



## Précis Paper

### *The Profession: Access to Justice and Professional Experiences*

A discussion of professional experiences, changes in the legal profession and access to justice.

#### **Discussion Includes**

- Comparing the work of solicitors and barristers
- Changes in the legal market
- Alternative dispute resolution
- The role of the lawyer in society
- Private practice and costs orders
- Litigation and financial hardship
- Delay and Access to Justice

## Précis Paper

### ***The Profession: Access to Justice and Professional Experiences***

1. In this edition of BenchTV, Hugh Marshall (SC, Barrister) and Alan Conolly (Senior Partner, AR Conolly & Company, Sydney) discuss the role for advocacy in a changing legal environment and the need for reform to preserve the integrity of our judicial institutions. These reforms must address delay, costs and access to justice.

#### Differences in the work of a solicitor and a barrister

2. Hugh Marshall SC notes the differences between the work of a solicitor and a barrister. Personally, he was drawn to the latter, the uncertainty of the courtroom and the challenge of rolling with the punches as cases evolve. Conversely, he found the level of detail required to be a solicitor tedious, such as, having to do file notes, record telephone calls and time costing.
3. Colin Charters observed that for him, the bar was like attending your final law exam every day. This is because of the relentless pressure and preparatory work. Furthermore in many ways, it is a solitary journey, a barrister does not share the same connection with clients that a solicitor does.
4. The work is entrusted to a barrister from a solicitor. Therefore, a barrister feels a strong sense of personal responsibility to do their best work. However, a degree of objectivity is also necessary to be an effective advocate. Objectivity enables an effective presentation of the case through the recognition of its inevitable imperfections.

#### Changes in the legal market

5. The practice of law in Australia has changed with the advent of large international firms and technology. Partners in those firms earn significant sums of money. However, over 85% of solicitors in NSW are sole practitioners who do not enjoy the same remuneration for their work.
6. Increasingly solicitors are using vast amounts of technology to record and retrieve information. Technology and the increased use of affidavit is affecting the role of advocacy in mediation and perhaps, as Justice Hammerschlag has noted, the art of examination at the bar. Furthermore, briefs that were once no longer than 30-40 pages are now made up of hundreds of documents. An unbelievable amount of information is available, such as extensive medical records or tax returns in an insurance claim.

7. The high level of content involved in practice requires a lot of reading and memory. For a barrister, memory is the most important aspect of presenting evidence to the court. Persuasive advocacy relies on maintaining flow and unbroken contact, especially when dealing with a witness. Recourse to notes, or flipping through documents impedes the quality of a barrister's work.

#### Alternative dispute resolution

8. Increasingly there seems to be less of a role for the bar in mediation. The facts set out in the position paper reduces the scope for advocacy. A confident solicitor would probably achieve the same results, with the advantage of having lived with the files. The true benefit of mediation may even lie with its ability to offer an open forum for the attorneys of both clients. This invites collaboration, as, with a less adversarial environment, lawyers can work together even when faced with problematic clients.
9. There is no longer the same volume of trials that there was 20 years ago. This is due to the advent of the *Civil Liability Act 2002* (NSW) and reduced litigation for motor vehicle incidents. The change to the structure of claims in these areas reduces the roll for advocacy.

#### The role of the lawyer in society

10. The visibility of the legal profession and the courts in people's every day lives is being eroded. Local courthouses are being used mainly for criminal matters as civil jurisdictions have, to a high degree, evaporated. Particularly, in terms of compensation claims there is great uncertainty around costs orders and the ability for lawyers to recuperate their costs.
11. The legal profession is facing a problem in terms of perception. The image of the lawyer as only orientated towards the fee not the product is encroaching on the practice of law. The expense of civil litigation is often out of proportion with the rewards for the litigant. For most people, they cannot afford to lose or even take up a claim because of the costs. The cost of the litigation process is unacceptable and advantages only a few.
12. Previously, the civil cases in the country circuit were settled and brought money back into the community. Country solicitors, and the legal profession were pillars in the community.

### Private practice and costs orders

13. Alan Conolly highlights the recent departure of a young lawyer from A R Conolly & Company to a large international corporation to exemplify the divide with private practice. This lawyer now enjoys a defined area of work and an achievable workload after experiencing 6 hard years of difficult work in conflict resolution. Private practice often involves gruelling work and dealing with people in terrible trouble re costs. The costs regime should recognise that a career in the law is not always a line to great wealth. A regulated payment system would aid the availability of lawyers in the towns and for people in all their diverse needs.

### Litigation and financial hardship

14. It is arguably the professional duty of litigators, particularly those working for big financial institutions, to consider the hardship their opponents may face. There are examples in practice where the successful litigant, the bank, insurance company or even the police have made a magnanimous social choice and shown restraint, deciding not to sell the loser up.
15. However, the commercial reality is that the implied threat of financial hardship is often used to achieve a resolution to the litigation and government legal aid budgets are underfunded. Furthermore, as politicians subscribe to the idea that there are 'no votes in law' they undervalue the importance of votes in public order and respect for our institutions.

### Delay and access to justice

16. The delay in the family law court is a terrible burden for judges and a shocking burden for the people in the system, especially as the victims are invariably, often, children. The heightened sense of vindication between the warring parties, due to the highly emotional nature of the cases, is not an ideal forum for lawyers as the adversarial situation fans existing anger and distrust and the delay further entrenches people's positions.
17. There has been a movement away from expensive adversarial processes in areas such as worker's compensation. Equally, the adversarial system in family law should be queried.
18. Hugh Marshall SC has experience as an advocate and a litigant in the family law court. His experience confirms that the delay thwarts the proper resolution of cases because often, economically, there is little choice but to discontinue.
19. Justice delayed in all jurisdictions, is justice denied. To have a reputable court system it must be efficient, i.e. it must determine disputes quickly.

20. The Hon Sally Thomas was appointed Administrator of the Northern Territory in 2011. She applauds the indigenous practice of instant justice. Delay increases expense, pain and suffering and decreases the reliability of the evidence on which you rely.
21. It is not just the lawyers whose public recognition needs to be elevated from the gutter, but also the administration of justice needs to re-earn the respect it had 50 years ago. The respect is not there in the budgets.
22. If there is publically funded legal aid for more people and if the administration of justice has an infusion of government funds to make it more efficient, the way the community feels about the justice system would improve.
23. The increase in the lawyer's function in administrative law, i.e. in tribunals, is a positive change. It is an opportunity to free up judicial time and extend the role of the rule of law throughout the country. This idea is particularly relevant in relation to family law, where many litigants cannot afford a lawyer but feel they have to take part in the judicial process.

#### A positive precedent

24. With the introduction of *The Defence Force Discipline Act 1982* (Cth) lawyers were employed by the Australian Army to represent those involved in disputes. They took the view that it was everyone's right, whether they were charged or engaged as a witness in a serious matter, to have representation. This is a positive example of access to the law, which is often a stumbling block for those in private practice dealing with people who cannot afford the risk of losing.

## **BIOGRAPHY**

### **Hugh Marshall SC**

Barrister, Jack Shand Chambers, Sydney

Hugh Marshall SC was called to the Bar in 1983 and appointed Senior Counsel in 2003. He has an extensive common law practice. He was an officer in the Army Reserve Legal Corp for more than 20 years and appeared in many Courts Martial and Appeals. He has also appeared frequently in the Court of Arbitration for Sport. Mr Marshall has held appointments as a NSW District Court and Supreme Court Arbitrator, has been a member of the NSW Bar Council, and has served on professional conduct committees for more than 15 years.

### **Alan Conolly**

Senior Partner, AR Conolly and Company Lawyers

Alan Conolly founded the legal firm AR Conolly and Company in 1968 where he remains a partner in full-time practice. He has chaired companies in diverse industries including oil, IT, dance, agrochemicals and film. Life Member of the Law Society of New South Wales, publisher of Benchmark.

## **BIBLIOGRAPHY**

### **Legislation**

*Civil Liability Act 2002* (NSW)

*The Defence Force Discipline Act 1982* (Cth)