2007 Conference of Regulatory Officers, 9am, Law Society House, Thursday 1 November 2007 Opening Address

Thank you for inviting me to deliver this opening address at the 2007 Conference of Regulatory Officers. I note that, despite some notorious republicans in the audience, the conference has the royal sounding acronym "CORO". The CORO is also the short name for a favourite Brisbane lawyers' watering hole of the 60s and 70s, the Coronation Motel, recently reinvented as Coronation Residences, an apartment block with a popular restaurant, "Lure". I was therefore a little disappointed to see that the CORO drinks and conference dinner were not being held at the CORO but at a rival establishment! Perhaps next time CORO comes to Brisbane it can have an event at the CORO!

I congratulate the organisers of and the participants in this important conference. CORO brings together legal profession regulators from throughout Australia. During the next two days you will benefit from hearing diverse views, including those of a wise retired judge, my friend and erstwhile colleague, Jim Thomas AO, cutting edge academics, Professor Jeff Giddings from Griffith University and Dr Christine Parker from the University of Melbourne, experienced capable practitioners like Pat Mullins, Pippa Colman, Peter Eardley and Randal Dennings, investigative journalist Hedley Thomas from *The Australian*, and legal commentator and presenter of the ABC's Law Report, Damien Carrick. Their input combined with yours can only enhance the performance of the often difficult and important roles of the Australian legal profession's leaders, regulators and CEOs. The beneficiaries will be the legal profession, but even more importantly, the public whom the profession serves and whom the regulators aim to protect.
Participating in a conference like this is a great way to get off the daily treadmill – in my case the grind of judgment writing and appeal preparation – and to open eyes and minds to a wider world view. When thinking about what I might say today, the first thing that struck me was how different legal regulation is now from when I was admitted as a legal practitioner 31 years ago. In 1976, the law in Australia was a parochial profession. If you qualified to practise in Queensland, as I did, generally speaking you expected to practise in Queensland for the rest of your days, as I have. That's my excuse for lacking imagination! Today, with uniform legal admission rules throughout Australian jurisdictions, national and global law firms and multi-disciplinary practices, lawyers are valuable, mobile commodities.

A recent brief from the Law Council of Australia noted that one of its 2007 initiatives is to improve access for Australian lawyers to the US legal services market. The USA has so far lagged behind Australia in achieving national uniform legal admission rules and practice. But in response to Law Council approaches, the Supreme Court of Delaware, a state which is home to over half a million corporate entities, will introduce a liberal Foreign Law Consultants rule later this year. A growing number of US states are now allowing Australian law graduates to take their bar exam without further preliminary study. This is in response to a US Conference of Chief Justices' resolution, adopted in February last, which urged every US state and territory Supreme Court to consider permitting university law graduates admitted to practise in Australia to sit US bar exams for the purpose of being admitted in the US

jurisdiction.[1] This suggests that we can expect the 21st century to bring continued progress towards core uniform admission rules throughout the common law world, no doubt with some specific local law requirements.

Matters of legal professional regulation are understandably an area of concern to the Law Council which notes:

> "… the challenge for the legal profession and Australian governments is to introduce regulations that take into account the fact that most lawyers and their clients are individuals and small businesses operating locally, while a significant portion of larger and complex legal work is being done at a national level. While this need not, and should not, mean that state based legal professions are lost, it does mean that the standards applying to the practise of law should be nationally consistent where this benefits legal consumers and their lawyers."[2]

The Law Council is also concerned that Australia is the only western nation that regulates its migration lawyers under a migration agents regulatory scheme instead of through the relevant legal profession regulatory regime. It argues that this means migration lawyers are subject to dual regulation - by the legal professional regulatory scheme and by the Migration Agents Registration Authority (effectively operated by the Migration Institute of Australia). The Law Council is concerned that this risks causing significant conflicts of interest, undermines the national legal profession regulatory scheme, diminishes consumer protection and provides a disincentive to lawyers who have much to offer in the practise of migration law.[3] The Law Council considers it a priority to ensure the regulation of migration lawyers is done solely by the legal profession regime.[4] This may be an area within CORO's field of interest and influence.

Any regulation by its nature tends to be negative in that it inevitably involves a list of "must do's" or "must not do's". Conferences like this should not only be about adding to the list of what must or must not be done by way of regulation of the legal profession. They provide an opportunity for participants to improve and refine the way the legal profession can best operate to the benefit of its members and the public it serves, so that mandatory regulatory rules may be minimised. Those of us who have the duty of determining disciplinary charges against legal practitioners at one level or another know that the overwhelming majority of practitioners are highly principled men and women who give a lifetime of dedicated service to the profession and the community. We also know that the overwhelming majority of those against whom charges are brought are not inherently evil, greedy or bad. They tend to be practitioners who, for various reasons, are unable to cope personally and professionally and slide into the dark hole where the black dog of depression awaits. If untreated, impaired judgment, lethargy and self-medication leading to alcohol and drug abuse precede even more disastrous consequences for the practitioner's clients,

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1 Law Council of Australia, "US Opportunities for Australian Lawyers", *Law Council of Australia Brief*, September 2007.

2 Law Council of Australia, "National Practice", *Law Council of Australia Brief*, September 2007.

3 Law Council of Australia, "Federal Election 2007 – Key Issues: Responses", *Law Council of Australia*, 2007

4 Above.

loved ones, fellow practitioners and, of course, personally. The following extracts from reported judgments available through Austlii contain all too familiar scenarios.

In *Law Society of New South Wales v McNamara*,[5] the solicitor knew he was miserable and not coping. He consulted his general practitioner but was unable to get an appointment for a recommended psychiatrist for at least a year. He told his doctor "Within the last 12 to 18 months my situation became such that I experienced suicidal thoughts and took some steps towards that outcome. During the worst of this time I began to gamble some money belonging to clients and the firm – this from someone who has always prided himself on honesty and ethics. On these particular occasions it is not overstating to say I did not care whether I lived or died."[6]
The practitioner had developed a chronic form of depression known as Dysthymic Disorder. He explained, "… The misappropriation occurred in the context of this disorder, resulting in actions that are completely out of character. I had no need to take this money as I had more than this amount freely available from my own funds, but my state of mind during this period was completely irrational. The misappropriated money as well as a large sum of my own was used on a pathological gambling habit which arose during this time and has now ceased. Gambling of any nature has never previously been part of my life. After 17 years of absolute integrity in the practice of law, I am devastated by this situation and the shock and distress it has caused my colleagues and family."[7]
The solicitor's doctor considered that the immediate triggering mechanism of the depression was the solicitor's high workload.[8] The practitioner was also self-medicating by drinking alcohol heavily at the time he misappropriated clients' funds.[9]

The case relating to struck-off New South Wales QC, Clarence James Stevens, shows that barristers, even silks, are not immunised against the black dog. For many years Stevens had not filed tax returns or paid tax. His debt to the Australian Tax Office was in seven figures by the time his case came before the regulatory authority. Stevens was diagnosed with depression in February 2000 and in late 2002 was referred to Associate Professor in Psychiatry, Roger Bartrop. Stevens told Professor Bartrop that "… if he had to do anything in relation to his own affairs it was as if he was 'operating in a fog'."[10] Professor Bartrop considered that Stevens was suffering from major depression, noting:
"I am impressed by Mr Stevens' stoicism in the face of the debilitating effects of his major depression: this has obviously sapped his emotional strength. It is remarkable that his obvious high intelligence and motivation to perform well for his clients, and to keep the high esteem of his peers in the Bar Association, has not resulted in any significant period away because of illness. Thus he continued, albeit with some difficulty, in his practice and in the maintenance of sustaining relationships in his personal sphere. He obviously struggled to maintain functioning in these domains without treatment before 1999. It was testimony to his knowledge and passion for the

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5 [2007] NSWADT 162.
6 Above, para 49.
7 Above, para 51.
8 Above, para 71.
9 Above, para 85.
10 *New South Wales Bar Association v Stevens* [2003] NSWCA 261, para 48.

Law as a vocation, as well as his strength of character that Mr Stevens still performed successfully for so many of his clients."[11]
Stevens' case was also an exemplar of Australian reciprocal regulatory procedures as his name being struck off the New South Wales roll of barristers resulted in his name being struck from the roll of practitioners in Western Australia[12] where he had also been admitted.

The death of Melbourne silk, Peter Hayes on 21 May this year following his ingestion of cocaine and heroin, very publicly raised the problem of substance abuse in the legal profession and its close link to mental health issues.[13] Mental health problems are often not treated professionally but instead sufferers self medicate, in context a synonym for alcohol and drug abuse.[14] The CEO of Beyond-Blue, a public interest group which seeks to increase community understanding of depression, reported that 50 per cent of those with depression self-medicate with drugs or alcohol.[15]

To demonstrate my evenhandedness, I observe that judges too can be visited by the black dog as the case of Justice Vince Bruce so publicly demonstrated.[16] The conduct division of the Judicial Commission of New South Wales was assembled to examine complaints relating to delays in the delivery of his judgments. He was then suffering from depression. The medical evidence was that the onset of depression in his case made more powerful the effect of a pre-existing character trait of procrastination. The majority of the conduct division determined that although treatment for his medical condition of depression meant that his illness had now plateaued, it could not be said that the incapacity satisfactorily to perform the judicial function had been removed. The New South Wales Supreme Court sitting as a bench of five determined that those findings of the majority of the conduct division were open.

In May this year, Beyond-Blue released the results of a survey designed by it and integrated into Beaton Consulting's 2007 annual professions study. The survey showed higher than average depression scores among professionals as well as significant use of alcohol and other non-prescription drugs to manage the feelings of sadness and depression.[17] The biggest representative group (about 15 per cent) experiencing moderate or severe symptoms of depression was lawyers.[18] A significant proportion of lawyers often turned to alcohol or non-prescription drugs to manage their symptoms.

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11 Above, para 49.

12 *Legal Practitioners Complaints Committee v Stevens* [2005] WASAT 210, 17 August 2005.

13 Jeremy Roberts, "Hayes 'ingested coke and heroin' " The Australian, 31 May 2007

14 Adam Shand, "Star Silk Dies", The Bulletin, 22 May 2007 available at http://www.bulletin.ninemsn.com.au.

15 Adam Shand, "Even Lawyers Get the Blues", *Sunday* program, Channel 9, 17 June 2007. See also: Steven Mark, "Impaired Practitioners: Substance Abuse and Mental Illness in the Legal Profession", *Without Prejudice*, Issue 37, Office of the Legal Services Commissioner New South Wales.

16 *The Hon Justice Vince Bruce v The Hon Terence Cole & Ors* [1998] NSWSC 260.

17 Geoff Gallop, "Black Dog isn't really invincible", *The Australian*, Wednesday May 2, 2007, p 42.

18 Mike Brett Young, "Breaking the Cycle of Silence", *CEO's Page*, June 2007, Law Institute of Victoria cited as: (2007) 81(6) LIJ p 6

The research of respected Canadian psychiatrist specialising in the field of professional health and well-being, Dr Mamta Gautan MD, FRCP(C), ranks lawyers as the most depressed of the 105 professions she has surveyed, with the incidence of the disease being three times higher than in the general population. She considers that 25 per cent of lawyers suffer from elevated feelings of psychological distress: inadequacy, anxiety, social isolation and depression. Dr Gautan argues that law firms are not doing enough to deal with the problem.[19]

The cost to law firms from depressed professionals is high. One person with depression in an organisation costs it around $10,000 a year because, if untreated, (and 62 per cent of people with depression do not get treatment) there is significant resulting absenteeism and loss of productivity.[20] There is the added cost of the toll taken on fellow practitioners and of the dissatisfied client base. The economic loss to a firm of a highly trained professional who leaves because of depression or substance abuse is also costly.

What can be done to stem this drain on the profession and ensure the public is served by lawyers who are in good mental health? Some have called for compulsory random drug testing for legal practitioners,[21] a suggestion of limited cost effectiveness in my view. Others support the position taken in a number of jurisdictions in the US where practice rules require the mandatory reporting of impaired colleagues. An observing lawyer who fails to report another lawyer whose ability to represent the lawyer's client is impaired breaches the practice rule as does the impaired lawyer. Similarly, in the United Kingdom practitioners are under a duty to report a solicitor to the Law Society if they believe the conduct of that practitioner falls short of the proper standard of conduct for the profession.[22] Such practice rules do not presently exist in Queensland. The *Legal Profession Act 2007* (Qld) does, however, require a legal practitioner who reasonably believes that there is an irregularity in connection with a law practice's trust moneys to give written notice of this to the law society.[23]

Perhaps mandatory reporting by fellow-practitioners is the way of the future. After all, in Queensland since the Fitzgerald Inquiry we require our police officers to report misconduct or breaches of discipline by other police officers and a failure to do so is itself a breach of duty.[24] Why should we expect less from our legal profession?

But whether or not we proceed down that regulatory route, it seems to me there is much more to be done by the profession itself to support and sustain its members. Having professional psychological and psychiatric assistance available through professional organisations and even through individual law firms is a good start. I commend those presently existing initiatives and encourage more firms to embrace

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19 Kate Gibbs, "Profession Depression", *Lawyers Weekly*, September 2006, available at http://www.lawyersweekly.com.au/articles/Profession-depression_z68762.htm

20 Above.

21 Gary Hughes, "Time for a Dose of Reality at the Bar" *Gotcha with Gary Hughes Blog*, (09/10/2007) available at http://blogs.theaustralian.news.com.au/garyhughes/index.php/theaustralian/comments/

22 Steven Mark, "Impaired Practitioners; substance Abuse and Mental Illness in the Legal Profession", *Without Prejudice*, Issue 37, Office of the Legal Services Commissioner of New South Wales.

23 *Legal Profession Act 2007* (Qld), s 260.

24 *Police Service Administration Act 1990* (Qld), s 7.2 and s 7.4.

them. But they are not the complete answer. Once someone is suffering depression or in the grip of alcohol or drug abuse, their judgment is often too impaired to realise they need help or they are too ashamed to seek it.

One of the causes of depression is undoubtedly long work hours and work-related stress. We must as a profession make work hours manageable to achieve a work-family life balance. Anecdotally, I am constantly hearing from disillusioned young practitioners that too many firms "talk the talk" but do not "walk the walk". This is a major reason why so many of them are leaving the practice of law for other fields. It is also why, despite the large numbers of women who have graduated in law over many decades, now, the numbers of women in positions at the top end of the legal profession remain proportionally low. There can be no argument that long hours are often needed in the successful practice of the profession of law. When a big case is being litigated or a company takeover is in process it is shoulder to the wheel. But why is it necessary and how is it effective to demand the day after the case finishes or the takeover is concluded that the lawyers involved attend at 8 am at the office to immediately get on with the next matter. The lawyers should be able to take some recovery time in addition to regular leave entitlements to sustain themselves and their family. A profession which nurtures its members and encourages them to develop practices based on physical and mental well-being will have members who will better serve the public and require less regulation.

Another thing that creates positive legal energy and helps ward off the black dog is involvement in pro bono work. Helping others for free is good for practitioners, their firms, the community and the recipient of the pro bono work. Firms should support practitioners in pro bono endeavours. I mean real support; not, as I heard recently, allowing a practitioner to attend at Caxton Legal Service from 6pm to 8pm as long as they returned to the firm from 8pm to 10pm to make up lost time!

In conclusion, I offer the following suggestions for the consideration of CORO.

- The compulsory legal education component now required for practitioners to renew practising certificates should regularly include presentations on mental health issues, work-life balance and alcohol and drug abuse.
- Professional organisations, law firms and groups of barristers should encourage practitioners to lead balanced lives and create work cultures supportive of this goal. Lawyers, like other members of the community – and young aspirational lawyers are no different – need regular sleep and exercise and a healthy diet to remain mentally and physically well and to work most effectively for their clients. Firms should encourage and practically support practitioners who wish to do pro bono work.
- Law firms that "walk the walk" by creating healthy work places where the work-family life balance is genuinely nurtured should be recognised and rewarded. This could be done by the professional associations. It could also be done by a process of accreditation as work-family life balanced work places. Model employers, such as governments, government agencies, Legal Aid, banks and major corporations, could require the law firms to which they give instructions to have such accreditation in order to continue to receive their work.
- Consideration should also be given to requiring legal practitioners to report breaches of professional standards to the appropriate professional regulator.

I thank you all for your commitment to the legal profession and the community. It is valued. I wish you a stimulating CORO 2007 and look forward to seeing its results.