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Hon Justice David Angel

The Origin of Lawyer Jokes . . .

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Over the Christmas - New Year period discussion of the Commonwealth's National Legal Profession Reform (NLPR) project proceeded at quite a pace. While resolution of key issues such as trust fund structures for national practices, professional indemnity insurance arrangements and funding matters has not yet been achieved, I am more hopeful than previously that there is the possibility of acceptable outcomes for the Territory being achieved.

One of the issues that have figured prominently in the NLPR discussions is that of disciplinary structures and "consumer" (i.e client) complaints. This was the issue that the Commonwealth led off on in the NLPR debate. The Commonwealth Attorney-General was frequently on the record stating that existing legal disciplinary and complaint structures were perceived as inadequate. "Caesar judging Caesar" was the phrase frequently used. The criticisms seemed to find some support in the media, in particular *The Australian*. These criticisms led to suggestions that reform of the profession should be based around a regulatory body appointed by the Executive government and with only limited professional membership. The notion of an "independent" legal profession being subject to regulation by the Executive government of the day alarmed many and much discussion ensued. Without going to the detail of these suffice to say that the proposal apparently under consideration would appear to allay many of these concerns.

However the speed with which these proposals gathered momentum is notable. The Attorney appeared to have represented popular opinion: to have struck a chord of popular dislike and distrust of lawyers. Now this statement may seem to be too obvious to make. Popular disapprobrium of the legal profession is manifested in many ways: the common lists of the most (un)popular professions will usually have lawyers down somewhere near used car salespeople, debt collectors and politicians (and there lies another story); the endless string of lawyer jokes – which somehow frequently have us associated with some or other species of fish. One reference I found recently in popular fiction has such a strong taste of spleen about it that I thought it was worth sharing.

The following is a passage from Bernard Cornwell's book *Sharpe's Havoc*. A young Portuguese volunteer Lieutenant has just saved the hero, Sharpe, from certain death at the hands of the French:

> 'I am a lawyer *senhor*.' 'A lawyer!' Sharpe could not hide his instinctive disgust. He came from the gutters of England and anyone born and raised in those gutters knew that most persecution and oppression was inflicted by lawyers. Lawyers were the devil's servants who ushered men and women to the gallows, they were the vermin who gave orders to the bailiffs, they made snares from statutes and became wealthy on their victims and when they were rich enough they became

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> politicians so they could devise even more laws to make themselves even wealthier. 'I hate bloody lawyers' Sharpe growled...

Given the traction achieved by the Commonwealth Attorney in NLPR and the other indicators I have mentioned it would seem that lawyers have not fared much better in the 200 odd years since the fictitious Sharpe formed his views. What has always intrigued me is "why?" Why do lawyers get such a bad rap? Shouldn't lawyers be seen as the guardians of the rule of law; the champions of freedom and the facilitators of legitimate business? Obviously we should, but just as obviously we're not. So again I ask myself why?

A number of reasons spring to mind. First of course is the nature of the litigious process. In the nature of litigation there will be a winner and a loser. The winner will be happy (or happier than the loser), the loser will be unhappy (even if they do pause to reflect on the essential fairness of the process, which is unlikely). For a start then, in a litigation context, at least half of our clients are going to be unhappy. Not a promising start. Nor should we assume the "winner" of litigation will be happy either. They may not have "won" to the extent they wished or possibly they may be dismayed at the time and cost taken to achieve their victory. Delay in litigation can arise for a number of reasons: a shortage of court resources; inefficient pre-trial civil procedure; inefficient counsel or instructors to name but three. Cost is often closely related to time and also likely to be affected by both inefficient pre-trial civil procedure; inefficient counsel or instructors.

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- *dissatisfaction with the quality or cost of the practitioner's services."*

A similar situation arises even in a non-litigation context. A non-litigious client may be dissatisfied for a number of reasons similar to their litigious counterpart. They may be unhappy with the state of the law (I'm sorry Ms Bloggs you just can't use Mindil Beach as a toxic waste dump). They may be unhappy with delay caused either through institutional causes, delay caused by another party or delay caused by their own solicitor. Also, similarly to litigation, cost may be another cause of dissatisfaction, although the nexus between delay and cost may not be as strong as in litigation.

However, considering both the litigation and non-litigation contexts the causes of client dissatisfaction can be broadly categorised into three main areas.

These are:

- dissatisfaction with the state of the law;
- dissatisfaction arising from institutional factors;
- dissatisfaction with the quality or cost of the practitioner's services.

The profession's ability to control many of these factors is of course limited. Where there is clearly bad law, law reform submissions can be made. Professional organisations such as the Law Society working with appropriate agencies can achieve reform to institutional factors. The expedited pre-trial civil procedure being introduced to the Federal and Supreme Courts is an example of this. The main area under the control of the profession though, is our own behaviour.

In my experience of disciplinary

matters gained through service on Council a (if not the) main cause of client dissatisfaction with practitioner's arises from communication difficulties. These difficulties can manifest themselves directly as complaints of failure to communicate or indirectly, for example as complaints of failure to follow instructions, or complaints as to costs. Communication with a client is a matter under the control of a practitioner. However it is not a panacea. Given the other causes of client dissatisfaction noted above there is likely always to be a certain level of client dissatisfaction. This fact of itself though underscores the need to minimise other areas of dissatisfaction such as communication. A major factor in ensuring effective client communication is effective practice management generally. The link between effective practice management and client satisfaction is shown to some extent by the PII discount afforded to firms that have undertaken quality practice reviews.

All the above noted I must accept that there is nothing new in anything I have written thus far. Law Society's have been making law reform and institutional reform submissions since they were first formed. The link between effective practice management and client satisfaction has been known and acted upon (to a greater or lesser extent) for some time now. Despite this public support for the independent legal profession was so marginal at the end of 2009 that its very existence was threatened by executive control. Clearly the profession needs to reflect upon further factors under our control that affect our standing within the community. This need for reflection is the main objective of the column in this *Balance*. Beyond the need for reflection generally though is one definite proposal: the abolition of the rule of the billable unit.

To my mind, effective communication aside, if there is one single factor that is under the control of the profession that needs reform it is the billable unit. I don't immediately have the reference to hand, but as I recall the Productivity Commission once described the billable unit as "a reward for incompetence". The basis for this allegation can be understood – the longer it takes to undertake a task the greater the return for undertaking it. The response to this suggestion is to ask for an alternative. If not billable units then what? A number of alternative options or combinations thereof are possible. Perhaps at this stage though it is best to focus upon objectives. First, the fee structure should reward competence. Second, to the extent possible, cost certainty and transparency should be sought. Without necessarily advocating such a structure it should be noted that medical fees are calculated on a "schedule" basis. The schedule basis *does* achieve both these objectives. It is frequently criticised though for causing other distortions. A practice would surely be disinclined to take on complicated matters if the extra effort required by the matter brought no greater reward. Resolution of these matters is well beyond the time and space available to me here.

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Certainly though, I think it is a matter that as a profession we must reflect on if we are to remain truly a profession into the future.