted that the requirement simply restates a criterion 'of ancient lineage'. He quoted Lord Bolingbroke's description of the legal profession in 1739 as 'in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and the most pernicious'. He went on to quote Lord Maugham's later observation that 'lawyers are the custodians of civilisation, than which there can be no higher or nobler duty' and then from a contemporary textbook, as follows:

'...throughout the ages the law has ranked as a high calling because... at its best it calls for the highest qualities of character and intellect. At the same time, lawyers have always been the object of criticism and sneers; for they do not all attain the highest ethical standards expected of them and those who fall short are condemned even for conduct which is condoned, or in a way admired, in other callings'.ⁱⁱ

The graduates in law among you will be familiar with rhetoric of this kind. The graduates in other callings, on the other hand, who like me owe no allegiance to the profession, might well be tempted to find it pretentious, even conceited. There is some truth in that, it seems to me, but the rhetoric has merit, too, for reasons I will get to shortly.

In any event, the reality, as the Chief Justice readily acknowledges, is much more prosaic: he says 'absent past infamy, misconduct or incapacity, fitness will generally be presumed'. Similarly, the fact with few exceptions is that the lawyers who are barred from practice after admission or who suffer some lesser disciplinary consequence for proven misconduct find themselves in that position not because they failed to meet some peculiarly high ethical standards but because they failed to meet ordinary and everyday standards of fairness and decency that apply equally to all of

us. They all have a story to tell, of course, but for the most part and not to put too fine a point on it they were proved to be thieves, liars, cheats or bullies who were motivated by good old-fashioned self-interest and greed. Their failure was not that they breached some esoteric standards they learned during their undergraduate or subsequent professional training in legal ethics but values they learned at the bosom.

It's true of course that there are few if any other occupations that are as likely to punish, even exclude practitioners who transgress, or that have an infrastructure in place to enable them to do so, and in that sense the high-blown rhetoric is descriptive. The fact remains, however, that the standards of conduct themselves are the ordinary and everyday standards of fairness and decency, and indeed something of a lowest common denominator at that. The profession's high-blown rhetoric impresses in this sense as fundamentally (and rightly) exhortatory – as bringing some peer pressure to bear in support of an essentially unenforceable expectation that practitioners behave themselves better than by not behaving badly. We would be right to expect the same of people in other callings, too.

This brings me to my second point. I am struck by the distinction lawyers draw in their narrative about themselves between the law as a profession and business. Some of them lament that the law has become a business as if, implausibly it seems to me, it wasn't ever thus. I take them to mean that the law was never *simply* a business and, regrettably, that lawyers used to be, but now are little or no more constrained by ethical standards in the pursuit of their self-interest than business people. Perhaps they are also lamenting the loss of collegiality in the increasingly commercialised dog-eat-dog world of much contemporary legal practice.

Other lawyers, however, appear to be untroubled by considerations of this sort and lament instead, for example, the regulatory constraints on their choice of business structure and the multiplicity of stamp duties and other imposts that impede their efficient access to cross-border markets. They appear to be relaxed about how the application of competition principles to the practice of law might impact their ethical standards.

There are myriad interesting questions in all this not least whether the professions are worth keeping.ⁱⁱⁱ The answer it seems to me is obviously yes, certainly if it is shorthand for lawyers organising themselves collectively to reflect on and decide what's important to them, their clients and the communities they serve and to inform and regulate their conduct accordingly.

In any event, I worry about the distinction between the law as a profession and business. The risk, if we 'talk up' the ethical obligations we are entitled to expect of professionals, is that we 'talk down' the ethical obligations we are entitled to expect of business people - and for that matter (if you're into these distinctions) of trades-people, shopkeepers, school teachers and everyone else.

The simple fact is that like everyone else I know I don't want business people to be thieves, liars, cheats or bullies any more than I want lawyers to be. I want business people to be constrained in the pursuit of their self-interest also. None of us want multi-national miners or for that matter the managers of local factories or plumbers to pour hazardous wastes into our, or anyone else's rivers and creeks, for example. Nor do we want manufacturers to promote and sell dangerous products, or to disown responsibility if they do. Nor do we want company executives borrowing and using up their employee's superannuation and other entitlements as if they were their own. These are some contemporary examples but the list goes on.

In fact most of us want business people no less than lawyers not only not to behave badly but to behave well. We want journalists and editors to inform the public, for example, and not simply to sell newspapers. We want architects and builders to build things of beauty not simply to comply with the codes. This list goes on, too. Luckily, we get at least some of what we want. We all want to wrap ourselves in glory, not only lawyers, and so leaders within these and other business sectors and occupational groups talk the talk and to varying degrees walk the walk to exhort themselves and their colleagues to noble purposes, or at least to hold the line.

They are right to do so, in my opinion, but it's as well to remind ourselves that there is a prosaic and everyday dimension to this sort of exhortation also. The heady language

of high ethical standards can blind us to some simple but beautiful social and personal values, including for example values according to which:

‘you should treat others as you want them to treat you. Be honest and fair. Show respect and compassion. Keep your promises. Here is a good rule of thumb: if you would be ashamed if your parents or spouse or children knew what you were doing, then you should not do it.’^{iv}

This brings me to my third point. I am struck by the way the disciplinary framework in relation to lawyers makes misconduct an almost exclusively personal responsibility of individual lawyers and only rarely a responsibility also of the law firms in which they practice. This is stark contrast to the laws that regulate some other aspects of our conduct in a civilized society and that are intended to raise the bar. The law in this and every other state and federally in relation to discrimination and sexual harassment, for example, makes employers vicariously liable for the proven misconduct of their employees and agents and even imposes a reverse onus of proof – they will be held jointly liable unless they can prove they took all reasonable steps to prevent their employees and agents from conducting themselves in that and like ways. Why shouldn’t law firms be similarly accountable for the greedy or otherwise unacceptable conduct of their employees, especially if it can be proven that the conduct can be wholly or partly explained by the corporate culture and / or the firm’s unreasonable expectations of its employees’ performance?^v

So what’s my point? It’s that many of you have just gone, or are about to go out into the worlds of law and business. No doubt you want to live ethically, including at work but, make no mistake about it, you are going to be sorely tested, every day: to tell a little lie here, to gloss over or stretch the truth there, to pad out your time sheet, to tip some waste down a creek, metaphorically or perhaps even literally - all to please your supervisors, to get an increment, to keep a client happy, to secure the repeat business, to make a quick buck. You might even get tested with a big lie.

You will all find your own ways to heaven or hell but at the risk of some hypocrisy here is my advice. Firstly, know the ethical rules. Know the codes of conduct, the regulatory frameworks and the like that apply to your line of work and honour them.

Don't believe for a minute, however, that alone will make you an ethical person. Set your sights higher than that. Believe in what you do, and take your beautiful social and personal values to work with you.

Secondly, reflect on what's happening around you at work, and to you. Acknowledge how powerful workplace culture can be and how you are being influenced by the 'system' and the people about you. Recognise when you find yourself admiring things you didn't admire before, or not being troubled by things that might have troubled you before, and ask yourself why. Make conscious choices. Identify who and what you admire in life, and try to be like that.

Thirdly, have a life. Work hard by all means but don't sacrifice yourself to your work. Remember, men and women alike, that you have ethical obligations at home, too – to your partners, children, parents and friends, and of course to yourself.

Thank you for listening. Congratulations on your success thus far; good luck in your chosen careers in future; and - dare I say it - be good.

ⁱ This is a slightly longer version of the speech on the night.

ⁱⁱ The Chief Justice quoted from G N Williams' second edition of Professor Walter Harrison's work 'Law and Conduct of the legal Profession in Queensland' in the course of giving the final lecture at the Bar Practice Course on 18 February 2005. His lecture was headed 'The 'fit and proper' criterion: indefinable, but fundamental' and is published in full on the Supreme Court's web-site (which can be found at <http://www.courts.qld.gov.au>).

ⁱⁱⁱ The Chief Justice of the High Court of Australia canvassed this very question in a speech to the Greek-Australian International Legal and Medical Conference on 31 May 1999 under the heading 'Are the professions worth keeping'. The speech is published on the Court's web-site (<http://hcourt.gov.au>).

^{iv} I have taken the quotation from an article by Patrick J Schiltz, 'On being a happy, healthy and ethical member of an unhappy, unhealthy and unethical profession', *Vanderbilt Law Review* (52) 1999, pp.871-951 at p.910. The remainder of my speech draws heavily on parts of that article which came to my attention only when Justice de Jersey mentioned it in a speech sponsored by the Queensland Law Society late last year.

^v cf Christine Parker, 'Law Firms Incorporated: How Incorporation Could and Should Make Law Firms More Ethically Responsible', *The University of Queensland Law Journal*, Vol 23, No. 2, 2004.