VICTORIAN BAR NEWS

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The Living Legends

Welcome: Pamela Tate ☐ Farewell: Justice Balmford and Judge Crossley ☐ The 2003/2004 Victorian Bar Council ☐ Women and the Law: Promoting Difference ☐ A Vote Against Judicial Elections ☐ The Fight Against Terrorism: One Step Forward, Two Steps Back ☐ Justice Cabaret: Life in Law ☐ Unveiling of Women Justices of the Supreme Court of Victoria ☐ Criminal Bar Association Dinner ☐ The Bar Care Scheme ☐ Reserve at the Victorian Wine Precinct ☐ The Basil Fawlty in All of Us ☐ Odd Connections ☐ Lush Family Gift

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for the year 2003/2004
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The Rights of Spring

IN spring an editor's fancy turns to thoughts of water. Thankfulness that we have had some much needed rain over winter, with the bureau promising even more over the coming months to spruce up our gardens and parks. Gratitude for the miracle of water into wine, though we doubt if that carries with it any exemption from the necessity of tasting firsthand the newly released vintages nor making regular excursions to Dan Murphy's. Sheer astonishment, most of all, that very recently a piece of legislation has come into force amending the *Water Act 1989* with provisions, penalties and offences that would send the production crew of *The Castle* into a frenzy of salivation for a sequel.

TO EXPLAIN

The *Water (Irrigation Farm Dams) Act 2002* was assented to on 2 April 2002 but the key provision that sends farmers' knees to water did not come into force until 1 July 2003. Whereas previously under the *Water Act 1989* a farmer could use the water from rain or existing naturally on her land as she saw fit, section 8 of the Farm Dams Act had the effect of requiring a farmer to obtain a licence if she wished to take and use water from a spring, soak or dam on her land for use *other than* domestic or stock use. To take the water from these sources for prescribed purposes (including irrigation in any shape or form, using water for non-domestic crops, or washing down the floor of a dairy) without a licence will make the farmer guilty of an offence under section 63 of the Act, carrying a penalty of 20 penalty units or imprisonment for three months. Not unnaturally, a farmer would feel justified in being aggrieved, even outraged, at such a proposition. What of her rights?

But the scenario in the preceding paragraph is not hypothetical. It is the fact scenario of a case that came before Justice Gillard* in the Supreme Court in May and June this year. In the course of his reasons for decision His Honour discussed at some length the intention of the parliament, the Crown's rights to water, and the common law rights of farmers. He found (at para 37) that the farmer had had for many years the right to use rainwater and other water that occurs or flows (otherwise than in a waterway or bore) on land she occupied, and had had the unqualified right to appropriate for her own use surface water not flowing in a definite or regular channel. A landowner's rights at common law extended to rights exercised over water, even though it interfered with a neighbour's expectations of water flow, without any liability. But the clear intention of the legislature had been to severely reduce and restrict those rights, and even to deprive the farmer of her rights to rainwater (para 57). What the legislature had done in one fell swoop was replace pre-existing common law rights with statutory rights (paras 77 and 87) and restrict the rights as described, imposing a corresponding regime of licensing, offences and penalties. What about compensation for loss of a right?

As the producers of *The Castle* might have scripted as a legal argument, this is not at all the right "vibe". We know from having seen the film that the comic genius of that term lies in its unique encapsulation of the principles contained in section 51(xxxi) of the Constitution, which provides that compulsory acquisition of property by the Commonwealth from the States or from a person can only be on just terms. Property rights are a cornerstone of the law; surely rights to the water on your property are also rights which cannot or should not be taken away without just compensation. Not only is there no compensation in the Farm Dams Act, there is the creation of offences and penalties. The legislature has effectively created a status offence, the offence of having water on land unusable for commercial purposes without a licence. It is a status offence in much the same way as the detainees in detention centres are there for being "illegals", many (most?) having committed no offence other than the offence of being desperate, stateless and homeless, escaping persecution and torture, being a refugee awaiting the processing of their visa applications.

No-one would seriously deny that the crippling drought of recent years and the resultant water shortages have created a need for the State to manage water storage and resources more stringently in its catchment areas. But licences? offences? penalties? where none existed before? A stripping away of rights by sleight of hand? Now what will *The Castle* team do with that in the sequel, *The Farm*? An angry mob of farmers with pitchforks storming Spring Street as the Speaker strides out onto the steps to soothe them

Ashworth v *State of Victoria* [2003] VSC 194 (17 June 2003).

with the promise of repeal of the offending Act in the Spring session of parliament? Sorghum sacks of compensation to boot? As Darryl Kerrigan would almost certainly say, "You're dreaming".

NEW ESSOIGN TAKES FLIGHT

In the last issue of *Bar News* the reopening refurbishment and relaunching of the Essoign Club was prominently featured. Bar and Bench appear to have flocked in, if a typical day's morning coffee and lunch scene alone is any guide. We have heard many members of the Bar freely confess that they have been more frequently to the new Essoign Club in the past two months than in the previous 20 years. The team appears to have hit on a winning formula, an inviting space and much return custom. We hope the trend continues onwards and ever upwards.

SUPREMO RETIRES

This September, Peter Ryan, the Secretary of the Board of Examiners for Barristers and Solicitors in Victoria turns 80, and retires in October after 15 years in the job. Author of *Fear Drive My Feet*, his compelling and unforgettable autobiographical account of an 18–20 year old's experience of the Second World War in New Guinea as a patrol officer; director of Melbourne University Press during a period which published Manning Clark, Brenda Niall, Elsie Webster and a small but significant archive of the best scholarship in Melbourne over a quarter of a century; journalist and writer for the *Age* and *Quadrant*; wit raconteur and bon vivant; he will be sorely missed by many of us around town. (But not, I suspect, by those seeking admission to the Supreme Court with interesting "disclosures".)

Have a long, happy and healthy retirement. Ancient person, *ave atque vale.*

WOMEN WOMEN EVERYWHERE

… it's enough to make you think. In this issue of *Bar News* you will find: a warm welcome to Pamela Tate S.C. on her appointment as Solicitor-General for the State of Victoria; an excellent, informative and though-provoking address by Her Honour Justice Marilyn Warren, "Women and the Law: Promoting Difference", delivered at the inaugural Womens' Achievement in the Law Awards in May this year; marking of the occasion in which a photographic portrait of five women justices of the Supreme Court of Victoria was unveiled, the second in a series of "Images of Women in the Law"; recognition of the generous gift donated to the Victorian Bar by Lady Lush, widow of Sir George, on display in the glass cabinet of the Bar Council Chamber; and, on a light-hearted and humorous note, a photographic rendition of the Women Barrister's Choir singing "I am lawyer" (to the tune of "I am woman", the Helen Reddy 1970s feminist anthem) at the Justice Cabaret Life in Law evening held last month. These, together with some excellent articles by Mr Ashley Halphen and Mr Yusef Zaman, to name but two other fine contributions, we think make a bumper spring issue of *Bar News.*

As the factional warlords might even concede, you need both wings to fly.

The Editors

Looking Back on a Year of Achievements

MY first, and very pleasurable task as the new author of this column is to thank the previous Bar Council for its work over the past year. I particularly thank those who have left the Council for their notable service to the Bar. Justice Robert Redlich and Chief Judge Michael Rozenes resigned in October and November 2002 respectively following their well deserved and universally applauded appointments to the Bench. Jeanette Richards resigned in June 2003 upon moving to Sydney; she had served on the Council for six years, including two years on the Executive Committee, and before that she was the Honorary Secretary of the Bar for some years. Jack Rush QC, Richard McGarvie and Kim Knights left in September. Richard McGarvie had served for six years; Kim Knights for a year. Each one of them contributed significantly to the work of the Bar Council, and their presence will be missed.

I congratulate and welcome to the Council Iain Jones, Rachel Doyle, Justin Hannebery and Paul Connor — all newly elected in the recent September 2003 elections.

LAST YEAR'S CHAIRMEN

Last year began with Robert Redlich as Chairman. He resigned in October upon being appointed to the Supreme Court. Jack Rush succeeded him and served the best part of a full year's term. Each was an outstanding Chairman.

During each of their terms as Chairman, the Bar Council was engaged in significant developments in the ongoing major issues of legal professional regulation, professional indemnity insurance, continuing legal education and, of course, the major renovation of Owen Dixon Chambers East, including the Bar's substantial commitment to the new Essoign.

Robert Redlich served on the Bar Council for over eight years, 14 months as Chairman. His term saw the finalisation of plans for the second stage of the renovation of Owen Dixon Chambers East from

the first floor up, the execution of contracts, and the commencement of work on the lifts and the first floor.

Robert believed strongly in the Essoign and the importance of the Bar having such a facility in which members could meet and mingle and entertain friends. The new Essoign is a very tangible legacy of Robert's efforts — and, of course, of the work of Tony Howard QC and his Essoign Development Committee. I am delighted to see that the Essoign is continuing to build on its initial favourable reception, and is attracting more and more new members — a 60 per cent increase of 350 members since May.

I congratulate and welcome to the Council Iain Jones, Rachel Doyle, Justin Hannebery and Paul Connor — all newly elected in the recent September 2003 elections.

Robert also believed in the importance of Continuing Legal Education, and his term saw the launch of the Bar CLE Program by Chief Justice Michael Black in July 2002.

Hallmarks of Robert's Chairmanship were his energy, his dedication and commitment to the independence of the Bar and the critical importance of its role in professional regulation, and his ready smile and generosity of spirit.

Jack Rush served on the Bar Council for 13 years — 10 years on the Executive Committee, and 10 months as Chairman. His term saw the completion of the first floor renovations and the commencement of work on the 13th, 12th and 11th floors — the first of the three-floors-at-a-time stage of construction, with the consequential increased strain on available chambers accommodation. He worked closely with Bar members affected by the construction work, and with Barristers Chambers Limited, to assess and alleviate the situation, both in relation to the construction and the shortage of chambers.

Jack was a great supporter of Continuing Legal Education. During his term three-years' CLE was introduced as a requirement for those coming to the Bar in the September 2003 Readers' Course — and, after a survey to enable members to express their views and Jack personally meeting with the CLE Committee to discuss the matter, in June 2003 a unanimous resolution of the Bar Council was passsed expressing in-principle support for the extension of a mandatory CLE requirement to all members of the Bar.

Like Robert Redlich, he also strongly supported equality of opportunity at the Bar and, in his last couple of weeks as Chairman, launched the media release of the Bar Equality Before the Law Committee Survey Report on Court and VCAT Appearances by Women Barristers.

Jack Rush was articulate and forthright in addressing current issues such as the Commonwealth enquiry to review the law of negligence; the critical role of the Ethics Committee in professional

regulation and discipline; and the maintenance of professional standards in the face of increasing application of competition theory to legal regulation.

His personal commitment to the work of the Bar Council was remarkable, and his unvarying good humour and equanimity made his 10-month term seem to the rest of us even shorter than it was.

On behalf of the Bar, I thank both last year's Chairmen for their outstanding work. Having been in the position myself now for just over two weeks, I appreciate more than ever just how much the Bar owes them.

RETIRING CHAIRMAN OF BCL AND BAR FUND

Ross Robson, QC, has retired from the Boards of Directors of Barristers Chambers Limited and Barfund Pty Ltd (the trustee of the Victorian Bar Superannuation Fund).

Ross has been a Director of Barristers Chambers Limited for nine years and Chairman for the last five years. His clear appreciation of the priorities of BCL and of the financial exigencies under which it operates has guided the Board through a number of major initiatives.

He introduced and implemented major organisational changes in the appointment of a Chief Executive Officer and the establishment of BCL offices separate from those of the Bar Administration. He also put financial dealings between BCL and the Victoria Bar Inc. on a formal and sound footing.

The re-organisation of BCL finances included the realisation of the Company's investment in a vacant block of land in Little Bourke Street. This involved complicated steps to remove easements and covenants, and to obtain a permit for the erection of a car park in order to realise the value of the site.

Over the course of Ross Robson's nine years on the Board, the total shareholder equity has risen from a deficit of nearly $3 million to a credit of over $31 million.

He has been a strong and decisive Chairman, and has presided over the entire process of planning and implementing the current major renovations of Owen Dixon Chambers East — a massive and complex undertaking that will benefit the Bar for succeeding generations.

Other projects have included the establishment of a new set of chambers — Joan Rosanove Chambers; the negotiation of an extension of BCL's lease over Latham Chambers; and the establishment of the Bar Internet system.

Ross has served the Bar Superannuation Fund for some 23 years, first as a Trustee, then as a Director of Barfund Pty Ltd. He has been Chairman of Barfund for the last seven years.

Over the course of his association with the Fund it has grown from about $1.5 million to about $90 million. Significant initiatives during his Chairmanship have included the appointment of a new administrator and an investment adviser, a change in the structure of the fund to a unitised fund, the establishment of an allocated pension division, the offering of investment choices, and the creation of an ability of members to access information on investments through a secure link through the Bar Website.

On behalf of the Bar I thank Ross Robson for his extraordinary and dedicated service to Barristers Chambers Limited and to the Victorian Bar Superannuation Fund.

LEGAL PRACTICE ACT REVIEW

In September 2003 the Attorney-General established an Implementation Group to work with the Department of Justice in developing legislation to implement the new framework for the regulation of the legal profession in Victoria announced on 25 July 2003. It is proposed to introduce legislation in Autumn 2004 with a view to implementation in 2005.

The main elements of the new framework are:

- A Legal Services Board will be responsible for funding, policy and non-disciplinary regulation.
- A Legal Services Commissioner will be the Board's CEO, and will be the single point of entry for all complaints against lawyers.
- The Commissioner may delegate the investigation and prosecution of complaints to the Bar and Law Institute, and has power to review any such investigation.
- Other regulatory functions may also be delegated to the professional associations.
- VCAT will hear all prosecutions and civil disputes between clients and lawyers in a separate Legal Practice List to operate largely in the manner of the current Legal Professional Tribunal.
- The Legal Services Board is to have seven members: a Chair appointed by the Attorney General; three non-practising members appointed by the Attorney after consultation with stakeholders; and three practitioners comprising two solicitors and 1 barrister, to be elected by the professional bodies.
- The Legal Services Board is to have the power to issue practising certificates, but also the power to delegate that function to the profession associations, subject to the professional associations meeting performance targets in that respect.
- In order to facilitate the establishment of the new system, and the transition, the initial appointment of a Legal Services Commissioner, once

the legislation is passed, will be by the Attorney-General. Thereafter, successive Commissioners will be appointed by the Board.

The Bar sees the delegation of the investigation and prosecution of complaints, and of the issuing of practising certificates, as key components in the scheme, and welcomes the opportunity of working with officers of the Department of Justice as part of the Implementation Group in developing the legislative framework.

NATIONAL LEGAL PROFESSIONAL REGULATION PROJECT OF SCAG

Since 2002 the Law Council of Australia and its constituent bodies, including the Victoria Bar, have been working with officers of the Standing Committee of Attorneys General (invariably referred to, unfortunately, as "SCAG"), on a model bill aimed at achieving harmonisation of legal professional regulation throughout Australia in order to facilitate national practice.

The model bill is unlikely to have any effect on the regulatory framework proposed for Victoria as described above. While it will establish detailed core provisions in relation to national practice (such as, for example, in relation to trust account regulation), the non-core provisions (such as in relation to the admission of local legal practitioners) will provide only the basic principles, leaving each State to determine its own particular arrangements.

On 20 September 2003, the Directors of the Law Council of Australia completed another review of the draft model bill.

SCAG is expected to finalise a draft for public discussion later this year, and the outcome of this process will also be taken into account in developing the proposed Victorian legislation.

PROGRESS OF RENOVATIONS TO OWEN DIXON EAST

The 13th, 12th and 11th floors of Owen Dixon East — all chambers — are expected to be fully operational by about the middle of October. Work will soon begin on the next three floors. The Bar Council continues to work with BCL on the shortage of accommodation necessarily involved in the renovation project.

ACCOMMODATION SURVEY — SEPTEMBER 2003

The Bar Council and BCL are concerned about the current shortage of accommodation, particularly of accommodation affordable to new barristers coming out of the Readers' Course. The Chambers Sharing Rules have been relaxed to alleviate the situation, and a number of barristers are now sharing chambers.

A survey of all counsel of less than 3 years call has been carried out to ascertain the current situation, needs, and responses to possible options in relation to accommodation by reference to ranges of rental cost and to sharing.

The survey has only just been completed, and a full analysis of the results and of possible strategies to accommodate the identified needs is a matter of priority for the Bar Council.

The Bar has, over the years, consistently opposed the appointment of acting judges as tending to undermine the fundamental principle of judicial independence.

ACTING JUDGES

There has recently been discussion in the press about the possibility of appointing short-term acting judges. *The Age* has expressed editorial support for such appointments.

The Bar has, over the years, consistently opposed the appointment of acting judges as tending to undermine the fundamental principle of judicial independence.

Such proposals are not new. On 18 August 1967 the Bar Council published a statement in response to a proposal by the then Attorney-General to appoint Commissioners who would exercise the powers of a judge in order to clear congestion in the Supreme Court jury lists. That statement laid out the Bar's principled opposition and included an historical outline of the development of the independence of the judiciary and its significance.

In that statement, the Bar referred to the development of judicial independence in England, in the United States, and in Australia. It quoted Alexander Hamilton from the *Federalist* papers (in connection with the ratification of the United States Constitution more than two centuries ago) in which he dealt specifically with temporary appointments and warned strongly against them:

> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there will be an unwillingness to hazard the displeasure of either.

Referring to a statement in April 1997 by the Chief Justices of the States and Territories on the threat to judicial independence posed by the appointment of acting judges, Chief Justice Sir Gerard Brennan wrote in *The State of the Judicature* (1998) 72 ALJ 33 at 34: "Judicial independence is at risk when future appointment or security of tenure is within the gift of the executive."

The 10 April 1997 statement of the eight Chief Justices of the States and Territories adopted the following principles relating to the appointment of judges of the Courts of the States and Territories:

1. Persons appointed as Judges of those Courts should be duly appointed to judicial office with security of tenure until the statutory age of retirement …
2. The appointment of an acting judge to avoid meeting a need for a permanent appointment is objectionable in principle.
3. The holder of a judicial office should not, during the term of that office, be dependent upon the Executive Government for the continuance of the right to exercise that judicial office or any particular jurisdiction or power associated with that office

Justice Michael Kirby spoke forcefully against the appointment of acting judges in an address in September 1998: "Acting Judges — a Non-Theoretical Danger", referring not only to the principle of judicial independence, but to practical concerns — such as, not merely actual bias, but the appearance or reasonable apprehension of bias — a matter which, as Justice Kirby points out, of its very nature, cannot be proved empirically because it rests on appearances and inferences.

If a barrister would love to be a permanent judge, may he or she not be tempted

(or appear to be tempted) to avoid a decision that might upset the appointing government? If a solicitor generally acts for insurance companies (or workers), might he or she not be tempted (or appear to be tempted) to avoid making decisions that could upset actual or potential clients, their law partners or their interests? With sections of the media baying for law and order and stiffer penalties, might an appointee hoping for a permanent seat on the Bench not be influenced by the need to avoid an unpopular sentencing or bail decision, however merited it might seem on the evidence or argument? These are not really theoretical questions. Every informed member of the legal profession knows of stories that are circulating.

His Honour concluded with the memorable statement:

> Do not pretend to citizens that busy part-time practitioners, scurrying back to their offices and chambers, are true judges. They are not. And they should not be held out as such.

The Attorney-General is reported to be "looking at a range of models, including the British recorder system, which allows barristers to be appointed as short-term judges": *The Age* 8 September 2003. The 10 September *Age* editorial also fastens on "a system of 'recorders' or short-term judges".

It is often pointed out that many other jurisdictions have acting judges. *The Age* editorial mentions England and New South Wales. There are at least two flaws in this argument.

First, it needs to be made clear that the English Recorder system is not one of acting judges. Recorders are appointed permanently, not temporarily. They are appointed to undertake part-time duties rather than full-time. They are required to sit judicially for at least 15 and not more than 30 days a year. They have security of tenure from initial appointment. Initial appointment "is for a (renewable) period of five years", and "appointments will be automatically extended for successive terms of five years, subject to the individual's agreement and the upper age limit [65], unless a question of cause for non-renewal is raised or the individual no longer satisfies the conditions or qualifications for appointment".

Second, the Victorian Attorney-General is apparently considering the appointment of practising barristers and solicitors. Since about 1999 or 2000, New South Wales has not done that. The present acting Supreme Court judges are all former judges. Two-thirds of the present acting District Court judges are former judicial officers; one-third are non-practising legal academics. Justice Kirby's speech was in 1998, when the New South Wales District Court had some 50 acting judges, most of whom were practising barristers or solicitors. That situation, was condemned by judges and the profession. The 1998 New South Wales Bar Association's President's Report said of it: "Most thinking lawyers see it as a scandal."

The Attorney-General is reported as linking acting judges with the appointment of women, asserting that the appointment of short-term acting judges would "advance female representation on the Bench" and that "a wider pool of acting judges would be good . . . for the advancement of women lawyers, who are rare in reserve judge ranks": *The Age* 8 September 2003.

The Attorney-General has an exemplary record of appointing well-qualified women to judicial office, and in advancing the cause of women in the profession by, for example, adoption of the Bar's Equal Opportunity Model Briefing Policy. The Attorney launched the Women Barristers Association internet-based directory of women barristers. He gave the address at the Women Barristers Association dinner in 2001. And he unveiled the first Images of Women in the Law photographic portrait of Justice Sally Brown. However, the appointment of a short-term acting judge is made no less offensive to the fundamental principle of judicial independence by virtue of the appointee being a woman.

The appointment of a short-term acting judge is made no less offensive to the fundamental principle of judicial independence by virtue of the appointee being a woman.

EQUALITY OF OPPORTUNITY FOR WOMEN AT THE VICTORIAN BAR

Members will have seen the newspaper reports of the 21 August 2003 release of the Bar Equality Before the Law Committee Survey Report of Appearances by Women before the Courts and VCAT. The report shows that women barristers are disproportionately underrepresented in court, particularly in more senior work. The Bar Council is working with the Law Institute and with the clerks to do what it can to promote the adoption and implementation of the Equal Opportunity Model Briefing Policy practices.

LCA: ROSS RAY ELECTED TO EXECUTIVE; BOB GOTTERSON QC PRESIDENT

Ross Ray QC has been the Victorian Bar representative on the Law Council of Australia (now that LCA is incorporated, our Director) for the last three years. At the LCA Directors' Meeting on 20 September, Ross was elected to the six-member Executive — a pleasing vote of confidence, in that Law Society (as well as Bar Association) votes were needed for him to be elected.

Also on 20 September, Bob Gotterson QC, a former President of both the Queensland Bar Association and the Australian Bar Association, became President of the LCA, succeeding Ron Heinrich of the New South Wales Law Society. Stephen Southwood QC, Vice President of the Northern Territory Bar Association became President Elect.

THE YEAR AHEAD

I count myself fortunate to have inherited from my predecessors an experienced and congenial Bar Council, many of whose members have served on the Council for some years. I have a formidable team in Ross Ray QC, Kate McMillan S.C. (Vice Chairmen). (At the time of writing, the positions of Honorary Treasurer and Assistant Honorary Treasurer have not been permanently filled.) Richard Attiwill has kindly agreed to remain Honorary Secretary for the time being, and Sharon Moore and Kate Anderson are both Assistant Honorary Secretaries. I look forward to working with them all. It is difficult to predict at this stage what the big problems will be; but there is no doubt that there will be plenty. There always are.

Robin Brett QC
Chairman

Making Courts More Accessible to the Working Public … and Practitioners

BALANCING the scales of justice is not the only juggling act facing 21st century legal practitioners. While some consider an equilibrium between their professional and personal pursuits to be a luxury they can't afford, or even the property of the unambitious, work/life balance is vital for a number of reasons.

Firstly, it is important to us as human beings, and as properly functioning practitioners. Our health and our families are not the only ones who suffer from our overextended work ethic. The legal forum benefits from participants with a broader perspective, and clients benefit from representation by a profession whose values, experience and backgrounds better reflect their own. However, striking a work/life balance in the legal profession is also crucial if we want the profession to attract and retain the best and the brightest practitioners, if we want to ensure that women are able to participate at the highest levels of the law.

This simple fact is not because we need to make exceptions for women, or to accommodate them. This is not because women can't "hack the pace" or aren't as committed to the job as others who seem able to dedicate 16 hours of every day to paid employment. It is simply because women have the physical capacity to bear and nourish children, and because, in our society, women still seem to carry the lion's share of rearing children and caring for other family members. Consequently, any profession hoping that women will remain in and rise through its ranks must change the way that it approaches this issue.

Of course, all of us are aware of the challenges facing women at the Bar, and they have not escaped the notice of the highest judicial office in the land, Chief Justice Gleeson recently suggesting that courts consider establishing childcare facilities. Childcare is certainly important, and a Court facility may give parents

additional flexibility to participate in long court days without having to leave in time to collect children at an external location. But simply entrenching the onerous demands of court life is not the only solution. Parents are not necessarily looking for more childcare options. Many of them are looking for more time to spend with their children, without incurring the derision of their colleagues in doing so.

In my view, we should not continue to base professional acknowledgment solely on the traditional model of constant availability. In my view, we must explore ways to reward practitioners who have been out of the workforce for a period of time, or who are participating on a part-time or flexible basis. Of course, there are already a number of barristers carving a role for themselves in advice and lecturing work, or in part-time hours. But in general the odds remain stacked against them. Overheads, including thousands of dollars in Chambers fees, don't diminish simply because a practice is part-time, and the culture of the Bar that demands constant visibility does not sit well with parents who want to get home to their kids.

While the number of women at the Victorian Bar has risen slightly to 18.6 per cent, they are getting relatively fewer briefs than they were five years ago, being involved in only 13.79 per cent of court appearances last year.

Flexibility is all very well in other professions, some practitioners say, but the law is different. The law, they argue, is immutable; the pursuit of justice relentless! In my view, this is nonsense. The law is not above the responsibilities of ordinary people, and within its traditional confines has demonstrated ample flexibility where this has suited its male protagonists. After all, why does our legal system accept long summer and winter breaks, long service leave and sabbaticals; but baulks at part-time work? We must stop thinking of the legal system in fixed and rigid terms around which we squeeze our family obligations and stop assuming that the only way we can participate at the Bar is full-time.

Some of you may be aware that I am an advocate for flexible court sitting hours and have raised the possibility of early morning, night, and weekend court sittings with the Bar, the Law Institute and the Chief Magistrate. Obviously, these proposals are designed to make courts more accessible to the working public, and to reduce delays. However, there is no reason why proposals such as these cannot be used to enhance the flexibility of practitioners. I'm told that some US jurisdictions are exploring part-day hearings. We should not assume that this cannot work

here, and I have asked my Department to make inquiries about similar schemes applying in Victorian jurisdictions.

I am also examining a greater flexibility in the use of reserve judges. Currently conventions regarding reserve judges dictate that only retired judges, and therefore by natural attrition, almost invariably men, can serve as reserve judges. To my mind, the role of reserve judges offers an unparalleled opportunity for senior practitioners to gain experience on the Bench, opportunities which would, by virtue of their occasional nature, have a particular appeal to senior practitioners looking for flexibility.

Of course, flexibility is not the only hurdle with which women are confronted at the Bar. To its credit, the Victorian Bar has highlighted the reluctance of solicitors to brief qualified women and established an iconic briefing policy in response. This policy was supported by the Victorian Government in the context of its contractual requirements of private firms engaged to provide legal services to Government.

However, a recent survey of briefing practices indicates that the situation is getting worse. While the number of women at the Victorian Bar has risen slightly to 18.6 per cent, they are getting relatively fewer briefs than they were five years ago, being involved in only 13.79 per cent of court appearances last year. It is clear that private firms are redirecting work away from women barristers and equally clear that the figures would be even more worrying if it weren't for progressive briefing practices in the public sector.

As Minister for WorkCover and TAC, I have asked the TAC and VWA Boards to promote equality in their respective briefing practices. I am optimistic that a formal approach will result in real progress. As Attorney-General I will also continue lobbying my Federal counterpart to adopt a similar policy at the Commonwealth level. No doubt to the embarrassment of Daryl Williams, any plans he may have had in this regard have been trumped by Assistant Treasurer Helen Coonan, who recently announced her intentions to introduce an equal opportunity briefing policy into her areas of responsibility. However, we must all continue to challenge the entrenched and discriminatory attitudes that direct clients and practitioners towards the same counsel, time and time again.

Women are now investing in their education at the highest levels in history. We owe it to the Victorian community, not to fritter this investment and to the law to ensure that it benefits from the experience of the best and the brightest that the profession has to offer.

We must not assume that professional dedication equals long hours. We must not apply that insidious and quiet discrimination that questions the "commitment" of practitioners who do not attempt to disguise or apologise for their family or their community activities. Quality, not quantity, should be our benchmark. and constant visibility should not be a prerequisite for those practitioners who want to get ahead.

I urge the Bar, and the profession as a whole, to apply the same rigour and creativity to resolving these issues that it applies to its practice. The objectivity of the law should not translate to the perception of those who practice it as automatons. Acknowledging our human obligations can only enhance, not diminish, our professional capabilities; and cultural change that recognises this human side, the family and community life of practitioners, will benefit us all.

Rob Hulls
Attorney-General

Solicitor-General

Pamela Tate

ON 24 May 2003 Pamela Mary Tate gave the Junior Silk speech at the Victorian Bar Dinner. As Junior Silk her "ranking" (to use a tennis term) was 196. Forty-five days later she was appointed Solicitor-General and was ranked number one at the Victorian Bar.

Pamela Tate came relatively late to the law and her progress through the ranks, although not always so meteoric, has been fast.

She obtained a BA Honours from the University of Otago in 1979; then went to Oxford where she obtained a B.Phil in 1981. She lectured and tutored in the Department of Philosophy at the University of Otago and at Monash before obtaining an LLB Honours from Monash in 1988. She served articles with Michael Salter at Phillips Fox and was admitted on 30 March 1989. From August 1989 to July 1991 she was associate to Justice Dawson of the High Court and signed the Roll of Counsel (No. 2675) on 28 November 1991.

She read with John Middleton and in the years that followed she appeared in a number of significant cases, many of them as junior to her predecessor in title, Douglas Graham. Amongst her appearances with Doug Graham in the High Court are included:

- *Kable* v *DPP* where the High Court held that legislation that detracts from independence of courts which are charged with the exercise of federal judicial power (whether or not they be created by State legislation) or which has the appearance of so interfering may well offend against Chapter III of the Commonwealth Constitution.
- *Katsuno* v *R*, a case involving a big "drug bust" in which the practice of providing to the Chief Commissioner of Police, in advance of the trial, details of convictions and other information relating to persons summoned as jurors, was held to infringe the Juries Act. Of peripheral relevance, perhaps, is that the drug smugglers were detected by reason of the fact that they entered the country as a group of some ten Japanese tourists, but had only one camera between them. It was obvious to even the least alert customs officer that these were not the tourists they purported to be.
- *Egan* v *Willis*, a case involving analysis by the High Court of the power of the NSW Legislative Council to deal with contempt of that House.
- *The State of Victoria* v *The Commonwealth* (Matter No. M46 of 1994) which involved a challenge to many of the provisions of the *Industrial Relations Act 1988* (Cth).
- *Residual Assco Group Limited* v *Spalvins* and *Re Macks; Ex parte Saint*, cases dealing with cross-vesting of the corporations power.

She also appeared in *Patrick Stevedores Operations (No. 2) Pty Ltd* v *Maritime Union of Australia*, initially with Neil Young and subsequently with Jim Merralls and Jack Fagenbaum; in *Boral Besser Masonry Limited* v *Australian Competition and Consumer Commission*, a case involving misuse of market power with Neil Young, David Shavin and Michael Crennan.

The likelihood, however, is that it is not her performance as evidenced in any of these cases which caused her to be appointed as Solicitor-General. In 1999 she appeared with Douglas Graham in *Department of Premier and Cabinet* v *Hulls* in which the Court of Appeal held that the Victorian Civil and Administrative Tribunal had erred in exercising its discretion to grant the (now) Attorney-General access to documents on the ground that the public interest required it.

It is no doubt his experience in that case that persuaded the Attorney, on the principle that "if you can't lick'em you join'em (or recruit'em)", to make the present appointment.

Pamela Tate, in the 12 years she has been at the Bar, has shown that, despite the commitments of a mother to a young son, and despite, or perhaps because of, her late conversion from philosophy to law, she is a force to be reckoned with. Those who attended the Bar Dinner or read her Junior Silk speech in *Bar News* will be well aware that under a serious demeanour there exists a keen sense of humour. She will be remembered for adding the word "juniored" to the English language.

The intellectual capacity of our new Solicitor-General is evidenced by her career path. Her capacity for hard work and commitment can be seen not only from her career to date, but also from the significant work she has done as a member of the Women Barristers Association.

We wish Pamela Tate well in her new role in which she follows in the footsteps of Henry Winneke, Tony Murray, Daryl Dawson, Hartog Berkeley and Douglas Graham.

Supreme Court

Justice Balmford

ON 12 September 2003 friends, family and members of the legal profession gathered at the Supreme Court to farewell Justice Rosemary Balmford.

Her Honour has enjoyed a distinguished career in the law. She was the first woman appointed to the rank of lecturer in the Faculty of Law at the University of Melbourne. That is the more significant because it was the end of 1963 and only three years after Her Honour had completed her law course. In 1958 Her Honour became resident tutor at Janet Clarke Hall. At the same time Her Honour was working as a solicitor at Whiting and Byrne.

In 1960, less than four years after admission, Her Honour became a partner at Whiting and Byrne (now Corrs Chambers Westgarth) at a time when few major city firms had a woman partner.

In 1971, during Her Honour's full-time final year of study for the MBA degree, she was appointed executive director of the Continuing Legal Education Board. Her Honour has made a major contribution to legal education in this State, particularly post-graduate practical training.

Her Honour was a prime initiator in the establishment of the Leo Cussen Institute where Her Honour was responsible for everything: planning, policy, budgeting, premises, staff and programs.

The courses created by Her Honour in the early 70s were all independent practical legal education for the profession and have been said to be the best, not only in Australia, but in the common law world.

Her Honour has played a major role in developing, for the first time in Australia, a national perspective on legal education.

While at the Leo Cussen Institute Her Honour was a member of the 1975 premier's committee on the status of women. The recommendations of that committee were largely incorporated in the *Equal Opportunity Act 1977*, which established the Equal Opportunity Board. Her Honour was appointed a temporary member of the Equal Opportunity Board and heard the complaint of pilot Deborah Wardley against Ansett Industries, which in many respects was a pioneering case.

From 1978 to 1983 Her Honour was assistant solicitor (special projects) at the University of Melbourne. Following this she was appointed a Senior Member of the Administrative Appeals Tribunal. The Melbourne-based senior members of the AAT, in the 10 years that Her Honour was on the tribunal, led Australia in developing constructive approaches to the complex and almost intractable legal problems thrown up by the drafting and administration of the Social Security Act.

Her Honour's decision in *Re W and the Director General of Social Security* pointed to the inequity of the exclusion from benefits of a single woman who had adopted a retarded child. It led to the amendment of the Act.

Our Bar is particularly indebted to Her Honour for having regularly taught in the Bar Readers' Course, giving the perspective of a tribunal member on the conduct of AAT proceedings.

In June 1993, Her Honour was appointed as a Judge of the County Court. Three years later, in March 1996, Her Honour was appointed a Justice of the Supreme Court. Her Honour has sat in every area of the Court's jurisdiction: crime, common law, commercial and equity, and the Court of Appeal. Her Honour has also presided over the Valuation Compensation and Planning List. Her Honour has had a number of difficult and important planning and valuation cases, including *Curry* v *Melton Shire* (a key decision on development contributions), the *Niddrie Quarry* case (raising complex administrative law issues) and the *Mount Hotham Airport* case (a difficult valuation case).

In crime, Her Honour presided over the long, Douglas Reid/Southern Cross Airline trial — one of the early trials in which documents were projected on computer screens.

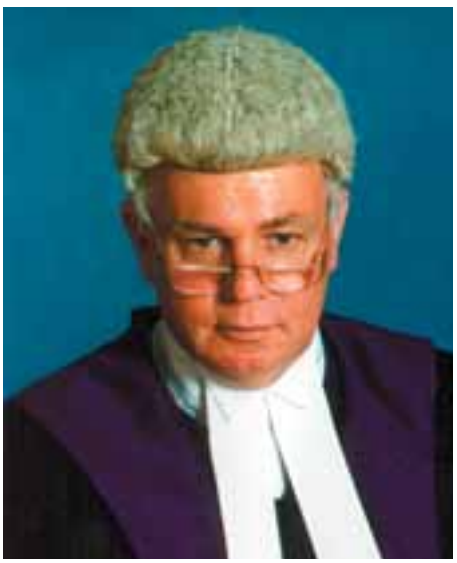
In her spare time Her Honour has found time to write and publish, in addition to books on birds, a monograph on Australian linguistic expressions derived from Australian natural history. The title of the monograph is *Miserable as an Orphan Bandicoot on a Burnt Ridge*. Her Honour has also written a scholarly book entitled *Learning about Australian Birds*.

In 1998 Monash University awarded Her Honour the degree Doctor of Laws, *Honoris Causa*, the highest honour the university can bestow.

Justice Balmford is now retiring after a long and distinguished career. The Victorian Bar wishes her a fulfilling retirement.

County Court

Judge Crossley



HIS Honour graduated from Melbourne University Law School and then served articles with Mr Vere Johnstone of Rigby & Fielding, Solicitors. After articles His Honour went to London and on returning to Australia was called to the Bar. He read with Van Tolhurst, later Judge Tolhurst of the County Court.

As a barrister His Honour had a broad and varied practice in common law, industrial relations and crime. He appeared for the Commonwealth in the National Wage Cases and industrial disputes. He also appeared in constitutional cases involving the freedom of interstate trade. His Honour had a general common law practice including personal injury work. He was junior counsel to Peter O'Callaghan QC assisting the Builders Labourers Federation Royal Commission.

His Honour's first reader was Robert Osborn, now the Honourable Justice Osborn. Justice Osborn speaks of the breadth of His Honour's practice and of the value in his reading. His Honour's second reader was Ross Middleton. Middleton describes his first day as a reader. He followed his Master to the Commonwealth Compensation Tribunal where His Honour was then the leading practitioner. The case settled. His Honour took Middleton to a very pleasant lunch. Middleton maintains he learned more at the long lunch than at the Readers' Course. Many would believe him. His Honour had another six readers: Ross Maxted, Jennifer Drake, Murray Preston, Frederick Casley, John Dugdale and David Findlay.

His Honour served on a number of Bar committees — Railway Damage, Juries Practice, and Police and Lawyers. For nearly 10 years the Bar's cellars benefited from His Honour's expertise and taste on the wine cupboard committee. His Honour assisted in the Centenary Bar Committee in 1984 and created the famous Dancing Barristers cartoon which is now the logo of the new Essoign Club.

For many years His Honour's artistic skills provided cartoons which enlivened the pages of the *Bar News*. A favourite cartoon depicted a jury foreman wearing a black eye announcing, "We are all agreed upon our verdict, Your Honour" … A signature calling card from His Honour was a cartoon of a cat walking away from the reader with its tail held high, exposing its rear end — and with a sign on its tail "The end is nigh".

His Honour has always been a keen yachtsman. He never misses the Bar's annual Wig & Gowns Squadron Regatta. His Honour's yachting career began at the Royal Brighton Yacht Club where he was Captain of cadet dinghies. In 1958 His Honour represented Victoria in his 12-foot cadet dinghy named *Black Adder* in the Stonevan Cup sailing from the Royal Perth Yacht Club. His Honour shares the honour of representing Victoria in that event with his friend and colleague Judge Bill White, who represented Victorian in Hobart the following year. His Honour's vocal abilities in the Clubhouse are matters of legend.

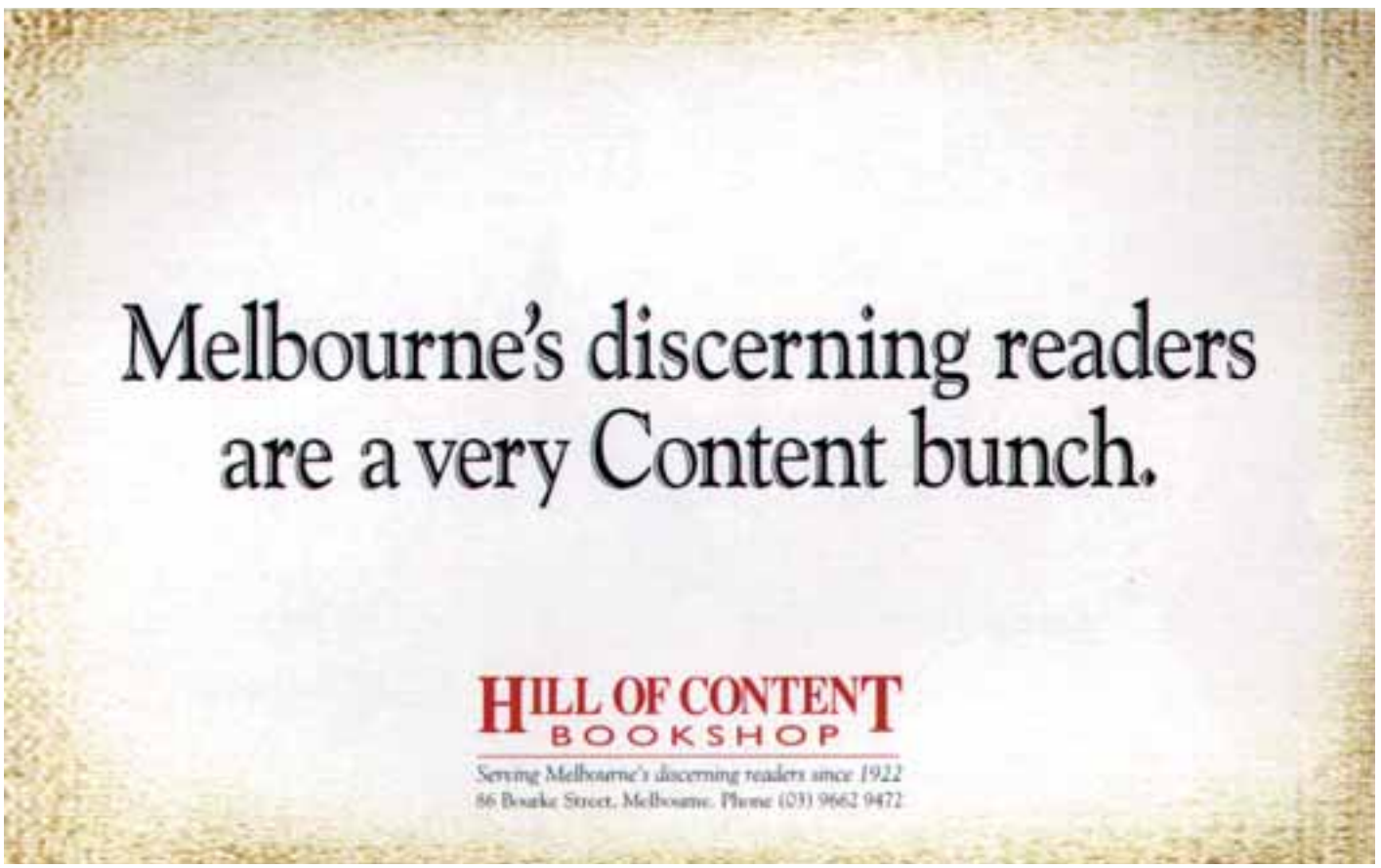
There His Honour could be relied upon, à la David Boon, to lead the raucous chorus beefing out "Free beers for all the dinghy boys", a ditty adapted without permission from the great working class anthem "Free beers for all the wharfies".

During his judicial career His Honour presided over one of the most highly publicised trials in the County Court in recent years — the exorcist manslaughter case of *Vollmer & Others*. Charles Francis QC appearing for one of the four accused, invited His Honour to grant a perpetual stay on the basis that the case was too complex to try. His Honour's response was that judicial cowardice was not a proper basis for such an order!

The *Vollmer* case was heard over 45 sitting days at Horsham and attracted publicity world-wide. The reported judgment of the Court of Criminal Appeal, [1995] 1 VR 95, extends over 93 pages. All applications for leave to appeal were dismissed; one ground of appeal by reference to Magna Carta, no less, and another to Sir Edward Coke' Institutes of 1628!

His Honour has been an outstanding Judge of the County Court, and the community has benefited greatly from his wide experience and talents. Outstanding Judges do not just "happen". Judge Crossley's breadth of experience as a barrister, wide interests outside the law, his humanity and concern for others and above all his legal acumen and preparedness for hard work have ensured his success as a Judge of the County Court.

The Victorian Bar wishes His Honour a contented and fulfilling retirement.



The 2003/2004 Victorian Bar

Seated Front Row (left to right):
Michael Shand QC
(Honorary Treasurer)
Kate McMillan S.C.
(Junior Vice-Chairman)
Robin Brett QC
(Chairman)
Ross Ray QC
(Senior Vice-Chairman)
Anthony Howard QC
Mark Dreyfus QC

Seated Second Row (left to right):
Michael Crennan S.C.
Debra Coombs
Rachel Doyle
Jacob Fajgenbaum QC
Sharon Moore
(Assistant Honorary Secretary)

Council

Richard Attiwill
(Honorary Secretary)
Iain Jones

Standing at Rear (left to right):
Michelle Quigley S.C.
(Assistant Honorary Treasurer)
Fiona McLeod
David Beach S.C.
Anne Duggan
David Neal
Michael Gronow
Paul Connor
Justin Hannebery

Absent:
Philip Dunn QC
Peter Riordan
Kate Anderson
(Assistant Honorary Secretary)

Women and the Law: Promoting Difference

Edited version of an address by the Honourable Justice Marilyn Warren, Supreme Court of Victoria, to the Victorian Women Lawyer Achievement Awards Presentation Dinner, Parliament House, Victoria on 15 May 2003

AT the recent 13th Commonwealth Law Conference I was privileged to join a panel of speakers led by the Women Barristers Association and the Victorian Women Lawyers on the topic of "Women and the Law". A number of eminent speakers participated. At the completion of each speaker's contribution three eminent panellists were invited to respond.

My topic was "Promoting Difference". I had a number of remarks to make. Unfortunately, due to time constraints I was able only to say a lot less than I originally intended. Nevertheless, I made my remarks essentially from a platform of positivism rather than negativism. I will return to that theme shortly.

In my almost 30 years in the law I have seen dramatic change. Back in 1974 as an articled clerk I remember attending one day to instruct in the old 14th Court, then the Practice Court of the Supreme Court. It was an intimidating sea of men in dark suits. At one point the sea opened and a person gracefully sailed past, robed, through the crowded foyer outside the 14th Court. It was a woman barrister. I had never seen one before. I enquired of my principal as to who she was. He said with much warmth and admiration, "Oh that's Molly Kingston." Nowadays there are many women barristers, robed, seen on the streets and in the foyers and in the courts. They are not an unusual sight. Such a change. There are now significant numbers of women on the other side, that is the Bench, also robed looking out at that sea of dark suits in front of them.

From my experience change did not start to occur on any noticeable basis until agents of change committed themselves to it. In the early 1980s the Honourable John Cain, then Premier and Attorney-General of Victoria effected symbolic but nevertheless significant change. The period of

Honourable Justice Marilyn Warren.

change followed measures initiated by the Hamer Government in the late seventies, including the enactment of the *Equal Opportunity Act 1977* and the appointment of an advisor to the Premier on women's affairs, Yolanda Klempfner. The Equal Opportunity Act was amended. Membership of the Melbourne Cricket Club and the Victoria Racing Club were opened up to women. These types of changes were important because they extended change in the prevailing culture. It permeated through our local society. It was embraced by the subsequent Attorney-General, the Honourable James Kennan S.C. who adopted an informal policy of briefing women, particularly in significant cases, wherever practicable. Hence, Elizabeth Curtain was briefed to represent the State of Victoria in relation to litigation concerning access to in vitro fertilisation. Later Susan Crennan QC was briefed as leading counsel assisting the Royal Commission investigating Tri-Continental — a tremendous first for women. These changes were continued and perpetuated later by the Honourable Jan Wade, Victoria's first woman Attorney-General through the appointment of women to the Bench, including the appointment of Victoria's first woman Supreme Court judge, the Honourable Justice Rosemary Balmford. Change has continued to be effected by the present Attorney-General, the Honourable Rob Hulls, MP with an affirmative action program in the appointment of women as judges and magistrates and the government briefing policy.

Between 1975 and 1985 I worked as a solicitor within the government sector. Predominantly, the officers were male but there were women located in key positions: Rowena Armstrong QC and Jan Wade, both then assistant chief parliamentary counsel. Eventually, Elizabeth Proust was appointed Secretary of the then Law Department. The change was continuing. Women were taking their place in senior positions in the public service.

In 1985 I went to the Bar. I moved from an environment where women were not unusual and their work was respected and admired. I was struck immediately by the prevailing masculine culture of the Bar. Nonetheless, I immersed myself in performing my work to the best of my ability and working very very hard. I believed that that was the way to succeed. Around that time in the late 80s there were a number of silks who consciously or unconsciously, I suspect consciously, seemed to engage in a policy of having women juniors. In particular, although not exclusively, they were Alan Goldberg QC, Ron Merkel QC, Bernard Bongiorno QC and Ray Finkelstein QC. There was a small core of women who regularly worked with those silks as their juniors — Ada Moshinsky, Susan Crennan, Susan

Kenny, Kate McMillan and, luckily, me. It was no coincidence that each of those women subsequently took silk and two were appointed to superior courts.

In my time at the Bar I saw significant changes in relation to women: increased numbers, women moving through the ranks of seniority, women taking silk, women conducting complex civil and criminal trials and an increase in the number of women instructing in trials. I saw a woman elected as Chairman of the Victorian Bar. I saw, also, a powerful agent for change occur with the establishment of the Women Barristers Association. Beyond the Bar I saw women appear more and more often in court instructing in trials and women starting to appear in positions of partnership in the firms. Outside the profession I saw a woman elected as President of the Law Institute of Victoria, a woman elected as President of the Australian Bar Association. I saw the appointment of a woman to the High Court of Australia. I saw women appointed to the Supreme Court of Victoria and the Court of Appeal and the Federal Court of Australia. I saw many women appointed as magistrates and judges of the County Court to the point that there now seems to be a critical mass of women presiding in those jurisdictions. Their presence cannot be ignored. It is no longer minor or token.

Despite all these changes there is impatience that change is not occurring more rapidly. There is irritation at ongoing discrimination against women.

Having observed the Victorian experience over almost 30 years and seeing the changes that I have, and they have been significant changes, I was surprised by the prevailing negativity at the "Women and the Law" session at the recent Commonwealth Law Conference. It seemed to me that the time had come to recognise and celebrate the achievements of our gender in the law and assess strategies for moving forward. Before doing that I state that my observations are based on 30 years in the legal profession. My experiences range the full spectrum from law student to a commercial and equity specialist judge who has recently made a foray into the criminal law. My remarks are devoid of footnotes and sources, they are based entirely on the scientific method of empirical research — that is, my life in the law.

What then is Promoting Difference about?

Difference, when used in the context of women and the law, provokes negativity. The identification of difference is so often interpreted as confronting discrimination on the one hand and a feminising and softening of legal rigour on the other hand. Complaint of discrimination leads to the utterance of defences: "There are women judges"; "women silks"; "large numbers of women solicitors"; and "vast numbers of women law graduates". Complaint of discrimination leads to the converse utterance in reply: "Women are not sufficiently represented on the Bench"; "There is disproportionate representation of men at appellate levels"; "Women are under represented at partner level in the major firms"; "Women are not briefed in major litigation or at best fill minor roles"; "Women are mainly briefed in traditional areas (family law, conveyancing and criminal prosecutions)".

I was surprised by the prevailing negativity at the "Women and the Law" session at the recent Commonwealth Law Conference. It seemed to me that the time had come to recognise and celebrate the achievements of our gender in the law and assess strategies for moving forward.

The identification of difference incites the protection of territory and the gratuitous dismissal of women as "having achieved so much" or "having done so well". Promoting difference on one analysis is provocative, negative and in terms of conventional dialogue is unfulfilling and static. This approach displays negative rigidity in the debate — a closed approach to the gender dialectic. Discussion of promoting difference on another analysis involves recognition and embracing of change. From such alternative perspective promoting difference contemplates lateralism, creativity, moving forward. In the context of the intellectual debate about legal gender politics I suggest that alternative approach.

Taking the second approach, in examining women and the law and considering promoting difference a question is prompted: What is the difference that women bring to the law? First, a different perspective. Women are represented in the law as judges, barristers, solicitors, attorneys-general, law makers and court administrators. They identify an issue quickly, focus on it and persuade rather than dictate. Mostly, women who work in the law are goal oriented. They readily identify their litigation goal, their judgment goal. Women provide perspective. They search out the resolutions. Women have finely honed organisational skills (hence they make excellent juniors and instructors in litigation, sometimes of itself a distinct disadvantage).

Women are adaptive and flexible. They have identified the open and closed areas of legal practice. Thus, women have remained in the traditional fields of family law, conveyancing and criminal prosecution but expanded into relatively new areas, taxation and revenue law, planning and environmental law, administrative law, human rights law and indigenous land rights law. In so doing they have avoided the more adversarial, combative zones of commercial law and common law.

Women bring to the law a strong sense of method. This is borne out in the judgment writing of women in the superior courts. They approach judgment in a chronological manner with a strong sense of method and stepped analysis. Let me provide an example, the judgment of Lady Justice Arden of the English Court of Appeal in *Stevens & Ors* v *Bell & Ors*, a complex superannuation trust case. The Canadian Reports are replete with the contributions of Chief Justice McLachlin and Madam Justices L'Heureux-Dubé and Arbour. We watch with interest the contributions of Madam Justice Deschamps. New Zealand, of course, has led the promotion of difference vis-à-vis women from the recognition of women's suffrage to the appointment of women to highest office, Chief Justice Elias. In Australia, the contribution of Justice Mary Gaudron to the High Court, particularly in the areas of the criminal law and industrial law, was applauded upon her recent retirement.

Women bring a combination of typically feminine characteristics to the law: energy, patience, humour and insight. These characteristics they apply to their work and it has a ripple effect on colleagues, clients, staff and litigants as the case may be. My list is not exhaustive. It is intended to highlight the difference that women bring to the law. Yet, in the legal gender context the negative side of the debate dominates. I suggest the positive side receive much greater prominence. What is the positive side? It is the seeking out of solutions. What are the solutions?

I make some suggestions and that is all they constitute, mere suggestions.

1. Recognition

There needs to be recognition that there are no absolute solutions. Nonetheless, solutions ought to be pursued by progression. As new gender phenomena are revealed new solutions are required. Recently the Victorian Bar with the co-operation of the courts re-visited the surveys conducted in 1998 as to the break-up by gender of appearances of counsel. Sadly the situation seems to have deteriorated. The numbers of women appearing in cases has largely declined. My own empirical research as a judge sitting in the Commercial List and Corporations List for some years is that women are simply not being briefed in commercial trials. Indeed, appearances by women were so rare that I can name (without the assistance of a note) the five women who appeared before me (as juniors) in commercial and corporations trials and the three women who appeared before me on contested interlocutory applications. Indeed, on Friday directions days in a period of three and a half years in the Lists I invariably had before me a sea of men in dark suits. I am surprised by this phenomenon. Surprised because the profession has been told at the highest levels how competent and able women are as counsel. Chief Justice Black of the Federal Court of Australia stated the position in plain and emphatic terms in an address to the profession and the Bar.

I will return in a moment to other strategies but the recent survey from the Victorian Bar as to the appearances of women is critical. Of itself the survey is a useful document but it is vulnerable to criticism on an obvious basis. I reflected on the calibre of women I would expect to have seen appear in the commercial and corporations jurisdictions and for that matter in the criminal and appellate jurisdictions where I have presided. Looking at the list of names one point became obvious to me. Almost all of the women I thought of are sought after, very busy and probably very difficult for practitioners to brief. It might be said, therefore, that there are simply not enough women at this time. Before such suggestion is howled down I raise it because, as I say, the survey is vulnerable to criticism. It seems to me that what is needed is a further updated survey of women barristers themselves as to their experience, the jurisdictions they practise in and the extent of their briefings. It is now five years since the previous work by the Victorian Bar. It needs to be updated so that the catch cry that "they have achieved", "women are silks", "women are briefed" and "women are judges" can be demolished.

It seems to me that also it is time for leadership. I mention my experience of the leading silks who tended to have women juniors. Each of those silks has been appointed. It seems to me that few have taken up from where they left. I would suggest that the leaders of the Victorian Bar should do everything they can to promote the inclusion of women juniors in their court teams. The best way of advertising women and their competence is for them to be seen in court. The Chairman, Vice Chairmen and members of the Bar Council who are silk could perhaps be surveyed as to how many of their juniors in the past two years have been women. The same questions might be asked of the inner Bar. My suggestion applies equally to female and male silks.

Ruth McColl S.C. in her capacity of President of the New South Wales Bar Association has referred to the resolution passed by the New South Wales Bar Council in April 2000 concerning the quality of women at the Bar. The resolution included a request for heads of chambers to take a leadership role in relation to the encouragement of equal opportunity for women, setting objectives, and establishing support groups and connections between the Bar Council and the New South Wales Law Society to eliminate sexually discriminating practices. It must be said that the Victorian Bar has done a lot for women. But having done that work it must be recognised that the solution needs to be ongoing. The work is unfinished. I suggest it is time for a re-appraisal of equality of opportunity for women at the Victorian Bar.

Turning to the profession, I do not need to re-visit the arguments concerning maternity leave and family leave. The Law Institute of Victoria and the Victorian Women Lawyers have done enormous work in this regard. At the launch of the Partnership Program of the VWL I, perhaps cynically, remarked "How will you stop the report being put in the bottom drawer of the managing partners?" Fortunately, and significantly, the VWL has very energetic leaders. The report does not seem to be lying in a drawer somewhere lost. Meetings have been convened with managing partners of law firms and the need for flexible work arrangements to accommodate women discussed. Nonetheless, the campaign must continue and the Law Institute should maintain its support and commitment.

The bottom line is that women as a resource in the law is a very very valuable gold lead. It demonstrates sheer commercial stupidity to mine the alluvial gold and not make the long-term investment in the infrastructure to facilitate the mining of the deep, pure leads of gold.

2. Responsibility

As women progress, those who succeed cannot rely solely on their example. They ought use their achievement to expressly and practically support the development and promotion of younger women in the law. Cross-generational promotion should form part of the mature ambition. As we progress there are constantly women behind us. It is imperative that the hand be cast down to the generation below to pull up the women from the previous generation to the next.

3. Accountability

When the opportunity for progression arises, duty ought prevail. When the offer of partnership, the difficult brief or judicial appointment comes there is a duty to accept, a duty to gender. Without seeing myself as a self-appointed recruiting agent for the government I made a point in recent months on an informal basis of speaking to women who I thought might be potential appointees to partnership or judicial office. I was shocked and disappointed to find, based on my own imperfect surveys, that women think and are being encouraged (generally by men) to "wait a while yet", "stay as a silk for a while", "enjoy myself for a while" and "there will be plenty of opportunity later on". Was I really that foolish in October 1998 when I answered the call and accepted my appointment? Could the same be said about Justice Elizabeth Evatt? Justice Mary Gaudron?

The numbers of women appearing in cases has largely declined. My own empirical research as a judge sitting in the Commercial List and Corporations List for some years is that women are simply not being briefed in commercial trials.

Justice Susan Kenny? President Margaret McMurdo? You see each of the women I mentioned were relatively young women at the time they were approached to accept appointment. They could so easily have postponed the moment. But let me postulate this question: if these women had declined appointment who would have taken their place? And so I say that if the call comes to take judicial appointment, to accept partnership, to take on the difficult complex brief or file, ask yourself this: if I do not accept who will? At the end of the day there is no use complaining about the absence of women if you yourself are not prepared to stand up and be counted.

4. Perseverance

Essentially the solution is this, keep gender on the agenda. Perseverance, is the ultimate imperative in promoting difference.

EPILOGUE

In the legal gender debate it is frequently suggested that as women make up fifty per cent of the population there ought to be no barrier to women achieving proportionate representation in practice, at the Bar and on the Bench. I suggest an additional way of approaching representation. Contemplate the difference that women are able to make to the development of the law and contemplate whether their contribution will develop better law.

I declare my bias on the suggestion. Nonetheless, in making the suggestion I urge your reflection on how the law will develop with the promotion of the feminine difference.

Some of my remarks I stated previously at the Commonwealth Law Conference but I think they are important and need to be re-stated. It was suggested to me that in speaking to you tonight my purpose was to provide inspiration. In the presence of this audience I think that is totally unnecessary. You have all achieved extraordinary heights. As we look at one another we all know how difficult it is. There is nothing special about me or what I have done.

Thank you for the honour and privilege of speaking to you this evening. I congratulate the winners of the awards. They are well deserved.

A Vote Against Judicial Elections

It is not unheard of for a member of the United States judiciary to act in a manner entirely incongruous to the position they hold. Judges have been known to refer to female attorneys as "babes"[1] and to victims as "niggers".[2] They have been public about beliefs that homosexuals should be put in mental institutions.[3] Judges have solicited sexual favours from female defendants[4] and been charged with driving while intoxicated[5] and perverting the course of justice.[6] Recent studies further highlight the increasing prevalence of judicial incivility in open court.[7]

How is it that these individuals were selected for judicial duty?

This article discusses the methods of judicial selection and in particular the American system of election and its deleterious impact on the justice system.

HISTORY

IN the early seventeenth century, Lord Chancellor Ellesmere, a supporter of King James I, asserted the King's omnipotence over the English Court and stated, "The King is the law speaking." England's Chief Justice, Sir Edward Coke, bravely retaliated, arguing that the King could not sit in the place of England's judges. Coke replied to his sovereign that, "The King should not be under man, but under God and law." On that day in history, the selection of the judiciary belonged to the people through its king. Coke foreshadowed a more independent judiciary insulated from the rigours of political selection. His ideas were put on hold as James I threatened to cast Coke into the Tower of London if he did not cease challenging him.

Whether judges should be independent arbiters of legal principle or should be held accountable to the electorate is a debate that still looms large in American society.

The selection of state judges has undergone significant change throughout American history. Until the mid-1800s, state judicial selection generally adhered to the federal model, emphasizing the appointment of judges. The emergence of egalitarian democratic ideals in the nineteenth century brought about a growing belief that judges, like other public officials, should be accountable to the voting public. The popular sentiment was that the appointment method produced corrupt, elitist and arrogant judges because judicial discretion was unconstrained by the majority's will.

Ashley Halphen is a member of the Victorian Bar who practices in the area of criminal law. He is the Vice President of Reprieve Australia, an organization that provides legal and humanitarian assistance to those facing execution by the state around the world. He is currently working at the Office of Capital Post-Conviction Counsel in Jackson, Mississippi.

As that ideal gained acceptance among reformers, a movement developed toward the selection of judges by popular election. In 1832, Mississippi became the first state to provide for the selection of its judges by popular election. For the next 65 years, every new state to the Union provided for some or all of its judges to be chosen by popular election.

When popular judicial election began, judges typically ran on partisan ballots. In the latter part of the nineteenth century, reformers pressed for non-partisan judicial elections to quell influences by party leaders. By the mid-twentieth century, reformers began advocating the Missouri Plan. This model of judicial selection combined appointment and election systems. The key element was that a governor or executive would appoint a judge from a list of nominated candidates. The appointed judges then ran in periodic retention elections where voters determined whether the judge remained in office.

Judicial selections either by appointment or by election are presently the most common methods of choosing judges throughout the many American jurisdictions. Six states and the federal government use appointments as the exclusive selection method. Appointments are decided either by the legislature or the governor based on merit. Judges are appointed to long or life terms of office and are ensured salary protection.

ELECTIONS

Approximately 82 per cent of state appellate court judges and 87 per cent of state trial court judges run in some type of election. Judicial elections serve democratic and constitutional principles and promote

participation by ensuring judicial accountability. There is a public expectation that judges should be answerable for their judicial decisions and conduct. Incompetent judges can be removed by facing the electorate for periodic elections.

The judicial election system in the United States is not dissimilar to a democratic political elective process. Candidates participate in campaigns to raise their profiles and project to the electorate an image that warrants selection. Campaigns are a costly exercise and candidates rely heavily on contributions and funds generated from fundraising events.

The tone of judicial campaigning is becoming increasingly disturbing. Campaign strategists have been known to brandish the word "paedophile" close to an opposing candidate's name and characterize an opponent as someone "who cares about the rights of violent criminals". One flyer contained a mugshot of an opponent with the words "murderer … rapist … innocent victims …" The insinuation being that the opponent should be held responsible for the murderous rampage of an individual he had afforded leniency to in an earlier case.

Campaigning becomes particularly unsavoury when death penalty cases are used for a "tough on crime" platform. Candidates have boasted being responsible for the most executions in the state and the ability to do the best job in executing more people. Another candidate ran advertisements taking credit for 32 executions. In Florida, the incumbent gubernatorial candidate ran television advertisements in 1990 showing the face of serial killer Ted Bundy who was executed during his tenure as governor. The governor stated that he had signed over 90 death warrants in his four years in office.

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Canon 7 of The American Bar Association's Model Code of Judicial Conduct governs the campaign and political activities of judges and candidates for judicial office. Many states have based their codes of judicial conduct on the Model Code. Its ultimate objective is to preserve the independence and integrity of the judiciary by curbing issues and abuses associated with election campaigns.

Candidates are prohibited from participating in forms of conduct that would affiliate them with a political group. They are also prohibited from announcing views on disputed legal or political issues and knowingly misrepresenting the public about any fact.

To avoid issues of conflict or bias that may arise when a candidate is selected, campaign candidates cannot be told the identity of contributors. Not only are candidates prohibited from personally soliciting campaign contributions, the Code requires the formation of a campaign committee that deals with funds so that the contributors remain anonymous.

The Code allows for fundraising events to raise money provided that the nature and type of event does not compromise the candidate's integrity or independence.

Restrictions on campaign content have tended to be interpreted in a manner that precludes the presentation of meaningful information on judicial candidates to the electorate. The end result is that the electorate has inadequate information to "judge the judges". One media commentator expressed a need to, "take off the muzzle and allow judges to discuss issues".

Due to a lack of useful information, a large part of the public casts votes on inappropriate criteria such as "ballot clues" or other surface characteristics. Many just refuse to vote at all. Virtually all facts necessary to make evaluations are kept from voters. Voters typically do not even know the judicial candidates, much less their accomplishments, their principles, or nearly any other factor related to the candidates' capability and merit.

While voters may be prevented from obtaining real knowledge about the judicial candidates, the contributors, special interests and lawyers are entirely aware of the judicial candidates' values and philosophical positions. As the need to raise large amounts of money to fund elections escalates, candidates primarily seek the support of lawyers and special interest groups.

EFFECTS

Whether partisan or non-partisan, judicial elections create serious problems. Elections threaten judicial independence by pressuring judges to follow the will of the majority, which may run counter to the rule of law. The public's confidence in the judiciary also suffers as tremendous sums of money are poured into state judicial campaigns and political mud-slinging becomes commonplace. Furthermore, elections may cause qualified candidates to shy away from office, or may result in their removal from office, for reasons irrelevant to the person's ability to thoughtfully apply the law in a fair and impartial manner. The most profound ramifications manifest in courts dealing with death penalty cases.

1. The Lack of Independence and Impartiality

The restraint, temperament and detachment that we rightly demand from our judges are fundamentally incongruous with political campaigns. Yet judges are expected not to gauge public opinion in making their decisions, but rather, as Judge William Cranch wrote, to decide the legal issues before them "undisturbed by the clamour of the multitude".

Those who oppose judicial elections, however, argue that current campaign elections and fundraising practices are a serious threat to judicial independence. Judicial independence and autonomy are among the touchstones of the American legal system and said to be the backbone of American democracy.

These "touchstones" are being threatened by judicial fundraising and by judges' dependence upon powerful special interests. Justice Stephen Breyer warns that:

> Independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts. The law and the facts do not include deciding according to campaign contributions … The balance has tipped too far, and when the balance has tipped too far, that threatens the institution. To threaten the institution is to threaten fair administration of justice and protection of liberty.

The threat to judicial independence is influenced by the fact that a substantial portion of a judge's campaign contributions comes from those seeking favourable decisions. Judicial candidates generally receive campaign contributions from a narrower set of interests. Special interest groups and lawyers contribute a

large portion of donations to judicial campaigns. Empirical evidence confirms that the threat to judicial impartiality caused by campaign contributions is more than mere perception; lawyer contributions may in fact influence court decisions.

There is also a concern that if judges can be influenced by campaign contributions then they will be unable to resist the difficulties that a judge faces through friendships and associations that come before the court. For state court trial judges, lawyers' contributions are the primary source of campaign funds. How can these judges effectively discipline and criticize lawyers if they are dependent on the lawyers for campaign contributions?

It is also feared that judges will not be able to render a decision in a case against those who are past or future contributors. Many rich and powerful organizations spend enormous sums of money attempting to capture the soul of the judiciary through campaign contributions. There is nothing to protect an elected judge who enforces the Constitution from an angry constituency that is concerned only about the end result of a ruling and may have little understanding of what the law requires.

Given these disturbing developments, it should come as no surprise that surveys consistently show that an overwhelming majority of the public believe that many state courts are influenced by money and politics.

2. Corruption and the Erosion of Judicial Integrity

The culture of judicial campaign financing and fundraising creates both the reality of impropriety and its appearance as an inherent and unavoidable truth.

i) Corruption

Judicial corruption is created by the need for campaign funding. This pervasive cultural value makes judges fair game as tools to be used to achieve desired ends. One scholar goes as far as asserting that, "We have created a system that allows payments that would otherwise be bribes and legalized the 'bribes' as campaign contributions."

The reality then becomes that justice is increasingly slanted toward the wishes of a minority of the wealthiest citizens whose role in funding elections is disproportionately large. "The people with money to spend who are affected by court decisions have reached the conclusion that it's a lot cheaper to buy a judge than a governor or an entire legislature and [the judge] can probably do a lot more for you."

A lawyer who practised law in Texas for 38 years sums up the situation: "With our partisan elections today, given a hard but close case, which even a biased judge couldn't be criticized for holding either way, the judge is going to decide for the party who gave him the $10,000 donation for his campaign chest."

A glaring example of a judiciary whose citizens have every right to consider it tainted is found in Texas. A report from a citizens' group, Texans for Public Justice, found that seven justices of the Texas Supreme Court had raised a total of $9,166,450 in contributions for their most recent elections. The amounts raised were not the most troubling issue. The report noted that: "Sources closely linked to litigants with cases before the same court contributed $3.7 million, or 40 per cent of the grand total … Of the 530 opinions the Supreme Court issued during the period studied, 60 per cent (322 cases) are tainted by the fact that at least one of the seven justices took money from sources with an interest in the case."

ii) Perceived Corruption

A belief that judges are directly or indirectly exchanging rulings for contributions has significant potential for developing among citizens a widespread perception of corrupt judicial fundraising. Even if judicial corruption through decisions that favour special interests is not empirically demonstrable, the public's perception could be that judicial decision-making favours special interests to which the judge is obligated through financial or other campaign support.

Once the public understands that courts are basing their rulings on political considerations, it undermines the legitimacy and the moral authority of courts as enforcers of the Constitution and law.

The implications are quite serious. Without a widely held public perception of judicial fairness, the members of political societies distrust their political institutions and lack the will to cooperate with others. If this distrust continues too long and becomes too intense and pervasive, the social glue is not strong enough to prevent a weakening or even disintegration of the political system.

The appearance of judicial neutrality is threatened because contributors are attorneys, special interest groups or litigants who appear before the judge.

The public believes that campaign contributions are made to influence a result; campaign contributors are not benevolent donors. A recent national poll indicates that four out of five Americans believe that "elected judges are influenced by having to raise campaign funds" and that "judges' decisions are influenced by political considerations". State polls have produced similar alarming results.

To make matters worse, the increasing fierceness of judicial campaigns is generating nasty rhetoric and partisanship. "Attack advertising, the use of aggressive political consultants and slogans that are often only thinly veiled promises to sustain or overturn controversial decisions are now established parts of campaigns for seats on state courts."

One must question whether the public will continue to hold judges in high esteem when they see judicial candidates engaged in or subject to such smear campaigns and character assassinations. Michigan Governor John Engler summed up the prevailing opinion on the subject of judicial elections when he stated that "the campaigns have a less than helpful effect in terms of the image of the judiciary".

The general view is that current elections and campaign financing create an impression of impropriety. The erosion of public confidence means no matter the result, public perception will be that the judge's ruling was paid for. "Within the last few years, this has become a national problem and one that has to be looked at nationally, not just in whatever state is having an election at the moment."

3. Discourages Meritorious Candidates

High-cost campaign fundraising discourages qualified judicial candidates from running or seeking re-election. Few competent lawyers are prepared to surrender a successful legal career to engage in rigorous and expensive campaigning. The cost of judicial campaigns has reached a level where both candidates and sitting judges are shaping their behaviour to attract financial and other support. This not only results in the distortion of judicial selection by repelling meritorious potential candidates who are unwilling to compromise their principles, but also in the capture of judges by special interests willing to finance judicial campaigns.

This problem will worsen as the cost of judicial campaigns continues to rise and candidates are forced to spend more of their own money on elections. Positions on the bench may become limited to those who can purchase them or are willing to take out personal loans to finance their campaigns.

Most people agree that the principal qualifications for a judge are a competent mastery of the law, good moral character, intelligence, impartiality, emotional stability, courtesy, decisiveness and administrative ability. While the ability to raise money, contacts in the political establishment, and charisma may be somewhat appropriate traits for selection of candidates for legislative or executive office, they have no relevance to the qualifications of a judge.

4. Death Penalty Cases

United States Supreme Court Justice Robert Jackson wrote, "One's right to life, liberty and property, to free speech, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." When it comes to the death penalty, however, judges face unparalleled pressure from political parties, interest groups and the media. Elected judges who wish to remain in office or move to a higher court are sometimes forced to base their decisions on political realities and the wishes of the partisan voting majorities.

It has been observed that "the more susceptible judges are to political challenge, the less likely they are to reverse a death penalty judgment". Rulings in a publicized case can have major political effects, such as loss of one's position or any hope of promotion, and judges are aware of this as they make controversial decisions, particularly in capital cases.

Justice William Brennan noted that the risk of a biased judge is "particularly acute" in capital cases. "Passions, as we all know, can run to the extreme when the state tries one accused of a barbaric act against society, or one accused of a crime that, for whatever reason, inflames the community. Pressures on the government to secure a conviction, to 'do something', can overwhelm even those of good conscience. When prosecutors and judges are elected, or when they harbour political ambitions, such pressures are particularly dangerous."

This "danger" touches on the impediment to the rights of many classes of unpopular defendants by overlooking fundamental constitutional rights to accommodate political pressures. Justice Byron White once observed, "If [for example] a judge's ruling for the defendant ... may determine his fate at the next election, even though his ruling was affirmed and is unquestionably right, constitutional protections would be subject to serious erosion."

The fear of removal by the electorate may pressure a judge to temper judicial decisions and may reduce a judge's willingness to protect minority rights and individual liberties. A state judge who reverses a death penalty case is subject to attack and may be vilified by a widespread campaign of slur and distortion. Failure to affirm the death penalty has caused countless judges to be defeated or challenged.

The chief justice and two other judges of the California Supreme Court were removed by a retention election in 1986 after the governor threatened to have them defeated if they did not uphold more death penalties. They did not bow to his threats so he successfully organised a campaign to oppose their re-election.

Capital cases have increasingly become campaign fodder in judicial elections. Judges have come under attack and have been removed from the Bench for their decisions in capital cases. Justice Penny White of the Tennessee Supreme Court joined her four colleagues in a unanimous opinion remanding a death penalty case for a new sentencing hearing because of evidence excluded in the first hearing; she did not author the opinion. She became the target of a smear campaign that resulted in her defeat in a retention election in 1996. One campaign brochure stated: "Richard Odom was convicted of repeatedly raping and stabbing to death a 78-year-old Memphis woman. However, Justice White felt the crime wasn't heinous enough for the death penalty so she struck it down." The Tennessee Police Benevolent Association reacted by claiming, "Justice White is more concerned with the scum's rights than she is with the victims and citizens of this state."

Challenges to state judges have made it clear that unpopular decisions in capital cases, even when clearly compelled by law, may cost a judge a seat on the Bench. In 1992 Justice James L. Robertson of Mississippi was the subject of a virulent campaign heralded by the Mississippi Prosecution Association. A campaign circular distorted Justice Robertson's opinions in two death penalty cases. The US Supreme Court subsequently reversed both cases mentioned in the circular. Justice Robertson was defeated at election despite being vindicated by the US Supreme Court.

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In the face of overwhelming pressure, some judges cower to their electorate. One of the most telling examples arose when the Texas Court of Criminal Appeals failed to reverse a judgment imposing the death penalty even though the defendant's attorney slept through major portions of the trial.

More alarming is the revelation by Supreme Court Justice John Paul Stevens. He pointed out that in states that previously allowed judges to override jury sentences in capital cases, judges would frequently override sentences of life imprisonment and impose death, but seldom overrode death sentences. He observed that:

> Elected judges too often appear to listen to the many voters who generally favour capital punishment but who have far less information about a particular trial than the jurors who have sifted patiently through the details of the relevant and admissible evidence. How else do we account for the disturbing propensity of elected judges to impose the death sentence time after time notwithstanding a jury's recommendation of life?

Elected judges may be tempted to compromise the procedural rights of criminal defendants lest they appear soft on crime. Most disturbing are the several studies which found that state Supreme Court justices facing re-election in states where the death penalty is particularly popular are reluctant to cast dissenting votes in death penalty cases, even if they believe the sentence should be overturned. In fact, judges in these states may scramble to be assigned to death penalty cases to obtain favourable press coverage, and may even be more likely in an election year to ignore a jury recommendation for a life sentence and impose the death penalty where state law permits.

As crime has become a more prominent issue in political campaigns, the death

penalty has become the ultimate vehicle for politicians to demonstrate just how tough they are on crime. Elected judges campaigning use controversial cases, such as death penalty cases, to win elections. In *Atkins* v *State*, a lower court judge in Alabama was appointed to preside in a capital trial two weeks before an election in which he sought a seat on the circuit court. The judge denied a continuance even though the defence attorney was suffering numerous complications from polio. The judge later refused a change of venue motion based on the media attention following his denial of a continuance. Moving quickly through the case, the judge, who was running a law and order campaign, oversaw a guilty verdict and recommendation for the death penalty. The judge won election to the circuit court.

When the community that elects the judge is demanding an execution, the judge has no political incentive to appoint an experienced lawyer who will devote large amounts of time to the case and file applications for expert and investigative assistance, all of which will only increase the cost of the case for the community. As a result, judges frequently assign lawyers who are not willing or able to provide a vigorous defence.

For example, judges in Houston, Texas, have repeatedly appointed an attorney who occasionally falls asleep in court, and is known primarily for hurrying through capital trials like "greased lightning" without much questioning or making objections. Ten of his clients have received death sentences.

CONCLUSION

The American justice system utilises a judicial method of selection that undermines the independence, integrity, and impartiality of the state judiciary. Professor David Barnhizer of Cleveland State University argues that, "Rather than symbolizing justice as a blindfolded goddess carefully weighing the evidence in legal disputes to ensure fair and unbiased outcomes, it has become more accurate to visualize her with blindfold askew, sneaking glances to see who places the most money or other tribute onto her scale to tilt the balance in their favour.

Too many sitting judges can be best described as "paragons of judicial Darwinism: successful candidates who have learned how to manipulate the system and compete more effectively than their challengers".

If "blindfolded Justice" is the abstract symbol of independent and equitable decision-making, the judge is the concrete manifestation of the process through which we attempt to attain justice and fairness. Achieving justice through the judicial mechanism requires independent and principled arbiters free of corrupting influence.

Scholars urge that steps should be taken to insulate judges from political pressures and to end direct elections and retention elections for judicial office.

Judicial codes of conduct that limit improper behaviour have not been an effective response to the situation. Furthermore, even though judges may excuse themselves in circumstances of actual or perceived instances of bias, they rarely do so because disqualification standards are subjective.

Appointive judicial selection systems may provide the best remedy for the damage elections are causing to the state judicial system. Appointive systems are not subject to the problems inherent to an elected judiciary: the appearance of impropriety caused by judges taking money from those who appear before them, the threat to judicial independence resulting from a judge's dependence on campaign contributions and party support, the reduced perception of impartiality caused by statements of judicial candidates on political or social issues, the elimination of qualified lawyers who would otherwise be willing to serve as jurists, and the loss of public confidence caused by the vile rhetoric of judicial campaigns.

Judicial independence is guaranteed because judges are insulated from criticism and threats of removal and do not have to rely on popular approval for their decisions. Democratic principles are still served by indirect accountability to the public through the elected appointing authority. And finally, the system attracts better qualified judges because it is devoid of campaign financing and fundraising; the most qualified lawyers are not discouraged from seeking judicial posts.

In a system that imposes the death penalty for certain types of homicides, it is critical that a judge apply the law and maintain the rights of the accused no matter how heinous the crime, how loathed the individual or how unpopular the ruling may be. Even more significant is that society have unqualified faith and trust in the integrity of the decisions made. It is well to remember that the ultimate decision in a capital murder is an irreversible one. Doubtless, democratic principles that demand the will of the majority would ask for no less than utter focus on the application of the law without regard to any political consideration.

Living Legends of the Bar

The edited speech of Justice Goldberg at the Legends Dinner, the Essoign, Friday 29 August 2003.

Legends in their own time: Jeffrey Sher, Douglas Meagher, Jack Fajgenbaum, Max Perry, Susan Crennan, Hartog Berkeley, George Beaumont and Gerry Nash.

WHEN I was asked to speak about the Living Legends of the Bar we are honouring this evening I wondered — why me? I initially thought that it was probably because, with one exception, I had in the course of my 31 years at the Bar offended each and every one of them on at least one occasion, so that anything I said would just add insult to earlier injury.

But then I reflected that it was probably because I was a judge. It was obviously a task for a judge. Why? The answer is probably found in the writings of two early judges. Sir Mathew Hale, who lived in the 17th Century, is recorded as saying:

> But most certainly it is a careful and a difficult employment so that it is a wonder that any prudent man will accept it, and a greater wonder that any man in his right judgment should desire it or not desire to decline and be delivered from it.

Sir Mathew Hale also observed:

> That since it is a business of that importance and yet difficulty a man may be careful to keep a temperate body, with great abstinence and moderation in eating and drinking, and a temperate mind totally abandoning all manner of passion, affection and perturbation that so he may come to the business with clearness of understanding and judgment.

I am conscious of the fact that tonight is not only a night for acknowledgment of achievement but also one for a demonstration of wit. However, I am constrained by the observations of Sir Francis Bacon, Lord Chancellor of England, who said:

> Judges ought to be more learned, than witty, more reverend, than plausible, and more advised, than confident.

I am also constrained tonight by his observation that:

> One foul sentence doth more hurt than many foul examples,

and

> An overspeaking judge is no well-tuned cymbal.

We are here to honour this evening in absolute order of seniority but in equal order of importance and respect, Hartog

Glen McGowan, Tim North, Graeme Clark, John Larkins QC and Cameron Macaulay.

Michael Flynn, Elizabeth Loftus, Peter Vickery QC and Max Perry.

Simon Wilson QC, Jayne and George Beaumont QC, and Manny Garantziotis S.C.

The scene at the Essoign.

Berkeley, Jeffrey Sher, Douglas Meagher, Jack Fajgenbaum, George Beaumont, Gerry Nash, Susan Crennan and Max Perry. Between them they have clocked up 269 years of practice at the Bar. If laid end to end, I guess they would be laid.

But we are honouring them tonight as "legends" and I wondered what imputation was to be derived from someone being described as a "legend". In a lay sense I thought that meant that there were myths about them. But since their tools of trade have been words for so many years, I had recourse to the *Oxford English Dictionary*. The very first or primary meaning of "legend" I found was "the story of the life of a saint". That appealed to me. I reflected on St Hartog, St Jeffrey, St Douglas, even St Susan and ultimately St George! But having cast round for stories I must confess piousness, or should I say piety, [and don't pick me up John Batt as both are in the Macquarie Dictionary] was not in the forefront of what was collected, apart from Susan Crennan. But that was because of Hartog Berkeley's response once when he was Solicitor-General and Justice Mary Gaudron asked him one day, "Why don't you bring a woman with you to Canberra?" Hartog, conscious of the well-known principle of law that the judge's point is the best point, asked the Victorian Government to find him a respectable woman. They briefed Sue Crennan, but who else.

But reflecting on piousness reminds me of the time Gerry Nash was appearing before Justice Howard Nathan on an order to review. The point of law to be determined was whether masturbation would constitute prostitution. An undercover policewoman had been approached for a quote: "How much for a hand job?" For some reason which is not clear, Gerry had the matter stood down to undertake some speedy research as to whether masturbation featured in the law reports. He returned some time later and the following exchange occurred:

Nash: "I found three cases of masturbation in the Supreme Court library, Your Honour."

Nathan J: "Well, Mr Nash I trust that will bring this to a suitable climax."

Nash: "I'm in Your Honour's hands."

But let me turn to more serious matters. Each of our legends is being honoured this evening because they exemplify, in numerous respects, the principles and standards for which an independent Bar stands. Integrity, hard work, ability and an absolute commitment to acting in their client's interests and not being deterred from standing up to irascible judges. I'm not going to recite their CVs, *Who's Who* listings, or lists of their committees, cases and professional achievements. That's all a matter of record. However, I should acknowledge the work each of them has undertaken for the Victorian Bar through the Bar Council, Barristers Chambers Ltd and numerous Bar and Building Committees. Of course, each and every one of them has their own particular idiosyncrasies and some of these will shortly emerge.

HARTOG BERKELEY

Let me begin with Hartog Berkeley. I remember many years ago working as a young junior with Hartog. That most important and religious part of the brief approached — what to mark. We fixed on

Justice Goldberg orates to the throng.

Mary Baczynski with Justice Nathan on his knee.

Mr Justice Batt, Kate McMillan S.C. and Hon. William Kaye AO, QC.

what I thought were the usual type of fees and then Hartog added — sorting papers in brief — $150. Of course in those days I had to mark ²/₃ myself.

Hartog had the unenviable experience about twelve years ago of being a litigant himself, albeit unwittingly. He or his manager arranged for a contractor to cut down some trees on his farm up Mansfield way on the Rubicon River without the required permit under the planning scheme. Apparently some local councillor wanted to embarrass either the government of the day or its senior legal officer so Hartog was summonsed for cutting down trees without a permit. The case was heard in the Mansfield Magistrates' Court. It was apparently regarded as somewhat newsworthy as Channel 9 flew up a camera crew in a helicopter so that they could take pictures of the disconsolate Berkeley walking out of court having been convicted and no doubt fined. It did not turn out that way.

The earthmoving contractor who had cut down the trees was called by the informant to give evidence as to the cutting down of the trees. In the course of cross-examination of the contractor he was asked:
Question: Did you have a conversation with the manager?
Answer: Yes.
Question: What did he say?
Answer: Could you come down and look at some very dangerous trees.
Question: What did you do?
Answer: I went with the manager, inspected the trees which were old river red gums.
Question: Were the trees dangerous?
Answer: Yes, they drop boughs, they're known as widow makers. I wouldn't be putting my good cattle under them.

Hartog had some pretty good prize cows in his paddocks, prize cows shelter under trees, boughs on trees sometimes break and fall off the trees, if prize cows are under the boughs when they will fall they will be severely damaged — therefore it is prudent animal husbandry to cut down trees on your property to ensure that your prize cows are not damaged. At the end of the informant's case a submission of no case to answer was made by Berkeley's eminent counsel to the effect that on the basis of the contractor's evidence, Hartog was entitled to cut down trees on his property because of the exception in the by-law or regulation that you could cut down a tree without a permit when it was dead or dangerous. The Magistrate accepted the submission that Hartog's cows were in potential danger and that accordingly he was entitled to cut down the trees to protect the cows from falling boughs. Hartog even obtained an award of costs and when he walked out of court there was not a camera crew to be seen.

That case demonstrated that Hartog was no different from a common or garden farmer but on occasions he did have delusions of status. On one occasion Hartog and Margaret went to London but they had not booked a hotel. Some Royal Princess was getting married and the hotels were all full. Hotel after hotel gave them the same answer — no room. Finally at the next hotel where he got a knockback, Hartog said, "I'd like to speak to the manager please." The manager appeared. Hartog asked him, "Are you suggesting that if Her Majesty The Queen

came and asked you for a room, you would not be able to find one?" The response was immediate: "No, of course not." Hartog's response, "Well, my good man, I can tell you that Her Majesty is not coming so I'll have her room."

But Hartog also had his tactful and sensitive side. Years ago Michael Dowling sometimes brought his niece, Elizabeth, a solicitor, to lunch and Hartog had met her on many occasions without knowing of their relationship. When Michael Dowling's first daughter was married Hartog was at the wedding, so was Elizabeth, but Hartog had studiously not recognised her. Well into the evening Michael Dowling came upon Hartog and his niece, Elizabeth, was nearby. Michael said "Of course Hartog, you know my niece, Elizabeth." Hartog was visibly relieved and said "Oh, you really are his niece" and was his sociable self again.

Hartog had his own particular style before appellate courts. On one occasion he was appearing before the Full Court with Justice Brooking presiding. Hartog was arguing a quite hopeless case with his usual flare. Brooking J, as usual, went straight to the point: "But Mr Berkeley what about such and such a case. Doesn't that render your argument nugatory?" Hartog responded immediately "Your Honour really shouldn't tease me like that" and without pausing for breath or interruption, went straight back into his argument.

Hartog was a clever counsel. In one case he was fighting Winneke and McPhee in a defamation case. Hartog and Bob Vernon were for the plaintiff. The newspaper had defamed his client who was a milkman in Preston, alleging that he was guilty of a crime. The plaintiff had been cross-examined with vigour by Winneke and McPhee but the paper got it wrong. The son of the plaintiff had been in trouble but not the plaintiff himself. McPhee, in his final address, said to the jury that we all make mistakes and sometimes we even forget our wife's birthday. Hartog turned this proposition of McPhee's to his advantage. He told the jury that we all make mistakes and forget about our wife's birthday, BUT THAT'S ONE WE PAY FOR. Inevitably the jury awarded the plaintiff a big verdict.

It has been said that Hartog has an understanding of members of the opposite sex. This is best demonstrated by the time when as Chairman of the Bar Council he needed a new secretary. His then secretary placed the following advertisement in *The Age*:

> Legal secretary required for barrister at Owen Dixon Chambers. Large office with pleasant view. Variety of work, congenial atmosphere. Must be able to work under pressure and negotiate with people at all levels. Salary negotiable.

Hartog decided to be more realistic and open. He placed an advertisement in the same edition and the following appeared in an adjoining column:

> Legal secretary required for charming old gentleman at Owen Dixon Chambers — coffee making, typing and shopping. Salary negotiable.

Would you believe the secretary's advertisement got two replies but Hartog's got thirty replies.

JEFFREY SHER

Let me turn to a daunting opponent — Jeffrey Sher.

Jeffrey Sher has built up a well deserved reputation for utter competence and being relentless in the manner in which he runs his trials and, in particular, the way he cross-examines witnesses. He has obviously made a profound impression on many of his opponents over the years. When researching humorous stories for the purpose of this evening's conversation, one senior counsel who wanted himself described as "anonymous", remarked, "Sher has never caused me the slightest amusement in 30 years at the Bar." I think Jeff should take that as a compliment. According to George Hampel, Jeff has an unremitting view of his cases and the causes for whom he appears — the other side in this case is wrong — and unprincipled — and ridiculous — with no hope of success — and there are no weaknesses in his case. I remember one case many years ago which involved National Mutual and AMP and the movement of life assurance agents from one company to another. I forget which way it was. Jeffrey didn't quite achieve the result he anticipated. I may have contributed to the result because I took the view that I should try and unsettle Jeff if it was possible. I took many objections and interrupted him, of course only when it was legitimate and proper to do so. At the end of the case Jeff remarked to me, "Next time I'm opposed to you I'm gonna bring a hammer and nails into court and nail your feet to the floor." I regard this as one of the greatest compliments I have ever received at the Bar.

Jeffrey wasn't always accurate in the prediction of the outcome of his cases. I recall Jeff Kennett's defamation suit against *The Australian*. It was towards the end of the luncheon adjournment in the Supreme Court. Picture the place: the men's toilet. Sher and Kennett found themselves standing side by side at the urinal. Although in such circumstances it is important to keep "eyes front", one cannot help but see in one's peripheral vision who the other person is. Kennett, ever the friendly and outgoing politician said, "G'day Jeff. Heard about your vineyard — fantastic. Heard it's up for sale." Sher's response: "With the bloody money from this verdict you'll be able to buy it." End of urinal activity and Kennett reports this exchange to Jeremy Ruskin, his counsel, and says, "Looks like we've got them on the run." However, Sher's fears were unfounded and history has recorded that Kennett lost.

The "anonymous" senior counsel may have taken the view that Jeff never caused him the slightest amusement, but Jeff apparently regarded himself as quite humorous. Jeff was opposed to Dick Stanley in the case against the Red Cross which was the first case of an AIDS victim suing the Red Cross over infected blood. Jeff was desperate to get the case away from the jury and made no fewer than six applications for discharge. His best basis was that his instructing solicitors, Arthur Robinson Hedderwicks, had been observing the jury very carefully and the jury didn't laugh at any of Sher's jokes or humorous asides, which clearly showed that they were biased against his client. I think that application failed as well.

Jeff Sher has served on the Bar Council and was on the Bar Council at the time Lionel Murphy was appointed to the High Court. You will recall there was some controversy about his appointment and some barristers wanted to call a general meeting of the Bar. The matter came before the Bar Council. Dick McGarvie was Chairman and Leo Lazarus was Vice Chairman. Dick McGarvie announced the agenda item "High Court appointment" and Sher immediately chimed in "I move that Leo Lazarus be appointed". But Leo missed out.

Sher and McPhee had many battles over the years. They both had well deserved reputations in defamation matters. On one occasion Jeff represented the Commissioner for Police, Kel Glare, in his libel action against the *Herald Sun* for whom McPhee appeared. Frank Vincent was the judge and he had been lecturing in the Readers' Course before court and had told the readers to sit in on the case as they would see how two

top barristers behaved immaculately, notwithstanding the high stakes and high emotions in the case. That is not what occurred. During the hearing McPhee in a successful attempt to distract Jeff Sher, took a ballpoint pen to pieces, extracting the internal parts and blew down the tube. Jeff apparently got quite hysterical. "He's doing it! He's doing it, Your Honour!" Vincent immediately sent the jury out to try and restore order in the court. Sher complained "He was doing it!" McPhee in all innocence said, "I didn't do anything." Sher: "Yes you did." Vincent calmed them down and brought the jury back in to explain that a judge is sometimes like a lion tamer with counsel. I think it probably took someone of Vincent's experience to keep those two under control.

DOUGLAS MEAGHER

Douglas Meagher has a well-earned reputation for getting involved in long cases. The word is out — if you want a long case — get Doug Meagher. Some of his cases have been quite notorious and sometimes Doug is not too far from controversy. He is reported as saying, "A case isn't a case until you've been reported to the Ethics Committee at least once."

Doug Meagher is an enigma to me. I have known him since our law school days but I have had a little difficulty in coming up with amusing anecdotes about him. Either he has been able to engender omerta — a code of silence about himself or, as one person put it — or there are just no funny stories about him. But there are certainly many stories about the long cases in which he has been involved over the years. I am reminded about the Ultra-Tune litigation which went for about six months before Justice Alex Chernov. Before the case began Doug and his junior had a long conference with the instructing solicitor. Towards the end of the conference Doug announced, "I forgot to tell you I don't settle cases." And he didn't. After the fourth month Justice Chernov, being the wise judge that he is, suggested mediation. That proposal was implemented and Doug sat down with his junior and started to draft terms. The junior remarked, "I thought you didn't settle cases." Doug's reply: "That's right, I'm drafting terms of surrender." The mediation was held, no one surrendered. The case went a further two months and Doug's client was successful.

I should point out that Doug has skills that I lust after. No, I'm not referring to his driving skills, which I'm told are less than average, but rather, to his skills as a touch typist and his computer literacy. I remember back to the Painters and Dockers Inquiry when he was counsel assisting. I think he had an office somewhere near Queens Road, it was certainly out of the city. I remember visiting him on behalf of a client who had been summonsed to appear before the Inquiry. Doug had built up a computer program by which he could tell at the press of a button which barristers had represented any particular person and the persons who each particular barrister represented from time to time. I was offended by the fact that my name was not on the list.

I must say this for Doug, he is not afraid to stand up and be counted. He has appeared in a number of cases where, on one view, it might be said that he was appearing for an unpopular party. However, he is also prepared to stand up against officialdom. He has appeared successfully for a solicitor challenging the powers of the Solicitors' Disciplinary Tribunal ([1988] VR 757). Ten years later he again took on the Law Institute on behalf of a law clerk, but this time unsuccessfully ([1998] 4 VR 324).

I haven't had the pleasure of being driven by Doug, but I am told that is an experience I should avoid. Someone who knows him very well told me that Doug knows two skills for driving — full ahead throttle and full down brake. It is no doubt for that reason that I have received advice that if driving with him as a passenger I should take a cervical collar.

Doug is not fazed by judges. In one case before the Full Federal Court when the Court wanted to move the case to a different date, Doug objected strenuously. It must have been strenuously because afterwards he said to his junior, "Don't ever talk to a judge like that."

MAX PERRY

Max Perry is the only one of our honoured guests who has not attained the exalted rank of senior counsel. In Max's case it doesn't matter — he is in a class of his own, particularly having regard to his commitment to the Leo Cussen course and its participants over the years. I am told that he has never banked any of the cheques he has received over the years for his participation in the Leo Cussen courses, as he regards such a practice as a form of forced saving. Max, have you ever heard of stale cheques?

Every Easter Max buys a job-lot of large chocolate Easter bunnies from Darrell Lea. On one occasion Michael Black, now an eminent Chief Justice, was robed and on his way to court with a case in each hand. Max was close by with some Easter bunnies. Quick as a flash, Max put a large Easter bunny under each of Michael Black's arms, so Michael had to walk with Easter bunnies sticking out of his arms. How dignified.

I should point out that Max has a driver's licence but doesn't drive. When his reader Diana Rasheva was driving him to court one day she stopped to get petrol. She attended to the petrol, checked the oil and the radiator, etc. A male motorist, seeing Max just sitting there in the passenger seat, said "You'd have to be the laziest, fat **** I'd ever seen." Max responded, "Well if that's the case, you really ought to get out more often."

I should point out that Max says that the six least used words in the English language are, "Why yes Max, I'd like to."

On one occasion Max was the presiding judge in a Readers' Course moot in the Banco Court. A group of Japanese tourists came into the back of the court shortly before the end of argument in a traffic appeal to see Australian justice at work. Max pronounced the death sentence. Somewhere in Japan there is a group of people who think Victoria is really tough on traffic offenders.

One of Max's often repeated pranks is to deliver the line theatrically, "Can you spare $5 for an old digger?" On one occasion he was robed and in the County Court lift on his way to court and he came out with this observation. Another barrister immediately interjected, "Don't give it to him. I can get you two old diggers for $8."

On another occasion Max was appearing in an extradition proceeding before Kevin "Maximum" Mason SM. Max addressed the Magistrate, "My client has heard Your Worship's name. He consents to the extradition — but could he be given a window seat?"

JACK FAJGENBAUM

Jack Fajgenbaum was an academic for quite a few years before coming to the Bar. Perhaps it took him a little longer to build up the successful practice he now has. However, some years ago Jack and Tony Pagone were talking about their practices. Jack in his laconic and resigned end-of-the-world, life-treating-me-unfairly way, said to Tony, "How is it that you have so much work and I don't?" Pagone responded, "What can I say but that it shows the imperfections in the market."

Jack also has the unique ability of being able, unobtrusively, to go to sleep at the

Justice Buchanan and George Beaumont QC.

Jack Chernov, Peter Vickery QC, Jack Rush QC and Judge Davey.

Rosemary and Douglas Meagher QC, Elizabeth Hollingworth S.C., Jenifer Batrouney QC, Kate McMillan S.C., and My Anhtran.

dinner table sitting quite upright. Many pictures verify such conduct.

Jack, of course, knows everything about everyone. As one of his friends put it, he is part of the great human drama — he knows everyone and everyone knows him.

Jack can also sometimes be distracted in the course of his submissions. On one occasion he was opposed to Ray Finkelstein. He put a proposition to the court and Fink remarked in a loud voice "Wrong". Jack reflected and corrected the proposition. Jack continued, he put another submission on a principle of law and Fink called out again "Wrong". Jack recoiled and again corrected himself. He started again stating another proposition and again, Fink called out "Wrong". Whereupon Jack turned to Fink and in frustration cried out, "How come you know everything."

One of my colleagues, Mark Weinberg, has had a distinguished academic, practising and now judicial career, particularly specialising in criminal law. I always wondered what interested Mark about criminal law. Not so long ago he told me. He found reading in Jack's chambers so excruciatingly boring because of the type of work Jack did, particularly in relation to bankruptcy and insolvency, that he turned to a life of crime. However, there must have been something fecund about Jack's chambers. Why? Because three of his readers, Robin Brett, Leslie Glick and Terry Murphy, celebrated the birth of their first child shortly after reading in Jack's chambers. And of course Jack and Vivienne had their first child after about 17 years of marriage.

I am a little troubled about referring to Jack Fajgenbaum as a legend because St Jack is stretching the bounds of ecumenism. I also wondered why Jack came to the Bar having chosen what I thought was a permanent academic career. I am told that one of the reasons he left Monash to come to the Bar was that he would be able to wear a suit every day.

Jack Fajgenbaum is a well-known cyclist along the bicycle tracks of Melbourne. I ought to tell you that Jack dresses down for the occasion, which is probably why one observer of his cycling referred to his cycling clothes as "daggy".

I also wondered why Jack came to the Bar having chosen what I thought was a permanent academic career. I am told that one of the reasons he left Monash to come to the Bar was that he would be able to wear a suit every day.

However, the most severe criticism was reserved for his "out-of-fashion medium length white socks".

But Jack is also an accomplished runner, or at least was. Around 1980 there was a Fun Run over eight miles, or should I say 13 km, or thereabouts. 13,000 people turned up and Jack finished 6,289, beating Fricke QC (7,287) and Castan (7,794).

GEORGE BEAUMONT

George Beaumont is, in my view, a most misunderstood person. His upfront and

Jeffrey Sher QC. replies

David Shavin QC, Pamela Tate S.C. and Colin Golvan S.C.

Vivienne Fajgenbaum, and Diana and Jeffrey Sher QC.

Jack Fajgenbaum QC, Judge Hart and Philip Kennon QC.

aggressive style disguises considerable ability and strategic judgment. However, I question his judgment. Towards the end of 1979 George asked me if I would lead him in a case in Papua New Guinea which would go for one or two weeks and would probably settle in the first week. In the events which occurred it went for three months and George and I became the most frequent fliers on Air Niugini and Qantas between Port Moresby and Melbourne. There is a lesson to be learned about how I came to be retained. George was being led by a Sydney silk who got upset with the judge one day and muttered, he thought in an undertone, "And this f**kwit calls himself a judge." Next day the transcript appeared with those words indelibly imprinted in the transcript. The moral of the story is keep your thoughts to yourself. The Sydney silk withdrew from the case and I was retained. I always wondered whether George put him up to it.

George has a penchant for first class air travel and what goes with it. On our regular trips to and from Port Moresby in 1979–80 there was a regular fracas on board. George would order French champagne and usually on Air Niugini they would bring him Australian champagne. George would reject it, vociferously asserting that he knew they had French champagne on board and it must be given to him. It usually was.

George was well-known for his robust style of advocacy. It would often extend to making faces. Howard Nathan was often critical of Beaumont for doing this and would tell Beaumont that he had had enough of his facial gymnastics. George would rise to his feet, screw up his face in the manner that only George could and retort "But I didn't say anything".

George is unashamedly frank and direct in his views which are often said to offend accepted principles of political correctness. When Pamela Tate, now our eminent Victorian Solicitor-General, became Convenor of the Women Barristers Association, she invited George to a WBA cocktail party to celebrate the opening of the legal year. George went and one of his friends asked him whether he had been invited as an exhibit.

George is renowned for his aggressive and punchy style. It probably dates back to his days in primary school where it was said that he could not eat his lunch until after he had had a fight. It is said that even now he prefers a fight to a good feed and that he is uncommonly fond of a good feed.

George Beaumont's penchant for international travel, French wine and a good feed is soon to be interrupted when he becomes a grandfather of triplets by courtesy of his daughter, Kareena. George, are you ready for a change of life?

SUSAN CRENNAN

I went to a person who I thought would be a reliable source for dirt on Susan Crennan but the response was, "No one has anything on Sue — she's squeaky bloody clean." However, I can vouch for the fact that Sue has obvious magnetic abilities other than in relation to law. When we were in London in the middle of 1989 in the middle of Victoria's longest running civil case relating to the separation of oil and water technology on offshore oil platforms (245 sitting days),

Graeme Cantwell, Ray Perry, Diana Rasheva and David Drake.

Lachlan Watts and Chris Connor.

Robin Brett QC and Judge Waldron.

Jeremy Ruskin QC, Caroline Kenny and Richard McGarvie.

Sue persuaded me to go one evening to a discothèque/nightclub in Covent Garden where she was immediately surrounded by milling men. I made sure we were both home and in bed by 10 o'clock. It was during this period that Susan coined what became a standard farewell from her — "flocculater". For the uninitiated, which I'm sure includes most of you, flocculation is the process of holding particles of aqueous vapour in suspension.

We even went to the learned Solicitor-General for the Commonwealth, David Bennett QC, with whom Sue read in Sydney. The best he could do was tell us that she was "not at all a frivolous young person". I assume he meant then and not now. However, on her first day as a reader with Bennett, who was trying to juggle five equity judges sitting simultaneously at the one time — a standard Sydney Friday — Sue helped him out by doing six mentions in five courts in the one morning. What an athlete!

Susan Crennan is distinguished by becoming the first woman Chairman of the Bar. She is very much a renaissance woman with a passion for English literature and Old Norse. It was always a joy settling her drafts. We argued more about grammar than we did about law.

In her capacity of Chairman of the Bar, Sue received a number of ethical complaints. The most succinct complaint was in the following form:

> Dear Missus,
> My barrister his name ****. He no bloody good. He talks stupid. He a bastard. He want me pay $300.
> You fix please.

I'm sure Sue fixed it but I don't know how.

Susan appeared one day as junior with an eminent silk in the Practice Court on an application for an injunction which had its problems. The application was heard in the morning and judgment was to be given after lunch. The silk told Sue, "If we get this injunction I'll bare my bum in Bourke Street." Sue went back after lunch to hear the judgment and came back to report to the silk the crowds were gathering outside Myers in Bourke Street for him. You will be pleased to know that modesty prevailed and the silk reneged on his promise.

In the mid 80s there was a substantial corporations case before Barry Beach. About ten silks and ten juniors were lined up and the silks approached Barry's associate to ask if they needed to robe. Word came back that they did not need to robe, so long as they all wore matching socks. Why Barry was concerned about socks was not clear. Sue asked her leader, Douglas Graham QC to seek leave for her to appear un-socked but he declined to do

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so. History does not recall whether Barry Beach objected to Sue's legs.

GERRY NASH

Gerry Nash had a distinguished academic career but I'd forgotten that he practised at the Bar before expanding on his academic career. Gerry came to the Bar in 1959 and shared one room with young Hartog Berkeley in Condon Chambers at 469 Chancery Lane. It was opposite the back entrance of Selbourne Chambers. Then, as now, accommodation for barristers was scarce and Mr Condon, the solicitor, let out rooms in his office. On the ground floor there were four small rooms. Gerry and Hartog shared one, Allayne Kiddle occupied another. My subsequent researches have disclosed that the other two were occupied by Garrick Gray and Garth Buckner. When you entered the ground floor there was a printer on the left for whom you rang a bell for service, and there were the barristers on the right, and heaven knows what you had to do to attract their attention. Probably wave a brief.

I am told that when Gerry was appointed as Foundation Professor and Dean at the University in Papua New Guinea Law School in 1966 the headline in *The Sun Newspaper* was "Professor at 32 and he's modest". What made him change?

Gerry had an extensive academic career before coming to the Bar both in Papua New Guinea and at Melbourne and Monash University where he became Dean. On one occasion his academic career and Bar practice clashed. George Hampel was sitting in the Practice Court hearing an application for an order nisi to review a decision from the Magistrates' Court. Jack Hammond was for the applicant and Hartog led Gerry for the successful informant. After Hartog made his submission, Hammond argued that what Hartog had said was contrary to the treatise of his learned junior, Nash on Magistrates' Courts. Hammond said that he realised one could not rely on a text until the author was dead, but that his learned friend was not looking too well. Hartog responded vigorously: "He might as well be dead! Certainly he's wrong, and I'm not responsible for the silly things my juniors write in their books." History does not record what Hampel J did.

I am reminded about the time Gerry was at a County Court Civil Call over. Many counsel were trying to get their cases listed and it was a problem if your case was going to take too long. Gerry reduced his assessment of time for his defamation case from four-to-five days to a day or two. The judge, a little perplexed, asked: "How so?" Nash's immediate response: "It's only a little reputation, Your Honour." History does not record the outcome.

On one occasion Susan Crennan was opposed to Gerry before Justice Howard Nathan. It was a very hot day and Gerry was suffering very much in the heat, being fully robed. He knew Howard Nathan's views about robes and had worked hard when on the Bar Council for their elimination. So he asked the judge whether, as similar heat was forecast for the following day, would it be necessary to wear robes. Howard's response, "Mr Nash you can come in feathers if you like." Tempting though it was, the former founding Dean of the Papua New Guinea Law School restrained himself from wearing a feathered headdress. They robed as usual. My recollection when I was in Papua New Guinea with George Beaumont 20 odd years ago was that there was a form of dress around the lower part of the body called "arse grass". How would Gerry have looked in arse grass?

I am told that when Gerry was appointed as Foundation Professor and Dean at the University in Papua New Guinea Law School in 1966 the headline in *The Sun Newspaper* was "Professor at 32 and he's modest". What made him change?

Let me conclude on this note. Since this is a legal gathering I thought I should be careful not to be obscene. I don't think I have been, but that's for you to judge. The problem is — what is obscenity? I am reminded of the case which was heard in Queensland many years ago around 1968 where an actor was charged with obscenity for using the expression on the stage "f****** *****". (The second word was racist, not regarded as objectionable then but unacceptable today). This gave rise to the porridge definition of obscenity. I think the play was "Norm and Ahmet". The actor was duly convicted and the case went on appeal to the Queensland Court of Criminal Appeal. In the course of argument the learned presiding judge asked counsel — tell me what is the definition of obscenity — what is obscene? Counsel responded that a workable definition of obscenity was what would be your wife's response over the breakfast table. The argument proceeded. That night the judge decided that he would try the workable definition of obscenity the next morning and assess the result. He sat down at breakfast and his wife said "What would you like, dear?" His response was "I'd like some f****** porridge." His wife's response was, "But you don't like porridge, dear." I think the appeal was upheld.

One has to be careful of one's use of language because it means different things to different people. A good example, is the late Queen Mother who had a partiality to gin and tonic and whose staff were composed significantly of men of the gay persuasion. One evening the Queen Mother was lusting for a gin and tonic. She rang for her staff but there was no answer again and again. Finally she got through. She was heard to say, "I don't know what you old Queens are doing down there, but this old Queen needs a gin and tonic."

I think I now need one too. I drink a toast to our eight living legends.

The Fight Against Terrorism: One Step Forward, Two Steps Back

By Yusuf Zaman, member of the Victorian Bar's Human Rights Committee

We can afford no liberties with liberty itself.

TWENTY-TWO July 2003 marked a watershed in the legislative history of Australia. On that day, the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (the "Act"), the legislative cornerstone of the Commonwealth government's anti-terrorism strategy, became law.

The stated purpose of the Act is to establish a mechanism for the gathering of intelligence relating to terrorism offences. It focuses on persons who may have information about such offences, but its mandate does not extend to persons suspected of actually perpetrating terrorism, unless they are between 16 and 18 years of age.

The Act has myriad controversial features that mark a departure from established civil libertarian principles. These include the possibility of compulsory detention for up to seven days of persons who may have information relating to a terrorist offence; the circumscribing of rights to legal representation; and the withdrawal of the right to silence and the privilege against self-incrimination.

On account of these unprecedented features, a storm of controversy brewed in the country when the Act first saw the light of day as the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (the "ASIO Bill").

After its passage through the House of Representatives, the ASIO Bill was significantly rebuffed in the Senate, as the opposition strove to de-fang it of its particularly extraordinary features. The Senate's Legal and Constitutional Committee (the "Senate Committee") held an inquiry into the ASIO Bill, and this inquiry was inundated with a host of submissions from community organisations, professional bodies and concerned individuals.

Yusuf Zaman, member of the Victorian Bar's Human Rights Committee

In late October 2002, the Victorian Bar was given the opportunity to make a submission to the Senate Committee. The Human Rights Committee of the Bar met on 6 November 2002 and unanimously objected to the ASIO Bill as an unwarranted and serious intrusion into rights held sacred by Australians.

On 8 November 2002, the Bar Council adopted the detailed resolution of the Human Rights Committee, which included a list of the particularly objectionable elements of the ASIO Bill, as the Bar's formal submission to the Senate Committee.

Further, on 22 November 2002 the Chairman of the Human Rights Committee, Jacob Fajgenbaum QC, and the Chairman of the Criminal Bar Association, Lex Lasry QC, represented the Bar at the public hearing conducted by the Senate Committee at Melbourne.

This article simultaneously pursues a two-fold objective: it expounds the submissions made by the Bar on the ASIO Bill and then examines the extent to which these submissions have been adopted in the Act.

THE BAR'S SUBMISSIONS VIS-À-VIS THE ACT

The Bar took a stand on the following features of the ASIO Bill:

(1) Compulsory Detention

In order to question a person under the ASIO Bill, he or she could be summonsed to appear before a questioning authority, or in certain circumstances a warrant could be issued for the person's arrest.

In essence, the legislation sanctioned the possible compulsory detention of persons, up to a maximum continuous period of seven days, for the purpose of collecting intelligence considered important in relation to a terrorist offence.

The crucial point was that persons potentially detainable under the ASIO Bill did not have to be suspected of actual involvement in terrorism activities; rather, the mere possession by a person of information "important in relation to a terrorism offence", was considered a sufficient trigger for compulsory detention.

The Bar took the stand that such a regime of compulsory detention for persons themselves not suspected of any criminal activity was foreign to the Australian legal system, an integral element of which is the principle of civil liberties.

Notwithstanding the view that desperate times often call for desperate measures, the Bar argued that the legislation failed to make a case for such a drastic abrogation of the cherished right of individual liberty.

In his oral evidence before the Senate Committee, Fajgenbaum QC proposed an alternative mechanism to compulsory detention. This mechanism sought to harmonise the importance of effective intelligence gathering with the equally crucial need for protecting human rights.

The proposed mechanism draws inspiration from the Canadian response to the events of September 11, 2001. According to an amendment to section 83.28 of the Criminal Code of Canada, a person who may reasonably be believed to have direct and material information relating to an executed or potential terrorism offence, or may reveal the whereabouts of an individual suspected in connection with the commission of that offence, may be subjected to an order for questioning before a judge.

However, a judge who orders a person to appear for questioning cannot order that the person be compulsorily detained for this purpose. This is because the Canadian legislation does not envisage a system of compulsory detention for a person subjected to an order for questioning.

The only exception to the above rule occurs when a person breaches the order for questioning and fails to appear before a judge. Section 83.29 of the Criminal Code of Canada provides that in such circumstances a judge may sanction the arrest of the person. Once the person is arrested and brought before a judge, he or she may be released and directed to appear for questioning, or be remanded into custody for this purpose.

The Bar submitted that the Canadian approach struck an equitable balance between intelligence gathering and civil liberties. Therefore, it was recommended that the ASIO Bill be amended on such lines.

However, the Act has not taken into account the concerns of the Bar, as well as countless other individuals and organisations, on the issue of compulsory detention. It continues to maintain a regime of possible compulsory detention for persons subjected to a warrant for questioning.

(2) Prescribed Authority

The ASIO Bill created a prescribed authority before which persons were to be questioned. A prescribed authority was defined as a deputy president, senior member or member of the Administrative Appeals Tribunal ("AAT").

Appearing before the Senate Committee, Fajgenbaum QC and Lasry QC recommended that the questioning of persons under the ASIO Bill be conducted before a serving or retired judge of a superior court. They further recommended that a panel of judges be set up for this purpose. Reference was also made to the anti-terrorism provisions of the Canadian Criminal Code, which direct the questioning of persons before a judge.

The Act has made certain concessions on this point. It defines a prescribed authority as a retired judge of a superior court. In circumstances where there is an insufficient number of retired judges, the Minister may appoint as the prescribed authority a serving judge of a State or Territory Supreme Court or District Court (or an equivalent).

Finally, if there is an insufficient number of the aforesaid judges, the Minister may appoint the President or a Deputy President of the AAT as a prescribed authority.

In view of the above amendments to the Act, the Bar's concerns about the independence of the prescribed authority have been largely met.

(3) Length of Custody

The ASIO Bill provided that persons suspected of having information relating to terrorism offences could be detained for periods of up to 48 hours under a warrant, with additional warrants extending the maximum continuous period of detention up to seven days.

In addition to its in-principle opposition to the concept of compulsory detention, the Bar condemned the potential length of such a period of incarceration. While recording its opposition, the Bar stressed the point that the detention was being envisaged in respect of persons suspected of having information about terrorism offences and not those who were suspected of actual involvement in such nefarious activities.

Notwithstanding the Bar's opposition to the length of any proposed detention, the Act has maintained the maximum continuous period of seven days for compulsory detention of a person arrested under the Act.

(4) Access to Legal Representation

The ASIO Bill provided that in certain circumstances a detainee could not have access to legal representation for up to 48 hours after his or her arrest.

The Bar opposed this restriction on the fundamental right of every person to have ready access to legal representation, no matter how heinous the charge against him or her.

The Act has retained a regime for conditional access to legal representation. On the plus side, the procedure for denying access to legal representation has been made more stringent. However, it seems this gain can at best be described as a Pyrrhic victory.

Before examining the question of denying access to legal representation, it is pertinent to refer to the manner in which the Act actually allows access to a lawyer.

According to the Act, a detainee must inform the prescribed authority of the identity of the lawyer whom the person proposes to contact. Presumably, if the detainee does not know a lawyer, or is unable to supply the identity of such a person, the only manner in which he or she may obtain legal access is if the prescribed authority makes a direction permitting the detainee to contact any person, who may in turn help the detainee identify a lawyer. At best this is a most circuitous way of obtaining legal access; at worst, it may be unworkable.

Returning to the point about denial of legal access, the ASIO Bill gave the Minister the power to specify in the warrant that a detainee was not to have access to an approved lawyer for a period of up to 48 hours.

According to the Act, it is the prescribed authority to whom a request to deny a detainee access to a lawyer of choice is to be made. Substituting prescribed authority for the Minister clearly marks an improvement over the procedure specified in the ASIO Bill.

However, once the request is made, the prescribed authority may direct that a detainee be denied access to a lawyer of choice. Before making this direction, the prescribed authority must be convinced that because of the circumstances relating to the lawyer, contact between the detainee and the lawyer will lead to alerting a person involved in a terrorism offence that the offence is being investigated or the destruction, damaging or alteration of a record or thing that the detainee may be requested to produce.

The denial of access to the lawyer in question will be in the nature of a blanket denial, and not merely for a set period.

Of course, the detainee shall have the right to seek another lawyer of his or her choice, presuming the detainee can identify such a person, or if the prescribed authority makes a direction to facilitate this objective. However, the new lawyer, too, could be barred from offering his or her services by virtue of a fresh request to the prescribed authority.

(5) Criteria for a Legal Representative

One of the particularly objectionable features of the ASIO Bill was that it envisaged a panel of approved lawyers. Only a lawyer from this panel could represent persons being questioned under the provisions of the ASIO Bill.

To be an approved lawyer, certain criteria required fulfilment. A practitioner needed five years enrolment as a legal practitioner of a federal court or of the Supreme Court of a State or Territory, and the successful clearance of a security assessment, as well as "any other material" considered relevant to approve the practitioner. The task of designating approved status to a lawyer was assigned to the Attorney-General.

The Bar strongly took issue with the need for lawyers to obtain security checks and meet other vague and broad criteria in order to represent persons being questioned under the ASIO Bill.

Both in its written submissions to the Senate Committee and at the public hearing, the Bar took the position that it should be sufficient for a lawyer of a certain years' practice and otherwise good standing to qualify as an approved lawyer. To expect lawyers to go through a vetting exercise, and that too partly at the hands of a Minister of the Crown, namely the Attorney-General, as opposed to a judicial referee, made the whole process quite objectionable.

The Act has adopted these submissions. It defines a lawyer of choice as a person who is enrolled as a legal practitioner of a federal court or the Supreme Court of a State or Territory. A lawyer of choice need meet no other criteria.

(6) Curtailment of Legal Professional Privilege

The ASIO Bill authorised for the monitoring of any contact between a person and his/her lawyer; however, no definition was provided for the term "monitoring".

Arguably, monitoring could be as non-intrusive as the video recording, without sound, of contact between a lawyer and his or her client. Then again, it could be as far-reaching as the physical presence of ASIO officers during such contact.

By not defining monitoring, it may have been intended to leave open all options, so that ASIO could do what the inimitable Bard described as, "the bloody book of law you shall yourself read in the bitter letter after your own sense".

On the face of it, this provision struck a blow at the time-honoured principle of legal professional privilege. Not surprisingly, the Bar condemned it as a distortion of an integral feature of the Australian legal system, namely the right to confidentiality of legal advice.

In his address to the Senate Committee, Fajgenbaum QC pointed out that the Canadian legislation imposes no limits on the ability of a person to confer with his or her lawyer.

For its part, the Act takes an approach that is opaque at best and unworkable at worst.

On the one hand, there is no concession made on the point of monitored contact between a person and his or her lawyer. But curiously enough, the Act also seeks to uphold the law relating to legal professional privilege.

It is hard to imagine how the twain shall meet.

The dilemma is brought to a head by the Protocol made pursuant to section 34C(3A) of the Act.

The Protocol, which was tabled in Parliament on 11 August, interprets monitoring as the exercise of contact between a lawyer and his or her client while in the presence of officers having authority under the warrant for questioning, unless the prescribed authority directs otherwise.

The effect of the above provision of the Protocol will be to render nugatory section 34WA of the Act. It begs the question how legal professional privilege could have any meaning in an environment where contact is being physically monitored.

Arguably, the Protocol is in irreconcilable conflict with the section 34WA of the Act. It must give way, unless the concept of legal professional privilege is to be turned on its head.

(7) Role of Lawyer of Choice

The ASIO Bill introduced a set of provisions that had the effect of consigning the role of an approved lawyer to that of an emasculated bystander.

A lawyer, whose role was already circumscribed due to the monitoring of contact with his or her client, was to be effectively neutralised during the course of questioning. He or she would have no right to intervene in the client's questioning or to address the prescribed authority, save to request clarification of an ambiguous question. And if the prescribed authority found the legal adviser's conduct to be unduly disrupting, he or she could be removed from the place of questioning.

The Act is a harsh piece of legislation. It clearly constitutes a drastic aberration from inalienable civil libertarian tenets that have formed the bedrock of Australian laws dealing with security and public order issues.

The Bar recorded its opposition to the above provisions on the ground that such a potent truncation of the role of a legal representative would virtually denude a person detained under the Act of the most basic right of legal representation. A serious infraction of human rights at the best of times, to virtually abolish the right to legal representation in circumstances where a person could potentially be questioned on a gamut of sensitive issues, with the prospect of severe penalties hanging as the sword of Damocles on his or her head, was particularly unwarranted.

At the hearing before the Senate Committee, Fajgenbaum QC pointed out that in the Canadian approach, a person brought for questioning has the right to retain and instruct counsel at any stage of the proceedings. No restrictions have been placed on this right.

On this issue, the Act has made no concession. The restrictions proposed by the ASIO Bill remain firmly in place.

In addition, there is a new curb on the ability of lawyers to discharge their professional obligations.

According to section 34VA of the Act, lawyers' access to information which is otherwise controlled or limited on security grounds, may be prohibited or regulated in connection with proceedings for a remedy relating to the issuance of a warrant or the treatment of the detainee under the warrant.

(8) Self-incrimination and the Right to Silence

The ASIO Bill discarded the privilege against self-incrimination and the right of a person to remain silent.

Accordingly, any person appearing before a prescribed authority for questioning could not refuse to provide any information, record or thing on the ground that doing so could incriminate the person. The penalty for refusing to answer a question was imprisonment for a maximum of five years.

The logic for scaling back these important rights was rooted in the need to maximise the likelihood of obtaining

information and material to avert or solve terrorism offences.

The Bar opposed the withdrawal of these rights on the ground that the move constituted an extreme and unjustified reaction to a threat that, although serious in nature, was largely amorphous in shape and of questionable imminence. To withdraw the privilege against self-incrimination and the right to silence in respect of persons who were themselves not suspected of involvement in terrorism offences was, in the view of the Bar, an unwarranted detraction from fundamental civil liberties.

Fajgenbaum QC pointed out to the Senate Committee that the Canadian legislation had withdrawn the privilege against self-incrimination; however, it still allowed a person to refuse to answer questions relating to privileged information. It was recommended that such an approach be followed in the ASIO Bill.

Nevertheless, the Act enshrines the withdrawal of the privilege against self-incrimination and the right of silence, without making an exception for privileged information.

(9) Use of Information

Having withdrawn the privilege against self-incrimination, the ASIO Bill sought to balance the pendulum by granting immunity in relation to any information obtained from questioning a person. But this immunity was of limited effect.

As pointed out by the Bar in its submission to the Senate Committee, the immunity granted by the ASIO Bill related only to direct use of any information obtained from a person who was questioned under a warrant.

Such information could not be used in any criminal proceedings against the person, save proceedings concerning the giving of false evidence during questioning.

However, unlike the Canadian approach, there was no immunity granted from derivative use of the information obtained from the person. The ASIO Bill left open the possibility that evidence derived from evidence obtained from the person during his or her questioning could be used against the person in subsequent criminal proceedings.

The Bar took the position that, coupled with the withdrawal of the privilege against self-incrimination, the failure to grant derivative use immunity marked a significant erosion of crucial civil rights. It was recommended that the Canadian approach be adopted in Australia, so that a fair balance could be struck between the needs of security and civil liberties.

The submissions of the Bar did not find favour with Parliament. The Act maintains the position reflected in the ASIO Bill. Consequently, evidence sourced from the information obtained from persons questioned under the Act can be used against them in other legal proceedings.

(10) Reverse Onus of Proof

The ASIO Bill put the onus of proof onto the shoulders of a person who answered questions in the negative. Such person was required to provide evidence that he or she did not have the information or thing requested of them.

The Bar opposed this innovation on the ground that it would be extremely difficult for a person to discharge the reverse onus of proof. Short of making assertions to the contrary, a person would be hard-pressed to provide evidence that he or she did not have any information relating to a terrorism offence. It was akin to providing evidence that some information was not in the mind of the person.

At the hearing before the Senate Committee, the point was thrashed out further. In response to questioning from the Chairman of the Senate Committee, Lex Lasry QC conceded that, depending on the manner in which it operated, the reverse onus might not be relevant in proceedings under the ASIO Bill.

Lasry QC explained that if questioning under the ASIO Bill followed the rules of a normal investigative hearing, like a royal commission, the mere assertion by a person that he or she did not have the sought-after information, might serve as a sufficient answer. It would then be up to the person exercising authority under the warrant to provide evidence to rebut the assertions made by the person being questioned.

Fajgenbaum QC made the further point that the practical effect of the reverse onus of proof would be to require the person being questioned to give evidence in his or her favour. Such a requirement would not have arisen in the absence of the reverse onus of proof.

In view of the ambiguity about the manner in which the questioning process would operate under the ASIO Bill, the Bar maintained its opposition to the introduction of the reverse onus of proof.

The Act has not made any concession on this point, and the reverse onus of proof remains in force.

(11) Children

The scope of the ASIO Bill extended to persons between 14 and 18 years of age. However, persons between these ages could only be compulsorily detained if they were actually suspected of involvement in terrorism.

Persons under the age of 14 years could not be made subject to a warrant for questioning under any circumstances.

The Bar did not make any written submissions to the Senate Committee on the provisions relating to children.

However, at the public hearing representatives for the Bar briefly expressed their views on this issue in answer to questions posed to them.

On the one hand, Fajgenbaum QC took the view that if persons aged between 14 and 18 years were suspected of actual involvement in terrorism, he saw no problem with their compulsory detention.

Elaborating this issue further, Lasry QC made the point that, whereas it was one thing to detain persons aged between 14 and 18 years if they were suspected of involvement in terrorism activities and were charged as such, it was quite another thing to detain such persons simply for an intelligence-gathering exercise. Under the scheme proposed in the ASIO Bill, it was possible that at the end of the questioning period, the 14-18 year olds may not actually be charged with involvement in terrorism.

In the final analysis, the Bar's representatives recorded their opposition to any move to detain persons under the age of 18 years for intelligence gathering purposes.

The Act has made the concession that a person must be between the age of 16 and 18 years, as opposed to the earlier threshold of 14 to 18 years, before he or she can be taken into custody for intelligence-gathering purposes if suspected of involvement in terrorism.

Persons under the age of 16 years cannot be detained under any circumstances.

CONCLUSION

The Act is a harsh piece of legislation. It clearly constitutes a drastic aberration from inalienable civil libertarian tenets that have formed the bedrock of Australian laws dealing with security and public order issues.

There is an old saying that laws too gentle are seldom obeyed; too severe, seldom executed.

The Bar hopes that there will be scarce need for the implementation of this severe legislation.

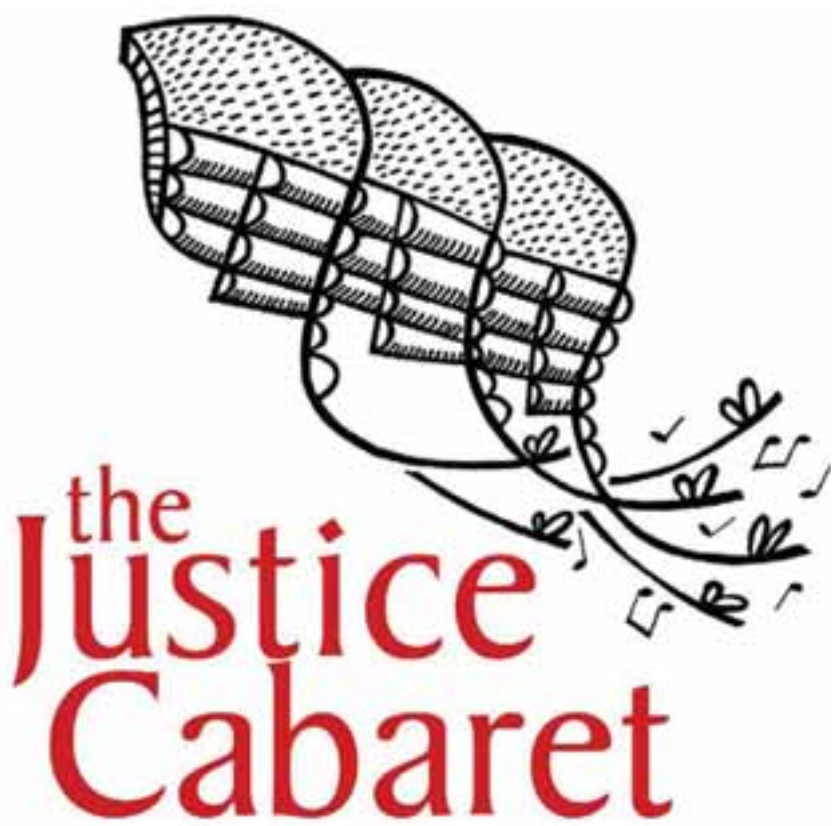
Justice Cabaret: Life in Law

Presented by the Victorian Law Foundation and National Trust of Australia (Vic), Storey Hall, RMIT on Thursday 11 September 2003.

Chief Justice John Phillips performs.

Judge John Smallwood does Ned Kelly.

Professor Kathy Laster.



WAS September 11 an auspicious date for a "Justice Cabaret"; to farewell the retiring Chief Justice, John Haber Phillips? The superstitious and soothsayers of the law had their doubts. Would there be bad karma at Storey Hall? The answer was a resounding no, with the night being a great success and a tribute to the career of John Phillips.

The idea was somewhat unusual. A cabaret to farewell a Chief Justice? Surely this was not the media's preconception of the legal profession or "industry" for that matter? Especially when the Chief was to sing?

But Professor Kathy Laster of the Victorian Law Foundation hatched the idea many months ago and a committee swung into action. The evening was a joint presentation of the Law Foundation and the National Trust of Australia. The surplus from the dinner/cabaret went to the funding of the new Law Museum to be housed in the old Magistrates' Court in Russell Street, now the property of RMIT.

There was much discussion at numerous meetings, a rehearsal of sorts, and suddenly there were performers, a program and a show.

As the photographs contained herein testify, there was a large and happy crowd watching the singing, acting, musical and comedic talents of the legal profession.

The cabaret loosely followed the career of the Chief Justice — with the empha-

sise on "loose". Judge John Smallwood, grandly attired in the armour of Ned Kelly, co-compared with talented solicitor William Mulholland. "Ned" searched the audience for the Chief Justice. After many false starts the Chief was "found" and duly emerged on stage to sing a bracket of songs entitled "Take Me To Your Heart". The audience did just that.

Those present were then transported back to the school days of the young John, as he tentatively entered the office of the Career Brother at De La Salle College, to discuss his future prospects. Ideas of becoming an opera singer, or renaissance man were firmly beaten out of the young Phillips with the familiar words "Put out your hand". Finally it was decided he was to get a good job in the State Public Service — the Chief Justice of Victoria. Paul Elliott QC made a good "Career Brother" and Mark Robins was the spitting image of the young Phillips.

The night was noteable in that the three Chiefs all performed. After the Chief Justice had sung, Chief Judge Rozenes and Chief Magistrate Ian Gray joined Justice Howard Nathan in a rendition of "Three Little Judges". Gilbert and Sullivan may well have turned over in their graves, but their Honours and His Worship performed with gusto and aplomb, and sometimes in tune.

The Gilbert and Sullivan theme continued with Judge Michael Strong's clever adaptation of "The Punishment Fits the Crime". Judge Strong does have a very good voice and his version of the famous "Trial by Jury" song brought the house down. He was ably accompanied by Grant Johnson and the very talented Allens Arthur Robinson House Band.

Then some professionals appeared on stage, that is to say, professional entertainers in the form of Jon Faine and comedian John Clarke. A sparkling exchange of Clarke's "15 minutes" at law school ensued. The next morning, on his morning radio show, Jon Faine was very complimentary about the level of theatrical talent to be found in legal ranks.

The evening ended with compere William Mulholland singing "Tenterfield Saddler" which was a fitting finale.

A great deal of hard work went into the organisation of the evening and the program listed on these pages testifies to the number of people involved.

It was indeed a fitting tribute to the career of our retiring Chief Justice, and it was obviously both an amusing and emotional evening for him.

Program

In the Foyer
Jugglers — Victoria Marles and Bryce Menzies
Squeeze Box — Russ Kelly
Clown — Liza Newby

Ned Kelly and the Search for the Chief Justice
Ned Kelly — John Smallwood J
William Mulholland — as himself

"Take Me To Your Heart"
Solo — The Hon. Justice John Harber Phillips AC, Chief Justice of Victoria
Accompanist — Grant Johnson

"The Boy Who Wanted More"
Written and performed by
Paul Elliott QC and Mark Robins

"Our Favourite Things"
Teacher — Kathy Laster
Student — Lucia Clarke
Practitioner — Elizabeth Wentworth
Accompanist — Grant Johnson

"I am Lawyer"
The Legal Women's Choir with
The Allens Arthur Robinson House Band

"Three Little Judges Stern"
Judge 1— Ian Gray
Judge 2 — Michael Rozenes
Judge 3 — Howard Nathan
Accompanist — Grant Johnson
with The Aliens Arthur Robinson House Band

"Punishment Fit The Crime"
Solo — Judge Michael Strong
Accompanist — Grant Johnson
with The Allens Arthur Robinson House Band

Ned Kelly Soliloquy
Ned Kelly — Judge John Smallwood

"Tenterfield Saddler"
Solo — William Mulholland
Accompanist — Grant Johnson
with the Aliens Arthur Robinson House Band

The Allens Arthur Robinson House Band
Piano — Melanie Bond
Trombone — Rosemary Bryant-Smith
Lead Guitar — Sam Cadman
Trumpet — Blair Day
Bass Guitar — Melissa Foong
Drums — Darren Seknow

Mark Robins, Elaine Melksham, Paul Elliott QC, Justice Howard Nathan, Chief Judge Rozenes, and Chief Magistrate Ian Gray.

Compere William Mulholland.

Ned with Justice Linda Dessau.

Judge Liz Gaynor, Judge John Smallwood, Judge Margaret Rizkalla and Julian Fitz-Gerald M.

Brendon Kissane, Fiona Smith, Judge Irene Lawson, Judge Meryl Sexton and Barbara Rozenes.

Dan and Anne Sweeney, John Briffa, Clare Darmanin, Janet and Max Grant, and Terry Victor Borg.

Professor Kathy Laster, David Thomson and Leanne Newson.

Anne and Judge Michael Strong, and Judge Wendy Wilmoth.

A quizzical John Clarke.

Kevin Lyons, Judge Rachel Lewitan, Helen Phillips and Patrick Tehan QC.

Elizabeth Brophy, Margaret Lodge and Robyn Wheeler.

Judge Margaret Rizkalla, Barbara Cotterell M and Jacinta Heffey M.

Dimity Lyle, Justice Robert Osborn and Anthony Southall QC.

Alistair Urquhart, Rowland Ball and Mary Urquhart.

Susan Phillips, David Collins S.C., Kathryn Dalton, Tabitha Lovett, Matthew Barrett and Aileen Ryan.

Ned with President John Winneke.

Life is a … Justice Cabaret

"I am lawyer, hear me ROAR …" sang a bunch of enthusiastic female lawyers, to the tune of Helen Reddy's "I am Woman".

In a night that drove the ghost of Ned Kelly (hilariously played by Smallwood J) to comment, "This room's full of sheilas! I thought this was a night for lawyers? … Don't they go off and have babies and neglect their career? How does the female mind deal with such intellectual rigour … how does the fairer sex cope with the adversarial situations …?"

(Little does poor Ned know that women sometimes revel in that kind of underestimation from an opponent!)

In a night of talent and enthusiasm, a bunch of legal women had only to cope with the intellectual rigours of song lyrics. Under the careful and extremely patient tutelage of choirmaster and singing teacher Julian Bailey, we learned to emphasis vocals, enunciate consonants, ROAR on cue, ham it up and generally have a good time.

We followed the great talents of Professor Kathy Laster of the Victorian Law Foundation, and a genuine talent in her own right, donning mortarboard and academic robe, urging a bit of statutory interpretation on the audience thus "When you read you begin with A, B, C. But in law you begin with Section 3 …" She soon realizes her audience just isn't paying attention and instead ignores them completely and dreams of a few of her "Favourite Things" — telling them in no uncertain terms at the end she just doesn't give a stuff!

Kathy was followed by the cheeky and talented tones of Lucia Clark (singing of the favourite things of students) and Elizabeth Wentworth (the favourite things of a practitioner) — it was an entertaining and lively look at what really goes on in the private legal mind.

A hard act for the choir to follow! Whilst we spent the previous eight or so weeks cursing the evenings we set aside for choir rehearsal (or at least, the ones we actually turned up to), it is a great reminder that there is a kind of adrenalin other than the adrenalin we get from court appearances, silks and juniors, solicitors and researchers, and those normally on the other side of the bench, we were all keyed up like teenages when we strode out on stage to be judged in a somewhat different setting.

We sang of women in every role:

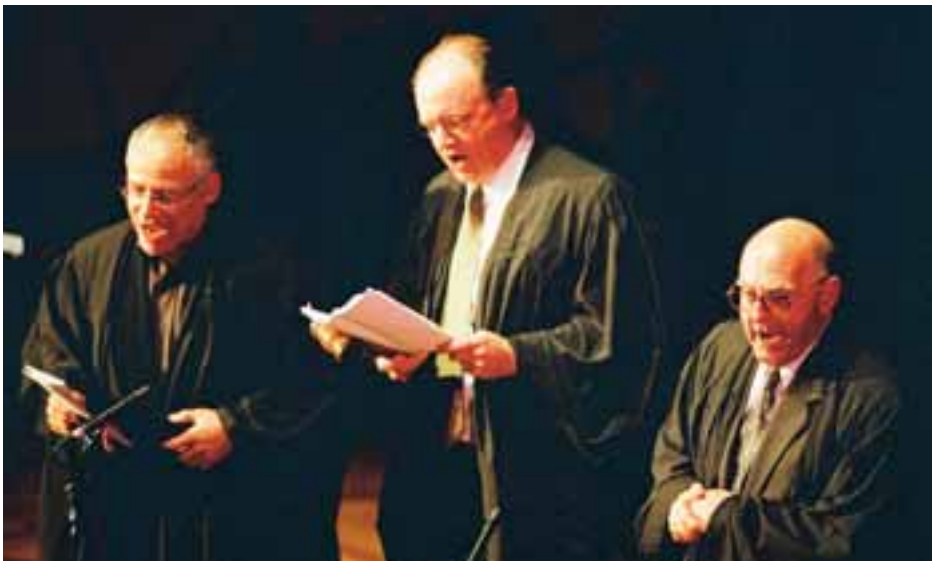
> And the Judges pull a face when I go to cite a case, may it please them but they still don't understand …
>
> I will take your full instructions, without causing any ructions and I won't skip details if its Legal Aid …
>
> I am judge now watch me rule, on every legal windbag fool …

We had a great time, tried diligently to follow the choreography we had been given, and got enough laughs to think the audience understood what we were singing (or was it the big screen on the side of the stage …).

A good time was had, and an affectionate farewell given to our retiring Chief Justice, by all.

Carolyn Sparke

The Legal Womens Choir — "I Am Lawyer".



Chief Judge Rozenes, Chief Magistrate Gray and Justice Nathan serenade.

Judge Michael Strong — "Punishment Fits the Crime".

Kathy Laster, Liz Wentworth and Lucia Clarke — "Our Favourite Things".

Career Brother Paul Elliott QC with young John Phillips — Mark Robins.

Jon Faine reminisces on the law.

Lawyer's Bookshelf

Continued from page 58

find references to a particular topic within other topics and otherwise to cross-reference terms. The result may be that an important principle is lost to a reader due to their lack of knowledge as to its precise nomenclature: for example, what proportion of non-criminal practitioners would know to look for the heading "Anunga rules" when dealing with the difficulties faced by an Aboriginal defendant without a full grasp of the English language? References to other topics which appear in the content of a heading go some way towards rectifying that problem.

That minor problem aside, the work is a handy reference for criminal practitioners. For those who only stray occasionally into criminal practice, it is an indispensable tool which explains fundamental concepts in plain language and provides comprehensive references to primary materials from which submissions can be drawn.

Stewart Maiden

Jusice Susan Kenny, Justice Marilyn Warren, Justice Katharine Williams, Justice Julie Dodds-Streeton and Justice Rosemary Balmford.

Right: Fiona McLeod and Robin Brett unveiling the portrait.

Unveiling of Women Justices of the Supreme Court of Victoria

On 9 September 2003 the second (photographic) portrait in the series of "Images of Women in the Law" was unveiled in the foyer of Owen Dixon West.

Frances Millane welcomed guests with these opening remarks.

MY task tonight is to say something about the series and the visual artist, Murray Yann. Our newly elected Bar Council Chair, Robin Brett QC, will tell you about their Honours' achievements before he and Fiona McLeod, the Convenor of the Women Barristers Association unveil the portrait.

The Images of Women in the Law series was established by the Victorian Bar and the Women Barristers Association in late 2001. The intention then as now was to enhance the visibility of women lawyers, to affirm their status in the law and to provide an opportunity for the Victorian Bar to honour the many women who have been and who are significant contributors to the law.

Many of those present tonight will have been present in June last year when the portrait of Justice Brown was unveiled.

I have passed it many times since then and each time I'm reminded that because of its subject matter and the medium used it is an arresting and unique image of a woman in the law.

I've also seen numerous other people stop to study the work and the accompanying plaque. I don't know whether they were pleased by it or not but what I do know is that the image has brought to their attention the celebrated role women have in the law.

Frances Millane speaking.

Robin Brett speaking.

As you know the second portrait is of one former and the four current women Justices of the Supreme Court of Victoria — Justice Susan Kenny who is now a Federal Court Justice, Justice Rosemary Balmford, Justice Marilyn Warren, Justice Julie Dodds-Streeton and Justice Katharine Williams.

When I say their names aloud, no doubt like me you experience a real sense of the growing presence of accomplished women lawyers in superior courts and, in particular, in the Supreme Court. The desire to make this apparent was a significant factor in commissioning this work.

As a general rule judges have the final say. Accordingly, we are particularly grateful to you all for your willing participation and for allowing Murray the artistic freedom to create an image of his making.

I need to say something about Murray and the work he has given to us. Murray has a special interest in portrait works that convey to the viewer as much as possible about the subject within the image and enables the viewer, in his words "… to almost know the subject intimately without ever having met …" them. I might say here that that's something we didn't tell their Honours beforehand.

When I asked Murray about what he hoped to portray in this portrait he said — a feeling of success and achievement coupled with an air of integrity and style.

He wanted to produce a work with a "painterly renaissance" feel, not unlike the old masters, which through its rich, deep and regal colour promotes warmth toward the judges and an air of power.

Thank you, Murray, because I think this audience will agree with me once they have seen the portrait that you have met, and exceeded, all of your objectives.

Finally, I take this opportunity to thank Miguel Belmar Salas and Alexandra Richards QC who as members of the Equality Before the Law Committee have brought this project together. And I'd also like to thank Anna Whitney who for the second year in a row has organised this function.

The Ballad of Briginshaw

When I first started in the law
I'd never heard of *Briginshaw*
But very soon I found that case
Must always have an honoured place
When counsel argues the defense
Of clients 'gainst whom evidence
Most weighty and germane is stacked
Of breaches of the TP Act.
"Your Honour must apply the law
As it's laid down in *Briginshaw.*"
So goes the plea, throughout the Bar,
"You must read 60 CLR."

The case concerns alleged romance
Said to have started at a dance
In Devonport where Mrs B
Was pining for male company.
She'd fled both Mainland and her mate
And clear enough the married state
No longer held much charm for her.
But yet she did on oath aver
That even tho' she'd chastely kissed
The co-respondent, they had missed
Out wholly on adultery;
Of guilt in that regard she's free.

Now Mr B had evidence
Of agents brought (at great expense)
Across from Melbourne to obtain
Admissions from th' alleged swain
And Mrs B. But they were smart,
Enough at least to take no part
In any written self damnation.
For Mr B — much consternation!
The agents, finding this no joy,
Resorted to a well worn ploy;
A "verbal" they alleged took place
When they met suspects face to face.

So did she fall to Cupid's spell?
Six judges said, "I cannot tell."
The trial was heard by Martin J.
His Honour thought he couldn't say
Which one was truthful and which not
Thus "Case Dismissed" without a blot
Upon repute of Mrs B,
The co-respondent too was free.

The High Court held this rinky dink,
All slightly puzzling, one might think.
Trial judge had said "If civil cause
The husband wins, but I must pause;
Adultery claim needs finding stout,
It's proof beyond a reas'n'ble doubt."

But once she'd finished with the law
What fortunes did Fate have in store
For Mrs B? Did true love find
Her happiness, a husband kind?
Could she in wild imagination
Foresee her name around the nation
Invoked in many courts of law
Consid'ring breaches of Part IV
Six decades hence? But what if chance
Had not enticed her to that dance
In Devonport, that is the toast
Of Tassie's wondrous North West Coast?

Perhaps in other litigation
A learned judge's explanation
Would clarify and make quite certain
How much an evidentiary burden
Is borne in civil case. But yet
I doubt that we would ever get
A human drama of the law
Like that portrayed in *Briginshaw*.

Peter Heerey

The Bar Care Scheme

THE Victorian Bar maintains a counselling service for members of the Bar and their immediate family – the Bar Care Scheme. The Scheme recognises that the health and well-being of a member can be adversely affected by the pressures of professional and personal life and that the Victorian Bar has a role to play in ensuring that assistance is available to members who require it.

The objective of the scheme is to enable members to immediately access a counselling service that will assist with emotional and stress-related pressures arising from family or marital problems, multiple life stressors, drug or alcohol dependency, and practice pressures. A vital feature of the scheme is that full confidentiality will apply to the identity of those who use it.

The Bar Care service is provided by the Cairnmillar Institute ("the Institute"). Inquiries to the Institute during business hours will be attended to immediately by the managing consultant and within one or two hours outside business hours. Appointments will be made within 24 hours of the initial contact.

The scheme is available to any member of the Bar and their immediate family.

A member who wishes to access the scheme should contact the Institute on 9813 3400 and advise that they require assistance in accordance with the Victorian Bar's Bar Care Scheme. The Institute is located at 993 Burke Road, Camberwell, 3124.

During the course of the initial consultation, the counsellor will provide assistance and will determine what follow-up services or treatments are needed. The counsellor may then arrange for subsequent consultations or referrals to other service providers. The cost of the initial consultation and referral will be met by the Bar Council. The cost of any subsequent consultations by the Institute or another service provider will be the responsibility of the member and may be reimbursable from government or private health insurance schemes.

General enquiries regarding the scheme may be directed to the Executive Director of the Bar, David Bremner, on 9225 7990.

Requests for assistance should be made directly to the Institute.

Criminal Bar Association Dinner

Judge Punshon, Robert Richter QC and Lex Lasry QC.

The Criminal Bar Association Annual Dinner was held on 14 September at Matteo's Restaurant

MATTEO'S has been a favoured location for past dinners and the decision to return once again was, by all accounts, well received by the members and guests who attended. In fact so popular was the occasion that Nicola Gobbo had to turn late acceptances away! Matteo did an excellent job fitting in the 140 lucky ones who made it and enjoyed, pan fried large potato gnocco with sauteed king prawns, tomato, leek and chilli fondue, pesto mascarpone or puff pastry "pithivier" of quail and Hiedi Gruyére, creamed leeks and savoury cabbage, porcini fumet sauce, followed by Gippsland lamb fillets roasted in crepinette with a herb mousse, "pissaladiere" caramelised onion, anchovy and olive tart, smoked

Marc Sargent checks out the vintage.

Lex Lasry QC addresses the gathering.

Reg Marron, Trevor Wraight and Steve Russell.

Peter Jones, Boris Kayser and Brent Young.

Declan Macy, Carolene Gwynn, Margaret Lodge and Betty King.

James Montgomery, Kate Rowe and Leighton Gwynn.

Benjamin Linder, Ed Lorkin, Danielle Huntersmith and Nicola Gobbo.

Michael O'Connell, Sharon Lacy, Sara Dennis and Justin Hannebery.

Ramon Lopez and John Smallwood.

Penny Marcou, Judge Gullaci, Michael Williams, John Hardy and Sara Thomas.

James Ruddle and Judge Jones.

Leighton Gwynn and Nick Healy.

Penny Marcou, Melissa Mahady, Mandy Fox and Justin Hannebery.

Ian Crisp, Phillip Dunn, and Barbara and Chief Judge Michael Rozenes.

Angus Macnab, Scott Johns and Shane Tyrrell.

eggplant caponata, lamb jus with tomato or Queensland barramundi, with a calorie cresting dessert and cheese buffet.

Master of ceremonies by Chairman Lex Lasry QC, the speeches were orderly and economical so as not to detract from serious eating, drinking and talk time. Robert Richter QC introduced the guest of honour, His Honour Judge Punshon, the immediate past chairman of the CBA.

His Honour's remarks that he was "truly enjoying the job and really nice people to work with" (duly noted by another attendee Chief Judge Rozenes) attracted a number of coloured responses from those who reminded His Honour of his time on the other side of the Bar table.

In all another great dinner. Thanks to Nicola Gobbo for her tireless work in helping to make it happen.

Reg Marron

Reserve at the Victorian Wine Precinct

The Age recently gave this restaurant two chief's hats — somebody must have leaked this review to them.

BARRY Humphries likened Federation Square to a "clump of crumpled kerosene tins". But whatever the debate about the architectural aesthetics of Melbourne's new city square, it contains a number of luncheon spots for the peripatetic barrister. The place must have culinary clout because the Victorian Bar chose it as the site for the 2003 Bar Dinner in the form of the Zinc Function Room. It is only a tram ride, taxi or in the case of my companion a large automobile ride away.

Reserve Restaurant is one of those lunch spots and judging by recent visits it is one of the best. The restaurant is part of the new Victorian Wine Precinct situated near the Art Gallery. The "Precinct" contains a wine shop, bars and a casual eating establishment. But Reserve is the flagship and no expense has been spared. The restaurant is firmly aimed at the upper end of the market and it is, indeed, a bold move in Melbourne town to make such a venture work. But this is not to say that lunchers with less expensive taste cannot enjoy Reserve. There is a set lunch menu of $32.00 for two courses and $40.50 for three courses including tea, coffee and petits fours. Considering the standard of the food this is a bargain.

But first to the décor — does it echo the kerosene tin qualities of the outer buildings? Far from it. There is not the overwhelming obsession Melbourne architects have with grey and light brown — large grey tiles seem to adorn the floors and walls of most of the recent public buildings in the city. Stepping into this restaurant from the grey tiles of the square and the light brown of its cobbled pavement is a blessed relief of light and taste. The restaurant is heavily mirrored with modern chandeliers and a view across an outdoor balcony to Flinders Street. Aqua/turquoise carpet dominates the atmosphere. The tables are well placed and, of course, linen prevails.

This is not an establishment for those who think size is the most important thing. It is not for those who seek a veal parmigiana that overlaps the plate. Moderne is the theme but quality moderne avoiding the epithet of "tricked up food".

Simple descriptions are the order of the day. Entrees are entitled quince and ham, beetroot and basil or scallop and truffle. Main courses are entitled steak and chips, sausage and peas, duck and coffee, bugs and peanuts. But these titles belie the complexity of the food. As part of the set menu the scallop and truffle turned out to be an excellent combination of three "seared" Canadian scallops on a runny bed of scrambled eggs combined with truffle oil. One of my fellow lunchers had an excellent trio of oysters with quince jelly. Beetroot and basil turned out to be wild beetroot risotto with Milawa goats' cheese and basil infused oil.

Steak and chips was not exactly steak and chips, but it was. The chips were more like circular potato roesti with a circular piece of grilled "MSA" scotch fillet on top accompanied by a side peppercorn sauce and salad. MSA turned out to be "Meat Standard Australia grade A rating for beef". The very small member of the party found it to be some of the best beef he had tasted. The very large luncher in the group wistfully wondered why the steak did not overlap the plate, why the chips were not crinkle cut and where was the egg. It was gone in a flash.

Duck and coffee sounded somewhat bizarre. Indeed some of the combinations on the menu cut across traditional boundaries and combined the sweet with the savoury in unlikely partnerships. Duck and coffee was duck leg done in confit style sitting atop a salad of raisins and apples. So far not too adventurous until the coffee, which was a mould of coffee bean panna cotta. It worked when it could have been disastrous. Other combinations included salmon and pork belly, swordfish and foie gras and rabbit and goats' cheese ice cream. The rabbit turned out to be a puck of slow braised leg, roasted peppered loin, belly crackling combined with,

Duck and coffee sounded somewhat bizarre. Indeed some of the combinations on the menu cut across traditional boundaries and combined the sweet with the savoury in unlikely partnerships.

of all things, goats' cheese ice cream. For those not in the know, the puck was not a misprint, but turned out to be a cabbage mould combining shredded pieces of rabbit. The dish was excellent and the goats' cheese ice cream combined well. For the vegans, greens and burnt butter was a ravioli of greens with burnt butter, warm tomato ras el hanout fondant, confit of fennel and caramel sauce. Everybody should know what that all means.

The chef, believe it or not, is only 24. Quite a responsibility and quite a gamble with such an unusual and imaginative menu. But George Calombaris does come from a pedigreed background, having worked at Fenix in Richmond, won Apprentice of the Year in 1999, won a gold medal in the food festival in Singapore and represented Australia in the Paul Bocuse Food competition in France. The *Age Good Food Guide* have just made him best young chef.

Desserts are equally exotic. Marshmallow and chocolate was a hot chocolate fondant with great rocky road ice cream, with the G & T being a gin and tonic jelly with a rhubarb sorbet. The cheese platter with a "glyko" of stone fruits, suitably ended a memorable midday repast.

Being part of a wine precinct the carte is both extensive and wide ranging in price. A soave was great with the entrees, a pinot superb with the mains, a Spanish sticky ended it all.

Prices on the à la carte range from $15.90 to $21.00 for entrees, $22 to $33 for mains and $15 to $17 for dessert. Wines start around $30ish and can end up anywhere.

Reserve is brave and bold. It is different and deserves success. Get there to get away from the greyness of chambers, the sameness of most restaurants and to enjoy a culinary experience. The cleansing can be achieved in the adjunct downstairs bar. You will need a map to find your way from the car park to the restaurant, but on the way will experience the delights of the ins and outs of Federation Square. Incidentally *The Age* very recently awarded this restaurant "best new restaurant of the year", and gave it two chef's hats. Somebody must have leaked the *Bar News* review to them.

Reserve
Victorian Wine Precinct
Federation Square
Ph: 9654 6499
Lunch and Dinner seven days

Paul Elliott QC

Verbatim

Masterclass

15 September 2003
Coram Master Wheeler: Supreme Court Master's Court, General Applications.
Upon the Master calling for opposed applications upon an assurance that they would not go beyond the luncheon adjournment:
R.H. Miller and V. Tallarida making an application for adjournment.

Miller: We cannot give the assurance you sought that we would finish before lunch. In any event ... also there is a matter that will take some time and in which Senior Counsel Mr Hayes (who was not in Court) is appearing and he has precedence ... and ...
Master Wheeler: Let us wait and see what happens ... how the business in the list goes. I may send him out to Master Evans.
.....
Hayes QC and his opponent seeking to stand the matter down:
Hayes QC: Master, in this matter we …
Master Wheeler: What matter is that?
Hayes QC: Master, we …
Master Wheeler: Who are you?? … What's your name…?? I do not have your name …
Hayes QC: My name is Hayes, Master … we …
Master Wheeler: Yes, … I think I heard that name this morning … I think someone mentioned it to me …
Hayes QC: It may have been me, Master …
From the Bar table: No, … Master, it may have been Mr Miller who did mention that name to you.
Master Wheeler: (to Hayes QC) Any how, … you appear … do you? …
Hayes' opponent (mentioning the file reference)**:** We wish to have the matter stood down … It's a matter in which I appear for the Deputy Commissioner of Taxation and …
Master Wheeler: Yes, I've heard of him …
Matter then stood down.
Later that day, Hayes' opponent appears in Court alone:
Master Wheeler: Yes … You wish to mention your matter? …
Hayes' opponent: Master, thank you, we have agreed to consent orders … I have them … I suppose we should wait for Mr Hayes …
Master Wheeler: No … no … it won't be necessary … if you have the orders and can assure me you have a consent … we will deal with it … and if Mr Hayes should burst in and carry on we will deal with that too …
Hayes QC did not "burst in" nor make any further appearance that day before Master Wheeler.

Jesus v Centrelink

Melbourne Magistrates' Court

4 September 2003
Coram: Gurvich, M
Commonwealth OPP prosecuting a Centrelink fraud.
Unknown solicitor for the Defendant.

Solicitor: The point is, Your Worship, my client is barely literate. She struggled to fill in the income estimate forms.
His Worship: I'm not interested. She's either guilty or not guilty. And she's entered a plea of guilty.
Solicitor: Indeed sir. Well, my other point is that my client has now found Jesus.
His Worship: She'd have done better to have found the Centrelink Compliance Officer.

No Shredders Here

Federal Court of Australia

9 September 2003
Goldberg J
Hearing an interlocutory application
Management and Executive Software Pty Ltd v *Chameleon Technology Pty Ltd and Others*
Mr A.K. Panna (instructed by Clayton Utz) appeared on behalf of Applicant.
Ms E.A. Strong (instructed by Corrs Chambers Westgarth) appeared on behalf of Respondents.

Ms Strong: Your Honour would have seen from my friend's material that the first respondent is running a business by which it is marketing and selling the PowerBudget computer program. Now, the wording of paragraph 9 makes it

impossible for the first respondent to deliver to one of its clients some disk that relates to the program they have already bought or makes it impossible to deliver to the clients a copy of the program for display purposes. In other words, Your Honour, it freezes …
His Honour: If (c) was removed altogether …
Ms Strong: (b) would have to go too, Your Honour, because …
His Honour: I haven't finished.
Ms Strong: I'm sorry.
His Honour: And (b) was made "subject to otherwise than in the ordinary course of business", I think that solves your problem.
Ms Strong: I think it does, Your Honour, and if the "otherwise than in the ordinary course of business" were put at the top, perhaps if there's a scrap of paper, for instance, that's going into the bin, in the normal course of business it would go into the bin.
His Honour: The only problem about that is that your client may have a general policy that at the end of every day, for example, copies that are made of particular programs are destroyed or removed from a disk …
Ms Strong: I'm not acting for a tobacco manufacturer, Your Honour.

Whiteboard Wake-up

Supreme Court of New South Wales

31 July 2003
Connelly J
Mr Everson appeared on behalf of the Defendant.
Ms Whitbread for the prosecution.

Mr Everson: The first is whether your Honour has any difficulty with me saying to the jury that unlike other jurisdictions like New South Wales where the legislature has provided for written directions there is no provision for that in the Juries Act. That's the first thing. The second thing is would Your Honour permit me to write some words on the whiteboard in the course of my address to the jury?
His Honour: Yes. What sort of words were you planning to write?
Mr Everson: The word "why", and I propose to put a question mark after that, and the word "inference". They're the only two words.
His Honour: All right. Well yes, I'll have to tell them about inferences obviously as part of the standard summing up. I hadn't ...(indistinct)... about why. But yes, I don't see any particular difficulty with that. Save that we want to be cautious about the use of whiteboards, because then it's easy to move from whiteboards to PowerPoint. And then when we start using PowerPoint we can have words that spin, and flash, and light up, and …
Mr Everson: I'm all for that, Your Honour.
His Honour: Well, indeed. But I mean so might the Crown, you know, in an assault case. And so that instead of neutrally seeing the knife we see spinning out of dark the knife in a sort of Hitchcock music under.
Mr Everson: Well, Your Honour, my attitude to that is bring it on.
His Honour: Audio-visual technology can mislead by creating emphasis that may be unfair. But I don't see that you writing "why" or "inferences" on the blackboard's going to cause a problem.
Mr Everson: Because what happens is, Your Honour, is the jury will have heard the Crown speaking for an hour. I want to do something that tries to wake them up.
Ms Whitbread: I can assure my friend I'm not going to be that long.
His Honour: All right. I think we won't go any further down this track. Yes, you may.
Ms Whitbread: I'll try and keep them awake too.
His Honour: You may use the whiteboard.

Roles Reversed?

Federal Court of Australia

9 September 2003
Goldberg J
Hearing an interlocutory application
Management and Executive Software Pty Ltd v *Chameleon Technology Pty Ltd and Others*
Mr A.K. Panna (instructed by Clayton Utz) appeared on behalf of Applicant.
Ms E.A. Strong (instructed by Corrs Chambers Westgarth) appeared on behalf of Respondents.

Ms Strong: If Your Honour pleases. I'm sorry, I am expecting an instructing solicitor, but he waited by the fax — I had this choreographed, Your Honour — may I present my instructing solicitor. He was waiting by the fax machine because as Your Honour would appreciate, things have been coming in thick and fast.
His Honour: I appreciate that. All I can say, Ms Strong, is it's a change on Perry Mason standing at the Bar table and Dallas Street walking into court.

The Basil Fawlty in All of Us

Richard A. Lawson

WE are a conceited lot, perhaps. Or perhaps not. I have never tried to register for *Who Wants to be a Millionaire?*, although it has crossed my mind. The dream of knowing a $250,000 answer, even before seeing the four choices, is alluring. But John Richards' heroics remain well-remembered and a hard act to follow.

So it was a surprise when Patrick, one of our lunch group, announced to us all, "I'm going on the show. They are taping it next Tuesday."

It might be thought that the collective Bar experience of those who heard this announcement would produce some caution. Most barristers know that court is uncertain at best. But everyone had Patrick's winnings spent then and there as had, apparently, his teenage daughters.

The next day, Patrick's up-coming triumph had slipped from my mind. Then he rang, "Richard, will you be my Phone-a- Friend"? "Of course." "Thanks. Now listen. You will have to be by your phone from 3:00 to 4:30 pm next Tuesday. Don't forget."

Everyone knows the anxieties of a late brief. Or a brief where the solicitor has a novel view of the law or an optimistic opinion of the strength of the evidence. Similar anxieties swamped me as soon as Patrick rang off. Would the dreaded call come? "Richard, this is Eddie Maguire speaking from *Who Wants to be a Millionaire?* Patrick's been going

The man looking at the author died in 1658. He is …

beautifully. He's got $64,000. But he's hit the wall at the $125,000 question. He'll give you that question and two alternative answers because he's already used his fifty-fifty." What if I don't know? Or, worse, insist on "A" when the correct answer is "B"? Snap out of it, I said to myself. All will be well.

The ensuing build-up proved to be bigger than expected. Next day, Patrick rang wishing to know my weaknesses. "Where do you want me to start, Patrick? Horse racing, TV shows, recent pop music, Greek mythology, Renaissance art." "I see," he said. "Well, wish me luck. Remember, Tuesday 3:00 pm."

When Tuesday dawned, I was glad not to be in court. I sat at my desk most of the morning contemplating my ignorance. I'd brought in the school atlas with the continents flagged. I had "Which of the following countries does not border Uganda?" covered. I had lists of presidents, prime ministers and Nobel Prize winners. I had the Periodic Table of the elements. All this was neatly spread out before me on the desk. Then the phone rang. A voluptuous voice said, "Is Richard there? This is Melanie from Who Wants to be a Millionaire?" "Hello Melanie. I'm Richard." "Hi! I'm just checking that you're Patrick's Phone-a-Friend. We're taping this afternoon from 3:00 to 4:30. You'll be by your phone." "Yes, Melanie."

There is a bit of Basil Fawlty in all of us. I started giving orders to an inanimate object. I repeatedly told the phone to ring, but it didn't. What an anti-climax.

I am happy to report that the Bar's collegiate tradition still lives. The count-down to 3:00 pm might have been intolerable. But the bush telegraph had done wonders and, one after another, colleagues started to prop in my room. First, Alan: a well-read gentleman, very strong on English literature. Next, Ross: very solid on the Oscars. Then Gary dropped-off his work-experience schoolgirl, Jessica. I said nothing but thought to myself that this was marvellous. She would know how many number one record Britney Spears has had on the US charts. Hold on. That was a bad case of thinking in stereotypes. For all I knew, Jessica could have been the full bottle on Greek mythology.

It was 2:10 pm. My room was getting more and more crowded. We dragged in chairs from the corridor. I'd never had a conference this big. We waited. I looked up "meningococcal" in the dictionary. Easy. I paced around the room. Who were those two assassinated American Presidents besides Lincoln and Kennedy? Beethoven was one year younger than Napoleon, wasn't he? And so on. Then I rang everyone who, conceivably, might ring me — and told them not to.

3:00 pm arrived. Then 3:15 pm. Nothing so far. "First he has to win the Fastest Finger First" warned Alan. We had all assumed that Patrick would do that easily. And he'd get two chances at it, or even three. 3:30 pm ticked by. The conversation in the room had, by degrees, becomes nearly constant and certainly louder — somewhat like the wedding guests at the church waiting for the late bride. Then it was 4:00 pm. Our morale was shipping. Surely Alan wasn't right with his Fastest Finger First warning? It was increasingly looking that way. 4:15 pm. Still nothing.

There is a bit of Basil Fawlty in all of us. I started giving orders to an inanimate object. I repeatedly told the phone to ring, but it didn't. What an anti-climax. Time had run out and our conference was winding up. We dispersed like losing Grand Finalists.

Eventually the phone did ring. But it was only my mobile and it was 5:30 pm. It was a disappointed Patrick. Slowest Finger Last, he explained.

Odd Connections

MOST of our vocabulary comes directly or indirectly from Latin or Greek; but the vocabulary of modern English is far greater than the sum of ancient Latin and Greek vocabularies. The difference is not explained by our borrowings from other languages. The reason why English has grown much larger than the sources from which it springs is that a single root word in Latin or Greek will be found to have spawned many offspring in English. This explains the enormous size of the English lexicon: the latest estimate is that English comprises 616,500 words. It also explains why words which may seem quite unrelated are found to be cousins. Many English words have widely different meanings but on investigation turn out to be connected in their origins.

Consider *exult*: "to manifest arrogant or scornful delight by speech or behaviour". Strange to find that it is related to each of the following words: *assail*, *resile*, *salient*, *salacious*, *salmon*, and *somersault*. The common ancestor of all these is the Latin *salire* to jump or leap. *Assail* is defined in OED2 as "To leap upon or at, esp. with hostile intent". To *resile* is to spring back or withdraw. A *salient* is originally something which leaps forward, then something which stands out prominently, especially a piece of land which juts out from its surrounding coastline. Used as an adjective, it signifies something which stands out prominently: in argument, a salient point is a point of great importance or significance.

The connection with *salacious* is less direct: *salire* is the root of *salaci* — *salax* lustful, lecherous, wanton. It was not always connected with sex, although it would be dangerous to use it now if a reference to sex was not intended. In 1661 Feltham wrote "… you have seen how the salacious and devouring Sparrow beat out the harmless Marten from his nest". And in 1675 Evelyn wrote of "Pigeons, Poultry and other salacious Corn-fed Birds". It seems unlikely that the sexual behaviour of sparrows, pigeons and poultry has altered much since the 17th century (although battery hens face a short and abstinent life by comparison with their free-range ancestors). Apparently their *salacity* consisted in jumping for more general purposes. Jumping is still used figuratively in sexual slang ("go the jump") but it is beyond the scope of this article to explore that interesting byway.

Somersault is more obviously connected to *salire* than is the spawning conduct of salmon which connects them to it. Nature has inflicted on salmon the most awkward instincts when it comes to reproduction: they swim as far as 3000 kilometers to return to the place where they had their origins, and this generally involves a good deal of uphill swimming: leaping up falls and rapids against all odds and commonsense. The dramatic absurdity of a fish leaping out of the water to fight its way upstream must have been uppermost in the mind of the person who gave the salmon its name.

****

A related feature of the English language — and one of its torments — is the existence of words that look and sound similar but have meanings which are quite different. Linguistic Darwinism should have weeded out these odd couples long ago — or half of each pair at least — because the confusing similarity of the unlikely partners tends to weaken one or both. But they limp along, the difference between them blurred by misuse, leaving the hearer to gather the intended meaning from the context in which they are deployed.

Examples of this unhappy confusion are exult/exalt, desultory/desolate, enervate/energise and venal/venial. There are many others.

To *exult*, as noted above, is to manifest arrogant or scornful delight by speech or behaviour. To *exalt* is almost the opposite: it is to raise or set up on high; to lift up, elevate. It comes from the Latin *ex* + *altus* high. Best not to confuse the two.

Desolate is readily understood. Used as a verb, it involves laying waste, utter destruction: Ambrose Bierce in his *Devil's Dictionary* defined a *garter* as:

> An elastic band intended to keep a woman from coming out of her stockings and *desolating* the country.

and a *creditor* as:

> One of a tribe of savages dwelling beyond the Financial Straits and dreaded for their *desolating* incursions.

As an adjective it is equally familiar: remember the last winning case you lost; the last sure-thing bet at the race track, or the spirit of a Collingwood supporter at grand final time. Originally it had the sense of being left entirely alone (from *solus* alone); hence having the characteristics of a place abandoned and without trees, in a ruinous state; and of a person: destitute of joy or comfort.

> Mr Rochester then turned to the spectators: he looked at them with a smile both acrid and desolate. (Charlotte Bronte *Jane Eyre*)

I have frequently heard *desultory* used as if it were a blend of *desolate* and *sultry*, which is a nice idea but wrong. It is another descendent of *salire*, and is more closely related to the leaping salmon and the salacious pigeon than the marauding creditor or the unhappy Rochester. It means jumping or flitting about from one place to another. It is most commonly used qualifying the noun "conversation" and the reader is left to gather the meaning from the context, or to look in the dictionary. A *desultory conversation* is one which shifts erratically from one subject to another: Bulwer-Lytton provides a contextual hint to make it clear in *The Last Days of Pompeii*: "The conversation, at first desultory and scattered, …"

How many people can, with confidence, distinguish between *venal* and *venial*? Both seem bad, but which is worse and why? *Venal* comes from the Latin *venum* "that which is exposed for sale": a cousin to *vendor*, and *vending* machine. Although the nation of shopkeepers has nothing against commerce as such, *venal* gradually drifted south: things exposed for sale; offices or privileges available for purchase; a person open to bribery; and finally its current, unsavoury meaning "Connected or associated with sordid and unprincipled bargaining; subject to mercenary or corrupt influences".

Tacitus wrote in the *Annals*:

> … of all articles of public merchandise *nothing was more venal than the treachery of advocates*.

By contrast, *venial* comes from *venia* indulgence or forgiveness. So, of any

offence, sin, lapse or error it signifies the non-conviction-bond end of the scale. Chaucer commented that "… sin is of two kinds; it is either venial or mortal sin". This is the problem with *venial*: it is very often associated with sin, and takes an unhealthy taint from it. Boswell avoided confusion when he referred to Johnson as imagining "*such little venial trifles* as pouring milk into his tea on Good Friday".

Tacitus was needlessly harsh on advocates. Johnson was not keen on them, either. He once observed, that "…he did not care to speak ill of any man behind his back, but he believed the gentleman was an attorney." Possibly Boswell, who was an advocate, helped adjust Johnson's attitude. Johnson understood better than Tacitus that there is no difficulty in taking an unworthy or unpopular cause:

> A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. (James Boswell *Journal of a Tour to the Hebrides* (1785))

Julian Burnside

Lush Family Gift

Jack Rush QC,Robin Brett QC and Lady Lush view the glassware gift in the Bar Council Chamber.

LADY Lush, the widow of Sir George Lush, has donated to the Bar three cut-crystal tumblers which formerly belonged to Sir Redmond Barry and carry the family crest. The tumblers are on display in the glass cabinet in the Bar Council Chamber.

On 26 August, 2003 Lady Lush, accompanied by her three daughters, Mrs Margaret Harper, Ms Jennifer Lush and Dr Mary Lush and their partners, joined the Chairman, Jack Rush QC, and other members of the Bar Council to view the gift she made to the Bar. The gathering took place in the Neil Forsyth Room, 1st Floor, ODCE, and then moved to the Bar Council Chamber where Lady Lush viewed the glasses in the cabinet. Jack Rush QC thanked the Lush family for their generous gift, and spoke briefly of the significance of Sir Redmond Barry in the history of Victoria.

Conference Update

20–21 October 2003: Second National Pro Bono Conference: Transforming Access to Justice presented by the National Pro Bono Resort Centre in conjunction with PILCH. Contact Ann Johnson. Tel: (02) 9385 7776. E-mail: ann@nationalprobono.org.au.

23–24 October 2003: Canberra. Innovation — Promising Practices for Victims and Witnesses in the Criminal Justice System. Contact the Office of the Victims of Crime Co-Ordinator. Tel: (02) 6217 4381. Fax: (02) 6217 4501. E-mail: jane.caruana@act.gov.au.

6–9 November 2003: Geelong. Annual Conference: Forensic Psychiatry at Work presented by RANZCP. Contact the Conference Organiser Pty Ltd. Tel: 9509 7121. Fax: 9509 7151. E-mail: info@conorg.com.au.

24 November 2003: London, UK. International Intellectual Property Law presented by Hawksmere. Contact Claire Vipas. Tel: 44 20 7881 1813. Fax: 44 20 7730 4672. E-mail: Clare.vipas@hawksmere.com.

8–9 December 2003: Melbourne. Second International Law and Commerce Conference. Contact Dr Murray Raff. Fax: (03) 9688 5066. E-mail: Murray.Raff@vu.edu.au.

9-15 January 2004: Cortina D'Amprezzo, Italy. Europe Pacific Medico-Legal Conference. Contact Rosana Farfaglia. Tel: (07) 3236 2601. Fax: (07) 3210 1555. E-mail: boccabella@themis.com.au.

10–17 January 2004: Whistler, Canada. The Australian Accountants and Lawyers Conference. Contact Ian Purchas. Tel: (02) 9223 2944. E-mail: ian.purchas@sdw.com.au.

26-28 February 2004: Surfers Paradise. Superannuation 2004: National Conference for Lawyers. Contact Dianne Rooney. Tel: 9602 3111. Fax: 9670 3242. E-mail: dirooney@leocussen.vic.edu.au.

12 April 2004: Capetown. Second World Bar Conference presented by the South African Bar. Contact Dan O'Connor, Secretary ABA. Tel: (07) 3236 2477.

26 April 2004: Melbourne. Eleventh Annual Wills and Probate Conference. Contact Leo Cussen Institute. Tel: (03) 9602 3111. Fax: (03) 9670 3242. E-mail: lpd@leocussen.vic.sdu.au.

Admiralty Jurisdiction Law and Practice in Australia and New Zealand (2nd edn)

By Professor Damian J. Cremeall
Federation Press
pp. i–xxii; 1–302 (including index)

IT is six years since the first edition of this work by Professor Cremean. Like the first edition, this edition is a compendious analysis of admiralty jurisdiction based around the *Admiralty Act 1988* (Commonwealth) and the *Admiralty Rules 1999* (Commonwealth) and the corresponding New Zealand legislation.

The concept of proceedings in *rem* and the apparent complexity of the various types of maritime claims can be confusing for persons not familiar with this area of the law. Professor Cremean's text carefully, clearly and authoritatively deals with the complexity of admiralty law and the peculiarities of its practice and procedure (for example, the peculiarities of arrest, bail and caveats against arrest in respect of vessels and that wonderful procedure for admissions enabled by the "preliminary acts").

In circumstances where shipping is the primary vehicle for international commerce it is not surprising that a substantial part of the text deals with jurisdictional issues.

As with the first edition of Professor Cremean's work, this edition is an extremely handy practice volume including the full text of the legislation and the rules and the author's commentary. Some useful precedents are also provided by the author. The case law cited by the author has been updated and provides both a representative and comprehensive analysis of the application of the Act.

All commercial lawyers at some stage or another deal with shipping or admiralty. This is a readable and authoritative text.

S.R. Horgan

Annoted Insurance Contracts Act (4th edn)

By Peter Mann and Candace Lervis
Law Book Company, 2003
pp. ix–xxx, 1–452, Index 453–465

THE scope of this work is not completely disclosed by its title: it is actually an annotation of several related Commonwealth Acts and statutory instruments: the *Insurance Contracts Act 1984*, the *Insurance (Agents and Brokers) Act 1984*, the *Insurance Contract Regulations 1985*, the *Insurance (Agents and Brokers) Regulations*, and the *Insurance (Agents and Brokers) Decision-making Principles No. 1 of 1994*. It also contains the text of the *General Insurance Code of Practice* and the *General Insurance Brokers' Code of Practice*, bereft of annotation.

While the Agents and Brokers legislation was repealed by the *Financial Services Reform Act 2001* (SSRA) regime, it is subject to a two-year transitional period and thus remains in the book. The work has been updated to include reference to the changes achieved by the FSRA. The preface assures readers that Agents and Brokers legislation will not survive into the book's next incarnation. Presumably it will be replaced by the appropriate provisions of the Corporations Act and any other relevant legislation.

Each annotated section is accompanied by annotations which include its legislative history. Usefully, the commencement date of any amendments is also indicated where necessary. Important concepts are defined by reference to precedent and by cross reference to other sections where relevant. Significant space is devoted to a detailed analysis of important decisions. Obviously, major changes in the new book include a discussion of cases decided in the two years since the previous edition, including *FAI General Insurance Co. Ltd* v *Australian Hospital Care Pty Ltd* (2001) 204 CLR 641, *Moltoni Corporation Pty Ltd* v *QBE Insurance Ltd* (2001) 205 CLR 149 and *Gibbs Holdings Pty Ltd* v *Mercantile Mutual Insurance Australia) Ltd* [2002] I Qd R 17 (to name but a few). While comprehensive, the text is not overly verbose.

The Insurance Contracts Act is not a complete statement of the law relating to insurance contracts in Australia. The common law relating to insurance has developed over hundreds of years and involves complicated topics including subrogation, contribution and *uberrimae fidei* (utmost good faith). Where the legislation touches on those concepts, the annotations would be improved by reference to textbooks or seminal articles which fully describe fee operation of those important parts of the law. Those changes would make the book more useful to all members of its intended audience. In particular, the additions would be appreciated by professionals and students who may not have the passing familiarity with the concepts that experienced insurance practitioners will.

Like earlier editions, the book is a handy and accessible reference. This up-to-date edition deserves a place in the library of anyone whose work involves insurance.

S. J. Maiden

Crime

By David Ross QC
Law Book Company 2002
pp. v–lxxiv, 1–1045,
Table of Cases 1047–1164,
Table of Statutes 1165–1214

THIS book is a comprehensive and detailed reference to more than 300 terms relevant to the practice of criminal law. It is arranged alphabetically by term, with major subheadings set out as separate numbered paragraphs and helpfully identified in the table of contents.

The book covers topics at the black letter heart of the criminal law, as well as explaining concepts surrounding its practice. For example, it addresses terms such as "aid and abet", "grievous bodily harm", "*nolle prosequi*" and "possession", evidentiary rules like corroboration, credit and the rule in *Browne* v *Dunn* (1893) 6 R 67, and ancillary issues such as counsel (ranging from duties and responsibilities through to liability in negligence and the need to robe) and the correct pronunciation of certain words. The scope of the book is at times astounding but occasionally obscure: for example, it includes a description of the steps via which DNA profiling is carried out, and almost three pages are devoted to a questionably relevant entry on "jazz".

Where appropriate, headings contain references to statutory provisions in each Australian jurisdiction. The author makes prolific reference to case law and frequently quotes both trial and appellate judgments to assist the interpretation and application of the principles which he addresses.

The work is engagingly written and peppered with witticisms, making it a pleasure to read.

The combination of a comprehensive table of contents and the alphabetical order in which the book's headings appear would render an index to this book of less than usual utility. Indeed, an index would add to the book's already voluminous size and repeat to a large extent the 69-page table of contents. However, the absence of an index denies the reader the ability to

Continued on page 46

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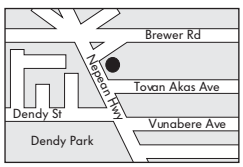

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