

AUSTRALIAN CATHOLIC UNIVERSITY
ST PATRICK'S LAW STUDENTS SOCIETY
LAW BREAKFAST
28 August 2017

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Thank you to the organisers for the opportunity to speak at this inaugural law breakfast on the important topic of wellbeing in the profession, a topic about which I am passionate. I have been asked several questions by the organisers about myself and about wellbeing in the profession which I will attempt to answer.

My background?

I graduated from the University of Adelaide with a Bachelor of Arts and a Bachelor of laws with First Class Honours. After graduating from law in 1998, I worked as a solicitor in Canberra and Melbourne for about 4 years in litigation. I worked in a large, top tier law firm, and later a small boutique law firm. I never particularly enjoyed working as a solicitor, and I don't think I was ever particularly good at it. I always hankered for the Bar. Before being called to the Bar in 2003, I began a PhD at the University of Melbourne and tutored law students as most PhD students do. I successfully completed a PhD on unconscionable conduct in contract law in 2005. I thoroughly enjoyed academic life and I accepted a tenured position as a lecturer at the University of Melbourne. I lectured in the subjects of legal ethics and contract law. I lectured part-time while I simultaneously built a general commercial and regulatory practice at the Bar. I loved the university and I loved the Bar but a second child compelled me to decide between the two. I chose the Bar. I haven't regretted the decision.

I have particularly enjoyed acting for regulators. Most recently I have acted for Consumer Affairs Victoria in several proceedings against estate agents for underquoting properties in advertising, I have also acted for the ACCC against Medibank for misleading and deceptive conduct and unconscionable conduct and have acted for the Legal Services Commissioner in prosecuting solicitors for serious breaches of their professional conduct rules.

I enjoy acting for regulators because, although they don't pay as much as private clients, the work is nonetheless very rewarding. Not only is the work intrinsically interesting, and intellectually stimulating, it is work that aims to help and protect the wider community.

What inspired me to enter the legal profession?

And that was what drew me to the legal profession – the opportunity to do something which was intellectually stimulating and which would enable me to be of service to the community. To be of help.

That was how I was raised. To be helpful. Most of my schooling was in various parish catholic schools. My catholic schooling impressed upon me a sense of duty to make myself useful.

Something interesting about myself ?

It was this sense of duty that also prompted me, as a law student, to become a telephone counsellor when a short-staffed Lifeline sent out a call for volunteers. In a very dull life, this is probably the only interesting thing I can tell you about myself. I was very young, only 19. I think I was one of the youngest volunteers at the time and probably the only law student. Most of the other volunteers were either social workers or psychology students. All sorts of people call Lifeline for all sorts of reasons with all sorts of problems – but when I manned the phones I was peculiarly lucky in receiving more than my fair share of suicidal callers. It became something of a joke among my fellow volunteers.

As you might imagine I found my first call from a suicidal caller to be very confronting. I will never forget it. Her voice was the voice of a mature woman. She was almost preternaturally calm as she announced to me that intended to end her life that day. Before volunteers man the phones, they are given several weeks of training. In calls like these we were drilled to repeat the following phrase “life and death is a choice, choose life”. I nervously parroted this phrase and even to my own ear I my voice sounded reedy and thoroughly unconvincing. The caller warmly replied: “thanks dearie, I have chosen, I have chosen to kill myself” and she promptly hung up the phone. I was horrified. But that call was the first time I was compelled to seriously consider what mental health and wellbeing was, particularly my own.

Because it quickly became apparent to me that in anguishing over that call, as I later did, I only became miserable and less helpful to other callers. This prompted me to become more conscious of the stress that I was experiencing as a law student. I became more aware of how this stress clouded my mind, adversely affected how I interacted with others and undermined my resilience to other stressful events. I noticed that when I was more successful in managing my stress by focusing on what I was doing at that time the more successful I was in completing that task. If that task was another call, the more help I was to that caller.

What does mental health and wellbeing mean to me?

So what does good mental health and wellbeing mean to me? Well, it doesn't mean lollipops and rainbows. What volunteer work taught me was that life, naturally, has its ups and downs and its stress and strife.

In 1963 Viktor Frankl, an Austrian psychiatrist, published *The Doctor and the Soul: An introduction to Logotherapy*. Frankl conceived of the idea for his book while interred in a concentration camp during World War II. Logotherapy is rooted in three key ideas. First, that life has meaning under all circumstances, even the most miserable. Second, that our main motivation for living is our will to find meaning in life. Third, we have freedom to find meaning in what we do. Indeed, it is the purest sort of freedom that there is. I may not always be free to change my circumstances, but I am entirely free to choose my attitude to those circumstances. Frankl considered that meaning could be discovered in three ways. First by creating a work or doing a deed. Second, by experiencing something or encountering someone. Third, by the attitude we take to unavoidable suffering. Frankl himself survived Auschwitz by developing his idea for logotherapy, keeping a record of his observations and thoughts on scraps of paper. He then survived his survival of Auschwitz by publishing his book and teaching people about logotherapy.

One of Frankl's core beliefs was that "life does not owe you happiness, it offers you meaning". For my part, I think that it is in meaning that you find happiness, if not, contentment. And it is meaning that forms the bedrock of good mental health and wellbeing.

I have found meaning in being of service to others by, among other things, practicing, writing and speaking about the law.

By finding meaning in my life and living in a way consistent with this meaning, I think gives me focus, it lifts the cloud in my head, it opens me up to others and it bolsters my resilience. I'll admit though that, as a barrister, living in a way that is true to meaning, or (to use modern, self-help parlance) to live an *authentic life*, is not always an easy thing to do.

How has my legal life impacted and affected my mental health and wellbeing?

Why? Because I think that legal practice is inherently hazardous to mental health. Drawing on my own experience, I think legal practice (and legal education) is hazardous to mental health in roughly 4 ways.

First, as Susan Daicoff notes in her book *Lawyer Know Thyself*,¹ lawyers are trained to view disputes in a certain way. They are trained to analyse disputes, in a dispassionate way, in terms of legal rights and legal wrongs. In orthodox legal education, an analysis of the interpersonal relationship between those involved in the dispute is discouraged. Instead lawyers are also trained to identify, assess and attempt to mitigate legal risks. This is the cornerstone of orthodox legal education. But in learning to think like a lawyer we also learn to feel like one. We learn to ignore feelings, including our own. We allow our emotional intelligence to atrophy. But what we do build is a strong sense of pessimism. Where others see sunshine, we see clouds – and then we get busy buying umbrellas. As psychologists have long known, pessimism has a corrosive effect of on mental health.

Second, legal disputes are adjudicated upon by courts within an adversarial system of justice. The American psychologist (and father of positive psychology) has observed that the adversarial system is a 'zero-sum game'.² A game in which for every gain by one side there is a counterbalancing loss by the other. Lawyers are trained to be aggressive and competitive

¹ Daicoff, *Lawyer Know Thyself: A psychological analysis of personality strengths* (2004).

² Seligman, Verkuil & Kang, "Why Lawyers are Unhappy" (2005) 10(1) *Deakin Law Review* 29.

to win the zero-sum game. Seligman explains that such training produces negative emotions that can be a source of lawyer demoralisation.

Third, lawyers are often required to hear stories and sort through evidence of very traumatic events. Or at even just of events that have caused or are causing great distress to their clients. This understandably may also cause distress for lawyers themselves. It has even been reported that criminal lawyers, who typically work with traumatised clients, are at a greater risk than their civil lawyer counterparts from acquiring post-traumatic stress disorder.

Fourth, the landscape of the legal profession provides fertile ground for bullying. Researchers have found that a power imbalance is a necessary pre-requisite for bullying to occur.³ Unsurprisingly, bullying has been found to be particularly prevalent in hierarchical organizations where dominance and power imbalances are strongly emphasized.⁴ Indeed, researchers have observed that bullying tends to be institutionalized in these kinds of organizations.⁵ The legal professional is deeply hierarchical. There are the divisions between solicitors, the bar and the bench and beneath that an entrenched hierarchy based on seniority.

The toughest challenge that I personally have had with respect to my own mental health has been, ironically, in fighting for better systems and services to support the wellbeing of my colleagues at the Victorian Bar.

In 2006, I became aware of the North American research into mental ill health in the legal profession. This research reported frighteningly high numbers of lawyers suffering from poor mental health. In 2006, there had been no such research into mental ill health in the Australian legal profession. The North American research resonated with me. The research

³ Salin at 10.

⁴ See Salin at 11 who refers to B.E. Ashforth, 'Petty tyranny in organisations', (1994) 47(7) *Human Relations* 755 and J.L. Ireland, "'Bullying" among prisoners: a review of research' (2000) 5(2) *Aggression and Violent Behaviour* 201.

⁵ Salin at 11.

seemed to describe what I had seen and experienced as a law student and lawyer but hadn't fully understood.

I asked the then head of the Victorian Bar if the Bar could establish a committee to inquire into the wellbeing of barristers and the resources that could be deployed to support barristers' wellbeing. I didn't have to push too hard, because co-incidentally at the same time news broke of the suicide of a senior member of the Bar.

The committee was established and it consisted of just 3 people: a suitably senior silk to head the committee, the CEO of the Bar and me – I wasn't considered senior enough to chair the Committee until 2014. No one else wanted to join.

In the early years, the committee met with considerable resistance. Many barristers I think considered the committee to be either something of a joke or an embarrassment. The very first seminar that I organised in the name of the committee, at which a respected psychologist spoke about managing stress, drew hecklers. There was even a push by some barristers to abolish the committee.

In 2007, however, there was yet another tragedy. This time a barrister, whose poor mental health was well known at the Bar, died suddenly from a drug overdose. The awkward circumstances of his death attracted much media attention and public criticism of the legal profession. One critic proclaimed that the Victorian Bar was "awash with cocaine".

By now I was getting smarter. "Look" I said to my colleagues "the existence of the committee helps protect you from public criticism. You can point to the committee and tell your critics that you are doing everything you can to support the wellbeing of barristers."

In 2008, I became aware of and heavily influenced by the Victorian Doctor's Health Program the "VDHP".

The Medical Doctors' Board together with the Australian Medical Association Victoria established the VDHP in late 2000. The VDHP is an entirely independent organization and is funded by the Medical Doctors' Board from a fee levied on every medical registration.

The VDHP address the problem of mental ill health right across the profession from medical school training to the regulation of the medical profession. In doing so, the VDHP plays three different roles: educator, counselor and advocate.

As an **educator** the VDHP through, many different means, seeks to raise awareness about mental health and impart to practitioners advice on maintaining good mental health.

As a **counselor** the VDHP provides free telephone counseling 24 hours a day, seven days a week - and if required, will arrange further counseling or clinical treatment to those who need it.

The medical profession, like the legal profession, is heavily regulated. Medical doctors' have a statutory obligation⁶ to notify their regulator on becoming aware of any illness that would impair a colleague's ability to practice medicine. When such a notification is made the VDHP may take on the role of **advocate** and will seek to represent and safeguard the best interests of doctors in any investigation. Where conditions are placed on a doctor's registration the VDHP will liaise with the Medical Doctor's Board to ensure that such conditions are met.

Inspired by the VDHP, a barristers counselling service was established by the Bar in 2009. In 2009 the counseling service consisted of free telephone counseling 24 hours a day, 7 days a week for barristers and their immediate family and up to 6 free face-to-face counseling sessions.

Given the stigma attached (and still attaches) to mental ill health in the profession, great care was taken to ensure confidentiality of the service. Face-to-face counseling was

⁶ *Health Professions Registration Act 2005 (Vic)* – section 36

provided in rooms on Collins Street outside the legal precinct and appointments were staggered to ensure that barristers did not meet accidentally in the waiting room or on the street. No information that would identify a barrister who has used the service was disclosed to the Bar. The committee was provided with half yearly reports with data on the numbers using the service.

To reinforce the confidentiality of the service, great care was also taken in the promotion of the service. Bernadette Healy, the psychologist who headed the organization that provided counselling service, gave regular seminars to become the human face of the service. All flyers promoting the service bear the Group's logo.

Using the VDHP as a model, the Committee assumed the role of educator in matters of wellbeing at the Bar. The Committee ran seminars for barristers and workshops on all sorts of mental health and wellbeing issues. The half-yearly reports provided by the counselling service assisted in identifying issues of concern to barristers. One of those issues identified in the half-yearly reports was bullying. In 2014, the Committee authored a report to the Bar on bullying within the Bar and from the judiciary. The report recommended that the Bar, among other things, draft and implement a policy with respect to bullying within the bar and engage the judiciary in a conversation about how best to deal with bullying within the courts.

The Committee also played a less visible role in taking calls from people who were concerned about the health of a barrister. Assistance was either provided to that person to support the barrister otherwise a committee member would approach the barrister to offer help.

The committee was largely successful in its efforts to educate barristers about mental health and wellbeing and in providing barristers with support.

The humble committee of 3 expanded to a committee of 13. Suddenly everyone wanted to join the committee.

There was no heckling at seminars. Instead, seminars were well attended with barristers earnestly discussing mental health issues. The Victorian Bar News, published articles about mental health and wellbeing written by many different barrister's keen to contribute to the Bar's conversation about mental health.

But the success of the committee could perhaps be best seen in the fact that in 2014 the take up rate of the counselling service was 4.1% of the Bar. The New South Wales Bar also ran a counselling service and its take up rate in 2014 was reported to be only 2.5%. It seemed that at the Victorian Bar the Committee had managed to make barristers feel comfortable about asking for help. In 2015, the counselling service even became a finalist in the Australian Psychological Society annual awards for excellence.

But despite this success, there still there was resistance from some quarters of the Victorian Bar, and rather unhelpfully from that quarter that decide how Bar resources are to be spent.

Each year, of the 9 years that I worked on the Committee, I had to fight like a terrier for funding. And in fighting for funding I had to continually justify the work of the Committee. There were two common, overlapping, objections that I was met with time and time again.

The first was that the Victorian Bar Association is an incorporated association and not an employer. The Bar was not obliged to care for the wellbeing for barristers as an employer might be obliged to care for employees.

The second objection was that barristers were running their own practices and should take responsibility for their own well-being.

In reply, I would point to Bar Association's constitution which at that time, stated that one of the purposes of the Association was to promote, maintain and improve the quality of the Victorian Bar.⁷ And I would say that wellbeing is central to the quality of barrister's work.

⁷ The Victorian Bar Incorporated Constitution, 22 November 2010 ('the Constitution'), cl 19.1. Replaced by a new Constitution effective from 5 March 2015.

Poor mental health is unlikely to assist barristers to achieve a high standard of legal practice. And this is unlikely to enhance the reputation of the Victorian Bar or the legal profession.

What is the best tool to advocate for mental health in the 21st century?

The best tool to advocate for mental health in the legal profession in the 21st century is to understand that we all have an interest in good mental health in the profession. Not just lawyers but the community at large.

While the poor mental health of one lawyer might appear to be a personal misfortune, widen your focus and consider the impact on that lawyer's client, widen your focus still further and consider the impact on the administration of justice and the broader community. It should also be remembered that it is frequently from the profession that judges are appointed. Lawyers are likely to take their mental health with them to the bench.

While we all have a stake in wellness in the profession, we all have a role in promoting wellness.

While each lawyer, and law student, should be expected to take responsibility for their own wellbeing research has shown us that there are institutional causes which undermine wellbeing making legal practice hazardous to health. These institutional causes can only be dealt with by the institutions themselves.

What often gets missed too, is that this new-found awareness of wellbeing in the profession presents us with an exciting opportunity. An opportunity to rethink orthodox legal education and training. An opportunity to be better lawyers. To be lawyers with higher emotional intelligence who are better and more empathetic listeners and communicators. To be lawyers who are just as skilled in cooperation as conflict. And in the 21st century, as traditional methods of dispute resolution are being pushed aside in favour of other more cooperative methods, it is the resilient and emotionally intelligent lawyers who are likely to serve our community best.