

KEYNOTE ADDRESS
TO THE CITY OF SYDNEY LAW SOCIETY
2011 ANNUAL DINNER
BY THE HONOURABLE T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
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Thank you very much for inviting me to your annual dinner this evening. It is a pleasure to join you and a privilege to be invited to give this address.

I know that you have just emerged from an Annual General Meeting and, accordingly, it is a significant act of bravery and politeness on your part to agree to sit through another speech. I will try not to bore you too much.

In a recent speech to newly admitted lawyers I highlighted the ethical obligation on members of the legal profession to serve the community in all that they do. I spoke about the importance of lawyers to the maintenance of the rule of law: without lawyers, courts would be unable to hold the government accountable;

private citizens would be unaware of their rights; those who have their rights encroached would find it difficult to obtain a remedy.

In many ways, these aspects of a lawyer's role have remained constant throughout the ages. The first lawyers in Athens were rich citizens who would represent their poorer 'friends' in court. These lawyers could not accept a fee for their services, so in many ways the very first advocates were all pro bono. Cynics say, however, that those who engaged in such representation generally did it for some other personal gain, either seeking the electoral votes of the poor citizens they represented or wanting to practice their oration skills so that they were more persuasive, and therefore more powerful, in the Citizens' Assembly.

In ancient Rome, Emperor Claudius was the first to legalise advocacy as a profession. However, the Emperor also imposed a fee ceiling on what lawyers could charge. Contemporary records reveal a mountain of complaints from lawyers about how restrictive the fee ceiling proved to be. Their complaints fell on deaf ears: Emperor Claudius was convinced that were lawyers allowed to charge what they wanted for their services the community service aspect of the profession would be lost.

Like in Athens, the early Roman lawyers were trained in rhetoric rather than law and the judges before whom they presented their cases were also not legally-trained. However, unlike in Athens, in ancient Rome a separate class of specialists in the law emerged, called juriconsults. Juriconsults were wealthy amateurs who engaged with the law as an intellectual hobby and did not make a living from it. They provided advisory opinions on legal questions and, over time, began to be consulted by Roman judges and governors. I think it is fair to say that from the very earliest stages of civilisation lawyers, in one form or another, had a role in advising governments, assisting courts, and ensuring that the law was properly understood and consistently applied.

A glimpse at Shakespeare's *Henry VI* which is believed to have been written in 1591 reveals the perception of lawyers held at that time, at least by Shakespeare. In *Henry VI*, a plotter of treachery states: 'The first thing we do, let's kill all the lawyers'. Although this suggestion has formed the basis of many anti-lawyer jokes over the ages, it in fact reflects Shakespeare's view that the surest way to achieve tyranny was to eliminate lawyers. Indeed, this quotation serves to illustrate the role of the legal profession as

guardian of the rule of law, the bastion of free-thinking and a protection against the worst abuses of power.

It was not until 1791, when the US Bill of Rights was ratified, that legal representation was first conceived of as a human right. In many ways the conception of legal representation as a human right speaks volumes about the role that lawyers played in 18th century society. Lawyers were at the heart of revolutions and a fundamental pillar of societies that believed in freedom of religion and sought liberty from oppression.

The obligation placed on lawyers to serve the community has never been an easy one to fulfil, but the challenges we face in fulfilling our objective to serve the community, to achieve equality before the law and to pursue justice have changed over time.

Sources from ancient Greece and ancient Rome suggest that lawyers initially struggled to make a living from law, which impacted on their ability to properly represent their clients and of course dictated the people who could enter the legal profession in the first place. Fortunately, this is not a problem we face today – it is a privilege to be part of a profession that any Australian can enter

and compete in. Throughout the ages, lawyers' ability to serve their clients has also been affected by the interference of government. This remains a problem in many societies today, but is luckily not one we regularly face in Australia.

In my speech tonight, I would like to look at key challenges the legal profession faces in maintaining our commitment to the community in the 21st century. Our ability to rise to these challenges will ultimately determine our ability to maintain the rule of law in this country and abroad.

The first challenge we face is one that we are all aware of, but one that deserves continued attention: access to justice. It is trite to say that the cost of legal representation is high. Usually our focus is on the cost of litigation, but I think the problem is broader than advocacy work: the price of having lawyers involved in transactional work is largely out of reach for the ordinary Australian. Rather than preach about the high costs of legal services, I want to ask two questions: what does the high cost of legal services mean for Australian lawyers in the 21st century; and what can we do to address this challenge?

The price of legal services has a number of potential implications. First, it means that people will use our services less or engage us later in the process. This is obviously undesirable, not from a purely selfish perspective but because citizens *should* be able to access legal services when they need them. Moreover, avoiding the involvement of lawyers in the process until it goes array often results in larger legal costs than if lawyers were involved in the first place. Yet, until lawyers seem accessible they will not be asked for assistance until absolutely necessary.

The cost of legal services may also result in some parts of the legal process being done by lawyers in foreign jurisdictions. We have already seen a number of large firms outsource work to India. This in itself poses significant challenges for the profession in building cohesion between lawyers working on similar matters, and in ensuring that the standards expected of lawyers in this country are met by those involved in matters overseas. This is a new challenge, arising out of this new era of globalisation, and it is one that we must effectively manage. If we cannot maintain the confidence of our clients in all aspects of the legal work we do, no matter where that work is completed, then we cannot call ourselves a profession.

There are a number of different things we can do to transform the pressure of keeping costs low from a threat to an opportunity. First, and perhaps most obviously, it is vital to engage in pro bono work. The latest figures show that on average lawyers spend approximately 30 hours per year on pro bono work. This is encouraging; it demonstrates the commitment of lawyers within this country to equality before the law and access to justice for all people. Second, we need to be as good at our jobs as we can possibly be, so that we can provide our clients with the best possible advice for the least possible cost. In order to constantly improve as lawyers we need to be aware of changes to the law and how they affect our clients. This is why the legal profession imposes on its members an obligation to keep learning. Being members of the City of Sydney Law Society is an optimal way to meet this challenge: your membership allows you to network with lawyers working in a variety of areas, to expand your knowledge, and to attend continuing legal education events.

Part of providing good and timely advice to clients in the modern era is about understanding out-of-court options. There is no denying that the cost of legal services, and litigation in particular,

has changed the role of lawyers in legal disputes. Increasingly, lawyers are playing a role in mediation or arbitration rather than as advocates in courts or as solicitors preparing for court. This means that we need a better understanding of ADR: when it is appropriate, when it is likely to produce results, and how we as practitioners can facilitate the just, efficient and fair resolution of disputes.

Another aspect of improving access to justice in the 21st century is about managing technology. In the past 20 years, technology has dramatically changed the way in which the legal profession does business. Cases are easier to find, legislative changes are easier to identify, witnesses are easier to access and documents are easier to manage. Although we are more efficient, clients have not always seen cost savings. It is the responsibility of each practitioner to look at ways in which technology can save business costs and then pass those savings onto clients.

The additional challenge posed by technology is the challenge of vigilance against laziness: while we now have computers with software to find the relevant documents and show us all the authority we need, it remains the responsibility of the practitioner to ensure that the information provided is accurate and

that nothing has been overlooked. Without wanting to sound too old-fashioned, technology is just as subject to error as we are, so the efficiency benefits we have seen and will continue to see in the 21st century must be balanced against a dedication to ensuring that legal advice is accurate and relevant.

Finally, an enduring challenge that we face in the modern era is the challenge of providing legal representation to the unpopular, and often becoming unpopular by association. South African judge, Albie Sachs, embodies this principle. Those who had the pleasure of hearing Albie Sachs speak in Australia last year for the launch of his book, *The Strange Alchemy of Life and Law*, will attest to extraordinary strength and courage. Albie Sachs was a white lawyer living in apartheid South Africa. As a young barrister he defended those who had been charged under racist statutes and draconian security laws, many of whom faced the death penalty. He paid a high price for his opposition to injustice: after being kept in solitary confinement in South Africa for two long spells, without a trial, he was exiled to Mozambique. In 1988, the South African Security force planted a bomb in his car. Albie Sachs lost his sight in one eye and lost his right arm. Albie Sachs did not just become unpopular as a result of his insistence on the fundamental tenets of

the rule of law. He risked his life doing so. His actions embody what is at the core of the legal profession: an obligation to serve those members of society who do not have the protection of popularity or political power.

As a profession I think we generally support the notion that providing access to justice to someone charged with a crime in unjust circumstances is admirable. We can usually all agree that it is important to represent defendants, even if they are guilty, to ensure that they have a fair trial and that faith in the justice system is maintained. However, the breadth of this principle is a challenge we will face in the coming years. Already in Australia there are debates between lawyers who will and will not work for cigarette companies. We are yet to have the debate raging in the US about the professional and personal ethics of lawyers who, for example, wrote memoranda to support the use of waterboarding or who drafted amendments to the law to enable torture. These issues cause us, as a profession, to question what justice means and to what extent we should represent the interests of our clients not only in court but in the political arena. I do not have the answer to these ethical dilemmas, and in many cases it comes down to an individual's conscience: whether to provide all people with legal

representation and advice no matter what the purpose or outcome, or whether to impose an additional moral taxonomy on what you are and are not prepared to do. In many ways these are old issues, but they arise in new scenarios. While for solicitors at least, the choice of the work you do and the people you work for may be an individual decision, working through the ethical dilemmas our profession faces is something we need to do collectively. Professional bodies such as the City of Sydney Law Society provide a perfect forum for having these kinds of tough discussions.

The final challenge for the 21st century that I would like to address tonight is the challenge of ensuring that the rule of law operates globally. Although the cost of legal services poses challenges for Australia, we generally alleviate those challenges through publicly funded lawyers and a judiciary that is aware of the difficulties for self-represented litigants. Citizens in some of our neighbouring countries do not have the same governmental assistance. We need to cooperate with our neighbours to ensure that as our legal system is increasingly intertwined with the legal systems of our neighbours, no one gets left behind.

In conclusion, we need to be ambassadors for our profession in all that we do. Without wanting to sound too much like a Public Relations representative, if we act with honesty and integrity in the way we treat each other and those with whom we work then the reputation of our profession as a whole is maintained. Australian lawyers already have an excellent reputation globally as possessing strong ethics, unparalleled analytical skills and a keen awareness of others. We need to ensure that we have this same reputation within our own community.

As we embark upon what is sure to be a challenging journey into the next century, I hope that we will always have the courage to stand up for what is right, to speak out against that which is wrong, and to ensure that Australia's democracy continues to be one of the very best in the world.

Thank you again for inviting me to speak tonight. It is a pleasure to have the opportunity to meet so many lawyers practising in the city of Sydney. I would like to congratulate the City of Sydney Law Society on a very successful year and wish you all the best for the new one.