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LAW, LAWYERS AND  
JUSTICE

## [CHAPTER 01]

## WELCOME TO THE LAW

## INTRODUCTION



Introductory video

Every single lawyer you have ever seen, or heard of, or read about, once sat right where you are sitting now. Every single one of them sat down, for the very first time, pulled open their very first law textbook, took a deep breath, and began to learn.

- Michael Kirby did, on his way to becoming a High Court judge who taught us that morality and dignity still belonged in the law;
- Julia Gillard did, on her way to becoming Australia's first female Prime Minister in 2010;
- Ronald Dworkin, did, on his way to becoming a Professor at both Oxford and New York University (simultaneously!), and teaching us new ways to think about the law itself;
- Quentin Bryce did, on her way to becoming Sex Discrimination Commissioner, Governor of Queensland, Governor-General of Australia and then undertaking a significant inquiry into the protection of women from domestic violence;
- Alfred, Lord Denning did, although he soon put his books aside to serve in World War I, before returning to become one of the greatest judges in history;
- Susan Kiefel did, on her way to becoming universally acclaimed as Australia's first female Chief Justice;
- Samuel Griffith did, on his way to becoming Attorney-General of Queensland, Premier of Queensland, Chief Justice of Australia, and one of the principal authors of our Constitution;
- Pat O'Shane did, on her way to becoming Australia's first Aboriginal Magistrate.

And now it is your turn.

Some of you may write your name alongside those above. Many of you will have no such aspirations, but will serve your communities in dozens of other ways. Because of you, separating families will do their best to resolve their affairs. Because of you, families will buy their homes in smoothly conveyed sales. Because of you, the innocent will be defended and the guilty sentenced in a way that is just. Because of you, businesses will be safely formed and conducted, laws will be properly written, consumers will be protected,

the environment will be supported, and rights will be maintained. Because *that* is what it means to be a lawyer.

In this first chapter of your legal studies, we begin by looking in general terms at the profession that your degree will qualify you to enter. We ask what lawyers actually *do*, we ask what *skills* lawyers have, and we ask what lawyers *know*.

## WHAT DO LAWYERS ACTUALLY DO?

Pretty much everyone has heard of lawyers; and most people have at least a vague understanding of what lawyers do. However, few people seem to really understand the sheer breadth of the legal profession, and the wide range of jobs that lawyers occupy.

Why does this matter? Well, at the outset of your studies it can be helpful to have an end goal in mind. Your goal might shift, of course, as you move through your studies, but it's worth knowing what the profession looks like once you have graduated, so that you can understand the relevance and importance of the material presented in this text and, indeed, in the rest of your degree.

### LEGAL JOBS WITH A FOCUS ON COURTS

Let's start with the obvious. Most people associate lawyers with courts. Surprisingly, though, only a relatively small proportion of lawyers work regularly in the courts, and only a *very* small proportion of disputes end up in the courts. Court-focused roles for lawyers include:

- › **Barristers**, who are specialists in courtroom advocacy (that is, actually standing up in court and arguing cases). In most **jurisdictions**, barristers still wear the traditional black barrister's robes and horse-hair wig for their appearances in the higher courts. In some jurisdictions, a lawyer who wishes to become a barrister must undertake an additional, usually very difficult course of examinations *after* being admitted as a **legal practitioner**.
- › **Judges and Magistrates**, who preside over the various courts and actually render judgments. In this category, we may also include the members of various tribunals such as the Administrative Appeals Tribunal, who perform the function of judges in those bodies. Judges and magistrates are usually very learned and very experienced, and their appointment 'to the bench' reflects the trust of the entire community in their judgment.
- › **Judicial Registrars**, who are delegated to perform some of the functions of judges (for instance, in the Commonwealth jurisdiction, it is usually a Registrar rather than a Judge who grants divorces).
- › **Judges' Associates**, who are usually recent law graduates, and who serve as the assistant of a judge, providing them with research support outside the court, and helping to manage the court process when the court is in session.
- › **Solicitor Advocates**, who are solicitors rather than barristers, but who have developed specialised skills similar to a barrister, and who argue matters in court.
- › **Instructing Solicitors**, who accompany a barrister or solicitor-advocate to court, and who provide considerable support to the barrister in the preparation of cases, and the management of clients and witnesses during the court proceeding itself.

**Jurisdiction** refers to the *limits* on a particular law or institution. For instance, a law might only apply within the jurisdiction of Queensland (so not in New South Wales). Or, used in another way, a court might have jurisdiction to try family law cases, but not criminal law cases.

A **legal practitioner** is a broad term covering judges, magistrates, barristers and solicitors – essentially all of those lawyers who have been admitted to practice under the various Legal Profession Acts.

The efficient operation of our court system relies on professional lawyers in all these roles (as well as a large number of non-lawyers in other, equally important roles). From time to time, during your studies, it can be extremely helpful (and interesting) to go to your nearest court and watch the proceedings, where you will see all of these roles in operation. Remember, though, that the lawyers you see in court are just the tip of the iceberg – a very small slice of a very large profession.



Web link

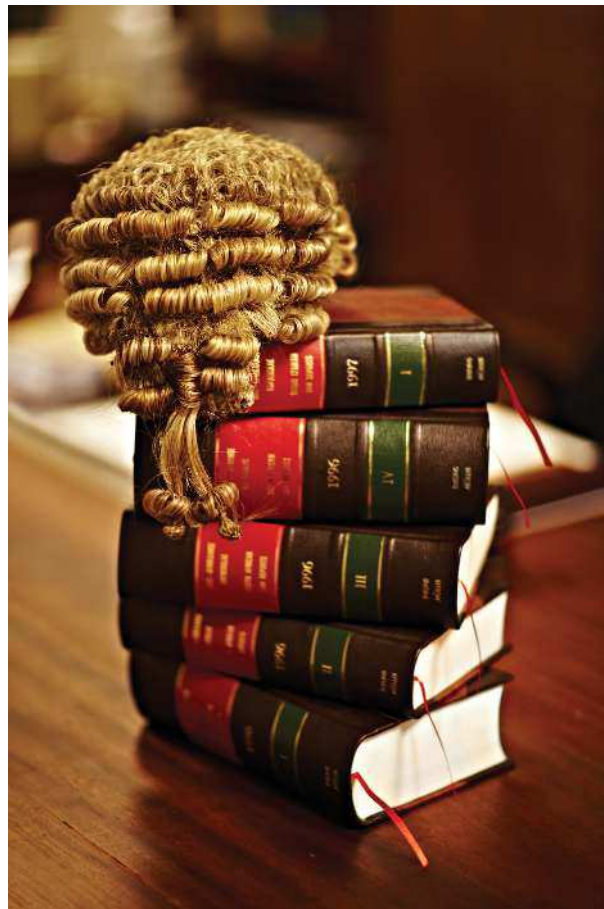


FIGURE 1.1 A TRADITIONAL BARRISTER'S HORSE-HAIR WIG

- › When planning a trip to court, start by looking up the 'Daily law list' for both the state and Commonwealth courts in your local area. These documents are updated daily, and will tell you the name of each matter, and often in general terms what will be happening (such as a trial, or a sentence).



## LEGAL JOBS WITHOUT A FOCUS ON COURTS

Many lawyers – mostly solicitors – virtually never go to court. Their role is dealing directly with clients, to help the clients to conduct their affairs in a way which does not give rise to legal problems at all; and to resolve problems before there is any need to go to the time and expense of court proceedings. There are literally dozens of specialised roles which lawyers might fill, and which might very rarely require them to go to court. A few of these roles include:

- › **Wills and estates lawyers** are specialists, who assist clients to think about their financial affairs, and to settle their estates in a way that will ensure that their loved ones are properly cared for once they die. These lawyers do more than just write wills though – they will also often assist the executors of those wills to obtain a *grant of probate* and then to take the proper legal steps required to distribute the deceased person's estate.
- › **Conveyancers** are no longer required to be lawyers, but it is still very common for solicitors to guide home buyers through the legal processes involved in transferring the ownership of land from one person to another, and avoiding the pitfalls which might beset an inexperienced purchaser.
- › **Family lawyers** advise separating couples about the distribution of the couple's assets, and help the couple to make parenting decisions in the best interests of the children. The vast majority of family separations are managed by these lawyers without any need to contest the dispute in court.
- › **Migration specialists** assist people who seek to come to Australia, and particularly those who wish to obtain permanent residency or citizenship (whether they are refugees or simply immigrants). Understanding Australia's complex citizenship laws can be difficult for anybody, let alone a person who might have limited English.
- › **Tax lawyers** assist people and companies to ensure that they are properly complying with the mountain of tax legislation which our system has developed over time.
- › **Planning and environment lawyers** guide developers, farmers, miners, and organisations through the requirements for planning approval and environmental approval, for projects as large as a multi-billion dollar mine, or as small as a proposal to alter drainage to a creek.
- › **Consumer lawyers** provide advice to consumers who have been the victims of fraud or other sharp practices within the retail industry.

**Probate** is the legal process whereby a court declares that a will (or a similar application called a letter of administration, where there is no will) has full force and must be obeyed. The will essentially becomes an order of the court.

Of course, this is still just a tiny slice of the range of activities out there. Lawyers specialise in maritime law, sports law, elder law, native title, aviation, intellectual property, personal injury, discrimination and human rights, construction law, banking law, administrative law, defamation law, law on the internet, children's law, and dozens more. See what we mean about law being a diverse profession?

## IN-HOUSE LAWYERS

Some practising lawyers do not practise in legal firms at all. A great many lawyers in Australia occupy various *in-house counsel* roles. Many large companies and large private organisations have so much legal work to undertake that they find it more cost-effective to hire salaried lawyers of their own, rather than obtaining their legal advice from law firms at an hourly rate. In fact, this is such a large part of the legal industry that the in-house counsel have their own professional body, the Association of Corporate Counsel Australia.

Lawyers also fill many thousands of public sector roles. One might obviously think of the Commonwealth and each state and territory Attorney-General's Department which employ many lawyers. In fact, however, every government department employs dozens of lawyers in both legal and policy-oriented roles.

A specialised type of public sector in-house lawyer is the *military* lawyer. Each of the three uniformed defence forces employs dozens of lawyers on a full-time basis, and hundreds of reservists on a part-time basis, to provide support for the military's discipline processes, its administrative processes, and its military operations, where lawyers have a key role in ensuring that our military carefully observes the humanitarian aspects of the rules of armed conflict.

### Squadron Leader H, RAAF legal officer

LIVING  
LAW

Squadron Leader H, a mother of two young children and already a veteran of the wars in Iraq and Afghanistan, was on a plane on the way to the Middle East when she was interviewed for this book. She has been an Air Force legal officer since graduating from the University of Melbourne in 2003 with a combined degree in Laws and Arts, majoring in Indonesian and Islamic studies.

Her role as the Legal Officer to Combat Support Group is extremely diverse. In one day, she might be required to give a Rules of Engagement brief to members about to deploy on military operations, provide advice to a Flight Commander about options for an under-performing member, and then draft an advice on state laws concerning traffic offences. Unlike most lawyers, Squadron Leader H (and other military lawyers) are required to be professional military officers as well as military lawyers. This means maintaining a combat-ready level of fitness, and proficiency in everything from aircraft recognition to the use of assault rifles and pistols.

She loves the diversity of the role of a military lawyer, and the opportunity her job has given her to see and live in different parts of Australia. She has had the opportunity to live in Melbourne, Sydney, Newcastle, Perth, Wagga Wagga and Brisbane. Finally, Squadron Leader H enjoys the community-minded aspect of the Air Force, which involves everything from speaking at schools to deploying humanitarian assistance overseas when disaster strikes our neighbours.

Squadron Leader H's advice for you is to keep your options open and look outside the square. 'A law degree doesn't necessarily have to lead to being a lawyer working in a firm.'

### ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution (ADR) means exactly what one might expect – finding ways to resolve disputes without requiring court action. ADR has always been a part of our legal system, but it has really gathered pace in recent decades. Lawyers are not the *only* ADR practitioners – for instance, many family dispute resolution practitioners come from a background in social work – but ADR is still a key area of work for lawyers. The principal Australian ADR organisation, the Resolution Institute, was formed in 2014 by combining two predecessor organisations, one of which was called 'Lawyers Engaged in ADR', or LEADR. Lawyers involved in ADR activities might fill roles such as:

- **Mediators**, who facilitate a structured conversation between the parties in dispute, but without making recommendations or offering ideas. A mediator is an expert in

the *process* of dispute resolution, while allowing the parties to remain responsible for the content.

- › **Arbitrators**, who are almost like private judges. In an arbitration, the disputing parties jointly appoint an arbitrator and agree to put their cases to the arbitrator and to be bound by the arbitrator's decision.
- › **Conciliators**, who are almost a mix between mediators and arbitrators. Conciliators do not sit as judges, but unlike mediators they will often make suggestions and offer their own views and assessments, in order to assist the disputing parties to reach a settlement.

Lawyers are also, of course, often involved in mediations, arbitrations and conciliations as *advisers* to the parties in dispute. Alternative dispute resolution is continuing to expand in Australia, as it offers a less expensive, less time-consuming process where the parties have much more control than they would if matters were resolved in court.

### LAWMAKING, ADVOCACY AND ACADEMIA

It should be no surprise that lawyers are heavily involved in lawmaking. We have already spoken about the in-house counsel in government departments. However, the Parliament itself inevitably includes many law graduates. As an example, the 43rd Federal Parliament, which sat from 2010 until 2013, had 226 members (in both houses). Ninety of those 226 members held law degrees. Of those 90, 30 had been engaged as lawyers before their election to Parliament. While there is little doubt that the Parliament benefits from diversity within its ranks, it remains true that many lawyers are attracted to politics, and do very well in politics.

In addition, of course, the Commonwealth and each state and territory has, in Cabinet, an Attorney-General, who is the chief law officer for that jurisdiction, and whose duties include general responsibility for the rule of law in Australia, as well as being the principal legal adviser for the Cabinet and the government generally.

Outside the Parliament itself, lawyers are often at the forefront of public advocacy, representing communities and opinions as they seek to have the laws changed. The range of lawyers in these roles is truly stupendous. One might think of lawyers like Noel Pearson, a constant leader in policy debates on behalf of Indigenous peoples. One might think of the work of the Australian Lawyers Alliance (ALA) on a range of issues, perhaps most prominently refugee issues. One might think of the Environmental Defenders Office



FIGURE 1.2 A SIGNIFICANT NUMBER OF AUSTRALIA'S POLITICIANS HOLD LAW DEGREES

(EDO), advocating on behalf of the environment. One might think of the work of the Australian Lawyers for Human Rights, or the Australian Women Lawyers, or the society of Labor Lawyers. One might think of the work of organisations like Queensland Advocacy Incorporated, on behalf of those with disabilities. This list can go on, and on.

Finally, of course, the authors of this text have all chosen to follow their legal careers into academia. Legal academics spend a great deal of their time teaching the law to those commencing their legal careers. In addition, however, legal academics spend considerable time researching and analysing the state of the law, identifying problems within the law and areas for improvement. Legal academics maintain their knowledge of the important history of the law, they consider the meaning of law and its relationship to our communities, and they compare Australian laws with similar laws overseas. Finally, they maintain the legal resources and databases upon which the entire industry is based.

### CAREERS OUTSIDE THE LEGAL PROFESSION

An enormous number of law graduates do not in fact practise law at all. The skills built during an education in the law, and the fact that the world in general becomes more and more legally complicated every year, means that law graduates are in high demand for a range of roles outside the legal profession. In fact, in recent years less than half of all law graduates have entered legal practice. So what are those other graduates doing?

- **Executive and managerial roles:** A large number of law graduates undertake double degrees, graduating with both a Bachelor of Laws and a Bachelor of Business or Bachelor of Commerce, which puts those lawyers on an ideal trajectory to undertake executive and managerial roles in private industry. Other law graduates undertake postgraduate studies such as the Master of Business Administration (MBA) on their way to higher level managerial roles. You can imagine that a prospective candidate who has a strong understanding of (say) employment law, company law, consumer law, and communications law would be a promising candidate for such roles, compared to a candidate with no legal training at all.
- **Professional compliance roles:** The role of compliance professionals is to ensure that their organisation has proper systems in place to comply with all of the laws which bind them. This might be anything from employment law, to discrimination law, to planning and environment law, to occupational health and safety, to tax law. Most large organisations have professionals whose entire job is to ensure that the companies are complying with the law; and to ensure that as the law changes and evolves, the organisation's practices also evolve.
- **Finance sector roles:** The finance sector is now very heavily regulated, and many students undertake double degrees in law and finance or accounting, but with an intention to spend their careers in finance roles rather than in legal roles. For those finance professionals, having a deep understanding of legislation such as the Australian Securities and Investments Commission Act, puts them 10 steps ahead of competitors who must hire lawyers for that advice.
- **Community sector roles:** Finally, lawyers outside the profession are not just involved in the world of big business. Many lawyers take their skills into the community sector. To take just one example, the Returned and Services League (RSL) includes staff with legal skills who can assist veterans to make claims for compensation and support





Web link

after their return from war. For many people, government processes can be truly bewildering, and lawyers in the community sector spend their time assisting those people to safely navigate the law as best they can.

### PRO BONO WORK

Finally, you should understand that many, many lawyers (in fact, the vast majority of lawyers) spend time during their career engaged in practice *pro bono publico*: ‘for the public good’.

Some lawyers volunteer their time in organisations such as the Community Legal Centres, or the Women’s Legal Centre, or in a Public Interest Law Clearing House, or for *pro bono* law firms like Salvos Legal Humanitarian.

Some lawyers – particularly barristers – habitually accept briefs for free, or at very low cost, for organisations such as Legal Aid and the Aboriginal and Torres Straits Islander Legal Service.

Most large firms have dedicated *pro bono* sections – in fact, in 2015, the law firm Clayton Utz became the first large law firm in Australia to reach the milestone of providing half a million hours of free service to clients in need.

Much of this *pro bono* effort is coordinated by the Australian Pro Bono Centre, but a substantial amount of the *pro bono* work of our profession goes on very quietly, by lawyers who simply undercharge or work for free in worthy cases without telling anyone about it. It is difficult to imagine any other profession in Australia which systematically gives away so much of its services to those in need. Many lawyers see *pro bono* as both a duty and a privilege, and it is certainly one of the greatest traditions of our profession.

### LAW TIP

- ▶ Many of these community organisations welcome law undergraduates to assist them. You won’t be able to give legal advice, but you can help in a large number of other ways and gain valuable practical experience which will help when you enter the job market.

## THE SKILLS OF A LAWYER

Regardless of which of those many career paths you might follow, you will carry with you the *skills* of a lawyer. The strange thing is, these are seldom overtly taught during your legal studies. You are unlikely to enrol in a law course called ‘thinking and analysing carefully’. Instead, these skills are developed alongside your knowledge of the substantive law. If you want to be an effective legal professional, and if you want to be an effective law student, then you should keep these skills in the back of your mind at all times as you make your way through your degree.

## PROBLEM-SOLVING

First and foremost, lawyers are *problem solvers* and *problem preventers*.

Many people come to see a lawyer because something has gone terribly wrong, and they are unable to fix it on their own. Perhaps they have been charged with a criminal offence. Perhaps they have been injured in a motor vehicle accident. Perhaps they have separated, and have been unable to have contact with their children. Perhaps they have applied for a visa and been refused. Perhaps they have been sold an expensive product which turned out to be fake. Your role, as a legal professional, is to help your client to resolve their problem, with as little damage as possible.

As you go through your studies, you will read the judgments of many court cases. One great way to understand these cases is to ask yourself ‘What does the plaintiff see as the problem here, and how do they propose to fix it?’

Problem-solving is an art in itself, and there is no simple model to apply. A few things you might consider from the outset include:

- › **Understanding the problem.** Sometimes this is more complicated than it seems. For instance, imagine two separate clients, each of whom has been the victim of a car crash, resulting in considerable damage to their car. For one of those clients, the problem might be that they have lost their means of transportation to work. For the other client, the problem might be that they were a car enthusiast who has spent hundreds of hours working on that car, only to see their efforts destroyed. For the first client, a new car may be a solution; for the second client, this is unlikely to be the case. Be sure, from the outset, that you understand what the actual problem is.
- › **How did the problem occur?** Often, working out how a problem occurred is an important step to resolving the problem, and to establishing which party should bear the responsibility (legal or otherwise) for the solution. It is important to do this in a systematic and logical way, asking which actions caused which effects. In real cases, lawyers often construct chronologies, or timelines, to allow them to see events unfolding carefully.
- › **What caused the problem?** This is similar to the question above, but just a little different in its focus. For instance, let’s take the example of two clients who have separated and been unable to see their children. In both cases, the problem might have occurred in the same way – perhaps a series of text messages between the parents resulting in a refusal by the other parent to hand over the children. And yet the root cause might be entirely different. Perhaps in one case the parent who has the children is angry at our client because our client had an extramarital affair. And perhaps in the other case the parent who has the children is angry because our client smoked cigarettes in the vicinity of the children during their last visit. Understanding the *cause* of the problem can lead you to the solution.
- › **What is the desired outcome?** At the end of the day, what does your client want? Do they want compensation? An apology? Do they want something repaired or replaced? Would they be happy to pay a fine provided they avoid jail? Different clients may want different outcomes, even if the problem is exactly the same.
- › **How do we get to that outcome?** What logical steps can be taken to achieve the outcome our client wants? Is it as simple as making a demand? Or is there perhaps