# 'Let's Kill All the Lawyers'

Kenneth Sutton*

[In this, the inaugural issue of the *James Cook University Law Review*, it seems appropriate to include the inaugural lecture delivered by me as the Foundation Professor of Law of the Department (and subsequently the Faculty) of Law on 17 October 1991. Since that lecture was delivered, there have been developments in the law as one would expect, and as a result some of the matters raised in the lecture have lost their immediacy or have been overtaken by events. At this stage, it will suffice to make the following points. The public attitude to the legal profession has not softened in the intervening years, but has if anything intensified. In all the professions, concern at the lowering of ethical standards has been expressed by the governing bodies of those professions, and attempts have been made to inculcate in their members a greater appreciation of and the necessity to observe higher standards of ethical conduct. At the same time, the competition for the limited amount of legal work available has grown with the marked increase in the numbers qualifying in law, aided by the relaxation of the restrictions on advertising, the enactment of mutual recognition legislation providing for the recognition in other Australian jurisdictions of qualifications obtained in a particular jurisdiction, and the abolition of the distinction between the two branches of the profession achieved in such states as New South Wales. This move towards a practical fusion of the two branches of the profession has seen an enhancement in the status of solicitors and the appointment to judicial office from among their ranks. At the same time, barristers have been empowered to deal directly with clients, while the archaic rule preventing a barrister from being seen within the precincts of a solicitor's office has been abandoned.

While the costs of litigation remain high despite the recommendations of a Senate inquiry into the causes of such costs, the move towards contingency fees has gained added support, a move which in my view is to be deplored as encouraging 'ambulance chasing' and a reduction in ethical standards. The trend to plain English in legal documents and in legislation continues unabated and is exemplified by the passing in late 1994 by the Queensland Parliament of a new Consumer Credit Code in a

* BA, LLM (NZ), PhD (Melb), PhD, LLD (Qld); Dean, Faculty of Law, James Cook University of North Queensland, Townsville, Queensland.

much more easily understood form than its predecessor which is intended to act as a model (or 'template' in the current jargon) for other jurisdictions to adopt. Alternative dispute resolution has come into its own, with many members of the profession hastening to qualify as mediators and many University Law Schools adding a course in this area to their Law curriculum. Clearly, this program fulfils a need and acts as a counterweight to the high costs of litigation and the delays and technicalities inherent in the judicial system. Its popularity may mean that the courts will have to look to their laurels, lest a similar situation to that adverted to by Devlin J in *St John Shipping Corp. v Joseph Rank Ltd* [1957] 1 QB 267, 289 arises and the approach to the courts as the arbiter of disputes is abandoned by the majority of litigants in favour of a cheaper and more informal means of adjudication.

As forecast in the lecture, an amendment to the *Trade Practices Act 1974* (Cth) has now been enacted which extends in accordance with the 1985 European Community Product Liability Directive the strict liability of a manufacturer of defective products to the consumer for loss or injury suffered; while a further amendment has widened the applicability of the concept of unconscionability to include the conduct of corporations. Sections 51AA and 51AB of the Act prohibit a corporation in trade or commerce from engaging in conduct that is unconscionable, not only in connection with the supply of goods or services but also generally to the extent that such conduct is proscribed by the common law in Australia. The Fair Trading Acts of the various states have extended this prohibition beyond the acts of a corporation.

This survey of developments concerning the issues raised in my lecture is not intended to be exhaustive, but it does draw attention to some of the changes of significance which have occurred since this lecture was delivered.]

It is a fact of life that no one loves a lawyer. The sentiment is not new. As far back as 1594, Shakespeare in his *Henry VI* Part Two, put in the mouth of Dick the Butcher the suggestion: 'The first thing we do, let's kill all the lawyers', and this sentiment is as strong today as it was then, tempered perhaps only by the necessity to pay lip service to the abolition of capital punishment. Again, that 18th century literary genius Samuel Johnson is credited with the observation: 'I do not care to speak ill of any man behind his back but I believe the gentleman is an attorney.' In much more recent times, a prominent politician has described lawyers as self-interested whingeing hypocrites who deceive their clients to protect huge profit margins; a comment which is both acerbic and ill-informed but which strikes a responsive chord in the minds of the public. And then there is the proliferation of legal jokes in rather poor taste, such as the pronouncement that psychologists are now using lawyers instead of rats in their laboratory experiments, the reason being that there are more of them and there is no danger of growing to like them in time.

I have given considerable thought to the reasons for this antipathy to a profession of long standing, indeed one reputed to be the second oldest calling in the world, a profession demanding high skills and profound learning whose existence is essential at all levels of society. In a perfect world, perhaps there would be no need for lawyers, but human nature being what it is, there must be rules to govern the conduct of people living in communities, and as long as rules are required there must be someone to frame those rules, to amend them to meet changing circumstances and to interpret them. Tribunals must be staffed by those skilled in the art of cross-examination, in the exposure of mendacity and in the application of the rules of evidence. The record of lay tribunals in the early days of the colony of New South Wales, and in Russia and China during this century, emphasises the point that the administration of justice cannot be left in the hands of those with no legal training, for bias, prejudice, hearsay upon hearsay and rank injustice will characterise the decisions of such tribunals. Provision must be made for the defence of persons accused of some offence and for the adjudication of disputes. There must be trained personnel adept at representing an accused and strong and independent enough to challenge any usurpation of authority; indeed, a strong and independent legal profession is the last bulwark against the excesses of a rapacious Executive. I do not think that the importance of having an independent legal fraternity is recognised by the average citizen who cannot see beyond the alleged shortcomings of the profession and who does not appreciate the watchdog role played by the various Bar associations and law societies in the maintenance of civil liberties and the protection of the freedom of the individual.

These remarks underscore the obvious — that lawyers are essential in any community — but they do not indicate why they are so unpopular. In recent weeks, sections of the media have indulged in the popular blood sport of 'lawyer bashing', and it appears from the spate of correspondence that this exercise has spawned, that the main complaints against the profession rest on allegations of overcharging, negligence, delay and incompetence, coupled with charges of arrogance and an uncaring attitude from a profession which regards itself as above reproach and unanswerable for its ineptitude.

These charges are not, of course, unique to the legal profession, for overcharging, negligence, delay, incompetence and arrogance exist in other callings. Nothing very much can be done about arrogance — humility is not the gift of little men and there are as many little men in the legal profession as in other professions. The notion that existed when I was in practice that the practitioner was there to serve the public and not the other way around, seems in many cases to have vanished in the wake of the marble floors, chrome fittings and elegant furnishings of the modern office. In my day, the shabbier the office, the more Dickensian the surroundings, the greater was the aura of respectability that was felt to emanate from the firm, while satisfaction was gained from the notion that the client could not accuse the firm of inflating its costs so as to meet

the expense of outfitting the premises in a lavish way. Today, with the merger of firms into Australia-wide conglomerates, with the insistence on prestige addresses to fit the new image, and with a preoccupation, at least until recently, with the affairs of big corporations engaged in take-over bids, the major legal firms have had little time or inclination to woo the ordinary citizen with his relatively minor problems. The current recession may, of course, induce a change of attitude, but by and large the provision of legal services to the man in the street has been left to the minor city firms or their suburban and country counterparts.

Delay is a frequent cause of complaint, but delays which appear to stem from negligence or incompetence may not in fact be due to such behaviour and in this connection legal practitioners may be to blame for their failure to communicate with their clients and explain clearly what has been happening and why a delay has occurred. Such lack of communication is productive of much misunderstanding between solicitor and client. If in the client's eyes there is evidence of negligence or incompetence and he complains to the local Law Society, he is liable to get little sympathy from that body, while the solicitor against whom his complaint is made may threaten him with legal action if he persists in his allegation. If he takes his case to another solicitor, the latter will be reluctant to take any steps against his fellow practitioner, no doubt on the ground that there but for the grace of God go I, a feeling which is understandable, but which is of small comfort to the client who is entitled to have his legal rights, be they real or imagined, tested in court. It is little wonder that, rightly or wrongly, the man in the street feels that the legal profession is protecting its own and that there is no one to whom he can turn to seek compensation for legal malpractice. What is needed, in my view, is either a major overhaul by the profession of its self-regulating mechanism whereby incompetent or negligent practitioners can be called more readily to account and the sting is taken out of the accusation that the profession is both judge and jury in its own cause; or the appointment of an independent ombudsman to investigate complaints of overcharging, negligence or incompetence on the part of a practitioner, in much the same way that the banking industry has set up an ombudsman service to deal with complaints against banks.

It would need to be made clear, however, that the recommendations of such an official in a particular case would have to be implemented by the Law Society or other relevant body, otherwise he would simply be a paper tiger whose proposals could be ignored with impunity. Under the legislation governing the practice of law in their jurisdiction, various states have provided for the appointment of a so-called lay observer who must not, however, be a legal practitioner or an officer of the public service, presumably so that he can approach a problem from the point of view of the ordinary citizen. The function of this person is to monitor written complaints against practitioners or their clerks alleging professional misconduct or unprofessional conduct or practice, and to make reports and recommendations to both the Law Society and the Attorney-

General. These recommendations do not have to be implemented, and to date the experience of the lay observer, at least in Queensland, does not appear to have been a particularly happy one. An appointee who recently retired from the position has been reported as saying that he was not able to be of assistance to complainants in 95 per cent of the cases and that the post was one of frustration. This situation would, in my view, be obviated, first, if the lay observer were to be a retired lawyer with experience of practice and therefore able to understand the pressures generated thereby and whether legitimate reasons for delay or seeming neglect existed; and, second, if his recommendations in a particular case were required to be implemented by the professional body concerned. The risk that such an observer would be biased in favour of the practitioner would, I suggest, be small and his recommendations would tend to be more realistic than might be put forward by a layman.

The preferable approach, however, would undoubtedly be for the Law Society to establish a vigilant and effective complaints committee which would be sympathetic towards a member of the public who considered he had a legitimate cause for complaint, even though on investigation it was found to be without substance. If this were coupled with the power to discipline the incompetent, the indolent and the negligent, as well as the greedy and the fraudulent, and this power was used in all cases where professional behaviour fell below a reasonable standard, much of the criticism at present directed against lawyers would be muted.

It would not be stilled, however, for other grounds exist for the antipathy which is generally felt towards lawyers. There is the aggression displayed when letters of demand are written, with the whole weight of the law threatened to be invoked without further notice against the hapless debtor if he does not pay within seven days although he might have very good grounds for not paying the debt in the first place. There are the bullying tactics displayed by the ruthless barrister in court, seeking to brow-beat a witness into making a damaging admission in cross-examination. There is the spectacle of well-connected defendants, who can afford the best legal representation, being acquitted because of a loophole in the law or on a technicality discovered by counsel, such as where a breathalyser certificate is not properly signed or a regulation has not been properly promulgated. There is the sight of a bargain solemnly and sincerely made being rendered unenforceable because one term of the agreement is not included in the written document signed by the defendant. Justice is not seen to be done, and the result is disrespect for the law and for lawyers. And then there is the vague feeling of dissatisfaction which arises when a person emerges from a legal office with nothing but advice ringing in his ears. He has no piece of paper prescribing some placebo for his malady as he usually would have had he been to his medical adviser; if he has a piece of paper at all, it is one outlining the fee he has to pay for that advice.

Dissatisfaction is not the word to use in describing the feelings of the party to a civil action who has lost the case. There must always be a loser

in such a situation and he will blame his counsel or the judge or the state of the law for his predicament, but he will never blame himself. The attitude is one of animosity to the law and all its works, while if the matter is a Family Court action involving questions of custody and the like, animosity turns to hatred and even the lives of judges are at stake.

Two of the greatest causes of animosity towards the legal profession are the fear of the unknown and the high price of justice. The fear that once a person tangles with the law he will find himself in uncharted waters and may well founder in a sea of legal technicalities and unbridled expense has an impressive lineage. In Shakespeare's *Henry VI* Part Two, following on Dick the Butcher's incitement to genocide, Jack Cade remarks: 'Is not this a lamentable thing ... that parchment being scribbled o'er should undo a man? Some say the bee stings; but I say 'tis the bee's wax, for I did but seal once to a thing and I was never mine own man since.' The rule that once a signature has been placed at the foot of an agreement the signer is bound by its terms even though he does not know what is in the body of the document, is based on sound reasoning, for if a man could deny his signature it could never be known when a contract had been formed. But the rule that a contract is a contract is a contract, has been tempered in recent years by the notion of unconscionability, by the recognition that in the modern world contracting parties are frequently not in an equal bargaining position and that some protection should be afforded the end-user of goods and services who is compelled to agree to terms of supply which are extremely favourable to the supplier. As will be seen later in this lecture, principles have been developed enabling a party to escape from a contract if it would be unjust or unfair to hold him to it.

The fear that once a person has signed a document he has irrevocably committed himself in a way unintended or unforeseen, is based on ignorance of the law and on the knowledge that such ignorance is no excuse. Once again, that principle is based on sound reasoning, for if it were otherwise the vast majority of defendants would be able to plead it as a defence. The solution that has been advanced is that all the laws should be couched in simple everyday words so that ordinary people could understand them, and in this way the perception that law is a minefield laid in a jungle of jargon into which the ordinary man ventures at his peril would be countered. I venture to suggest that this solution is an oversimplistic one and that plain English, while a step in the right direction, is not the panacea for all legal ills that it is supposed to be. Let me give a couple of examples of legislative provisions couched in plain English. Section 52 of the *Trade Practices Act 1974* stipulates that 'a corporation shall not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. Those words appear simple enough, but the section has been the basis for an enormous amount of litigation since it was enacted, with courts being called upon to construe 'in trade or commerce' and to ascertain what is meant by 'misleading or deceptive'. In the latter case, there has been considerable debate as to the test to be applied. Is it

that which would be likely to mislead a person in the community with only very limited intellectual ability (that is, the lowest common denominator test applies), or is the standard that of the mythical reasonable man with average intelligence, or again, is the test to be related to the average person within the particular group at which the conduct is aimed? The second example is s. 21 of the *Insurance Contracts Act 1984* which sets out the duty of an assured person to disclose certain facts to the insurer when he takes out insurance cover. The assured is required to advise the insurer of matters known to him which a reasonable person in the circumstances could be expected to know to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms. The English is plain enough, but I venture to suggest that the ordinary person who wishes to insure his house is none the wiser after reading that provision than he was before it.

In short, the plain English campaign is of limited value; the words have still to be interpreted by the courts to define their scope. English is not as precise a language as Latin or French, and complicated drafting is required to endeavour to cover gaps or loopholes or possible ambiguities which can be exploited by clever lawyers. The situation may, however, be alleviated to some extent by the recent changes in the rules of statutory interpretation whereby the literal rule has given way to the canon of construction known as the purposive rule, so that that interpretation is to be adopted which promotes or achieves the purpose of the Act. Greater weight is thus paid to the objectives sought to be achieved than to the language used. The crusade for plain English will not, of course, assist the average person in his understanding of the common law as opposed to statute law — in other words, those rules of law promulgated by the courts. A single case before the supreme appellate body in Australia, the High Court, might involve five separate judgments from five members of the Bench, all giving different reasons for coming to the same conclusion, and it is a difficult enough task for a trained lawyer to analyse each judgment and conclude eventually what he thinks are the principles of law established by the case, let alone expecting the ordinary person to be able to do so. To put the matter succinctly, difficult technical concepts cannot always be reduced to words of one or even two syllables, a fact which is true of any discipline, and not only law.

Perhaps the main reason for the unpopularity of the legal profession is the expense of justice. There is widespread dissatisfaction by the community with the law, because the expense of legal services is so great that the basic purpose of justice, to make it available to all, is not being achieved. The acid comment by one of the Lords Justices of Appeal in England at the turn of the century (I think it was Mathew LJ) that the Courts of Justice, like the Ritz Hotel were open to all, is as true today as it was at that time, and of course the feeling that the cost of justice was too high was nothing new even then, for two centuries earlier Voltaire had complained that 'I was never ruined but twice: once when I lost a lawsuit, and once when I won one', while Benjamin Franklin thought that the course of the

courts was so tedious and the expense so high, that the remedy of justice was worse than the disease of injustice.

Today, only the very poor who can satisfy the means test for legal aid and the wealthy can afford to pursue their rights through litigation, and as a consequence people abandon legitimate causes of action as too expensive to fight for. A claimant knows that he will have to pay $1,000 a day as a minimum for a reasonably competent barrister, while if the other party briefs a silk, he will have to do likewise and face a payment of $3,000 to $6,000 a day or more to compete with the opposition. If he loses his case, he will be called upon to meet not only his own legal expenses but those of the successful litigant as well. And even if he wins the battle, he may lose the war. A cleverly timed company liquidation or personal bankruptcy can leave a successful litigant lamenting at the prospect of no assets possessed by the other party with which to implement his hard-won judgment. In one particular case in New South Wales, the owner of a newly constructed house obtained judgment against the builder for a $4,000 claim together with costs of $22,000, but the victory turned to ashes when the builder promptly went into liquidation with no assets with which to meet either judgment or costs. A Pyrrhic victory indeed, which could possibly have been avoided by obtaining beforehand an order for security for costs, but that is being wise after the event.

If to these hazards of litigation is added the expense of pre-trial manoeuvres, of orders for discovery and interrogatories, of delay used as a time-honoured tactic if such is perceived to be of advantage to one side or the other, it is no wonder that recourse to the courts is seen as a last resort. Indeed, the expense involved is frequently used as a bargaining counter by a financially strong adversary to force a disadvantageous settlement or the abandonment of a claim by his opponent. An example of this ploy is to be found in the insurance field. An insurer may take much longer than is reasonable to investigate a claim and then decline to pay without giving any reason for the rejection. The assured must establish his right to an indemnity by a costly suit and only then will the insurer be forced to pay the claim plus costs and interest at 13 per cent. This tactic is sometimes justified on the ground that the claim is suspected of being a fraudulent one, but the insurer is judge and jury in his own cause, always a situation to be deplored, and too often the tactic is used to defeat a proper claim.

It is, of course, always easier to state a problem than to advance a solution for it. Some of the costs of litigation are avoidable and some are unavoidable. A litigant does not have to select the best representation available, but if he wants the best that he can get he must be prepared to pay for it, because pre-eminent skill and reputation will always command a high price. Much will therefore depend on the advocate selected by the client or on the firm of solicitors chosen by him to give advice. And while fees appear to be relatively high, they cannot compare with the earnings of top-ranking sporting personalities, rock-stars or television announcers. The problem is that the average citizen is more concerned with and

affected by the cost of legal services than with the earnings of a golf or tennis player through sponsorship and the like. And, of course, two wrongs have never made a right. One practice which has emerged in solicitors' offices in recent years and which in my view is to be deplored is that which requires employees to complete time sheets accounting for every ten minutes of their time. This practice has assisted in inflating the cost of legal services and is, I suggest, quite inappropriate for legal firms, which should not be run on the same lines as the business of a plumber or motor mechanic.

When companies start insuring against the possibility of incurring large legal fees in litigation (which is at best a lottery and at worst the road to bankruptcy), when a graduate in law of three years' standing could, at least up to the recession, earn more than the law teacher who taught him, then something is wrong somewhere. The basic propositions with which no one I think would quarrel are that the lawyer is entitled to be reasonably remunerated for his services and that market forces, the law of supply and demand, should operate to determine what is a reasonable rate of remuneration. Encouragement of competition and greater relaxation of the rules on advertising should be the order of the day, although I hope I shall not see the time when a commercial announcement on television assures its listeners that 'Legal fees *are* too high, but not at John Doe's'.

There are unavoidable costs in litigation. Thus, state government charges for filing and processing necessary documents can border on the rapacious but they are unavoidable; while costly delays not due to dilatoriness or incompetence on the part of a practitioner are inherent in the judicial system. One can never be sure how long a civil action will last or, indeed, if it will even begin, for the action may be settled at the door of the court and the resulting gap in the court calendar may not be able to be filled at once. And even if the parties are ready to proceed, a shortage of judges and a policy of giving priority to criminal trials and to appellate cases may exacerbate the situation for commercial litigants. Delay is an intractable problem in an adversarial system and the answer may lie in reforming judicial practice and procedures, in having more pre-trial conferences to refine the issues, even in fact abandoning the adversarial system in favour of the inquisitorial system of the civil law. I know of no real study that has been undertaken in this country on the advantages or disadvantages of the civil law approach, but it seems to me that the time may be at hand to abandon the adversarial system of the common law where the judge sits aloof from the fray as a sort of umpire to ensure that at least the rules of evidence are observed and that proceedings do not degenerate into a dog-fight, while the palm of victory more often than not goes to the advocate with the silver tongue and the ability to think more quickly on his feet than his opponent. Whether justice as the man in the street would see it is achieved is, of course, merely fortuitous.

While the effect of high costs in discouraging litigation is generally regarded as deleterious, this is not invariably so. In the United States, where the party who loses an action does not have to pay the costs of the

winning side as well as his own and where the concept of the contingency fee is recognised and applied, the litigiousness of the average citizen is notorious. The principle whereby a lawyer bargains for a substantial percentage of the damages awarded if his client wins the case, but gets nothing if the case is lost, has a superficial attraction but it runs counter to the notion that a labourer is worthy of his hire and that services rendered should attract a reasonable reward. The principle would also encourage a 'win at all costs' mentality, with a consequent deterioration in ethical standards to the detriment of both the law and the community it serves. A better approach, in my view, would be the adoption of the concept of contingent legal aid fees whereby a plaintiff who is considered by a legal panel to have a good case is advanced a substantial portion of his costs on the basis that if he succeeds, he will refund the advance together with a premium. Properly administered, the scheme should be self-funding in a reasonably short period. I understand that the plan has been considered in certain quarters of Australia, but I think it is unlikely to be implemented in the foreseeable future.

It is a generally accepted view that if the legal profession's restrictive trade practices were reduced or eliminated and legal services rendered more competitive, the present high costs of litigation would be reduced. I think that is true, but the reduction might not be as marked as the advocates of such a course might expect. Certainly, the elimination of the dichotomy in the profession between barrister and solicitor that exists *de jure* in Queensland and New South Wales and *de facto* in Victoria, and the emergence of a truly fused profession in those states, as in Western Australia, South Australia and Tasmania, would be a step in the right direction. Those members of the profession who wished to practise solely as barristers should be entitled to do so in partnership if need be, but there should be no requirement that they alone should have the right of audience in superior courts, that as members of the so-called senior branch of the profession they should take precedence over solicitors in interlocutory matters and that appointment to judicial office should come solely from their ranks. Barristers would deal directly with the public, and the double imposition of costs by both solicitor and barrister would disappear. Appointment of Queen's Counsel, or 'silks', would be eliminated and with it the archaic rule that the 'silk' could only appear with a junior who would receive two-thirds of the fee negotiated with his leader, a rule which, I might add, has been abolished in New South Wales for some years in favour of a negotiated fee for the junior barrister.

The result would be that all lawyers would be recognised as legal practitioners, specialising however in a particular branch or branches of the law if they wished. A necessary corollary of this would be that there would be no separate admission boards and no separate admission requirements for barristers and solicitors, to the considerable relief of heads of University Law Schools, not to mention their students.

A further reform aimed at encouraging mobility of the profession should be the establishment of uniform admission requirements through-

out Australia. The move towards national accreditation has been given impetus by the new federalism and by the High Court of Australia's strictures on restrictive admission practices in particular states aimed at protecting the local profession from external competition. The notion that a practitioner admitted to practice in one state should be able to pursue his calling without hindrance throughout Australia will, I predict, be accepted by the powers that be in the not too distant future, and the inevitable consequence of this will be that the content of the LLB degree, so far as compulsory or 'core' subjects are concerned, will also become uniform throughout Australia, for it is inconceivable that the Queensland admitting authority for example would continue to insist on 20 compulsory subjects as a requirement for local admission when a student, by doing half that number of compulsory units in New South Wales or Victoria, could be admitted to practice throughout the whole country.

If the proposal to fuse the profession is successful, the rules that a barrister cannot sue for his fees and that he cannot be liable for negligence will no longer be appropriate — if they ever were. The current position is that a barrister is not liable at common law for negligence in conducting a case in court or in making preliminary decisions affecting the way in which the case is to be conducted. Thus, if a barrister overlooks the provisions of a Royal Commissions Act rendering evidence given before such Commission inadmissible and as a result his client is convicted of an offence, the barrister is not liable for his carelessness. If he forgets that s. 74 of the *Trade Practices Act 1974* requires a contract for services to be performed with due care and skill, and as a consequence his client fails in an action for damages for breach of contract and has costs of $10,000 awarded against him, again the barrister is not liable. The rationale for this immunity is said to lie in the public interest and not the bestowal of any benefit on the barrister. The arguments advanced in support of the rule include, first, that if a barrister were liable for negligence, he would prefer the interests of his client and would be deflected from observing his overriding duty to the court on which the administration of justice depends; second, that the threat of litigation for negligence might have an adverse effect on the barrister's efficient conduct of proceedings in court; and third, that the recognition of a right of action for negligence would pose a threat to the finality of litigation. If negligence on the part of the barrister were proved, the re-trial of the original action would probably be inevitable and the result would be to prolong litigation to the detriment of the efficient administration of justice.

I suggest that of these arguments only the last one has any weight. I do not think that a barrister would ever be found guilty of negligence if he were to discharge his overriding duty to the court in preference to observing the wishes of his client. Nor do I think that the fear of being sued for negligence would adversely affect a barrister's performance in court. Other professional men manage to conduct their affairs in spite of such a threat, and the existence of a professional indemnity insurance policy can alleviate any distress that might be generated. The third argu-

ment is more difficult to counter. In a criminal case, any negligence by counsel would inevitably lead to an appeal and a possible re-trial of the action, but in a civil case justice could be served by a claim for damages against the barrister which could be met by his professional indemnity insurer without the necessity for further proceedings. I am not convinced that in this age of accountability, the public interest justifies immunity from suit of a barrister who has overlooked a piece of legislation vital to his client's case. The considerations of public policy expounded in the leading cases on the matter, in my view, do not outweigh the injustice involved in depriving a litigant of redress for 'in court' negligence committed by his counsel.

Of course, in the flood of legislation and reported cases cascading from the eight jurisdictions in Australia, it is not too difficult to overlook a relevant section of a statute or a judicial decision bearing on the matter, even in the age of computers, databases and indices of various kinds. This flood of legal material has a direct connection with the cost of justice, but before I consider that matter let me say this in relation to the proposals for reform of the profession which I have just advanced. I realise that some of these proposals are radical and that they strike a mortal blow at centuries of tradition inherited from England, but tradition alone in my view is not sufficient justification for retention of outmoded practices, and if their *raison d'être* is gone, their continued observance cannot be supported.

The law is a learned profession, and an adequate library is to the lawyer what the laboratory is to the scientist. Today, one million dollars is regarded as barely sufficient for a university to set up an undergraduate law collection containing essential sets of statutes, periodicals and reports, all of which have to be maintained as fresh volumes appear, sometimes annually and sometimes several times a year. The cost of maintaining these serials is horrendous. So far as the statutes are concerned, it has been estimated, I do not know how accurately, that in the period that the Hawke Government has been in office more than 8,000 separate pieces of legislation have been enacted by the Commonwealth Parliament, while in 1989 alone the New South Wales legislature passed 239 Acts. On top of this massive regulation, the numerous state and federal courts and tribunals charged with the task of interpreting these laws continue to promulgate their decisions and the reasons therefor at an ever expanding rate. The bound volumes of law reports appear with increasing frequency, and the practitioner, not to mention his academic counterpart, has to essay the endless task of trying to keep up with legal developments. Like Sisyphus he pushes the legal updating stone up the hill every year, only to see it roll downhill again as he reaches the top and a new year dawns. It is an utter impossibility to keep up with all the changes in the law, and reliance perforce must be placed on summaries in legal digests and law journals, on papers given by experts at conferences, on continuing legal education seminars, on LEXIS, SCALE CD-ROMS and other databases and on looseleaf services provided by specialists in the field. In sheer

self-defence, the practitioner is forced to specialise in a particular area of the law and in this connection it is of interest to note that both Victoria and Western Australia have introduced, while New South Wales is proposing to introduce, a scheme of specialist accreditation for practitioners. To date, accreditation has been limited to the areas of family law and local government and town planning law, but litigation, property and criminal law are seen as other areas having the potential for specialist accreditation in the future. Continuing legal education conducted under the aegis of local law societies has been a feature of the professional life of solicitors in practice for some time, with some state professional bodies such as New South Wales requiring as a condition for the issue of a practising certificate that a mandatory number of hours in such education be undertaken by solicitors each year.

It might be thought that a partial solution to the problem of keeping up with the changes in the law would lie in the promulgation of uniform laws throughout Australia. However, the history of attempts at uniformity has not been a happy one. Rightly or wrongly, the states have seen moves in that direction as an attack on their autonomy and have strongly resisted any perceived erosion of their sovereign rights. The view has been taken that uniformity is creeping centralism in disguise and that the more it succeeds the more the state becomes an irrelevance. Only in the last year or so, with the concept of the new federalism sweeping Australia in the wake of sympathetic state governments, has a fresh impetus been given to the notion of uniform laws, and currently moves are afoot for the eventual enactment of standard laws in such areas as criminal law, defamation, traffic laws and commercial regulation. Already there is a national Corporations Law replacing a so-called uniform Companies Act which had been so amended by each state as to be anything but uniform. A draft uniform Credit Bill has been issued to replace the various state Credit Acts, which themselves were supposed to be uniform but which after more than a decade of gestation turned out not to be so. The history of the Credit Acts shows the difficulties of achieving uniformity. With the promulgation of the Rogerson and Molomby reports on consumer credit in 1969 and 1972 respectively, the first steps were taken to abrogate the multifarious statutes dealing with the provision of credit and to replace them with a single all-purpose Act. This was followed by a national conference to consider the reports and eventually a draft bill appeared, but it was not until 1984 that New South Wales, Victoria and Western Australia enacted similar but not identical legislation, followed by the A.C.T. in 1985 and Queensland, last as usual, in 1987. South Australia had gone its own way in 1972. The so-called uniform legislation was some 12 years in seeing the light of day, it is not uniform and is about to be replaced by something hopefully standard, and it is one of the most complex enactments in the statute-book. It is difficult enough for a lawyer to understand it, let alone a layman.

But even if there is uniform legislation, it is liable to be interpreted differently by different courts. In the United States there are 51 jurisdic-

tions, and the differences in interpretation amongst the state and federal courts became so great that it was felt necessary in the early part of this century to issue a restatement on various aspects of the law. In Australia there are only eight jurisdictions, but the threat of discrepancies in interpreting statutes and in stating the law is very real. In truth, with a population of 17 million, this country is over-governed, over-regulated and over-judged. In the last 20 or 30 years there has been a proliferation of courts and tribunals of one kind or another. This has been partially due to the prevailing legal philosophies of those in power and to the consequent attempts at social engineering to implement those philosophies, while the legal philosophies themselves have either contributed to, or have derived their impetus in some measure from, current fashions in the law.

For there are fashions in the law. The trend in Australia has been to follow slavishly where the United States has led ten years before. Thus, both the reform of the law and the protection of the consumer were prominent issues in America before they became of vital concern to governments in Australia. Now, in this country, following the lead in the United States, law reform is *passé* — there are no longer any votes in it; consumer protection has had its day, although it is an unconscionable time adying, for there is a perception that there may still be some electoral support for it, despite the dawning realisation that you cannot successfully legislate for fools; and the current enthusiasm is for the study of environmental law, closely followed by alternative dispute resolution which is a rather grandiose title for an informal kind of arbitration foaled by high costs out of extended delays. There is this difference, however: that any settlement is achieved by negotiation and mediation, by agreement between the parties before attitudes have polarised, rather than being imposed upon them by an arbitrator after intransigence has set in. Coming rapidly down the straight is feminist legal theory, a concept which I have some difficulty in understanding but which I believe is concerned with the proposition that as statutes have been drafted by men, such enactments are inevitably discriminatory of women in their impact. I do not accept that conclusion. In my view, it will be a sorry day for law and legal scholarship in this country if such a concept obtains a foothold in Australian jurisprudence. It can lead only to division, dissension and discord.

It is my view also that too much attention has been paid in recent years to gender in the law. Let me state at once my wholehearted support for equal opportunity, for the principle that the best applicant should be appointed to a position, irrespective of gender. But having said that, I suggest that the pendulum has swung too far, that to have some bureaucrat in Canberra spending days or even weeks compiling a non-sexist style manual so that it is no longer acceptable to use such words as 'business man', 'mankind' or 'spokesman' is bordering on the absurd. It is equally ridiculous to regard as incorrect any reference to manning the lifeboat or to mastering the art of conversation, while those who object to the word 'chairman' are denigrating a word which, along with 'chairwoman' dates back to the 17th century and whose derivation is arguably

linked to the Latin *manus*, or 'hand', and not to gender — as indeed is the word 'manoeuvre'. Pope's immortal line 'The proper study of mankind is man' is, I fear, lost to this generation as is, no doubt, his whole *Essay on Man*, not to mention Shaw's *Man and Superman*, and the substantial number of other literary works which will have to be retitled before they can be removed from the index of prohibited books.

The question might well be asked: 'Do we have to go to such ridiculous lengths to emphasise the role women play in society?' Undoubtedly there is a place for human rights and anti-discrimination, but such legislation must be applied with moderation and commonsense, and it would appear from some reported instances that commonsense has not always prevailed in the implementation of the relevant statute. I realise that I am dangerously close to slaughtering a sacred cow of this generation, but it does seem to me that some of the time spent in investigating alleged discriminatory practices could be better spent in ensuring that business practices were within the law, that blatant violations of regulations were punished and that inadequacies in existing legislation were corrected. Some examples will illustrate the point. I understand that it was not until some seven years after the bottom-of-the harbour tax scheme was known to the authorities that the bureaucracy was induced to take action to curb its use, and the question is why it took so long. Again, in the climate of opinion of the last decade when the ruling philosophy was that greed was good, insider trading was rife, yet I believe that not one successful prosecution has so far been undertaken in Australia because of the inadequacy of the laws aimed at stopping corruption. New regulations have since been introduced, but they may likewise prove to be inadequate because of the difficulties of proof and the fact that most juries are financially illiterate and unable to follow the machinations of a clever financial manipulator. For the same reason, corporate raiders have been able to take over other companies and strip them of their assets to the considerable financial loss of minority shareholders who either realise too late what has happened or who cannot afford to take legal action against the raiders. The Australian Securities Commission has recently complained about the activities of entrepreneurs who use the resources of a company controlled by them to support other enterprises in which they are interested but which have no connection with the company concerned. The law is apparently inadequate to deal with this abuse of assets.

My point is that the expenditure of some of the time and money now allocated to advancing the causes of non-sexist language and affirmative action might be better spent in providing a more effective defence to the minority shareholder against corporate swindlers and confidence men.

I have departed somewhat from the theme of my address, but my thesis is that the proliferation of statutes and law reports, and the consequent flood of material which lawyers have to acquire and try to absorb, is a large element in the cost structure of a legal practice. The expense of attempting to keep up with the law is high, indeed the task is a well-nigh impossible one, and no prudent solicitor would dream of continuing in

practice without a professional indemnity policy to protect him. In some states, the necessity for such insurance as a condition of the issue of a practising certificate is compulsory, and the premiums are not cheap. The growth of the consumer-oriented society has led to the increased awareness of the community of the right to make claims, and the expansion of the boundaries of liability for negligence to include economic loss has resulted in greater exposure for professional people.

Nevertheless, the greatest factor in the high cost of justice remains the relatively high fees charged for legal services. I have suggested earlier that the labourer is worthy of his hire and the question is what is reasonable by way of recompense for the service provided. That must depend on the particular kind of service that is sought, and in this connection I would suggest that the complexity of the legal problems arising in the last decade of the 20th century, the complexity of the technology which almost weekly appears in some new form and the complexity of the legislation which is required to control this new technology will ensure that the services of the best legal brains in this country will never come cheaply.

The 20th century has witnessed a constantly expanding area of liability in the civil sphere, with recognition being given to the right of third parties to obtain compensation for purely economic or financial loss unaccompanied by physical injury or damage to property; with the abrogation in the field of contract of the doctrine of privity of contract so that third parties can sue on a contract made for their benefit; with a statutory liability being visited on a manufacturer who puts into circulation a defective article whereby the ultimate consumer or a person acquiring the article from him suffers loss or damage, even though there is no negligence on the part of the manufacturer; and with a supplier of goods to a consumer being under far more stringent statutory requirements in respect of the quality of the items he supplies than was insisted upon in the 19th century. Bare promises outside the setting of a contract are rendered enforceable to the extent necessary to prevent injustice arising, and a party who has given an undertaking but has made no contract to that effect will in certain circumstances be held bound as if he had made a contract. The crucial test is one of unconscionability — whether it would be unconscionable in the circumstances to allow the person giving the undertaking to go back on his word. Indeed, there is a school of thought that would treat the law of contract as today but a branch of the law of equity. This is a far cry from the 19th century with its rigid stance on the requirement of a bargain before a promise was regarded as enforceable.

The 19th century was also noted for its commitment to the view that parties were of equal bargaining strength and that a contract was a contract was a contract. The notion that held sway in that era, that one must not lightly interfere with freedom of contract, has, paradoxically with the expansion of the enforceability of promises, been eclipsed by 20th century notions of consumerism so that certain contracts such as one made by a door-to-door salesman can be set aside by the purchaser within a certain period of time, while legislation exists in at least one

jurisdiction in Australia whereby contracts can be abrogated if they contain harsh, unfair or unjust terms. Coupled with this is the all-embracing s. 52 of the Commonwealth *Trade Practices Act* to which I have already referred, which is mirrored in the Fair Trading Acts enacted by the states and which proscribes conduct that is misleading or deceptive or likely to mislead or deceive.

Liability under this head is almost open-ended; a case in point is the finding of Justice Morling that the Tobacco Institute of Australia had infringed the section when it denied in an advertisement that there was any link between passive smoking and the onset of cancer. Not only was the Institute's conduct misleading, but s. 52 was held to apply to an advertisement aimed at refuting criticism and thus protecting the market.

Examples of the expanding area of civil liability can be multiplied. That monument to incomprehensibility, the *Credit Act*, is one such example, but I shall confine myself to the proposed legislation on products liability. I have already mentioned the statutory liability of the manufacturer for loss to a consumer caused by defective products. This limited strict liability is expected to be extended later this year by amendments to the *Trade Practices Act* under which a consumer who proves he has suffered loss or injury which was caused by the product and was not due to his misuse of it, can recover compensation from the manufacturer unless the latter proves that the product was not defective or that, if it was, the current state of scientific knowledge was not such as to enable the existence of the defect to be discovered. Thus, the onus of proof that the goods are defective is reversed, with the manufacturer having to show that no defects existed. The result will be to extend the area of liability for the manufacturer which he can meet only by taking out product liability insurance — if he can obtain it. Frequently such insurance, if available at all, is obtainable at only a prohibitive premium and inevitably the cost to the manufacturer of his increased liability will be passed to the consumer by way of an increase in price. The end-users as a whole will pay for the losses suffered by the unfortunate few. The new legislation may also result in an upsurge in damages claims and in a reluctance on the part of manufacturers to introduce new technology and develop new products despite the 'state of the art' defence available.

It has been estimated that in the United States, where products liability is even more stringent, the cost of legal liability insurance is in the order of $385 billion and fear of damages claims is a major impediment to the use of new technology. Seventy per cent of the world's lawyers live in America, and innovative and inventive claims have become a feature of American jurisprudence. The culture of victimisation has been developed rapidly in the United States with a growing compulsion for people to blame someone or something else for their misfortunes and to shirk individual responsibility. Thus, a smoker who contracts lung cancer after smoking 30 cigarettes a day for 40 years sues the tobacco manufacturer for the injury to his health; a person who is dismissed because he is not equal to the job alleges racial or sexual discrimination; the search is on for

a scapegoat who can be blamed for one's own shortcomings or self-inflicted injury and who can be compelled to pay compensation. Rights of all kinds, be they the right of a non-smoker to unpolluted air, the right of a shooter to carry a gun, the right of an outlandishly attired man or woman to be admitted to a nightclub, are insisted upon without those so asserting realising that any right carries with it a corresponding obligation or responsibility.

A similar tendency is starting to develop in Australia, and I am waiting for the day when a student who has dropped out of the university or who has achieved only a pass and not an honours grade sues the university and his teachers for not making him work harder.

Other trends in the law which have appeared in the last quarter of the 20th century include the threat to privacy posed by the march of the computer and the microchip. The new technology galvanised the various state legislatures into imposing curbs on the use of listening devices, while in 1988 the Commonwealth Government enacted the *Privacy Act* providing for the appointment of a Privacy Commissioner to investigate complaints of interference with individual privacy and setting out a detailed statement of information privacy principles. A subsequent amendment has provided for the regulation of the practices of credit reporting agencies and for the issue of a code of conduct of legally binding effect governing the collection of, storage of and access to personal information for inclusion in credit information files kept by an agency. Only certain information collected by a bank or credit provider can be handed on to a credit reporting agency, and the latter is restricted as to whom it may pass on this information.

The law does not appear to have kept up with the sophisticated computer expert or 'hacker' who can find his way into the databases of multinational corporations both here and overseas by the use of modems and other communication devices. In one recent case in Melbourne, a 'hacker' was charged with attempting in Australia to gain access to a computer network located overseas, and the question arose as to the extraterritorial effect of the provision under which he was charged. However, if the Commonwealth Parliament can legislate retrospectively in respect of war crimes committed 50 years ago in a foreign country and involving only foreigners, there should be no difficulty with computer 'hacking' committed in Australia but whose effect is felt overseas, provided always that the defendant is within the jurisdiction.

Whether juries are equipped to decide the guilt or innocence of an accused charged with the commission of a sophisticated crime or with a crime which involves a great deal of technical or scientific evidence is a matter which has been called in question in the light of recent criminal trials in Australia in which a miscarriage of justice has occurred. These trials have involved scientific evidence of a highly technical nature, and their outcomes suggest that ordinary juries cannot absorb such evidence, especially where experts in the field put forward differing views based on the available data. Where the case involves 'white collar' crime and

the highly sophisticated financial manipulations of a dishonest entrepreneur, it seems that the inability to understand the complicated manoeuvres involved is not limited to juries but that some judicial officers may be financially illiterate as well. In such cases where complex technical or scientific evidence is adduced and there are likely to be expert witnesses in disagreement with one another, I suggest that a panel of assessors should sit with the judge and that they should present to the jury their opinion on the technical or scientific evidence that has been placed before the court. Where the case is one of fraud in which documentary evidence plays a leading role, some thought should be given to a relaxation of the rules of evidence so as to allow for the more ready admission of such documentary material than is now the case. A leading barrister with experience in prosecuting in 'white collar' crime trials is reported to have suggested that in such cases the rules of evidence are archaic, irrational and insufficiently flexible to allow for the expeditious disposal of the indictment. The traditional insistence on oral testimony as the primary source of evidence would need to be modified where proof of documents is concerned.

Clearly, some steps will have to be taken along these lines. The Australian record for a trial involving fraud is, I think, held by Queensland, where the District Court hearing in connection with the Russell Island land transactions lasted for approximately 18 months and in the end resulted in a mistrial. Such a length of time on one prosecution is an imposition on the jury and on the court system, let alone the public purse. There has to be a better way to handle such cases.

There are other problems which need to be addressed as the 20th century draws to a close. Advances in biological and medical technology and in genetic engineering have given rise to moral and legal dilemmas with which society is only slowly coming to grips. Bio-ethics is now recognised as a legitimate field of study, and the issues raised include such topics as the patient's right to die with dignity, the duty to maintain life using all the resources available even though the patient will never recover and will die if left without a life support system, the extent to which confidentiality must be observed in the case of AIDS sufferers, and the extent to which surrogate motherhood should be permitted.

Attempts have been made by such legislation as the *Infertility (Medical Procedures) Act 1984* (Vic.) and the *Surrogate Parenthood Act 1988* (Qld) to restrict human genetic experiments and to outlaw contracts for surrogate motherhood which have been castigated as 'baby-farming'. Some regulation is obviously necessary to prevent exploitation, but the legislation is open to criticism as being based in part on outmoded notions of morality. So far as human genetics are concerned, the genie is already out of the bottle and in my view scientific advances or discoveries can no more be halted or held in check than the tide which refused to do the bidding of King Canute. A total ban on any agreement for surrogate motherhood is small comfort to a childless couple who are desperate to have a child and who are prepared to pay a substantial sum for another woman to un-

dergo the dangers and discomfort of pregnancy. Provided there are adequate safeguards to prevent exploitation, to allow the biological mother to keep the child if she wishes, and to resolve any disputes as to parentage by permitting adoption by the childless couple, it seems to me that there is a place in the common law for such contracts.

The problem of confidentiality in the case of AIDS sufferers remains unresolved. At issue is the duty of a medical practitioner to respect the confidences of his patient and the extent to which his duty to other people overrides the duty to his patient. Thus, if the patient gives a positive test to the HIV virus and rejects the advice urged upon him by his doctor to disclose his condition to his wife, does the doctor have a higher duty under the common law to inform the wife of the position, a duty which transcends the duty of confidence owed to the patient? The matter, as far as I am aware, has not been the subject of judicial decision but it is likely to arise at any time and require a solution. The law must keep pace with technical and commercial development and be prepared to provide answers to new problems as they arise. A variety of experts, philosophers, scientists and the like, may assist in resolving the issues, but in the last analysis it is the lawyer to whom society must turn to formulate answers and frame appropriate rules to meet new situations.

Much will, of course, depend on the calibre of the men or women appointed in the future to the state superior courts and to the High Court of Australia. The common law of England is in eclipse with the entry of the United Kingdom into the European Economic Community, and the mantle of Coke and Blackstone has fallen upon her erstwhile colonies. The High Court of Australia has in recent years shown itself to be equal to the task of developing the common law to meet new situations, to be prepared to cast aside hallowed rules as having outlived their usefulness, and to embrace principles and concepts from other jurisdictions which will best serve the interests of Australian jurisprudence. Whether or not that trend will continue must depend on how liberal-minded, perceptive and courageous future appointees to the High Court Bench will be.

I can conclude this lecture in no better way than to quote the words of Lord Brougham, a reformer of the law and a Lord Chancellor of England in the early part of the 19th century. His Lordship said:

> It was the boast of Augustus that he found Rome of brick and left it in marble, a praise not unworthy of a great prince ... but how much nobler will be the Sovereign's boast when he shall have it to say that he found the law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.

One hundred and seventy years later that task remains incomplete. In the light of the complexity of human nature, the complexity of current technology, and the complexity of the laws required to regulate that technology, I doubt if the task will ever be accomplished.