

# THE WINDS OF CHANGE HIT THE LEGAL PROFESSION

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Changing demographics, economic change, the Lawyers and Conveyancers Act 2006 and increasing public criticism are having considerable impact on the New Zealand legal profession. New Zealand is not alone in this respect. Similar forces are at work in the United Kingdom and Australia.

In this article we will look at each of these changes in turn. In doing so the author draws on two extremely useful recent publications – *The Business of Law*<sup>1</sup> published by Brookers in 2006 and *Inside Lawyers' Ethics*<sup>2</sup> by Christine Parker and Adrian Evans and published by Cambridge University Press in 2007. *The Business of Law* is a report on management and financial performance in the New Zealand profession with Ashley Balls, Ronald Pol and Rebekah Palmer as main contributors. It gives an overview of the legal profession, corporate counsel, what clients think, human resources and practice management. *Inside Lawyers' Ethics* is an excellent compact resource for students and practitioners by two able Australian scholars. It deals with values in practice, alternatives to adversarial advocacy, ethics in criminal justice, conflict of interest, overcharging, corporate lawyers and corporate misconduct and regulation of lawyers' ethics. It is very well written and contains a number of very useful case studies. Although written for an Australian audience it is of value in New Zealand.

## I. CHANGING DEMOGRAPHICS AND ECONOMIC CHANGE

Today fewer lawyers work in private practice. Data from the New Zealand Law Society Annual Report for the Year ended November 2005 was 68 per cent although there was also a separate 13 per cent for Barristers.<sup>3</sup> This is consistent with overseas trends and demonstrates the rise of non private practice – such as corporate or government work which represented seven per cent and nine per cent respectively.<sup>4</sup>

Research by Team Factors Ltd in New Zealand links the growth of non private practice with a number of factors including lack of pricing information, poor client management skills and poor communication. Commercial practice in particular is becoming more demanding and competitive.<sup>5</sup>

Two thirds of the profession are aged under 40<sup>6</sup> and the average age is declining rapidly. Only 14.2 per cent are over 50. Only 38.4 per cent have more than ten years experience. There are now

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1 A Balls, R Pol and R Palmer (eds) *The Business of Law* (2006) (hereinafter 'The Business of Law')

2 Christine Parker and Adrian Evans, *Inside Lawyers Ethics* (2007) (hereinafter 'Inside Lawyers Ethics').

3 *The Business of Law* 6.

4 Ibid.

5 Ibid.

6 Ibid 10-11.

more female lawyers (51.5 per cent) as compared with 48.5 per cent males. This is also the beginning of a very significant trend where about 60 per cent of current law students are female.

Only 18.5 per cent earn \$150,000<sup>7</sup> or more yet over 90 per cent<sup>8</sup> worked more than 36 hours a week. 34.4 per cent said they worked 46-53 hours, 12.2 per cent 56-65 hours and 4.4 per cent more than 65 hours. Either these figures are inaccurate or a significant number of practitioners are working hard for poor rates of remuneration.

## II. THE LAWYERS AND CONVEYANCERS ACT 2006

The Lawyers and Conveyancers Act 2006 had a long gestation and is still causing much uncertainty in the profession. It received the Royal Assent on 20 March 2006 but still leaves much to be sorted out. The New Zealand Law Society structure and constitution are still under discussion. The Council is examining how to develop and implement a unitary model which would not require separately constituted District Law Societies. The timetable is for ratification by the Council on 21 September 2007.

Professor Duncan Webb of the Canterbury Law School has prepared a paper on Rules of Professional Conduct and Client Care which is under going debate.

Other matters being discussed are the NZLS constitution, Senior Counsel, Conditional Fee Agreements, Trust Account Rules, Complaints and Standards, the Fidelity Fund and Law Society Libraries.

Having attended what was described as the last ceremony for admission of a QC in New Zealand one was left with the impression of losing some of the strengths of a long tradition without having any clear idea of what is to be put in its place.

## III. CRITICISM AND COMPLAINTS

The procedure at the moment is set out in the Law Practitioners Act 1982 with a degree of local autonomy which will disappear.

Some of the common complaints about the profession are:<sup>9</sup>

- Excessive adversarialism in litigation;
- The high cost of litigation;
- Conflicting loyalties;
- Excessive billing and overcharging;
- The role of lawyers in corporate misconduct.

New Zealand has been slower than Australia but faster than the United Kingdom in developing Alternative Dispute Resolution, particularly mediation.<sup>10</sup> There is a need to institutionalise mediation in High Court and District Court practice and procedures.

The method of billing on a time basis and the tendency of some firms to over lawyer transactions is a common complaint.<sup>11</sup>

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7 Ibid 12-13.

8 Ibid 12.

9 *Inside Lawyers' Ethics*.

10 Ibid chapters 2 and 4.

11 Ibid chapter 8.

Conflict of interest problems<sup>12</sup> inevitably arise in a small jurisdiction with a limited number of specialists. The question of coping with the consequences of clients changing firms needs to be dealt with as this is more common with major corporate clients and government departments who are beginning to diversify their legal services work.

The role of lawyers in major corporate scandals in the USA, Canada and Australia has caused the public to question professional ethics and values.<sup>13</sup> Enron's lawyers Vinson and Elkins were fortunate to avoid the fate of Arthur Andersen. Lawyers for tobacco companies are constantly criticised. The role of the lawyers in the Patrick Dock Wars and James Hardie has been strongly criticised.

The consequences of this are increased responsibility for securities lawyers in the USA and stronger scrutiny in Australia.

In the United Kingdom and some of the Australian states there are steps being taken for greater public involvement in complaints procedures.<sup>14</sup> In the UK the Legal Services Bill currently before Parliament provides for a Legal Services Board with a Consumer Panel. Legal complaints will be dealt with by an Office for Legal Complaints which will operate an ombudsman scheme. The regulatory objectives are:

- (a) to protect the public interest
- (b) to support the rule of law
- (c) to improve access to justice
- (d) to promote consumer protection
- (e) to promote competition
- (f) to encourage an independent, strong, diverse and effective legal profession
- (g) to increase awareness of citizens rights
- (h) to promote professional principles (which are defined).

More modest reforms are taking place in some of the Australian states.<sup>15</sup>

These are trends which are hard to resist since other professions have already been gradually subjected to this scrutiny.

The outcome is likely to be a shift from the strong individualism of adversarial advocacy to more responsible lawyering and a return to the gate keeper role that lawyers have had in the past. It is a time for greater realism in the profession. We must acknowledge just criticism<sup>16</sup> but resist a mindless sweeping away of the positive traditions of the Bar. It is time for us to reinvent ourselves before others do it for us. In the meantime lawyers are advised to eat more bananas.<sup>17</sup>

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12 Ibid chapter 7.

13 Ibid chapter 9.

14 Ibid chapter 3.

15 Ibid.

16 Christine Parker, *Just Lawyers, Regulation and Access to Justice*, (1999) Chapter 5.

17 Simon Tupman, *Why Lawyers Should Eat Bananas*, (2000). It is ironic to note that the cover of this book shows commendation by the Managing Partner of Andersen Legal now no longer in existence post Enron and Meredith Hellicar, former CEO of Corrs Chambers Westgarth and Chair of James Hardie Group, which was strongly criticised for lack of social responsibility in dealing with asbestos litigation in Australia.