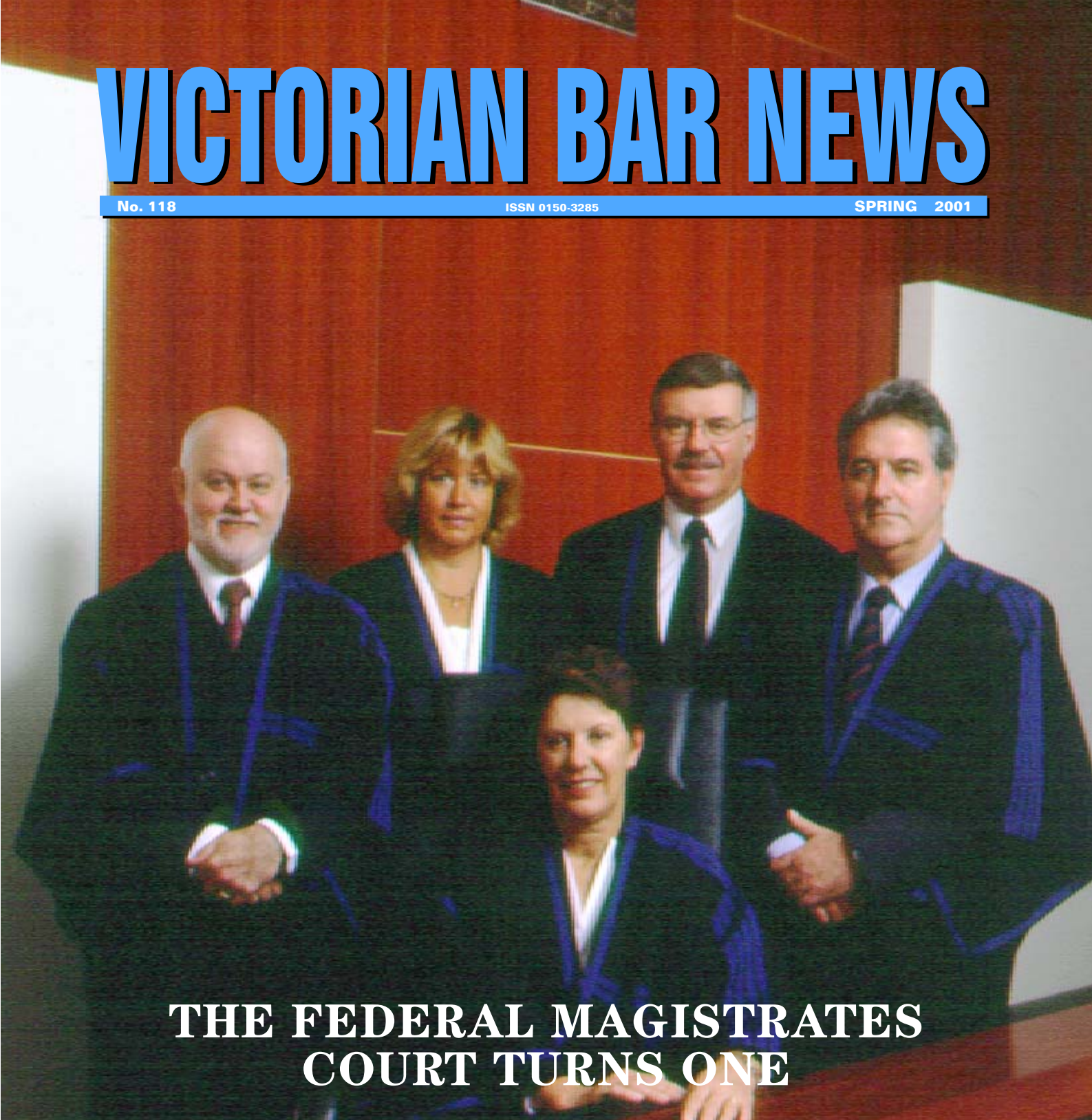
VICTORIAN BAR NEWS

No. 118 ISSN 0150-3285 SPRING 2001



THE FEDERAL MAGISTRATES COURT TURNS ONE

Welcomes: Vincent JA, Justice Flatman, Justice Habersberger, Judge Lewitan, Judge Hicks, Judge Smallwood, Judge Cohen, Judge Sexton, Senior Deputy Presidents Lacy and Kaufman, Phipps FM, Connolly FM and Walters FM ☐ Farewells: Judge Mullaly and Judge Keon-Cohen ☐ Obituaries: Douglas Salek QC and Lillian Lieder QC ☐ The 2001/2002 Bar Council ☐ Launch of *ReprieveAustralia* ☐ Supreme Court Library Plaque Commemorates Five Bar Members ☐ 2001 Women Barristers' Association Annual Dinner ☐ Refurbishment of Owen Dixon Chambers East ☐ Rip Van Winkle Awakes ☐ *R* v *Pemberton*: the Black Book Case ☐ Recent Works by Garry McEwan and Ruth Ross at the Essoign Club

VICTORIAN BAR NEWS

No. 118 SPRING 2001

Contents

Cover:
The Chief Federal Magistrates: (seated) Chief Federal Magistrate Diana Bryant; (standing) Federal Magistrates, McInnis; Hartnett; Phipps and Connolly.
See pages 50–51.

Welcomes:


Vincent JA


Justice Flatman


Justice Habersberger


Judge Lewitan


Judge Hicks


Judge Smallwood


Judge Cohen


Judge Sexton


Senior Deputy Presidents Lacy and Kaufman


Federal Magistrate Phipps


Federal Magistrate Connolly


Launch of ReprieveAustralia


Refurbishment of Owen Dixon Chambers East

VICTORIAN BAR COUNCIL
for the year 2001/2002
*Executive Committee

Clerks:

R *Redlich QC, R.F. *(Chairman)*
H *Rush QC, J.T. *(Senior Vice-Chairman)*
W *Brett QC, R.A. *(Junior Vice-Chairman)*
B Zichy-Woinarski QC, W.B.
G Howard QC, A.J.
F *Dunn QC, P.A.
B *Ray QC, W.R.
A *Pagone QC, G.T. *(Honorary Treasurer)*
A Shand QC, M.W.
B *McMillan SC, Ms C.F.
A Delany C.J.
G O'Bryan J.
H McGarvie R.W. *(Assistant Honorary Treasurer)*
A Richards Ms J.E.
H Bourke Ms K.L.
D Riordan P.J.
W Neal D.J.
S Duggan P.T.
D Gorton J.P.
D Gronow M.G.R.
S Clarke P.A.
D Attiwill R.H.M. *(Honorary Secretary)*
D Moore Ms S.E. *(Assistant Honorary Secretary)*

Ethics Committee

A Wright QC, H.McM. *(Chairman)*
D Lyons QC, J.F.
A Pagone QC, G.T.
H Young QC, P.C.
B Hill QC, I.D.
G Lacava SC, P.G.
B McMillan SC, Ms C.F.
H Lewis G.A.
B Maidment R.J.H.
A Macaulay C.C.
A Delany C.J. *(Secretary)*
D Riordan P.J.
F Johns Ms S.L.**Chair of Standing Committees of the Bar Council**

Aboriginal Law Students Mentoring Committee
B Kaye QC, S.W.
Applications Review Committee
W Brett QC, R.A.
Bar Constitution Committee
G Colbran QC, M.J.
Child Care Facilities Committee
D McLeod Ms F.M.
Conciliators for Sexual Harassment and Vilification
F Rozenes QC, M.
Counsel Committee
H Rush QC, J.T.
Equality Before the Law Committee
W Brett QC, R.A.
Ethics Committee
A Wright QC, H.McM.
Human Rights Committee
D Fajgenbaum QC, J.I.
Legal Assistance Committee
A Moloney G.J.
Legal Education and Training Committee (and Steering Committee)
B Ray QC, W.R.
Litigation Procedure Review Committees
- *Commercial Law*
A Derham QC, D.M.B.
- *Common Law*
H Rush QC, J.T.R.
- *Criminal Law*
F Dunn QC, P.A.
- *Family Law*
R Redlich QC, R.F.

Past Practising Chairmen's Committee
D Francis QC, C.H.
Professional Indemnity Insurance Committee
A Shand QC, M.W.
Strategic and Planning Committee
G Crennan QC, Mrs S.M.
Victorian Bar Dispute Resolution Committee
S Martin QC, W.J.
Victorian Bar Theatre Company Steering Committee
R Houghton QC, W.T.

VICTORIAN BAR NEWS

Editors
Gerard Nash QC and Paul Elliott QC

Editorial Board
David Bennett QC
Julian Burnside QC
Graeme Thompson

Editorial Consultant
David Wilken

Editorial Committee
John Kaufman QC, Peter Lithgow (Book Reviews), Richard Brear (Assistant to the Editors), Carolyn Sparke, Peter Nugent, William Gillies, Nicola Gobbo
David Johns (Photography)

Published by The Victorian Bar Inc.
Owen Dixon Chambers,
205 William Street, Melbourne 3000.
Registration No. A 0034304 S
Opinions expressed are not necessarily those of the Bar Council or the Bar.

Printed by: Impact Printing
69–79 Fallon Street,
Brunswick Vic. 3056
This publication may be cited as (2001) 118 Vic B.N.

Advertising
Publications Management Pty Ltd
38 Essex Road, Surrey Hills,
Victoria 3127
Telephone: (03) 9888 5977
Facsimile: (03) 9888 5919
E-mail: wilken@bigpond.com

Individual Rights and Community Interests

WE WERE WRONG

WE apologise for the obvious errors that slipped through the net and which appear in the second complete paragraph in the middle column of page 50 of the Winter issue.

The thought of Joe Gutnick posing (even hypothetically) as a seductive Arab lass is alarming rather than appealing. We do not believe that he wore a yashmak in his recent visit to the Supreme Court. Nor, so far as the editors are aware, does he have any rowing expertise.

We also apologise for the delay in the publication of a welcome to her Honour Judge Lewitan. Too often, the publication of welcomes is delayed by the fact that those best fitted to draft a welcome are unable to meet the *Bar News* deadline.

INDIVIDUAL RIGHTS AND COMMUNITY INTERESTS

In a number of issues in recent years, we have lamented the movement to "group rights" and have asserted the need to preserve the rule of law, under which judges and other members of the legal profession act as a buffer between government and the individual.

Two news reports appearing in *The Age* on 4 August this year suggest that the rights of the individual will not be permitted to prevail over the interests of the community.

BEYOND THE LAW

The first of these reports appears on page 10 and suggests that when the Victorian authorities incarcerate someone, they put him or her at risk of violence which the authorities cannot prevent. We doubt that a prison authority in a civilized society can intend to operate a prison system of which it could be said, as reported in *The Age*:

> The State Government's Prisons Authority could not guarantee the safety of a transgender prisoner allegedly gang-raped in the Port Phillip Prison last week, a court was told yesterday.

It is hard to credit that our society does not take responsibility for the safety of the persons it has locked up. According to *The Age*:

> In reluctantly refusing bail, Mr Barrow said it was unfortunate there was no secure, therapeutic environment for transgenders and for great numbers of young people in custody.

Our bureaucrats, our politicians and our society as a whole seem prepared to accept the proposition that young people, and others, sent to gaol are likely to be raped, but are not prepared to spend the money to prevent the atrocity. Physical and sexual abuse are merely incidental discomforts associated with a prison sentence. Judges and magistrates are faced, if not daily, at least weekly, with the problem. Will they sentence a young or vulnerable person to be confined in an unsafe environment?

Under the old system of outlawry, serious offenders were treated as "beyond the law". They were fair game for anyone who wished to take advantage of their "lawless" state.

In this modern "caring and sharing" world, where huge sums are spent on tribunals directed to the protection of group rights, where sexist language is forbidden, where whole bureaucracies are devoted to ensuring that the spoken and written word is not offensive to any particular group, we do not just abandon wrongdoers to their fate at the hands of their fellows. We lock them up (sometimes pursuant to a mandatory sentence) with people who, we know, will physically and sexually abuse them, and then, like Pontius Pilate, we say "there is nothing we can do about it".

If the cost of ensuring the safety of prisoners is high, it is nonetheless one that society must meet.

Justice and the need for law and order do not stop at the prison gate.

NO TECHNICAL DEFENCES FOR UNWORTHY ACCUSED

The other headline in *The Age* of 4 August (or, as *The Age*, in keeping with the Americanisation of the universe, dates itself, "August 4") which attracted our attention is one directed to statements made by the Court of Appeal.

The relevant headline on page 3 of *The Age* reads:

> Judges Attacked Drink-Driving Law "Industry".

The first paragraph of *The Age* news item states that:

> Three of Victoria's most senior judges have criticised the behaviour of lawyers who help drink-drivers escape conviction on technicalities.

Many years ago, when all the world was young and all the trees were green, we learned about the cab-rank principle, about the duty of the barrister to make his or her skills available even to those whom he or she believed to be guilty or whose cause he or she considered to be unworthy.

In those days, at least so it seemed, the rule of law meant, amongst other things, that we had an obligation to make our skills available to all comers. Some of us even now believe this to be correct and that it is the duty of the barrister, subject to the duty to uphold the law and the duty to the court, to do for the client what the client could do if the client had the skills and experience of the barrister.

In the late 1960s one of us defended four New Guinea highlanders charged with the murder of a policeman. The crucial evidence against the accused was contained in confessions which had been obtained contrary to the Judges' Rules as they then stood. Under the then law in Papua New Guinea, failure to comply with the Judges' Rules rendered the confession inadmissible.

One of the prosecution witnesses had said that if the four accused were acquitted there would be payback killings. In the context, this did not mean a killing of the accused but a killing of a member of the same tribe, more likely a woman or child.

The editor involved in this case spent many hours wondering whether he should take the "technical" objection to the admissibility of the confessions and argue it to the best of his ability or to let the matter drop or not push the argument all the way so that the confession would be admitted and he would not have to take responsibility for the death of innocent persons. He took the objection. The confessions were excluded and the accused were acquitted.

There were in the weeks immediately following a number of killings reported in the area. Whether or not they were related to the trial we do not know. Whether faced with the same dilemma today that editor would place the ethical duty ahead of the moral compulsion he does not know.

If we are to have a rule of law, as opposed to tyranny or rule by philosopher kings, palm tree justice is not good enough. If a technical point is a bad one it will be unsuccessful. If it is a very bad one it should not be taken. If it is a valid point there is a duty to take it.

To say that while "Parliament does its best to keep drunk drivers off its streets", lawyers devote time and ingenuity to finding ways for their clients to escape a conviction, is to say no more than that the lawyers do their job. If they take untenable points, then they are doing their job badly. If they take points which are valid they are doing their job well.

For the Court to say (as is reported in *The Age*) that it is "not at all persuaded that the results of all this activity are in the public interest . . .", appears to misconceive the duty of the lawyer.

If the statement means that the taking of untenable technical points involves a major waste of public resources, it is probably a valid criticism. If, however, it means that the successful defence of people on technical grounds is not in the public interest, it is a negation of the principle that a man or woman should not be convicted except according to law.

If it means that this particular group of alleged offenders are "unworthy" of being defended, or if it means that technical defences should not be taken in this area of law (where the offences themselves are highly technical) what does it say of the activities of lawyers who defend persons who have in fact committed murder or rape or who traffic in heroin?

INDIVIDUAL RIGHTS *v* COMMUNITY INTEREST

These two newspaper articles highlight the fact that in our society today — and perhaps it is a worldwide movement — there is a move towards the view that the whole is greater than the sum of the parts. The "community" has interests which must prevail over the rights of the individual.

This is contrary to the Western liberal tradition in which the whole is no greater than the sum of its parts and injury to the individual is seen as damaging to society, in which the individual is seen as having value in his or her own right, not merely as one more cog in the treadmill of society. One is led to ask: who did win the Battle of Salamis?

There seems to be an inevitable movement to place the good of the greatest number, or the interests of the Fatherland, ahead of what happens to mere individuals. The courts and the legal profession are the last bastion against this wave towards totalitarianism.

There are no people, whether in gaol or elsewhere, who are not entitled to the full protection of the law. If the legal profession or the courts seek to water down this principle, then the principle is dissolved and there is no rule of law.

THE EDITORS

A Busy Year Ahead

Review of Legal Aid fees; CLE at the Bar; sentencing review; rules for mediation; Indigenous Liaison Officer appointed; review of the Legal Practice Act; renovations to Owen Dixon East.

AT the Bar Council meeting on Thursday 6 September 2001, Mark Derham retired as Chairman of the Bar. He served the Bar as Chairman for 18 months. During his time as Chairman, the Bar Council managed a large number of tasks with skill and efficiency. Much of the success of the Bar Council during this time was due to the exceptional amount of work that Mark performed and the energy and good humour that he brought to his work as Chairman. On behalf of the Bar I thank Mark for the exceptional service he has provided to the Bar. He had made an outstanding contribution to the life of the Bar.

REVIEW OF FEES FOR LEGAL AID

The level of fees for legally aided matters has long been a matter of concern throughout the Bar. In 1997 the Bar Council commissioned a report from Price Waterhouse Urwick, which examined the adequacy of legal aid fees and the extent to which they had met the increased costs and inflation faced by practitioners. The report confirmed the widely held view that legal aid fees had not kept pace with the increased costs faced by practitioners. In the four years since that report was written, the level of fees for legal aid has not improved, so the relative position of fee scales for legal aid matters has worsened considerably.

The Bar Council has moved to establish a working party with the Law Institute and Victoria Legal Aid to review all current VLA fee scales. The Bar has proposed that the working party engage a consultant to review VLA fee scales over several years, to provide comprehensive information on the state of legal aid fees, for use by the profession, VLA and other parties who have an interest in improving funding for legal aid. This issue will receive the highest priority from the Bar Council.

The concern of the Bar is directed to the ability of the public to gain access to the best possible legal advice. The decreasing relative value of legal aid fees has an adverse effect on legal aid services. Many experienced practitioners are unwilling or unable to accept legally aided work. Most practitioners who accept legal aid matters provide far more work than the fee scales provide. These consequences are not fair for clients who rely on legally aided practitioners, or those members of the profession who wish to accept such work. Funding for courts, police and prisons have not been frozen for the last several years, yet the scale of fees for legal aid matters has hardly changed. A fair and effective system of legal aid cannot ignore the needs of the legal practitioners who provide their professional services.

The Bar Council has moved to establish a working party with the Law Institute and Victoria Legal Aid to review all current VLA fee scales.

The Bar should not be required to continue to subsidise an inadequate legal aid scheme. There must be some limit to the burden placed on members of the Bar who offer their service pro bono or at the very low levels of funding through VLA providers.

CLE AT THE BAR

At its meeting on 19 July the Bar Council resolved to support the introduction of a structured CLE program that is compulsory for practitioners of less than three years standing. While there is a great deal of work to be done before the CLE program commences, all members of the Bar should be informed of these developments as they occur.

The Bar Council determined under the former Chairman that any CLE program should be adequately staffed and funded in order for it to be able to provide a useful service to members of the Bar. For this reason, the Bar has engaged a new staff member, Jan Earle, to assist the Readers' Course. This will allow Barbara Walsh to devote a large amount of her time to managing the implementation of the CLE program, while Liz Rhodes will assume greater responsibility for the Readers' Course. The Bar Council has also agreed that the education activities of the Bar should be administered by a single small steering committee. The existing Readers' Course and CLE committees will operate as subcommittees of the steering committee.

The compulsory requirement for CLE is not retrospective and will apply to newly admitted members of the Bar after the commencement of the CLE program. Existing members of the Bar are encouraged to participate in CLE activities if they wish.

In my view, the high standard of our Readers' Course provides members of the Bar with the best possible introduction to the Bar. Readers receive comprehensive and well-informed instruction from leading members of the profession. New

and established practitioners have much to gain from a CLE program of a similarly high standard. I believe that a well organised CLE program, which also involves the leaders of the profession and is managed by the Bar itself, will be valuable for all members of the Bar.

SENTENCING REVIEW

The State government has released a discussion paper as part of its review of sentencing laws. The paper addresses several specific issues such as child stealing and whether a distinction should be drawn between drug trafficking for profit and trafficking to feed an addiction. It also examines the effectiveness of all existing sentencing options in great detail, particularly non-custodial sentences. Specific areas examined include: the effectiveness of combined custody and treatment orders; whether the existing single form of community corrections order should be divided into several categories to provide more appropriate options for different offenders; the introduction of some form of "restorative justice", which aims to draw offenders and victims together in order to resolve problems that flow from criminal behaviour; and whether a Community Corrections Board and Sentencing Advisory Council with a broad membership should be established. The detailed attention given to non-custodial sanctions is welcome. As most practitioners would know, the majority of offenders are given non-custodial sentences. An effective review of sentencing must, therefore, pay great attention this aspect of the criminal law.

The compulsory requirement for CLE is not retrospective and will apply to newly admitted members of the Bar after the commencement of the CLE program.

The government has called for comment from parties interested in the administration of criminal justice, to assist its formal response to the discussion paper. The Bar Council is working with the Criminal Bar Association to ensure that the review can provide fair and effective sentencing options.

RULES FOR MEDIATION

The Bar Council is developing draft rules of conduct to govern members of the Bar who act as mediators. While everyone would agree that practitioners who act as mediators can and should be subject to professional standards, there are differing views as to how this can be achieved.

Many practitioners believe that successful mediation involves a level of pragmatism and flexibility that does not lend itself easily to regulation. On this view, specific rules of conduct governing mediation may not be necessary because existing rules of conduct provide all the professional standards that can and should be applicable to mediation work.

Other practitioners believe that mediation has become such a significant aspect of practice that it should be governed by appropriate specialist rules of conduct. If this view is accepted the immediate task is to determine which of the existing rules of conduct should apply to mediation work. The more difficult task is to determine the nature and extent of the amendments that might be required to existing rules that could be extended to mediation work. Another task is determining what, if any, new rules might be desirable for mediation work, if that area is to be subject to specific regulation.

INDIGENOUS LIAISON OFFICER

Beverley Burns has commenced work at the co-ordinator of the indigenous law students and lawyers project. In accordance with an agreement between the Bar and the Department of Justice of Victoria, the Bar is providing Beverley with accommodation and will meet many of the administrative costs associated with her work. Beverley's main task will be to co-ordinate the "Supporting Indigenous Lawyers Initiative", which arises from the Victorian Aboriginal Justice Agreement. It aims to assist indigenous law students and legal practitioners in all parts of their studies and the legal profession, in the form of work experience, mentoring, articles or clerkship and employment.

Much of the initiative is directed to drawing together the many parties with an interest in fostering a greater role for indigenous Australians in the legal profession in Victoria. It is widely agreed that greater co-ordination of the needs of, and opportunities for, indigenous people is crucial to increasing their participation in the legal profession. These tasks will involve a great deal of work with all aspects of the profession. Beverley will provide a detailed final report to the Aboriginal Justice Working Group of Victoria late next year. The Bar is pleased to be part of this important task.

REVIEW OF THE LEGAL PRACTICE ACT

The final report of the review of the Legal Practice Act will be delivered to the Attorney-General shortly. Amongst the matters to be addressed in the final report will be the simplification of the Act. It will also deal with how both branches of the profession should be regulated, in particular in relation to disciplinary issues. I remain hopeful that the Bar will able to retain an appropriate level of involvement in the regulatory process.

When the Attorney-General announced the commencement of the review, he indicated that following the delivery of the final report, he would consult with all interested parties on the report and the proposed response of the government. The Bar Council will continue to make every effort to emphasise the importance to the administration of justice of the profession continuing to play a key role in the regulation of the profession.

RENOVATIONS TO OWEN DIXON CHAMBERS

Planning for the further renovation of Owen Dixon East has been under way for some time. The plans for the first floor should be finalised in the near future. It has been proposed that the Essoign Club be remodelled and moved to the first floor. Careful consideration will also be given to whether we can relocate the Readers' Course and Continuing Legal Education facilities on the first floor. The present plans also involve locating the library, Bar Council offices and other facilities such as the Chairman's Room on the first floor. Although the final plans have not been settled, the renovations will be designed to ensure that members of the Bar receive the best possible professional facilities with attention to the expected future needs of the Bar. Cost considerations will continue to significantly limit our options in selecting an appropriate design. The Bar Council and BCL will be able to provide detail on the final form of the proposals to members of the Bar in the near future.

Robert Redlich
Chairman

Address to the Women Barristers' Association Dinner

23 August 2001

WE are all here tonight as agents of change — as members and leaders of a 21st century legal profession which is slowing adjusting to the participation of women within its ranks. None of us here would suggest, however, that the adjustment is complete.

Most of you will be familiar with Justice Kirby's Lesbia Hartford Oration in which he expressed alarm that only six women counsel had appeared before him in all his time at the High Court. It was suggested by Justice Kirby in his article that the dearth of women with senior recognition at the Bar is primarily a result of women's child bearing and rearing responsibilities.

Sadly we still live in a society that puts the primary burden for the care of children on women. Even when both parents are working, often it is the woman who is expected to get to the creche at breakneck speed before the 6 pm lockout or to take Isobella to piano lessons. However, responsibility for children is not only relevant for women who already have kids — it is equally pertinent for young women who are starting out on their careers.

Given the substantial time that a law degree takes, and the fact that many young women now take time to do postgraduate studies or travel, the point at which a woman's career is taking off converges with the ticking of that proverbial biological clock.

If she wants to have children, a woman may ensure she is in a relatively secure environment before she risks taking time away from her career. She may go into community, government or corporate work so that she has a guaranteed position to which she can return.

This is not just reflected in the scarcity of women at the Bar. Released in January 1999, the Law Institute's Survey Report of Legal Practitioners revealed a dramatic

disparity between the career paths of male and female law graduates within only five years of graduation.

The study revealed that a significant number of women were electing not to continue, or even to start practising in the private profession. While at least 50 per cent of law graduates are women, at the time of the report only 39 per cent had gone into or stayed in private practice.

With great respect to Justice Kirby, I don't think that child bearing, either actual or potential, is the sole cause for this disparity. While it may be stating the obvious,

Misguided attempts at chivalry are just one of the many things that make many women feel like they are outsiders in the legal profession.

the old boys' networks and accompanying culture of boozy lunches, footy competitions, and backslapping humour can be intimidating and alienating to women. Women are expected to participate and laugh along lest they be accused of being killjoys or of having no sense of humour.

The old guard, raised primarily in privileged backgrounds, often has an inability to relate to women. Women are expected to be encountered only in the social sphere and their participation in the professional arena creates an awkward conundrum for those of their less flexible colleagues.

If one can't crack a bawdy joke or talk about the football, what can one say to her? Quick, better give her a compliment about her appearance or remark on her colourful outfit — that'll make her feel more at home.

Misguided attempts at chivalry are just one of the many things that make many women feel like they are outsiders in the legal profession. It is illustrative of a subconscious determination to highlight the woman's gender in a situation where it is completely irrelevant.

Judges can sometimes be the biggest culprits in the alienation of women at the Bar. Men on the Bench or at the Bar who are used to hearing voices of a certain pitch, timbre and physiological lung capacity wriggle in irritation at women's quieter projection.

While a number of judges have in fact recently commented that loud voices or theatrical behaviour are not necessarily supported by strong argument, the belief that "the bigger the voice the better" nevertheless pervades both of the professions in which I have been involved.

In politics and law women struggle to be heard, literally as well as figuratively. Many female politicians experience trouble in making their voices heard over the

din of the "bearpit". I suspect that in politics, as in law, the difference in lung capacity is exacerbated by the fact that the participants are so delighted by their own voices and opinions, they're incapable of hearing anyone else.

Of course differences in voice quality and physical appearance are not the only impediments to women participating in senior legal positions.

I know of one judge who observed that the added difficulty with being a woman on the Bench was that her male judicial colleagues were paralysed with confusion upon entering or exiting a room — who would go through the door first — the head of jurisdiction or the female judge?

If this is one of the biggest challenges facing the legal profession then perhaps the problem can only be solved by making

I suspect that in politics, as in law, the difference in lung capacity is exacerbated by the fact that the participants are so delighted by their own voices and opinions . . .

sure we have a woman heading up every court in Victoria, so that everyone is certain who has first refusal at the door. It's now obvious to me why progressive countries like New Zealand have a woman appointed as Prime Minister, Governor-General, Chief Justice, and Attorney-General, so that this diabolical situation never occurs!

You all know my commitment to appointing women to the Bench. While equality of opportunity is not just about the numbers of judicial appointments, I'm proud of the fact that 13 out of my 22 judicial appointments have been women.

However, as I've said on a number of occasions, it's been tough going. Traditionally, potential appointees are recommended to me by the heads of jurisdiction and other senior positions in the profession. The majority of names that are put forward, however, are the same male candidates, over and over. Like seeks out like, and often the response I receive when I suggest a woman's name is that "she's not ready yet, she's only been at the Bar for 15 years".

I've learned over the last two years that I need to consult more widely, and draw from a larger pool. My office now consults with the WBA, Victorian Women Lawyers and Feminist Lawyers, but I am also keen to talk to and draw from pools outside the traditional paths to the Bench. If women are deciding against the Bar because they want flexibility rather than long hours at the time of their child bearing years, I want to seek out women in the private profession, the community, public and corporate sectors.

If women are taking other forms of work because they are tired of being ogled across the Bar table, or of missing out on senior briefs, I want to know what other experience they have which will be just as valuable and bring different and much needed variety to the Bench.

At the same time, however, the Government is committed to ensuring that the situation of women at the Bar is improved, through a better quality and quantity of briefs.

The Victorian Government Solicitor's office has a proactive equal opportunity briefing policy. I am always represented by a woman at Crimes (Mental Impairment) hearings, and the VGS and Bar Council are determining appropriate ways of measuring briefing practices.

Many of you will also be aware of my recent announcement that, when vying for a piece of nearly $40 million worth of Government legal work, law firms will not only have to demonstrate that they are model litigants and are committed to pro bono work, but also a commitment to equal opportunity briefing practices and distribution of work within their firms.

While this may seem a simple initiative, we have already had complaints from some of those less lateral thinkers at the Bar that this is discriminatory, indicating that we still have a long way to go in changing cultural expectations.

While the Government must take the lead on these issues, it cannot bear the sole responsibility for the promotion of women within the profession. I acknowledge that there has been significant change in both the private profession and in the Bar in recent years in relation to women. Equal opportunity committees are alive and well, studies are being done, policies are being put in place. I applaud the Bar's Directory of Women Barristers and similar initiatives by the LIV.

Changing the entrenched male culture of the profession, however, is not an overnight proposition, and I issue a challenge to everyone here tonight to prove that they're capable of embracing change.

Change is frightening to most people, as is difference. We are currently seeing this reflected in the broader political landscape, but it is also relevant to our sheltered legal profession.

Men in power have often regarded women with suspicion — a woman on her own is disconcerting enough, but women banded together can only mean a terrifying conspiracy. Agents of change, whether they be for broader political, economical, or social change are always regarded with alarm by those who benefit most from the status quo.

I do not advocate equal representation of women in the profession to plot anyone's downfall. Nor do I desire the promotion of one gender over another. My motivation is at once more extensive and more selfish than that.

I want to be Chief Law Officer of a State in which the diversity of its population is reflected in those making decisions that affect it. I want to head up a legal profession in which the best and the brightest are awarded on their merit, and not on the value of their old school tie.

I want a legal profession that is accessible, modern and relevant — how can the diversity of those using the legal profession be understood when the diversity of those employed in it is not? I don't want more women in senior legal positions just because it is good for women — but because it is better for the law and for the Victorian community.

The Women Barristers' Association is a valuable agent of change, as is everyone here tonight. It is not the responsibility of just the Bar, or the Bench, or the law firms or Government — it is the responsibility of every individual in the profession. We all need to think about how we relate to our colleagues, and about what qualities we value in our assessment of a good lawyer.

We all need to strive for a profession in which women feel equal participants — accepted both socially and professionally — and in which their elevation to senior ranks is merely par for the course.

The longer I am in politics the more I realise one thing — that it's not until you tire completely of saying something that the message is starting to get through.

Shouting the message of equality in and before the law is one thing. We now must ensure that everyone is listening.

Rob Hulls
Attorney-General

Indigenous Lawyers Project

AS a result of funding provided by the Department of Justice, the Victorian Bar has begun an exciting new initiative — the Indigenous Lawyers Project. The co-ordinator for the project, Beverley Burns, commenced with the Bar Council Office on 3 September 2001 and can be contacted through the Office. Beverley is working three days per week on the project as well as studying law at Deakin University. Beverley brings to the project her experience of working in Aboriginal legal services in Tasmania and Western Australia and a current understanding of the challenges of being a law student.

The Indigenous Lawyers Project has the support of many organisations including the Judicial Officers' Aboriginal Cultural Awareness Committee, the Department of Justice, the Australian Institute of Judicial Administration and the Law Institute of Victoria. The project involves the employment of a co-ordinator to undertake the development of mentoring, funding, employment and training schemes for Indigenous law students and lawyers, the establishment of an Indigenous Law Students and Lawyers Association and the creation of databases of contact details for Indigenous law students and lawyers and of scholarships, job opportunities and related information.

The suggestion that a co-ordinator be employed arose out of the experience of a sub-committee of the Judicial Officers' Aboriginal Cultural Awareness Committee — the Mentor's Sub-committee chaired by Justice Eames of the Supreme Court ("the Eames Committee") which has as an objective the encouraging of Indigenous people to enter the legal profession. The Eames Committee has a wide membership including representatives from Aboriginal groups, the courts, universities, the Department of Justice, and the Law Institute as well as the Bar whose representatives are Stephen Kaye QC, David Parsons, Jenny Richards, Jane Dixon and David Bremner.

The Eames Committee has been fostering the development of an association of Indigenous law students and lawyers in order to create an organisation that will be an on-going source of support and encouragement for students and lawyers. It has also, with the support of the Law Institute, conducted a pilot program of securing part-time and temporary employment for students. As a result of its experiences, the Committee came to the view that the most efficient manner in which to progress these activities would be through the employment on a part-time basis of a suitably experienced person to act as co-ordinator and facilitator for the following tasks:

(a) Undertake the procedures necessary to enable the Association to be incorporated under the *Associations Incorporation Act 1981*, and to do so in cooperation with the members of the Indigenous Community, the Judicial Officers' Aboriginal Cultural Awareness Committee, the Australian Institute of Judicial Administration, the Law Institute of Victoria and the Victorian Bar, and volunteers from the profession;

(b) develop the statement of purposes of the Association for the purposes of its incorporation;

Beverley Burns

The Eames Committee has been fostering the development of an association of Indigenous law students and lawyers . . .

(c) establish a contact database of all current Indigenous law students and graduate lawyers;
(d) develop and maintain a database of available resources and programs, which may be accessed by Indigenous law students and lawyers;
(e) develop and coordinate the supporting Indigenous Lawyers Initiative for Indigenous law students and lawyers;
(f) coordinate employment placements for Indigenous law students and lawyers;
(g) develop and coordinate mentoring programs for Indigenous law students and lawyers;

The Bar is indebted to the members of counsel who have been so generous in the assistance they have provided to students.

(h) actively assist Indigenous law students and lawyers in finding opportunities suitable to their needs, whether it be work experience, mentoring, articles of clerkship or employment;
(i) generally encourage arrangements that enable Indigenous students in post-secondary education to attain the same graduation and/or workplace participation rates as those attained by other students.

The Bar Council agreed that it would employ the co-ordinator on a part-time basis for a period of one year and through its committees and administration provide guidance and support. The Bar Council subsequently applied to the Department of Justice for funding of the project from the Department's Community Initiatives Pilot Programme and that funding has been granted. Representatives of the Department of Justice and the Bar Council then formed a selection committee which advertised the co-ordinator's position and subsequently recommended that Beverley Burns be appointed.

The Indigenous Lawyers Project is proceeding at a rapid pace. A meeting of a steering committee consisting of Indigenous law students and lawyers was held on 22 September 2001 at which a draft of the model rules and statement of purposes for the association was settled. The rules and purposes will then be taken forward to a future meeting of prospective members of the association to be held in November at which time the formal resolution to incorporate the association will be considered.

A second aspect of the project — finding employment and work experience placements for law students over the summer period— is also under way. This task will involve surveying law students to identify their needs and then matching the students with law firms who will provide the required employment or work experience. The 2001/2002 employment program will build on the experience gained from the pilot program which was run in summer 2000/2001.

After the employment program is in place, Beverley will turn her attention to the development of databases of scholarship, employment and educational opportunities for students and graduate lawyers. The databases will be connected to the Internet so the information can be accessed all over Australia.

The project will also conduct a review of similar programs in other States and Territories with the objective of ensuring that it is properly co-ordinated with those programs. This will involve working with other Bar associations and law societies, particularly in assisting students who in some cases live in one State but attend a law school in another State.

Beverley will also assist with the co-ordination of the Victorian Bar's Aboriginal Mentoring Program. This program has been in operation for almost two years and has assisted 29 students by matching them with barristers who are providing tutoring in specific law subjects, assistance with examination techniques and mentoring. The program was instigated by the Bar Council following a recommendation from Stephen Kaye QC who subsequently became the chairman of the Bar

The Indigenous Lawyers Project is proceeding at a rapid pace.

Committee which manages the program. The Bar is indebted to the members of counsel who have been so generous in the assistance they have provided to students. The mentoring program was overwhelmed with volunteers (over 170) when it was created and, although it has not been possible to make full use of the good-will generated when the scheme was originally launched, the wide field of potential mentors has facilitated the matching process. For this, the Bar's Aboriginal Mentoring Committee is most grateful. As further mentoring opportunities arise, more volunteers will be approached.

Members of the Bar are encouraged to bring forward to Beverley or the Aboriginal Mentoring Committee any ideas or initiatives they may have for the promotion of this valuable project.

The soon to be formed association of Indigenous law students and lawyers will play a critical role in the Indigenous Lawyers Project. The members of the association will provide the guidance and focus that will be integral to the success of the project. Beverley has a major task ahead of her over the next twelve months, and I am confident she will receive the full support of the Bar and the legal profession.

David J L Bremner

Correspondence

Burnside on Words

The Editors

Dear Sirs,

DELIGHTED as I was to read Burnside QC's thoughts (*Victorian Bar News*, Winter 2001) on the conversion of adjectives into nouns (and I look forward to *accessing* his companion piece on the conversion of verbs into nouns, notably by the Tip Tap variety of barrister, on whom you report in the same issue), it is my melancholy duty to point out a gap in his education.

Burnside writes that:

> *Pedal* was originally an adjective, but is only used as an adjective in the special case of the *pedal pipes* of a pipe organ.

Has he never heard Fats Waller sing "Your Feet's Too Big"? Therein he will find:

> Your *pedal extremities* are colossal,
> To me you look just like a fossil.

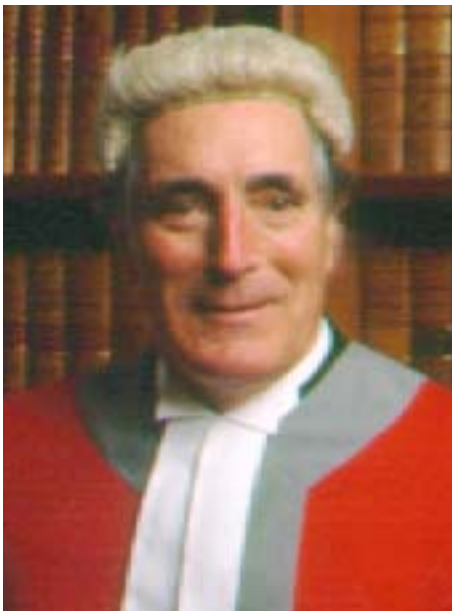
They don't write adjectives like that any more (or *anymore*, as I so frequently see it spelt).

Yours faithfully,

Stuart Littlemore QC

Court of Appeal

Vincent JA



ON 3 May 1985 Frank Hollis Rivers Vincent was appointed a Justice of the Supreme Court of Victoria. On 5 June 2001 he was appointed to the Victorian Court of Appeal. He has been a member ofthe Supreme Court Bench for some 16 years, during which he has established himself as one of the finest criminal trial judges of this Court. He brings to the Court of Appeal an astute mind, a quick perception and ready wit, and a deep knowledge of what happens at the coal face.

His Honour's concern for the rule of law is reflected in the words he uttered at his Welcome in 1985. Those words are even more pertinent today than they were when his Honour uttered them:

> We all understand that at every level of our criminal justice system there are real difficulties being experienced as society itself is under considerable strain and stress. What the Criminal Bar Association and the Bar Council itself have been concerned about over recent years has been that in the endeavour to correct those problems and to deal with the difficulties that our society is facing, the very nature of our legal system and the very values upon which it rests . . . will be changed, indeed substantially weakened. I would certainly urge the Bar to continue on, and the solicitors' branch of the profession as well, to ensure that whatever changes are made, and there will be some, to the administration of justice in this community, that we do not abandon any of those fundamental rights which I see currently under attack. We should not permit the fear which I see prevailing in our society to prevent a recognition of the value of those rights, which provide the very justification for the existence of a Bar and indeed the existence of a legal profession in general.

This concern for the rule of law and the rights of the individual are valuable qualities in a trial judge. They are qualities essential in an appellate judge (whose duties and functions place him or her at one more remove from the litigant or accused as an individual) if we are to maintain the freedoms we presently enjoy.

His Honour's capacity to master and analyse complex facts and to assess the credibility of a witness will be sadly missed in the Trial Division. We believe he will also find some frustration in dealing only with pre-digested fact situations. However, his insight, knowledge of the criminal law and sense of reality will prove invaluable in his new role.

His Honour brings to his new role enormous experience of the realities of criminal practice, the insights gained from the many years as Chairman of the Parole Board and a concem for the rights of the individual.

We welcome his Honour's appointment. We wish him every success and happiness (and minimal frustration) in his new role.

Supreme Court

Justice Flatman

ON the 18 July, 2001, Geoffrey Flatman was sworn in by the Governor as a judge of the Supreme Court of Victoria. His Honour was born in 1944. His father was a bank manager and as a result His Honour grew up in a number of towns in rural Victoria. He was educated at various country schools including Merbein State School and Mildura High School. He completed his education as a boarder at Wesley College.

His Honour started a combined law/arts degree course at Melbourne University in 1963. He was then a resident in Queens College. He graduated with degrees in law and arts in 1969.

After graduation, His Honour served his articles of clerkship with J.H. Trotter. His work at that firm was far removed from the criminal law which later became the central focus of his practice. He was admitted in 1970. He worked as employee solicitor at Sackville Wilks and Co. where he did some appearance work and says that he lost hundreds of games of chess to Ray Finkelstein, now Justice Finkelstein of the Federal Court.

In 1971 His Honour came to the Bar and read in the Chambers of Michael Black, now Chief Justice of the Federal Court. Like many young barristers in the early 1970s, he developed substantial practice in the Magistrates' Court, in both criminal

and civil cases. He quickly moved on to trial work in the County Court, much of it on behalf of the Public Solicitor and the Legal Aid Commission.

His Honour soon came to be regarded as an able, hard-working and astute advocate. He moved on from County Court trials to Supreme Court trials and appeal work in the Court of Criminal Appeal and the High Court. He was briefed on behalf of both the defence and prosecution in all those jurisdictions. His work was greatly admired and he gained a reputation as a fearless and forceful cross-examiner. The breadth of this practice may be seen, for example, in his successful appearances as prosecutor in *R* v *Lucas*, a murder case, as counsel for the applicant in the High Court in *Prasad* v *R* and for the accused in R v Pearce and others, the Walsh Street shooting trial.

His Honour gave generously of his time to his readers Howard Friedman, Sandy Elliott, Carmen Osborne, Sarah Thomas, Nick Poynder, Mark Gamble, Claire Quin and Anita Kwong, and also to the Criminal Bar Association where he served on the committee and as secretary.

His Honour had Chambers on the 5th floor of Owen Dixon Chambers East and nearby were to be found the late Bob Kent QC, Chris Dane QC, Graham Thomas, Raymond Lopez and John Barnett (now His Honour Judge Barnett of the County Court) and many others. The debates were rigorous and the "war" stories legendary.

In 1994 His Honour was appointed Chief Crown Prosecutor and in 1995 he became the Director of Public Prosecutions, and he took silk in the same year. He was appointed as Director following Bernard Bongiorno QC. His Honour was presented with challenges which he took on with equanimity, patience and great determination. His management style is remarkably inclusive and he led by example and encouraged cooperative effort. Many associated with the Director's office learnt much from him. His efforts in giving victims of crime a say in the criminal justice system have changed the face of prosecuting in this State permanently.

As Director he continued to appear in important and complex cases in the Court of Appeal and the High Court in particular. He advanced his reputation as an able, thorough and persistent advocate.

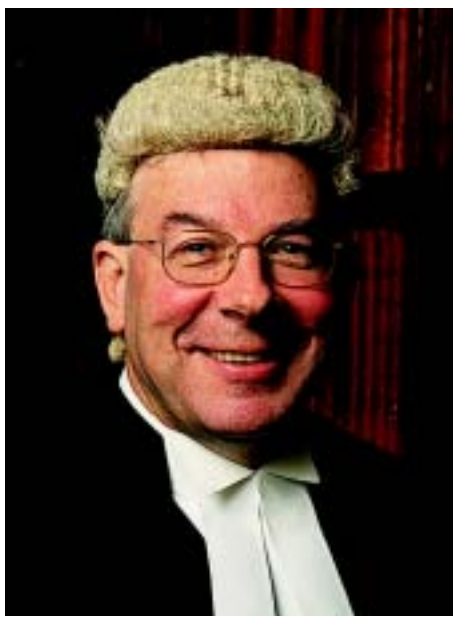
Throughout his legal career His Honour has pursued his alternative career as a tennis player with mixed success but has always been keen to represent the Bar and the Bench against the solicitors and no doubt will continue to do so.

His Honour accepted many invitations as Director to attend various community groups to talk about his work. He recognised the importance of engendering public understanding of what was involved in his office and the work of prosecuting generally. Earlier this year he was appointed Adjunct Professor in the Faculty of Business and Law at Deakin University.

He is a great family man and is devoted to his wife Margaret and sons Sam and Tom. His Honour's appointment to the Supreme Court is seen by the profession as a welcome one and as a logical extension to a distinguished legal career.

Justice Habersberger

ON 18 July 2001 David Habersberger was officially welcomed as a judge of the Supreme Court of Victoria. His Honour's appointment follows a long and distinguished career at the Bar. He was educated at Wesley College and then studied arts/law at Melbourne University, graduating with an honours degree in arts in 1968 and first class honours in law in 1970. He completed his article clerkship with Blake and Riggall in 1971, and was admitted to practice the following year. Following his articles His Honour was Associate to the Chief Justice of the High Court of Australia Sir Garfield Barwick and as an Associate highlighted the qualities for which is he now well known — hard work, intelligence and adherence to principle. In 1973 His Honour signed the Bar Roll reading with Stephen Charles, now Justice Charles of the Court of Appeal of Victoria. His Honour quickly developed a reputation as a thorough and effective advocate in all forms of commercial law, administrative and constitutional law. His Honour developed a great reputation as a reliable junior counsel. He appeared as junior counsel in several important cases before the High Court such as *The Attorney-General of Victoria (ex Rel Black)* v *The Commonwealth* in 1980, which examined the legality of federal legislation for the funding of schools managed by religious organisations, and in 1983 *The Commonwealth* v *Tasmania*, widely known as "the dams" case, which served as a defining moment in Australian constitutional law in 1983. All counsel in that case still remember its preparation, the hard work, the drama, and then the relaxation just before the end!.



His Honour's reputation at the Bar led to important duties outside the normal course of litigation. His Honour acted as counsel assisting the enquiry into the ownership and control of newspapers in Victoria. The enquiry was conducted by Sir John Norris, a retired judge of the Supreme Court. Having appeared in so many important and complex matters it was not surprising in 1987 that His Honour was appointed Queens Counsel. His time as a silk was unusual because he received a

relatively small number of briefs, because most of the briefs were for large cases, very, very large cases. His Honour acted in the proceedings involving St Andrews Hospital, which inched through various stages for over a year. He also appeared in the case of H.F.C. Financial Services. The finance company applied for a credit licence and also relief from the loss of substantial credit charges. The matter involved a large number of associated credit disputes, and must have seemed endless.

The H.F.C. case prepared His Honour for his next magnum opus, which was the inquiry into the collapse of the Farrow Group of Building Societies and associated companies. This included the well known Pyramid Building Society. The inquiry was an enormous effort. His Honour produced a final report. It was an extremely detailed and careful analysis of all the circumstances of the many complex events of the Pyramid collapse. The fine quality of the report resulting from the enquiry proved invaluable in the legal proceedings that arose as a result of the collapse. The inquiry was a very difficult and enduring task. As it came towards the latter stages, the funding ran out. Few people may know the reasons for that, but most are aware of the consequences. His Honour continued his work in completing the report for over a year without payment. The cynical among society might be surprised that a leading member of the Bar might work for such a long period without payment. But His Honour's friends were not surprised that he continued with the task. It was typical of His Honour's dedication and commitment to the pursuit of justice. The Supreme Court of Victoria is extremely fortunate to have appointed to its ranks a person who discharges his duties which such a strong sense of justice.

After completing the mammoth Pyramid inquiry, His Honour returned to practice at the Bar. He appeared in many important and complex cases in all aspects of commercial and public law. His Honour has advised governments of all persuasions without fear or favour. He has appeared in many cases of high principle. One case of particular note was that involving the judges of the Accident Compensation Tribunal, who had been dismissed when their office was terminated. The judges claimed compensation, arguing that they had the status of judges and could not, therefore, be dismissed in the manner that they were. Again it was a difficult case but His Honour protected the interests of his clients with great vigour. His Honour acted throughout this case pro bono. His Honour was instrumental in achieving a settlement for the former judges. He acted with a fearless commitment to the rule of law. Again it is these qualities that His Honour now brings to judicial office.

Despite the constant demands of a busy practice, His Honour has always been a great contributor to the work of the Bar. He has served the Bar in many capacities — as assistant Honorary Secretary, then Honorary Secretary, then when elected to the Bar Council in 1984 he served on the council for eleven years. During this time he served as assistant Treasurer, Treasurer, junior Vice Chairman, senior Chairman and finally Chairman. During his time as Chairman the Bar Council introduced many changes to improve the position of women at the Bar. This important task continues today. In addition to his long-standing service to the Bar Council His Honour served as the Victorian Bar's representative to the Australian Bar Association for many years, Director of Barristers Chambers Limited and as a trustee of the Victorian Bar Superannuation Fund. In addition to his work for the Bar His Honour has given service to many other parts of the community. He has tutored in various law and politics subjects at the University of Melbourne, Monash University, the RMIT and also Queens College at the University of Melbourne. His Honour has a long association with Queens College, and has served on the Council for many years and has been its President since 1996.

To many at the Bar His Honour's appointment is no surprise. The Victorian Bar warmly welcomes Justice Habersberger and wishes him every success in this new stage of his career.

County Court

Judge Lewitan

THE welcome for her Honour Judge Lewitan to the County Court in May of this year saw popularity test capacity and left the merely punctual pressed to find standing room. The widespread approval that met Her Honour's appointment was unlikely to have elicited surprise from any of those familiar with her merits and attainments.

Born in 1951 and educated at Mount Scopus College she attended the University of Melbourne from which she graduated with a Bachelor of Arts and Bachelor of Laws (Hons) in 1972. Taking the exhibition for Family Law and first class honours for her thesis on the custody of children in divorce proceedings, her Honour demonstrated from the outset a concern for social issues and structural injustice which was to remain the focus, albeit in a different context, of much of her time at the Bar.

Completing articles with Corr and Corr in 1973, Her Honour worked with that firm until 1977, when, as an associate partner, she was called to the Bar. Reading with Ron Castan and also with Peter Jordan, Her Honour swiftly developed a wide-ranging practice across the field of commercial law.

In 1982 Her Honour was elected to the Bar Council. She was the first woman elected to that body in its history, an achievement that also underlined the beginning of the slow rectification of the historical imbalance between the sexes in the law. Her Honour served on the Council until 1985, beginning a history of serving on various posts within the Bar.

Apparently finding such obligations insufficiently onerous, her Honour in 1983 also joined the Royal Australian Naval Legal Reserve. She acted both as prosecutor and accused friend, impressing fellow members of the reserve with her careful preparation and skilful conduct of trials. As was by now appearing habitual, Her Honour was again the first woman to serve as a legal officer in the Naval Legal Reserve and held her own in the mess hall functions that attended the role. Possibly by way of contrast, the following year, Her Honour joined the Council of Monash University, upon which she was to serve until 1993 during that time teaching at Victoria University, RMIT, the University of Melbourne, and the Leo Cussen Institute.

Her Honour's concern to achieve improvement in the opportunities and facilities available to both sexes led to her involvement with a variety of bodies within the Bar during the 1990s. In 1993 she was the inaugural convenor of the Women Barristers Association, which body was conceived to push for systemic change within the Bar. The Association provided an organisation that was capable of articulating the impediments to women's achievement existing within the Bar's control and effectively to agitate to remove them. Her Honour's role in organising the enthusiasm of members and championing its goals to an organisation, which like all organisations was reluctant to examine its own deficiencies, cannot be under-estimated.

Her Honour's concern for matters of equality and fairness led her to pursue them both in practice, within that part of her practice appearing in anti-discrimination actions, and in private. Her Honour shared the view that one of the major impediments to women maintaining their careers at the Bar was the break represented by early parenthood. Those primarily responsible for the care of newborn children found themselves struggling to maintain their practices. Her Honour served as chairperson of the Child Care Facilities Committee of the Bar. The Committee pushed for and obtained a number of amendments to the Bar's rules, providing amongst other things rental subsidies for those with primary care of children under one.

Similarly, Her Honour served as chairperson of the Equality Before the Law Committee of the Bar. The Committee made detailed submissions to the Bar regarding the inequalities of opportunity for women at the Victorian Bar and induced the Bar Council to commission a report on the subject. It also led the Council to introduce the rules of conduct in relation to sexual harassment. The Committee produced expert submissions on the effects of proposed legislative changes, inter alia on the particular consequences of cutting legal aid to women's access to justice.

The importance of this history of involvement and service was eloquently summarised by Mark Derham QC in the course of Her Honour's welcome: "As a result of this work Your Honour leaves a legacy to the Bar. That is something to which few practitioners can lay claim . . . And it is something of which you are entitled to be extremely proud. It is something for which we at the Bar are most grateful and it will no doubt provide a great benefit to future practitioners."

Notwithstanding the duration and extent of this involvement, Her Honour found time to develop a wide-ranging practice in commercial law. Appointed as one of her Majesty's counsel in 1994, Her Honour practised in contract, trade practices, banking, discrimination, insolvency and other fields. Generous with her time with other members of counsel, she gave the benefit now to those fortunate enough to appear as her juniors in the trials that she fought.

Throughout her career, however, Her Honour has always ensured that her professional obligations were admirably balanced by her time for her family. She and her husband George are blessed with two inestimable sons, Daniel and Joshua, whose faces could be seen beaming down from the shelves of her chambers on the 18th Floor of Owen Dixon West. After school hours, while Her Honour conferred with junior counsel, it was by no means unknown for a discussion of the more recondite issues of compound interest in a restitutionary claim, or the aspects of agency required to give rise to fiduciary obligations, to be interrupted by a telephone call from Daniel, Her Honour's eldest, eager to explain his achievements on the field of endeavour and to place requests for dinner. Both sets of demands were always handled simultaneously without any apparent difficulty.

The Victorian Bar warmly welcomes Judge Lewitan to the County Court Bench and wishes her a long and satisfying career in her new role.

Judge Hicks

ON 15 August 2001, the Executive Council announced the appointment of Graeme Geoffrey Hicks SC as a judge of the County Court of Victoria, effective on 20 August 2001.

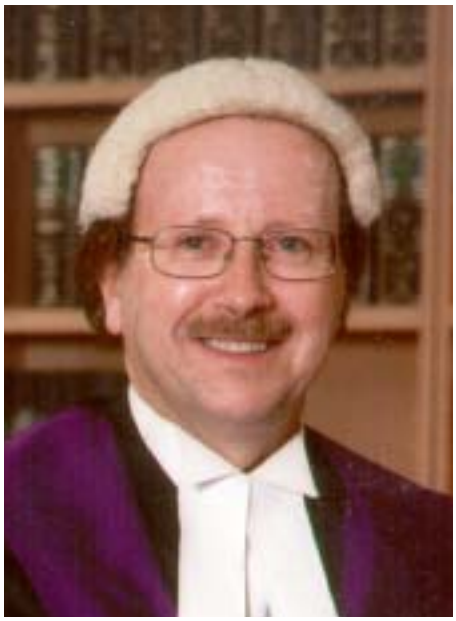
His Honour was born in Melbourne and grew up in Glen Iris.

He was educated at Melbourne Grammar School and then at the University of Melbourne, graduating with a bachelor's degree in law in 1970. His Honour was a bright law student and obtained honours in most subjects. He served articles with the firm of Henderson and Ball and was admitted to practice in 1972. He signed the Bar Roll in 1973 and was one of the founding members of the then new list, Muirs.

He read with a leading member of the Bar, Mr Bill Gillard, as he was then and who is now the Honourable Justice Gillard of the Supreme Court.

His early practice at the Bar involved a great deal of taxation work and many cases in the Magistrates' Court. During this time, he completed a masters degree in law. His thesis was on the socially useful subject of the use of international tax havens and the Australian taxation system.

He was quick to suggest to his supervisor, Mr Spry QC, that it was necessary for him to take a trip to the Cayman Islands, the Canary Islands and other exotic places in order to complete his research.



Over the years, His Honour developed an increasing interest in criminal law which eventually became his main area of practice. He was one of a small number of members of the Victorian Bar who were able to earn a substantial living from the private practice of criminal law over many years.

As his reputation grew, he became sought after by most of the leading law firms who practised in criminal law. By the early 1980s, he began to be briefed by solicitors representing the Police Association. No police officer defended by His Honour at trial was ever convicted. He developed a reputation as an advocate who was well prepared and always sought out his opponents for a "chat" as to the law and agreements as to what evidence the Crown sought to lead as a "matter of fairness" against his clients.

Indeed, on one occasion after having the Prosecutor announce he was not proposing to lead certain very incriminating evidence, the judge, Judge Southwell, as he then was, was heard to ask the prosecutor, "have you got instructions from your superiors or have you been persuaded by your opponent?"

Judge Hicks did not buy into the argument but simply looked staggered that anyone should suggest he had anything to do with the prosecutor's decision.

As an advocate, His Honour was a skilful and devastating cross-examiner. He was also renowned for his great tactical skills. He appeared in many difficult and complex cases. He appeared as junior counsel to the late Robert Kent QC, representing the individual police officers in the long running coronial inquiry into the police shootings in the 1980s. He appeared for Rodney Minogue in the Russell Street bombing case.

His Honour gave generously to service at the Bar. He served for many years on the Ethics Committee and acted as a mentor to four readers.

His Honour left the Bar in 1993 to accept a position as a magistrate. During that time, he presided over many cases including the *Elliot* case which was a complex and long running fraud case. He discharged his duties with great distinction.

After serving as a magistrate, he was appointed as a Senior Crown Prosecutor. He has prosecuted some of the most significant murder trials in this State including the Bega murder trial, which was described by members of the Court of Appeal as the worst case of murder in the living memory of those judges.

His Honour appeared on many occasions as a prosecutor before the Court of Appeal and discharged his duties with ability and fairness.

In recognition of his high standing in the profession, he was appointed Senior Counsel. His Honour was one of the first group of counsel in this State so appointed. His Honour has become the first Senior Counsel in this State to be appointed to judicial office.

His Honour has a somewhat legendary status as having lost very few cases as either defence counsel or prosecutor.

Outside the law, His Honour has many interests. A fanatical Collingwood supporter, he once drove to Horsham and back in the one day to watch an intra club practice match. As his son Matthew demonstrates great potential (and being a 6′5″ centre half forward) his Honour had dreams of seeing him in a Pie jumper.

His Honour has had an interest in a number of race horses. His first horse, Holsam, won the Moonee Valley Stakes, the Baggett Handicap and the Moonee Valley Cup. Another horse, Excited Angel, won races at every city track in both Melbourne and Sydney, winning in excess of $700,000 in stakes.

His Honour claims to have great ability on the golf course, however, we are reliably informed he buys his golf balls through an intermediary in lots of hundreds at a time.

His Honour has a long history of lunches (mixed pasta) with a bottle of red from his endless supply of good reds, rounded off by a demand that his lunch guest drive his car back to the city and into his car park. Judge Hicks never explains who drives the car home.

Judge Hicks is a devoted family man, married to Maureen with children, Claire in the second year of an Arts Course at Melbourne University, and Matthew who is in year 12 at Melbourne Grammar.

Maureen and family have always understood His Honour's need to have a little holiday each year by himself so that he can unwind and relax before he holidays with them.

The large number of people who attended his welcome testified to the popularity, and high level of approval amongst the profession, of His Honour's appointment.

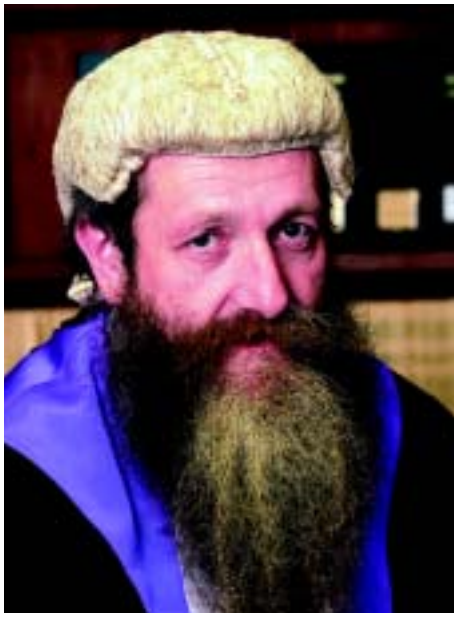
His Honour brings to the Court not only a great capacity to deal with legal issues in a manner that will be a credit to the Court, but also outstanding personal qualities that are worthy of a judge of the County Court.

The Bar congratulates Judge Hicks and extends to him every best wish for a long and successful judicial career.

Judge Smallwood

HIS Honour John Arthur Smallwood was born in Melbourne on 26 September 1951. He comes of colourful stock — a great-grandfather was a police Magistrate in Hobart, one grandfather the conductor of a circus band, the other a professional actor with J.C.Williamson's until he married and retrained as a pharmacist, ultimately setting up as the local chemist in Foster, South Gippsland. His Honour's parents met whilst working as radar operators in Queensland during the Second World War. His father followed several careers including work as a swimming instructor and then a disc jockey before he too retrained as a pharmacist, taking over the chemist shop from his father-in-law in Foster, and moving his family to the country.

His Honour attended Foster Primary School before being sent off to Burke Hall as a boarder in Form One where he pined for country activities such as fishing for eels in the local creek, and opening the batting for the Foster First cricket XI. Noted in his latter years at the Bar for attracting media attention, His Honour began early when a giant 12-storey cubby



house he and a mate built across a line of pine trees behind his home became the subject of the ABC television show "Weekend Magazine" in 1963.

His Honour continued on somewhat unhappily at Burke Hall and then Xavier College until an inevitable parting of the ways in Form Three when he began school as a boarder at St Patrick's College in Sale. He thoroughly enjoyed himself there, describing the school as "a footy match with a few classrooms built around it", playing vast amounts of football and his beloved cricket, and ending up as school Vice-Captain in his final year. He discovered a love of debating at the compulsory "Literary Society" the school held each Sunday morning where boys had to speak on a wide range of topics.

Despite duxing his Leaving class, His Honour's attention to sport took its toll in the Matriculation exams and he barely passed, scraping into the Articled Clerks' Course at RMIT which he began in 1970. He was articled to John Healy, now of the Bar at the firm Mills Oakley & McKay in East Melbourne. He worked mainly with another partner, Richard Spicer, also now of the Bar. During his four years at the firm he finally put his head down and obtained Supreme Court prizes in land contracts, family law, civil procedure and property, with Honours in most of the other course subjects.

His Honour was admitted to practice in 1975, then immediately departed for England, to watch a test match at Lords (a lifelong ambition). He then flew to Canada and from there entered the United States, persuading a border official to stamp his passport "entry for the purposes of hitch-hiking" — hitch hiking being an illegal activity in all USA States at the time! This entry bluffed local police in every State except Texas, where he hastily took a Greyhound bus to Arizona.

On his return to Australia in 1976 he began work as an employee solicitor with Adrian McKay & Associates in Beaumaris where he remained for five years practising in Common Law. In that time he became the firm's all-round "legal expert" working in the areas of workers' compensation, family law and personal injuries including a damages case for a thalidomide baby. It was a somewhat unorthodox situation with conferences often taking place in the shop back room of the local baker who would cook steaks for everyone, accompanied by a fairly rough cask wine.

On the birth of his first child Meg, His Honour decided to take a break from law and spent the next four years running a secondhand shop in Richmond, during which time he became something of an authority on secondhand records.

He returned to the law in 1985, becoming a Reader in the March intake of the course that year. He read with Collin Hillman, now a Senior Prosecutor with the DPP who he describes as "the most meticulous and helpful Master I could have hoped for" and to whom he attributes much of his later success. His Honour came to the Bar without a particularly clear idea of what he would do and discovered what was to become his great love — the criminal law. He has practised in little else since that time.

His Honour took 47 days to get his first brief — defending a charge of "fail to give way" at Broadmeadows' Magistrates Court, given to him by his sister Mary-Lyn (now also at the Bar). He won that case, and thus began a thriving practice where from the earliest days His Honour became known for his skillful cross-examinations, legal submissions and standing his client mute. He swiftly moved to work in the County Court, winning his first trial and appearing in some of the leading cases there, including acting for prison warder Heather Parker who assisted in the famous escape of well-known criminals Peter Gibb and Archie Butterly (also a former client of His Honour's) from the Melbourne Remand Centre.

His Honour, however, was ultimately most well known for his appearances over almost a decade in murder trials. He regards as his greatest achievements the total acquittals of a 13-year-old boy who dropped a stone from a bridge over the Eastern Freeway causing a fatal accident, and an elderly man who killed his chronically ill and pain-ridden wife who was eking out her last days in a nursing home which she hated. These were only two of many successes in almost 100 murder trials. His Honour became one of Her Majesty's Counsel in 1999.

His Honour also became somewhat of a favourite with the press, who enjoyed the mix of skilled legal argument with a distinctly "Australian" approach. His criminal barrister wife Liz Gaynor mourns the fact that his elevation means she can no longer carry out her longheld threat to rise during one of His Honour's final addresses and play "Waltzing Matilda" on a comb wrapped in a gum leaf. He was also noted for his long Ned Kelly-like beard (the result of an extreme dislike of shaving) leading to press reports headed "Hair comes the Judge" when his appointment to the Bench was announced. His Honour was also voted one of the three favourite counsel of the "Alternative Jury" — a band of diverse people who come to watch almost every murder trial.

In the months before his elevation His Honour often spoke publicly of the enormous strains imposed by the work of a criminal trial lawyer. A fanatical Collingwood supporter, His Honour says his appointment will allow him to once more attend to his club's football matches which with the tensions of murder trial work he had found too stressful to endure.

The Bar congratulates His Honour on his appointment and wishes him many fulfilling years as a judge.

Judge Cohen

JUDGE Susan Cohen comes from a fine legal background. Her father, the late Senator Sam Cohen QC, was a member of this Bar. At the time of his death he was the deputy leader of the Labor Party in the Senate and would have formed part of Prime Minister Whitlam's cabinet. At the Bar he was a committed barrister who mainly acted for plaintiffs. Her Honour, in her career at the Bar followed his commitment to fairness and justice.

Her Honour is the first woman in Australia to follow her mother as a judge. Her mother, the Honourable Judith Cohen, had been a Commissioner of the Australia Arbitration Commission and later appointed a Deputy President of the Australian Industrial Relations Com-

mission, a position having the status of a Federal Court Judge. It is a fine tradition to which Her Honour has succeeded.

Judge Cohen was articled to Ron Salter of the then Phillips, Fox and Masel, where she worked as an employee solicitor for two years. She worked extensively with Geoff Masel of that firm, particularly in relation to insurance claims arising out of the 1977 bushfires. She was later briefed by Geoff Masel for the SECV in relation to claims arising out of the 1983 "Ash Wednesday" bushfires. She came to the Bar in 1981 and read in the chambers of Roger Gillard, now one of Her Majesty's Counsel. Her Honour's work as a junior barrister covered the full ambit of the law from crime, civil law, tribunals and family law.

Her Honour's commitment during her 20 years at the Bar has seen her accept a considerable amount of pro bono work, as well as representing plaintiffs on a "no win no fee" basis. She comes to the Bench with a reputation of being able to assess a case fairly and accurately and to provide objective and detached advice.

Her Honour was a part-time member of the Estate Agents Board for nine years and was appointed as a Local Land Board to determine applications for forfeiture of leases over crown land. This has equipped Her Honour to come to the Bench with knowledge and experience of life on the other side and the discipline that this entails.

Judge Cohen was one of the leaders in the area of equal opportunity for women at the Bar. She was a founding committee member of the Women Barristers' Association and has been an active member of its committee since the first committee meeting in 1993. She was its convenor at the time of the publication of the Victorian Bar Council Report on "Equality of Opportunity for Women at the Victorian Bar". She has also been a member, since its inception, of the Bar's Equality of Opportunity Working Party. Consequently she was involved in all of the steps taken by the Bar in implementing the recommendations of the report, an example of which is that the Barristers' Clerks now have detailed equal opportunity policies.

Her Honour has been a consistent member of the Labor Lawyers, particularly in its lean years during the Kennett premiership. Her Honour is ideally suited to the County Court Bench bringing to it wealth of trial experience and profound common sense.

The Victorian Bar warmly welcomes her appointment.

Judge Sexton

ON 27 August 2001, Her Honour Judge Meryl Elizabeth Sexton was welcomed to the County Court by the President of the Law Institute and the then Senior Vice-Chairman of the Victorian Bar.

Her Honour studied law at Monash Law School, graduating in 1983 with a Bachelor of Laws and Bachelor of Economics. Her Honour completed her Articles with E.W. (Bill) Coady of Coady, Dwyer and Associates in 1984 and was admitted to practice in 1984. While completing articles, Her Honour gained a wide range of experience in common law and criminal law.

Her Honour, while at Coady, Dwyer and Associates, instructed counsel in the matter of *R* v. *Tizzone* when Tizzone pleaded guilty to conspiracy to murder Donald McKay. Her Honour recalls that at one stage during the plea hearing, whilst instructing Walker QC and Delaney of counsel in the Supreme Court, the Court needed to be cleared to enable Tizzone to return to the cells. Her Honour was advised by a prison officer: "You'll have to leave the court, girlie." Her Honour dutifully left the courtroom at that stage despite counsel being given permitted to remain, sufficiently intimidated to not declare that Tizzoni was in fact her client. Those who know Her Honour will know that such occurrences would not happen again without a suitable retort.

Judge Sexton signed the Roll of Counsel on 23 May 1985, having read with His Honour Judge F. Davey, where Her Honour gained further experience in the common law, criminal law, and also family law. Her Honour greatly appreciated the assistance given to her by His Honour in whose chambers she attempted to learn the art of remaining relaxed and laid-back in the face of mountains of paper.

After Her Honour's second year at the Bar, she began to specialize in criminal law, and since 1987 has regularly appeared in criminal trials. Her Honour accepted briefs for both prosecution and defence, thereby obtaining valuable experience in appearing at both ends of the Bar table. Her Honour has appeared in courts of all jurisdictions including the High Court, Court of Appeal, Supreme Court, County Court, Coroner's Court, Pharmacists Board of Victoria and the Australian Broadcasting Tribunal.

In August 1995 Her Honour was appointed a Crown Prosecutor and remained in that position until her recent appointment to the County Court. As a Crown Prosecutor Her Honour appeared in a large number of trials, including *R* v. *Glennon* in the County Court and Court of Appeal, and as junior counsel in *R* v. *Lewis* in the Supreme Court and Court of Appeal. In addition to those appearances, which took approximately 15 months of court sitting time since 1996, Her Honour also appeared in numerous committals, trials and appeals throughout that period. These appearances were in

addition to fulfilling other duties and advising the Director and Solicitor for Public Prosecutions.

Her Honour has always been interested in legislative reform. Her Honour was briefed by the then Attorney-General, the Honourable Jan Wade, to consider amendments to legislation which culminated in the 1997 amendments to section 372 *Crimes Act 1958*. Judge Sexton was also involved in the legislative changes to section 464ZF *Crimes Act 1958* and the creation of section 398A *Crimes Act 1958*.

Continuing her commitment to the legal profession, Her Honour was the author of a chapter in *Criminal Law Investigation and Procedure*, edited by Dr Ian Freckleton of counsel, on the law relating to sexual offences in Victoria.

Her Honour has also lectured extensively on the practice and procedure of criminal law to groups which have included the Victoria Police, Leo Cussen Institute, Office of the Public Advocate and the Victorian Institute of Forensic Medicine, and has also taught at the Victorian Bar Readers' Course and acted as a judge in the Monash University Moot Competition.

Judge Sexton, having been appointed as a Crown Prosecutor upon 10 years call, was not able to take Readers in prosecutors' chambers. Her Honour considered it unfortunate that such experience was not available to Readers at the Victorian Bar. However, undeterred, Her Honour informally mentored new advocates and assisted with the in-house advocacy program undertaken by the Office of Public Prosecutions.

Her Honour has always given freely of her time to a number of committees involved in legal issues and also to organizations outside the legal profession.

Whilst at the Bar, Her Honour served as a member of a number of committees, including the Fees Committee, the Equality Before the Law Committee and the Committee of the Criminal Bar Association. Her Honour was also a member of the working party which set up the Women Barristers' Association and has been a member since its inception. In 1997 Her Honour was appointed as an advocate member of the Legal Professional Tribunal and in 1998 was reappointed for five years, until her appointment to the County Court intervened.

From 1995 to 1997 Judge Sexton was a Trustee of the Queen Victoria Women's Centre, which included three months as Acting Chairman. Her Honour was an inaugural member of the Trust which took over the Queen Victoria Women's Hospital building when it was a run down shell and unoccupied, and opened the refurbished Queen Victoria Women's Centre on its premises. Her Honour's commitment to fulfilling the aim of the Centre — "To provide educational and recreational facilities for the women of Victoria by women for women" — is consistent with Her Honour's commitment to women's issues. Her Honour's work as Trustee and Acting Chairman involved tackling the challenge of making the Centre self-funding. This task was made more difficult as the Centre had not been given tax deductibility status. This often led to conflict between providing facilities free of charge and providing facilities that were income producing. To assist the Centre to become self-funding, a cafe was opened and operated within the building. There are many who have fond memories of a recent birthday party held for Her Honour at those premises.

Her Honour is a member of the Australian Federation of Business and Professional Women Inc. and was President of the Victorian Division of that organisation from 1992 to 1995. The aim of the organisation is: "To use the combined strength and abilities of business and professional women to work for equality of opportunity." Her Honour began as a local member in 1987, and in 1989 attended a conference in the Bahamas as the Australian Business and Professional Women's Young Career Woman. Her work within that organisation has included being a committee member at State, National and International levels. Her Honour has also organised conferences at State level and participated and chaired sessions at the National and International levels. Her Honour had continued her active involvement with regular local meetings at which invited guests speak on a range of topics of interest to business and professional women, including mentoring, advice on how to succeed in small business, superannuation and financial issues.

Her Honour has undertaken public broadcasting on legal matters, which have included an appearance on Radio National in the program "Law Matters" hosted by Suzanna Lobez, where she spoke on the issue of cross-examination of child witnesses.

Mention must also be made of Her Honour's achievements and interests in the sporting and acting field from her school days until the present. Her Honour completed Years 7 and 8 at Ashwood High School then transferred to Presbyterian Ladies College to complete Years 9 to 12. Her Honour was vice captain of that school in her final year. While at school, Her Honour became a foundation member of the Victorian Youth Theatre and appeared not only in a number of productions with them, but also in annual school productions. Her Honour's most demanding role was as Mrs Peterson in "Bye Bye Birdie" where Judge Sexton, at age 16, faced the challenging role of playing an overweight, loud, middle-aged American woman who wore orthopaedic shoes. It seems Her Honour's performance was not only demanding but also convincing as one critic seated in the front row commented that the only thing that gave her age away were her wrinkle-free hands.

Those who know Her Honour well will also be aware of her sporting achievements, in particular her interest and participation in hockey, a sport commenced at 12 years of age. In addition to playing for school teams, Her Honour also played for the Camberwell Hockey Club (Under 16's) which boasted a premiership team. Whilst at Monash University Her Honour became a member of the Monash Hockey Club in 1978, and continues to be a member. Judge Sexton was the first female player to be made a life member of that club. Her Honour proudly boasts that to this day she still fits into and wears the same hockey skirt she wore in 1978. It has been suggested by team members that the skirt should be framed and placed in a prominent position within the newly completed club house. It seems, however, Her Honour has not agreed to this proposal, being of the opinion that there are a few more games to be played by her in that skirt. At the Monash Hockey Club Her Honour has been part of two premiership teams, the most recent in 2000. Her Honour also played inter-varsity hockey for the five years of her undergraduate degree and has been a qualified umpire since 1981. Her Honour has recently started to learn tennis (for the third time) to ensure that she can participate in a sport when she decides to retire from the demands of hockey.

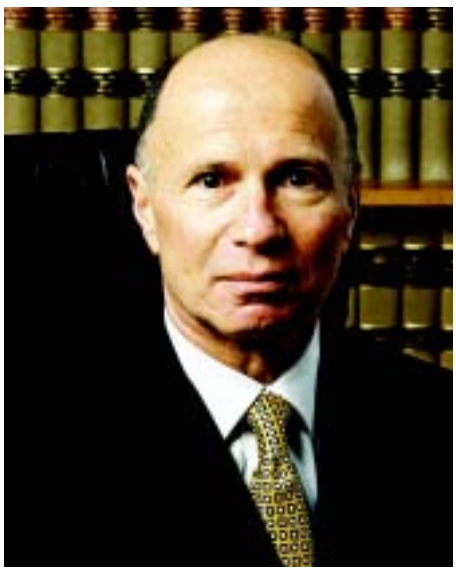
Those who know Her Honour will attest to her singing skills and will no doubt agree with Her Honour's own assessment of her singing as "off key and loud". Her Honour's commitment to her beloved football team, Essendon, is also well known and Her Honour's barracking can best be described as "enthusiastic and loud". In 2000 Her Honour volunteered at the Olympic Games in Sydney for two weeks, which involved her assisting visitors to find their way

around the various venues. On one occasion Her Honour was provided with a megaphone which she used to direct the crowds whilst seated on a tennis umpire's chair. For the first time in her life Her Honour was not just loud, but also tall.

Her Honour's commitment to the legal profession and the administration of justice is well known and Her Honour's enthusiasm for the law will be greatly missed at the Office of Public Prosecutions. It is, however, these very qualities which will make Her Honour a valuable addition to the County Court Bench. We wish her well in that venture.

Australian Industrial Relations Commission

Senior Deputy Presidents Lacy and Kaufman



THE erstwhile well-settled accommodation arrangements on the ninth floor of Latham Chambers were dealt a shattering blow one morning in February 2001 when the federal Minister for Employment, Workplace Relations and Small Business swooped, appointing two established residents, Brian Lacy and Les Kaufman, as Senior Deputy Presidents of the Australian Industrial Relations Commission.

The *Workplace Relations Act 1996* provides for an interesting hierarchy of adjudicators. There is a President, two Vice-Presidents, some Senior Deputy Presidents, some Deputy Presidents, and many Commissioners. The current President, Giudice J, was also taken from the ninth floor of Latham by the same predator (or more correctly, his predecessor in office).

The Honourable Senior Deputy President Lacy signed the Bar Roll in 1992, after a lengthy period of public employment which included military service and a time as District Registrar of the Federal Court in Melbourne. Perhaps it was the working conditions in the latter role that prompted His Honour to undertake articles at A J Macken & Co, from where he gained experience, which was later to prove invaluable, in the representation of dismissed employees, particularly executives. The unlawful dismissal jurisdiction was to become a significant part of His Honour's practice at the Bar.

It was to be expected of a practitioner with His Honour's background (in addition to the roles mentioned above, he had spent some time in a policy role with the short-lived and somewhat controversial Industrial Relations Bureau) that industrial law, the settlement of labour disputes, litigation by dismissed employees and the like would predominate in his professional interests. But there were other areas of the law that felt the keen edge of His Honour's expertise. At his welcome in the Commission on 9 February 2001, it was reported (without any audible denial) that His Honour had worked in such varied areas as administrative law, equal opportunity, contract, bankruptcy and company law. It is within the knowledge of this correspondent that His Honour recently took a particular interest in the achievement of fair compensation for owners of, and traders in, firearms and accessories for firearms in the new statutory environment that followed the unhappy events at Port Arthur. Despite these para-military attachments, however, His Honour is a gentle and com-passionate man whose demeanour and conscience will be of great value to the Commission and the community.

The Honourable Senior Deputy President Kaufman (who will ever be known to those who attended the 2001 Bar Dinner as "Cough, Man!") has the most impeccable credentials for membership of the Commission. At a time when others were enduring the tedium of serving as associates to various members of sup-erior courts, His Honour was associate to Sir Richard Kirby, the *eminence grise* of the Conciliation and Arbitration Commission where he had served since its establishment in 1956 (which service in turn followed nine years on the Commonwealth Court of Conciliation and Arbitration). This was *the* Kirby whose name appears in the long title (as it were) of the

Boilermakers' case. This was *the* Kirby who shares a biographer with Mr Robert Hawke and who, so folklore has it, shared many a cup of tea with the same gentleman at an undisclosed location somewhere on the south coast of NSW where major industrial disputes, threatening national catastrophe, were settled with gentility and expedition.

Although His Honour knew little of this, the Kirby experience clearly stood him in good stead for a career practising industrial law. When, having completed articles at Mallesons, he came to the Bar in 1975, his choice of Master was no less propitious. His Honour read with Don Ryan, now Ryan J of the Federal Court. Ryan was a (probably the) leading junior at the industrial Bar, accepting briefs from employers and unions alike. Les Kaufman could not have had a better introduction to the traditions of the Bar.

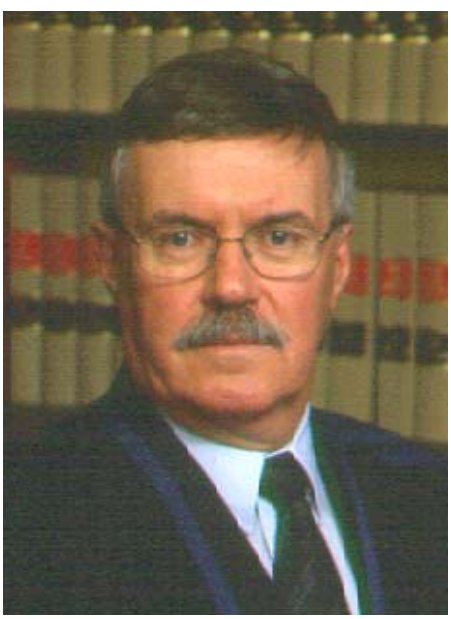
Over his 15 years at the Bar, His Honour represented the industrial interests of major commercial concerns, governments and others. He had what non-barristers would regard as the misfortune to be involved in many disputes that were intractable and drawn-out, and which required the making and exposition of constitutional and jurisdictional points that were not always universally popular. Many of these matters gave rise (usually with a certain inevitability) to High Court proceedings. His Honour often had the distinction (which others might perhaps have regarded less favourably) of appearing as junior to Ian Douglas QC in the Commission and then, in subsequent prohibition proceedings in the same matter, as junior to Ron Merkel QC in the High Court. It is a tribute to His Honour's powers of translation that some of these ventures actually succeeded.

Let this short note stand as a warning to any junior member of the Bar who proposes to embark on a career in industrial law by testing the limits of the Commission's jurisdiction: do so before His Honour at your peril. There is no path you might tread that has not previously been trod bare by His Honour.

His Honour's appointment as a Senior Deputy President has been warmly received. There is wide recognition of the value to the Commission and the community of a practitioner with such extensive experience in the work and jurisdiction of the tribunal which he has now chosen to serve.

Federal Magistracy

Federal Magistrate Phipps



MAURICE Phipps graduated from Monash University in 1970, having completed a Bachelor of Jurisprudence and Bachelor of Laws. He was admitted to practice in 1971, and signed the Bar Roll the following year.

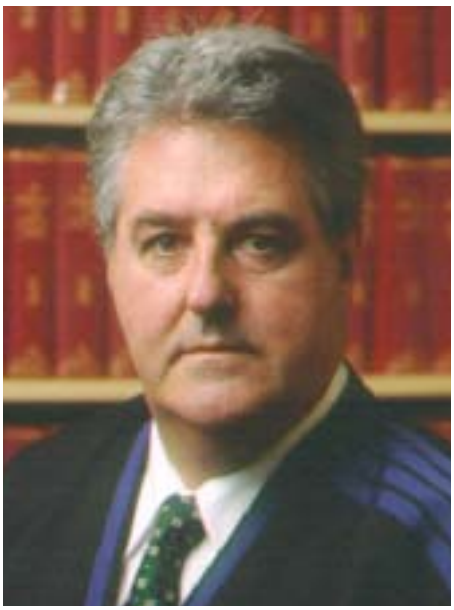
In his early years at the Bar, he practised in family law, bankruptcy and corporations law. Later he developed a practice in building and construction law. His practice involved considerable use of mediation and dispute resolution. He was a member of the first group of mediators appointed to the County Court Building Cases List and one of the original group of mediators to the Supreme Court Building Cases List. He was appointed to the panel of conciliators and arbitrators under the Victorian Retail Tenancies Act in 1989. He also held similar positions in areas as diverse as the electricity market and the gaming machine industry.

Magistrate Phipps was one of the original members of the Victorian Dispute Resolution Committee, and served as its chairman from 1994 to 1995. He was a member of the National Council of the Institute of Arbitrators and Mediators from 1995 to 1999. He taught courses in arbitration and mediation, both general and advanced, at Deakin University.

In November 1990 he was appointed one of Her Majesty's Counsel. Maurice Phipps has made a significant contribution to the activities of the Bar and the Bar Council. He served as a member of the Bar Council in 1998–99. He has been a Director and Deputy Chairman of Barristers Chambers from 1994 until his appointment to the Federal Magistrates Court. Aside from performing the substantial administrative work involved in these appointments he undertook several major projects. Four Courts Chambers, as it was, was renovated and renamed after one of Victoria's leading legal figures, Sir Douglas Menzies. This renovation included the establishment of the Victorian Bar Mediation Centre and the Readers Course area. As the Director of Barristers Chambers he was responsible for overseeing the renovation and for briefing the architect on the design of the Mediation Centre. The Bar is also greatly indebted for his contribution to the renovations of Owen Dixon Chambers East and, in particular, the William Street entrance. These achievements are a visible testament to his commitment to the Bar.

Magistrate Phipps is dedicated to his wife and five children. He brings to the Federal Magistrates' Court a depth of professional experience. The Bar warmly congratulates him on his appointment.

Federal Magistrate Connolly



ON 4 June 2001 Michael Connolly was sworn in as a Federal Magistrate. He was educated at Xavier College and graduated in 1969 with degrees in Bachelor of Law and Bachelor of Jurisprudence. He completed articles with Doyle & Kerr solicitors and then practised as a solicitor in Castlemaine with the firm H.S.W. Lawson & Co. In 1983 he came to Melbourne to work with Ridgeway Clements as a specialist family law solicitor.

In 1984 Magistrate Connolly signed the Bar Roll and read with Bruce Walmsley. Magistrate Connolly quickly established a good practice at the Bar, working in a range of criminal, commercial and family law matters. As his practice developed the focus of his work moved largely to family law, and involved all aspects of family law proceedings including property settlements, custody, and work in related jurisdictions such as de facto law and testator's family maintenance claims.

Magistrate Connolly had a large circuit practice, particularly in Mildura and Bendigo. His circuit work provided him with the obscure but necessary talent of what is known on the Mildura circuit as "baking". This phenomenon is peculiar to Mildura because as practitioners know, Mildura has an extreme climate, and circuit work often takes place during some of the hottest times of the year. "Baking" occurs when a client has to wait for their matters to come on in court, and the barrister sends them to wait outside the court. Leaving clients "to bake" is widely acknowledged as a useful means of encouraging even the most recalcitrant client to settle their litigation. The conditions can be oppressive as clients have to wait outside in Deakin Avenue. As the temperatures soar the litigant's will to fight tempers. Magistrate Connolly as an experienced family law barrister was always very kind to his baked clients and often able to procure for them an excellent settlement!

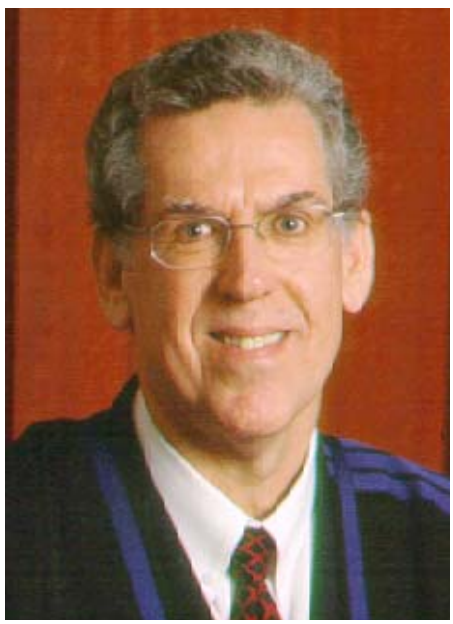
Magistrate Connolly provided much service to the Bar. He was a member of the committee that prepared the submission of the Bar on the proposal as it then was . . . Federal Magistracy. It turned out to be a prophetic task. He also represented the Family Law Bar Association in response to the Australian Law Reform Commission in the last stage of its review of the federal litigation system and on the committee of the Chief Justice of the Family Court to examine the future directions of that court.

Despite the demands of a busy practice Magistrate Connolly is a devoted family man. He has many friends at the Bar who all regard him as being the best of company. The community is fortunate to have him appointed to the Federal Court of Australia. We congratulate him and wish him well in the years ahead.

Federal Magistrate Walters

JOHN Walters QC is no stranger to a challenge. On signing the Roll of Counsel of the Victorian Bar earlier this year he asked were there any formalities he needed to comply with when he first appeared as Senior Counsel in Victorian Courts. He was told "Just wear a rosette"! When reflecting on this advice he decided to stay with tradition. He believed Senior Counsel should not appear naked in Court just wearing a rosette but also be robed with wig and gown!

He was educated at Scotch College and the University of Western Australia and graduated with a Bachelor of Laws degree in April 1973. He completed articles with Messrs Knott, Wallace and Gunning, and was admitted to practice as a barrister and solicitor of the Supreme Court of Western Australia on 18 February 1975. He then travelled to Israel where he was admitted to practice at the Israeli Bar. During his years in Israel he was a member of the Israeli Armed Forces (artillery division) and an officer of the Israeli Police Force. In 1982 he returned to Australia and joined the firm of Lavan & Walsh Perth and later became a partner of its successor Lavan Solomon (now Phillips Fox). In April 1985 John Walters joined the Perth Bar and



has practised principally in family law and appeared in many of the leading reported cases. In March 1997 he took silk.

The Victorian Bar congratulates him and wishes him every success in the voyage ahead.

Judge Mullaly

IN June this year Paul Richard Mullaly retired after 22 years as a judge of the County Court.

He was known to many as "the Ace" not because of any penchant for card playing or tennis, but by reason of his knowledge of the law (based on a personal system of case notes and records which he created) and his willingness at the Bar to share that knowledge in the form of advice and assistance to young barristers. This systematic and helpful approach to the law continued during his life on the Bench.

He came to the Bench highly qualified for the work which was to occupy most of his time for the next two decades. After graduation he served articles with Ray Dunn from whom, no doubt, he developed his fascination with the criminal law. He then read with the late "Ben" Dunn who subsequently became a judge of the County Court and thereafter a judge of the Supreme Court. Although his early practice was mixed, as the years passed his briefs increasingly brought him into the criminal courts.

From 1961 to 1977 he was a Prosecutor for the Queen. He took silk in 1976 and was Crown Counsel for the State of Victoria from April 1977 until his appointment to the Bench in April 1979.

In welcoming His Honour, Frank Costigan QC (the then Chairman of the Bar Council) said:

> Your Honour brings to this Court, which is the major criminal court of this State, over a quarter of a century of experience in all areas of the criminal law, an experience which has been honed by an interest in law reform and involvement at a high level with general questions of civil and constitutional law.

Since his appointment to the County Court, His Honour has made a major contribution not only in the work he has performed as a trial judge, but also in providing, in the typical "Ace" tradition, judicial "materielle" which services those who have come to the County Court with a somewhat narrower understanding of the criminal law and which enables even the relatively inexperienced to conduct a balanced and fair jury trial.

His Honour was the person primarily responsible for the preparation of the Sentencing Manual now used in the County Court. Subsequently, he completed a Trial Manual for the judges of that court. In the foreword to the Trial Manual the Chief Judge wrote:

> The scope of the Trial Manual is all-embracing. Certain judges have made contributions to it. Nevertheless it may be fairly said that it stands as a demonstration of the uniquely encyclopaedic knowledge and depth of experience of the criminal law and its practice which is possessed by its author, His Honour Judge Paul Mullaly QC. He, in particular, along with the court researchers who assisted him, are to be commended for their erudite industry in composing and compiling it.

Over the years His Honour has been not merely a practitioner and a judge. He has been a law reformer, a researcher, and a teacher. He has served as a member of the Attorney-General's Special Advisory Committee on the Criminal Law, as Chairman of the Forensic Science Society of Victoria and as a Major in the Army Legal Corps.

On the Bench His Honour was sometimes said to be "irascible", a term which in his case is properly translated as "intolerant of sloppy preparation". He believed firmly in the rule of law and the need to ensure that trials were conducted fairly in accordance with the law and without prejudice to the accused. His Honour was never unfair, but he was intolerant of incompetence, humbug and irrelevancy. He conducted a tight trial and would not allow the prosecution to take shortcuts nor would he allow prejudicial material to be put before the jury unless it was very highly probative.

His departure is a loss to the County Court. It robs the Court of a source of great experience and wisdom. However, we understand that His Honour is not lost to the. law. He plans to undertake research into the origins of the law in the Australian colonies.

We wish his Honour well in this new venture.

Judge Keon-Cohen

JUDGE Chester Keon-Cohen retired last August after 13 years of service on the County Court. At his farewell, tributes and recollections flowed thick and fast, recalling a career noted for industry, achievement and, in later years, reform of the Court's administrative processes.

Judge Keon-Cohen was born in 1941, the first son of one of Australia's leading orthopaedic surgeons, then seeing active service for God, King and Country in North Africa. The Judge is the grandson of H.I. Cohen KC, dux of Scotch College in the 1890s, prize winner at Melbourne University, and a member of the Victorian Bar from 1905 to 1920, who thereafter became leader of the (conservative) Legislative Council in the Victorian Parliament. "H.I." as he was known to his Jewish (and other) friends held, amongst other portfolios, Attorney-General, Education, and Local Govern-

ment. Keon Park, once an outer Melbourne wasteland (doubtless known to T.S. Eliot) was named after Chester's Irish Catholic grandmother, Ethel Mary Keon. Oral history has it that in the early 1920s, the Hon H.I. was offered the position of Chief Justice of Tasmania by the Tasmanian Attorney-General, which he (H.I.) accepted. However, the next day, the said Attorney, showing extremely bad timing, but considerable appreciation of the legal needs of Victorians, dropped dead on a golf course, and the appointment thereafter, mysteriously, lapsed. This of course explains the Judge's "do-or-die" attitude to all golf courses wherever located.

Undaunted, during and following World War I, "H.I." educated his three sons at (Presbyterian) Scotch College, the second of whom (Bryan) duly presented his honourable (first) son to the same institution in 1947 with the same idea in mind . There he was a boarder during his senior years — despite living precisely 852 yards, as they were then known, from the school's front gate. This boarding experience no doubt prepared the future Judge well for the Victorian country circuits he later came to dominate, and perhaps informed significant domicile decisions made later in life to move from the big smoke (Kew where he served as a Councillor for four years) to a rural property on the smoke-fringe at Dewhurst, near Emerald. There he and his wife Sue — (whom Chester met when she was resident at (the then female-only) Janet Clarke Hall, located next door to (the allegedly all-male) Trinity at a time when such liaisons required determined effort — have nurtured not only four children, but also numerous dogs, trees and blueberries. Any "collegiate" impediments to their courtship pale, however, into insignificance with those encountered by "H.I." and his beloved Ethel Mary, half a century earlier. During their courtship in the late 1890s in Melbourne, religious bigotry being what it then was meant that they met secretly at that well-known inter-denominational sacred site: the outer stands of the MCG. Perhaps this also explains why His Honour — along with most of the current Keon-Cohen clan — tragically, and despite all odds, continue to support, to the point of religious fanaticism, the once-mighty Ds — albeit these days from the members' pavilion. Still, most families are full of tragedies, of one sort or another.

Nevertheless, during his final years at Scotch (1958–59) in the days when students commonly studied Matriculation (year 12) twice, irrespective of marks attained, the Judge-to-be earned solid grades, was appointed a Probationer, rowed in the first VIII (1958–59) and played football with the first XVIII (1958–59), notoriously as 19th man during the 1958 premiership year. In this capacity, the footballer hit the MCG (running) for a period during the 1958 centenary game to mark 100 years of Australian Rules. He was also an outstanding and powerful swimmer, becoming beltman for Pt Leo SLSC in the days when life-savers had to actually swim for their lives — and to save lives.

Despite such excitement, His Honour matriculated in 1959, and proceeded, as did various ancestors, to Trinity College and the law school (in that order) at Melbourne University. There he stroked University and Trinity crews, winning both the Inter-Collegiate (1962) and Inter-Varsity (1963) boat races, for which he was awarded a full blue at a time when one had to win the event to win the colours. This success continued a family rowing tradition (i.e., rowing for Scotch, Trinity and the University) which now embraces three generations, reaching back to his father's day in the 1920s. In addition, Chester coached Trinity and University crews, and his sons also rowed, with distinction, for Scotch and various Universities in Melbourne. It is sad to note that "H.I." (and various other uncles) played, believe it or not, cricket — a tragedy so unspeakable that that family cupboard shall remain firmly, and forever, shut!

The future Judge graduated in law in 1964 and was articled to Mr Hector Bathurst at Rodder Ballard and Vroland, solicitors, where he received the handsome salary of $10 per week. He was admitted to practice in the Supreme Court of Victoria in March 1966, continued employment with that firm, and in 1967, moved to the firm Frank Monotti and Co, located at Dandenong.

The young solicitor soon saw the light, returned to the city, and signed the Bar Roll in April 1969. He read in the chambers of one Glen Waldron, now the Honourable Chief Judge of the County Court, and was that year anointed Mr Junior, an experience he recalls with pleasure.

At the Bar, Chester enjoyed both his passion for the unfortunate Ds, his golf at Royal Melbourne and other courses, his many friends, and also a highly successful junior practice, focussing on general common law, medical negligence cases, and defamation. He was retained, amongst many others, by the Tramways Board, and James Hardy and Co in asbestosis cases, and shared close friendships and facilities in chambers with various leading lights, including his former Master, Allan McDonald, now of the Supreme Court. He developed a large personal injuries practice, particularly on the Mildura and Ballarat circuits during the late seventies and eighties, with the firm conviction that cases were there to be settled, and golf courses were there to be played. After a very busy career at the Bar, His Honour was appointed to the County Court by the then Labor government on 2 August 1988, to the universal acclaim of the profession.

During his welcoming address, the then Chairman of the Bar, Charles Francis QC, recalled how difficult it was to cross-examine the new Judge's father, who was often called (for defendants) as an expert orthopaedic witness in medical negligence cases. According to Francis the only question he found worth asking was "whether the accident might not in fact have actually improved the plaintiff's condition!". Indeed the author recalls many medical "war-stories" narrated at Sunday lunchtimes at a time when such family rituals were important, but these memories support a slightly different thesis: first, that Dr Bryan loathed, repeat loathed, giving evidence in any court as an unutterable waste of time and money; and second, that his opinion was his opinion, that was that, and bloody lawyers should get used to the idea. Those medicos who made a career out of giving expert evidence, or worse, who tailored their evidence to one cause or another, were fiercely condemned during these discussions as committing the most heinous of sins: unprofessional conduct. Perhaps these firm views, forcibly expressed and no doubt eagerly heard at a young age, influenced both the Judge's choice of career, and his adherence to the highest professional standards.

His Honour adjudicated in civil and criminal jurisdictions during the nineties with distinction, showing the benefits of extensive experience, firmness but fairness, and a conviction that if malpractice or worse was revealed, including by government agencies, such behaviour should be forcefully exposed and dealt with. Hence he spoke out, from time to time, in sentencing remarks, including against practices in the second-hand dealing world (cash converters); and concerning what, in his view, were misplaced campaigns seeking leniency (or severity) in sentencing, including government interference with a Judge's sentencing discretions. Inevitably, the Supreme Court on appeal, from time to time, set aside various sentences — an

experience shared by many County Court colleagues over the decade.

But here the judicial story, like the World Trade Centre in New York, encounters what one hopes is temporary, and not terminal, adversity. In January 1995, the Judge was literally and figuratively struck down "out of the blue", not by an aeroplane, but by a mysterious (presumably air-borne) and very debilitating virus, resulting in the not-uncommon condition known as idiopathic dilated cardio-myopathy. This virus of uncertain origin attacks and damages the heart muscle, severely reducing the heart's capacities. Indeed, in many cases, the point can be reached where survival depends upon heart-transplant surgery.

Fortunately, after a period of hospitalisation and with careful management (not one droplet of alcohol) and continuing extensive medication, the Judge recovered a fair measure of his strength, and with it, his fearsome reputation for both hard work and long drives on the par fives. However, his ability to pursue extended physical work, and to sustain the pressures of trials, especially lengthy trials, were both drastically reduced by this ongoing disease.

In the event, long-suffering Victorian litigants were the beneficiaries. From mid 1995, His Honour, in close co-operation with his colleagues, directed his remaining energies into completely re-organising the court's long civil lists recorded in the ubiquitous "green books", especially calling-over and cleaning-out approximately 3000 cases languishing in the causes list. His Honour took to this gigantic task with vigour and determination, as many recalcitrant solicitors at directions hearings over subsequent years were to discover — sometimes to their professional and personal financial cost. Not to put it too kindly, the causes list in mid 1995 was a mess — long delays, dead-matters still walking, and costs and frustration mounting horribly on all sides. His Honour got stuck into each and every one of these "listless" matters, tore them apart (sometimes into tiny bits, depending upon the misfortunes of the mighty demons in any given week) struck them out, never again to desecrate the registry's desks, or put them back together again and either facilitated (not forced, despite rumours to the contrary) their settlement, or referred them to trial — a bit like a perpetually angry, and potentially dangerous, humpty dumpty sitting on a wall with Her Majesty's best china teetering on the edge.

Coupled with this was the introduction, as in other Australian courts, of video conferencing facilities for civil list call-overs, including taking evidence; re-organising the Judge's roster system to six-months on/off as between civil and crime; and preparing for and implementing judicial case management accompanied by the new Order 34A of the County Court Rules, which commenced operation on 1 January 1996. As a result, the Victorian County Court can justly claim to be a leader in the field of case management techniques with other jurisdictions, at home and abroad, learning from and, on occasions, implementing aspects of these reforms.

His Honour having now retired from active judicial life, all the rest continues as best it may. An extensive family shortly to welcome its first grandchild; life on the farm in all its seasonal richness; the beloved Ds with rather different seasonal experiences; golf of a more accurate if less lengthy variety; music, especially in the form of opera and piano lessons; bridge being played at his other city haunt, the Australia Club and its rural competitor, the Berwick Bridge Club; the support and companionship of countless friends in many fields; and perhaps some future work as a reserve Judge with the County Court.

The Bar wishes His Honour well in his retirement, and records the gratitude of the profession, and of the community, for his various and distinguished contributions to the law, litigants and to the County Court.

Obituaries

Douglas Salek QC

DOUGLAS Salek will be remembered not only as a fine criminal barristers but as a man of style, wit, theatricality and a true friend of the Bar.

Douglas was too young to die at the age of 48. He had fought lung and throat cancer for four years, had survived the removal of one lung and the removal of a tumour in his throat. But over those four years he was appointed silk in 1999 and continued his flourishing and successful criminal practice, specialising in appellate court advocacy.

Doug had many friends at the Bar and indeed loved the Bar itself and its way of life. He loved acting and was a great mimic. Sometimes he mused about whether he would have been a better actor than barrister. The eulogies at his funeral, at a memorial dinner at his beloved Savage Club and at the Criminal Bar's gathering at the Essoign Club testified to the fact that as a barrister he led a varied, stimulating and full life. His life was not only filled with the law but with his love of the theatre, travel, food, wine, and the company of friends.

Douglas Michaelis Salek was the second son of Alan and Mary Salek and the grandson of Sir Archie Michaelis who had a profound influence on his grandson. He was educated at Melbourne Grammar where he first revealed his abilities as a mimic and actor. In his final year at school he was awarded the inaugural Barry Humphries prize for the liberal arts for his title role as *Richard III*. He matriculated with honours, and attended Monash University obtaining Bachelor of Jurisprudence and Bachelor of Law degrees in 1974.

In 1975 he went to London where he worked for two years with a commercial law firm, Coward Chance (now Clifford Chance). Douglas returned from London

in 1977 and read with His Honour Michael Kelly, now Judge Kelly. He became a great friend of Kelly's and to the last was able to mimic that Kelly lisp so well. He became a significant criminal trial barrister and later successfully took up the rigorous work of practice in the Court of Criminal Appeal.

Douglas appeared in many significant cases concerning the administration of criminal justice. In the High Court these included *Kesaravagh* on insanity, and *Pavic* and *Swaffield* on confessions. In the Court of Appeal he appeared in *Parker* and *Anderson* on expert evidence, and *Lucas* on DNA evidence. In his later years he appeared in many appeals against conviction and sentence and was well recognised for his hard work, research and incisive arguments.

Lillian Lieder QC

LILLIAN Lieder QC was born in Munich Germany on 3 June 1948, the only child of two medical students, Michael and Sarah Lieder-Mrazak. She came to Australia in 1951, speaking no English, only Polish and German, but by the time she was at Bank Street Primary School in Ascot Vale, she was speaking it well enough to be in tears when the milkman who used to deliver those friendly little 1/3 pint bottles to the school, referring to her flaming red hair, called her "bluey". She mastered English quickly enough, but the Australian sense of humour took a little longer.

Lillian completed her secondary education at Presbyterian Ladies College and her tertiary studies at Melbourne University where she obtained an honours degree in law. She followed that with articles at Gilbert Field and Warne, and in 1971 she was admitted to practice. Lillian then spent a year in corporate practice at Yarwood Vane and Associates (now Deloittes) and in 1973 following her true inclinations she joined the Victorian Bar.

Lillian read with Frank Walsh (now His Honour Judge Walsh of the County Court) and was certainly his star pupil. When Lillian came to the Bar it was a very different place to the Bar of today. There were approximately 450 barristers in active practice and only five women practitioners, almost all of whom practiced in the area of family law, which was in those days considered a "respectable" area of practice for women.

This was not the area in which Lillian desired to practice. She was involved in the Buoyancy Foundation in a voluntary capacity, which was one of the first alcohol and drug rehabilitation programs in Victoria, and she was determined to work in this area. She was tenacious, not to be denied, and against the odds, after a couple of years at what she always called "this man's bar", she started appearing in the early drug-related trials, acting for severely addicted people on trials and pleas. She quickly established a reputation as an extremely intelligent and fearsome opponent and as an expert in drug trials. As she continued in practice she managed to somehow combine pregnancies, motherhood and a fierce intellectual rigour and daunting court presence. I remember her ringing me one Saturday morning and asking if I could take judgment for her on Monday morning, in a case which had concluded on Friday. I agreed and asked why she wasn't appearing, and she said that she had just given birth to her son David (her third and youngest child) that morning. Such was her dedication to her clients that even before she told me the news of the birth, she was ensuring that her client would not suffer.

Lillian appeared for both the defence and the Crown in all jurisdictions in this country from the Magistrates Court to the High Court, and was highly regarded in all areas, but particularly in the Court of Appeal where her amazing intellect shone through and at times confounded both her opponents and the Bench before whom she was appearing.

Lillian read broadly from histories to the classics to pot boilers and she was an extremely interesting person to have any form of discussion with as her depth of knowledge across disparate areas would occasionally astound you. She appeared in many of our most famous criminal cases. When her son Mathew Kowalski was studying criminal law at Monash University, I recall being at her home during a discussion between them of the finer points of some cases he was preparing for the next lecture and she was busy explaining to him exactly what those cases meant, and Mathew was disagreeing with her over some of the points she was making, pointing out that his lecturers had a different view. She managed to convince Mathew that she was correct by merely asking him to read who appeared as counsel in all the cases that they had been discussing and of course it had been Lil.

She trained young barristers through being a master or by teaching at Leo Cussen or the Bar Readers' Course. She believed passionately in all the great things that the Bar stands for — protection of the weak and poor in our community, justice tempered with mercy, equality, comradeship and an abiding passion for the law. This passion she communicated to her nine readers being Weiner, MacKenzie, Michelle Williams, Stuogiannos, Slade, Jane Dixon, Sol Rozencwajg, Burrows and Auty.

Not only did she train young barristers, she also trained solicitors for both the defence and the prosecution. She made it clear to them that they were part of the case and that she expected high standards from them in terms of preparation and participation. They couldn't just wrap a backsheet around the file and think it was the end of their work.

There are so many memories of Lil, but an enduring image is of her at breakfast in Domino's, her flamboyant mane of red hair flowing, endless cups of coffee, arguing the law with Weinberg, Willee or any other of her friends whilst having at least one other conversation involving gossip with other friends.

She could make me laugh as no one else could; her wit, biting as it could occasionally be, was special. Conversations with Rose, Lil and I could reduce the strongest person to cringing fear, as we shared a strong friendship which bounced off each other as did our ability to gossip and laugh.

Lillian is singlehandly responsible for various terms entering into the legal lexicon of a number of criminal lawyers: "wilfully short" and "doctrine of similar furniture" (describing the furniture of all successful drug importers). These phrases were so accepted that they found their way into the script of "Janus".

During a Supreme Court trial in which the trial was conducted by way of intercepted telephone calls in Urdu, she taught herself that language so that she could effectively cross-examine the interpreters, and she did it so well that one of the interpreters she was cross-examining accused her of "verbal seduction". She decided to teach herself Greek at one stage for something to do, she had that sort of inquiring mind.

I would describe my mate as fierce and courageous.

Lillian was fiercely intelligent, fiercely loyal, fiercely dedicated to her clients or cause, a fierce supporter of the independence of the Bar, fiercely private, and she loved and didn't love just as fiercely.

She loved her children ferociously — Mathew, Alexisis and David Kowalsi — she was fiercely proud of them and one of the special moments in her life was when Mathew signed the Bar Roll as counsel.

As her friend, she was your friend forever and always believed that you would never do anything of which you would not be proud, she believed the best of you. There was nothing she would not do for you.

As her client, be it a brothel owner, the Commonwealth DPP, a large-scale drug importer, or a mentally impaired youngster she was ferocious on your behalf, she gave her all. As your opponent she was fierce, she never took a backward step in a courtroom, to be opposed to Lil was to sometimes know what real fear was.

Courageous — now that's a word to describe her. Long before the time of her illness when her courage was demonstrated on a daily basis to everyone who knew her and loved her, she was renowned for her courage. She took on drug work when very few others would touch it. She appeared for the Children of God in a long running case, opposing with huge courage the government of the day. She was vice president of Civil Liberties, she was a member of the Mental Health Review Board and on the ethics committee of the Prince Henry and Alfred hospitals. She taught at Leo Cussen and the Readers' Course, Moot Master at Melbourne University, and many other things which were all voluntary and unpaid.

She had the courage to come to this male-dominated Bar in a time when women were thin on the ground. Lil truly was a pioneer. She took the boys on at their own game and won. She earned their respect and their friendship. She took silk in 1991, the first female to take silk in the criminal jurisdiction in Victoria, and she held it. She was always busy, always in demand, but despite that she managed to give of her time and herself to so many people on a fee declined basis because she truly believed in what she did.

When I was clearing her chambers I found an application for a Petition of Mercy that she had done on a fee declined basis. She had taken this on after she had been diagnosed with her illness and she had done a mountain of work on it, despite being exceedingly busy with fee paying work, plus trying to fight this dreadful illness, but that was typical of Lil, there was nothing that was beyond her.

I don't think Lillian ever truly appreciated how much she was loved by members of this Bar or how much she impacted on the lives of various fellow members of the Bar and the solicitors she worked with. I can't begin to tell you the number of people who contacted me and asked me to pass on their love and affection to Lil whilst she was hospitalised. She was such an intensely private person in so many ways, and she wished to keep her illness private, so unfortunately many people never got the chance to tell her how much they cared or how much she had affected their lives.

One story I will allow myself, the night that we had taken silk, after we had been out with various family and friends we got together about 1.00 in the morning, at our usual place, sitting around Lil's kitchen table drinking copious cups of tea. We were both sober, but we were discussing a number of things. One of the matters we were discussing was, having achieved our dream, what was next for us in terms of future ambitions, and I will never forget Lil's answer. She said she had been admired all her life for her brain, now she wanted to be admired as a "bimbo", despite her tireless work to be accepted as such, her brain unfortunately still kept getting in the way.

She was a generous, kind, irascible, feisty, loyal friend. She was a demanding, fierce, warm, funny, critical, courageous friend, who didn't suffer fools gladly. She was one of a kind and unfortunately I don't think we will see her like again.

We'll miss you, sweetie, but you won't ever be forgotten.

The 2001/2002 Bar Council

Seated Front Row (left to right):
- Kate McMillan S.C.
- Robin Brett QC *(Junior Vice-Chairman)*
- Jack Rush QC *(Senior Vice Chairman)*
- Robert Redlich QC *(Chairman)*
- Ross Ray QC
- Philip Dunn QC

Seated Middle Row (left to right):
- Peter Clarke
- Tony Howard QC
- Tony Pagone QC *(Honorary Treasurer)*
- Justin O'Bryan
- Michael Shand QC

Standing at Rear (left to right):
- Jeanette Richards
- Jim Delany
- James Gorton
- David Neal
- Peter Riordan
- Michael Gronow

Paul Duggan
Richard McGarvie
(Assistant Honorary Treasurer)

Absent:
Brind Zichy-Woinarski QC
Katherine Bourke
Richard Attiwill
(Honorary Secretary)
Sharon Moore
(Assistant Honorary Secretary)

THE new Bar Council was declared elected at its first council meeting on 6 September 2001.

Mark Derham QC retired after 18 months of outstanding dedication and hard work as Chairman. Single-handedly he dealt with many issues to the great benefit of the Bar.

A member of the Bar has been heard to comment, "The ideal Bar Council is with Derham as Chairman and all other members in bed with the flu!"

Three members of the Bar Council who did not seek to be re-elected, namely David Ross QC, Garrie Moloney and Sara Hinchley, must be congratulated for their contribution to the many committees and sub-committees upon which they served.

Will Houghton QC and Peter Nugent were not re-elected but they too have ably served the Bar Council over the last 12 months.

Garrie Moloney's work in relation to indigenous issues deserves a special recognition.

And what of the future? The Bar can rest assured that its cawing rookery of committees and sub-committees will continue to provide government and direction for the Victorian Bar.

Graeme Thompson

Launch of *ReprieveAustralia*

Nicholas Harrington

ON Thursday 17 May 2001 the Criminal Bar Association generously sponsored the launch of *ReprieveAustralia*, a new organisation committed to providing humanitarian and legal assistance to inmates on death row the world over. *ReprieveAustralia* is a sister organisation to Reprieve, a registered charity in the United Kingdom committed to providing humanitarian and legal assistance to inmates on death row in the Caribbean and the United States of America.

In October 2000, Clive was awarded an OBE by HRH Elizabeth II for "humanitarian services" in recognition of his 20 years of tireless labour for justice for those facing death at the hands of the state in America.

ReprieveAustralia brought Clive to Australia to speak at the launch the Australian arm of Reprieve. *ReprieveAustralia* was also extremely grateful to Justice Kirby of the High Court of Australia for accepting an invitation to assist in, and speak at, the launch of the organisation.

ReprieveAustralia is committed to providing assistance to those who the state seeks to execute. It is presently putting in place a program to assist volunteers from Australia to travel to the USA to work in law offices involved in capital defence trial and appeal work. If you would like to become a member of *ReprieveAustralia* or find out more about its work, please contact the organisation on reprieveaustralia@hotmail.com.

The following speeches were delivered to a full house at the launch of *ReprieveAustralia* at the Essoign Club on 17 May 2001.

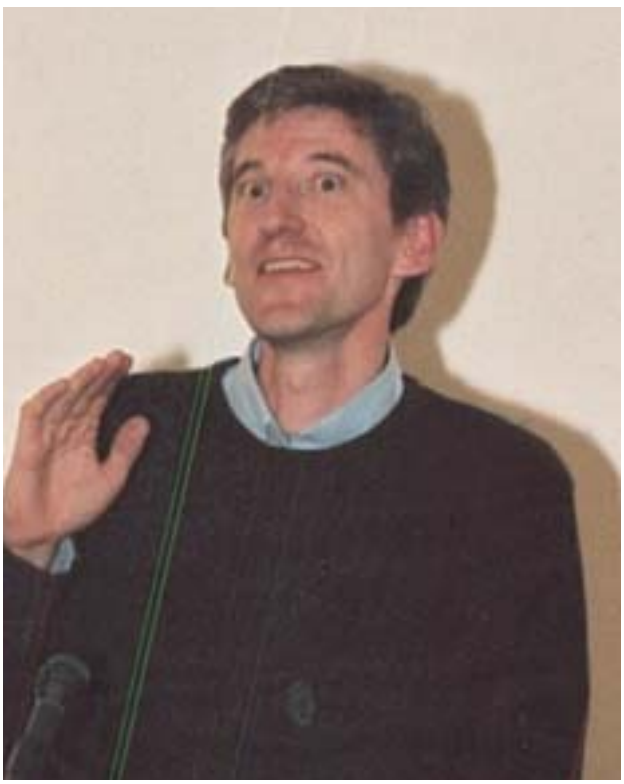
Nicholas Harrington, President,
ReprieveAustralia

Reprieve Founder Addresses the Victorian Criminal Bar Association

Clive Stafford Smith, OBE at The Essoign Club on 17 May 2001

Reprieve was founded by Clive Stafford Smith, a British born lawyer who has spent over 20 years in the southern United States representing over 200 people on death row. Clive is the director of The Justice Center, a non-profit law office in New Orleans, USA, dedicated to fighting in court for the lives of the men, women and children that the state seeks to execute.

ALRIGHT, alright, enough of that embarrassing introduction. I was absolutely assured this evening that I was just to do the little follow up to the major speech of the evening and that's what it's going to be. But I want to tell you, I got a little teary-eyed because listening to your Justice Kirby reminds me of the old days. There was a time in the U.S. when we had two of the great judicial names in the world, Thurgood Marshall and William Brennan. They were not just wonderful judges but they were also wonderful human beings, and used to joke with lawyers in the Supreme Court to make you feel better when you were wetting yourself up there. It has been a long time since we have heard that kind of speech in the United States, and to hear Justice Kirby tonight — you should be so proud of this guy. I don't know whether you have life terms, but don't let him retire. Don't let them take him out any way but feet first in a box. That's my advice to you guys. And let that not be for a long time too. You should be very grateful to that sort of leader in your judicial system because we don't have it in the U.S. and I wish we did, because the rest of us really depend on it.



Clive Stafford Smith, OBE

I am going to talk a little tonight — and not for too long — about Reprieve and about what's happened with people coming over to the United States to help us. You might be standing there saying what can we really do in America? Well you will be proud to hear that one of these wonderful Gallup polls, they did one in Georgia. The average Georgian thinks that someone with a British accent is twice as smart as they are. There are some English people who are quite offended by that actually, but that's only because we are a pretentious lot. Fortunately they can't distinguish Australia, South Africa, or France. SO you start with a big advantage.

I will tell you why we need to branch out from just the legal profession. There was a study in California that found that the three groups of Americans who came out as sociopathic on the Minnesota Multiphasic Personality Inventory are doctors, lawyers and multiple murderers. That's why we actually have to reach out beyond the people here tonight, though I know you are the exception to the rule.

The play that's being staged at the Carlton Courthouse right now is about Howard Neal. When Justice Kirby talked, I liked the phrase he used: "intellectually disadvantaged." In America, they talk about mental retardation. Howard's IQ is 51 and you know when you take the WAIS-R you get 45 points just for taking the test so that means he is only six points above this podium. Mississippi feels like they should kill him.

It's true what Nick Harrington said — back in 1994/1995, we were litigating the question of whether someone who is mentally retarded and on death row should have the right to counsel. That's extraordinary, isn't it? Without meaning contempt for any of the Justices on the U.S. Supreme Court, the three stupidest opinions the Court has come out with in the last

30 years include *Murray* v *Giarratano*[1] which says that you don't have the right to counsel. As an aside, before we get to that, we must also remember *Herrera* v *Collins*[2] that says that if you're innocent that's not relevant to whether you should be executed for the crime. That's pretty silly, isn't it? But *Murray* says that if you are mentally retarded on death row, you have no right to counsel to represent you.

Willie Russell was one plaintiff and Howard was involved also. They are both on death row in Mississippi and we were suing the State on this absurd notion that they should represent themselves. Willie ended up being 40 minutes away from being executed. He didn't have a lawyer. They wouldn't give him a lawyer, and they wouldn't give him a pencil, for goodness' sake. He was in this tiny little cell all by himself, all forgotten and he came very, very close to being executed that day without counsel. One of the things that the volunteers who came to work with us did was they helped us on that litigation. They IQ tested everyone on death row, and it was pretty astounding to discover that 32 per cent of them fell within the range of mental retardation. (Now, we thought about IQ testing the prosecutors as well who were arguing that Willie and Howard shouldn't have lawyers, but we figured they might come out way low so we didn't do it.) We also gave the clients the law school admissions test on the principle that if you couldn't get into law school you really shouldn't have to represent yourself when your life's on the line.

In arguing over these fatuous things, one of the principles in all of this is that you must not take the other side too seriously, because if you do, Justice Scalia will tell you that the U.S. Constitution nowhere says, "You shall not execute an innocent person." Therefore, Justice Scalia says, "Hey, we can go ahead and do it." If you have that sort of silly semantic, intellectual debate, you lose; whereas if you do it in the *National Enquirer* way you win.

We ended up threatening to subpoena all of the Justices in from the Mississippi Supreme Court to depose them to tell us exactly how it was that Willie Russell was meant to represent himself in a death penalty case from his cell. That was when they settled the case because they got a bit panicked.

This is the sort of thing we deal with on an almost-daily basis. Reprieve is about getting help on that. We need volunteers with Reprieve because you don't get rich doing death penalties cases. Capital punishment, as they say, means them without the capital get the punishment. Take Marion Albert "Mad Dog" Pruitt: Our office was representing on that issue. For a while we got him to change his sobriquet to "Puppy Dog Pruitt" but then he stabbed his cell mate. But our office was representing him at his re-trial, and they were seeking the death penalty yet again. Fortunately this time it came out the right way. But there was a statutory maximum of $1000 that you could get paid, and our office had hundreds of hours in the case. It came to about a dollar an hour. So we ended up suing them under the Federal minimum wage law — that's $5.25 an hour. At least one might get that much for representing someone on trial for his life.

But this is the price that America puts on life. And it's an important issue for us all, American or not, because the country that holds itself out as the moral leader of the world behaves this way, and we cannot allow that to happen.

. . . the (US Supreme) Court's three stupidest opinions has come out with in the last 30 years include *Murray* v *Giarratano* which says that you don't have the right to counsel.

Another facet of the death penalty where Reprieve gets involved concerns the children on death row. Don't ever let them talk to you about juveniles. "Juveniles" is part of that legal language where we try and dress something up so it sounds a little better. Yet these are people who cannot vote, they cannot serve on juries, we say they are too young and immature to even smoke or drink. They are children.

Shareef Cousin. There are some folk here tonight who have kids who are writing to Shareef. He was put on death row for a crime alleged against him when he was just sixteen. In reality (and this is every defence lawyer's dream) he was actually playing basketball at the time of the crime. It was on videotape but somehow, in the United States, they managed to convict him and sentence him to death. Some of our Reprieve folk who came over to volunteer helped us establish an organisation called "Stop the Pig" — that's Stop the *P*erjury *I*n *G*overnment, because so many of the cops were lying. We caught a series of police officers committing perjury in capital cases in New Orleans and they wouldn't do anything about it. We kept reporting them to the chief of police, reporting them to the Feds, and nobody would do anything.

So, through some of the volunteers we did a lot of investigation so we could establish this absurd organisation Stop the Pig. There is a road in New Orleans called Chef Monteur Boulevard, which those of you speaking French know means "Big Liar" Boulevard. I had a snitch one time who lived there, and it was immensely entertaining cross-examining him about why he lived on Big Liar Boulevard. We started to give out an award every month to the biggest liar in the New Orleans Police Department. We give them a Chef Monteur award and, just to be fair, we also give out a Serpico award to an honest cop. We keep that secret, though, because being honest might get them in trouble.

Shareef was a 16-year-old child, and I went up to see him for the first time when he was on death row. We were sitting up there, when he was meant to be in high school, and we were talking about his life on death row. Shareef wanted to be a tough kid, but he would burst out crying because here he was on death row for something he patently didn't commit. Through Reprieve we had a lot people help investigate the case thoroughly and fortunately they dismissed the charges against him.

Now you get to these other issues, these other dramatic across-the-board issues, like the inadequacy of counsel. The tragic truth is whenever someone comes up with a good story about their own justice system, America can top it every time. I was representing a guy in Mississippi who was on death row not for the crime of murder but for statutory rape — touching up someone under the age of 12, it doesn't even have to be penetration. That's a death penalty offence in Mississippi and Louisiana. Alfred Dale Leatherwood was represented in his capital trial by a third-year law student, doing her "students in court" program, whose first words to the Judge were: "Your Honour, can I have a moment to compose myself, I have never been in a courtroom before".

Sure enough Alfred, who was 18 and was also mentally retarded, ended up on death row. It was kind of fun arguing the case in the Supreme Court of Mississippi, discussing whether we should have third-year law students doing death penalty cases. But the opinion never mentioned that fact — they reversed it on another ground but were too ashamed to talk about

students doing capital trials.

Another area where Reprieve has been doing work involved a person who has been funded through Britain to come out and work full time, a British barrister called Shauneen Lambe. Her main aim has been to deal with the death penalty for statutory rape, and she has helped us tremendously. We've prevented the death penalty in several such recent cases in Louisiana.

One thing you have to remember is that our office, the Louisiana Crisis Assistance Center, is a tiny office. We pay our lawyers very little, we have very limited resources, and consequently we cannot do the job that we need to do in many ways. We depend very much on the people who volunteer to help us. Another project that Reprieve is doing is dubbed Post Mortem. We have always said, you pray for the dead and you fight like hell for the living, but we cannot afford to say this any more. There is a tide in the United States, and the death penalty will ultimately drown in it when we can show that people who have been executed were innocent.

It is a tribute to my incompetence, perhaps, that one of the four people I have lost was Edward Earl Johnson, who was indeed innocent. Edward was executed back in 1987. You have to look for silver linings to the dark clouds — Edward's death, for example, or having George Bush as President. The silver lining at this point is that Bush has politicised this issue for the next four years. He said, we don't make any mistakes in Texas. Post Mortem, which we are trying to fund through Reprieve, involves bringing someone over full time, funded from Britain, to spend a year simply investigating the cases against dead people. The LCAC does not have time to represent dead people, so it's crucial that Reprieve helps do it. It's going to be Joe Hingston, some guy with a deeply British accent, wandering around looking at cases, and they will probably think he is with the BBC. Half the time they used to think I was from the BBC — thank God, because I got invited to a Ku Klux Klan meeting one night in Mississippi. I didn't go because I was such a wimp. I wish I had, but I thought they would find out what a commie-pinko-liberal I really am, and I would have gotten lynched myself.

Anyway, Joe Hingston is going to come over and he is going to investigate cases of dead innocent people. I anticipate that in another 12 months we will be able to present the cases of the half a dozen people who were innocent when their executions were sanctioned, some of them perhaps by George W. Bush.

So, what can you do? What can you do?

I know that it's an awful way from here to Louisiana. Trust me, it was four rotten movies on Qantas Airlines, between Los Angeles and Melbourne. But what you can do is tremendously important. I totally second the three things that Justice Kirby said, but there are other things as well. Again, you can't take them too seriously. I just had Owen Davies, a judge from Britain, come over and visit me for a while. It was immense fun having him come because I took him around to my cases and I introduced him as a judge from Britain. I asked the local judge whether he would mind if Owen sat up on the Bench with them.

Just to have Terry there doing his ridiculous antics in his wig and gown was the difference between life and death for Russell Moore.

On a very practical level, Owen helped make sure that we did not lose a motion for the entire week. They were so well behaved with him around. We get other people who are not judges coming over and I simply introduce them as the Human Rights Observer from Reprieve. The locals hate the idea that there are people watching them, and they have to behave themselves. You may think it sounds silly, but it's a tremendous benefit.

Also, the cross-fertilisation of ideas is tremendously important. I love to have people come over in part because I get to see people's reactions. We may become used to things (such as the absurd wigs that you all wear) and it bears a reminder when people come in from the outside say, "What on earth is that?"

Actually before I move on, I have to tell you an anecdote about the wigs; they too play their role. Terry Malone is a barrister from Western Australia who came over to help me with the Russell Moore/James Savage case. We dressed him up in front of the Florida Supreme Court. They loved it. He did a minute and a half of the argument (they only give you thirty minutes for a death penalty case) and he prattled on in some ridiculous accent. They didn't understand a word he said but they were so impressed. The reason people get killed is because they don't have friends, no one cares, no one sets them apart from other people. Just to have Terry there doing his ridiculous antics in his wig and gown was the difference between life and death for Russell Moore. I don't think it had anything to do with anything I said or did, quite honestly. The simple fact that the eyes of the world were on them made all the difference.

Going back to the cross-fertilisation of ideas, it is tremendously helpful to have people come just to visit because they bring their ideas, and they see the sort of absurd things that we get up to. They point out things that we have accepted as normal for so long. Too long.

But, there is another issue about the death penalty. There is another reason why it is very, very important for us to be involved, from Australia and from all around the world. The death penalty is a microcosm of everything that we do. The death penalty is not just an "issue", it is a distillation of what society does everywhere. We look at racism in the United States, and we see, yes, it's extreme. There was a judge on the stand not long ago who, when asked if he called black people "niggers", said "yes". When asked whether he called the client a nigger, he refused to answer. Then you spend some time arguing over whether there was a bigot's privilege that gave him a right not to answer. The things that happen in America may seem extreme, and they may be bizarre, but we have shadows of the same issues everywhere. The English behave in a similar way to the Irish. And if you consider the language we use when we talk about criminals, it's the same language that the Ku Klux Klan used to speak about black people. It really is.

There will be a time, ages and ages hence perhaps, when we will be truly ashamed of what we do in our own criminal law, even if it doesn't seem as barbaric as the Americans. What we do when we look at the death penalty is we shine a bright light on ourselves. It's much easier for us to accept criticism of ourselves when we see it through the filter of the United States and that's a major part of the need to work with a group like Reprieve.

Another part that you all play is this: America doesn't have a lot of regard for international law, and this hypocrisy is one of the tremendous ironies in a country where there are some very positive ideals. The tradition of Jefferson politics was a marvel of the eighteenth century, but isn't it bizarre that a country that espouses

one person, one vote so vigorously should have such a dictatorial approach to international law and the United Nations? What is this right they have, a God given right, that says that if they pay enough, they should be allowed a veto on the Security Council, to ignore the decisions of the International Courts, and to dictate everything that happened to them. This hypocrisy is dramatically significant, because until the Americans respect their own ideals about the rule of law, how can we expect the Chinese to listen to criticisms about democracy or human rights?

I would never denigrate anything good that anyone does towards people who need help, but each of you has a huge amount of power when you go to the Bar.

We have a case right now before the U.S. Supreme Court on whether the Eighth Amendment, which prohibits "cruel and unusual punishments", bars the execution of the mentally retarded. Justice Scalia said not long ago, when discussing the "evolving standards of decency" under the Eighth Amendment that this refers to American standards of decency, not what he disparages as "bullshit" from across the seas. He came down to Tulane Law School in Louisiana just a few weeks ago and said incredibly rude things about foreign judges — I wish I could say they were Australian judges, but they weren't, they were British. His theme was that international courts write total nonsense, and he did not feel bound to pay any attention to them. These words were from a very influential Justice on the U.S. Supreme Court. That's pretty shocking, and that's why it's important for you to keep coming to America to remind them that the rule of law does not dissolve at the Pacific and Atlantic Oceans.

I have taken cases to the Inter-American Commission on Human Rights. The person on Death Row always wins. So far, though, it doesn't do much good. I took a case not long ago, Leo Edwards', where the prosecutor said that it was his "philosophy" when picking jurors "to get rid of the blacks". He went on to say that his ideal juror was a "middle-aged white male with white socks and a crew cut who welds for a living." We took that to the Inter-American Commission and they ruled in our favour, but they ruled in our favour four years after Leo Edwards was dead in his grave. Because America didn't pay any attention to the fact that they issued a stay order.

It's this rather obscene refusal to accept the rule of law where you must keep shining the bright light, because it will gradually become a huge issue in the abolition of the death penalty in America. Finally, America will recognise that the rest of the world thinks what they do is odd. The Americans are not a bunch of nuts — they simply don't know what everyone else thinks. They simply don't know.

Howard, the guy who is in this play, "This is a True Story": I was talking to him just two weeks ago and I said I was coming down here. The most positive aspect of all for me, being here tonight, is the impact on Howard. Howard is someone on death row who has no friends and is forgotten, or hated, by everybody. When I told him that there were a bunch of people in Australia who wanted to hear about him, he got very excited. He never did quite get the name of the country right — he called it Lostralia. I asked him what language he thought you spoke and Howard just doesn't get the idea of speaking other languages, so when I made him guess, he said, "French". And he really, really wants to ride kangaroos. It was a great conversation. All Howard wants in life is for someone to love him. He didn't do, in my opinion, what he is on death row for, but in a sense that is neither here nor there, because there is no way he should be where he is, even if he had. And to have people thinking about him, to have folk from Australia care about him, makes all the difference in the world to a man-child who has spent 20 years on Death Row.

To have Nick Harrington come over from Australia to Louisiana, to have Richard Bourke come over, and have my clients know there are people that care for them, means much more than all this legal talk, because it really makes a difference to their own sense of their humanity.

Justice Kirby talked about standing on the shoulders of others who go before us. Ultimately what Reprieve is about is people standing on shoulders. I have got to tell you if I am really standing on the shoulders of someone like Justice Kirby then I am proud of being in that position. But there are many others among us who need to stand on those same broad shoulders. I would never denigrate anything good that anyone does towards people who need help, but each of you has a huge amount of power when you go to the Bar. I think we have an obligation, generally, as members of the Bar to make use of that power. If we are fortunately enough to have talents, we must use them for the benefit of those who need our help.

As a lawyer in America, I think we even have more power. We can subpoena the President, we can put Judge Walter T. McMillan on the stand and ask him if he calls the client a "nigger", and we can do all sorts of other things that really shake up the balance of power. The ultimate honour, the ultimate honour, of representing people on Death Row is that they are the most hated people in the world. That's why I do it. It is very easy when you look and you say to yourself, "Who really needs the help of the power that I have?" It is the folk who are most hated.

Death Row is our battle ground in America. The most hated in Australia, if I had to guess, probably wouldn't be victims of racism (though that may be bad enough), for at least it has become less acceptable to be a bigot. It would probably be paedophiles. People who are despised by everyone really need our help. Death Row is an example, but it is by no means the only example.

The main purpose of Reprieve, the main purpose of Justice Kirby when he

gives an inspirational talk from your High Court, the main purpose of all educators, and the main purpose of tonight is to try to convince young people (older people as well) to devote their lives to doing this sort of work. Be it in America, where you are tremendously helpful when you come over; be it in Britain, where Reprieve has a growing group of graduates who I hope will come home to deal with our own problems. Whatever they may be, whatever it is that attracts your attention, the only real crime is to stand on the side and do nothing.

It's a privilege to be here tonight all the way from the U.S. and have everyone listen so kindly, but the real privilege was to be here to hear the wonderful speech from Justice Kirby. I hope we don't let the torch go out after tonight. I hope you will be in contact with everyone here from *ReprieveAustralia*, so that we can work together in the years to come. Thank you very much.

NOTES:

1. *Murray* v *Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (states are not required to provide counsel to indigent death row prisoners seeking state post-conviction relief).
2. *Herrera* v *Collins*, 506 U.S. _, 113 S.Ct. 853, 122 L.Ed.2d 203 (1992).

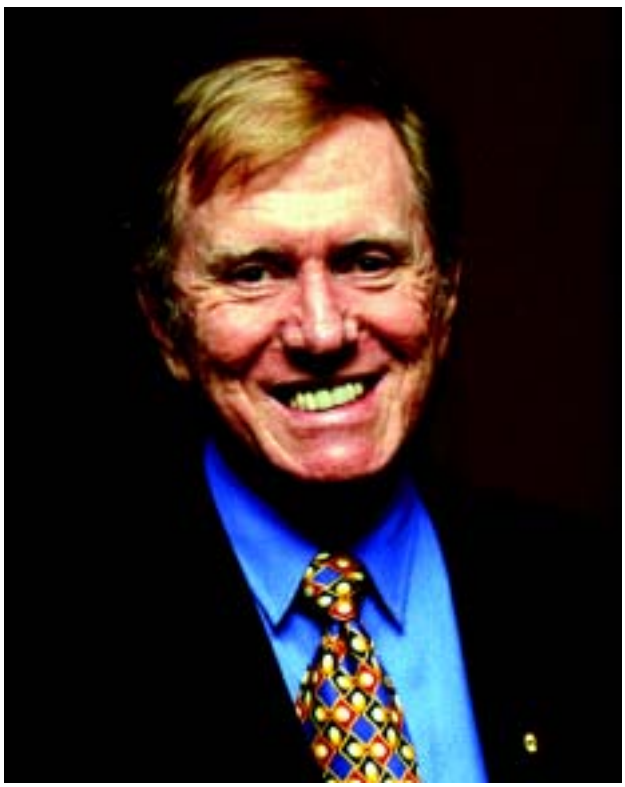
The Death Penalty: A Special Sign of Barbarity[1]

The Honourable Justice Michael Kirby AC CMG

STANDING ON SHOULDERS

ISAAC Newton said of scientists that each generation stands on the shoulders of the generation past. So it is in the law. Thus I am a link to judges and advocates of the bygone years. In July 2001, when Justice Trevor Olsson retired from the Supreme Court of South Australia, I will be the longest serving judicial officer in the nation. My first welcome ceremony took place in December 1974. At that time the death penalty remained on the statute books of Victoria. It was awaiting its statutory quietus.[2]

Soon after my appointment I had to attend a conference in Shepparton. I there fell into conversation with Mr Justice (Sir) Murray McInerney, a judge of the Supreme Court of Victoria. He told me of his early years as a barrister. He recounted the special terrors of receiving a brief in a capital case. Of how the peril facing the client subjected the advocate, as well, to intolerable pressures. Of how he, and many before and since, had been ill during the proceedings, haunted that some slip or oversight would affect the outcome of the case adversely and cost the client his life.



The Honourable Justice Michael Kirby, AC CMG

Listening to Murray McInerney describe those awful responsibilities helped to explain why most Australian judges and other lawyers, by 1975 at least, were opposed to the death penalty. Queensland in 1922 had been the first State to abolish that form of punishment.[3] One by one, the other jurisdictions followed. But Victoria still clung to the sentence of death. For some politicians at the time it enjoyed a symbolic and political value.

DRAMA AND THE SCAFFOLD

Not all that long before my conversation in Shepparton (in 1962) a case came before the High Court of Australia which concerned a prisoner sentenced to death. The sentence had been passed on Robert Tait when a jury found him guilty of murder and rejected his sole defence of insanity. The Court of Criminal Appeal dismissed his appeal. The High Court, and then the Privy Council, refused special leave to appeal against the conviction. The execution of the prisoner was directed to take place on 22 October 1962.

Ten days before that date, a petition was presented to the Supreme Court of Victoria requesting an inquiry under Victorian legislation into the prisoner's sanity. When that application was dismissed, an appeal was taken to the Full Court. The execution was

postponed. In the Full Court, Mr Justice Thomas Smith stated that in his opinion a *prima facie* case had been made, on the affidavit evidence, that the prisoner was insane. However, the Full Court refused to intervene. The Chief Secretary directed the execution to take place on 1 November 1962.

The day before the appointed date, applications were made to the High Court in Melbourne. The lineup of counsel included some of the most experienced members of the Victorian Bar. I knew most of them. J.E. (later Sir John) Starke QC for the petitioner. J.A. (later Sir John) Nimmo QC in the interests of the prisoner. Sir Henry Winneke QC, Solicitor-General for Victoria, for the Crown. The juniors are also worth noting. On the prisoner's side was one J.H. Phillips. On the Crown side was B.J. Shaw.

The High Court required time for further argument. The Crown opposed an adjournment saying that the execution of the sentence had been postponed on three occasions and "it is the considered view of those who are responsible for advising his Excellency [the Governor] that it is essential in the public interest that this matter should be finalised".[4]

The report of the submissions and the interventions of Chief Justice Dixon, reads like high drama — as it was. The Court allowed the adjournment. It ordered that the execution be stayed. It asked Sir Henry Winneke for an undertaking. That wily advocate could not give the undertaking, not being instructed to do so. But the High Court was resolute. By order, it restrained the Chief Secretary and the Sheriff. The High Court declared that its inherent or implied constitutional power allowed it to preserve the subject matter of litigation before it, including where that subject matter was a human life. In the end, at the adjourned hearing, the Court was informed that the sentence had been commuted. An order was made under supervening provisions of the *Mental Health Act 1959* (Vic). Justice Smith's inclination was confirmed.

Those events were fresh in mind when in 1967 the last death sentence to be carried out in Victoria, and in Australia, occurred. Ronald Ryan was hanged. By 1974, when I was appointed, the Honourable T.W. Smith had retired from the Victorian Supreme Court. He was appointed Victorian Law Reform Commissioner. I was to come to know him and to admire him greatly in my capacity as first Chairman of the Australian Law Commission, a post I took up in 1975.

Justice Cummins (Supreme Court), Justice Coldrey (Supreme Court) and Justice Kirby.

Founders of RepriveAustralia*: Pia Mattina, Richard Bourke, Susan Brennan, Clive Stafford Smith and Nicholas Harrington.*

Beset with conflicting political opinions, the Victorian government asked Commissioner Smith to advise whether it would be feasible, and if so how, to distinguish those crimes that were so heinous as to attract the death penalty and those that should not. If the truly heinous crimes could be identified and singled out, those who advocated retention of capital punishment might fulfil their desires to preserve it in a way still acceptable to the general public and the legal profession.

In his report of August 1974, Commissioner Smith advised against adopting distinction. Notwithstanding efforts in England to draw such lines,[5] he said that the result would always be arbitrary and controversial. Within a year of receiving his report, legislation was introduced to abolish the death penalty in Victoria. No execution has since been carried out in Australia.

In 1990 Australia signed the Second Optional Protocol to the "International Covenant on Civil and Political Rights" (ICCPR). That Covenant entered into force for Australia, and generally, on 11 July 1991.[6] By Article 1 of that Covenant "no one within the jurisdiction . . . shall be executed". Australia bound itself to that obligation and to take all necessary measures to abolish the death penalty within its jurisdiction.[7] In such circumstances, if a State or Territory legislature were now to attempt to reintroduce capital punishment, it seems likely that the Federal Parliament would have the power, and be bound to act, to over-ride any such attempt by federal law.[8] At least this would be so as long as Australia, through the

actions of the Commonwealth, did not renounce the Protocol.

Because it seems unlikely, in the foreseeable future, that a federal government in Australia would re-enact capital punishment for federal crimes, or condone its reintroduction elsewhere in Australia, a question is presented as to why Australian lawyers should become involved in a new body, largely addressed to lawyers, committed to oppose the death penalty? I would offer three reasons:

1. A Sceptical Public

First, public opinion in Australia has never quite embraced the opposition to the death penalty which the judiciary, the legal profession and informed opinion have manifested. The last Morgan Gallup Poll on the subject was conducted in June 1990. In answer to the question: "About the penalty for murder. In your opinion should the penalty for murder be death or imprisonment?" The percentage of Australian respondents favouring death was 51.4 per cent. Those favouring imprisonment numbered only 35.1 per cent. 13.5 per cent were undecided

An accompanying question asking, in the case of murder, "Where imprisonment is the penalty, should it be for life or should the judge fix the number of years depending on the evidence?" Those favouring life imprisonment as a fixed punishment numbered 59.1 per cent. Those who would permit judges to fix the period of imprisonment numbered 37 per cent. Only 3.9 per cent were undecided.

To a further question which asked whether an Australian convicted of trafficking drugs in a country that provided death for such offences (as Malaysia, Sri Lanka and some others do), 75.3 per cent believed that the death penalty should be carried out. 21.1 per cent said that it should not. Those undecided were 3.6 per cent.

The pattern emerging from these answers to the Australian opinion poll indicate that, at least in 1990, there was no deep philosophical or religious objection to the death penalty amongst the great majority of Australians. Indeed, a small majority favoured it. Experience in the unpredictabilities of political life teaches that sometimes, after challenging events, public views can be the source of pressure for legal change. Indeed, that has happened in our region. Japan and the Philippines, having once abolished the death penalty, have restored it. The United States has also gone through a period of reinstating the death penalty. In New Zealand, following the abolition of capital punishment in 1941, it was restored in 1950 but again abolished in 1962. In the United Kingdom, following its abolition in 1969, there have been 13 unsuccessful attempts to reinstitute capital punishment.[9]

. . . a question is presented as to why Australian lawyers should become involved in a new body, largely addressed to lawyers, committed to oppose the death penalty? I would offer three reasons.

To some extent, the fact that the Australian Federal Parliament does not have legislative responsibility (as the Canadian does) over the general criminal law but does have power over external affairs, separates in Australia the critical power from the critical pressure. Yet there had been proposals by senior politicians in Australia (such as the former Premier of Western Australia, Mr Richard Court) to restore capital punishment.

Upon one view, Australia is passing through a period of punitive policies in respect of convicted offenders. This period has witnessed legislative and other innovations, such as truth in sentencing, increased mandatory punishments and the development of private prisons. Criminal punishment is a major preoccupation of talk-back radio which sometimes appears to enjoy a disproportionate power to sway political policies. Against this background, it is impossible to say that Australia would never reintroduce the death penalty. Specifically, there is no regional human rights body or other instrument to afford restraint.[10] Nor is there a local Bill of Rights to ensure a decision from the courts holding that the death penalty is incompatible with Australia's constitutional norms.[11] Therefore, those in Australia who oppose the death penalty in principle need to maintain their vigilance.

2. A Black Day for Justice

Secondly, lawyers have a special reason for being concerned about capital punishment. In the states where this form of punishment exists, it is lawyers who often have to play a vital role in processing such cases. Lawyers above all know the human imperfections of the legal system generally and the criminal justice system in particular. We all know that even highly talented judges and lawyers can sometimes make errors in the conduct of trials. Such errors may have serious consequences, not all of which can be cured on appeal. We also know of the great variety, experience and skill that exists amongst legal practitioners defending criminal accused. Even if, following *Dietrich* v *The Queen*,[12] it would be unthinkable in this country to return to the situation that those facing capital charges were not legally represented, or represented as on a dock brief, the fact remains that many indigent accused receive representation of variable quality. Many of them have mental and physical disabilities, criminal records and other features that make a completely effective defence of their interests difficult or impossible to attain.

A recent Australian case illustrates what can happen in our law. In *R* v *Frank Button*,[13] the Queensland Court of Appeal had before it an appellant who had been convicted by a jury of rape. He spent approximately 10 months in custody as a consequence of that conviction. He never ceased to protest his innocence. Fortunately, his lawyers believed him. They continued to insist that DNA tests should be carried out. Ultimately they were. They established that the prisoner was not the perpetrator of the crime. Indeed, the test identified another person as the perpetrator.

Justice Glenn Williams, giving the reasons of the Court of Appeal declared that the case represented a "black day in the history of the administration of criminal justice in Queensland". He was particularly scathing about the failure of the investigating authorities to take possession of the bedding where the offence had occurred and to test it prior to the trial. The excuse given was that it "would not be of material assistance in identifying the appellant as the perpetrator of the crime". This caused Justice Williams to observe acidly that "DNA testing has a two-fold purpose: that of identifying the perpetrator of the crime and secondly that of excluding a possible offender as being the perpetrator of the crime".

In this case the truth came out. But what of other cases where DNA evidence is not available? Or is not accurately performed? Or could not be decisive? Not every case can be reduced to objective determinants. Lawyers know this. It is a reason for maintaining critical scrutiny of every assertion that a miscarriage of jus-

tice has occurred. They do happen. But when they are followed by the death penalty, it is impossible, later, to vindicate a prisoner shown to have been wrongly convicted. It is the horror of that outcome, and the sure conviction that it sometimes happened in the past, that makes most contemporary Australian judges and lawyers resistant to suggestions about the supposed merits of capital punishment. For similar reasons, their experience makes judges and lawyers much more sceptical about the power of increasing punishment to deter crime. Usually, it is the risk of apprehension rather than the scale of punishment that works on the mind of the would-be offender.

3. Thinking Globally

Thirdly, most lawyers today appreciate the paradigm shift that has occurred in the law within the last decade or so. Whereas once law was confined strictly to a particular jurisdiction, today it must be seen in national, regional and global terms. I have witnessed how the discipline has changed by seeing at first hand the work of the United Nations, most particularly in Cambodia where, before 1996, I was Special Representative of the Secretary-General of the United Nations. It is the influence of the United Nations and the lawyers and others working for it that led to the recent enactment by the Cambodian National Assembly of a law to establish a Tribunal to render those Khmer Rouge responsible for the genocide in Cambodia accountable for their crimes against humanity.

Nowadays, lawyers are less inclined to wash their hands of such crimes, simply because they happen outside the jurisdiction. Since Nuremberg, some crimes have been accepted as being the world's concern. The proposed establishment of the International Criminal Court, and the operations of the International Tribunal on the Former Yugoslavia and on Rwanda (on the first of which Justice David Hunt of Australia serves with great distinction), demonstrate that the criminal law is increasingly international in its operation and outlook. In the age of computer crime, drug smuggling, international money laundering and the like, it could hardly be otherwise.

It is in these circumstances that the contemporary Australian lawyer, concerned with criminal law, becomes affected by the operation of the legal systems of other countries, particularly where defects are reported which represent a serious affront to basic human rights.

Commonwealth lawyers, following the trend of decisions of the Privy Council in Caribbean appeals by prisoners on death row, will be aware of the bold steps that that body has lately taken to ensure "the protection of the law" and to expand the reviewability of executive decisions.[14] In response to the Privy Council's jurisprudence, some Caribbean countries have withdrawn from its jurisdiction. Some have also withdrawn the right of prisoners facing the death penalty to apply to the Human Rights Committee of the United Nations under the First Optional Protocol to the ICCPR.

It is in these circumstances that the contemporary Australian lawyer, concerned with criminal law, becomes affected by the operation of the legal systems of other countries, particularly where defects are reported which represent a serious affront to basic human rights.

The United States of America is the only major Western country that retains the death penalty.[15] This has led to much litigation attempting to confine the carrying out of the death sentence to particular cases of the kind that Commissioner Smith found was bound to be arbitrary. Independent scrutiny of the operation of capital crimes in the United States has been extremely caustic.[16] The system of jury selection and jury determination is sometimes reportedly affected by racial and class bias. Legal representation is not always assured for those indicted for capital crimes. Prosecutorial discretion is not adequately controlled and channelled. The overall impression is that the death penalty is administered in the United States in an arbitrary, racially discriminatory and often unfair way.[17]

WHY REPRIEVE?

In these circumstances, it is admirable that lawyers, from the United States and abroad, are participating, through Reprieve, in offering periods of service to assist in the legal defence of the living and to scrutinise cases, following execution, where there is a powerful inference that a grave miscarriage may have occurred. Proof of repeated wrongs may help turn the tide of public opinion.

Young law students from Australia are already participating, as part of their professional practice courses, in clinical programs in the United States. They are working on capital as well as cases involving non-capital crime. One of them, from Monash University, has told me of the special burden of acting as "second chair" (junior counsel) in a trial in the Supreme Court of Missouri where the accused was charged with armed robbery and kidnapping but shortly faced a second trial for murder. Conviction in the first trial would be used by the state later in seeking the death penalty if the client were also convicted in the second. The student told me that the experience was "eye opening" and one "that will stick firmly in my mind should I ever be involved in a jury trial again".

In Australia we have plenty of work for lawyers to perform pro bono: work for Aboriginal defendants, for refugee claimants and others. But that does not mean that we should have no interest in wrong happening in other countries where the injustices may be greater and the consequences of a miscarriage even more terrible.

At his swearing in as Chief Justice of Australia, Sir Owen Dixon said that an advocate occupies "an essential part in the administration of justice.[18] This was why he felt an advocate had to be "completely independent and work entirely as an individual" for he or she stands "between the subject and the Crown, and between the rich and the poor, the powerful and the weak".

In founding Reprieve and in his work on death row cases in the United States and the Caribbean, Clive Stafford Smith, an English lawyer, has devoted his life to the noble ideals that Chief Justice Dixon expounded for us in Australia.[19] I am sure that any Australian lawyer who worked with him, under the pressures he daily accepts, would learn much. Standing on his shoulders, they would return to Australia to teach their colleagues a lesson of professional devotion, skill and imagination.

Law, at its best, is a noble calling. The Australian lawyer of today is inescapably engaged, intellectually, in the problems of other lands. I congratulate Nicholas Harrington, Richard Bourke, Pia Dimitina and Susan Brennan for bringing Clive Stafford Smith to Australia and for launch-

ing *ReprieveAustralia* as a permanent reminder of our need to be ever vigilant for the maintenance of justice under just laws.

NOTES:

1. Victor Hugo *Ecrits sur la peine de mort, Avignon* (1979) in W. Shabas, *The Abolition of the Death Penalty in International Law* (2nd ed, 1997).
2. Capital punishment was abolished by the *Crimes (Capital Offences) Act 1975* (Vic).
3. *Criminal Code Amendment Act 1922* (Qld). In New South Wales the punishment was abolished for all crimes except treason and piracy by the *Crimes (Amendment) Act 1955* (NSW). It was finally abolished for the remaining crimes by the *Crimes (Death Penalty Abolition) Amendment Act 1985* (NSW) and the *Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985* (NSW), after which the law in no Australian jurisdiction has provided for capital punishment.
4. *Tait* v *The Queen* (1962) 108 CLR 620 at 624.
5. *Homicide Act 1957* (UK) discussed (1957) 20 *Modern L Rev* 381 at 384–5; Victoria, Law Reform Commissioner (Report No 1) *Law of Murder* (1974), 9.
6. Australian Treaty Series 1991, No 19.
7. Article 1.2 of the Second Optional Protocol to the ICCPR.
8. S. Garkawe, "The Reintroduction of the Death Penalty in Australia? Political and Legal Considerations" (2000) 24 *Criminal LJ* 101 at 108–9. By Article 9 of that Second Protocol the provisions are extended "to all parts of federal States without any limitations or exceptions".
9. S. Garkawe, op cit n 8, 105.
10. A condition for admission to the Council of Europe is removal of the death penalty.
11. The South African Constitutional Court held that capital punishment was forbidden under the new Constitution: *S* v *Makwanyane* (1995) 3 SA 391 (CC): see also *Mohamed* v *President of Republic of South Africa* (2001) CCT 17/01, <www.concourt.gov.za/cases/2001/mohamedsum.shtml >.
12. (1992) 177 CLR 292.
13. [2001] QCA 133 noted (2001) 26 *Alternative LJ* 97.
14. e.g. *Lewis* v *Attorney-General of Jamaica* [2000] 3 WLR 1785; *Thomas* v *Baptiste* [2000] 2 AC 1 considered by Hare, "Prerogative and Precedent: The Privy Council on Death Row" (2001) 60 *Cambridge LJ* 1; cf "Jamaica and the Privy Council" (1999) 73 ALJ 857.
15. S. Garkawe above n 8, 106. See *Gregg* v *Georgia* 428 US 153 (1976) and later cases there cited.
16. International Commission of Jurists, *Administration of the Death Penalty in the United States* (1996).
17. *Ibid*, p 157.
18. (1952) 85 CLR at xi.
19. His work is described in "How Kindness is Killing the Death Penalty" in *The Spectator*, 28 April 2001, 10.

Supreme Court Library Plaque Commemorates Five Bar Members

In the library of the Supreme Court of Victoria a brass plaque commemorates the life of five members of Victorian Bar, each of whom made the supreme sacrifice for a sacred cause.

ON 23 July 1916, the Battle of Pozières began, being part of the Somme battlefield in Northern France. At the end of July, Australian troops took part in the first general assault on the Pozières heights, a position outside Pozières and held by the Germans. The northernmost sector of the objective in the O.G. Lines was on this occasion apportioned to the 22nd Battalion of the 6th Brigade. The second company of the 22nd was under the command of **Major Murdoch Nish Mackay**.

Born on 8 February 1891, Mackay was the son of George and Mary Henderson Mackay and husband of Margot Gordon Mackay.[1] He signed the Bar Roll (No. 130) on 1 August, 1912.

In the *Official History of Australia in the War of 1914–1918*, Mackay was described as "a singularly determined officer". A Bendigo boy, who at the age of 16 had passed through State and High schools to Melbourne University and, after a brilliant course, had become a barrister at twenty-one. He was of the stuff which makes good leaders but difficult subordinates.[2]

After heavy fighting over 4–5 August, the 22nd Battalion occupied its whole objective. Bean continued "but the splendid young leader whose initiative and determination were the direct cause of this success did not live to see it. Within a few yards of O.G.1, Mackay was shot through the heart. It is not too much to say that by his conduct during the crisis of the utmost difficulty and peril the whole operation was snatched from imminent risk of complete failure."[3] He was mentioned in despatches.

Mackay was 25 years old.

On 2 May 1917, **Franc Samuel Carse** died of wounds. Born in St Kilda, Carse was the son of Samuel Harris Carse and Alice Metford Carse.[4] Married to Eileen Carse, he signed the Bar Roll (No. 110) on 12 November 1909. A Captain serving with the 12th AFA Brigade Australian Field Artillery, Carse served with the Field Artillery in the Noreuil Valley. On 11 April 1917, there occurred the first attack at Bullecourt in an endeavour to capture a strong point in the string of German defences across northern France along the Siegfried (Hindenburg) Line. The attack did not succeed with the result that plans were made for a second attack. On 30 April 1917, the final order for the second attack was received.

The second attack commenced on 3 May 1917. On the night of 2 May, as they had done during the day, the Germans systematically shelled the Australian battery positions, and employed at night a large proportion of gas-shells, including the positions in the Lagnicourt and Noreuil Valleys.

The Official History records that "at noon on 2 May the guns of the 2nd Battery in the Lagnicourt Valley had to be temporarily abandoned, two pits being hit. In Noreuil Valley, Capt. F.S. Carse (South Yarra, Vic.) was mortally wounded"[5].

Carse was 31 years old.

On 7 June 1917, the Battle of Messines began, being a major action in the Flanders region of Southern Belgium. The plan was to capture the Wytschaete–Messines ridge south of the British salient at Ypres then to press the German depth position known as the Oosttaverne Line. Bean records that "long before sunset on 7 June the final British objective had been won along practically the whole battle-front. The plan had been fulfilled with a swift

completeness far beyond that of any major achievement of the British Army in France until that day."[6] From the moment the British troops reached the Oosttaverne Line, there existed the prospect of a German counter-attack. Reconnaissance as to their whereabouts was essential under conditions of heavy bombardment. Bean recorded "on this occasion, the brigade majors of the two engaged brigades gave magnificent service. Major T.F. Borwick of the 9th was indefatigable in reconnaissance. Major E.W. Connelly of the 10th, with his brigadier, McNicoll (who was hampered by an old leg wound) were badly gassed on the night of the 6th, but Connelly worked at the Black Line throughout the heavy barrages on the night of the 7th."[7]

The Official History records as follows:

> **Major E.W. Connelly**, D.S.O. Brigade Major 10th Aust. Inf. Bde, 1917 G.S.O (2) 3rd Aust. Div. 1918. Barrister-at-law; of Bendigo, Vic. b. Bendigo 18 Sept., 1888. Died of wounds 9 Sept. 1918.[8]

Eric Winfield Connelly was the son of Frances Cresswell Connelly and Thomas Jefferson Connelly.[9] He signed the Bar Roll (No. 124) on 17 March 1911 and (is recorded on the Roll as having) enlisted as a Lieutenant in the First Expeditionary Force in August, 1914.

Connelly was 29 years old.

On 23 December 1916, the Australian Light Horse attacked successfully the Turkish garrison at Magdhaba in the northern Sinai Desert 35 kilometres from the Mediterranean coastal town of El Arish. The Official History records that "dismounting about a mile and a half from the Turks, the two Australian Regiments advanced quickly over the first 1000 yards. As the opposition of the enemy rifles grew strong, each squadron moved troops in bounds of twenty-five to fifty yards . . . Soon after three o'clock the line resumed its troops successively, and the 8th Light Horse Regiment, always singularly unlucky, suffered many casualties at this stage".[10]

The Official History records as follows:

> Capt. M.B. Higgins, Adjutant 8th L.H. Regt. 1916. Barrister-at-law; of Malvern, Melb. and Dromana, Vic. b. Malvern 8 Nov., 1887. Killed in action 23 Dec. 1916.[11]

Higgins was mentioned in despatches. The Official History records that "Captain M.B. Higgins and Lieutenants E.H. Mack and E.G. Down were killed as they led their men".[12]

Mervyn Bournes Higgins was the son of Henry Bournes Higgins and Mary Alice Higgins.[13] He signed the Roll (No. 134) on 8 May 1913 and (is recorded in the Roll as having) enlisted in the Second Expeditionary Force in November, 1914.

Higgins was 29 years old.

Edward Norman Hodges signed the Bar Roll on 6 March 1912 (No. 125). The Bar Roll records that, in 1915, he enlisted in England and, on 22 June 1918, died in France.[14]

Some years ago, I happened upon a certificate (in a condition far from pristine) issued by the City of Hawthorn on 22 November 1919 to my grandfather, Alfred Marcus Chalmers (who was not a lawyer). The certificate certified that Alf had "served the Empire and Australia in the Great War for the sacred cause of freedom, liberty and justice and thereby has earned the grateful recognition and appreciation of the citizens".[15] One would hope that the somewhat abstract notions of freedom, liberty and justice would have some relevance to the contemporary practice of the law (as opposed to the business of dispute resolution) and, in that sense, the work done by this Bar in the Courts and in other places continues to "keep the faith for which they died".[16]

On a personal note, Alf enlisted on 26 July 1915 (leaving Australia about that date), served in the 8th Light Horse Regiment and (fortunately for me) returned to Australia on 3 July 1919. Less fortunate was great uncle George Donald who, having enlisted on 22 August 1914 (readers will recall that Britain declared war on Germany on 4 August 1914), died of wounds on 29 July 1918. No doubt, the Armistice could not come too soon for an unlucky generation of (overwhelmingly) young men earmarked by history for destruction.

Andrew Donald

NOTES:

1. Australian War Memorial — on-line Roll of Honour Database — www.awm.gov.au/database/roh.asp.
2. *The Official History of Australia in the War of 1914–1918 Vol III — the AIF in France: 1916* (C.E.W. Bean) Sydney, Angus & Robertson, 1937, p. 683.
3. *The Official History of Australia in the War of 1914–1918 Vol III — the AIF in France: 1916*, Sydney, Angus & Robertson, 1937, p. 686.
4. Australian War Memorial — on-line Roll of Honour Database — www.awm.gov.au database/roh.asp.
5. *The Official History of Australia in the War of 1914–1918 Vol IV — the AIF in France: 1917* (C.E.W. Bean) Sydney, Angus & Robertson, 1936, p. 429.
6. *The Official History of Australia in the War of 1914–1918 Vol IV — the AIF in France: 1917,* Sydney, Angus & Robertson, 1936, p. 637.
7. *The Official History of Australia in the War of 1914–1918 Vol IV — the AIF in France: 1917,* Sydney, Angus & Robertson, 1936, p. 657.
8. *The Official History of Australia in the War of 1914–1918 Vol IV — the AIF in France: 1917*, Sydney, Angus & Robertson, 1936, p. 648.
9. Australian War Memorial — on-line Roll of Honour Database — www.awm.gov.au/database/roh.asp.
10. *The Official History of Australia in the War of 1914–1918 Vol VII — Sinai and Palestine* (H.W. Guillett).
11. *The Official History of Australia in the War of 1914–1918 Vol VII — Sinai and Palestine*, Sydney, Angus & Robertson, 1937, p. 225.
12. *The Official History of Australia in the War of 1914–1918 Vol VII — Sinai and Palestine*, Sydney, Angus & Robertson, 1937, p. 225.
13. Australian War Memorial — on-line Roll of Honour Database — uwww.awm.gov.au/database/roh.asp.
14. Australian War Memorial records do not record Edward Norman Hodges on the Nominal Roll nor the Roll of Honour. Given that he enlisted in England, it may be that he served in the British forces.
15. For those who are interested, (for reasons of preservation) the certificate has been framed and hangs in my chambers.
16. John McCrae, *The Anxious Dead.*

SOURCES:

Australian War Memorial Records — on-line.
The Official History of Australia in the War of 1914–1918. Sydney, Angus & Robertson.
Bar Council Records: Victoria — Roll Kept by the Committee of Counsel.
Coulthard-Clark, Chris — *Where Australians Fought The Encyclopaedia of Australia's Battles*. Sydney, Allen & Unwin, 1998.
Coombs MBE, Rose — *When Endeavours Fade — A Guide to the Battlefields of the First World War.* London, Battle of Britain International Prints Limited, 1983.

How Law Constructs Gender and Vice Versa

by Professor Marcia Neave AO

Professor Marcia Neave AO

THANK you for inviting me to speak at the Women Barrister's Association Annual Dinner. When I was a law student I interviewed Joan Rosanove QC for a law student magazine. At that time she was one of only two women practising as a barrister in Victoria. In the course of the interview I told her I was thinking of going to the Bar. Joan told me that the only reason that she had survived as a barrister was that she had practised as an amalgam for many years before she went to the Bar. Her advice to me was that I would face enormous obstacles and that I would be wise to abandon my plan. In many ways I regret the fact that I took that advice.

The large number of women here tonight shows how things have changed since I was a law student. The Report on Equal Opportunity for Women at the Bar made recommendations for further changes to improve the situation of women barristers, though I understand that not all of them have yet been implemented. We should celebrate the advances of Australian women in the past 30 years. But at the same time we need to recognise that we still have a long way to go.

Justice Michael Kirby's recent Lesbia Harford Oration focused on the numerical position of women in the legal profession. For some years around 50 per cent of law graduates have been women. However, we are still under-represented at the Bar, in the judiciary and in legal partnerships. The Victorian statistics on women in the judiciary have improved as the result of the Attorney-General's recent appointments to the magistracy and the County Court. However, the position of women lawyers mirrors the position of Australian women generally. The 1992 House of Representatives Standing Committee Report "Half Way to Equal" and the 1994 Australian Law Reform Commission Report, on "Equality Before the Law", show that gender continues to affect destiny. Men predominate in politics, in the senior ranks of business and the professions, while women are disproportionately represented among survivors of domestic abuse and sexual assault. The distribution of responsibility for household work remains largely unchanged, despite the increasing involvement of women with children in paid work. The gender gap in wages has widened in the 1990s since the introduction of enterprise bargaining. In May 2001, adult women's total full-time earnings were 81.2 per cent of men's total full-time earnings.[1]

An analysis of numbers of the kind undertaken by Justice Kirby is an important measure of the extent of women's progress towards sexual equality. But we must go further. It is necessary to understand and uncover how gendered assumptions are built into language, culture and into the structures of knowledge. We have to unpick how gender biases affect what

2001 Women Barristers' Association Annual Dinner

On 23 August 2001, a very successful dinner was held by the Women Barristers' Association. The function was very well attended by members of the judiciary and magistracy as well as WBA members. The Attorney-General, the Honourable Rob Hulls, addressed the guests. The substance of the Attorney's speech can be found in his regular contribution to the *Bar News*, "the Attorney-General's Column". Frances Millane, the Convenor of the Women Barristers' Association, introduced our guest speaker, Professor Marcia Neave AO and welcomed, on behalf of the Association, the appointment of their Honours Nicholson, Cohen and Sexton and Her Worship Kim Parkinson. The full text of Professor Neave's speech is set out above.

is recognised as "truth" and how beliefs about men and women affect the way men and women are seen and treated by law.

The gendered nature of knowledge has been recognised in areas such as history, philosophy and sociology much longer than in law. Historians[2] and philosophers[3] have shown that what counts as "truth" is usually based on the experience of men, although this knowledge is often seen as gender neutral. Medical research provides a good illustration. In the past, the results of drug trials using only male subjects, were often assumed to apply to women. Later research showed that findings based on men's physiological reactions were often inapplicable to women. I am sure that when these trials were conducted, those responsible believed they were reporting the objective truth.

Legal scholars are beginning to show that similar processes operate within the law. In the early 1990s the distinguished American legal scholar, Catherine MacKinnon argued that the law sees and treats women in the way that men see and treat women.[4] Other legal philosophers have examined how the structures and content of particular areas of law have been affected by the personal experience of those who shape it, who until recently were almost entirely men.[5]

The purpose of my talk is to look at how women's historical exclusion from law and our current under-representation at senior levels of the legal profession has shaped the nature of law and how in turn law contributes to the shaping of ideas about gender. This theme is elegantly expressed in the title of Professor Regina Graycar and Professor Jenny Morgan's important book, the *Hidden Gender of Law*.[6]

As many reformers have observed, law has contradictory characteristics. On the one hand, people who are powerless often look to law for a remedy. Sometimes, as in the *Mabo* case,[7] a judicial decision can result in recognition of and redress for historic injustice. On the other hand, we know from history that law is often an instrument for the preservation of the status quo. The "Persons Cases" which were decided by common law courts in Canada, Australia, England and the United States in the late nineteenth and early twentieth century are a good example. In case after case male judges held that women were not "persons" within the language of legislation which determined eligibility to be elected, to vote, to take out a University degree or to be admitted to legal practice. In the *Kitson* case,[8] Mary Kitson had been admitted to legal practice under legislation passed by the South Australian Parliament, to overcome uncertainty about whether women were "persons" for the purposes of admission to legal practice. In 1920 she applied for admission as a public notary. Not surprisingly she believed that because she was a person for the purposes of admission to legal practice, she was also a "person" within the Public Notaries Act. The Supreme Court of South Australia interpreted the word "person" to mean "man", in spite of statutory interpretation legislation which provided that masculine expressions included the feminine.

The purpose of my talk is to look at how women's historical exclusion from law and our current under-representation at senior levels of the legal profession has shaped the nature of law and how in turn law contributes to the shaping of ideas about gender.

The case is not just an historical curio. It shows that ideas about gender can prevail in the face of the clear words of legislation.

Some of you may be resistant to the idea that law today has a "hidden gender". After all, most of the rules which excluded women from participating in the professions and public life were abolished many years ago. Anti-discrimination laws have been in force in most States and at federal level for nearly three decades. Surely law now operates gender neutrally and fairly?

I believe that this response reflects the stake which all lawyers have in upholding the legitimacy of law. If we accept that law is affected by gendered assumptions (and by racist and heterosexist assumptions as well) how can we defend what we do? Exposing subtle and hidden gender assumptions in the legal system conflicts with the socialisation that many of us received in law school. Until recently legal education was largely a formalistic process in which we were taught that the "correct" legal solution was produced by the identification of relevant facts, the selection of the correct legal principle and the application of the law to the facts. Many lawyers still believe that law is an objective science. This belief was reflected in a letter written to the Vice Chancellor of Melbourne University by a senior legal practitioner, who complained about the inclusion of courses dealing with law and gender in the law school curriculum. Clearly the letter-writer believed that laws which have historically protected the interests of men are gender neutral and objective. By contrast, he thought that identifying ways in which gender influences the content of law and the structure of legal thought was simply "indoctrination".

Because law is portrayed as rational and objective it is often difficult to recognise the extent to which it is gendered, particularly for those who are working within the legal system. However, I believe it is easy to disprove claims about gender-neutral and objective nature of law. Sexual offences law provides many examples of the way that law reflects ideas about the characteristics and proper roles of men and women. It was not until 1991 that the High Court overruled the principle that women irrevocably consent to intercourse when they marry,[9] although conventional legal research shows that the doctrinal foundations of the principle were extremely shaky.[10]

Similarly, the idea that prior sexual experience is relevant to the credibility of a woman who reports that she has been raped reflects the sexual double standard by which women were judged until well into the twentieth century.[11] Although this principle was first modified by Victorian legislation in 1976,[12] empirical research suggests that it still influences legal practice. Research by Melanie Heenan and Helen McKelvie in 1997 shows that in 1992 and 1993 rape trials, almost 40 per cent of complainants who gave evidence were questioned about their prior sexual history with the accused or others with the leave of the court and a further 30 per cent of complainants were questioned about their sexual history without leave of the court, in other words in breach of the statutory provisions.[13]

The situations in which leave was sought to admit sexual history evidence also revealed gendered assumptions on the part of both prosecution and defence lawyers. The prosecution sought to use evidence about lack of sexual history to support the complainant's evidence that she had not consented to penetration. The defence sought to show that the woman's sexual history made it likely that she had consented or that the accused believed

she had consented.[14] Clearly both the prosecution and the defence believed there was a link between sexual experience and truthfulness, though I am unaware of any evidence that women who have had sex lie more or less frequently than women who are virgins.

Since McKelvie and Heenan's study there have been further statutory reforms to deal with sexual history evidence.[15] It remains to be seen whether these formal legal changes have actually altered the practice of trial lawyers and judges. The assumption that rape allegations are easy to make and difficult to disprove still seems to be alive and well in the minds of many lawyers, though it is unsupported by empirical evidence.[16] Just as in the *Kitson* case, where the Court ignored the clear words of the legislation, substantive law reform may not affect how the law applies in practice.

Examples of gendered assumptions are not confined to criminal law. Another example is the assumption that women are normally dependent on male breadwinners, which was reflected in labour law and family law until the 1970s, and in social security and income tax law until very recently.

There are still many areas in which the substantive law reflects ideas about gender. Let me give you two more examples. The first example is the way that law deals with work. The categories of legal knowledge differentiate between "paid work" which is the subject of labour law, and unpaid domestic work, which is largely invisible to law. Historically, even women who did paid work at home were not treated like other workers under employment law. I suspect that this is one of the factors which has historically contributed to the disadvantages experienced by outworkers, many of whom are women working at home.

Family law is the only area of law which gives some recognition to the value of domestic labour. Interestingly a comparison of cases under s. 79 of the Family Law Act and under Part IX of the Property Law Act shows that wives' domestic labour is more valuable than the domestic labour of de facto wives.[17] Now that Part IX has been extended to same-sex couples it will be fascinating to see how the value of a gay man's domestic labour is compared with the work done by a wife.

The difference between real work, and unpaid domestic work, which is usually not seen by law as work at all, is also reflected in the principles of assessment of damages for personal injury. At common law loss of ability to do housework or care for children is not treated as an economic loss suffered by the person who does such work. Instead it is equated to the non-economic loss suffered by a person who can no longer play amateur football or go ice-skating.[18] You will recall that the common law gave husbands an action for loss of consortium if they were deprived of the wives' domestic and sexual services. The law focused on the economic loss of the husband, rather than that of the wife who was no longer able to do domestic work. Some Australian States have now extended the right to sue for loss of consortium to wives, and some have abolished it altogether. In the former case the loss is still seen as that of the partner, rather than that of the injured person.[19]

The invisibility and under-valuation of domestic work is also reflected in contract law doctrine. In contract law the performance of domestic work does not usually give rise to an inference of a contract that the worker would be paid. Even if there is clear evidence of a contract that a women will be given an interest in property in return for her work, doing the work does not amount to part performance of the contract. This is because it is assumed that domestic labour is done "for love" without any expectation of reward.[20]

My second example involves a comparison of two English cases decided in the 1990s, which dealt with the question of whether a person could consent to an assault causing bodily harm. In *R* v *Wilson*,[21] the English Court of Appeal held that a woman could validly consent to her husband branding his initials on her buttocks with a hot knife. The Court said that it was contrary to the public interest to interfere in the consensual activities of husbands and wives. By contrast, in *R* v *Brown*,[22] the House of Lords held that gay men who had voluntarily gone to a venue where they had participated in sado-masoschistic activities could not consent to assault. It seems to me that the consent of the gay men was much more likely to have been free and voluntary than the consent of the wife. When one goes behind the technical legal reasoning in the cases, *Wilson* reflects assumptions about the appropriate relationship of husbands and wives, while *Brown* reflects homophobia.

My argument that law is gendered has important implications for women. It is of course a matter of simple justice that women lawyers should have equality of opportunity with men. But there is an even more important reason why we want more women lawyers at senior levels of the profession. Law, along with money, is both an instrument of power and a means of entrenching powerlessness.

The situation of women in situations of disadvantage is more likely to be addressed if we have more senior women barristers, judges and law reformers. Because women lawyers tend to come from middle-class backgrounds, their personal experiences will often differ from those of indigenous and working class and NESB women. Despite these limitations women lawyers have a noble history of pro bono work and of campaigning for changes which will improve the situation of all women. We are unlikely to have a legal system which redresses gender injustice unless women are involved in shaping the law. Women lawyers have the power to put issues on the policy agenda and to shape the questions which law deals with as well as the answers that it provides. In Canada, the Women's Legal Action and Education Foundation has participated in many test cases which are significant for women. In Australia greater use of amicus briefs could draw on the skills of women barristers. Australian Women Lawyers, to which the Women Barristers' Association sends a delegate, has made submissions to various governments on mandatory sentencing, human rights, and industrial law. Women lawyers have also been involved in working with Law Reform Commissions to improve the law for women.

This brings me to the role that the Victorian Law Reform Commission could play in exposing and redressing the gendered nature of law. The Victorian Government established the Commission on 6 April this year. One of the advantages of having a new Victorian Law Reform Commission is that it is independent from party political and bureaucratic processes. Because the Commission does not have to respond to immediate political crises, or advise the Attorney-General on day-to-day legal issues, it can consider broader, structural issues which underpin the operations of the legal system. In Australia, Law Reform Commissions have, in the past, addressed many issues of concern to women. I have already mentioned the Australian Law Reform Commission's Report on Equality Before the Law. In that Report, the Commission was able to examine legal structures and principles in a broad range of areas and could also look at the way in which different legal rules interacted. Similarly, the work of the former Law Reform Commission of Victoria on

sexual offences led to important changes in Victorian criminal law.

The Attorney-General has already given the Commission two references which affect women. The first is on sexual offences law. One of the issues we have been asked to consider concerns the responsiveness of the law to the needs of complainants in sexual offence cases. The second relates to disputes between co-owners. The co-ownership reference is primarily concerned with technical legal matters. However, the submission we have received from the Victorian Community Council Against Violence points out the implications of this reference for women in violent relationships, who co-own property with other family members. The Attorney-General has also asked us to advise on priorities for reform in the area of privacy law. In considering privacy issues we will need to think about whether the principles which we recommend have a differential impact on men and women and whether that is justified.

To conclude, I would like to "verbal" the Editors of the *Victorian Bar News*. In the autumn edition they commented that "perception provides the ultimate reality. As perception changes that reality changes". My speech has argued that law has traditionally reflected the perception and reality of men. The Women Barristers' Association can play an important role in changing that reality. It is to be congratulated for providing women barristers with a voice which can be used to improve the situation of women in Victoria.

NOTES:

1. Australian Bureau of Statistics, *Average Weekly Earnings* Cat 6302.0, May 2001.
2. See, for example, J. Scott, "Gender: A Useful Category of Analysis" (1986) 91 *American Historical Review* 1053.
3. See, for example, S.M. Okin, Women in *Western Political Thought* (1980).
4. See, for example, C. MacKinnon, *Towards a Feminist Theory of the State* (1989) 242; C. MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory" 1982) *Signs* 515.
5. See, for example, N. Naffine and R. Owen (eds), *Sexing the Subject of Law* (1997); P. Easteal, *Less than Equal Women and the Legal System* (2001).
6. 1990, Federation Press, Sydney.
7. *Mabo* v *Queensland* (1992) 175 CLR I.
8. *Re Kitson* [1920] SASR 230; see also *Re Edith Haynes* (1904) 6 WALR 209 and M.J. Mossman, "Feminism and Legal Method: The Difference it Makes" (1986) 3 *Australian Journal of Law and Society* 30.
9. *R* v *L* (1991) 174 CLR 379. The principle

Conference on Women and Human

By Susan Brennan and Kathryn Rees

ON Saturday, 25 August 2001, the International Commission of Jurists (Victoria) hosted a conference on "Women and Human Rights" at the University of Melbourne. The conference venue was filled to capacity with delegates, both male and female, from a wide cross-section of the community.

The conference is the fourth in a very successful series organised by the ICJ (Victoria) since the United Nations Fourth World Conference on Women was held in Beijing in 1995.

Justice Warren chaired the conference and Justice Bongiorno, Chair of the Victorian Branch of the ICJ delivered the opening address. The Honourable Dr Elizabeth Evatt AC, member of the United Nations Human Rights Committee over the period 1993–2001, gave the keynote address. Dr Evatt reviewed developments since the 1995 Beijing Conference and reported that treaty bodies are now integrating women's issues into their work on treaties and conventions. Dr

Susan Brennan, Justice Marilyn Warren, Dr Elizabeth Evatt AC and Justice David Harper.

Evatt looked at Australian processes dedicated to procuring equality for women and considered critically Australia's refusal to sign the Optional Protocol to the Convention for the Elimination of All Forms of Discrimination against Women ("CEDAW") in the context of Australia's support for the process and development

was also overruled in England in *R* v *R* [1991] 4 All ER 481.

10. See K. O'Donovan, *Family Law Matters* (1993) Ch I.
11. See N. Naffine "Windows on the Legal Mind: the Evocation of Rape in Legal Writings" (1992) 18 *MULR* 741, 744 ff.
12. *Rape Offences (Proceedings) Act 1976* (Vic) which inserted s. 37A in the *Evidence Act 1958*. Section 37A has been amended several times since.
13. *Evidence Act 1958* s. 37A. The legislation restricts the admissibility of evidence relating to the complainant's sexual activity either with the accused or another person. It requires an application to examine or cross-examine the complainant in relation to her sexual history. *The Crimes (Rape) Act 1991 — An Evaluation Report, Executive Summary* 34, M. Heenan and H. McKelvie.
14. Ibid.
15. See *Crimes (Amendment) Act 1997*.
16. R. Hunter and K. Mack "Exclusion and Silence" in *Sexing the Subject of Law* (1997) 171 ff.
17. For discussion see M. Neave "Property Disputes in De facto Relationships — Can Equity Still Play a Role?" in M. Cope (ed) *Equity Issues and Trials*, (1995) 213, 215 ff.
18. R. Graycar and J. Morgan, *The Hidden Gender of Law* (1990) 80 and see Ch 5.
19. J. Fleming *The Law of Torts* (9th ed) at 265 and 728.
20. See for example *Ogilvie* v *Ryan* [1976] 2 *NSWLR* 504.
21. (1996) 3 WLR 125. The Court said that the wife not only consented but "instigated" the action and that the husband's intention was to assist her in obtaining 'a personal adornment'.
22. [1994] I AC 212.

Rights

of the Protocol. The Optional Protocol provides a mechanism for individual or group complaints about breaches of the CEDAW to the relevant UN Committee.

The Conference was divided into themes of Refugee Women, Women in Prisons and Women in East Timor. Delegates were fortunate to hear from both learned practitioners in each field and from women who had been refugees, prisoners and involved in East Timor.

Diverse perspectives on the difficulties women experience as refugees and in establishing refugee status were provided by Dr Susan Kneebone, lecturer at Monash University, by a representative from the Department of Immigration and Multicultural Affairs, by Debbie Mortimer of the Victorian Bar who regularly appears for claimants and by Samia Baho, an Eritrean refugee now living in Australia.

A lively debate about women in prisons and the practice of strip searching, the issues associated with drug use, and the special needs of women with children was argued out between Penny Armytage, Commissioner for Corrections, Helen Barnacle, a psychologist and former prisoner, Amanda George, prisoner advocate, and Celia Lashlie, former Manager of New Zealand's women's prison, amongst others.

The moving story of two young East Timorese women living in Australia was portrayed in the preview filming of "Story of the Crocodile"; Etervina Groenen, the Melbourne-based Liaison Officer of the East Timor Department of Foreign Affairs provided an enlightening insight into the lives of urban and rural East Timorese women and the impact of the current international presence on their lives; a paper was presented on the pressures on the fledging East Timorese justice system in protecting women from domestic violence.

Justice Harper, former President of the ICJ (Victoria) closed the conference with a commitment to action on the protection and promotion of women's human rights in Australia and globally.

Edmund Alfred Drake-Brockman

HIS Honour Judge Gebhardt has reminded the editors of the *Bar News* that in the previous issue they had failed to refer to another prominent barrister who was both a general barrister and judge. That person was his grandfather Edmund Alfred Drake-Brockman (1884–1949).

Edmund Drake-Brockman completed his articles in 1909 and after marrying in 1912 joined the Australian imperial Force as a Major in the 11th Battalion on 25 August 1914. After a distinguished service at Gallipoli, he was promoted during the course of World War I to Brigadier and was awarded the Distinguished Service Order in December 1917, having been mentioned in dispatches six times. He was promoted to Major General in 1937 and during World War II commanded the 3rd (Militia) Division until 1942.

After World War I Drake-Brockman returned to legal work in Perth and politics. He was elected as a Nationalist senator for his State in 1919 and was admitted to the Victorian Bar in 1920. In 1924 he became president of the Australian Employers' Federation. After some years in parliament he retired and became a judge of the reconstituted Commonwealth Court of Conciliation and Arbitration in 1926. He oversaw many changes in the industrial sphere during his service on the court and over some years became the de facto head of the Arbitration Court. Finally he was appointed Chief Judge in June 1947. For the next two years he suffered ill health which he believed had been caused by the strain of the protracted 40-hour case and which necessitated his carrying out most of his duties from his sick bed.

He died on 1 June 1949 at Tarnook, Victoria and was survived by two daughters and a son. Of added interest is the fact that his successor as head of the Arbitration Court was Judge Kelly's father, Sir Raymond Kelly.

So indeed there has yet been another member of the Victorian Bar who was at various stages a judge, barrister and general.

THE EDITORS

The Federal Magistrates Court Turns One

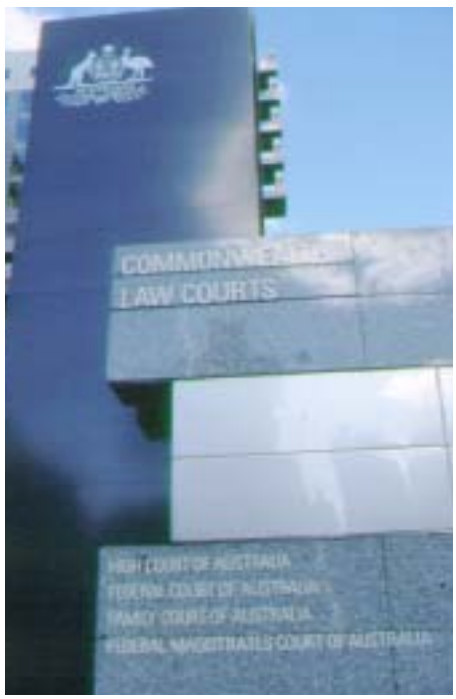
THE Federal Magistrates Court of Australia had its first birthday in July this year. The occasion was marked by a reception held on the 6th floor of the Commonwealth Courts Building. The Federal Magistrates Court has its National Administrative Offices on the 6th Floor, and mostly uses courts 6G, 6H and 6J on that floor. Many members of the Victorian Bar attended the reception.

The Federal Magistrates Court has 19 members. Six of them are based in Melbourne. Uniquely, compared to elsewhere, all were practising members of the Victorian Bar before appointment.

Chief Federal Magistrate Diana Bryant, appointed early in the year 2000, was a QC practising in family law. Federal Magistrate Norah Hartnett and Federal Magistrate Murray McInnis were appointed in July 2000. Norah Hartnett practised in family law and Murray McInnis had had a wide practice throughout his career — criminal law, common law and more recently administrative law — and a commercial practice mostly involving insurance claims. Federal Magistrate Maurice Phipps was a QC with a practice in construction law, commercial tenancies and general commercial work. He was appointed in December 2000. Federal Magistrate Michael Connolly, appointed in June 2001, practiced in family law. Federal Magistrate John Walters was appointed in October 2001. He took silk in Western Australia and was practising at the Victorian Bar when appointed.

Some controversy surrounded the court's creation. The legal profession, represented by the Law Council of Australia, opposed its existence. The various professional bodies, including the Victorian Bar, did likewise. That has now changed and the court now receives frequent expressions of support from various representative bodies in the profession.

Perhaps the most dramatic change is that of the Chief Federal Magistrate. As Diana Bryant QC, she appeared before a Senate committee in support of the professional view that the court should not come into existence. She, as Chief Federal



Magistrate Diana Bryant, is now an enthusiastic supporter.

The court, as the daily law lists demonstrate, is very busy. Much of its work is in family law. In Melbourne, most bankruptcy applications are now issued in the Federal Magistrates Court, as are applications under the Human Rights and Equal Opportunity Act.

The Federal Magistrates Court is created under Chapter III of the Constitution by Section 8 of the *Federal Magistrates Act 1999*. By that section it is constituted as a court of record and a court of law and equity.

The concepts of associated jurisdiction and accrued jurisdiction apply to the Federal Magistrates Court. The Australian Law Reform Commission report on the judicial power of the Commonwealth, recently issued, describes associated and accrued jurisdiction in the following way:

> The concepts of associated jurisdiction and accrued jurisdiction have been developed to avoid multiplicity of proceedings and split jurisdictional problems. Associated jurisdiction is a statutory doctrine that enables the Federal Court to exercise jurisdiction in relation to Federal claims that are not otherwise within its jurisdiction, where the claim is associated with another Federal claim over which the court does have jurisdiction. Accrued jurisdiction is a judicial doctrine that enables the Federal Court to adjudicate a claim that would otherwise be non-Federal, where that claim is attached to and not separable from a Federal claim within the court's jurisdiction. — see paragraph 2.17.

The following paragraphs then elaborate on the statutory provisions which give the Federal Court, including the Federal Magistrates Court, associated jurisdiction and the doctrine of accrued jurisdiction as developed by the High Court. The report can be found on AustLII.

The Federal Magistrates Court has been given jurisdiction under the following acts:

Trade Practices Act

Applications arising out of Division 1A of part V of the *Trade Practices Act 1974*.

This includes consumer protection provisions dealing with unfair practices such as:

- misleading or deceptive conduct;
- bait advertising;
- referral selling;
- pyramid selling;
- product Safety;
- product Information.

There is a monetary limit of $200,000 for damages in trade practices applications.

Human Rights and Equal Opportunity Commission

The Federal Magistrates Court has jurisdiction to hear and determine a complaint determined by the President of the Human Rights and Equal Opportunity Commission under Section 46 PH of the *Human Rights and Equal Opportunity Commission Act 1986*.

There is no monetary jurisdictional limit upon the Federal Magistrates Court for proceedings under the HREOC Act.

The Federal Magistrates Court may provide substantive relief, and interim relief in relation to complaints under the *Racial Discrimination Act 1975*, *Sexual Discrimination Act 1984*, *Disability Discrimination Act 1986* and the HREOC Act.

Bankruptcy Act

The Federal Magistrates Court has concurrent jurisdiction with the Federal Court under the Bankruptcy Act. The only exception is the capacity to undertake trials by jury pursuant to Section 30(3) of the Bankruptcy Act. That power is limited to the Federal Court.

There is no monetary limit on the Federal Magistrates Court's jurisdiction.

Administrative Decisions (Judicial Review) Act

The Federal Magistrates Court has jurisdiction to hear applications under the Administrative Decision (Judicial Review) Act.

Appeals from the Administrative Appeals Tribunal

Appeals from the Administrative Appeals Tribunal must be commenced in the Federal Court of Australia. The Federal Court of Australia may then transfer an appeal from a decision, not given by a presidential member, to the Federal Magistrates Court. This means that the Federal Magistrates Court may hear appeals from the Administrative Appeals Tribunal constituted by a member or senior member.

Privacy Act

The Federal Magistrates Court will have concurrent jurisdiction with the Federal Court under the *Privacy Act 1988* when the amendments made by Schedule 1 of the *Privacy (Private sector) Amendment Act 2000* commence operation on 21 December 2001.

Migration

Recent amendments give the Federal Magistrates Court current jurisdiction with the Federal Court under the *Migration Act 1958*. Other Acts passed at the same time as the Act giving the Federal Magistrates Court jurisdiction have curtailed applications to either court to the extent that the jurisdiction is virtually non-existent.

Family Law and Child Support

The Federal Magistrates Court has the same jurisdiction as the Family Court under the *Family Law Act 1975* with these exceptions:

- It cannot deal with nullity or annulment of decrees of validity.
- In property proceedings, if the total value exceeds $300,000 and the parties do not consent then the Federal Magistrates Court is required to transfer the proceedings to the Family Court. On 1 January 2002 this limit will increase to $700,000.

In children's matters, the Federal Magistrates Court has the same jurisdiction as the Family Court.

In child support matters, the Federal Magistrates Court has the same jurisdiction as the Family Court.

Appeals

Appeals from the Federal Magistrates Court are to the Full Court of the Federal Court or the Family Court. In both cases, the Chief Justice of each Court may constitute the Full Court by a single judge.

The nature of an appeal from a decision of a Federal Magistrate is the same as from a single judge of the Federal Court or the Family Court.

The Federal Magistrates Court was established with the intention that it would use the existing courts and court buildings and facilities of the Federal Court and the Family Court.

Its staff is limited to its national administration and associates and deputy associates for the Chief Federal Magistrate and Federal Magistrates. Otherwise, it uses the Registries of the Family Court and the Federal Court. In family law and child support matters, applications are commenced and documents filed with the Family Court Registry. In other matters, described as general Federal law matters, applications and documents are filed in the Federal Court Registries. Registrars and Deputy Registrars of the Federal Court and the Family Court have been appointed as Registrars of the Federal Magistrates Court with similar delegated powers. Thus, in bankruptcy, the practice is as with the Federal Court where all applications commence before a Registrar. Matters such as unopposed bankruptcy applications are dealt with by the Registrars, as are many procedural matters. As necessary, the Registrars then refer the proceedings to Federal Magistrates for hearing.

In Melbourne, all general Federal law matters are dealt with by a docket system, which operates in the same manner as the Federal Court. In Family law, where there is a much higher volume of work, a modified docket system is used. The Chief Federal Magistrate and the other four Melbourne Federal Magistrates all do some Family law, the Chief Federal Magistrate and two others almost exclusively.

The Federal Magistrates Court Rules came into operation on 20 July 2001. Prior to that, the Family law rules and the rules of the Federal Court apply. Provisions in the Federal Magistrates Act provide that the Family law rules and the Federal Court rules apply when the Federal Magistrate court rules do not make provision for a particular situation. The Federal Magistrates Court rules specifically adopt many of the other rules, in bankruptcy and human rights almost exclusively.

The Court rules, daily lists and other information can be found on the Court's website www.fms.gov.au

Court circuits

Family law circuits have been held in Bendigo, Geelong, Warrnambool/Hamilton, Shepparton, Albury and Gippsland. The Court sits regularly at the Dandenong Family Court — in 2001, generally two weeks out of four to be extended to three weeks out of four in 2002.

The Court will sit on circuit in general Federal law matters as necessary. A disability discrimination hearing has been conducted at Morwell.

The Court is a national court, and so its sittings are not confined to any particular area. There is no Federal Magistrate based in West Australia, but regular sittings have been held. The Federal Magistrates Court does not have jurisdiction over family law matters in Western Australia since Western Australia has a State Family Court. The Federal Magistrates Court sittings in Western Australia have been in general Federal law matters.

In its first month, the Court commenced with twelve Federal Magistrates. It now has nineteen. Federal Magistrates are based in Townsville, Brisbane, Sydney, Parramatta, Canberra, Melbourne, Launceston, and Adelaide, and shortly in Darwin.

Its numbers have expanded and are likely to keep on expanding. Chief Justice Gleeson has said that he expects it to become the largest court in Australia. The present members of the Court based in Melbourne hoped to be joined by many more members of the Victorian Bar.

Maurice Phipps FM

Judicial Disapproval

FOR those who feel that the Courts do not accord their arguments adequate respect, we set out below views expressed by Judge Kent of the United States District Court for the Southern District of Texas, Galveston Division, in June this year.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR TRANSFER VENUE AND ORDERING SUBSTITUTION OF COUNSEL OF RECORD

On 6 June 2001, Defendant Jacintoport Corporation filed a Rule 12(b)(3) Motion to Dismiss or in the Alternative to Transfer for Improper Venue. *See* Fed. R. Civ. P. 12(b)(3); *see also* 28 U.S.C. § 1406(a). Defendant's Motion contends that venue in the Galveston Division of the Southern District of Texas is improper, but that venue in the Houston Division of this Court is proper. Accordingly, Defendant seeks a dismissal or, alternatively, a transfer to the Houston Division of this Court's Judicial District.

Manifestly, any person with even a correspondence-course level understanding of federal practice and procedure would recognize that Defendant's Motion is patently insipid, ludicrous and utterly and unequivocally without any merit whatsoever. Worse, it is just plain blatantly wrong in light of the unambiguous language of a decades old federal statute and veritable mountains of case law addressing venue propriety. *See* 28 U.S.C. § 1391; *see also*, e.g., *Lowery* v *University of Houston—Clear Lake*, 50 F. Supp. 2d 648, 649 (S.D. Tex. 1999). The federal venue statute hopelessly incorrectly interpreted and cited by Defendant provides that venue is proper in:

> (1) a judicial DISTRICT where any defendant resides, if all defendants reside in the same State, (2) a judicial DISTRICT in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial DISTRICT in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b) (emphasis added, as it is apparently needed by blithering counsel!) As the heightened letters above indicate, the venue statute speaks in terms of *districts not divisions.* Thus, if venue is proper in the Houston Division of the Southern District of Texas it is *ipso facto* proper in the Galveston Division — as well as in the Divisions of Corpus Christi, Victoria, Bownsville, McAllen and Laredo. Whether a case might be more conveniently prosecuted in one *Division* versus another is a question left to analysis under 28 U.S.C. § 1404(a). Defendant's obnoxiously ancient, boilerplate, inane Motion is emphatically DENIED.

Moreover, Defendant's present counsel-of-record, Mr Eric G. Carter is determined to be disqualified for cause from this action for submitting this asinine tripe. In his place, the Court hereby ORDERS that Mr Brandon Mosley of Mr Carter's lawfirm be SUBSTITUTED as attorney-in-charge for Defendant. Mr Carter shall appear no further in the present matter.

IT IS SO ORDERED.

DONE this 2nd day of June 2001, at Galveston, Texas.

Samuel B. Bent
United States District Judge

Documents

LAWYERS love documents. The traditional image of a lawyer is that of a pasty-looking gent (always male) slightly hunched (from long hours of reading), wearing glasses (all that reading . . .) at a desk piled high with papers — affidavits, writs, indentures, deeds, titles, charterparties, briefs bound in pink, documents with wax seals and ribbons — all set against a backdrop of bookcases filled with leather-bound tomes. His mind appears to be scheming and dreaming some complex rigmarole with which to baffle lay people.

Not only do we love documents, we have many different words for them, as the previous paragraph illustrates.

Our commonest word for a thing with writing on it is *document*. It comes immediately from the Latin *document-um*, a lesson, proof, instance, or specimen. Ultimately it comes from the Latin *docere* — to teach. From the original meaning of *lesson* or *proof*, it came to mean "something which serves to instruct or prove"; then "something written containing proof or other information about any subject".

The original pedagogical meaning of *document* is preserved in one sense of the related adjective documentary. When *documentary* is used as an adjective, it simply means *of or pertaining to a document*; but when it is used elliptically as a noun "a documentary (on television/radio)" it generally means a broadcast with an educational purpose. Oddly, this use of *documentary* seems to be confined to modes of instruction which do not rely on documents. When a documentary series on TV results in the inevitable book available at ABC Shops, the book of the series is not called a documentary book.

An *affidavit* is a statement made in writing, confirmed by the maker's oath, and intended to be used as judicial proof. It is a modified form of *fidem dare* — to make loyalty — by way of the now-obsolete word *affy*. *Affy* means trust or reliance. It has one or two living relatives: *affiance* (confiding or having faith in a person) and by extension *fiancée(e)*.

Writ is much more obvious: it comes from *writing*, and meant originally anything written, but since the 17th century it has been limited in use to scriptural writings (holy writ) and in law as a written command, precept or order.

Most lawyers remember that an *indenture* is originally a parchment which has been cut into two or more pieces. In times before word processors, photocopiers or carbon paper, parties to an agreement faced a practical difficulty in ensuring the genuineness of counterparts of the document. An early, and practical, arrangement was to write the text of the agreement twice on the same piece of parchment and then divide it into two parts with a wavy or notched cut. Only the original pieces would fit together perfectly. The indented edges are a natural explanation of the name, which comes ultimately from the Latin word for *tooth*.

Another document with the same origins but a different name is a *charterparty*. It is originally a *carta partita*: a charter which has been divided into several parts. Traditionally it was cut with an indented line, in the same manner as an indenture. In modern times it came to refer specifically to the charter or deed between owners and merchants for the hire of a ship. In Latin, a *charter (carta)* is simply a piece of paper; later in special use it was a deed, then a written document delivered by the sovereign or legislature, of which Magna Carta is the best known example. The corresponding portions of an indenture or charterparty are *counterparts*.

It is not obvious that the *party* of *charterparty* has anything to do with the *party* in litigation, but they have the same origins: the idea of division. The Latin *partitum* meant "that which is divided, shared, or allotted". In English, it originally signified a division of a whole, a portion. From there it enlarged to encompass "those who are on one side in a contest, etc., considered collectively" (as in litigation) and "a number of persons united in maintaining a cause, policy, opinion, etc., in opposition to others who maintain a different one " (as in a political party).

For some odd reason, people often refer to learned books as *tomes*. Generally this is to be understood as a literary flourish to please and impress. *Tome* comes from the Greek for *volume*, specifically one volume from a larger set. The Greek root *tom-* means slice or cut. In the laboratory, a *microtome* is used for the purpose of taking thin slices off a specimen for examination; the ingenious, but now commonplace, CAT scanning technology is (in its full glory) Computerized Axial Tomography, because it produces images of axial slices through the subject. Likewise surgical operations which involve cutting something out: *gastrectomy*, *hysterectomy*, *lithotomy*, &c.; and of course the branch of medicine which is learned by cutting up bodies is *anatomy*.

Less obviously, *atom* comes from the same root, meaning *not able to be cut or divided*; and even more remotely: *epitome* which, in the original Greek, is an incision into something, or abridgement of it; and in English is a summary or condensed account of something. Tomes, however, are rarely noted for their brevity; a *concise tome* would be thought a contradiction in terms.

Even *rigmarole* has its etymological origins in a form of document. It is a corruption of *Ragman Roll*. The Ragman Rolls are the scrolls on which the Scottish gentry and nobility subscribed (rather unwillingly) their loyalty to Edward I in 1291–1296. These scrolls bore the seals of all who executed them. The proud and glossy seals have embedded in them the ribbons once thought essential to the dignity, if not the efficacy, of deeds. When the rolls are fully furled up, the ribbons protrude at odd points, giving them a certain shabby chic.

Now, at the time Edward was on his voyage of conversion there existed a game called Ragman. The main piece of equipment was a scroll, which contained a series of short narrative descriptions of various personality traits, rather like the thumbnail sketches which keep readers of horoscopes satisfied. Each character trait had a length of string attached to it, so that when the roll was fully furled, the strings would protrude from the edges. Each player would take hold of a piece of string and, when the roll was unfurled, the

players would read the personality trait at the other end of their piece of string. It must have been tremendously entertaining for all, but sadly the game has fallen into obscurity, along with bagatelle and maypole dancing. Perhaps it was suppressed: Ragman was also a convenient, but illegal, form of gaming: one or more strings were associated with prizes, and players paid to take a string.

In any event, the rolls compiled by Edward looked rather like the playing equipment used in Ragman. Thus, it is thought, the Rolls came to be called Ragman Rolls. When opened, the Ragman Rolls contained wordy acts of homage and fealty, all unconnected save for the subject of their feigned admiration, Edward I. By early in the 18th century, Ragman Roll had become *rigmarole* and meant *a succession of incoherent statements*; *an unconnected or rambling discourse*; *a long-winded harangue of little meaning or importance.* The original Ragman Rolls are preserved in the Record Office, London.

A *rigmarole*, by definition, is not brief. A *brief*, by definition, should not be a rigmarole. *Brief* is from Latin *breve*: a short catalogue or summary. *Brief* also came to mean a letter, especially a letter of authority. In German it is the common word for letter.

A brief is, or should include, a summary statement of the case in which counsel is retained. In America it is the summary of argument filed with a court. In the US Supreme Court, where oral argument is limited to 30 minutes for each party, the brief is a summary of the entire argument, which must "be concise . . . and free from burdensome, irrelevant, immaterial and scandalous matter". In response to a complaint by Justice Clarke that some briefs exceeded a thousand pages the 1980 rules impose a 50-page limit.

Julian Burnside QC

Law Council Calls for Review of Mandatory Detention of Asylum Seekers

LAW Council of Australia President, Anne Trimmer, has called for the urgent review of Australia's policy of mandatory detention of asylum seekers.

Writing in the September edition of *Australian Lawyer*, Ms Trimmer refers to the humanitarian role that Australia can play in the international management of asylum seekers. She also states that the practice of mandatory detention is "questionable" in the light of several international conventions.

Ms Trimmer notes that the Law Council accepts that at particular points in the refugee determination process, and for certain individuals, detention is appropriate to ensure that people are available while checks are being conducted in relation to health, identity, and national security. However, she believes that the current policy is excessive and not necessary for all asylum seekers.

Even the Minister for Immigration and Multicultural Affairs admitted earlier this month that 75 per cent of unauthorised boat arrivals between July and December last year were granted temporary protection visas. For the 1999/2000 calendar year, the approval figure was 94 per cent.

"It would therefore appear that we are detaining large numbers of people who are accepted as fleeing a well founded fear of persecution. To test this, however, we are enforcing detention on these people, who have already been traumatised by their experiences," she said.

Ms Trimmer has criticised the Federal Government's attempts to further restrict judicial review of migration decisions and claims that the legal profession runs unmeritorious appeals on behalf of asylum seekers.

"It is simply too easy for the Minister for Immigration and Multicultural Affairs to assert that the legal system, the legal profession and the applicants are to blame for extended detention of asylum seekers," Ms Trimmer said.

"The Law Council does not condone vexatious litigation, or litigation that is an abuse of process. However, it is important to recognise that in a democratic society individuals, including asylum seekers, have certain rights, including the right to have government decisions reviewed by the courts.

"The answer does not lie in further restricting those rights. We should instead learn from the experiences of other countries that have handled asylum seekers in a more humane manner," she said.

While she describes the Minister's announcement in early August of the trial of the release of women and children into the Woomera community as "a step in the right direction", Ms Trimmer also calls for a wholesale review by both major parties of the current policy of mandatory detention of asylum seekers.

(Note: The September Edition of Australia Lawyer *can be downloaded from the Law Council of Australia's website: http://www.lawcouncil.asn.au/publications.html)*

Contacts: Anne Trimmer, President, Law Council of Australia, (02) 6274 3284/0417 048 265. Christine Harvey, Deputy Secretary General, 0417 393 306 http://www.lawcouncil.asn.au

Refurbishment of Owen Dixon Chambers East

OWEN Dixon Chambers East was built in the early 1960s. It was built by the Bar for its members. Since opening it has been the heart of the Bar, however, the charm of the building has faded and, although Dickensian lawyers may disagree, today the building presents a less than satisfactory standard of accommodation for professional offices.

Accordingly the directors of Barristers Chambers Limited have embarked upon a course that will see Owen Dixon Chambers East completely refurbished within the next few years. Total cost of the refurbishment work will be in the order of $20 million.

Stage One of the refurbishment, being the ground floor, has been completed (save for several maintenance items) and this has provided a significant and attractive new entrance to the home of the Victorian Bar.

. . . although Dickensian lawyers may disagree, today the building presents a less than satisfactory standard of accommodation for professional offices.

Substantial preliminary work has been done in relation to the refurbishment of floors 1 to 13. Preliminary work defining the budget and scope of works allowed for the exploration and development of various design options.

Although no contractual obligations have yet been entered into in regard to actual refurbishment work, it is hoped that by the end of 2001 binding contractual arrangements will have been entered into with the proposed builder, Bovis LendLease.

It is proposed that refurbishment of the lifts in Owen Dixon Chambers East will be commenced prior to the major refurbishment works to the balance of the building. To this end it is hoped that the lifts can be refurbished one by one with work commencing in early 2002.

In relation to the refurbishment of chambers, the earliest time at which any work could commence would be June 2002, although a more realistic expectation for the commencement of works is late 2002.

Extensive concept and design work has been undertaken, and a number of significant features will be incorporated into the new chambers.

First, it is proposed that each level of chambers will have a view through a

Looking at plans for Owen Dixon East refurbishments: John Digby QC; Andrew Rutt, the project manager for the architects; Michael Colbran QC, member of the building committee and Ross Robson QC, chairman of Barristers Chambers Ltd.

waiting area across William Street to the Supreme Court. In turn, this view will be seen along the line of the east/west corridor in Owen Dixon Chambers East.

Second, individual chambers will have an integrated security/airconditioning/lighting system. The air-conditioning is controlled on an individual chamber basis and is activated when the door is opened.

Third, as a result of representations made to BCL, levels 6 to 13 will have openable windows, although this facility will not be available to chambers on William Street.

Fourth, the entire building will have a new facade providing a significant enhancement to this building and the image of the Bar generally.

A number of the floors will retain the existing configuration of rooms, save for the loss of those chambers needed to provide the vista across William Street. Equally, on a number of floors there will be a new configuration of rooms allowing for the possibility of suites and a reconfiguration of the floor plan to suit groups.

Finally, the 12th and 13th floor will be entirely devoted to chambers with the Essoign Club, Bar Library and Bar Administration moving to the first floor. The move of these facilities to the 1st floor should enhance their accessibility for the entire Bar. Significantly, the Essoign Club will have a William Street frontage. The first floor will be lost as chambers, however, this will be compensated in part by the 12th and all of the 13th floors becoming available for chambers.

Once refurbishment works commence, it is proposed that those works will proceed from the top down on a three-floor by three-floor basis. Each group of floors should be completed in 13 weeks. The expected duration of the refurbishment works in total is 12 months.

After the refurbishment it is proposed that each of the new chambers will have a cupboard, credenza, bookcase and Internet access cable fitted as standard, although tenants will have the option to incorporate further joinery if they so desire.

BCL is committed to keeping all members of the Bar, and particularly the tenants of Owen Dixon Chambers East up to date with the current position in regard to the refurbishment. As further developments occur, members of the Bar will be kept fully informed. Details as to the proposed alternative accommodation to be provided to those tenants dislocated during the refurbishments will be discussed with all tenants in the near future. While it is unfortunate, there is no alternative but that tenants vacate their chambers during the refurbishment works. Vacation of chambers will be limited to the period when work is done on the particular floors, not for the entire 18-month building period.

BCL believes that the significant improvement in the standard of accommodation after refurbishment justifies the significant but temporary inconvenience for members of the Bar generally and tenants of Owen Dixon Chambers East in particular. Every effort will be made to minimise the inconvenience and disruption.

Should any members of the Bar wish to discuss any aspects of the proposed refurbishment they are welcome to contact any of the directors of BCL. When detailed plans and displays of proposed finishes are to hand, these materials will be prominently displayed.

Rip Van Winkle Awakes

In the 1950s and 1960s "Phil" Opas was a leader of the Criminal Bar featuring in a great many of the high-profile criminal cases of the day. He took silk in 1958 but left the Bar some ten years later when his client was hanged for a crime which Phil was convinced — and is still convinced — he did not commit. It is disturbing that the last person executed in Victoria — and executed, primarily, as a matter of principle by the Bolte Government — is a person as to whose guilt there can be some doubt.

In what follows Phil reminisces about the Bar as he knew it. It was a much smaller, more intimate Bar than we know today.

I feel as though I have been asleep for 20 years and have opened my eyes in a new alien and incomprehensible world. The practice of law as I knew it has undergone a fundamental change. It is a serious business with little room for fun. In every case in which a judge adjudicates, media reports invariably refer to the judge by his or her given names. Familiarity extends to reducing William to the diminutive Bill or Richard to Dick. No doubt it is intended to show that — to quote an old vaudeville melodrama — beneath that tattered stocking there beats a heart of gold.

In criminal law the accused has been deprived of the right to make an unsworn statement from the dock. Inducement to plead guilty is enshrined in statute so that by saving the State the cost of a contested trial complete with jury, the sentence which would otherwise be justified by the heinous nature of the crime is discounted.

In our English language we have the most extensive vocabulary of any language in the world. But to cater for the virtual illiterates among us, we are deprived of the use of about one-third of it, and obliged to speak and write in plain English.

Res ipsa loquitur and *autrefois acquit* are foreign words to be vanished from our courts. Once we all knew what a chose in action was, but a THING in action! Ugh! I use that exclamation because I have actually heard that uttered. Indeed I have used that myself in contrast to "pshaw", beloved of Victorian novelists, which I have never heard. It probably sounds like a flushing toilet.

I remember as a student a useful aide memoire was:

> There was a young fellow named Rex
> Who was deficient in organs of sex
> When charged with a rape
> He made his escape
> *De minimis non curat lex.*

Of course Latin was then a mandatory prerequisite to the study of law. Those of us who took Roman Law as a subject had to read fluently the Institutes of Justinian in the original Latin. We also were exposed to the magnificent sonorous metre of Horace's poems. He boasted, naturally in Latin, "I have erected a monument more enduring than brass and loftier than the highest pyramid." History has justified his conceit for his poems have survived the centuries while constructed edifices have long ago crumbled into dust.

How extraordinary has been the change in what we are allowed to read. There could be no suggestion of pornography if the original writing was in Latin or Greek. Scholars should have ample access to the English translation published in a book with a plain unadorned cover and devoid of illustrations. The Golden Ass by Apuleius could be purchased in any reputable bookshop at a time when *Lady Chatterley's Lover* was banned. At my school students in Years 8 and 9 passed around a dog-eared copy of D.H. Lawrence's work and I remember that I regarded it then as disgusting. It reminded me of the little child determined to shock his parents by saying "Bum".

I was surprised some years later that a Bishop could give evidence that to him *Lady Chatterley's Lover* was a scholarly work of great literary merit.

When one looks at what passes for poetry these days with the first line comprising three syllables, the second thirteen syllables, the next nine and so on without any semblance of rhyme, I am left to wonder whether my education with its emphasis on classic Latin and Greek was entirely wasted.

Then I reflect on the impeccable metre of the poems of Catullus. During a rare heterosexual interlude for both of them he wrote his famous *Ode to Lesbia*. Her name will be forever linked with a practice that she certainly did not invent but no doubt a lawyer versed in intellectual property could argue that she contributed at least a scintilla of inventiveness which would justify the issue of letters patent. This ode translates well into English.

> Soles occidere et redire possunt.
> Suns may set and rise again.
> Nobis cum occidit semel brevis lux,
> But for us when our brief light goes out,
> Nox est perpetua una dormienda.
> There is one never-ending night for sleeping.

When considering this topic one cannot ignore the Bard of Avon. One of the most exquisite passages in all literature is Juliet's soliloquy while she awaits the return of her newly acquired husband and the eagerly anticipated consummation of the marriage.

> Come gentle night; come loving black-brow'd night,
> Give me my Romeo; and when he shall die,
> Take him and cut him out in little stars,
> And he will make the face of heaven so fine
> That all the world will be in love with night,
> And pay no worship to the garish sun.
> O! I have bought the mansion of a love,
> But not possess'd it; and though I am sold,
> Not yet enjoy'd. So tedious is this day
> As is the night before some festival
> To an impatient child that hath new robes
> And may not wear them.

This literary gem in plain English would be rendered as "Hurry home Romeo. I've got the hots."

Whenever I was opposed to the late Woodsie Lloyd it was likely that we would find the occasion to quote Shakespeare or other poets at each other and sometimes the judge would join in. Strangely enough I used the Bard with amazing success before that most irascible of judges, Justice Russell Martin. It was weeper day — when a number of pleas of guilty were to be dealt with. The case ahead of mine was that of a man who pleaded to bigamy. The judge gave him six months. I followed with a man pleading to having "married" three women. Martin J snorted at me and said, "Are you saying that I should treat your client more leniently because he has wronged three women instead of two?"

Unbidden to my lips came an apt quotation.

> Didst thou but know the inly touch of love
> Thou wouldst as soon go kindle fire with snow
> As seek to quench the fire of love with words.

The judge was so startled that he gave my man a bond.

I remember being opposed to Woodsie Lloyd before the Full Court where I was acting for grandparents seeking custody of a child who, in my contention, did not deserve to be placed in the care of either of two unworthy parents. I opened by saying to the three male judges, "Your Honours, we are all grandfathers, and we know the importance to a child of an extended family." Woodsie jumped to his feet. "Your Honours, if my learned friend is allowed to give expert evidence as a grandfather, I claim the right to give evidence as a grandson." He was unplayable.

I often appeared against George Pape and later before him when he was elevated to the Supreme Court. We became good friends. On one occasion before the High Court we each had junior briefs in a constitutional case in which each State and the Commonwealth had intervened. Silks occupied the Bar table and juniors were seated a row behind them. The well-known differences of opinion on section 92 became evident as soon as the case opened and the Court was fairly evenly divided. Until P.D. Phillips for the Commonwealth opened his case. The Court was united in its opposition to his case. George Pape whispered to me behind his hand. "Hey Phil. Cop old P.D. He's up to his neck in shit. Somebody throws a turd. Should he duck." Plain English cannot improve on that observation.

I think my favourite judge was Sir Charles Lowe. It was said of him that nobody could possibly be as wise as he looked. I believe he was so wise. That is why I shudder every time I enter Owen Dixon Chambers and see what is said to be his portrait. It shows a tired old man resting his head on his clenched fist in a clothed imitated pose of Rodin's "Thinker". To me it is a caricature. This man was always vital in full possession of his intellectual vigour; a man of compassion and a Puckish sense of humour. At Bar dinners he would often bail me up, usually in the toilet, to ask me what was the latest story going the rounds because he had to associate with a dull lot of colleagues.

Before there was a Family Court, divorces were dealt with in the Supreme Court. Undefended cases were bread-and-butter to junior barristers and we loved to appear in our "undies". Judges listed several a day. Sir John Barry was known to list thirty. One day I was seated at the Bar table waiting for my case to come on before Sir Charles Lowe. The one ahead of me concerned a wife's petition on the ground of her husband's adultery with her mother. Looking straight at me, Sir Charles said, "This seems to be one occasion when a man has been able to get on with his mother-in-law."

On another occasion before the same judge, I appeared for a defendant in a motor accident case being tried with a jury. My opponent was Hubert Frederico Senior. I was faced with the ultimate disaster — an independent witness who put my client completely in the wrong. He was a schoolboy aged about ten wearing a blazer with XC on the pocket. I sought to get on the right foot with the boy and started, "I see Kevin that you attend X-avier College." Freddie's lower lip rolled out like a landing deck on a carrier as he interjected, "Zavier, please, Zavier." Sir Charles said, "I take it there is no "X" in Melbourne Grammar." Freddie replied, "If there were my learned friend would pronounce it."

George Pape became a very good judge, rarely appealed against. However, he was garrulous to a fault. I was appearing before him once on 11 November. He insisted on observing two minutes silence at 11 a.m. and all in court stood with heads bowed for the requisite time. The silence in the court was so unusual that I recorded it in doggerel commencing "In the Papal Court of Babble-On". I showed it to my opponent Davern Wright who wanted to publish it. Being a practising coward I retrieved it and tore it up.

Sir George was a keen cricketer. I was appearing before him in a long drawn-out case on the day in 1961 when the final test against the West Indies was being played at the MCG. I have been completely deaf in the left ear since a wartime aircraft crash. Because the nerve was destroyed I cannot wear a hearing aid, but I always seated myself at the left end of the Bar table. On this day I had a transistor in my Bar jacket with the hearing plug in my good ear. My partial deafness was notorious so it did not appear strange that I had a cord sticking out of my ear. From time to time I passed a note with the scores to the judge's associate. It was obvious that the game could go either way but that there would be a definite result in the afternoon. At about midday I announced, "Your Honour, this is entirely my fault and I apologise for it. I underestimated the time my learned friend would take in cross-examination and I will have no witness available until the morning. I feel compelled to apply for an adjournment until tomorrow. I hope that this will not inconvenience the court."

The judge replied, "This case won't finish for several days. You haven't inconvenienced me at all. This is a country case. The witnesses don't live in Little Bourke Street. Of course I will grant the adjournment until 10.30 tomorrow."

As I left the court, the Associate was waiting. "Can you give His Honour a lift to the ground?"

All the old times were not worthy of perpetuating. Before the drinking laws became civilised, pubs had to close at 6 p.m. The old Four Courts Hotel was a club for the Bar before the Essoign Club was established. Many barristers would go to the pub after court and at a quarter to six we would each order a large jug of beer holding at least six pots. We had until a quarter past six to drink it. We settled more cases in that pub than in our chambers. However, on reflection I am sure most of us left the pub in no fit state to drive home. I feel fairly certain that if I arrived home with a blood/alcohol reading below 0.05 the dog would have bitten me.

Petronius wrote as far back as AD 61, "We tend to meet any new situation by reorganising and a wonderful method it can be for creating the illusion of progress while producing confusion, inefficiency and demoralisation."

As my only excuse for writing this, I quote Charlie Chaplin. "Age has its compensations. It is less apt to be browbeaten by discretion."

Philip Opas

R v *Pemberton Billing*: The Black Book Case

THE trial of Noel Pemberton Billing MP for criminal libel in May 1918 was described at the time, and for years afterwards, as the trial of the century. An overstatement probably, but on any view the trial had some extraordinary features: the defendant was a remarkable character, and the judge was almost equally remarkable in his own way; the evidence called by the defendant was utterly fantastic; and the cast of witnesses included Lord Alfred Douglas, the love and nemesis of Oscar Wilde.

The prosecution of Pemberton Billing had its origins in the conditions which existed in England in early 1918. The great war was still deadlocked: the appalling battles of Ypres and Passchendaele had only just ended, and the huge cost had not brought any closer the prospect of peace. There was some sympathy for the idea that traitors within were weakening England's resolve. Casement had been tried only 18 months earlier. And the name of Oscar Wilde was still reviled in polite society.

Noel Pemberton Billing was the independent MP for East Hertfordshire. He was a brilliant and quixotic character who held extreme right-wing views, which found a sympathetic audience in the climate of the times. He had founded a journal called *Imperialist* (shortly afterwards renamed *Vigilante*) in which, on 26 January 1918, he published an article which alleged the existence of the *Black Book*. This was a book said to contain the names of 47,000 English men and women who were allegedly homosexuals. German agents, it said, were exploiting these 47,000 to "propagate evils which all decent men thought had perished in Sodom and Lesbia (sic)".

The article drew no response.

In February 1918 J.T. Grein was to present two private performances by Maud Allan of "Salome" — public performance was still forbidden by the Lord Chamberlain. The first edition of the *Vigilante* (16 February 1918) included the following paragraph:

> The Cult of the Clitoris
>
> To be a member of Maud Allan's private performance in Oscar Wilde's "Salome" one has to apply to a Miss Valetta of 9 Duke Street, Adelphi, W.C. If Scotland Yard were to seize the list of these members I have no doubt they would secure the names of several thousand of the first 47,000.

. . . on any view the trial had some extraordinary features: the defendant was a remarkable character, and the judge was almost equally remarkable in his own way; the evidence called by the defendant was utterly fantastic; and the cast of witnesses included Lord Alfred Douglas, the love and nemesis of Oscar Wilde.

To suggest publicly that Maud Allan was lesbian was, in 1918, sufficiently serious to warrant a prosecution for criminal libel. (Three books which contain accounts of the trial and which were published in 1936, 1951 and 1953 respectively, treat the paragraph as too scandalous and offensive to print in full). The trial before Mr Justice Darling began on 29 May 1918 and lasted six days (compare Casement's trial for treason, which ran three days). The prosecution was led by Ellis Hume-Williams KC, with Travers Humphreys.

Pemberton Billing acted for himself. He began by asking Darling J to disqualify himself. The judge had a reputation for quick wit, and his clever remarks on the Bench were famous, but not universally acclaimed. Pemberton Billing pointed out that he had, as a member of parliament, criticized the judge for "the atmosphere of levity which your Lordship has frequently introduced into cases you have tried". He said he would not receive a fair trial from the judge he had criticized so publicly. Mr Justice Darling replied that he had never noticed the criticism, and that "the fact that you take an unfavourable view of me can be no reason why I should not try your case, because by the same process you might exhaust every judge on the bench. People cannot choose the judges who shall try their cases . . ."

Pemberton Billing's plea of justification was supported by particulars which included the assertion that "Salome" was:

> a stage play by Oscar Wilde, a moral pervert . . . an open representation of degenerated sexual lust, sexual crime, and unnatural passions . . . The German authorities, in furtherance of their hostile designs upon this country, have . . . compiled a list of men and women . . . in this country with a record of their alleged moral and sexual weaknesses . . . which would render such persons easy victims of pressure, and enable them . . . under fear of threats of exposure to be forced into courses of conduct agreeable to the wishes of . . . Germany."

The course of the prosecution evidence was relatively uneventful. Maud Allan gave evidence, in which she defended the artistic merit of "Salome". This did not endear her to the jury, or to the judge who clearly shared the prevailing view that Wilde's talent had been much overrated. Pemberton Billing cross-examined her to the effect that she had a brother who had been convicted of a double sex-murder in America, and that she was therefore a sexual pervert. (The link remains as obscure now as it was then.)

Then the defence case began. Pemberton Billing called Eileen Villiers, who said she had seen the *Black Book* in the possession of Prince William of Weid, Mpret (ruler) of Albania since 1913. She said that the list of names included Mr Justice Darling, Mr and Mrs Asquith, and

Lord Haldane . . . where upon the judge ordered her to leave the witness box. He rebuked Pemberton Billing for his questions, saying: "I have not the least objection to your having asked the one about myself, but I am determined to protect other people who are absent."

Then Captain Harold Sherwood Spencer was called. Reading an account of his evidence, it is clear he was certifiably mad. He had written the two articles. He gave an account of his extraordinary adventures as ADC to the Mpret of Albania, followed by the circumstances in which his attempts to produce proof of his claims had been systematically thwarted. It was a magnificent, if impenetrable, edifice of paranoid self-delusion.

He was followed by various medical experts who offered views about the link between immoral literature and sexual perversion. None of them had seen the play, but thought playing in it would pervert Maud Allan's character. Likewise the dramatic critics, who were able to say with confidence that the play was an evil and corrupting influence, although they had not seen it performed. (It might be added in their defence that this seems to be an essential skill of critics, that they can criticise without seeing or hearing the object of their attack.)

Then came Lord Alfred Douglas. By then 48 years old, the man Wilde had called Bosie was savage in his attack on Wilde as a man and as a writer. He said Wilde was ". . . the greatest force for evil that has appeared in Europe in the past 350 years …". He criticized "Salome" as "a most pernicious and abominable piece of work". (It seems that his 312-page autobiography, published in 1914 and filled with criticism of Wilde and justification of himself, was not enough to slake his thirst for revenge). He attacked counsel for the prosecution for his conduct of the case, and when the judge rebuked him for this, he attacked the judge for his conduct of this and previous trials in which the witness had been involved. Douglas' conduct in court was so troublesome that the judge ordered him to leave, which he did. He came back for his hat, literally: he had left it on his seat in court!

Pemberton Billing's closing address was a polemical diatribe which focused on the link between "Salome", the *Black Book*, and England's inability to prevail on the Western Front. Hume-Williams' closing address concentrated on the libel, which had scarcely been answered by the defence. Its effect must have been diminished by the frequent interruptions from Pemberton Billing, despite warnings from the judge.

The judge's summing up was likewise interrupted: by Pemberton Billing, who was warned repeatedly; by Lord Alfred Douglas, who was removed from the court; and by Captain Spencer, who was also removed.

It took the jury half an hour to reach a verdict of acquittal. This was greeted with great acclaim from Pemberton Billing's supporters in court.

* * * * * * *

Pemberton Billing continued his strange career as parliamentarian, inventor and litigant. His political prominence faded after the armistice deprived his ultra-nationalist views of their earlier appeal. With the benefit of a clever mind and an inherited fortune, he founded Pemberton-Billing Limited to produce his "Supermarine" aircraft. The company later produced the Spitfire fighter plane. He invented a combined heating and cooking unit, which was shown at the Westminster Homes Exhibition a few months after the criminal libel trial. He designed the Phantom camera system, an example of which sold at Christies for 147,000 pounds in 1995. And he founded the World Record company, which developed a long playing, constant surface-speed record player to compete with the Edison phonograph; it was able to hold 10 to 100 times as much audio material as the then current 78s. The technology was complex and did not prevail.

* * * * * * *

It seems improbable in the extreme that there exists any connection between this remarkable trial and the Esplanade Hotel in St Kilda. In fact, in 1923 Pemberton Billing set up the first Australian disc recording plant, under the name of World Record (Australia) Limited, and an associated radio station. The plant was in Bay Street, Brighton, and was the base of radio 3PB. Pemberton Billing established 3PB for the purpose of broadcasting the company's recordings. It was a limited "manufacturers' licence", a sort which was only available during the first few years of wireless broadcasting in Australia.

The first recording made by World Record (Australia) was released in July 1925, and featured Bert Ralton's Havana Band, then performing at the Espy.

Pemberton Billing died, virtually forgotten, in 1948. The Phantom camera is no more than a museum piece. The constant speed gramophone record is no more. But the Espy survives, and still provides a stage for comedians and musicians. Currently at the Espy you can hear such groups as Mav and Her Majesty's Finest, Ruby Doomsday, Pout, Nude Lounge, and The American Public. Bert Ralton would be proud.

Julian Burnside

Recent Works by Garry McEwan at the Essoign Club

LEADING Australian artist Garry McEwan exhibited original oil pastel drawings at the Essoign Club, Owen Dixon Chambers, from 24 May to 5 July 2001.

In this exhibition we saw a series of Melbourne images, including Flinders, Brunswick and Collins streets — all painted in McEwan's trademark vibrant colours.

Also on show were a series of drawings inspired by nature in autumn. We saw peppercorns, chestnuts and scattered love leaves. "Nature is a constant source of inspiration. I walk through my garden and discover treasures fallen from heaven — beauty is all around us," McEwan says.

Garry McEwan has had renowned success over recent years, his works now in collections all over the world. Having had sell-out shows for a number of years, the work is in demand while prices are still affordable. The artist is currently completing work for the Australian Consulate in New York.

McEwan's philosophy is to create images that make people feel good, perhaps the reason for the widespread appeal of his work.

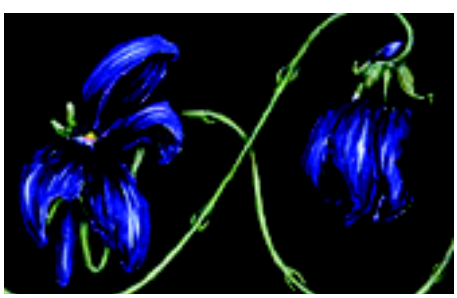
All works are available at the Garry McEwan Gallery, 137 Acland St, St Kilda, Tel: 9534 0582, and on *www.garrymcewan.com.au.*

John Monahan, Michele Williams and Jack Keenan QC.

Tess McLoughlan, Alex Zafiriou and Gerald Hardy.

Carl Matto, Mary Kroni and Alex Zafiriou.

On Acland Street.



Violets.

Mary Walsh and Mary Kroni.

Ruth Ross Exhibition at Essoign Club

Ruth Ross with her self-portrait.

THE 6 September 2001 opening night was, as usual, very well attended by club members, their guests and members of Melbourne's art community.

The exhibition features a magnificent portrait of the artist's brother, Michael Shand QC.

Ruth Ross, an accomplished painter and teacher, says she chose her somewhat unwilling subject carefully.

"Michael was a bit reluctant to be painted but overcame his reticence due to his strong support of his family. I called the oil 'Brotherly Love' for obvious reasons," Ruth says.

Admiring a self-portrait: Peter Fox, Heather Gordon and John Wadsley.

The exhibition reveals Ruth's exploration of issues and emotions which she conveys with sophisticated control of oils, acrylics, watercolour, gouache and photography. As one visitor said on opening night: "Its refreshing to see art work that clearly shows the artist can draw."

Ruth has been teaching and exhibiting for many years after having completed a Bachelor of Education in Art and Design at the University of Melbourne.

She has exhibited at Gryphon Gallery at the University of Melbourne, the Distelfink Gallery and recently at the Walker Street Gallery. In March 2000, Ruth presented a very successful joint exhibition with Jill Holmes-Smith at the Glen Eira Gallery in Caulfield.

Gunilla Hedberd, Michael Shand QC (subject of portrait behind) and Mirella Trevisiol.

Ruth is currently teaching art and design to senior students at Xavier College and says she enjoys nurturing creativity and enthusiasm in students. If you missed the opening night, come up for lunch and admire Ruth's works. Ask Anthony behind the bar for a price list. The exhibition closes 20 October.

Royal Commissions and Permanent Commissions of Inquiry

Stephen Donaghue
Butterworths, 2001

DESPITE the regular appointment of Royal Commissions in Australia and the emergence of standing investigative commissions at the Federal and State levels, there has been no Australian text in this area for nearly 20 years. Hallett's *Royal Commissions and Boards of Inquiry* (1982), although a seminal text in the field, has been overtaken by far-reaching statutory and common law developments.

Stephen Donaghue's *Royal Commissions and Permanent Commissions of Inquiry* has stepped into the breach. Apart from extensive coverage of case law concerning the *Royal Commissions Act 1902* (Cth), and its State equivalents, Donaghue examines the statute and case law with respect to the National Crime Authority, the Australian Securities and Investments Commission, the Independent Commission Against Corruption (NSW), the NSW Crime Commission, the Criminal Justice Commission (Qld), the Queensland Crime Commission and the Anti-Corruption Commission (WA).

The emphasis of the work is on enquiries related to criminal conduct and issues arising at such inquiries, and afterwards, when evidence is sought to be adduced in criminal proceedings. This is not to say that the book is confined in its scope. It deals most effectively with the investigative powers of commissions, limitations on those investigative powers and procedural rights in the course of commission investigations. These topics are of broad application whether an inquiry relates to a corporate collapse, a rail disaster, a police service, systemic failures in an area of government administration or criminal or corrupt conduct.

The book is exceptionally well researched. There is a detailed coverage of relevant Australian and overseas authority and literature. It remains, however, a practical work.

Practitioners will have experienced requests for urgent advice or representation arising from the activities of a Royal Commission or standing commission of inquiry. This may relate to private hearings, the execution of a search warrant or some other issue that has arisen at short notice. The book will equip practitioners to deal with urgent situations as well as representation at public hearings where coercive powers are exercised. It contains a thorough and readable coverage with respect to issues including the use of coercive powers, privilege against self incrimination, legal professional privilege, procedural fairness issues and contempt. There is a most useful coverage of the use of compelled evidence from a witness, including so-called "use immunity" and "use derivative use immunity".

The book should provide considerable assistance to those called upon to assist a Royal Commission or permanent commission of inquiry. It will be a most valuable tool in the hands of practitioners called upon to advise or appear for an interested person before such a Commission. One minor criticism is the omission from the book of reference to the Police Integrity Commission (NSW) which performs a most important function in New South Wales. No doubt that omission will be remedied in the inevitable second edition of the book.

The appointment by the Commonwealth Government of the HIH Royal Commission serves as a timely reminder of the utility and value of a contemporary book in this field. In the words of Sir Edward Woodward OBE, the author of the foreword: "I only wish that it had been available decades earlier, when I was assisting or conducting commissions of inquiry."

The book will be a most welcome acquisition for any practitioner called upon to advise about or appear before a Royal Commission or statutory commission of Inquiry.

Peter Johnson SC

Mediation: Skills and Techniques

By Laurence Boulle
Butterworths Skills Series, 2001
pp. i–331

Traditionalists maintain that cases should continue to be heard and determined by courts. But the world has moved on. Going to court is expensive and time consuming. Even the courts themselves encourage use of alternative dispute resolution (ADR). By far, the most widely used form of ADR is mediation.

Professor Boulle's book on *Mediation: Skills and Techniques* is a welcome addition to the writings in this area. In the preface he says the book "deals with the skills and techniques of mediators". Also in the preface he makes clear that the book is intended to be "practical and pragmatic". It thus "deliberately avoids dealing with different models of justice". Nor does the book deal with the question "of whom mediation is appropriate".

The book lives up to its promise. It is both practical and pragmatic. It gives sound, helpful insights into topics like — Managing the Mediation Process (chapter 5); Assisting the Communication Process (chapter 6); Encouraging Settlement (chapter 8); Avoiding Mediator traps (chapter 11); Other topics include — Establishing the Foundations for Mediation (chapter 2); Maintaining a Favourable Climate (chapter 3); Facilitating the Negotiations (chapter). Where appropriate useful examples are given to highlight points. Effective use is made of headings and sub-headings, making the text very readable indeed. There is an important chapter for members of counsel (chapter 12) on Developing a Practice and Practising Mediation. On the use of humour, interestingly, Professor Boulle writes (p. 47): "Jokes about mediators will no doubt emerge, but should be treated with great insouciance by serious practitioners."

This is a very handy book, well worthwhile purchasing. Established, and budding mediators will find it of edless help and assistance.

Damien J. Cremean

Annotated Consumer Credit Code and Regulations (2nd edn)

Beatty, Smith and Barclay
Butterworths, 2000
pp. lxv + 410 pages, including index (paperback)

THIS is the second edition of one of a number of annotated Consumer Credit legislation volumes currently on the market. Its three authors are all partners of that well known small law firm Mallesons. It is up to date as of late last year, and incorporates all of the 1998 amendments made to the Code, some of which commenced on 28 October 2000. Notwithstanding its unattractive purple cover with gold lettering (need I say more), the book itself is quite elegant.

Now that the Code has been in operation for a few years, a modest body of authority has accumulated around it. Most

of this can be found in the commentary in this book. The commentary is also useful for offering suggestions and examples as to how provisions of the Code should be interpreted when there is no decided authority.

The book comprises a full annotated text of the "Consumer Credit Code", and the "Consumer Credit Regulations". It also has a good index, and a table of cases and statutes, as well as a comparative table for State credit legislation and a table of the differences for the WA Code. There were in addition well-set-out tables of the effect of the 1998 amendments, and a comparison of transitional provisions. These are particularly useful if one is dealing with documents or transactions not entirely governed by the Code and Regulations as currently in force

I found this annotated Code easier to use than some of its competitors. It is well set out and the relevant information was quick to find. Those sections of the commentary I read (I won't pretend it was the lot!) seemed authoritative, clear and well-written. They included many practical tips, which would probably be of more use to a credit officer or solicitor conducting or planning a transaction than to a barrister, but which are still helpful to know. There were good (and easy to follow) cross-references to other relevant provisions and commentary. All in all, I can see this work running into several editions after the second.

Michael Gronow

Outline of Succession (2nd edn)

By Ken Mackie and Mark Burton
Butterworths, 2000
pp. i–xl including Contents, Preface, References, Table of cases, Table of Statutes; 1–279 including Index.

THE very nature of this text is both its strength and its weakness. An excellent short reference guide, the *Outline of Succession* provides a short review of almost the entire law with respect to wills and succession. What it lacks in depth it makes up for in breadth.

The book is a student text but not an overly academic one. It contains questions at the end of each chapter and touches on many aspects of history which will not be relevant to a practitioner. Having said that, for practitioners who occasionally dabble in succession law, they would do well to have this little book on their shelves. The book covers everything from the validity and the making of wills, the formal requirements, the construction of wills, the nature of wills and the gifts they contain, the rectification of wills and the formal requirements of wills. It also covers the nature of gifts made by wills, revocation and amendment of wills, the redemption or lapse of gifts. It covers intestacy (including hotch-pot) and moves on to the nature of grants of representation including the general principles of such grants, the appointment of legal personal representatives, their right duties and powers and general principles involving the administration of both solvent and insolvent estates. As can be seen, it covers almost every conceivable aspect of the law of succession. (It also includes some commentary on little explored areas such as indigenous succession laws, wills procured by fraud and privileged wills.)

It also contains a chapter on family provision. This chapter is necessarily brief and probably the most disappointing of all the chapters. It sets out most relevant points but could not be reliably used for the basis of a testator's family maintenance advice.

The book is very well laid out, containing short chapters with easy to read headings. It is easy to navigate, with a comprehensive contents pages and a reasonably good index. It is clearly written. The explanation it gives of some difficult areas — for example, the common law rectification powers, the use of evidence in construing a will — is clear and straightforward.

The book states the law as at 1 August 1999, recent enough to include the major changes made by the *Wills Act 1997* in Victoria, including statutory wills, statutory rectification, informal wills and the various housekeeping changes. Unfortunately, it skims over the breadth of the new provisions with respect to testators family maintenance. It refers to legislation in the various jurisdictions and it is not at all obvious from which jurisdiction the authors hail. (It is a personal gripe of this reviewer that some "Australian" text books primarily use a single State legislation as a model then simply comment on the various other States. This book covers all States — roughly equally.)

The book is very much an "outline" and does not provide a detailed analysis of the law. However, it does refer to the principles, including, often, referring to the admissibility of evidence and the onus of proof required in court. The text relies upon case references for its general propositions but for more important quotes, sets out the exact quote. It is therefore not too academic and not as much as in the "text-book style" as many other books. It is certainly a good practical starting point.

As would be expected from a student text, it does not contain precedents or practical guidance to issues such as stamp duty and taxation. However, for anyone who has the occasional need to prepare a submission or advice in a will area, this is certainly an excellent starting point. It would be an indispensable student text and will remain on the shelves of many practitioners well beyond their student days.

Carolyn Sparke

Land Law

By Peter Butt
Law Book Co. (Thomson Legal & Regulatory Ltd)
pp. i–cxli, 1–895 (paperback)

Peter Butt is a prolific author of books concerned mostly with New South Wales property and conveyancing law. This volume is the fourth edition of his general text on land law.

The preface acknowledges the relevance of the work particularly to New South Wales but also notes that it will be relevant in other jurisdictions given the similarity of property legislation throughout Australia. After considering several chapters in the book I suggest that it has definite relevance in Victoria. In particular, there are some substantial chapters dealing with general topics such as the nature and type of interests in land (tenures, estates, uses, trusts and equitable interests, fee simple, fee tail, life estate, remainders and executory interests and settlements). Other chapters deal in depth with easements, covenants, mortgages and priorities. There is an extensive and interesting chapter dealing with Torrens Title which relates directly to the registration system applicable in Victoria.

A new chapter in this edition deals with native title. There is an extensive and detailed review of all native title decisions running from *Mabo* v *Queensland* (No. 2) (1992) 175 CLR 1 through State and Federal decisions to the present date.

Most of the statutory references relate to New South Wales, as would be anticipated in such a text. Notwithstanding, the book provides a valuable exposition of the wide and varied area of land law. The

book is extremely well indexed and there is extensive footnoting of authorities from all jurisdictions.

This is a wonderful omnibus text that takes into account not just those conveyancing and leasing issues but all relevant interests in land (including trusts and estates). It will be of great assistance to any practitioner involved in property and associated areas. Given the depth of coverage in respect of areas of general application. It is a useful acquisition for Victorian practitioners.

S.R. Horan

Principles of Criminal Law

By Simon Bronitt and Bernadette McSherry
LBC Information Services, 2001
pp. i–lxxxv, 1–900

SIMON Bronitt and Bernadette McSherry have produced a comprehensive and highly informative work on the principles of criminal law.

The Honourable Mr Justice Kirby, in launching the book, was extremely supportive of the authors' commitment to showing how the principles of criminal law reflect the changing social, political and moral concerns about wrongful conduct and particular groups. His Honour also praised the authors for their coverage of "new crimes" or "aspects of old offences that once did not trouble the law". Not only does the book include an up-to-date analysis of the traditional offences of murder, offences against the person and offences against property, but it also incorporates a discussion of offences such as female genital mutilation, sado-masochistic assaults, stalking, offences by people living with HIV knowingly infecting others, computer crime, unlawful invasion of privacy by electronic means, money laundering, sexual trafficking, under-age sexual assaults overseas and child pornography on the Internet. Certain other offences, such as drug offences and public order offences, are given much greater attention in this book than they have traditionally been given, perhaps in recognition of their increasing prevalence in today's society. The chapter on sexual offences is particularly thorough and informative, as are the chapters in Part II (Justifications and Excuses) which discuss mental state defences, provocation, self-help defences and mistake.

The material in the book is presented clearly and the text is supplemented by case studies, perspectives sections, shorter aside boxes, tables and diagrams.

This book encourages the taking of a critical and socially aware approach to the practice of criminal law in light of contemporary standards and attitudes. I am confident that this book will prove to be a very valuable text for all criminal practitioners.

Kerri Judd

Conference Updates

16–19 September 2001: Vancouver. Australian Rules & Probate Conference 2001. Contact Patricia Palman. Tel: 9602 3111. E-mail: lpd@leocussen.vic.edu.au.
20–26 September 2001: Rome, Italy. Pan Europe Asia Legal Conference.
21–23 September 2001: Hobart,19th ALTA Annual Conference. Contact AIJA website.
29 September–6 October 2001: Herron Island. Pacific Rim Legal Conference. Contact Lorenzo Boccabella. Tel: (07) 3236 2601. Fax: (07) 3210 1555.
4–8 October 2001: Christchurch. Law/Asia and New Zealand Law Society Conference 2001. Contact Conference Innovators. Tel: 64 3379 0390. E-mail: info@conference.co.nz.
8–9 October 2001: Best Practice in Corrections for Indigenous Prisoners. Contact Julie Dixon. Tel: (02) 6260 9229.
11–14 October 2001: Canberra. 32nd Australian Legal Convention of the Law Council of Australia. Contact Susan Burns. Tel: (02) 6247 3788. E-mail: susan.burns@lawcouncil.asn.au.
25–26 October 2001: Brisbane. Police and Partnerships in a Multi-Cultural Australia: Achievements and Challenges. Presented by the Australian Institute of Criminology. Contact Julie Dixon. Tel: (02) 6260 9229. E-mail: Julie.Dixon@aic.gov.au.
21–22 November 2001: Melbourne. Mental Health and Criminal Justice Workshops. Contact Julie Dixon. Tel: (02) 6260 9221. E-mail: Julie.Dixon@aic.gov.au.
13–15 December 2001: Hong Kong. Migration Professional Education Seminar. Contact Lorenzo Boccabella. Tel: (07) 3236 2601. Fax: (07) 3210 1555.
8–14 January 2002: Cortina D'Ampgezzo, Italy. Europe Pacific Legal Conference. Contact Lorenzo Boccabella. Tel: (07) 3236 2601. Fax: (07) 3210 1555.
24–30 March 2002. The Matterhorn, Cervinia, Italy. Pan Europe Australia Legal Conference. Contact Lorenzo Boccabella. Tel: (07) 3236 2601. Fax: (07) 3210 1555.
July 2002: Schools and Crime Prevention, Canberra. Contact Julie Dixon. Tel: (02) 6260 9221. E-mail: Julie.Dixon@aic.gov.au.

THE LEGAL WEAR SPECIALISTS

146 King Street, Melbourne
Telephone: (03) 9621 1521
Facsimile: (03) 9621 1529
E-Mail: info@ludlow-legal.com
Contact: Andrew Tolley or Richard Phan
URL: www.ludlow-legal.com

LUDLOWS

Benjamins Jewellers

COURT DRESS

Cultured pearl
8.5mm – 9mm
necklace and gold clasp.
RRP $3,950.

Longines ladies and gents watches
RRP $1,295 each.

1.24ct diamond
pavé set bangle
RRP $3,400.

Pink sapphire
and diamond
set ladies
dress ring.
RRP $3,500.

Blister pearl stud earrings. RRP $800.

Merchants in fine jewellery,
watches and distinctive gifts since 1880.

360 LITTLE COLLINS STREET MELBOURNE 3000 TELEPHONE +613 9670 9416 FACSIMILE +613 9670 3936