THE IMPACT OF TECHNOLOGY AND INNOVATION ON THE WELLBEING OF THE LEGAL PROFESSION

THE IMPACT OF TECHNOLOGY AND INNOVATION ON THE WELLBEING OF THE LEGAL PROFESSION

Edited by
Michael Legg
Prue Vines
Janet Chan

INTERSENTIA
Cambridge – Antwerp – Chicago

Intersentia Ltd
8 Wellington Mews
Wellington Street | Cambridge
CB1 1HW | United Kingdom
Tel: +44 1223 736 170
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and
Rest of the World (incl. Eastern Europe)
NBN International
1 Deltic Avenue, Rooksley
Milton Keynes MK13 8LD
United Kingdom
Tel: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel: +32 3 680 15 50
Email: mail@intersentia.be

Distribution for the USA and Canada
Independent Publishers Group
Order Department
814 North Franklin Street
Chicago, IL 60610
USA
Tel: +1 800 888 4741 (toll free) | Fax: +1 312 337 5985
Email: orders@ipgbook.com

The Impact of Technology and Innovation on the Wellbeing of the Legal Profession

Artwork on cover: Wizemark / Stocksy

ISBN 978-1-78068-955-5
D/2020/7849/23
NUR 820

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

FOREWORD

There has been an explosion of concern about the impact of technology and innovation on the wellbeing of the legal profession, especially in Australia and the United Kingdom. Mention of 'wellbeing' itself signals something that is very new. The impact of stress and mental illness on the delivery of services, outside of the armed services, were not systemically studied before the twenty-first century. Such matters played no role in legal duties of care or professional regulation either, until the very recent past.

As a pointer to the modernity of the wellness issue, a cited text written in 2013 is described as pre-dating the 'current explosion of interest' in the United Kingdom (p. 314). Australian attention began earlier but it goes no further back than around the year 2000. For seeding the debate, much credit goes to the campaign of Marie and George Jepson and the Foundation they established following the death by suicide in 2004 of their lawyer son. The Tristan Jepson Memorial Foundation (now Minds Count) explored what is peculiarly toxic about the study and practice of law compared to other callings.

The chapters in this excellent compilation analyse key drivers that impact negatively upon the wellbeing of many legal practitioners. Some of them were changes in the nature of legal practice, others the stuff of modern life. The book's contributors strive to identify differential impacts on different classes of person. Students', teachers' and lawyers' own perceptions of their stress and anomie are surveyed as well. The paucity of practical solutions on offer confirms to this reader that little will improve under the dominant neoliberal ideology.

Change itself can bring dangerous levels of stress. This is so even if its innovations produce optimal outcomes in the careful hands of many users. (The same may be said about motor cars and circular saws.)

This book also highlights the recency of many key innovations on the technological front and in workplace practices. Word-processing computers arrived in the late 1970s. Cellular phones and the internet in the 1980s, with email quickly supplanting 'snail mail' and facsimiles. These changes allowed the upsides and downsides of 24/7 access to communication across the globe and the ambivalent benefits of 'work-place flexibility'. Aided by these developments and spurred on by the mindset of Neoliberalism, legal

practice has transformed itself so totally that the 1970s (when I started in the profession) appear almost Dickensian. In the 1970s legal partnerships were severely limited in size and all of them functioned within a single jurisdiction, i.e. a single State or Territory in Australia. To canvass for legal work was unprofessional conduct. Barristers had no direct access to clients. Costs agreements were unheard of. If there were office diaries, they were to record work done, not used for detailed costing and aggressive management purposes. Anything approaching the notion of a "billable hour" was itself an undisclosed Alternative Fee Arrangement in those days. Brief fees were marked in advance on the briefs delivered to barristers. For briefs themselves, even a thin ring binder was exceptional. A mountain of documents or of cases to be researched, hidden in a tiny computer file, lay blessedly in the distant future.

Nationwide "Competition Principles" would be favoured by the larger over the smaller firms and generally resisted by the Bar. But they were promoted by government, which (rightly in my opinion) recognised that differences between professions, business and trades were marginal at best. With the curtailment of professional self-regulation, the exposure of unproductive restrictive practices, and key rulings such as *Street v Queensland Bar Association*, the practice and oversight of law would quickly cross state and national boundaries. This expansion in the size and horizons of legal firms would contribute to disconnectedness and stress.

Adding to the pressures upon lawyers of the 'old school', clients became less respectful of old school ties. Commercial and governmental entities called for tendering for such services as they were not beginning to manage in-house. Conveyancers and tax accountants nibbled on profitable corners of traditional legal businesses. The law's counterpart of "Dr Google" and the rise of consumerism touched the self-esteem and pocket books of lawyers, reminding them that their own 'wellbeing' was and is not an exclusive right. Economic busts may be inevitable but they tend to recur unexpectedly: seismic global economic downturns would bring their own shocks to 'normality' and income.

The law itself has changed markedly over this period, partly in response to all these phenomena, but certainly in ways that have made its practice more complex and stressful. Within the working life of today's senior practitioners, the fiction of the declaratory theory has been overtaken by a fast-evolving common law that functions inside burgeoning regimes of state regulation. An actionable duty of care in professional advice has been discovered, triggering a huge expansion of professional indemnity insurance and all that that entails. Liability for psychiatric

injury unassociated with physical trauma has been recognised, leading to a tightening of the employer's duty to take reasonable care for a safe workplace. (There is still a long way to go in this pocket of tort law, in my opinion, and the task is made harder by what this book describes as the 'contractualisation' and 'uberisation' of legal practice.) Discrimination of various sorts has become actionable and bullying is no longer viewed as the peculiar risk of schoolboys. Students and teachers at universities have come to expect that care is taken for more than their physical safety.

These legal developments are, of course, to be welcomed. But navigating them has brought new levels of complexity and stress. The legal developments have in turn contributed to identifying problems ignored by previous generations, doubtless at the 'cost' of exposing the apparently rising levels of the problems needing to be faced. These changes in the law have at least recognised some of the harms that are now so clearly in view and palliated them to a degree.

Because one has to start and finish somewhere, the contributors to this work have addressed the impacts of technical change and innovation on the *legal* profession. But the surveys and studies discussed herein all recognise the impact of externalities. One that is only touched upon lightly is the recent entry of women in large numbers into the legal workplace. This entirely laudable development has undoubtedly added to the stress of many men and not a few women, for a range of reasons going beyond the added competition for advancement. One upside of this demographic has been some revaluation of the true worth of unpaid work in the home. But more than anything, it has promoted the discourse of 'work-life balance' that functions as both as an aspiration and one focus of expanding legal and moral duties of care of employers and professional organisations.

These last-mentioned phenomena remind us that the issues confronting the legal academy and the legal profession that are addressed in this book are really problems of living in the modern world. Great-grandparents and grandparents who endured global wars and the Great Depression led lives untouched by the technological and innovative changes addressed in this book. But the stories they could tell would remind us that each generation has to confront its own crises of change and innovation. The COVID-19 pandemic which has arrived as the book is about to be published has added its own severe disruptions, many of them likely to be long term. Hopefully it will seed some positive reassessments and adjustments.

Keith Mason AC, QC
May 2020

ACKNOWLEDGEMENTS

This book originated from a number of strands of thought arising from our different areas of scholarship over several years. As we had separately worked on different areas of focus on the legal profession and as concerns about mental health in the profession mounted, we decided to draw on expertise that we were aware of from around the world in order to organise a symposium to discuss the interaction of the changes in technology, the profession and its practices and how they might impact on wellbeing. The symposium, as all such symposia do, then allowed us to tease out further implications of the interactions discussed, resulting in this book.

We are grateful to a number of organisations for supporting our research endeavours: the Law Society of New South Wales Future of Law and Innovation in the Profession (FLIP) research stream at UNSW Law; Whittens & McKeough Lawyers (now Automic); the Allens Hub for Technology, Law and Innovation at UNSW Law; and the Law Council of Australia who kindly gave permission for Allison Wallace and Imogen D'Souza to use findings from their 'National Attrition and Re-Engagement Study (NARS) Report' 2013 in their chapter.

A number of people who have contributed to the book, including research assistants Lachlan McFarlane, Sharon Mo and Deborah Hartstein, we thank them.

We would also like to thank Ann-Christin Maak-Scherpe and Ahmed Hegazi of Intersentia for bringing the book into the world with such professionalism and attention to detail.

CONTENTS

LIST OF CASES

LIST OF AUTHORS

Felicity Bell
Research Fellow for the Law Society of New South Wales Future of Law and Innovation in the Profession (FLIP) Research Stream at UNSW Law, Sydney, Australia

Holly Blackmore
Doctoral candidate and Research Officer at UNSW Law, Sydney, Australia

Janet Chan
Professor and leader of the Data Justice Stream for the Allens Hub for Technology, Law and Innovation at UNSW Law, Sydney, Australia

Richard Collier FAcSS FRSA
Professor of Law at Newcastle University, UK, and was recently a Leverhulme Trust Research Fellow engaged in studies of wellbeing and anxiety in law

Imogen D'Souza
Honours Student and Research Assistant at Urbis Pty Ltd, Sydney, Australia

Rachael Field
Professor of Law at Bond University, Australia

Tahlia Gordon
Doctoral candidate at UNSW Law and Director at Creative Consequences Pty Ltd.

Colin James
Senior Lecturer at the Australian National University College of Law, Canberra, Australia

Michael Legg
Professor of Law and Director, Law Society of New South Wales Future of Law and Innovation in the Profession (FLIP) Research Stream at UNSW Law, Sydney, Australia

Suzanne Poynton
Acting Director and Research Manager at the Bureau of Crime Statistics and Research at the Department of Communities and Justice NSW, Australia

Jennifer K. Robbennolt
Associate Dean for Research, Alice Curtis Campbell Professor of Law and Professor of Psychology, Co-Director of the Illinois Program on Law, Behavior and Social Science, University of Illinois, USA

Justine Rogers
Senior Lecturer and Deputy Director of the Law Society of New South Wales Future of Law and Innovation in the Profession (FLIP) Research Stream at UNSW Law, Sydney, Australia

Alex Steel
Professor of Law and Director of Teaching Strategy, Office of DVC Academic, UNSW, Sydney, Australia

Caroline Strevens
Reader in Legal Education and Head of Portsmouth Law School, UK

Margaret Thornton
Emerita Professor of Law, Australian National University, Canberra, Australia

Prue Vines
Professor of Law and Co-Director of Private Law and Policy Group at UNSW Law, Sydney, Australia

Alison Wallace
Public Policy Advisor and Program Evaluator with over thirty years' experience, previously worked as a Director in Urbis' Economic and Social Advisory Team, Sydney, Australia

LIST OF TABLES AND FIGURES

Tables

Chapter 2

Chapter 3

Chapter 4

Chapter 5

Figures

Chapter 2

Chapter 4

Chapter 5

Chapter 11