

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

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PROFESSION

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Chicago, IL 60610
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Email: orders@ipgbook.com

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

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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

<i>Foreword</i>	v
<i>Acknowledgements</i>	ix
<i>List of Cases</i>	xvii
<i>List of Authors</i>	xix
<i>List of Tables and Figures</i>	xxi

PART I. INTRODUCTION

Chapter 1. The Changing Field of Lawyering and its Impact on Practice and Wellbeing

Michael LEGG, Prue VINES and Janet CHAN	3
1. Introduction	3
2. The Great Expansion: Law Firms, In-House Counsel, the Billable Hour and Budgets	6
3. Globalisation	8
4. Technology	11
5. The New Law Firm	15
6. The Sharing or Gig Economy	16
7. The Future of the Legal Profession	18
8. The Approach of this Book	20
9. Conclusion	27

PART II. CHANGE, STRESS AND WELLBEING

Chapter 2. Student Attitudes to Legal Education: Revisiting the Pointers to Depression and Anxiety?

Prue VINES and Alex STEEL	31
1. Introduction	32
2. The Prevalence of Depression in Lawyers and Law Students	33
3. Explanations for the Disproportionate Incidence of Depression and Anxiety	34

4. Aims of the 2018 Survey	39
5. Results	40
6. Limitations.....	52
7. Discussion	53
8. Conclusion.....	55

**Chapter 3. The Paradox of Satisfaction and Distress Among Lawyers:
Implications for a Changing Field**

Suzanne POYNTON and Janet CHAN.....	57
1. Introduction: Satisfaction and Mental Health of Lawyers	58
2. Understanding Lawyering Stress	60
3. Research Method and Analysis.....	61
4. Results	65
5. Conclusions and Implications.....	73

**Chapter 4. Stress, Bullying and Harassment in the Legal Profession:
A Risky Business**

Alison WALLACE and Imogen D’SOUZA	77
1. Introduction	77
2. Poor Mental Health in Legal Workplaces	78
3. Sexual Harassment in Legal Workplaces.....	80
4. Bullying in Legal Workplaces	82
5. Psychosocial Workplace Injury in Australia is on the Rise.....	83
6. Aims of the National Attrition Study.....	85
7. Methodology	86
8. Results	88

**Chapter 5. Public Sector Lawyering Stress and Wellbeing:
Neoliberalism at Work?**

Janet CHAN and Holly BLACKMORE	105
1. Introduction: Neoliberalism and Lawyering.....	106
2. What is Neoliberalism?	108
3. Neoliberalisation of Lawyering and its Consequences in the Public Sector.....	112
4. Comparing Public/Community with Private Lawyering	116
5. Perceptions of ‘Wellbeing Interventions’.....	124
6. Concluding Remarks	128

Chapter 6. Law Teachers Speak Out: What do Law Schools Need to Change?

Colin JAMES, Caroline STREVENs and Rachael FIELD 131

1. Introduction 131
2. The Neoliberal University and Legal Education 133
3. An Ethical Imperative to Interrogate the Quality of Working Life for Law Teachers 136
4. Methodology 137
5. Methodological Limitations 141
6. Demographics 141
7. Satisfaction at Work 141
8. Qualitative Data in Response to: ‘Please Explain What You Think your University Could do to Improve Staff Quality of Working Life’ 143
9. A ‘To-Do’ List for Law School Leaders and Managers. 150
10. Conclusion. 151

PART III. TECHNOLOGY, INNOVATION AND THE STRUCTURE OF LEGAL PRACTICE

Chapter 7. Behavioural Legal Ethics and Attorney Wellbeing in Contemporary Practice

Jennifer K. ROBBENOLT 155

1. Introduction 155
2. Ethics and Wellbeing 156
3. Substance Abuse and Mental Health 163
4. Factors in the Modern Legal Profession that Influence Both Ethics and Wellbeing 165
5. Conclusion. 174

Chapter 8. Is ‘Uberisation’ the Path to Lawyer Wellbeing?

Margaret THORNTON 177

1. Introduction 177
2. The Psychological Distress of Lawyers. 180
3. Uber Lawyering. 184
4. Flexible and Autonomous 187
5. The Debit Side of NewLaw 190
6. Conclusion. 197

Chapter 9. Do Law Firm Structures Matter? Incorporated Legal Practices and the Health and Wellbeing of Lawyers	
Tahlia GORDON	199
1. Introduction	200
2. The Unhealthy and Un-Well Profession: Legal Practitioners in Crisis	203
3. The Demands of Practising in the Traditional Law Firm Partnership Structure	205
4. Law Firm Practice Structures: A New Look but a Different Feel? . . .	218
5. Conclusion	236
Chapter 10. Artificial Intelligence and Lawyer Wellbeing	
Felicity BELL, Justine ROGERS and Michael LEGG	239
1. Introduction	239
2. Definitions and Current Situation	242
3. Indicators of Wellbeing within a Wider Context	243
4. What does Artificial Intelligence Mean for Wellbeing?	250
5. Concluding Remarks	264
Chapter 11. Lawyers’ Fee Arrangements and their Wellbeing	
Michael LEGG and Justine ROGERS	267
1. Introduction	268
2. The Billable Hour and AFAs: The State of Play	270
3. Fees and Wellbeing	275
4. Billable Hours	284
5. Alternative Fee Arrangements	292
6. Conclusion	306
PART IV. CONCLUSION	
Chapter 12. Reflections on the UK Experience of Legal Academic Wellbeing and the Legal Professions: Moving Across Silos	
Richard COLLIER	313
1. Introduction	313
2. From Legal Practice to Law School: A Snapshot of Wellbeing and Mental Health in the UK Legal Community	315
3. Approaching (Legal) Academic Wellbeing	318

4. From Legal Practice to Law School, or Moving Across Silos: Shared Themes	322
5. The Potential and the Problems of Wellbeing: Identity, Resilience and Responsibility.....	326
6. Concluding Remarks	330
<i>Index</i>	335

LIST OF CASES

<i>Anderson v. Cryovac</i> 862 F.2d 910 (1st Cir. 1988)	297
<i>British American Tobacco Australia Services Ltd v. Cowell</i> (2002) 7 VR 524	215
<i>Da Silva Moore v. Publicis Groupe</i> 287 FRD 182 (SDNY 2012)	13
<i>Giannarelli v. Wraith</i> (1988) 165 CLR 543	215
<i>Hickie v. Hunt & Hunt</i> (1998) EOC ¶92–137 [1998] HREOCA 8	184
<i>Irish Bank Resolution Corporation Limited v. Quinn</i> [2015] IEHC 175	13
<i>Law Society of NSW v. Foreman</i> (1994) 34 NSWLR 408	211
<i>McCabe v. British American Tobacco Australia Ltd</i> [2002] VSC 73	215
<i>McConnell Dowell Constructors (Aust) Pty Ltd v. Santam Ltd (No. 1)</i> [2016] VSC 734	13
<i>Pyrrho Investments Ltd v. MWB Property Ltd</i> [2016] EWHC 256 (Ch)	13
<i>Spence v. Gerard Malouf and Partners Pty Ltd</i> [2010] NSWSC 764, [110]	295
<i>Re Robb</i> (1996) 134 FLR 294	295

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LIST OF TABLES AND FIGURES

Tables

Chapter 2

Table 1.	Bifurcated cultural backgrounds.....	42
Table 2.	Students' self-rating of written English	42
Table 3.	Students' self-rating of spoken English	43
Table 4.	Parental education level.....	43
Table 5.	Main reasons to do Law: Response count, percentage of total responses and mean rank (1 being highest rank, 5 lowest rank).....	45
Table 6.	Categories which >50% of students saw as essential	50

Chapter 3

Table 1.	Characteristics of lawyers by severity level of reported mental health symptoms.....	66
Table 2.	Logistic regression model comparing normal/mild/ moderate vs severe/extremely severe depression (n = 746).....	68
Table 3.	Logistic regression model comparing normal/mild/ moderate vs severe/extremely severe anxiety (n = 749).....	69
Table 4.	Logistic regression model comparing normal/mild/ moderate vs severe/extremely severe stress (n = 749).....	69
Table 5.	Summary of the logistic regression models examining drivers of poor mental health.....	72

Chapter 4

Table 1.	Participation in online surveys by lawyer cohort and gender	87
Table 2.	Percentage of lawyers surveyed who had experienced bullying or intimidation in their current workplace	88
Table 3.	Percentage of lawyers surveyed who had experienced sexual harassment in their <i>current</i> workplace	90

Chapter 5

Table 1. Depression Anxiety Stress Scores (DASS) by Workplace.....	117
Table 2. Ranking of Job Stressors by Workplace.....	118
Table 3. Median Job Satisfaction Scores by Workplace.....	122

Figures

Chapter 2

Figure 1. Mean rankings of the importance of particular experiences by undergraduate law students in 2005 and 2018 (Average +/- SE).....	49
Figure 2. Most important aspects of degree.....	49
Figure 3. Mean ratings of the importance of certain traits to employers by law students in 2005 and 2018 (Average +/- SE)	52

Chapter 4

Figure 1. Top ten causes of lawyers' dissatisfaction with current position, by gender.....	92
Figure 2. Top ten causes of women lawyers' dissatisfaction with current position, by legal sector/role.....	93
Figure 3. Most common reasons for lawyers changing jobs in the previous five years, by sector.....	95
Figure 4. Most important and most frequent reasons female lawyers changed jobs in last five years	96
Figure 5. Most important and most frequent reasons male lawyers changed jobs in last five years	97

Chapter 5

Figure 1. Perceived Effectiveness of Wellbeing Interventions.....	125
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Chapter 11

Figure 1. Macquarie Bank 2017 Legal Benchmarking Results.....	273
Figure 2. Norton Rose Fulbright Litigation Trends Survey 2017	274