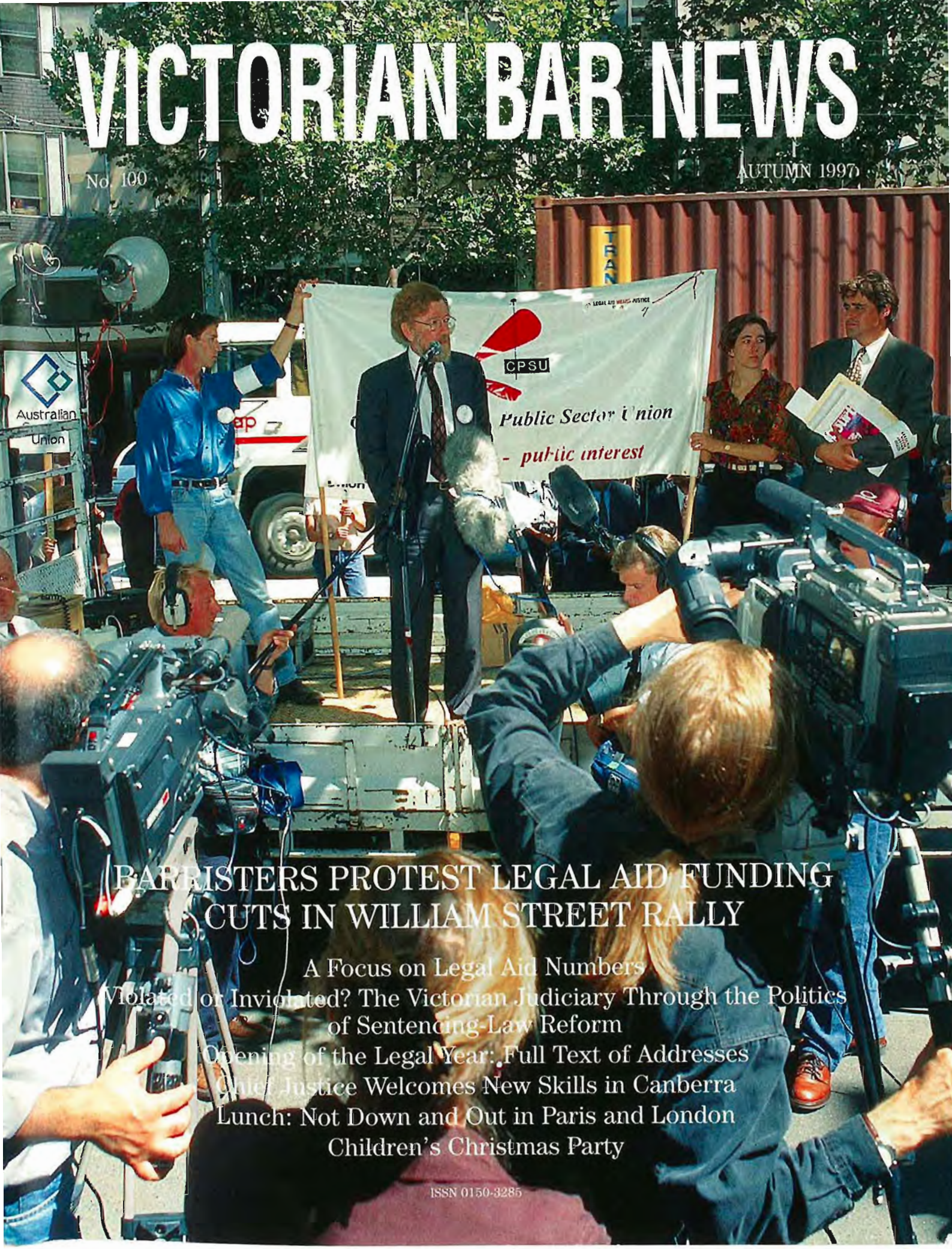
VICTORIAN BAR NEWS

No. 100

AUTUMN 1997



BARRISTERS PROTEST LEGAL AID FUNDING CUTS IN WILLIAM STREET RALLY

A Focus on Legal Aid Numbers

Violated or Inviolated? The Victorian Judiciary Through the Politics of Sentencing-Law Reform

Opening of the Legal Year: Full Text of Addresses

Chief Justice Welcomes New Skills in Canberra

Lunch: Not Down and Out in Paris and London

Children's Christmas Party

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Contents

EDITORS' BACKSHEET
5 The Legal Practice Board Must be Right
CORRESPONDENCE
7 Mr. Fischer and the High Court
CHAIRMAN'S CUPBOARD
8 Chairman Reviews Bar Changes
ATTORNEY-GENERAL'S COLUMN
10 *Turning the Tide*, and Drug and Civil Process Reforms Contemplated
11 *Legal Practice Act 1996*
OBITUARY
13 Gifted Lawyer Lived Life to the Full
ARTICLES
14 Barristers Protest Legal Aid Funding Cuts in William Street Rally
15 Senate, Legal and Constitutional References Committee Inquiry Into Legal Aid
20 A Focus on Legal Aid Numbers
22 Violated or Inviolate? The Victorian Judiciary Through the Politics of Sentencing-Law Reform
NEWS AND VIEWS
Opening of the Legal Year:
34 At St. Paul's Cathedral
38 At St. Mary's Star of the Sea Catholic Church
39 At the Greek Orthodox Church of St. Eustathios
40 At the Temple Beth Israel
42 High Court Chief Justice Welcomes New Silks
43 Taking Silk in the 1860s
44 Second World Congress on Family Law and the Rights of Children and Youth
45 Verbatim
46 Bar Member Launches Big River Valley History of Gold Mining
48 Lunch: Not Down and Out in Paris and London
51 A Bit About Words: The "F" Word Reviewed
52 Wacky Sex Laws
53 The First Five Years: Centre for Legal Education Reports
54 Children's Christmas Party
56 The Dos and Don'ts of Holidaying in Queensland
57 Death and the Morning After in Massachusetts
59 Competition: It is a True Story!
SPORT
60 Royal Tennis: Box Trophy Won by Solicitors
61 Cricket: A Cause Célèbre at the Bar
LAWYER'S BOOKSHELF
62 Books Reviewed
CONFERENCES
65 Conference Update
UPDATE
66 LAWASIA

Cover: Robert Richter Q.C. addressing a rally held on 4 March 1997, in William Street, to protest legal aid cuts.

Barristers protest legal aid funding cuts.

Violated or Inviolate? Sentencing. By Peter Crockett.

Opening of the Legal Year services.

Not Down and Out in Paris and London.

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The Legal Practice Board Must be Right

AND so it seems that we were all born on the 1st January 1900. This came as somewhat of a shock. But it must have been right because the birth date was contained in the all important form for registration under the new Legal Practice Board regime. At least it was a shock to the junior editor of the *Bar News* to learn that for all his life he had been living under a misapprehension of his age. So the junior editor consulted the senior editor, who confirmed that he in fact also had been born on the 1st January of 1900. This, of course, was much more believable.

What was surprising, was that it turned out that the whole editorial board of the *Bar News* had also been born on the 1st January 1900. Historically we have accepted that this is correct. Full investigations have found that the whole of the Victorian Bar was indeed born on the 1st January 1900. Each person had been told this in the new registration form which adds a lovely degree of conformity to those at the Bar.

As well as having our age rethought, the new legal regime has rethought what we are. To begin with we are not natural persons. Natural persons are solicitors, or should we say, those who were formerly known as solicitors. This must be correct because all the former solicitors' forms had renamed them as being natural persons. Therefore those who are brave enough to swear documents had to have new stamps created stating that they were natural persons.

Questions were asked at the Bar as to whether this left the whole of the Victorian Bar, or as it then was, or what it ever is now, as being unnatural or supernatural persons. Many former solicitors would agree with this but again this came as a shock. But instead of being unnatural persons it appears on the Victorian Bar forms that we are indeed, sole practitioners. Which also led to some questions being asked as to whether you could be a natural person and sole practitioner at the same time. Undoubtedly sub-committees will be set up and regulations passed to sort out this difficult question which otherwise had been unknown whilst the guilds had wrongly supervised themselves.

Of interest was one of the forms that had to be filled in. Somebody had not quite designed it the right way, and the heading and the addresses were so large that there was a second piece of paper which required a signature, leaving the first page unsigned. So confusing that the senior editor forgot to sign and send in the second page. This undoubtedly will cause great filing problems. Extra staff will have to be employed to make sure that the first and second sheets do not become separated, or indeed, that a signed second sheet is attached to the first sheet. This will necessitate triplicates and quadruplicates to be created, filed and then destroyed.

Full investigations have found that the whole of the Victorian Bar was indeed born on the 1st January 1900. Each person had been told this in the new registration form which adds a lovely degree of conformity to those at the Bar.

What is the most telling thing is that, at this stage, the Bar-type sole unnatural practitioners had to fork out $250.00. This must be regarded simply as a down payment on the future licence fees which will be needed to properly supervise, discipline, register, fingerprint, identify and tax file, all those people loosely regarded as members of, or even practitioners in, the law industry. One can see why the new Legal Practice Act needed over 300 sections to govern the unwieldy and economically non politically correct former guilds.

Quite rightly the new regime has stated that there must be fees agreements. This has caused a great frenzy of drafting. Nobody quite knows what needs to be in a fees agreement or how much has to be told to the solicitor or what the solicitor

has to tell the client. This of course is creating much more work and paper work all around the law industry. Some solicitors have taken it to be rather insulting that barristers should believe that somehow or other they would not guarantee their fees. It is hoped that such a tradition continues. Although it cannot be said that we can have traditions any more. (See section IIAA(b)(c).)

Now that the new regime does not require barristers to have chambers under the control of Barristers Chambers Limited, there has been a slight movement to buildings outside the control of the central Bar. The moves have seen the springing up of Crockett Chambers, Winneke Chambers and a new one proposed over in Golan Heights. Chairman John Middleton has sent a circular around urging people not to follow this course. It is too early to judge whether this will be a continuing trend, but at the moment there are not significant numbers moving away to create their own chambers. Nor at the moment does there appear to be any move for these groups to sever ties with their existing clerks. Only time will tell as to whether some of these groups will endeavour to set up Sydney-type Chambers. It is hoped that such a move does not eventuate.

LINKS WITH THE PRESS

Chairman Middleton hosted an enjoyable evening of drinks on 28 February wherein various members of the media partook of refreshments in the Chairman's room. It is a laudable trend to encourage some exchange between the media and the Bar. Now that we have been totally reorganised under the new regime perhaps the press will look on us more kindly. At least the level of barrister bashing seems to have declined to some degree.

OPENING OF THE LEGAL YEAR

This issue contains some splendid sermons and addresses given at the various openings of the legal year. It is hoped that a reading of these works will cause some rumination and philosophy. Something not to be encouraged by the new legal bureaucracy. Perhaps regulations will have to be passed governing the content of addresses made at openings of legal years. Indeed, regulations may have to be passed as to whether openings of legal years are acceptable in a microeconomically correct and governed legal industry.

The Editors

Mr. Fischer and the High Court

The Deputy Prime Minister acknowledges criticisms were based on incorrect advice

FOR the information of our readers and with the permission of the Chief Justice we publish below the correspondence between the Chief Justice of the High Court, Sir Gerard Brennan, and the Deputy Prime Minister, Mr. Tim Fischer, concerning the "delay" in the Wik decision.

3 January 1997

The Honourable T. Fischer, M.P.
Deputy Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Mr. Fischer,

I have delayed writing this letter until the judgment of the Court in the *Wik Case* was delivered.

The Australian of 28 November carried a headline and article "Fischer lashes High Court for delay in *Wik* decision". This was the second attack you have made upon the Court suggesting an unwarranted delay: the first was in relation to the date of hearing, the second in relation to the date of judgment. It is as well that you should be acquainted with the facts of the case. The *Wik Case* judgment was delivered by Justice Drummond of the Federal Court on 29 January 1996. The Federal Court granted the Wik and Thayorre Peoples leave to appeal to the Full Court of the Federal Court on 22 March 1996. On 27 March 1996 the State of Queensland and another party filed notices of motion in the Brisbane office of the High Court seeking removal of those appeals into the High Court pursuant to s. 40 of the *Judiciary Act* 1903. Removal of such cases is not automatic. Because of the urgency of the matter, the application was expedited by being inserted into the list for the next day of hearing applications for special leave to appeal, namely, 15 April. The order for removal was made on that day. On 6 May, I held a directions hearing to identify the issues and to give directions for the preparation of this complex matter. The parties, who co-operated efficiently, prepared lengthy written submissions and accepted time limits on oral argument. The matter was advanced in the High Court hearing list and came on for hearing on 11 June. The hearing was completed on 13 June.

The appeal books consisted of 17 volumes, containing 263 documents covering 3,036 pages. There were 7 volumes of legislation contained in 338 documents covering 1,971 pages. The written submissions of the parties and of the interveners covered 714 pages with 915 pages of attachments. 98 Australian and 155 overseas cases were cited. The transcript of oral argument covered 266 pages.

This mass of material involving novel and difficult questions of law is an indication of the length of time that each of the Justices was required to spend to form his or her view on the answers to be given to the questions of law that arose in each of the appeals. That time had to be found while the Court continued to sit and to deal with the cases listed for hearing during the balance of the year. To say that there was any unwarranted delay in the delivery of this judgment is quite unjustified. The practice of this Court is to deliver a judgment as soon as can conveniently be done after all Justices have written their judgments. This was the practice followed in the *Wik* case. Judgment was delivered on 23 December 1996.

This Court has never attracted criticism for a failure to discharge its enormous burden. On the contrary, during my time on this Court, the only comment on this score that has been made by those who are familiar with its working is amazement at its capacity to produce judgments of erudition in the variety of fields covered by its caseload. Perhaps some indication of the Justices' devotion to their duty is that the members of this Court, alone amongst other Courts and, for that matter, other branches of Government, have for many years been unable to take the leave to which they are entitled, sabbatical or other, during their tenure of office.

I am sure that you are no stranger to long hours of work. Neither are the Justices of this Court. You will the more readily appreciate that attacks of the kind that you have made, emanating from a Deputy Prime Minister, are damaging to this Court. You will appreciate that public confidence in the constitutional institutions of Government is critical to the stability of our society. By a convention which is based in sound practice, judges do not (and certainly should not) publicly attack the members of the political branches of government, and the members of the political branches of Government do not (and certainly should not) attack the judges except on a substantive motion in the Parliament. This convention does not restrict criticism of Court judgments, but it does restrict criticism of judicial integrity or devotion to judicial duty.

Neither the co-operation that is required among the branches of Government nor the dignity of this Court would be advanced by my making a public statement to repel the attacks which you have made. Indeed, Courts are not capable of responding — nor would they wish to respond — to media attacks. I ask you to bear this in mind and to consider whether the making of attacks on the performance by this Court of its constitutional functions is conducive to good government, even if an attack can gain some temporary political advantage.

Yours sincerely,
(Signed: Gerard Brennan)

13 January 1997

The Hon. Sir Gerard Brennan
Chief Justice
High Court of Australia
PO Box E435
KINGSTON ACT 2604

Dear Chief Justice Brennan

I acknowledge your letter of 3 January and I have carefully noted your comments.

In my public statements I have at all times sought to acknowledge the separation of powers between the Executive Government and the Judiciary. This separation of powers was referred to in the Australian article of 28 November 1996.

My comments were made against the

background of incorrect advice I had received which predicted that the Wik decision would not be handed down by the High Court until calendar year 1997. My intentions were neither to engineer the headline printed in The Australian, nor was it to gain "some temporary political advantage". Short or long term political advantage and/or disadvantage would only have resulted, in my view, from a far more robust comment than those I made.

Ironically I am currently under attack for placing too much faith in the judiciary in the context of debate concerning the constitution, and one option proposing a non-discretionary extra role for the Chief Justice in relation to the Governor-General.

I readily acknowledge the huge and difficult work load before the High Court of Australia. I also strongly concur with your view that "public confidence in the constitutional institutions of government is critical to the stability of our Government". I have made a point of saying on the ABC "AM" program and elsewhere recently, that I respect the amount of work being processed by the High Court.

I should add I also particularly note your comment that Court judgments may be criticised as a separate matter from judicial integrity and devotion to duty, the Sydney Morning Herald of 11 January 1997 falls into that category although it was somewhat exaggerated.

Thank you for writing to me and please accept my best wishes for 1997.

Yours sincerely,
(Signed: Tim Fischer)

14 January 1997

The Hon. Tim Fischer, MP
Deputy Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Mr. Fischer,

Thank you for your letter of 13 January 1997. I appreciate the speed and terms of your response.

Yours sincerely,
(Signed: Gerard Brennan)

Chairman Reviews Bar Changes

SINCE the last issue of *Bar News* the Victorian Bar has undergone some major changes. With the introduction of the *Legal Practice Act 1996*, the Bar is now officially the Victorian Bar Inc., an accredited "RPA" (recognised professional association) within the terms of the new Act. A new regulatory framework for the legal profession has been created, headed by a new Legal Practice Board. This has meant, among other things, that the Bar is now responsible for regulating non-member practitioners, and that the Bar must now issue practising certificates to people wishing to practise at the Bar.

On the whole, this transition has been effected without disruption. There are some problems and ambiguities in the *Legal Practice Act 1996* which the Bar Council is raising with the Attorney-General and the Legal Practice Board. One significant change is that the Bar is now subject to the scrutiny of a Legal Ombudsman who has power to investigate complaints made about barristers, and to investigate the effect on competition of the Bar's activities. The Bar must therefore ensure that its complaint-handling procedures remain, and are seen to remain, at a high standard, and must also be ready to justify, in the light of the Competition Code, some of its long-held practices. However, we see no reason why these challenges should prove to be too great for the Bar. Already we have developed a good relationship with the Legal Practice Board, the Legal Ombudsman, and the other bodies created by the *Legal Practice Act 1996*. The commencement of the new Act has created a new environment for the Bar which is challenging, but not necessarily hostile.

Another effect of the *Legal Practice Act 1996* is that the Victorian Bar, reborn as an RPA, must work harder than ever to maintain and improve its standing with its members and the broader community. The Bar cannot rely upon official recognition as of right, and cannot rely upon membership subscriptions as of right. All members of the Bar Council will be invited to attend a special meeting of the Executive, to be held in April, which has been called to address the needs of members of the Bar, and to consider a medium-to-long-term strategy for the Bar in the new legal landscape. We hope that in 1997 the Bar will be able to improve upon existing services and introduce a new range of services to members, and that we will be able to create a greater public understanding of the important role of barristers and the Bar.

However, as an immediate priority the Victorian Bar is currently continuing the process of moving towards a uniformity of policy and practice with other Australian Bars. This is in keeping with the goal of the Australian Bar Association and the Law Council of Australia to create a truly national market for legal services. This in itself should be of direct benefit to our members.

The Bar is also currently undergoing a period of change in terms of its executive administration personnel. Effective Friday, 11 July 1997 Mr. Ed Fieldhouse is to retire from his position of Executive Director of the Victorian Bar Inc. and Company Secretary of Barrister' Chambers Limited which he has held since January 1983. On Monday, 7 April 1997 Mr. David J. Bremner will take over the position of Executive Director of the Victorian Bar Inc. Mr. Bremner has had

extensive experience in finance and general management in law firms and in one of Victoria's largest private hospitals. Mr. Bremner has a Degree in Commerce, is a member of the Australian Society of Certified Practising Accountants and is also a member of the University Business School Association. The Bar Council believes that the creation of a full-time position of Executive Director of the Bar will foreshadow a greater focus in the increasingly complex task of managing the Bar, and will allow the Bar to represent itself more effectively to the legal community and to the public. I am delighted that a person of Mr. Bremner's calibre has accepted this important position.

The position of Company Secretary of Barristers' Chambers Limited will be taken over by Mr. Geoffrey E. Bartlett on Wednesday, 2 April 1997. Mr. Bartlett has had extensive experience in many areas of accounting. Mr. Bartlett also has had experience in property control and development. Mr. Bartlett was previously employed as Barristers' Chambers Limited's accountant during the period March 1983–September 1985. Mr. Bartlett holds a Degree of Business Studies (Accountancy), is a member of the Australian Society of Certified Practising Accountants and is also a member of the Association of School Business Administrators of Victoria. Ed Fieldhouse has kindly agreed to remain in his present employment until 11 July 1997 to assist with the handovers and training of both David Bremner and Geoff Bartlett.

Finally, as this will be my last column as Chairman, I would like to thank the last two Bar Councils for their support in what has been a most crucial 18 months for the Victorian Bar. The demands made upon all Council members have been great, and their dedication to the appointed tasks has been well beyond all reasonable expectation. All this done, of course, in an honorary capacity. The administrators of the Bar, including the Chairman's assistants (Ms. Elisabeth Wentworth and Mr. Jonathan Morrow) who have been of great support to me, have acted in a truly professional manner in this transition period, and I thank them for their hard work, enthusiasm and support. Ed Fieldhouse, who is to leave us, has led the administration through this period, and on behalf of the Bar Council I thank him for his recent efforts in this regard and for his many years of service to the Bar.

The independent Bars in the other states, which have already existed for some time under a similar regime now imposed upon our Bar, seem to be thriving and increasing in members. I am confident that our Bar will similarly continue to develop under the operation of the *Legal Practice Act 1996*. All members of the Bar must come to appreciate that the *Legal Practice Act 1996* is now law, and that we all must operate within its provisions and the spirit of the changes, and look to new opportunities so created to develop an even better Bar. I am sure that this will occur, and that the continuing Bar Council and its new Chairman will undertake the leadership required of them.

John Middleton Q.C.
Chairman

Turning the Tide, and Drug and Civil Process Reforms Contemplated

IN early 1996, the government established the Drug Advisory Council headed by Professor David Penington. The Council reported its recommendations in March 1996. The government is now well advanced in implementing the majority of the recommendations and has already allocated more than $59 million funding for the $100 million, four year strategy known as *Turning the Tide*. Some areas of progress might be of particular interest to members of the Bar. Also of interest may be the reforms in contemplation for civil process.

TURNING THE TIDE

Turning the Tide represents a whole-of-government approach and involves legislative changes as well as special programs across a number of portfolios. The following represents a selection of initiatives the government is implementing:

- A need has been identified for the establishment of an independent and specialist court advice service to provide pre-sentence advice regarding the treatment of defendants with drug problems. In 1997/98 this service will be established which is consistent with the continued funding of the post treatment program for offenders.
- The government is in the process of establishing drug education and awareness programs for prisoners with drug problems together with enhanced drug detection and deterrence measures in prison. This will involve the provision of information and advice about treatment programs and the risks of drug use throughout the public prison system. A service will also be established to measure a substance abuser's needs along with their preparedness to address those needs and to match them to the appropriate treatments.

The government is now well advanced in implementing the majority of the recommendations and has already allocated more than $59 million funding for the $100 million, four year strategy known as *Turning the Tide*.

- A major redevelopment of drug and alcohol services began in 1994 and is ongoing. $8.5 million has been allocated to address deficiencies in current drug services. Additional counselling positions will be established along with improving the capacity of drug withdrawal services to ensure continuity of care for clients.
- Victoria Police have produced an internal guide providing information on force policy in relation to drugs. The development of a coordinated monitoring system for data on illicit drug use via Police, Corrections and other sources has been approved.
- Legislative reforms increasing the penalties for drug trafficking and manufacturing will be introduced in the Autumn session of Parliament. The strategy will ensure however that drug users who commit drug-related crimes have better access to rehabilitation programs.
- The Drug Advisory Committee recommended that asset confiscation orders be followed up more effectively. Legislative and administrative reforms to ensure that the asset confiscation system operates more effectively will be introduced in the Autumn session of Parliament.

CIVIL PROCESS REFORM

A two year project to review the Victorian civil justice process has just commenced. The Department of Justice has employed Professor Peter Sallmann, the former Executive Director of the Australian Institute of Judicial Administration to work in partnership with the courts to make recommendations that will lead to cheaper justice, reduction in delays and simplified procedures for litigants in civil litigation.

The scope of the review is ambitious. It will examine initiatives and recommendations in all Australian jurisdictions and overseas, including the recommendations in the Woolf report, to improve civil justice processes. The review will focus primarily on, but not be limited to, statutes, rules of procedure and administrative processes.

In conducting the review, Professor Sallmann will work with an Advisory Committee comprising members drawn from each Victorian court, my Office, the Department of Justice, Victoria Legal Aid and the legal profession. It is my intention that Professor Sallmann and the Advisory Committee will make recommendations for action on a periodic basis throughout the project, to the courts in relation to matters in their domain and to me in relation to legislation.

I believe that the project has great potential to improve access to civil justice for all Victorians.

Jan Wade, M.P.
Attorney-General

Legal Practice Act 1996

Determination under Division 1 of Part 7, as modified by item 30 of Schedule 2

I, Jan Wade, Attorney-General of Victoria, acting under Division 1 of Part 7 of the *Legal Practice Act 1996*, as modified by item 30 of Schedule 2 of that Act, determine that the classes of persons required to pay a contribution under Division 1 of Part 7, and the contribution payable by members of each class, for 1997 are as set out in the following table:

TABLE

Class of persons — *Contribution*

1. The holder of a practising certificate that authorises the receipt of trust money (other than an incorporated practitioner) who:
   (a) received or was a partner of a firm, or a director or employee of an incorporated practitioner, that received trust money exceeding $500,000 in total during the year ending on 31 March 1996; and
   (b) has their principal place of practice in Victoria; and
      (i) did not receive at any time during the year ending on 31 March 1996 money from a client to be lent on the security of a nominee mortgage; or
      $550
      (ii) at any time during the year ending on 31 March 1996 received money from a client to be lent on the security of a nominee mortgage and practised during that period as a sole practitioner; or
      $800
      (iii) at any time during the year ending on 31 March 1996 received money from a client to be lent on the security of a nominee mortgage and practised during that period as a partner of a firm, or as a director or employee of an incorporated practitioner, that was authorised to receive trust money.
      $725
2. The holder of a practising certificate that authorises the receipt of trust money (other than an incorporated practitioner) who:
   (a) received or was a partner of a firm, or a director or employee of an incorporated practitioner, that received trust money not exceeding $500,000 in total during the year ending on 31 March 1996; and
   (b) has their principal place of practice in Victoria; and
      (i) did not receive at any time during the year ending on 31 March 1996 money from a client to be lent on the security of a nominee mortgage; or
      $50
      (ii) at any time during the year ending on 31 March 1996 received money from a client to be lent on the security of a nominee mortgage and practised during that period as sole practitioner; or
      $800
      (iii) at any time during the year ending on 31 March 1996 received money from a client to be lent on the security of a nominee mortgage and practised during that period as a partner of a firm, or as a director or employee of an incorporated practitioner, that was authorised to receive trust money.
      $725
3. The holder of a practising certificate that authorises the receipt of trust money who:
   (a) was at any time during the year ending on 31 March 1996 employed by a legal practitioner or firm that was authorised to receive trust money; and
   (b) has their principal place of practice in Victoria.
   $400
4. The holder of a practising certificate who has their principal place of practice outside Victoria, or a registered interstate practitioner, who received, or was at any time during the year ending on 31 March 1996 employed by a legal practitioner or firm that received trust money exceeding $500,000 in total during that period.
   $200
5. The holder of a practising certificate who has their principal place of practice outside Victoria or a registered interstate practitioner who received, or was at any time during the year ending on 31 March 1996 employed by a legal practitioner or firm that received trust money not exceeding $500,000 in total during that period.
   $50
6. The holder of an employee practising certificate who:
   (a) was employed by a legal practitioner or firm at any time during the year ending on 31 March 1996 when that legal practitioner or firm was authorised to receive trust money, or has not previously held a practising certificate; or
   $150
   (b) at any time during the year ending on 31 March 1996 was the holder of a practising certificate authorising them to receive trust money.
   $350

Where an applicant for a practising certificate or for a variation of a condition of a practising certificate the holding or variation of which, or an applicant for registration as a registered interstate practitioner the granting of which would make them a member of any of the classes set out above makes their application after 1 March 1997, the contribution payable by the applicant shall be calculated in accordance with the following formula:

$$\$[(({}^{n}/_{12}) \times C) - P]$$

where:

$[(({}^{n}/_{12}) \times C) - P]$ is greater than zero; and
n is the number of whole months of 1997 after the date of the application; and
C is the contribution payable by members of the relevant class; and
P is the amount (if any) already paid under this Determination as at the date of the application.

Jan Wade, M.P.
Attorney-General
27/12/96

Gifted Lawyer Lived Life to the Full

Christopher Spence

Barrister
Born: Melbourne, 4 December 1959
Died: Melbourne, 21 December 1996, aged 37

CHRIS Spence, a promising barrister, died last month, aged only 37. He sustained severe head injuries in a skiing accident in August 1990, from which he never recovered. Chris had lived each year, indeed each day, to the fullest as if realising that he had no guarantee of longevity.

Educated at Spring Road Central, Malvern, and Scotch College, he completed his HSC at 16.

He followed his father's profession of law and graduated LLB (Hons) from Monash University in 1981. At Monash, he was awarded the Butterworth Prize for Contract and Common Law, co-edited the *Monash University Law Review*, was house-student representative to the law faculty board, and an active committee member of the Law Students' Society.

Chris had a strong social conscience that developed during two years as volunteer solicitor with the Springvale Legal Service. He then backpacked around Europe and North Africa for a year, returning to commence articles with Clarke Richards & Co.

Following his admission to practise, he was appointed associate to Sir Edward Woodward of the Federal Court in 1985. This was invaluable training for a career at the Bar. In his eulogy at Chris's memorial service last month, Sir Edward read a reference he had given Chris in 1985. It read in part: "Chris has a highly developed social conscience and a genuine interest in community affairs . . . It would not surprise me if he later became interested in politics or some other field of involvement in community affairs. He will never be a narrow, self-interested practitioner of his profession." Sir Edward said his high regard for Chris had been borne out by his outstanding progress at the Bar.

In another eulogy, a close friend, Geoff Bell, said: "If Chris had something to say, people listened, and this was to be something, a trait, that Chris had throughout his life.

Christopher Spence.

"He had that way of seeing things before other people, of formulating his ideas into words — launching the words with profound meaning, that would arrest the listener, to tune them into what Chris was saying." Polished in debate, Chris was described by Sir Edward as "always the master of his brief". He was keen to expand his knowledge in many areas of law, but his main interest was in commercial litigation.

Chris participated fully in wider Bar affairs. He was an instructor at the Leo Cussen Institute until his accident, a reporter for the *Federal Law Reports* and state editor for *The Laws of Australia* in Real Estate Agency.

The law, however, did not dominate his life. He participated in many sports, including football, indoor cricket, golf and even parachuting, but particularly loved skiing, bushwalking and rafting.

Above all, Chris was a family man. He married Rosemary Norton in 1985 and was devoted to her and their daughters Sarah and Emily and also to his wider family. Witty and intelligent, Chris often sparked up what would otherwise have been pretty dull. He had a natural interest in people, was genuinely compassionate and not afraid to express his care and concern. His desire to live life to the full was infectious.

Chris made friends easily and the packed church at his service last month — six years after his accident — showed the great respect with which he was regarded and the realisation of the tragic loss of a young life of such potential.

Gordon Spence

Barristers Protest Legal Aid Funding Cuts in William Street Rally

ALL members of the Bar are conscious of the fact that the Legal Aid system has for a considerable period of time been grossly underfunded. Those who receive Legal Aid briefs know only too well that in order to represent their clients properly they must ignore the preparation restrictions set out in the brief and put in many hours of unpaid work. And for many years they have done this thereby propping up a system which government has been unwilling to fund adequately.

In Victoria, Legal Aid (subsidised by the unpaid hours provided by the legal profession) last year provided representation for 71,000 people and advice to another 39,000. The figures for Australia were over 350,000 represented and a further 220,000 given advice.

The inadequacy of Legal Aid funding has been manifest and notorious for many years. The funding was clearly inadequate four years ago but in the last four years staff at Victoria Legal Aid have been cut by 23 per cent while the level of internal case work has increased by the same percentage. Now the Commonwealth has decided to cut its contribution to Legal Aid by (coincidentally) 23 per cent.

On Wednesday 4 March 1997 at 1.15 p.m. a protest rally was held outside the Supreme Court attended by barristers, many of them bewigged, solicitors, representatives of public service unions and others concerned at the effect which the cuts in Legal Aid will have on what (we hope) is still regarded as an essential element of a democratic system: namely the provision of a fair trial for those accused of crime and the provision to all, irrespective of their economic circumstances, of justice according to law.

Senate, Legal and Constitutional References Committee Inquiry Into Legal Aid: Victorian Bar Submission

OVERVIEW

IN 1992 the Commonwealth embraced the proposition that the objective of legal aid was to protect the legal rights and interests of people in the Australian community by ensuring that they could obtain access to independent advice, representation and the legal system. Fundamental to the question of legal aid is the notion that "access and equality before the law is critical to the effective operation of the rule of law and the stability of Australian society". (Law Council of Australia Submission: "Executive Summary", p.2.) The Victorian Bar submits that there cannot be equality before the law if citizens are denied the means of access to our system of justice.

The Commonwealth, as the largest beneficiary of our taxation system, has primary responsibility to ensure sufficient funds are available to enable all Australians to have access to our legal system. It is, however, also the responsibility of the State governments to ensure that its citizens have access to the law, and to do otherwise is for a government to breach its fundamental obligation to maintain the rule of law.

The Victorian Bar's submission seeks to demonstrate that the rules and guidelines introduced by Victoria Legal Aid ("VLA") as a result of the proposed reduction in Commonwealth legal aid funding to Victoria (and the other States) will deny a large number of people in the Australian community any or any adequate access to our system of justice.

A. The Victorian Bar fully adopts the submission made by the Law Council of Australia dated 21 January 1997. Furthermore, the Victorian Bar adopts a number of the propositions which are reiterated throughout many of the other submissions already received by the Senate Committee concerning *the inadequacies of the existing Commonwealth funded legal aid system.* Those propositions are to the following effect:

A1. *The demand for legal services greatly exceeds the aid available*

(See Law Council of Australia submission 1.8 et seq.)

In particular, reference is made to the Law and Justice Policy released by the Coalition in February 1996 which noted, inter alia, that "for far too many Australians access to justice was limited" and observed that a Coalition government would make a commitment to a continual focus on the problem "with a view to achieving a justice system that is accessible to all Australians regardless of their means". "The provision of legal aid is an essential element in providing access to justice." (Law and Justice Policy, February 1996, pp.7–10.) The increasing demand for legal aid was noted by the Access to Justice Advisory Committee in *An Action Plan*, pp.240–242, which identified growth in population and legislation, depressed economic circumstances, an increased crime rate, and the effect of the decision in *Dietrich* v. *The Queen* and in *Re K.* as clearly producing a higher demand for legal aid services.

A2. *There is a disparity in the resources between the Crown and a legally aided defendant in criminal cases and a disparity between the resources of a privately funded litigant and a legally aided litigant in civil cases.*

The Victorian Bar reiterates the submission of the Law Council of Australia (paras. 5.2–5.9) and asserts that such circumstances presently exist in the State of Victoria.

A3. *The cost of litigation continues to increase*

In addition to the submissions made by the Law Council of Australia, the Victorian Bar notes that the Victorian Government has introduced new litigation fees. See the submission of the Victorian Government — Department of Justice, 18 February 1997, p.10. We have seen no evidence that these increased fees have resulted in money becoming available for court facilities or administration or for any other purpose associated with the judicial system.

A4. *The Dietrich responsibilities continue*

Criminal trials involving serious or complex charges must be stayed in the absence of legal representation, otherwise an unfair trial would result. The Victorian Bar refers to the Law Council of Australia submission 8.1 et seq. The reduction in Commonwealth funding and the consequential guidelines announced by VLA reflects a lack of acceptance by the Commonwealth of any obligation flowing from *Dietrich's* case or from the International Conventions to which Australia is a party. As the Law Council noted (para. 8.7), the *Dietrich* principle applies to all criminal trials, whether arising from State or Commonwealth law. Contrary to the assumption made in the

Law Council of Australia's submission at para. 8.9 that legal aid commissioners could be expected to meet their *Dietrich* responsibilities by diverting funds from less serious criminal cases, VLA has introduced a policy which will divert funds from most of the more serious and complex criminal cases. (See the submission hereafter on funding of Supreme Court and County Court trials.)

The *Dietrich* case continues to generate delays in trial and summary hearings and will have a direct impact on Victorian Police and other users of the criminal justice system. The Victorian Government — Department of Justice Submission, at p.12, correctly identifies some of the more significant effects of the application of the *Dietrich* principle.

A5. *Inadequate advice and representation for poor litigants constitutes an infringement of international covenants to which Australia is a signatory*

As a result of the obligations assumed by the Commonwealth pursuant to the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and other Conventions (see Law Council of Australia Submission 3.3D), the Commonwealth Government, the Victorian Government and a decision maker within any public body is required to act in accordance with the duties imposed by those Conventions. See, for example, *Teoh* v. *The Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 273. The Victorian Government — Department of Justice Submission at p.7 acknowledges this responsibility and argues that it is the Commonwealth's responsibility to ensure that the Victorian government is capable of providing services to persons intended to be the beneficiaries of those convention obligations. The Victorian Bar endorses the submission that the Commonwealth has an obligation to provide adequate funds to ensure that the State government can provide the services necessary to give effect to those obligations. This duty resting upon the Commonwealth cannot be circumscribed by the adoption of a "Commonwealth matters" criterion for the provision of legal aid funds.

A6. *The power of the judiciary and the legal profession is limited*

Whilst both branches of the legal profession and the judiciary will continue to seek methods of increasing the efficiency of the judicial system and reducing the cost of litigation, such efficiencies or reforms will not satisfy the existing demand for legal aid services which will continue to far exceed the funding available.

B. THE IMPACT ON VICTORIA LEGAL AID OF THE PROPOSED COMMONWEALTH FUNDING CUTS

B1. VLA is an independent statutory authority established pursuant to the *Legal Aid Commission (Amendment) Act 1995*. In a submission provided to the Senate Committee by VLA on the 19 February, and dated 14 February 1997, the managing director outlined some of the steps already taken by VLA in anticipation of the Commonwealth funding reduction.

B2. *VLA policy has not been approved by the Consultative Committee*

The Victorian Bar asserts that the policies adopted by VLA are inappropriate and unsatisfactory and the underlying reasoning of VLA is unsound. The Victorian Bar is a member of the Consultative Committee which was also established under the Act as a committee to consult with and advise VLA. Representatives of the following bodies are members of the Consultative Committee:

The Supreme Court of Victoria
The Family Court of Australia
The County Court of Victoria
The Magistrates Court of Victoria
The Victorian Bar
The Victorian Law Institute
The Office of the Public Advocate
Court Network
Brotherhood of St. Laurence

The Consultative Committee has played no role in the development of the policies or guidelines thus far adopted by VLA. In particular, the Consultative Committee has not endorsed any VLA policies or guidelines.

B3. *The approach of VLA*

The approach of VLA is to reduce the number of cases in which legal aid is provided and to introduce across the board reductions in the amount of money available in those cases where aid is granted. In addition to reducing the number of cases in which aid is provided, the reduction in funds available to those cases that are aided will necessarily involve a diminution in the quality and effectiveness of the service provided. The Victorian Bar believes that the approach adopted by VLA is fundamentally flawed. The underlying rationale is that access to the system is correlative to access to justice. Thus, the policy of VLA is founded on the proposition of less aid per successful applicant. This approach does not permit any consideration to be given to the quality of service which the profession or the court can provide on such limited assistance. The policies introduced by VLA demonstrate that there will be a dramatic further reduction in the number of litigants who will be successful in obtaining legal aid to obtain legal advice or representation.

B4. *VLA policy in the Family Court*

B4.1 As a consequence of the provisions of the Convention on the Rights of the Child, to which the Commonwealth is a signatory, and the decision of the Family Court in *Re K.*, there remains a continuing need to ensure that children are properly represented. The Victorian Bar adopts the submission of the Law Council of Australia that "the provision of representation for the child is not an exercise of legal aid but is rather an obligation on the Commonwealth under the Family Law Act", which obligation appears to be reinforced by the Convention on the Rights of the Child (Law Council of Australia Submission, para. 9.12). Despite the Family Law Act, the decision of the Full Court in *Re K.* and the Convention, VLA has implemented a guideline which results in the funding of child representatives in only limited circumstances. On 2 January 1997 Justice Mushin wrote

in the Melbourne *Age* that VLA's approach of "more cases at less cost disclosed a worrying lack of understanding of the court process". His Honour noted that:

> "Whilst simplified procedures, case management and trial management are obvious reforms that have been undertaken by this and other courts, every person has a right to be heard before the courts and society must be very careful about placing undue restrictions on that right."

The Victorian Bar agrees.

B4.2 The Victorian Government — Department of Justice Submission, p.7, acknowledges that legal aid is the principal means by which the Convention on the Rights of the Child is given effect.

The VLA proposal means that accused persons who would ordinarily have received legal aid receive no representation in complex and longer hearings. This poses serious consequences for the criminal justice system.

B4.3 Current inquiries of the Family Court in Victoria indicate that something in the order of 50 per cent of litigants are unrepresented. The burden placed upon a trial judge in dealing with an unrepresented litigant is well documented. The risk of a protracted hearing and/or injustice to one or other of the parties is high. The Australian Law Reform Commission has noted that unrepresented litigants in person impact adversely on the costs of other parties and on the time taken to complete proceedings (Background Paper 4, November 1994).

B4.4 VLA has further exacerbated the problem by setting a ceiling limit (fee cap) for the successful applicant. This fee cap commences to run with the first legal fees incurred. By the time a contested hearing is reached it is not uncommon for there to be little of the lump sum fee remaining. Neither judges nor lawyers can be expected to sit for an extraordinary number of hours to complete a case before funds are exhausted. This, and other "short cuts", are not conducive to a just resolution of a dispute.

B4.5 The Victorian Bar supports the submission of the Victorian Government — Department of Justice that the absence of legal aid has led the Family Court to make increasing use of its power to require the involvement of the Victorian Department of Human Services where a child is unrepresented thus shifting the responsibility for the poor and the cost of assisting those children to the State (Victorian Department of Justice Submission, p.13).

B5. *Children's Court*

Legal aid is the means by which children charged with criminal offences are given appropriate legal assistance as required by Article 40(2)(b)(ii) of the Convention on the Rights of the Child. The Victorian Bar adopts the submission of the Victorian Government — Department of Justice (para. 3.1) concerning the likely delays where legal aid is unavailable, the risk of delays in court process and the consequential denial of justice for children.

The VLA policy of reducing the fees usually paid again reflects the absence of any consideration of the quality of the advice and representation that is required in this jurisdiction.

B6. *VLA will only fund committals which will be completed in one day*

As a result of the VLA guidelines, where a committal is anticipated to take more than one day it will proceed without representation at the committal unless the Director of Public Prosecutions determines to present the defendant for trial directly, without a preliminary committal hearing. VLA has resolved to follow this course notwithstanding that it recognises that the same defendant would most likely have legal aid for a subsequent trial, if required.

Many committals cannot be completed in one day, nor in one week. The VLA proposal means that accused persons who would ordinarily have received legal aid receive no representation in complex and longer hearings. This poses serious consequences for the criminal justice system. People who should not be committed for trial are likely to be so committed. There will be additional costs imposed upon VLA with respect to those unnecessary trials. Some trials will be lengthened because it will be necessary for the trial judge to carry out voir dires or conduct other pre-trial hearings before the commencement of the trial. This will result in additional expense for VLA and give rise to serious injustice. Two classes of accused persons will be created, namely those charged with matters which can be the subject of a short committal who can have the benefit of representation, and those charged with more complex offences who will be denied representation. These are not matters in the control of the accused but rather the prosecution. No accused person should be denied representation and so discriminated against. A consequence of this proposal is that the public are likely to have diminished confidence in the criminal justice system.

B7. *VLA will not provide more than ten days of funding to a person facing any criminal charge in the Supreme or the County Court (save for conspiracy offences)*

This fee cap introduced by VLA covers all legal expenses incurred prior to the commencement of the hearing. As with Family Court fee caps, much of the funding may be exhausted prior to the commencement of the hearing. VLA acknowledges that the fees are being calculated on the basis that only 68 per cent of Supreme Court trials take fewer than ten days. An applicant whose trial is anticipated to take in excess of ten days will, in effect, be denied legally aided representation. The Victorian Bar believes that such a proposal is productive of grave injustice. An accused person should not be put in a different position because his trial may take more or less than ten days. An accused's entitlement to proper advice and representation should not depend upon the application of

some arbitrary figure involving an estimate of the length of their trial. The Victorian Bar asserts that where proper funding is made available for preparation, often complex and potentially lengthy trials can be dramatically shortened in their length. The provision of "caps" will actively discourage preparation to ensure sufficient funds are available for the hearing.

B8. *Other policies introduced by VLA*

- VLA will not, in future, pay for advice on the merits of an appeal for consideration by a Legal Aid Review Committee.
- Preparation fees significantly reduced.
- No funding of conferences prior to an appeal.
- No funding of solicitor to instruct on an appeal.
- No special provision for funding for counsel in Family Law proceedings in the Magistrates Court.
- Reduction in the fees available on arraignment of an accused.
- Reduction in the fees available for pleas in the County Court.

These policies have no regard for the quality of the service being provided and the potential for injustice. Since legal aid was introduced the legal profession has always performed legal aid work on the basis of being paid for the work which was required to be done but at a reduced rate. The consequence of the above proposals by VLA is to require both branches of the profession not only to work at a reduced fee but also to work for many hours at no fee at all if they are to discharge their legal and ethical obligations to their client. The diminution in quality of legal service becomes apparent when cases are presented on the basis of unrealistically limited preparation. The Victorian Bar submits that these proposals are another illustration of the misconception that reducing the costs of a case, and thereby permitting an applicant access to the system, is correlative to access to justice.

B9. *False economies in VLA's proposals*

Actual cuts to preparation fees and conferences for trials or proposed trials, together with the proposed cuts for committal proceedings, can properly be described as false economies. Independently, and in combination, they are decisions which are likely to lengthen trials and the cost thereof, and lead to trials which should not take place (either because the Crown should drop the charges or the accused should plead guilty to those charges or lesser charges). This approach is also likely to result in persons charged being found guilty who should not have been (because of insufficient preparation or inadequate representation). Many appeals will not be properly presented and, accordingly, some who should be acquitted, or at least have a retrial directed by the Court of Appeal, will be unsuccessful. Under the new VLA guidelines, adequate reading of a trial transcript cannot take place. This is an indispensable step in the proper presentation of an appeal because it is upon the transcript that the appeal must be conducted. It is very difficult, if not impossible, in many appeals, particularly those where the appeal involves a claim that the conviction is contrary to the weight of the evidence, to adequately prepare or present an appeal on the fees now fixed by VLA.

This approach is also likely to result in persons charged being found guilty who should not have been . . Many appeals will not be properly presented and, accordingly, some who should be acquitted, or at least have a retrial directed by the Court of Appeal, will be unsuccessful.

B10. *The appointment of retained counsel*

VLA is now considering the appointment of retained counsel to deal with some cases which fall outside their guidelines. In evidence, before the Committee, the VLA managing director submitted that such retainers would tend to flatten out the current imbalances in areas of legal aid expenditure. VLA has invited barristers and solicitor advocates to lodge expressions of interest in an appointment as retained counsel. As the submission tabled by VLA on 19 February with the Senate Committee indicates:

"The essence of this proposal is that counsel retained on an annual fee basis will cost less per day in court than private practitioners retained for an individual case on a daily fee basis."

The Victorian Bar's view is that the annual fee basis proposed by VLA is in fact in excess of fees paid to a private practitioner retained for an individual case on a daily fee basis. Cost saving to VLA will not be found in the fee. The Victorian Bar's concern is that any savings for VLA may be in the way in which VLA intends to require counsel retained by it to conduct those cases which presently create the imbalances in legal aid expenditure. One of the terms and conditions of the VLA retainer would be that counsel "act in accordance with VLA policies and directions relating to the conduct of litigation". Such a condition is inconsistent with the role and function of independent counsel who must, subject to their duty to the court, act in the best interests of their client. The retainer presently contemplated by VLA is not compatible with the legal and ethical duties of counsel. The Chairman of the Victorian Bar Council wrote to VLA on 24 February 1997 in the following terms:

"Thank you for your letter of 13 February 1997, in which you invite my comments regarding a proposal of Victoria Legal Aid to retain counsel on an exclusive retainer for legally assisted clients in indictable criminal cases heard in the County and Supreme Courts. You indicate that it is VLA's intention that retained counsel will remain members of the Victorian Bar.

On the proposed terms and conditions of appointment as detailed in the advertisement enclosed with your letter, it would not be possible for counsel so retained to maintain their membership of the Victorian Bar; nor would such counsel be eligible to remain as practitioners regulated by the Bar within the terms of

the Legal Practice Act 1996.

In particular, the conditions that retained counsel will 'provide services solely to legally aided clients during the term of their retainer', and that retained counsel will 'act in accordance with VLA policies and directions relating to the conduct of litigation' are, in their current form, incompatible with several provisions of the Victorian Bar's Constitution and Rules of Conduct. We will be informing our members and regulated practitioners of this fact.

However, the Bar Council is currently considering possible means by which this situation can be remedied. In this regard I would welcome an opportunity to meet with you to determine whether your proposal might take a form such that retained counsel do not contravene the Constitution and Rules of Conduct of the Victorian Bar."

B11. *Using Legal Aid funding cuts to improve and streamline the court process*

The view of VLA, as reflected in its submission tabled with the Committee on the 19 February (paras. 17–18), is that the Commonwealth funding cuts provided an "opportunity" to improve the court process so that cases can be heard more swiftly and cheaply. The Bar Council asserts that speedy, cheap hearings are unlikely to provide access to justice. The use of legal aid funding cuts as the battering ram of law reform is fraught with danger. In utilising the "opportunity" provided by the proposed Commonwealth funding cuts to conduct cases more "cheaply", VLA has disregarded the quality of service which is required of the legal profession and the courts if legally aided litigants are to obtain justice. The Victorian Bar refers to the submission of the Law Council of Australia (para. 2.15) regarding the proper role of the managers of legal aid delivery (the Legal Aid Commissioners).

C. CONCLUSION

The Victorian Bar endorses the submission of the Law Council of Australia that:

"It has been a fundamental principle of legal aid that a legally aided client should be no better or worse off than a privately funded client. The quality of service should be no less than that available to the privately funded user of the legal system." (Law Council of Australia, para. 2.19)

As a consequence of the proposed Commonwealth funding cuts and the policies introduced by VLA, the worst fears of the Law Council of Australia have come to fruition. The situation has now arisen in Victoria where many in the community are unable to receive any advice, representation or advocacy service at all. Those who do fall within the VLA guidelines will, by virtue of policy limitations, not receive the same quality of service as that available to those who can afford to pay for it and, significantly, will receive an inferior quality of service to that previously available when legal aid was granted. Both the Commonwealth and State governments have a core obligation to ensure that this situation does not continue.

A Focus on Legal Aid Numbers

Tony Radford advocates: More funds for Legal Aid in Victoria More sources can exist in Victoria for State matters

SYNOPSIS

Position

That more funds for State matters can be created by legislative action at State level.

Benefits

1. Minimisation of press feuding over Legal Aid at State levels.
2. Reduction of unnecessary adjournments, uncertainty over entitlements, burdens on courts consisting of:
   (i) trial judges *unwittingly* misdirecting themselves post Dietrich,
   (ii) trial judges forced into playing judge and advocate — a most unfair position,
   (iii) Courts of Appeal with Dietrich appeals.
3. Saving of costs.
   Other reforms through more effective case management can be run also.

THE ELEMENTS OF THE SCHEME FOR MORE LEGAL AID FUNDING AT STATE LEVEL

THE NEW STATE LEGAL AID FUNDING ACTS

The 1997 crisis in legal aid funding may be partially, if not also substantially overcome by the adoption of a simple legislative scheme adopting new sources of revenue.

The scheme comprises several separate elements, which are as follows:

1. Levy
   That a levy be imposed on the Victorian public in order to raise funds specifically for Legal Aid for State matters.
   If large enough it might be in lieu of all other State funding.
2. Stamps Act
   That the levy be levied in fact as an "add-on" to motor car registration and third party charges or preferably, as part of the *Stamps Act*. (There are other alternatives which are less attractive.)
   This would then also, cause changes to be made to the *Legal Aid Act*. An outline of the changes are stated in paragraph 5.
3. Annual Charge
   An appropriate (monetary) figure can be imposed, annually. This could be a figure which is a *percentage* of the charges imposed on other matters under the various Acts, e.g. on land transfers under the *Stamps Act* and automatically rise if the charges rise or be a fixed one to be adjusted in accordance with time.
4. Name
   I propose that the funds from the new sources of revenue for legal aid for State matters be called "LEGAL AID FUND" (or "LAICARE" or "LEGCARE").
5. Details and gross quantum of revenue to be raised
   (a) I propose that the levy would be imposed either by an amendment
   (i) to the *Transport Acts*, (viz. (a) *Road Safety (Vehicles) Regulations 1958* and (b) *Road Transport Charges (Vic) Act 1995* (heavy vehicles)
   (ii) or to the *Stamp Duty Acts*.
   As the latter Acts raised $120M c.f. $813M under the *Transport Acts* figures in the 1995/96 State Budget Papers — and may be perceived to be less likely to upset the motoring public, the latter could be an easier way.
   Further as there is a fixed charge ($140) for registration for vehicles under three tonnes, any additional levy would be more obvious than in a small section in the (frequently amended) *Stamp Duty Act*. Tucked into that Act, it could be hardly seen — yet it would be far from being revenue neutral.
   A third alternative to these two possible sources is to provide a means of securing monies raised from gambling taxes. These raise (1995/96) $1,041M in revenue. There would need to be a diversion of funds or the inclusion of a "Legal Aid Fund" in the community project schemes. However one would want an Act for it to be effective — to avoid unnecessary changes (in this area) in emphasis, policy and administration within the life of any one government or through a change of government itself.
   It is to be noted incidentally, that the total estimated receipts for the Victorian State Consolidated Fund for 1996/97 are $16,336M, State tax receipts are $7,983M. (The total on a one-off basis, for privatisation receipts — anticipated for 1996/97, are $366M). (Victorian State budget estimates (Papers 1996/97 pp.407–411)).
   A fourth avenue is by a specific purpose grant. There are many in this category.
   Like examples can be found in State Government budget papers. This is of limited long-term benefit, open to opportunism and "pork barrelling" and not recommended.
   (b) The actual revenue which could be raised can be illustrated in the following figures:

Revenue Sheet

(a) Levy as imposed on matters charged under the *Stamps Act 1958* (as amended):
Total revenue estimated 1996/97 — $1,260M.
Levy of: 3% = $36.18M
2.5% = $30.15M
4% = $48.24M
5% = $60.3M
1% = $12.06M

(b) Levy as imposed on road transport registration and third party charges under the *Road Transport* and other Acts:
Total Revenue — Motor Vehicle Taxes (including stamp duty) estimated 1996/97 — $813M.
Levy of: 3% = $24.39M
2.5% = $20.325M
4% = $32.52M
5% = $40.65M
1% = $8.13M

(c) The Auditor-General might criticise any Act imposing a levy expressed as a percentage of some

larger figure itself based on estimates. However it is done all the time under the *Stamps Act*. Estimates can and are made, annually, on this basis.

(d) Taxes or the provision of Goods and Services including (only) tax on various forms of gambling is $1,379M.
Levy of: 3% = $41.37M
2.5% = $34.475M
4% = $55.16M
5% = $68.95M
1% = $13.79M

(e) It is noted that gross expenditure on Legal Aid (cases) in the five years to (end) 1995/96, was $181M.

(f) The expenditure to "Case related" Professional Payments for 1995/96 by the LAC (and the Board) was $53.183M.

(g) The total amount of the Receipts for the State are $16,121,905,958. Total Consolidated receipts are $21,198,825,557.

(h) If a levy was imposed (and revenue was collected) in the following ways:
(i) As 2.5% of estimated *Stamps Act* revenue ($1,206M) this realises $30.15M, 0.142% of Total Consolidated Receipts.
(ii) As 2.5% of estimated motor vehicle revenue ($813M) this realises $20.325M or 0.0959% of Total Consolidated Receipts.
(iii) As 2.5% of gambling revenue ($1,379M) this realises $34.475M or 0.16% of Total Consolidated Receipts.

(i) Proposal (i) is least likely to cause an upset.
Proposal (iii) would perhaps require annual political haggling over special purpose grants — ala — community projects and is not recommended without legislation in place.
Proposal (ii) is too low for the long-term point of view although it might be a very modest beginning. One could start there however.

6. Initial holding of funds
I propose that the Act provide that the whole of the monies be directed/diverted at least nominally, from the time of imposition of the levy, to an independent Legal Aid board.
The board would comprise a representative of the State Government, a member of the public, a member of the LIV and a member of the Victorian Bar Council.

Reasons for the new proposals

(a) The reasons for this scheme are, in short:
— There is a current crisis in Legal Aid funding.
— It would produce certainty in the short, medium and longer term.
— It would be for the longer term.
— It would avoid appeals to higher courts, wherever they are, and even over State matters through a lack of paid legal representation or adequate legal representation below.
— It could avoid longer hearings where there is no legal representation and the judged decision to go on, notwithstanding the High Court ruling in 1994.
— It would also assist to end the feuding between Governments now 6 months old.

(b) The proposal is soundly based politically because:
— It would avoid any allegation of political bias.
— It would have an appropriate level of acceptance in the community.
— It would maintain employment at current levels, both within the LAC and in the areas of practice by independent practitioners (including representation and advice work).
— Accounting to economic theory, one dollar spent (on staff, rental, equipment, library etc.), returns five dollars.
— It can go hand in hand with other changes in Legal Aid areas.

The attraction of this author's neutrality

I can put this idea as a person who:
(a) is apolitical;
(b) does very little paid Legal Aid work anyway; and
(c) has an interest in community welfare and public interest at large.

Other reforms of the legal system can take place also

It is necessary, I think, to indicate that Legal Aid reform can also proceed with, other emphasis on ways to minimise costs such as:

(i) through Mediation Centres open to the public;
(ii) through the Mediation Centre run by the Bar;
(iii) through the widespread adoption and practice of mediation in one form or another in civil cases, particularly through the 300 Accredited Mediators at the Bar;
(iv) through the initiation of further proposals for case management in criminal cases beyond those now practised and more effective case management by the courts in civil cases;
(v) a better system of selection of charges by prosecutors and informants so as to avoid the clear impression of a "shot gun" approach or a "'hit them with the book" attack — techniques that can result in unduly long trials.

POSTSCRIPT

This proposal in substance, was submitted to the Bar Council in December. For his pains, the author was included in the Bars' Legal Aid Task Force. Subsequently, with the approval of the Bar, the author submitted the scheme to the State Attorney-General and the State Treasurer. Complete responses have yet to be received. Another submission on Federal Funding is shortly to go to Canberra.

Violated or Inviolate? The Victorian Judiciary Through the Politics of Sentencing-Law Reform

By Peter Crockett, author of *Evatt: A Life* (Oxford University Press, 1993)

AS a constitutional arm of government, the judiciary is a fundamental part of the broad political environment of Victorian society. It is the judiciary's responsibility and obligation to recognise that political identity by taking constitutional initiatives to strengthen its position, notably in times of constitutional crisis, while taking care to retain its dignity and to avoid involvement in party politics. This matter is examined through the sentencing-law reform dispute. For the use of a range of sentencing options has generally led most judges not to seek routine or ready recourse to the imposition of harsh terms of imprisonment, which has provoked the open criticism of judges by some members of the parliamentary executive.

HISTORICAL FORCES

The constitutional history of the judiciary is a fine subject for the examination of shifts in power relations resulting from upheaval, often causing substantial changes to the English and to Australian Federal and State Constitutions. Characteristically, the judiciary's power fluctuated as it grew and receded both through and without reference to its own efforts. The constitutional identity of the judiciary has long given it a full political personality, and it has most successfully acted as an integrated constitutional partner and responsive leader of society when it has fully recognised that innate political identity.

Councillors during the time of the Tudor Constitution possessed powerful political and judicial functions and maintained an uneasy relationship with the declining Common Law Courts in many legal and jurisdictional matters, although Common Law judges did deal with cases concerning governmental authority.[1] In

fact, Common Law Courts and Parliament were joined through the principle of the ultimate supremacy of the law in the State. In the seventeenth century, Coke's progressive challenge to the conservative bond between Common Law judges and the Crown seemed, through an uncertainty over the nature and power of the prerogative, to encapsulate protracted problems between Parliament and the Crown that caused parliamentary deadlock, civil war and a benign but unstable military dictatorship.[2]

Should the Victorian judiciary be able to repel the expansion of executive power, the repercussions of such a reversal in power relations would be felt far beyond the borders of this State.

With the demise of the councillors, the courts of law after 1660 assumed full control of vast portions of judicial activity. A resultant institutional strength and full professional autonomy was confirmed by the constitutional settlement, aided less by that settlement's three enactments of 1689, 1694 and 1700 than by a newly formed popular understanding of the extinguishing of monarchical divine right and the demonstrated supremacy of Parliament; sovereignty residing in an assembly prompted the evolution of responsible government and an awareness in the people that they were a principal source of power.

The eighteenth-century Constitution strengthened the principle of the separation of powers, asserting the discrete functioning of governmental spheres, which was obeyed in practice and preserved by the pre-eminence of the rule of law.[3] Before and during the early stages of the Industrial Revolution, the judiciary in England not only became increasingly powerful but retained a keen sense of its political nature and respected community standing. Its administrative and judicial power in the early years of the eighteenth century grew at the expense of the clergy, while justices, in fact, decided on parliamentary candidates at Quarter Sessions:

"From time to time, this body would take decisions of fundamental importance to English social life, and to these decisions they themselves gave the force of law. For example, the famous 'Speenhamland Act' of 1795, which altered fundamentally English poor relief by making the parish responsible for making up the labourer's wage to subsistence level, was merely the decision of one of these local legislatures, in this case the Berkshire magistrates. As Justices they enforced it and other Justices followed suit. This indicates something of the Justices' power."[4]

The exercise of delegated legislation, in fact employed since the fourteenth century, accelerated markedly during the nineteenth century, enhancing administrative power,[5] expanding the reach of the executive, and creating the conditions for an extensive alteration of the British judiciary, which occurred within the context of parliamentary reform and the development of social-welfare legislation. The British judiciary was radically overhauled during and beyond Gladstone's first ministry, between 1873 and 1880. Gladstone's Lord Chancellor, Lord Selborne, streamlined the judicial system by incorporating seven Common Law Courts into one Supreme Court of Judicature, while:

"By 1880 the present threefold division was established: King's Bench, Chancery, and Probate, Divorce and Admiralty, and any judge of the High Court could sit in any division."[6]

Utility and flexibility were features of the Victorian Constitution, while the idea of a balanced Constitution continued to enjoy authoritative support.[7]

There nevertheless remained unresolved questions between the courts and Parliament, in Britain and her dominions, mainly concerning the extent and content of parliamentary privilege and who determined it, while the judiciary continued to guard its constitutional authority.[8] The inherent, natural political context and content of these shifting relations — often manifested as "disputes" — was evident during this century in Victoria, at least as publicly evident issues, from the time of an 1865 *cause célèbre*, in which the Chief Justice of the Supreme Court of Victoria, Sir Redmond Barry, was rebuked by the Attorney-General, George Higinbotham, for not informing him of his absence on leave from the State. As a constitutional leader, Barry considered himself under no such obligation.[9] Higinbotham believed that as a Crown servant of the government, Barry was obliged to apprise him of his intentions, an issue that is relevant to the sentencing-law reform debate through a tendency for the executive and bureaucracy to seek to widen their control over the judiciary.

The dissatisfaction of the current Victorian executive with the sentencing practice of most judges represents the latest disagreement arising from a long-standing constitutional imbalance that had become more pronounced during and since the Second World War, in Great Britain and Australia, with a tendency to the centralisation of executive government, and the enhancement of its power through extended reach, with such reforms as expanding federal administrative and tribunal functions, including the ministerial control of quasi-legal functions. There is "a vast administrative jurisdiction in modern Britain, attempting functions similar to those of the conciliar courts of earlier centuries. Such an organisation is indeed an inseparable part of any system of government".[10]

In Australia, several factors contributed to the executive's accretion of power, to the detriment of the authority of other arms of government. These include: the impact of National Security Regulations, which extended beyond the war; the exigencies of post-war reconstruction; the pronounced inclusion of Australia in international affairs, and the wide application of the External Affairs power; the formation and precocious rise of the Liberal Party of Australia; and the accelerated growth of a national intelligence service, and of sophisticated communications and records management technology. The long-serving former parliamentarian, David Hamer, examining the performance of 20 selected parliaments of the Westminster system formed since Bagehot published *The English Constitution* in 1867, expressed displeasure at the decline of legislatures. He observed that executives handle legislation of their own choosing, while the control of delegated legislation:

"is virtually non-existent in many of the twenty parliaments, and inadequate in all of them. Parliamentary supervision of government business enterprises and other non-departmental governmental activities is derisory. Desirable parliamentary investigations into government activities are often frustrated by party-line voting. No lower house has been able to be both the decisive chooser of a government and an effective critical scrutineer of the administration of that government. Non-parliamentary structures have had to be set up to extract essential information from governments, to protect human rights, to inquire into serious administrative failures by the government, and

to obtain fair treatment from the bureaucracy for individuals and organisations. These are all matters for which the government is supposed to be responsible to parliament, but which the various parliaments have proved unable to handle.

Upper houses, where they survive, can put some controls on an elective dictatorship, but they have generally proved frail barriers."[11]

In 1952, in Victoria, a County Court judge presiding in the Court of General Sessions commented adversely on a feature of the housing policy of the Cain Government. The judge was admonished through a cabinet statement, and the legal authorities Zelman Cowen and David Derham found the admonition to be an unacceptable constitutional breach.[12] In 1954, Supreme Court judges presented a written submission to the Victorian Premier, Mr. John Cain, requesting that a projected modest salary increase be raised to conform with economic changes that had ensued since their previous salary adjustment. Not only did Mr. Cain refuse to comply, he failed to present the report to Parliament for debate, thereby unconstitutionally denying the judiciary formal communication to Parliament.[13] The issue also raised, again, the question of whether judges hold "special" positions, or are effectively public servants with no claim to exceptional entitlement — Mr. Cain: "too much respect is paid to these people"[14] — and is not unlike the dispute that arose more than 20 years earlier in England. In this disagreement, of 1932, judges were perceived as civil servants when faced with a salary reduction, a status which they renounced on grounds of judicial independence and the necessity of legal justification for all governmental acts.[15]

The context of the sentencing-law reform debate raises the question of the nature of the Victorian judiciary and its response to its constitutional condition, while should the Victorian judiciary be able to repel the expansion of executive power, the repercussions of such a reversal in power relations would be felt far beyond the borders of this State.

SENTENCING-LAW REFORM

"The Victorian Sentencing Committee, headed by Sir John Starke, in its Report in 1988 drew attention to the fact that people believe crime rates to be higher and sentences to be lower than they are. It pointed out that the sentences reported are mostly those perceived to be sufficiently lenient to make them newsworthy. It commented that the public is left with nothing but the impression that cases where courts go wrong represent the norm of the sentencing process."[16]

Before the Victorian *Sentencing Act 1991* came into effect, there had been much discussion about the early release from prison of offenders who had breached the Victorian criminal law. For it was believed that, with remissions and other allowances, offenders were not serving the terms to which they were sentenced, their release being considered widely as premature and even farcical, so that sentencing law was not effective. Nationally, all aspects of sentencing and punishment policy are matters that continue to be debated among the public, media and specialists.

The Victorian Parliament demonstrated concern for the early release of prisoners by substantially recasting the *Sentencing Act*, producing in 1991 revised legislation that, by introducing provisions that compelled offenders to serve genuine terms, adhered to the "truth in sentencing" principle and accurately reflected the sentencing conditions desired and imposed by most judges. Senior members of the first Kennett administration, elected in October 1992, nevertheless appeared to be unhappy with this newly tightened legislation. Amendments to it in 1993 and 1994 increased the severity of sentencing provisions, notably by inviting longer prison terms. At the same time, however, it was clear that there was a need to permit flexibility for each judge to assess the specific idiosyncrasies and subtleties of every case in which a defendant was found guilty. Thus, provisions allowing the consideration of mitigating factors — including the number, seriousness, date, relevance and nature of any previous convictions, and general reputation and significant community contributions of the offender — were not and could not be repealed or amended. This meant that a continuance among judges of their established, moderate sentencing views and practices might remain, particularly as the current wisdom on sentencing supported the "truth in sentencing" provisions of the 1991 Act. That is, a rounded appraisal of a range of sentencing options, embracing imprisonment, parole and other non-custodial orders might confirm among judges the correctness of their resistance to harsher prison terms, and reinforce their belief in the cost efficiencies, rehabilitative benefits and advantages to society in the long-term reduction of crime resulting from the reduced use of imprisonment in sentencing. It transpired that most judges in practice, by and large, declined to avail themselves of the Act's new stringencies.

The Victorian Sentencing Act 1991

The Report of the Victorian Sentencing Committee, published in 1988, was a considered and comprehensive statement on sentencing needs and community expectations. It drew on vast practical experience and incorporated philosophical considerations and frequent comparisons with societies similar to that of Victoria. Its measured recommendations fully accounted for truth in sentencing requirements, the obligation in each instance to assess an offender's mitigating and aggravating circumstances, and the need to consider fully the circumstances and needs of victims.[17] The *Sentencing Act 1991* was framed broadly in the spirit of this report.

The objectives of this Act are set out in sections 1, 5 and 6, and provide for the prevention of crime and the promotion of respect for the law by:

- providing for sentences that are intended to deter the offender or other persons from committing offences of the same or a similar character;
- providing for sentences that facilitate the rehabilitation of offenders;
- providing for sentences that allow the court to denounce the type of conduct in which the offender engaged;
- ensuring that offenders are only punished to the extent justified by:
  - (a) the nature and gravity of the offences;
  - (b) their culpability and degree of responsibility for their offences;
  - (c) the presence of any aggravating or mitigating factor concerning the offender and any other relevant circumstances; and
- ensuring that victims of crime receive adequate compensation and restitution.

The provisions of the Act gave substance to these objectives, for example in section 11, which by dealing with the fixing of non-parole periods of imprisonment terms of 24 months or more, substantiated the truth in sentencing aspiration. This Act provided a flexible and comprehensive, considered and humane, coverage of sentencing needs.

Amendments of 1993 and 1994, in conflict with the 1991 Act, reveal a regressive tendency to seek cumulative rather than concurrent sentences, make draconian provision for indefinite sentences for offenders of the worst crimes, and emphasise community protection over the

circumstances of offenders, notably in relation to violent and sexual offences.[18] For example, sub-sections of section 5, inserted in 1994, demonstrate emphasised regard for the welfare of the victim, providing that:

"In sentencing an offender a court must have regard to . . .

- the personal circumstances of any victim of the offence; and
- any injury, loss, or damage resulting directly from the offence."

These amendments place excessive stress on victim impact and community defence which, while they are important considerations that had already been given ample scope in the 1991 Act, have the effect of reducing the ameliorative influence of rehabilitation within the penal system, providing a distorted punishment regime.

THE AUSTRALIAN LAW REFORM COMMISSION REPORT ON SENTENCING 1988

The ALRC Report on Sentencing[19] — which has in eight short years become a highly regarded and often-quoted statement on sentencing — focused on the need to reduce reliance on imprisonment as punishment, especially in view of its proven cost in human and financial terms. The commission, which also recommended reduction in maximum terms, offered five major reasons for this initiative:

(1) "the experience of imprisonment is negative and destructive for the offender", while boredom and frustration in prisoners stem from a lack of useful activities.
(2) "The cost of imprisonment is enormous and the returns few."
(3) The value of imprisonment as a punishment option for only the most serious crimes will be enhanced by having it used more sparingly.
(4) Reducing the emphasis on imprisonment complements, and is properly linked with, the principled approach to custodial orders, so that severe punishment can be imposed on prisoners through parole, without resorting so readily to imprisonment, by employing intensive corrections orders, suspended sentences of imprisonment and youth training centre orders.
(5) It *was* the policy of all Australian governments to reduce reliance on imprisonment; Victoria is the only State in which this trend has been reversed.

The more extreme but comparable pro-prison reforms of the British Home Secretary, Mr. Michael Howard, have failed. A marked worsening of crime has resulted, with the overcrowding of prisons intensifying stress for prisoners and staff. The British criminal justice system has consequently been thrown into disarray.[20]

Additionally, the commission advised — and the 1991 Victorian Act adopted — truth in sentencing; the abolition of inhumane, cruel or vengeful punishments; an increase in the range and severity of non-custodial measures, such as community-based orders and the imposition of fines; the requirement that remissions be authentically earned for good behaviour, diligence or other creditable activity; and the pursuit of the rehabilitation of the offender, particularly through the use of parole as measured reintegration into the community (an option which nevertheless often carries stringent obligations and so may form an effective punishment component within a sentencing decision).

This report has employed a sensible, careful, structured use of a wide range of sentencing options, where the offender is genuinely and fully punished, and is offered extensive rehabilitative opportunities through closely programmed reintegration into the community. Sentencing provisions of the *Crimes Act* duly reflect the recommendations of this report,[21] and the recently released New South Wales report on sentencing mirrors the tenor and substance of its federal counterpart.[22]

There is, therefore, broad agreement of opinion between the legislators of the Victorian *Sentencing Act 1991*, Federal, New South Wales and Victorian academics and practitioners — specialists among whom wrote the Federal and New South Wales reports — and Victorian judges. The Victorian Government seems not to conform to current thinking on the issue.

The Philosophy of Sentencing in the British Criminal System

The incongruity of the position of those Victorian officials is further reflected in the broad philosophical position of sentencing that underlies the British criminal justice system.

Briefly, philosophical tension is created between the principle of reductionism and retributivism. On one hand reductionism seeks "to reduce the frequency of the types of behaviour prohibited by the criminal law". This viewpoint accepts that economic strictures prevent the full realisation of crime reduction measures, but that society must aim to institute correctives likely to reduce criminal tendencies, employ general deterrents, deny opportunities for crime to be committed, and promote better social conditions, such as improved social hygiene, for example, where slum clearance is demonstrated to reduce crime. On the other hand, sophisticated retributivists do not ask the question, "How should we decide the form or the degree of suffering which is appropriate to the offence?" but assert the liberal principle that "Society has no right to apply an unpleasant measure to someone against his will unless he has intentionally done something prohibited". There is appeal in this principle, for it allows punishment along reductivist lines to be imposed on those who intentionally offend, and it does not, at least overtly, introduce the moral problem of retribution.

Sophisticated retributivism, however, falls down on two grounds. First, infractions due to negligence — as distinct from intentional breaches — are punishable by law. Secondly, the threat to commit a prohibited act — as in the building of an explosive device — can be punishable by law, even when the full intention has not been realised. These broad concepts and other sentencing principles warrant more detailed discussion, but even on a consideration of this brief survey it should be apparent that the best option is recourse to the philosophical views and practical measures of reductionism; further, the Kennett Government's sentencing-law reforms seem to draw on the idea of retribution in the wish to encourage the infliction of harsher prison sentences as the "purest" way to impose suffering as atonement for the commission of wrong, in spite of a measure of cushioning that might be expected from incarceration through proposed new and better gaols.[23]

Sentencing-Law Reform as a Political Issue

We might consider the motives of the Victorian Attorney-General, Ms. Jan Wade, in commissioning last year's *Herald Sun* survey on sentencing, where the public was invited to offer its opinion on sentencing, despite it being a technical field of law. It is unlikely that the survey represented a desire to respond to community concern; it seemed instead to be a ploy to use the popular press to shape public opinion. Similarly, the timing of the commissioned press survey to coincide

with the early release of Peter Vaitos (known as the "Silver Gun Rapist") underscores the view that the survey was part of a political strategy. For Vaitos had been sentenced *before* the enactment of the *Sentencing Act 1991*, which naturally gave full provision to truth in sentencing. Since there is rightly no retrospectivity permitted in the application of Australian laws, the fact of the release of this offender is a virtual irrelevance that cannot fairly be seen in the light of developments in Victorian sentencing law since 1991.[24]

If the Attorney-General has nevertheless genuinely sought to act on her political and moral beliefs, she has also hoped as a consequence to enhance her own and the Government's popularity. For the *Herald Sun* survey may be seen as a political indulgence designed through a superficial format to marshal popular — at bottom electoral — support for harsher sentencing. These mixed motives, deepening the problem of constitutional propriety, appear to be behind media publicity given to opinions expressed by the Attorney-General — and also the Premier — in support of this reform and in strident attacks on Victorian judges.[25] For this method seems to have been chosen, rather than persisting with the failed promotion of reform through professional publications, to intensify pressure on judges to implement that reform; the microcosm of sentencing-law reform is lodged within the macrocosm of the disposition of political and constitutional power.

THE JUDICIARY VIOLATED

Control

A feature of the exercise of power is the desire to extend control as extensively and as comprehensively as possible. Politicians, absorbing administrative influences, are often tempted to use bureaucratic means — in this case, the Department of Justice — in addition to political and constitutional avenues to acquire that control:

"In the modern State an extended executive, able to make, enforce and interpret law, has come into being, under imperfect parliamentary and judicial control. The principle of the separation of powers has been violated. Considerations of 'policy and government', as they would have been called in the seventeenth century, have been accorded a larger place in the constitution than they have held for three hundred years . . . It may in reply be suggested that the danger has been exaggerated. Numerous as are the statutes giving sub-legislative powers, no statute has yet created a general as distinct from a particular power to govern . . . Neither sub-legislative nor quasi-judicial powers express the right of an omnipotent executive to do as it likes. Both express the power of a sovereign legislature to confer on a limited executive authority such functions as it may from time to time deem necessary."[26]

The Kennett Government's sentencing-law reforms seem to draw on the idea of retribution in the wish to encourage the infliction of harsher prison sentences as the "purest" way to impose suffering as atonement for the commission of wrong.

The process is two-way: "The complexities of modern government lead ministers to depend very much on the public service for the policies and legislation they promote",[27] while it is predictable that a government may regard sentencing as law reform encapsulated within its management of judicial administration, for the judiciary alone is often seen by politicians to be unacceptably beyond the control of the executive; "Governments become prone to take steps which reduce the standing of judges".[28]

A long-standing difference of opinion has clearly existed between the executive and judiciary over whether or not the judiciary is independent of the public service. This disagreement has risen in intensity with contests between the executive and judiciary over specific issues, which in Victoria has lain at or near the heart of the disputes of 1865, 1952 and 1954.[29] It may be noted that the judiciary as an arm of the Victorian Constitution is a functional and structural apparatus that is clearly separate from the executive; it has unique responsibilities to the Constitution and society in the application of law — at times, in fact, to hold parliamentary legislation invalid — and it also has an implied obligation to uphold such fundamental values as the recognition of Parliament's legislative supremacy, the protection of the authority and integrity of the judiciary, the maintenance of the civil liberties of the individual, and the support of the rights of property holders; additionally "the judiciary acts as the custodian of the body of laws and values by which society is regulated and governed and, to a limited extent, adds to and modifies those laws and values".[30]

In no formal sense, or through no commonly appreciated understanding, can the judiciary be held to be aligned to the public service. Some court officials are members of the public service — although responsible to senior members of the judiciary — and in the mid-1980s the Supreme Court of Victoria was structured so that its officials have come under the "ultimate" authority of the Council of Judges, that is, the collective of judges — who meet regularly as a group — at each of the three levels of the court system.[31] Yet, as demonstrated in Victoria since the mid-1980s under Labor and Coalition administrations, the public service remains most influential in its capacity to implement wide reforms in judicial administration, a "success" which has fortified the belief in many politicians that the judiciary remains an adjunct of the public service. Specifically, the Victorian Attorney-General seems to be trying to incorporate the sentencing issue into a broad program of reforming the legal system. For the Attorney-General and policy advisers within the Department of Justice have since 1993 continued the reform of the justice system, particularly as it relates to streamlining judicial administration complemented by the delivery of cost efficiencies, consolidating reforms of the previous Government, and introducing fresh innovations.[32]

The administration of justice within the public service has itself undergone remarkable change, with centralisation again increasing the potential for control. The correctional and enforcement wing of the administration of justice — formerly known as the Department of Corrective Services — had in the past been separated from the legal and policy wing — formerly known as the Attorney-General's Department. Both wings have since October 1992 been amalgamated as the "Department of Justice", so that the focus of the sentencing debate may be seen to assume an administrative prominence, for correctional and enforcement officials and agencies might well be expected actively to support policy input into the case for harsher sentencing.

That there is troubled debate over sentencing-law reform is further evidenced by a pro-prisons policy that has been set in place at political and bureaucratic levels. That policy is endangered should judges decline to pass sentences with a high

imprisonment component, as both a financial and managerial issue: funds have been invested in the upgrading of Pentridge Prison, and in the building of new gaols; and operating Victoria's reformed prison system — which is proposed to be privatised — creates a managerial issue of magnitude, with that system depending upon the employment of a large management staff and the engagement of associated services.

Concept in Language

If the Attorney-General has adopted a view that judges are effectively public servants, to be swept along with departmental reforms of the judiciary, the question is raised of the precise nature of law reform. There is a clear conceptual division here in the nature of the *type* of reform. The reform of judicial administration may well be a facet of bureaucratic activity; but the sentencing of offenders by judges involves a discretionary privilege that, as legal interpretation drawn on the complex matters of sentencing law, is a precept of legal philosophy that lies at the heart of a judge's inherent and unique functions and responsibilities in the fulfilment of incontrovertible legal right and constitutional principle. Devoid of administrative reference, solely a jurisprudential matter, the executive should accept that this matter lies beyond its domain.

The engagement of the bureaucracy in legal interpretation within the reform of the judiciary has resulted in bureaucracy ignoring the distinction between philosophy and administration; the "long view" of the reform of judicial administration as a bureaucratic totality disavows such conceptual nicety in favour of the executive's pursuit of bringing the judiciary under its control, and in keeping with bureaucracy's wish to deal with offenders by relying primarily on imprisonment. The sentencing views of the judiciary are expected to conform to a greater imperative of sweeping judicial and penal reform. Conceptually, there has been a centralising of administration and a structural facilitation of bureaucratic accountability to the executive without reference to or consultation with the judiciary. The executive's verbal assaults on judges confirm that exclusion as much as they disclose disapproval of the judiciary's continued existence beyond executive control. So, "law reform" as an embracing bureaucratic aspiration of restructuring judicial administration is being employed to widen further the political and bureaucratic scope at the expense of the autonomy of the judiciary.

THE JUDICIARY INVIOLATE?

Unproductive constitutional disputes between the executive and the judiciary will persist until there is a clear understanding of the nature of the judiciary, and of its position within the Victorian Constitution. The determination of these matters might condition and promote worthwhile, varied and fresh responses in the judiciary to the current and future disagreement provoked by the sentencing-law debate, and in the likelihood of future quarrels. The options and possibilities available to the judiciary are widened should it be more aware of its fundamentally political character.

"Law reform" as an embracing bureaucratic aspiration of restructuring judicial administration is being employed to widen further the political and bureaucratic scope at the expense of the autonomy of the judiciary.

The constitutional arms of government plainly act in dynamic relation to one another; but since all of those arms, including the judiciary, are political — the legislature and executive as party political more obviously so than the governor and judiciary — that dynamism is inescapably a political relation. Likewise, the identity of the judiciary in the everyday business of government and as a governmental institution professionally obliged to respond to society's fluctuations, renders it subject to political influence and empowers it as an actuator of political influence. It is, in fact, an abnegation of duty — worse, a derogation from principle — for the judiciary not to employ political means to assure its authority and integrity in order for it to fulfil the constitutional responsibilities for which it is charged as a leader of society.

Politics — the Judges

A judge performs two main roles: first, to interpret the law according to his or her understanding of common and statutory law; second, in particular through knowledge of the common law, to interpret the law according to the judge's understanding of change in society.

Although judges have a clear right not to have their assessments of the law affected by external influences, it is false to link the concept of legal impartiality to an absence of the integration of political attitudes into the interpretation of the law. For through the act of assessment, a judge necessarily imposes views on legal facts and opinions, a considerable portion of which are views that are personal, or personal suffused into the range of decisions that help to comprise a professional appraisal. And personal factors in decision-making are created from the "partisan" factors of peculiar conditioning inherent in disposition formed from genetic make-up and familial influences in rearing, education, interaction with peers and many other facets of social development and environment. The qualities that make a good judge comprise intellectual fineness; tempered, rounded and composed psychological scope; and empathic yet disciplined emotions whose varied stimulation is activated within a generous and humane amplitude. The intricacy and subtlety — the fact and manner — of the assimilation of intellect, psychology and emotions form the political and legal cast of a judge's character, moulding a condition of preference to an established order or a desire to introduce modifications: just as the judiciary holds members, including judges, who are conservative, centrist, progressive and radical, so judgments likewise range across this spectrum. Decisions might therefore be very different but comparably worthwhile or comparably lacking in worth — while the word "worth" itself is subject to variable political evaluation.

The ability with which a judge interprets law according to change in society will itself be a fine gauge as to the ability of that judge to advise and implement change both within the judiciary and in the judiciary's relation to the political system — beginning with the management of his or her court, and ending with the attempted or realised influence over other arms of government. This is merely to fulfil a judge's role as a leader of society and of government as vested in, and as being responsible to, the Victorian Constitution. The judge, as leader of a court, is in a dynamic relation to the judiciary; collectively, judges' dynamism at court and council levels confer authority on the political system.

Politics — the Judiciary

The judiciary has been stated by Brennan J. to be one of:

"The essential organs of government — the Governor, the Parliament, the Ministry and the Supreme Court . . . on which the 'existence and nature' of the body politic depends. (I mention only the Supreme Court, for that is the court of general jurisdiction in which, subject to the jurisdiction of this Court, the laws of the State are finally interpreted and the constitutional and administrative law of the State is applied.)"[33]

McGarvie J. responded:

"I treat the whole judicial arm as including all the courts, their judges, magistrates and other judicial officers and the court staff responsible to them rather than to the executive. The legal profession is not part of the judicial arm but is intimately associated with it and performs a service essential to its operation."[34]

Although both are valuable as formal descriptions, Brennan's definition links the judiciary to the "*existence* and *nature*" of the "body politic", placing the judiciary in a political environment.

The judiciary is constitutive of society, integral to society's primary workings, as an arm of government and interpreter of law. It thus possesses an elemental political character as a self-contained sphere of government, both serving and being of society. Moreover, as interpreter of the law and the Constitution, it is the custodian and enforcer of that Constitution, and so as legal interpreter and as receptor and guide of change in society it is a political reformer through being both a legal and constitutional leader.

Politics — the Judicial System

Where Green C.J. observed: "I appreciate that there is room for debate about the extent to which the courts are or have been the guardians of liberty, on the one hand, and the extent to which they have been merely concerned about protecting property and conserving the established order, on the other",[35] one matter raised is a conserving of the established order through guarding the constitutional liberty of the judicial system itself. In other words, the maintenance of essential values of society and precepts of justice through upholding fundamental constitutional and legal principles as the traditional guardian of liberty and of established constitutional practice asserts judicial liberty as an established protection of society's institutions. Moreover, the judicial system tends to identify itself with that order — it maintains that order through self-identification in the perpetuation of the working of the judicial system itself. Nevertheless, although the protection of liberty is traditional and the defence of the established order is conservative, the need for the judicial system to accommodate change at both individual and institutional levels requires self-examination, identification of needs and receptivity to the approaches of critics in the operation of the judicial system.[36] However, the frequently held restriction of the legal system to formal legal functions has placed a limitation on responsiveness to change, forming a mental conservation that is itself a block to change.[37] Required legal progressiveness assumes a larger responsibility to the judicial system's constitutional obligations and functions; the judicial system owes a politico-constitutional service to the people through an amalgam of legal, political and constitutional expressions, as full recognition of interaction with society.

This contention is substantiated by the kernel of its current constitutional conundrum set by the sentencing-law reform debate and the response of judges — a conservative judicial system sorely requiring the identification of its needs and responding accordingly, must first know its identity. Reformed by a progressive-centrist Labor executive, reformed by a progressive-conservative Coalition executive, one arm of government has attempted to impose its will on another arm that seems discomforted by inherently political shifts or "provocations". The judiciary has responded in legal terms by continuing to deliver moderate sentences — itself a tacit constitutional response — but its challenge is to respond through better understanding its constitutional character.

The Victorian Constitution

The essential nature of the Victorian Constitution is that of an abstraction, lightly structured and of modest definition. Its concretely presented instruction is so skeletal as to invite the sweeping of a broad brush across the given roles of the Constitution's four spheres of government — gubernatorial, legislative, executive, legal — tacitly entreating the leaders of those arms to discover constitutional meaning and structure, direction and inner purpose, to endue the Constitution with relevance, modernity and sagacity. For, although in virtual repose in the processing of perfunctory duties, it is a legislative frame of tensile and at times dynamic capacity: variable, evasive, circumspect, sentient, wistful and brutal in its possibilities, this instrument of power rightly declines to articulate the nature or range of potentiality, for power itself, as a relational property, discloses its character only through exertion between forces, as engagements executed between and through the vaults of constitutional authority and responsibility.

The theory of the separation of powers is understandably not entrenched in the Constitution, for the arms of government are expected to seek accommodation with each other through the political, social and legislative issues of the day. In fact, there is an important debate as to whether the concept of the separation of powers is constitutional doctrine. The view that it is turns on an idea of judicial independence as a principle of sanitised isolation which carries sufficient authority to resist the acquisitive inclinations of other constitutional spheres, these spheres working in constrained harmony through a range of checks and balances. However, this view is anachronistic, a neat almost geometrically proportioned eighteenth-century conception of constitutional obedience and obeisance that lacks relevance to contemporary institutional life. The view that it does not turns on the idea that "absolute independence is neither attainable nor desirable".[38] The observation that judicial independence derives from the judiciary's tutelage of a range of principles that underpin society brings out a greater constitutional responsibility that exceeds the mere preserve of judicial function. And it is in such instances as the sentencing-law reform debate that the call to the "principle" of the separation of powers warrants closer examination. Just as the Constitution changes, so do constitutional principles change — the view that principles may possess incontestable moral standing does not preclude their organic development in accordance with changes in political and social life. The evolution of constitutional practice as a politico-legal interrelationship has led to the paring back of the separation of powers, leaving a much larger grey area of constitutional contest, so that more disagreements between the arms of government can be expected.[39]

Leadership

Many legal authorities and members of the judiciary assert the principle of "judicial independence" as a legal imperative.[40] Commonly, this principle is expressed as the requirement that the judiciary be free "from improper influence or interference",[41] a definition which invites an examination of the meaning of "improper".

The context in which the word "improper" may be defined is that of influence or interference in the work of the judiciary by another constitutional arm, where such an action may be regarded as constitutionally unseemly for not being "in accordance with the accepted rules of behaviour".[42] Since the judiciary as well as other constitutional arms are essentially political, and given large areas of plausible interpretative dispute in relations between those arms, it may be difficult to assert improper influence or interference when it concerns matters of constitutional imprecision. Moreover, since the assessment of improper action implicates moral valuation, that uncertainty is deepened.

Green C.J., however, helps to overcome the problem by claiming that:

"The need for protection against extraneous pressures or interference becomes particularly strong when judges are required to exercise a discretion or make value judgments of the kind which are involved when they have to make a decision involving criteria such as reasonableness, fairness or justice. In cases of that kind a judge is required to apply values which are ultimately derived from those prevailing in the community from time to time. However, in doing so he cannot simply reflect public opinion: he must exercise a discriminating judgment as to what values he applies so that whilst assuring that he is responsive to enduring shifts in community morality, he does not allow himself to be influenced by merely transient changes in public attitudes, or by prejudices or sentiments which are in conflict with established principle."[43]

Improper action can be said, first, to extend beyond tracts of constitutional inexactitude to the "purity" of solely legal function or opinion, where a political institution seeks to impose views in a matter that might appear to lack constitutional reference. Should a constitutional arm cross this boundary, an instance of improper influence or interference seems evident, especially when supplemented by the public reproach of judges. The view that a core of exclusive judicial function and opinion remain free of external impingement is sound, chiefly so that a judiciary can resist becoming ineffectual as a judicial institution by being made a tool of government policy.[44] The gaining of constitutional leverage through employing a flexible Constitution to maximum advantage — the larger grey area of constitutional contest — does not authorise the control of the Constitution; for the paring back of the separation of powers leaves discrete essences of power and function that can be exercised only by applicable arms of government, those essences in effect representing constitutional responsibility and duty to the people, for whom the Constitution exists and in whom ultimate power resides.

A judge performs two main roles: first, to interpret the law according to his or her understanding of common and statutory law; second, in particular through knowledge of the common law, to interpret the law according to the judge's understanding of change in society.

Second, a judge is obliged as appropriate to make a moral decision as to the soundness or the depth of shifts in community morality, of which the durability of established change is clearly a key benchmark.[45] For instance, where broad community acceptance of sexual equality has become entrenched, judges are expected to display a keener responsiveness than was formerly thought necessary to matters that concern the recognition and defence of that equality. Another benchmark is the level to which the community has been fully and accurately informed of an issue in which it takes a moral interest. If a judge considers that there may be community misunderstanding — sentencing-law reform is a case in point — then it may be that judges steeped in sentencing law shall regard that moral valuation as being misinformed rather than "improper", for being based on unsatisfactory premises — there has been no constitutional breach, although public misunderstanding might in part result from political and media misrepresentation — and dismiss it.

The matter of judges' receiving favourably, or resisting, the moral valuations of the community raises the problem of the receptivity of the judiciary to community needs, both to maintain awareness of community attitudes, and to shape them. The quality of the receptivity, with the ability to know when to follow and when to advise, is called "leadership"; this discernment represents the quintessence of the discretionary power of a judge in finely weighing fairness in justice. If leadership, in other words, can be seen to be the mature blending of knowledge, balance, responsibility and experience, this quality of leadership lies at the core of a sentencing decision as a delicate discretionary evaluation that must remain the sole preserve of a judge. If community attitudes are undeveloped, the judiciary's response should be not only to continue always to be receptive to the community, but to seek to deepen its knowledge as underpinning for a full understanding of sentencing needs.

The Rule of Law

If the sentencing debate raises the central problem of the executive's breach of judicial independence, it is less through its influence and interference in the domain of legal specialism than its influence and interference on a moral issue belonging governmentally to the judiciary's constitutional function as a political leader that the executive has acted in a constitutionally improper manner. The fascination and vexation of the sentencing-law reform debate, in other words, is that by bringing into focus the concern for pure legal opinion in a discretionary matter of moral engagement, the debate clarifies the judicial and constitutional right of judges to apply their critical faculty to exercise political authority as moral helmsmen. This, as the constitutional essence of the judiciary, the identification of and the justification for its constitutional empowerment, is what causes conflict with the executive, specifically though not fundamentally through the "vehicle" of disagreement over sentencing policy. The crux of the sentencing debate, therefore, is that the judiciary by holding firm on its approach to sentencing decisions has "encroached" on the power of the executive. For the judiciary has used its moral and political authority as a constitutional power — recall the broad neglect by most judges of the *Sentencing Act* amendments of 1993 and 1994 — to diminish the constitutional power of the executive. In response, the executive has attempted to reassert its political power by seeking to undermine the judiciary's moral stand; the judiciary's impingement on executive independence has provoked the executive's affront to judicial independence.

Perhaps the concept of the "rule of law" might therefore be more tellingly encapsulated through the idea of moral overlordship, rather than through a more formal description of the rule of law as substantiating the concept of judicial independence, validating the judiciary's institutional functions and duties, and

upholding basic institutional and individual principles.[46]

The gravamen of this paper lies in the psychological rather than philosophical point that self-realisation through the full understanding of identity might furnish the judiciary with sufficient political strength to arrest its constitutional decline.

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REMEDIES

How can the judiciary project such an identity? The view that judges cannot "lobby", as this would impugn their very independence,[47] fails to consider the constitutional character of the judiciary as integral and answerable to society. The judiciary need not and cannot shut itself from meaningful communication with any institution, group or individual,[48] in the interests of the public good as perceived by the judiciary. Communication with just cause through closely reasoned presentations should take official (and at times unofficial) and commanding forms. If these approaches represent "lobbying", they are nevertheless authoritative communications by a constitutional power that are devoid of electoral motive. Furthermore, the judiciary's status and role ought to be the subject of informed debate, within and beyond Parliament, so that communications from the judiciary might be better understood by those with and without knowledge of the judiciary. The presentation of information in the interest of encouraging illumination is persuasion, and a productive form of lobbying. A resolute will fashioned by the deft touches of sophistication, imagination and poise shall find the judiciary eluding the twin dangers of association with party politics and a loss of dignity, and therefore of stature, in the judiciary.

The success with which a judiciary can skilfully give effect and respond to change relies on the effectiveness with which reform creates a climate of receptivity within a constitutional arm. If a confident, assertive executive — the Coalition Government's sound majorities in both Houses contrasts with the current weakness of the Victorian ALP — can be expected to obstruct such initiatives, a heated, and quite possibly acrimonious, environment nevertheless stirs the emotions and the imagination, concentrating the mind on the task of exploring afresh basic conditions and positions: the present dispute may well not be unfortunate. Moreover, a demonstrated capacity and willingness within the judiciary to act on a perception of its breadth and an understanding of its multi-faceted stature should in the future help to restrain senior executive officials.

Judicial

The judiciary loses control of its functions, of its own condition, when forced by the executive to change, or provoked openly to resist change because it believes the executive's reforms to be wrong. It should therefore seek to control its functions on its own terms. Legal authorities have generally sought to consolidate judicial independence through internal structural reform at State and federal levels, shielding the judiciary from constitutional assaults, although there is an understanding that a responsiveness to the changing needs of society and the desirability of communication with the executive must permit the penetration of those structures.[49] While valuable, they have where implemented not succeeded in moderating or preventing the sentencing-law reform dispute. Some suggested reforms have not been, and may never be, instituted, notably the idea of a highly inclusive, over-arching national structure. I consider that the judiciary should not erect a protective citadel, but rather mobilise its constitutional profundity and breadth, which is the source of its inner strength, self-confidence and authority, to inspire greater confidence and respect in the community and in the other arms of the Constitution.

To this end, the staff of the judiciary might better reflect its constitutional role.[50] With the pivotal role played by court administrators in public confidence, court efficiency, and in particular, in reducing the judiciary's dependence on other branches of government, selected administrators might as appropriate — in addition to associates — be appointed for skills in political research and offering political advice, while the Diploma in Court Policy and Administration might be altered to contain subject units in constitutional history and political science. Similarly, a political research officer might be appointed who, without party-political background or affiliation, has training in constitutional matters, to advise judges in their monthly Council meetings. Likewise, associates may be employed both for their judicial work and for their ability as political researchers and political advisers, undertaking this second aspect of their work when their judges are not sitting in court. Associates and other court officials, therefore, should be selected in part for their ability to research parliamentary issues of concern to the judiciary — not least through maintaining close, formal contact with the State parliamentary library (staff at court libraries and the Law Institute Library may assist in this matter) — and provide thoughtful, professional advice to their judges that might sustain the constitutional standing of the judiciary. Administrators and associates should possess a law/arts degree, the arts component being a major in political studies and, if they might pool their knowledge and routinely compile reports for scrutiny at meetings of the Council of Judges, so might judges from time to time invite political or constitutional authorities, who have no political party affiliation, to address those meetings.

Although on one hand it may be said that lawyers are insular, with their experience limited to their profession[51] (and this may characterise many practitioners who work in professional, specialised and technical fields), on the other a particular feature of the work of judicial officials, including judges, "involves identifying and reconciling competing interests and conflicting values . . ."[52] A great deal of political work — indeed the professional focus which calls on politicians' skills — concerns the handling of conflict leading to an appraisal that takes the form of a decision. Although the nature of that management and the motives that control decision-making differ between politicians and judges, there is an innate similarity in the act of weighing and often seeking to reconcile incompatible views, with in each case interested parties seeking a preferred outcome from an arbitrator. In this sense, judges possess practical political skills.

Parliamentary

Judges might communicate formally through submissions detailing matters of concern to the judiciary to leaders of both

Houses of Parliament, contact with the legislature and executive representing an even-handed and bipartisan approach.[53] (In fact, judges petititioned the Legislative Council in 1865, to assert that the judiciary formed an arm of government.[54]) An intransigent executive might be confronted with a discussion in Parliament by non-executive House leaders, while a party currently in Opposition might later support the judiciary as a holder of office. These approaches appeal as much to the authority of the leadership offices, without reference to political disposition or party affiliation, as to the individual office-bearers. Considerable authority should be conveyed from this considered, formal approach, carrying a specific purpose and without any suggestion of an established or routine practice of communication.

The duties, functions and responsibilities of the Victorian Attorney-General are not of course set down in this State's Constitution or in any other Victorian statute. It is a feature of the Victorian Constitution that powers of officials are not circumscribed, but develop by convention. However, given that the Attorney-General, as the legal representative of the executive, may make and has made adverse comments on judges, and is the formal link between the judiciary and the executive, it is worth considering the range and identity of an attorney-general's powers in relation both to the executive and the judiciary, so that judges are aware of what an attorney-general can and cannot do.

We may say, nevertheless, that in broad terms, the Attorney-General 1) should, if perhaps not represent the judiciary by defending it, refrain from attacking it; 2) act as legal adviser of the Crown; 3) act as legal adviser of the government; 4) act as administrator of the Legal Department; and 5) act, in certain cases, as an "adjudicator" where the government is a party to litigation.[55] The Attorney-General may defend his or her sphere from interference by other members of the executive, and may enlarge personal and portfolio power through the cultivation of popular support and through bureauractic means without compromising other powers. Yet the detailing of an Attorney-General's powers, using these understandings as a basis does not really assist the judiciary in knowing fully how it might deal with the attorney-general during constitutional disputes. Far from codification, such an understanding would allow the arms of government greater potential flexibility to develop the Constitution's conventions, with the aim of reducing the intensity and the likelihood of future disputes.

A parliamentary committee might be established to investigate and report on the powers of ministers, one that may be similar to the House of Commons Committee on Ministers' Powers, which reported to Parliament in 1932, embracing precise powers, conventions, and the enlargement of powers through, for example, quasi-legal, administrative expansion.[56] The initiation of a parliamentary committee requires majority support of members of parliament in the case of a single House committee, or the majority support of both Houses should it be joint parliamentary committee, on a motion moved by a member of parliament. The Victorian Parliament has a history of seeing the successful establishment of committees that the government of the day has not wanted to be formed, firstly where a majority has been reached due to the government being in a minority in the Legislative Council, and secondly from government members — most commonly where National Party opinion has differed from that of the Liberal Party — siding with Opposition members. Additionally, a standing committee considering a certain field of inquiry may establish on its own authority an investigatory committee to examine a particular matter within that field of inquiry. Any standing committee that deals with issues that concern a minister's role might be the subject of an investigatory committee examining ministers' powers. In the current case, a climate of opinion throughout Parliament, created mainly through the presentation of reports from the judiciary, may result in the formation of a desired committee. Of course, a tabled report of a committee's findings might not result in recommended action, but its tabling, discussion in Parliament, and availability to the public as a printed document can all cause beneficial results.

I consider that the judiciary should not erect a protective citadel, but rather mobilise its constitutional profundity and breadth, which is the source of its inner strength, self-confidence and authority, to inspire greater confidence and respect in the community and in the other arms of the Constitution.

Specifically, in relation to the sentencing-law reform debate, the power of members of the executive, and notably the Attorney-General, to admonish judges both within and outside Parliament might be examined by such a committee. There is no statutory power to admonish judges, but there is ample legal authority stipulating that no judge be reproached unless it is in pursuit of a proceeding for removal.[57] There is no Standing Order of the Victorian Parliament that expressly proscribes criticism of judges in Parliament.[58] However, the Parliament continues to defer to *May's Parliamentary Practice*, applicable to the English Parliament, for procedural guidance, which expressly disallows such an admonition.[59] (Of course, the verbal attacks by members of the executive have been made outside Parliament, the curious fact being that politicians usually seek the shelter of parliamentary privilege to express recrimination. And these attacks are criticisms of judges generally, not the reproach of named individual judges.)

Constitutional

The Council of Judges could appeal to the Governor to advise as to constitutional propriety of the executive in meetings of the Governor in Council for:

> "Quite apart from the reserve power, the governor has an inherent constitutional right to counsel government ministers on the exercise of their powers and functions . . . In giving this counsel, the Governor may query whether proposed action is appropriate, or suggest changes. This is the source of most of the influence of the Governor in constitutional affairs. It takes place in confidence."[60]

Similarly, the tabling of a report, on the Command of the Governor, should stimulate discussion in Parliament, but this may be considered by judges to be awkward and unproductive should the thrust of a report take issue with an obstructionist executive, members of whom may be reluctant to discuss the report, or simply to deride it when tabled.[61] This emphasises the importance of bipartisan approaches to both Houses of Parliament, where there is opportunity for a comprehensive and sympathetic discussion.

Another initiative concerns the role of

the Executive Council, led by the Governor, in overcoming constitutional disputes. A plenary meeting of the Council permits discussion under an environment different from that of Parliament in which a contentious matter might receive a broader, more dispassionate, reassessment.[62] In fact, there is a precedent for appeal by judges to join the Executive Council, an approach which was not developed.[63] Perhaps judges — possibly only the Chief Justice and the senior puisne judge — might again seek membership of the Council, to encourage the smoother functioning of constitutional relations.

Community

The difficulty in the judiciary's relation with the public is that the public is not conversant with the facts of legal and judicial activity, for instance believing sentences to be more lenient than they are,[64] while the media, themselves with financial and political concerns that regulate policy irrespective of the wishes of the judiciary, at times falsified the sentencing position,[65] an unfortunate reality given that some 95 per cent of people obtain information on sentencing from the media.[66]

It therefore seems clear that as much as is possible should be done to ensure that the public is accurately informed. Selected judicial officials might be employed for education in communications studies, and for experience in communicating judicial affairs to the public. The media can be employed sensibly as an educative forum, while the sustained use of television in the courtroom would mark an important advance in bringing the court system and judicial functions to the public. Since the judiciary is duty-bound to come to the people, and is ideally placed to do so on the initiative and the terms of the judiciary, such officials would be expected to work with the judiciary's Media Liaison Officer, to realise an effective, coordinated outcome. A key initiative resulting from her role is the willingness of some judges to distribute copies of their judgments to court reporters immediately after the judgment has been delivered from the bench, so that reporters have precise, full and fresh information, to best allow a balanced view. Similarly, should a press article be published that is considered unbalanced, a copy of the judgment can expeditiously be sent to the applicable newspaper editor and journalist.[67] The fact that the sentencing-law reform debate has arisen since the appointment of the Media Liaison Officer in September 1993, with difficulties ensuing with the executive and the media despite the efforts of judges and this official, suggests the need for a wider redeployment of the staff of the judiciary.

The judiciary has long lacked power, and is clearly beleaguered when in disagreement with the executive. It might well become the strongest arm of government because of the immense resource of eminent public respect and confidence that it should enjoy as a legal institution and as a constitutional leader, a repository of power that the executive and legislature can only dream of. The judiciary is obliged for its own sake and for that of society to draw on this resource.

Specifically, in relation to the sentencing-law reform debate, the power of members of the executive, and notably the Attorney-General, to admonish judges both within and outside Parliament might be examined by such a committee.

CONCLUSION

Much is made in commentary on politics of the motives of politicians, whether they lead in shaping public opinion, whether they are led by community attitudes, or whether they are inordinately influenced by imperatives of interest or pressure groups, whose drive and focused political organisation result in outcomes that are incommensurate with the value or merit of their cases. Is the end of electoral success held in thrall to the means of political accommodation? Likewise, we might be persuaded that there is truth in the contention that politicians are not skilled in, or overly troubled by, the inculcation of moral positions within a political group or the community at large. For their interests and abilities lie in using language, frequently as convoluted obscurantism, to satisfy the electorate — often actively engaged sections of the electorate — not only that morality is being served but that they are representing the electorate's best interests in support of the electorate's wishes. Yet it is too cynical and not generally realistic to assert that facility in linguistic device combined with the insincere use of concepts — known in common usage as "rhetoric" — constitutes the communication of political activity to the community. Politicians, for all their self-serving ambition, vacillation and derogation from principle, by and large possess a sense of constitutional propriety and ethical positions which they will defend when challenged, even if in many a calculating appreciation of the limits of electoral tolerance is required to fortify that sense of "right". It is for the judiciary to penetrate the shifting, the expedient, the deceitful superstructure to reach a substructure that embraces some conception of the public good, not least by inducing an acceptance in members of the executive that it serves personal and community interests to act as a constitutionally responsible institution.

NOTES

1. D. Lindsay Keir, *The Constitutional History of Modern Britain since 1485* (London, Adam and Charles Black, 6th Edition, 1961), pp.19ff, 134.
2. Ibid., pp.197–8.
3. Ibid., pp.233, 268–9, 294–5.
4. J.H. Plumb, *England in the Eighteenth Century, 1714–1815* (Harmondsworth, Pelican, 1955 (1950)), p.35.
5. Lindsay Keir, pp.521–3.
6. D. Thomson, *England in the Nineteenth Century, 1815–1914* (Harmondsworth, Pelican, 1983 (1950)), p.133; Lindsay Keir, p.523. Unlike Victoria's Lieutenant-Governor or Attorney-General, of course, the Lord Chancellor is the head of all three branches of government.
7. G.H.L. Le May, *The Victorian Constitution: Conventions, Usages and Contingencies* (London, Duckworth, 1979).
8. Lindsay Keir, p.524; Z. Cowen & D.P. Derham, "The Constitutional Position of the Judges", (1956) 29 *ALJ* 705 at 708; J.A. Pettifer (ed.), *House of Representatives Practice* (Canberra, Australian Government Publishing Service, 1981), pp.19–24, 531, 534.
9. Z. Cowen & D.P. Derham, "The Independence of Judges", (1953) 26 *ALJ* 1462 at 1464–6. A. Galbally, *Redmond Barry: An Anglo-Irish Australian* (Carlton, Melbourne University Press, 1995), pp.136–7.
10. Lindsay Keir, p.528.
11. D. Hamer, *Can Responsible Government Survive in Australia?* (Canberra, University of Canberra, 1994), p.vii.
12. Cowen & Derham, "The Independence of Judges", pp.462, 465–7.
13. Cowen & Derham, "The Constitutional Position of Judges", pp.705–8.
14. *Argus*, 23 July 1954.
15. Lindsay Keir, p.524.
16. R.E. McGarvie, "The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence, Part Two", (1992) 81 *VBN* 33 at 42.

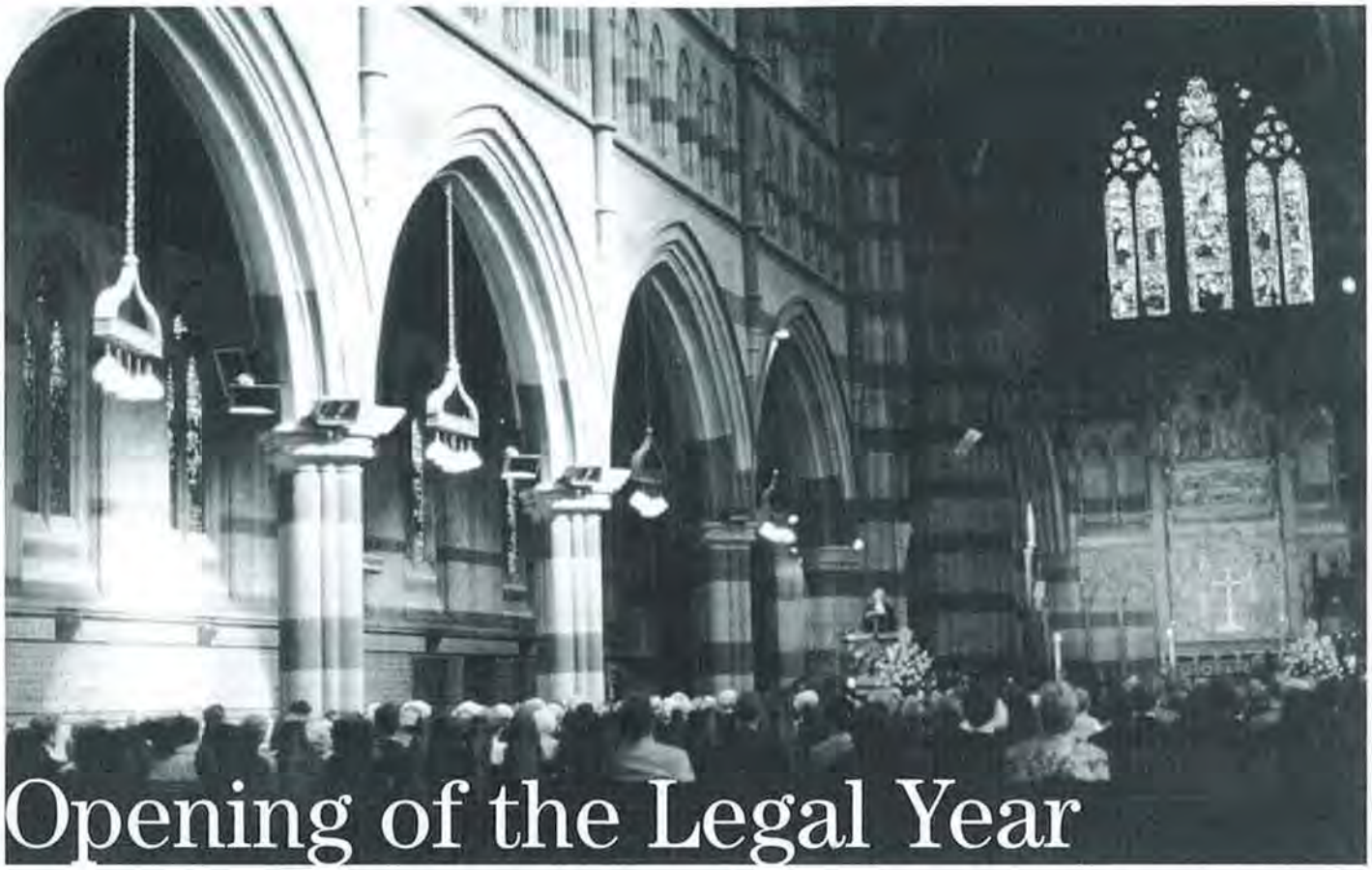
17. *Sentencing*, Victorian Sentencing Committee Report. 1988 (Melbourne, Attorney-General's Department, Victoria, 1988).
18. Amendments to the *Sentencing Act 1991*, at No.98/1995.
19. *Sentencing*, ALRC, Report No.44, 1988.
20. *Guardian Weekly*, 6 October 1996; *Economist*, 16 November 1996, 1 February 1997, 15 February 1997.
21. *Crimes Act 1914*, reprinted 1995, part 1B; However, ensuing difficulties in expenditure of court time and cost; McGarvie, "Part Two", p.35.
22. *Discussion Paper* 33: Sentencing New South Wales Law Reform Commission, 1996.
23. *Report of the Department of Justice for the Year ended 30 June 1995*, pp.17–8. N. Walker, *Sentencing in a Rational Society* (Harmondsworth, Pelican, 1972 (1969)).
24. Moreover, the Victorian Parliament has enacted the *Victims of Crime Assistance Act 1996*, which reinforces the view that the Government has not primarily been responsive to community concerns, but was guided by pragmatic, political matters. In this case the Government's intention to cut compensation payments to victims of crime has been driven by budgetary, not humanitarian, motives, although this Government has sought longer prison terms in part to appease the impact of crime on victims. Also *Age*, 2, 8, 9, 11 November 1996. Survey, *Herald-Sun*, 13 September 1996.
25. *Age*, 16, 17, 18, 26 September 1996.
26. Lindsay Keir, pp.530–31. The Report of the Franks Committee in 1957 recommended that there should be a Standing Council on Tribunals, appointed by the Lord Chancellor and reporting to him.
27. R.E. McGarvie, "The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence, Part One", (1992) 80 *VBN* 32 at 34.
28. Ibid.
29. Cowen & Derham, "The Constitutional Position of the Judges".
30. G. Green, "The Rationale and Some Aspects of Judicial Independence", (1985) 59 *ALJ* 135 at 136.
31. McGarvie, "Part One", p.40.
32. Notably through the compelled abbreviation of much court process, the tribunalisation of disputes to preclude the need for court action, the shortening of queues of litigants waiting for their cases to be heard, the privatising of certain routine legal functions, and facilitating access of the general public to the courts in far greater numbers than previously was possible.
33. Cited in McGarvie, "Part One", p.37.
34. Ibid. The author added that the law schools and administrative tribunals may also be considered to be allied to the judiciary.
35. Green, pp.138–9.
36. McGarvie, "Part One", p.41.
37. See, for example, F.R. Beasley & P. Brett, "The Independence of Judges", (1953) 26 *ALJ* 582.
38. Green, p.135.
39. Discussed within *Clyne* v. *East* (1967) 2 *NSWR* 483; *Attorney-General of Australia* v. *R.* (1956) 95 *CLR* 529.
40. N. Stephen, "Southey Memorial Lecture 1981: Judicial Independence — A Fragile Bastion" (1982) 13 *MULR* 334; Lord Hailsham, "The Independence of the Judicial Process", (1978) 13 *ILR* 1.
41. Green, p.135.
42. This is one definition of the *Concise Oxford Dictionary*.
43. Green, p.136.
44. R. Dahrendorf, "A Confusion of Powers: Politics and the Rule of Law", (1977) 40 *MLR* 1 at 9.
45. Green, p.136.
46. Additionally, in parliamentary terms, it includes ". . . the doctrine that the executive is under the law and that the courts have the power to determine the ambit of the prerogative, the rejection of the doctrine that a plea of State necessity is capable of validating what would otherwise be an unlawful act . . ."; Green, p.137.
47. Cowen & Derham, "The Constitutional Position of the Judges", p.713.
48. Green, p.143.
49. McGarvie, "Part Two", pp.33–5. And through such organisations to be consulted fully about legislation that concerns the welfare and interests of the judiciary, and the efficiency of operating the court system; McGarvie, "Part Two", pp.42–3.
50. Green, p.147.
51. McGarvie "Part Two", p.39.
52. Green, p.140.
53. Namely, in the Legislative Council, the Liberal Party, Mr. Mark Birrell; the National Party, Mr. Bill Baxter; the ALP, Mr. Theo Theophanous. In the Legislative Assembly, the Premier, Mr. Jeff Kennett; the Attorney-General, Ms. Jan Wade; the Leader of the Opposition, Mr. John Brumby; and the shadow Attorney-General, Mr. Rob Hulls. Such a submission might also be forwarded to the Secretaries of the Department of Justice.
54. *Votes and Proceedings of the Legislative Council 1864–1865* E. No.4.
55. E. Jenks, *The Government of Victoria, (Australia)* (London, Macmillan, 1891), pp.284–5.
56. 'Report of Committee on Ministers' Powers', *British Parliamentary Papers, Commons Sessional and Command Papers, Great Britain*, 1932, Command 4060. Additionally, a legal definition of the Lords was legislated in the Parliament Act, 1911, as a consequence of a disruption to established convention; Le May, p.4.
57. Cowen & Derham, "The Independence of Judges", pp.466–7.
58. Standing order number 75 proscribes such criticism in the Australian House of Representatives.
59. *May's Parliamentary Practice*, 21st edition 1989, pp.379–80
60. R.E. McGarvie (et al), *Victoria's Constitution: The Constitution of Victoria with notes on how it works*, Melbourne, Law Press, 1995, p.20. Should it be presumed that the Governor — currently R.E. McGarvie, as it happens — has counselled the executive to respect the preserve of the judiciary, it may further be presumed that the executive has ignored the Governor's advice, the Governor then declining to pursue the issue in order not to risk precipitating a constitutional crisis.
61. A perusal of *Papers Presented to the Parliament of Victoria* since 1992 has revealed no tabled report of the Council of Judges. Discussion of earlier practice: McGarvie, "Part Two", p.45.
62. Green, p.140.
63. Cowen & Derham, "The Constitutional Position of the Judges", p.710.
64. Report of the Victorian Sentencing Committee; McGarvie, "Part Two", pp.42–3.
65. A *Herald Sun* court reporter once wrote a fair, thoughtful press report of a court case and judgment, only to have a sub-editor drastically alter her article and publish an unbalanced report that was sensationalist and adverse towards the judiciary, and included confidential information.
66. McGarvie, "Part Two", pp.42–3.
67. Formal title 'Courts Information Officer'. Some judges use the Media Liaison Officer more than others; some are careful to discuss portions of a sentence with the officer that might be contentious, and seek to alert court reporters in order to overcome contentiousness and potential confusions, while broader employment of this office might be made for the dissemination of a wide range of judicial, court and judgment matters and confidential information. For a discussion of matters concerning the judiciary and the media, see journal articles in (1995) *JJA* Vol. 1, No. 1.

I'm a Lawyer; Bonk Me!

A more specific view of the degree to which a man's profession can affect his desirability was provided in June 1991 by a survey conducted for the British edition of *New Woman* magazine. More than 200 woman, aged 20–45, were asked which professional their ideal man would work in and what traits they valued most. Once again, security, stability and intelligence were seen as the greatest male virtues, and in this case the legal profession was judged most capable of providing them.

Lawyers were felt to have sex appeal, a good social background and plenty of brains. More than two-thirds of the woman sampled felt that their own status would be increased by dating a lawyer. "The idea of a man fighting for justice in the courts is powerfully sexy", one particularly idealistic woman remarked, a notion that will surprise many people who have come into contact with lawyers, few of whom are noted for their over-acute sense of justice — not at any rate, compared to their finely developed feeling of how much they deserve to be paid.

David Thomas, *Not Guilty in Defence of Modern Man* (1993) 64.



Opening of the Legal Year

The addresses to lawyers attending the "Opening of the Legal Year" services, 3 February 1997

AT ST. PAUL'S CATHEDRAL:

Reverend Robert Gribben M.A., Theol.M., Minister of Wesley College, Melbourne

THE CHURCHING OF THE LAW

Readings:
1 Samuel 1:20–28a, Hannah's presentation of Samuel.
St. Luke 2:22–24, The Presentation of Christ in the Temple.

ONE of the surprises in visiting King's College Chapel in Cambridge for Choral Evensong may be that if you look venerable, or learned enough, you will be admitted to one of the upper stalls usually reserved for Fellows, and you will be able to follow the service in one of the leatherbound folio volumes of the Book of Common Prayer. The appeal of these volumes is that they are out of date, and you may find yourself praying for King George and Queen Charlotte instead of the present Queen and you may spend a profitable few minutes trying to decide which George it was. (The answer, so that I can keep your attention, is George III.) The books provide the further distraction of liturgies which are no longer celebrated, including the Commination, which is a kind of public cursing, for the revival of which there may be a case, the commemoration of the Gunpowder Plot (!) and the Churching of Women.

This last service was in imitation of the story in the Gospel passage which is set for 2 February and was close enough to today to illustrate my theme. The mediaeval liturgy of Sarum unblushingly called it "The purification of women"; Thomas Cranmer, when preparing the first Anglican liturgies, modified it (in 1552) to "The Thanksgiving of Women after Childbirth, commonly called the Churching of Women", but it was always called by the second title. It has been replaced in modern prayer books by a thanksgiving for the birth (or adoption) of a child, and it is a service which involves *both* parents.

Some may say that the Churching of Women is as obsolete as the Churching of Lawyers, and perhaps for good reason. I want to suggest that we are today engaged in a larger and more evolutionary exercise than at first appears, for public ritual marks not merely tradition, but transformation.

The incident which St. Luke described at the end of his Christmas stories emphasises the ritual nature of the action of the holy family. Mary and Joseph brought their child to Jerusalem to do for him "what was customary under the Law" (Lk 2:27). A number of ceremonies were prescribed in the Mosaic law at the birth of a firstborn son, and as a matter of fact, Luke confuses them. They involve circumci-

sion, an act of redemption, and, on the fortieth day, the purification of the mother. Ritual, however, always operates on a number of levels; it never means only the prescribed things, so Luke is within his rights to vary them.

The controversial meaning today is, of course, *purification*. Purification from what? From the ritual uncleanness caused by giving birth, as set forth in the laws of most ancient societies. This notion is rightly and strongly rejected today, but it is interesting how long the unwritten law has held sway. Until very recently in Britain (and it has not changed in several other cultures), a new mother was constricted by custom for a time from living a normal life. It had its protective side, its gentler purposes, but the liturgy of the Church of England required the mother to come on the fortieth day after birth to be "churched", that is, to undergo a public ritual before she rejoined normal society.

It is a particular problem for students of the New Testament to account for the tenacity of this ritual, for the conspicuous emphasis of Luke, who alone records this story, is his generosity towards the poor and the outcasts of society, and to women in particular. No-one who knows the spirit of Luke's Gospel could have understood him to mean that women were demeaned by childbirth, and especially this woman. Liberation, or at least a radical change of custom, is inherent in this Gospel, and it has taken two thousand years for the church to give effect to it. We were a little quicker with slavery.

There is at least a hint that the Church knew "purification" of women would not do, in the gradual change in the title and the purpose of the liturgy. The same modification takes place within the Law itself, for example in the commentaries of Sir William Blackstone on the legal "place" of a married woman. He remarked (1775) that "in the politer reign of Charles the Second" the power of a husband to correct his wife was tempered by her rights to security and peace. "So great a favourite", he adds, "is the female sex of the laws of England". This is perhaps an example where the law had especially imitated time (as Francis Bacon declares in his *Essays*, as in this morning's extract) which "innovateth greatly, but quietly, and by degrees scarce to be perceived".

In time, the Church modified its emphasis to favour the second purpose of the customs for new parents on the fortieth day, namely, as the title of the liturgical feast now usually has it, "the *Presentation* of Christ in the Temple". This derives from the first lesson which was read this morning, from the story in which Hannah brings her small son Samuel to the temple at Shiloh (a predecessor of the one at Jerusalem) and presents him, as she had promised God, to the old priest Eli. Samuel was literally a gift to God, and he remained in the temple service for life. For Jewish parents since, however, the custom was to bring the child to present him in thanksgiving to God, but then to "redeem" him, to purchase his freedom for life in the family.

Reverend Robert Gribben M.A., Theol.M.

There is something rather solemn in such a presentation. I have occasionally seen a look of panic in a young mother's eye when her baby, after baptism, has been taken through the congregation to meet the family of God; it *is* a threat to the nuclear family! There is a sense in which a child is given up in baptism, and never *only* belongs to its parents again. That may apply to this service too, as members of a learned profession place their work in the larger context of the wisdom and mercy of God: the Law does not belong only to lawyers.

But for Mary, there is an even darker message. The ceremonies of the presentation are witnessed by two old people, Anna and Simeon — typically, in Luke's narrative, people of no account, the pious poor, half senile, half visionaries. They welcome this child as a sign of hope for their people, but Simeon adds a further note:

> "This child is destined for the falling and rising of many in Israel, and to be a sign that will be opposed . . . and a sword will pierce your own soul also." [Lk 2:34–36]

Here, I think, is an example of the way in which rituals may strike home. Both church and civil rituals to celebrate a birth can atrophy by smothering human realities with sentiment. I mean, who on such occasions can say: Be prepared for when this child dashes your hopes, when he or she brings heartache and pain and startling anger in place of filial devotion? But that is exactly what Simeon says in the temple: this child's destiny will pierce your soul — part of all parenthood is *passion*, passion in the sense we use it of the crucifixion. And the rest of the Gospel is not good news unless it addresses this part of human existence; in this parents are a microcosm of all humankind. It is only good, only true, if it speaks a word to the dark side of human life which most of us will face somewhere, sometime. That revelation — I use the word in its strict sense — occurred as part of public ritual. No-one would have said it at the family party.

Ritual anthropologists tell us that ritual has three main functions. The first two are the more obvious ones: making and preserving order, and fostering community. The ceremonies of a national day strengthen the bonds of society and pass on the national myths. The myths, of course, change and develop over the years, and those who organise such events are wise to think carefully about what they do and what they say. Ceremonies and celebrations are not all serious and solemn; they need a certain drama, some enjoyment of dressing up, something of that old quality of *hilaritas*, and they cannot be changed suddenly without doing damage. Repetition and predictability assist the continuity of a particular com-

Members of Victoria's Judiciary and Bar at St. Paul's Cathedral for the 1997 "Opening" Service.















munity with a shared history and shared values.

Yet few things can be clearer at this time than that shared history and shared values are under question. The recently retired Archbishop of York has summarised the change in consciousness this way: "the shift from duty to self-fulfilment, from truth to opinion, from community to individual, from the understanding of a comprehensive tradition to transitory insights." Dr Hapgood concludes, "The idea that there may be public and unassailable truths and values becomes hard to entertain. And with this comes not so much a failure of nerve as a loss of shared landmarks and direction."[1]

But the response is not to give it all up — "it" being the things enshrined in acts like today's service. I myself do not think we need to accept the fragmentation of post-modernity as inevitable. There is immense cultural and intellectual wealth in the received tradition, but its value lies in its ability to be claimed by each successive age and remoulded. Melbourne's splendid churches, its treasury of Victorian civic buildings act for many who never enter them on business (or for prayer!) as markers and anchors of values and beliefs. The citizens of this State do not expect such institutions to remain forever the same — quite the contrary — but they welcome signs in their midst which point beyond the immediate to more enduring meanings.

Both the church and the law are fair game for parody, but there is another side. We are those who know what human beings really are capable of, how they deal with each other, what are the issues which threaten civilised existence, what are the matters which produce tears and rage, which require justice and reconciliation. These things are our daily bread in the church and in the courts. We are precisely those who provide an alternative to merely following the most strident voice or the most popular myth, who challenge the misuse of power, especially in a time of rapid change. Our institutions, for all their seeming immovability, are those which take significant initiatives for the betterment of human life, for the articulation of moral virtue, for communal solidarity. In Philip Larkin's words, religion and law are "serious places on serious earth".

Breakfast at St. Paul's Chapter House before the Opening Service at St. Paul's Cathedral.

But there is a third purpose of ritual in addition to preserving order and maintaining community. It is: effecting transformation. Ritual is not about fixity: ritual changes things. It may creatively and healthily move us from where we have been to where we might be. Take the role of public mourning in the face of the tragedy of Port Arthur, or in helping people recover from the losses in the recent fires. The number of people who come to the public gatherings speaks for itself — I am not here concerned with the particular religion(s) involved. I suspect that a good deal of the sickness of our society comes from our present inability to mark significant change in people's lives by meaningful ceremony.

This third element is present in both biblical stories read this morning. The presentation of Samuel in the temple spelt the death of the old order of the hereditary priesthood; henceforth the work of God is done by a new kind of functionary. Indeed it fell to Samuel to choose a new form of government in Israel, the experiment of monarchy. And the coming of Jesus did mean the "rising and falling of many in Israel and . . . a sign that will be opposed so that the inner thoughts of many will be revealed (2:34–36)", and the legacy is, like all human traditions, marked by both good and ill, but the ill, I believe, cannot be attributed to the One who was presented in the temple.

In neither of these cases, did ritual transform automatically; for ritual is, as I have said, multifaceted by nature. It is not always clear what is emerging, and its articulation is a slow and uneven process, requiring much rehearsal and experience, and more than an occasional flash of genius. Simeon did not make his judgement on the child in his arms by the application of logic, but by something much deeper in the human soul.

Many who will pause to look as we appear briefly on Flinders Street will be critical, perhaps even scornful of our frivolity in the name of tradition; that itself is a comment on our culture, and it is not the whole truth. But the spectators may include our Annas and Simeons. They may ask whether, in the grandeur of the temple, we have heard them, whether we too have recognised the signs of our redemption and consolation. They may need to be convinced that our celebration is about the transformation of society, theirs and ours. They may even ask if we have been willing to be purified.

At the end of the ceremony in the temple, old Simeon begged to depart in peace. There is a dismissal used in the Uniting Church at the end of a Sunday service. It bids the congregation remember that "in all things, at all times . . . Christ is with you", and it concludes "make your *life* your worship, to the praise and glory of God".

That is the solemn and joyful sacrifice which we bid you offer in your work in this Legal Year.

1. John Hapgood, "The Church in Society" in Jeffrey John (ed.), *Living Evangelism, Affirming Catholicism and Sharing the Faith*, London: Darton, Longman and Todd, 1996. I owe several thoughts to Dr Hapgood's essay.

AT ST. MARY'S STAR OF THE SEA CATHOLIC CHURCH:

The Most Reverend Bishop Hilton Deakin, D.D., Ph.D., V.G.

HOMILY PREACHED AT THE ANNUAL RED MASS

MY dear friends,
Permit me to welcome you all to this beautiful church of St. Mary Star of the Sea, West Melbourne, for the Annual Red Mass, to open the Legal Year.

I welcome those of you who come from various jurisdictions, be they Local, State of Federal. I welcome those of you who provide essential and supportive professional services to the various legal bodies. I welcome the representatives of State and Federal governments who shape our laws. You are all creators and guardians of a wonderful heritage — the rule of law.

SCRIPTURE IMAGES

Our scripture readings today for this Mass invoke images of a God of history who projects justice, mercy, reconciliation and a sense of responsibility for deeds done. All of these qualities become imperatives for those who dedicate their lives to the formation and administration of law for all citizens in our land.

I think it can be said that your calling to the law in whatever capacity is a high calling indeed; it is particularly a high calling of service. But without a doubt, I believe you are beset on all sides in the pursuit of the high ideals of your professions.

WAVES OF CHANGE

I believe it is true to say that in our nation there is incessant wave after wave of change that sweeps over us — and every one of these changes generates a necessary reaction from legal quarters.

I note for instance the challenges of widely disparate issues, for example, the explosion in quantity and quality of information along the super highway of Internet and other channels, have now reached into the most private areas of home and life and the public areas of the business world. Somehow the law has to respond to the quality question that this challenge presents. It needs to determine the acceptable moral levels of information type made available to young people, and for that matter, to the whole community.

In the area of human relationships, in a world where perceptions of such relationships change, even as one discusses them, there are moves to alter the varying definitions of such relationships that were once referred to as fundamental institutions in the fabric of our society. There was a time when we thought that such definitions were untouchable. You would appreciate that such challenges do not stop at that, but have repercussions that go to the very heart of our understanding of law and good order.

The Most Reverend Bishop Hilton Deakin D.D., Ph.D., V.G.

LAW MAKERS

I note too, the complex challenges that those who form our laws have to make in a society which is at base democratic, which has become secularist in nature, tends to be relativist in principle, and which seeks to cut adrift from ancient heritages and received traditions, which now inhibit the exercise of latter day insights into our understanding of self and others in a post modern society.

Your task is particularly unenviable. But be assured of our prayers and good will, which ever political party you belong to as you go about your tasks. I have to say that because you occupy a central space of public debate, especially in, say, matters of life and death, of fundamental notions of individuals and society, and such like, we will from time to time join a debate and even do battle with you over issues that we believe to be fundamental and non negotiable if our society and nation are to have a future in the civilising tradition to which we are heirs. I would believe that you would not wish this to be otherwise.

SIFTERS OF THE LAW

The days ahead will be full of debate and of the flurry of opinions about the shape of our nation. We have to decide whether we will become a republic or remain a monarchy in whatever united form we choose. Whatever decision we make in this regard as we move into what presumes to be a heady second century of Federation, a third millennium of the era, and a national life that is leaning, even lurching towards a place of sorts in South East Asia, we will need new laws, new legal insights and new legal inspirations to help us on our way.

Nonetheless, on the one hand, we have still not sorted out the legal implications of our recognition of the rights of the Aboriginal people of our land. Until we do, we should find it difficult to claim the right to stand tall, or even to be considered equals in the world around us.

In this matter as in so much else, I appreciate the problems that personally face the formulators and the administrators of our laws. But in the end, justice rather than sectional interest, must prevail.

On the other hand, as our national face turns away from Europe and looks to our north, we are met with endless challenges from diverse cultural groups who now live among us and are part of us. In the present climate that protects minority groups, rights and views, and where relativist values prevail, the deep challenges of our heritage that such groups present, impose tensions of their own. Society most often has its way of working through such problematic areas. At times sectional interests may prevail but one always hopes that the influence of our evolving tradition, of our perceptions of present

needs, of our understanding of an historical common sense, will in the long run, win through. I remember particularly at this time. All the refugees in our land who have fled from political or military oppression, from starvation and lack of any opportunity, who seek to live in freedom, even as we do. We must remember that we are all migrant people, pilgrim people in this lucky country.

RESPECT AND PRAYERS

On this day let it be our prayer that our laws be a good servant and guide to the common good of our state, our nation, and all people who live within our shores.

Your work, endeavours, and achievements win thanks and profound respect of the communities you serve. As well, I pray and let us all pray, that Almighty God grant you the wisdom to serve our people well, that you frame good laws, and administer justice to the benefit of all.

AT THE GREEK ORTHODOX CHURCH OF ST. EUSTATHIOS:

His Eminence Archbishop Stylianos

For when the Gentiles, who do not possess the law, do by nature the things in the law, these, though not having the law, are a law to themselves.

(Romans 2:14)

SISTERS and brothers,

We gathered here today to pray together once again at the beginning of the Legal Year.

In so doing, we express at the same time two basic wishes: firstly, our need to be enlightened and strengthened from above in facing the manifold relations with our fellow human beings in everyday life. Secondly, our desire to support spiritually and morally all our sisters and brothers involved in the judiciary and legal profession by our special prayers. I warmly welcome, therefore, all of you who responded to our invitation, and I express my particular thanks to the Judges of the Supreme, Federal and District Courts, Magistrates of local courts and practitioners. But above all to His Honour the Chief Justice John Phillips for honouring us with his distinguished presence.

In such a particularly important Church Service, it is only natural that the word of God should have a very central place.

For this reason, I would like to draw our attention to the scriptural passage which has just been read.

It is obvious that in the passage St. Paul draws a clear comparison between the divine law of revelation on the one hand and, on the other hand, natural law as it is expressed in human nature itself.

Though the Apostle describes both these sources of moral order as being equally legitimate for the evaluation of human behaviour, we should not believe that he therefore places the human and the divine on the same level.

Such an interpretation would lead to a dangerous distortion of St. Paul's spirituality. For, in all his writings, the Apostle makes a clear distinction between the will of God and the basic inability of human nature to respond faithfully and gratefully to the requirements of the divine will.

Precisely on this point, we should not forget how dramatically he describes the inner struggle between two kinds of law in his own conscience:

Ὁ Σεβασμιώτατος Ἀρχιεπίσκοπος Αὐστραλίας κ.κ. ΣΤΥΛΙΑΝΟΣ

His Eminence Archbishop Stylianos.

"For I know that in me nothing good dwells; for to will is present with me, but how to perform what is good I do not find. For the good that I will to do, I do not do; but the evil I will not to do, that I practise."

[Romans 7:18–19]

After all the above, the question of the real meaning of St. Paul's comparison between both sources of law mentioned becomes more vital.

The urgency of a correct answer to this crucial point becomes more evident to all of us today, since we all know that in societies of the modern world, human rights and natural law turn out to be more and more alienated from the divine revelation.

Very indicative of this situation is the fact that, even in countries in which the Judeo-Christian tradition prevails, one speaks already of an experience of a post-Christian era.

In order to be in a position to evaluate properly the attitude of St. Paul towards the problem we mentioned, one should carefully observe the fact that the Apostle does not trust human nature unconditionally.

On the contrary, as he declares that the human conscience is an alternative authority to the divine law, to the degree that it is a reflection of it, he clearly formulates two conditions for this:

a) that man had not yet the opportunity to receive the divine revelation as the extraordinary word of God, and
b) that human conscience is not disinterested in the main questions of spiritual and moral life.

Concerning the second condition, one could go even further and state that here the Gentiles are respected by St. Paul not only for their theoretical interest in the basic moral questions, but rather for their concrete exercise of moral principles.

This is precisely the meaning of the words: "Doing by nature the things in the law".

As a result of this brief analysis, we must admit that, for St. Paul, the more seriously we take the words of the extraordinary revelation, the more we are enabled to evaluate fairly the rights of all human beings created in the "image and likeness of God".

Such a message — coming from the Apostle who has been distinguished in Christendom not only as the greatest theologian, but also as the missionary to all nations — has of course special significance for our country and for all its institutions, which have the noble ambition of enabling all citizens to enjoy equal rights and opportunities.

If we truly believe that multiculturalism or cultural diversity is the most binding moral postulate of our present time, then we cannot refer to any other element as a common denominator of us all, than the original sacredness of the human person created in the "image and likeness of God".

If we forget, as we unfortunately very often do, this unquestionable quality of human nature, then we are exposed to all dangerous adventures of blind naturalism or even fatalistic agnosticism. Surely it is not a secret for those who study carefully the public morality and the social plagues of recent years, that both mentioned "ideologies" — naturalism and agnosticism — are dictating to a great extent the solution to major problems of our family, social and national life.

However, such a "solution" to problems may appear to be an expression of a greater amount of democracy in interpersonal relations, but in reality it does not promote peace and goodwill.

Rather, it creates new problems which we are unable to handle any more, since we are in advance deprived of any steadfast moral criteria which would in turn give impetus and promising direction to our legislation.

For all these reasons, the task of all servants of law and justice became in our modern times not only a complicated and extremely dangerous profession, but very often, also, a heavy cross for people of integrity and faith to bear.

In realising all these responsibilities and dilemmas, we sincerely pray that God the Almighty inspires all those involved in the judiciary, law and public leadership to find always the strength to resist temptations, and to fulfil, in fidelity, the demands of God's will as it is expressed in divine revelation, or at least in the voice of their unenslaved conscience.

Amen.

AT THE TEMPLE BETH ISRAEL:

Rabbi John S. Levi A.M., D.D.

THIS is a service which proudly celebrates tradition and there is wisdom in this, for these are confusing times

We evidently are so sophisticated that we have become unshockable. We enjoy entertaining erotic movies about car crashes. The moral foundations of our society seem weak. Somehow or other our system of justice has allowed Nazi war criminals to live out their lives in Australia undisturbed.

The decay of conscience fills the air with foulest of odours. We are assaulted with materialism. We neglect our hospitals and our schools and we build casinos. We mock gentleness and exult brute strength.

Some of you may have seen an interview on last week's television news of a representative of the lease holders and farmers of Australia who emerged from an interview with the Prime Minister in Canberra and said — more or less — we had a productive discussion . . . We put to the Prime Minister the proposition that the High Court's ruling on the Wik Case should be overturned by legislation. After all, he said, it is not the business of the High Court to make the laws of the land . . . and anyway he said the ruling was passed by a majority of only one judge. And when I heard his words a shiver went down my spine — and I thought of our Service this morning.

Rabbi John S. Levi A.M., D.D.

Either human beings have inherent rights or they do not and if they do not it is the duty and the privilege of those judges, chosen not by chance, nor by political whim, to interpret those rights and to defend the vision that has brought Australia and Australians to this day.

There is an ancient legend that I would like to share with you. It is not a Jewish story. It is a traditional story from West Africa. We are told that the members of a distant tribe on the edge of the desert faced a mysterious and dangerous shortage of milk. For some reason their precious herd of cows was not producing the milk as it was supposed to and a young strong member of the tribe was appointed to watch over the animals through the night in search of a clue.

Hiding behind some bushes he waited and suddenly and unexpectedly he was greeted by a vision. A young woman of astonishing beauty flew down a moonbeam! In her hands she carried with her a large covered bowl. She looked around and, believing that no-one was watching, began to milk the herd. When the bowl appeared to be full she climbed back on to a moonbeam and travelled into the sky!! Overwhelmed, the young watchman decided that the next night he would confront her. And so, when she returned, he stepped out from his hiding place held her fast and demanded to know who she was. With a certain degree of shame she explained that she had come from another world that had no food of its own. "It is my duty," she explained, "to come down to earth and find food. Please," she begged,

"let me go and I will do anything that you ask."

The young man, who was by this time smitten by her awesome beauty, said, "I will release you but you must come and live with me". The bargain was struck and the woman agreed on condition that she would be allowed to return home to prepare her dowry.

It seemed a small price. It was a gamble but the young man agreed and he let her go. When she returned she carried with her not a bowl but a beautifully carved box. She explained: "This box comes from my home. You may look at it but you must promise never to open it." Of course the young man agreed but inevitably, as time passed, he became increasingly curious about the contents of the dowry box upon which his marriage and his promise was built. And so one fateful day when his wife was not at home he opened the box and saw that it was empty.

When his wife returned home she immediately understood what had happened and she said to him, "I can no longer stay here with you for you have broken your promise." "But why should that matter?" The young man protested. "After all it is just an empty box." His bride explained, "I am not leaving you because you opened the box. I knew that sooner or later you would do so — I am leaving you because you said it was empty. It isn't empty. It contains the sunlight and the air and the smell of my distant home in the sky. When I went home I filled the box with all those things that were really precious to me. How can I be your wife, your partner, if everything that is most precious to me is emptiness to you?"

The story can have many meanings, but let us apply it to ourselves. The Commonwealth of Australia will soon be one hundred years old. When the Constitution was drawn up its citizens were in fundamental agreement about the values and ideals it was designed to enhance and protect. We were subjects of a worldwide empire that covered the face of the globe. That empire was founded upon law. It gloried in the Magna Carta. It embodied the great covenant that enshrined the rights of the Crown — those who were chosen to rule and the rights of the commoner.

Those who framed the Constitution had profound faith in the Common Law, the restraint of politicians and the power of Parliament. And yet, as Father Frank Brennan S.J. has recently written, "Racism was inherent in the drawing up of the Australian Constitution", and he quotes Sir John Forrest, Premier of Western Australia at the 1898 People's Convention in Melbourne: "It is no sense for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but it is still so."

And because of this issue the Federation did not impose a clause guaranteeing equal protection and due process for all its citizens. These matters were left to the States.

Brennan quotes the prophetic warning of the future High Court Judge Richard O'Connor who, valiant in defeat, pointed out that, "We are making a Constitution which is to endure, practically speaking for all time. We do not know when some wave of popular feeling may lead a majority in the Parliament of a State to commit an injustice by passing a law that would deprive citizens of life, liberty or property without due process of law. If no State does anything of the kind there will be no harm in this provision, but it is only right that this protection should be given to every citizen of the Commonwealth." One hundred and one years later O'Connor's words are worth recalling.

The treasure chest of life and liberty and justice that one person can see and taste and feel and love, can seem to the next person to be empty and without value.

By one of those coincidences that occur quite often, last Shabbat the *parashah* included the reading of the Ten Commandments — *Aseret Hadibrot* — the First Commandment that Christians see as the prologue and Jews count as Commandment Number One!

Unlike the last five it does not begin with the stern and simple admonition "Lo" — do not — it begins with a statement *Anokki Adonai Eholochekha asher hotzitecha meretz Mitzrayim* — "I am the Lord your God who bought you out of the Land of Egypt" — we are commanded to understand that all law is based on the historic march of humanity from slavery to freedom.

Without that understanding the box is empty. The human contract or covenant is empty of meaning. There are values that are non negotiable and which we celebrate at this time and at this service, and for which the Torah is the symbol and the legal process the living embodiment of civilisation.

The author and essayist Paul Johnson is the most distinguished British historian of modern times. He is an observant Catholic and in 1987 he published an excellent book called *A History of the Jews*. In the introduction to the book he explains why he wrote it. And he asks "What are we on earth for? Is history merely a series of events whose sum is meaningless? Is there no fundamental difference between the history of the human race and the history of say, ants? No people has ever insisted more firmly than the Jews that history has a purpose and humanity a destiny . . . the Jewish vision became the prototype for many similar grand designs. The Jews therefore stand right at the centre of the perennial attempt to give human life the dignity of a purpose."

Purpose is hard to quantify.

Justice is invisible to the naked eye.

Meaning is always debatable and difficult to detect.

But the Covenant — our dowry that we have brought from a distant place and time is not empty.

May the Jewish contribution to the life and to the history of this land be based upon our passion for justice, for human dignity, for purpose and meaning and law.

Amen.

Chief Justice Welcomes New Silks

Welcome by the Hon. Sir Gerard Brennan, A.C., K.B.E., Chief Justice of the High Court of Australia, Canberra, Monday 10 February 1997

THE Court congratulates the new silks who wear their gowns for the first time in this Court. We offer our best wishes too to the spouses and families of the new silks who, by their forbearance, understanding and support, have permitted the new silks to forge their careers in a profession that is both competitive and time consuming.

The grant of silk is a recognition of integrity, of high ethical standards and the possession of superior skills as a legal advocate. As the procedures for the granting of silk in the several jurisdictions of the States and Territories involves consultation with practitioners and, frequently, confirmation by judges who know the quality of a candidate's professional work, the grant of silk is a warranty of the esteem of a professional peer group. That is a warranty of great significance to solicitors and their clients who are seeking counsel's services.

But, in the public eye, the status of silk depends on the status of the Bar as a whole. Peer group recognition is no commendation unless the peer group is itself held in high esteem. The tradition of the Bar is that the silks are its leaders — not necessarily by popular vote, though that is often the case, but by merit which others seek to emulate and by example which others freely follow. So you have a new responsibility which goes with the new status. And, reciprocally the status ultimately depends on the discharge of the responsibility.

Some occasions in recent years have given reason to wonder whether the Bar which you will be leading has appreciated the full meaning of the independence which is essential to a satisfactory discharge of the Bar's important function. Of course, it is understood that there must be independence in the sense of avoiding conflicts of interest and duty, especially independence from impermissible external pressures and independence from financial aspirations that might tend to divert a counsel from his or her strict professional duty. But the independence of the Bar goes further than that. There must be a degree of independence from the client in order that the client may have the benefit of dispassionate advice and in order that the court may be confident that counsel is capable of assisting in the doing of justice according to law. That confidence is shaken if counsel lend themselves to the advocacy of their client's cause in the public fora or engage in exercises of self-promotion. Further, although the Bar is independent of the judiciary, it may not be fully appreciated that that independence requires not only a fearless refusal to mislead the court or to permit it to be misled but also a respectful and firm resistance to any judicial proposition which does not accord with the law or with sound legal practice. A sanguine or supine acceptance of legal or factual error or of irregular procedures which ought not be adopted undermines the independence of counsel on which the doing of justice according to law so largely depends. Counsel's task is legal advocacy, properly prepared, fearlessly presented yet controlled by the paramount duty of assisting the court to do justice in an adversarial system according to law.

The tradition of the Bar is that the silks are its leaders — not necessarily by popular vote, though that is often the case, but by merit which others seek to emulate and by example which others freely follow. So you have a new responsibility which goes with the new status.

Independence is fostered by the Bar's individuality of practice or, at least, practice in a single-disciplinary partnership. There may be administrative or commercial advantages in the provision of advocacy services in a multi-disciplinary firm which offers services to assist a client in a variety of ways, but advocacy so provided may not be proof against duties of loyalty to others whose work is not focused on the curial process. Counsel are participants in the work of the third branch of government and they cannot subordinate that function to concerns about a client's affairs other than the client's legal rights and liabilities nor can they subordinate that responsibility to different concerns entertained by an advocate's associates.

Your responsibility is not only to maintain the Bar's high standards but also of seeing to it that the Bar maintains them. Else your profession becomes a mere service industry. Then there would be no justification for resisting a regime of regulation that is appropriate to an industry. Rugged independence, a generous application of the cab-rank rule so that the Bar's services are extended as widely as can reasonably be expected, and a passionate but critical approach to the administration of justice according to law will do much to confirm the Bar's pivotal importance as a social institution.

You are the incoming custodians of its best traditions. Those traditions are conducive to camaraderie and conversation, to mutual assistance and to long-lasting friendships. As you move into this new stage of your professional careers, you may find that, despite the structured clashes of the court-room, and perhaps because of them, there is a peace that comes from that well-ordered priority of interests of which Belloc spoke:[1]

"From quiet homes and first beginning,
Out to the undiscovered ends,
There's nothing worth the wear of winning,
But laughter and the love of friends."

You may even find a little time to acknowledge those whose love and support have brought them here today. To you and to them, the Court extends its best wishes.

1. 'Dedicatory Ode', *Verses* (1910).

Taking Silk in the 1860s

From *The Australian Jurist*, 15 May 1871

VICTORIAN QUEEN'S COUNSEL

THE following correspondence took place on the appointment of Mr. Michie and Mr. Ireland, as Queen's Counsel.

(1)

Crown Law Offices, 18 July, 1863

My dear Sir, — I desire with your permission to recommend to the Governor-in-Council that you be appointed a Queen's Counsel upon your acceptance of the office of Minister of Justice.

I beg to call your attention to the enclosed copy of a letter I have written to Mr. Ireland, stating the terms upon which it is proposed that this distinction shall in future be conferred. I ask you to inform me whether you will be disposed to accept a silk gown on these terms.

I am, my dear Sir, yours faithfully,

GEO. HIGINBOTHAM.

The Hon. the Minister of Justice.

(2)

Crown Law Offices, 18 July, 1863

My dear Sir, — Will you do me the favor to inform me whether you would be disposed to accept the office of Queen's Counsel in the event of the Governor-in-Council being advised to confer the distinction on you upon your retirement from the office of Attorney-General.

No Queen's Counsel have hitherto been nominated in this colony. I believe that such appointments would be acceptable to the profession, and would prove beneficial to the bar by bringing it into closer correspondence with the state in which the profession exists at home. But if Queen's Counsel are to be introduced here, I think that care must be taken that the office shall exist in reality as well as in name; and that the conditions which are understood to be attached to the office, and which may in some cases be felt to be onerous, shall be accepted together with the title of distinction. A silk gown is, I believe, always given at home on the understanding that it is to be retained for life, or given up only under special and unforeseen circumstances. A Queen's Counsel, moreover, is forbidden by the professional usage to practise in inferior courts, to draw pleadings, and generally to undertake business which commonly falls to the share of the junior members of the profession. I am aware that their Honors, the Judges of the Supreme Court concur in the opinion that these and all other obligations attached to the office of Queen's Counsel in England and Ireland ought to be observed and enforced in Victoria. Considering the extensive jurisdiction at present possessed by the Courts of Mines, and the great importance of many of the suits brought in them, I think that these Courts should, so long as they continue to be constituted as they now are, be an exception to the general rule, which forbids a Queen's Counsel to practise in an inferior Court.

If you should be willing to accept an appointment upon the terms I have mentioned, and subject to the regulations made on the 7th of December, 1857, I shall have pleasure in recommending your name to the Governor-in-Council.

I am, my dear Sir, yours faithfully,

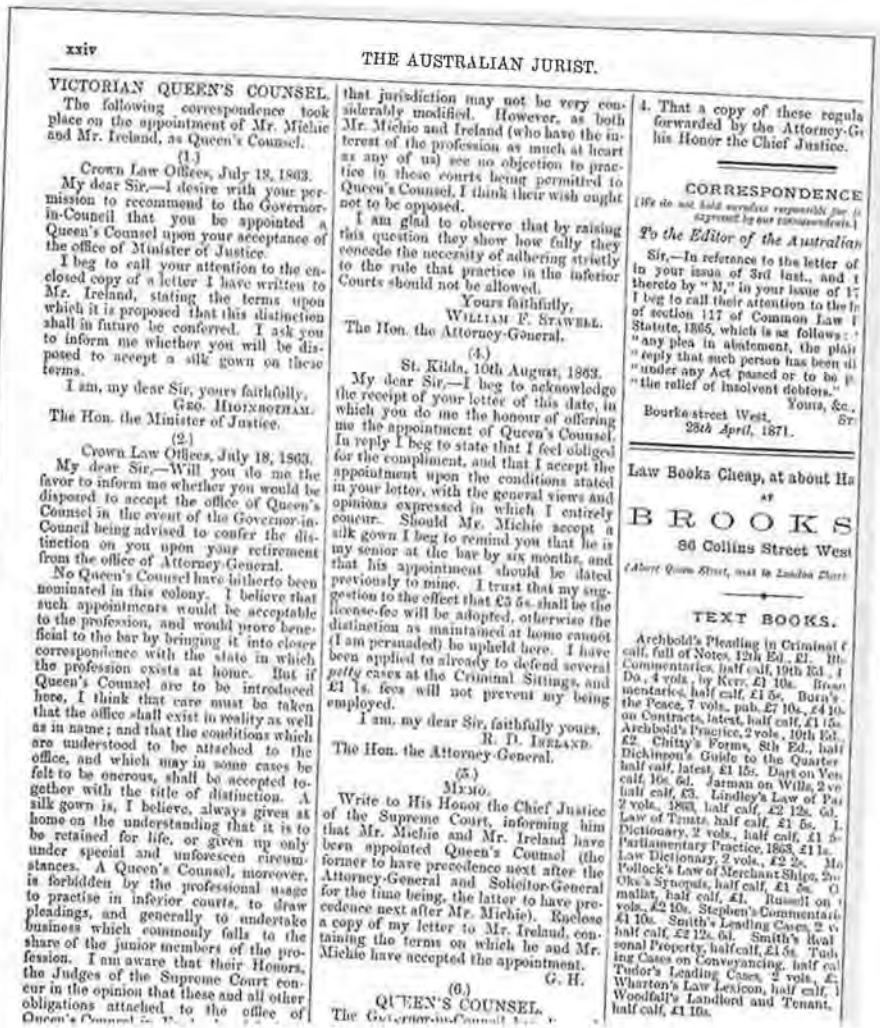
GEO. HIGINBOTHAM.

The Hon. Richd. D. Ireland.

(3)

Chambers, 10 August, 1863

My dear Sir, — With reference to your inquiry in the note of the 31st, I also concur in the opinion that Courts of Mines, possessing the jurisdiction they now do, form an exceptional case; but I confess I am not free from apprehension that that jurisdiction may not be very considerably modified. However, as both Mr. Michie



xxiv THE AUSTRALIAN JURIST.

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I am glad to observe that by raising this question they show how fully they concede the necessity of adhering strictly to the rule that practice in the inferior Courts should not be allowed.

Yours faithfully,
WILLIAM F. STAWELL.
The Hon. the Attorney-General.

(4.)

St. Kilda, 10th August, 1863.

My dear Sir,—I beg to acknowledge the receipt of your letter of this date, in which you do me the honour of offering me the appointment of Queen's Counsel. In reply I beg to state that I feel obliged for the compliment, and that I accept the appointment upon the conditions stated in your letter, with the general views and opinions expressed in which I entirely coincur. Should Mr. Michie accept a silk gown I beg to remind you that he is my senior at the bar by six months, and that his appointment should be dated previously to mine. I trust that my suggestion to the effect that £3 5s. shall be the license-fee will be adopted, otherwise the distinction as maintained at home cannot (I am persuaded) be upheld here. I have been applied to already to defend several *petty* cases at the Criminal Sittings, and £1 1s. fees will not prevent my being employed.

I am, my dear Sir, faithfully yours,
R. D. IRELAND.
The Hon. the Attorney-General.

(5.)

MEMO.

Write to His Honor the Chief Justice of the Supreme Court, informing him that Mr. Michie and Mr. Ireland have been appointed Queen's Counsel (the former to have precedence next after the Attorney-General and Solicitor-General for the time being, the latter to have precedence next after Mr. Michie). Enclose a copy of my letter to Mr. Ireland, containing the terms on which he and Mr. Michie have accepted the appointment.

G. H.

(6.)

QUEEN'S COUNSEL.

The Governor-in-Council [illegible]

4. That a copy of these regula forwarded by the Attorney-G his Honor the Chief Justice.

CORRESPONDENCE

[We do not hold ourselves responsible for the opinions expressed by our correspondents.]

To the Editor of the Australian

Sir,—In reference to the letter of in your issue of 3rd inst., and t thereto by "M," in your issue of 17 I beg to call their attention to the l of section 117 of Common Law P Statute, 1865, which is as follows: "any plea in abatement, the plain "reply that such person has been di "under any Act passed or to be p "the relief of insolvent debtors."

Yours, &c.,
Bourke-street West, 8r
25th April, 1871.

TEXT BOOKS.

Archbold's Pleading in Criminal C calf, full of Notes, 12th Ed., £1. Mo Commentaries, half calf, 19th Ed., 1 Do., 4 vols., by Kerr, £1 10s. Broo mentaries, half calf, £1 5s. Burn's the Peace, 7 vols., pub. £7 10s., £4 10s on Contracts, latest, half calf, £1 15s. Archbold's Practice, 2 vols., 10th Ed. £2. Chitty's Forms, 8th Ed., half Dickinson's Guide to the Quarter half calf, latest, £1 15s. Dart on Ven calf, 10s. 6d. Jarman on Wills, 2 ve half calf, £3. Lindley's Law of Pa 2 vols., 1863, half calf, £2 12s. 6d. Law of Trusts, half calf, £1 5s. L Dictionary, 2 vols., half calf, £1 5s Parliamentary Practice, 1863, £1 1s. Law Dictionary, 2 vols., £2 2s. Mo Pollock's Law of Merchant Ships, 2 Oke's Synopsis, half calf, £1 5s. O mallet, half calf, £1. Russell on vols., £2 10s. Stephen's Commentari £1 10s. Smith's Leading Cases, 2 v half calf, £2 12s. 6d. Smith's Real sonal Property, half calf, £1 5s. Tud ing Cases on Conveyancing, half cal Tudor's Leading Cases, 2 vols., £ Wharton's Law Lexicon, half calf, 1 Woodfall's Landlord and Tenant, half calf, £1 10s.

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G.H.

(6)

QUEEN'S COUNSEL

The Governor-in-Council has directed the following Regulations to be published for general information:-

By His Excellency's Command,

GEO. HIGINBOTHAM.

Crown Law Offices,

Melbourne, 10th August, 1863. 3594

Regulations to be observed on the appointment of Queen's Counsel. Approved by the Governor-in-Council, on the 7th of December, 1857.

1. Except in the case of barristers who shall have held the office of Attorney or Solicitor-General, no barrister shall be appointed Her Majesty's Counsel, except on the recommendation of the Chief Justice to the Governor-in-Council.
2. On every such appointment the usual fee of five guineas shall be paid for the patent at the office of the Chief Secretary.
3. For every license to appear against the Crown in cases in which the services of any of Her Majesty's Counsel may be dispensed with, a fee of one guinea shall be paid at the same office.
4. That a copy of these regulations —— forwarded by the Attorney-General —— his Honor the Chief Justice.

Second World Congress on Family Law and the Rights of Children and Youth

3–7 June 1997
San Francisco, California

THE First World Congress on Family Law and Children's Rights was held in Sydney, Australia in 1993. Over 850 delegates from 54 countries around the world attended including lawyers, members of the judiciary, politicians, academics, mental health professionals, clergy, service providers and child and human rights interest groups.

The First World Congress was convened as the result of a request by the Law Association for Asia and the Pacific (LAWASIA) to the Law Council of Australia to provide a forum to promote the human rights of families and children.

The co-conveners, Stuart Fowler and Rod Burr, both former Chairs of the Family Law Section of the Law Council of Australia, were determined that the Congress would achieve positive outcomes. The Congress achieved the following significant and important results:

- the enactment of laws imposing criminal sanctions for the abuse and exploitation of children committed extra-territorially
- the generation of a climate of international condemnation of the exploitation of children
- significant exchange of information leading to new developments in family law, family courts and alternative dispute resolution
- the creation of a LAWASIA Children's Trust to fund projects consistent with the resolutions of the Congress
- the promotion of a protocol to the UN Convention on the Rights of the Child designed to bolster international sanctions for the prevention of trafficking of children.

The success of the First World Congress led to a decision to convene the Congress every four years. It is intended that the Second World Congress will also be result oriented. A report card will be presented on the human rights performances of the countries of the world as it relates to families and their children. Positive outcomes will be pursued.

Verbatim

Questions and Answers

Human Rights and Equal Opportunity Commission

Coram: Sir R. Wilson, President, Ms. A Kohl
11 March 1997
Commissioner McCunnie v. *Air Services of Australia* and *University of Tasmania at Launceston*
Scutt for Applicant
Hammond for First Respondent
Shelton for Second Respondent

Hammond Cross-Examining Applicant
The Commissioner: If you could just listen a moment while Mr. Hammond gives you the outline and then he's going to ask you . . .
Mr. Hammond: You may have misunderstood my question. Mr. Mason made the comment about your dress, as I apprehend it, in about May, June 93, correct?
Ms. McCunnie: That's correct.
Mr. Hammond: May I just pause there. Were you able to . . .
Ms. McCunnie: Yes, I have.
Mr. Hammond: You know what my question was?
Ms. McCunnie: Sorry?
Mr. Hammond: You know what my question was?
Ms. McCunnie: Was I able to find . . .
Mr. Hammond: Were you able to? Marvellous, I can get questions answered without even asking — well, answer the next one.
Ms. McCunnie: I don't have any . . .

Collision Course

Magistrates Court of Victoria at Melbourne

Coram: Gibb M.
7 March 1997
Burnett for Plaintiff
McEachren for Defendant

Burnett: I tender this photo of the scene of the collision. The previous barrister, Andrew Donald, is pictured standing next to a planter box at the intersection.
Magistrate Gibb: I saw that. I thought it was a garden gnome.

Verbal Exchange

County Court of Victoria

Coram: Judge Ostrowski
6 February 1997
Xerri v. *Commonwealth Bank of Australia*
Nash Q.C. with P. Freckleton for Plaintiff
Loughnan for Defendant

Nash commencing his opening
Nash: Will your Honour bear with me. I appear to have lost a document.
His Honour: That cannot be Mr. Nash. That cannot be.
Nash: I'm afraid it is, your Honour. I do seem to have lost a document.
His Honour: Mr. Nash, Queen's Counsel never lose documents. Their juniors do.
Nash: That's true, your Honour. When I was a junior my secretary lost documents and before I had a secretary my wife lost documents.
His Honour: Do I take it from that that one does not have a secretary and a wife at the same time?
Nash: It depends upon the meaning you give to the verb, your Honour.

Up the Workers!

Supreme Court of Victoria

Coram:
Dreyfus for Plaintiff
N. O'Bryan for Defendant
21 March 1997

Dreyfus Cross-Examining
Mr. Dreyfus: It's not possible, is it, Mr. Barkla, for a farm to make a profit without farmers, is it?
His Honour: Without farmers?
Mr. Dreyfus: Farmers? Sorry? It's not possible for a farm to make a profit without farmers?
His Honour: Farmers? By that are you meaning people working on the farm or owning a farm?
Mr. Dreyfus: People working on the farm.
His Honour: People working on the farm?
Mr. Dreyfus: Yes.
His Honour: As distinct from owning a farm?
Mr. Dreyfus:; Well, they might not be farmers, your Honour.
His Honour: It just seems to me a great difference. Some people are called farmers and never pick up a spade or a scythe.
Mr. Dreyfus:: Let's call them farm workers, Mr. Barkla, and not Queen's Counsel.

Of Mice and Men in Estate Mortgage

THE Estate Mortgage case being held on the ground floor of 55 King Street is a sight to behold. Tables and tables of barristers and computers fill a vast space with His Honour Mr. Justice Smith presiding in the distance. Of concern is that there is a great number of the Sydney Bar present. This has led to an opening of a case never before seen. Rumours abound that having opened the case at the beginning of the legal year, there may not be a witness in the box until June. Those with insomnia may wish to go and see the Sydney Silks opening with every document in sight.

The following is a marvellous exchange between His Honour and Counsel for the plaintiff on Tuesday 4 February 1997:

Palmer Q.C.:
"I'll conclude today with reference to this document. It's of some significance and it's worth looking at. If we can get it up on the screen. It's there. I've seen it on the screen myself, 27 July 1990, if one scrolls further up, under the heading 'Retirement of B.P.T.C. and Appointment of New Trustees'. No, it's much further down the document under a different heading. Yes, 27 July 1990. Yes, we have got it. After all that trouble I think we might leave it until tomorrow morning."

His Honour:
"I think everyone has had enough. My mouse certainly has. I can't get it to behave itself at the moment."

Bar Member Launches Big River Valley History of Gold Mining

John Kaufman interviews author John Pilkington about *Big River Days*

JOHN Pilkington, a member of the Victorian Bar has recently written a book called *Big River Days* which is about the history of goldmining in the Big River valley. The Big River flows into Lake Eildon between Thornton and Jamieson. The book launch was held at Enoch's Point, which originally was a mining settlement along the valley beside the Big River. John Pilkington is interviewed by John Kaufman.

Kaufman: John how long have you been at the Bar now?

Pilkington: I have been at the Bar for about eight years after some 16 or 17 years as a solicitor.

Kaufman: You have had a long association with Enoch's Point.

Pilkington: Yes, that goes right back to 1954, I first went up there with my father. We walked the last 10 miles into Enoch's Point. My father had built a log cabin there for his father in the 1930s. He built it when he was a medical student and he subsequently had a practice at Yea and he used to go there for a well-earned holiday but his trips were pretty few and far between in the 1940s and 1950s. So when we went there in 1954 we used to pack everything on a push bike, that is the fishing rods, gear, rifle and food all held on with good strong leather straps and we walked the 10 miles into Enoch's Point. I was eight at the time.

Kaufman: This was after Eildon was created and the township of Bonnie Doon flooded?

Pilkington: The first Eildon dam was in the 1920s and that was called Sugar Loaf Dam. It was quite a small dam but it flooded where the Big River flowed into the Goulburn and covered a lovely little township called Darlingford and went about 4 or 5 miles up the Big River valley. The second dam, the Eildon dam, was constructed in the early 1950s and that went even further up the valley.

Kaufman: The Jamieson River and the Goulburn River meet and flow into the Eildon Weir.

Pilkington: They meet at Jamieson. Before the dams, the Howqua and the Delatite used to flow directly into the Goulburn River. It was quite a big river and very good for trout fishing. A lot of fishermen were attracted to the area and one of those was my grandfather who used go fishing when he could on an old Harley Davidson motorbike. One day he found himself up on the Big River and he liked the place. He prevailed on my father to build a log cabin for him at Enoch's Point. That is how we came to have the place.

Kaufman: In those days there would not have been anybody living there except people who went up to camp, is that right?

Pilkington: That is right and there were not very many of them. When I first went there there were still some old huts, probably better described as miners' shacks, that were built in the 1930s. A number of people went back in the Depression to try and scratch a bit of gold out and so their huts were still standing.

Kaufman: You have written a book about all of this.

Pilkington: Yes, I have really been at this book for most of my lifetime from when I first went into the valley with my father and saw the works of these miners, the old water races, the tunnels, diggings and old bits of broken crockery and bottles. I became very interested in how they got the gold and how they lived and so I started collecting photographs and any anecdotes or anything that I could find about mining in the Big River. In recent years I have to my great delight found a whole lot more information in the La Trobe Library, the Mines Department, the Public Records Office and of course by speaking to a lot of the families of descendants of the old miners, many of whom are still living in the area around Eildon, Thornton, Alexandra and Jamieson.

John Pilkington signs a copy of Big River Days.

Kaufman: You have called your book *Big River Days* and I went along to your book launch, it was most exciting to see some of the older people there who had family associations with that area.

Pilkington: Yes it gave me a lot of pleasure. We expected about 60 people to turn up and 150 were there. There was one old lady who was 90 and she had last been to Enoch's Point 75 years earlier. Her grandfather had been buried in the cemetery. The cemetery has only got two head stones although there are probably upwards of 60 people buried there. Her grandfather's grave did not have a headstone. She walked up the ridge to where the cemetery was and saw a big stringy bark tree and decided that he must be buried very close to that, so she reached into her purse and pulled out a little posie of flowers and laid that at the foot of the tree. It was a very touching moment.

Kaufman: Another member of our Bar Bryan Keon-Cohen came to launch the book, he has obviously had an association with Enoch's Point.

Pilkington: Bryan, amongst a lot of other friends of mine, has been going up there for 30 years or so now. The original hut that was built by my father has been expanded and several other huts built around it so now there is accommodation for 26 people. There is fishing and lots of good walking to do around the hills or it is just pleasant to be with other families in the bush.

Kaufman: I have read the book and it was interesting to see the association between the Big River Valley and the valley that runs along the Goulburn River.

Pilkington: The first track actually came up the Big River and crossed over the range to Gaffneys Creek and onto Woods Point, so Enoch's Point and Darlingford were both very important places for Woods Point. Soon after that the Yarra track was constructed and that really made Enoch's Point a bit of a cul-de-sac and there was not such a great exchange between Woods Point and Enoch's Point after that. The township of Enoch's Point really lasted from the late 1850s to about the First World War, the alluvial gold was mined there for many years and there were reef mines that were started in the mid 1860s but the last one of those was closed in 1916.

Kaufman: Have you visited many of the mines around your area in Enoch's Point?

Pilkington: I have really made a point of going to all the mines that are mentioned in my book. The effort and sheer willpower of the reef miners in getting the machinery right up to the heads of these gullies is just extraordinary, given that there were no roads usually the machinery for the stamping battery or the boilers had to be prefabricated in lengths suitable for carriage on a packhorse. There are a network of packhorse tracks all around those hills that lead to the mines and back to Enoch's Point and some of them cross the range to Kevington and Ten Mile and Gaffneys Creek. I have nothing but the utmost admiration for the miners and their efforts in moving the machinery and in fact moving the rock to get at the gold. There are some extraordinary open cuts and long tunnels. And there are water races carrying water that they needed for the boilers contouring around the hillsides, it is just extraordinary to see the work that they performed.

Kaufman: It all had to be cut before they could move anything.

Pilkington: Yes that is right and it was hard rock they had to drill, the drilling was done by hand with a hammer and tap method with a steel bit which is hit and then turned slightly to drill a hole and then dynamite was used to break up the rock which was then carried out of the mine and put through the battery. These were usually run by steam power although some of the early ones were run from water from the creeks and there were water wheels up to 30ft in diameter set up in the creeks to run the crushing machinery. Amazing stuff. I believe from my research that the money to set up the mine came from the miners themselves probably from money that they had made in alluvial mining. There was not a lot of speculation in shares and raising money back in Melbourne to set up these schemes. They were good miners and they worked very hard and some of them did very well but a lot of them didn't.

Kaufman: You have obtained a lot of pictures which are in your book.

Pilkington: Yes, I have been very lucky. I have had a great amount of help from locals who have freely given me photographs and the one on the cover is interesting. That is the mining crew from the Star of Erin mine at around about 1910.

Kaufman: How many numbers did you publish of the book?

Pilkington: Well, I published 500 and I have sold the lot so I have just taken delivery of the second 500.

Kaufman: Tell me how can we buy a copy of your book?

Pilkington: John Dever has got them down in his office and they can be purchased from him for $25.00, or I can post some out if people wish or from my own chambers in Owen Dixon East.

Not Down and Out in Paris and London

LUNCH in London and Paris can be a tricky business. Both cities seem to have countless restaurants. But beware, most are not worth lunching in. Organisation and research is necessary.

Walking the streets of central London can lead to an indiscriminate lunch in such remarkable places as the Angus and Aberdeen Steak Houses. These can be seen heavily surrounding Piccadilly and Leicester Square. Plush velvet and the thought of a decent steak often drives the unwary luncher inside. The luncher is then to be horrified by indescribable meat surrounded by tinned vegetables. It is hard to believe that tinned vegetables can be served in modern days. Indeed one would have thought that tinned vegetables would have been more expensive than fresh vegetables. Nevertheless these gastronomic wonderlands still have the marvellous rounded potato, grey pea and beautifully sliced carrot accompanying a grey sliver of some form of meat.

Many would say, "Oh well that's London", but beware in Paris. Each corner seems to have a lovely bistro. Tables spill out onto the pavement, waiters bustle about with moustaches and gallic uncharm. Beware of places called *L'Entrecote* and *Le Bistro Romaine*. Expectations of a wonderful French meal can be dashed. Instead, again, a tired steak comes out, surrounded by machine cut chips and a wilted salad. This is washed down by rather unextraordinary wine.

The cost can be quite shocking.

Therefore, with this in mind, certain Melbourne barristers decided to properly lunch in London and Paris. To this end Brown, Constable and Elliott decided to meet in London on the 27 December of 1996. Lunch was the aim, but not in an Angus Steak House. After early refreshments in the Sub-Rosa Bar of the original (well almost original) Duchess of Duke Street Hotel, it was off to *The Ivy* Restaurant.

London can be divided into two types of restaurant. The new trendy type and the old. *The Ivy* is a place to be seen. The rich and famous, although together with those who would like to believe that they are rich and famous, can be seen there all the time. We were lucky to get a table for lunch, although the manager said that we would have to sit in the "little dining room". This turned out to be an extremely pleasant area near the bar.

David Brown, Paul Elliott and John Constable at The Ivy Restaurant in London.

Indeed the Ivy can be said to be a very pleasant restaurant. It is hard to describe the atmosphere. It is sort of modern, but with stained glass windows, blonded wood and a style rather all of its own.

David Brown claimed that he saw lots of rich and famous people, but they turned out to be the managers. The food was surprisingly good and surprisingly not outrageously expensive as is the wont of many London restaurants.

Brown and Constable consumed an earthy dish of scrambled eggs and smoked salmon. I partook of the mixed hors-d'oeuvres. These were not your usual salami and jar of pickled vegies. It was an interesting combination of some Japanese sushi, some Lebanese tit bits and some excellent smoked fish. Overall a marvellously presented entrée.

The mains were equally as impressive. Brown and Constable like Tweedle Dum and Tweedle Dee had the same thing again. This time they despatched a stuffed spatchcock for two. Simply presented it was an immaculate bird with well presented juices, sauce and vegetables. I had chicken, but of the rounded and stuffed variety without bones. Again this was an extremely delicate and well-presented dish. A large cheese platter followed.

The wines were well priced on a very large list. Of particular note was the marsanne from the Rhône Valley. It is to be noted that there was also a large selection of Australian wines. This is a pleasing note as the food writers of England berate those restaurants who refuse to have new world wines upon their menus. The marsanne was accompanied by a few bottles of excellent red.

It was somewhat of a shock to leave lunch and find that everything was pitch black. There was a need for cleansing ales in Soho. It was dark, of course, because it gets dark very, very early in England in the winter. By the way nobody in the party died of frost bite.

The Ivy is to be contrasted with *The Bank*. The Bank is a trendy restaurant taken to the absolute extreme. It would be the envy of every restaurateur in Southgate. It was at this establishment that I met young barrister Stewart Rowland for another lunch in December.

The Bank is an enormous former bank (as could be guessed by the name) in Kingsway up towards Australia House. It had been written up in the London *Times*

What's on for lunch at Le Grand Vefour

as one of the best restaurants in London. Never fully trust food writers in newspapers. (Nor in the *Bar News* for that matter.)

The Bank advertised itself as having the biggest chandelier of any restaurant in London. Envisaging some old bank chamber similar to the old E.S. & A. building in Collins Street, Rowland and I stumbled into a super dooper whizzy laid back space. The so called chandelier which covered the huge ceiling of the former bank area, was simply thousands of louvres placed together. Louvres of the variety that one can see in beach houses all over Victoria. These had been assembled across the ceiling to what, to some, was very pleasing.

The restaurant was inhabited by dozens of black-dressed, pony-tailed waiters and we thought, waitresses. Although the line between the two was rather blurred. These were solemn high priests of waiting. It is obvious that the Southgate school of arrogant waiting derives from this school in London.

These particular waiters are too important to carry food. With their shaved and pony-tailed heads they come to the table and look down at you. Little bowls of olive oil appeared with some funny bread. Then there is the question of ordering. Each carries a black square object in which they punch your order. This order in turn goes to the huge exposed stainless steel kitchen full of young and keen chefs.

No waiter need go into the kitchen. When the order is ready a magical electronic device must set off the black box. Wherein apprenticed Buddhist-like waiting staff attend the kitchen. One knows that these are underlings because they wear blue with a little round blue hat upon their heads. These serf-like creatures are those that are seen fit to actually carry the food to the table and dispense it whilst the noble senior priests and priestesses sneer down their noses.

Lunch was livened up by a table full of women straight out of "Absolutely Fabulous". One absolutely "darl" of a woman regaled her two companions after the fourth bottle of house Chardonnay (at $35 a bottle), with a wonderful story as to the last time she had been in the restaurant. At the end of that lunch she had found that she had lost the use of her legs. This caused her some consternation. It was only after dinner that she usually lost sensation in her lower limbs. She was then forced to summon one of the high priests over and request that a taxi be called. She informed the staff that she would be unable to walk across the very large expanse of the restaurant, past other patrons, as she was absolutely legless. So with great elan and aplomb two of the waiters grabbed one arm and, with her legs tucked under her chin, she was carried across the whole of the restaurant to the waiting taxi. She stated that he was a wonderful taxi driver because when they arrived at her flat in Chelsea he obliged by carrying her up the stairs. Unfortunately our orders arrived just as she was telling her friends what happened when the taxi driver put her to bed.

The food had great pretentions. It was served with all sorts of trays, bowls and dishes. Overall it was of the new dreadful bistro variety so rampant in Melbourne. Risottos which offer a lot, and deliver not much. A breast of pheasant with cabbage, which promised to be hearty, but turned out to be a small insignificant piece of bird on a nouvelle type cabbage purée. Young Rowland tucked into some guinea fowl which was acceptable. The price was large. This is a restaurant to be avoided.

On the other hand one to be visited is the oldest restaurant in London, *Rules*. Founded in 1760 one would have thought that this place would be by now a complete tourist trap. Quite to the contrary. Despite its overwhelming knick-knacks and its interior, it served superb food.

The waiter who attended was a cross between Denis Smith and Simon Wilson. This is a place for real game, not just vapid nouvelle breasts. The restaurant boasts that one can go on a shooting party and shoot one's own game birds. This sounds terribly cruel and politically non correct. However the game dishes are something to be seen.

My wife had the teal. Which is a delicate little duck which provides very dark but beautiful meat. I had partridge with cabbage. This was superb. This restaurant provides vegetables without charging extra, which is to be encouraged. A sticky toffee pudding was a grand finale. The meal was washed down with some excellent claret. Again although not cheap, lunch is much cheaper than dinner. A place to be visited.

And so to Paris. Paris means even more organisation than London. One presumes that you are going to get much better food in every single restaurant than anywhere else in the world. This is not true.

A one star Michelin restaurant called *Cafe Drouant* turned out to be extremely disappointing, albeit for dinner, indifferent food and off hand service at a large cost.

The problem in Paris is to find somewhere between the top Michelin restaurants and the tourists menu steak and chip type establishments. This proved to be too difficult, so we opted for the two star Michelin restaurant *Le Grand Vefour*.

This restaurant claims to be again, one of the oldest in Paris. Its setting is magnificent being decorated in 18th century gold. It is situated in the gardens of the Palais Royale near the Louvre. It claims to have been the haunt of gastronomes, politicians, artists and writers for over two hundred years.

To not be overwhelmed by absolutely enormous cost, it is very advisable to go to lunch at these grand restaurants. The set menu was 335 francs for lunch, which is about $83. Something that one can easily pay in Melbourne at one of the grander establishments. This is for four courses. Indeed more than four courses because at dessert time the restaurants normally bring out all sorts of chocolates and friandissements.

The chef is one Guy Martin. He was at the door welcoming guests. I was somewhat surprised when they insisted that I wear a tie. I had a jacket but was not used to European restaurants insisting upon these things. Very quickly a whole range of ties was produced and gladly I accepted one and entered the gilt and grand dining room.

These top restaurants make you feel welcome. There is no sneering. The waiters are anxious to explain the menu. The wine waiters are anxious to discuss the wines. However the sommelier was rather shocked when I ordered Beaujolais. The restaurant would certainly not have such a vulgar wine on its list.

The meal began with une coupe de Champagne. The glass of Champagne was poured from a magnum held grandly by a wine waiter. This was worth the $25 per glass.

As an entrée I had the cheese terrine. This is extremely difficult to describe apart from the fact that it was sensational. It was a hot cheese terrine surrounding minute layers of vegetables. Superb, and something that could not be cooked at home. My wife had a wonderful poached haddock on a coulis of onions.

For a main course I was served a rouget which is a whole large fish which had been split down the middle, deboned and in the cavity placed a confit of cashew nuts, and snails, of all things.

My wife had a magnificent fillet of marinated duck roasted in its juices.

Then followed the table of cheeses. A huge platter which included about ten goats' cheeses arrived. The choice was overwhelming.

The desserts were remarkable, I had a fine feul©lette with marron glacé, my wife had a wonderful citron tart. Such simple descriptions cannot describe the quality of these desserts.

Then the little bits and pieces arrived. The restaurant had a special plain cake which was wheeled around and large slices were given to us whilst we consumed our Baume de Venice muscat. There followed some magnificent confectionery creations which had taken hours to concoct and then chocolates. The restaurant would have kept providing as much of these as you wanted.

Overall a grand and magnificent meal washed down with a Petit Chablis and a red Côte de Rhone. A final foaming glass of Champagne was the fitting end to a real lunch.

And so these lunches are but a memory. But a memory that I intend to recreate somewhere in Melbourne with Brown, Constable and Rowland. My wife would not want to attend a gathering of this nature.

THE IVY, LONDON
THE BANK, LONDON
RULES, LONDON
LE GRAND VEFOUR, PARIS

Paul Elliott

The "F" Word Reviewed

THE Court of Appeal in NSW recently passed upon the use of the word *fuck* by a policeman to his (female) subordinate. Although the decision turned on other points, a question arose whether it constitutes offensive behaviour to use the word, and its variants, in a police station. The decision in *Commissioner of Police* v. *Anderson* (CA NSW unrep 21 October 1996) thus provides an interesting starting point for a bit of harmless etymology.

The case was an application to review a decision of the Police Tribunal. It had found that Anderson had "failed to show respect for his subordinates". It dismissed a charge that he had "used offensive language in a public place". The Commissioner sought to review that dismissal, saying that he had not had a proper opportunity to prove that the Blacktown Police Station was a "public place".

The Court of Appeal said the decision was not reviewable on that ground. Meagher J.A. went on to say that in any event the words spoken did not amount to offensive language in the circumstances.

The words complained of were spoken to a female officer, Constable Cowin. They included the following passages of limpid prose: "Constable, get fucking over here . . . why aren't these fucking messages on the fucking pad . . . I don't fucking care, I want them on the fucking pad . . ." etc.

The charges also alleged that Anderson used the word "cunt" although not to Const. Cowin.

The decision of all three members of the Court was that the Commissioner had had a proper opportunity to prove that the police station was a public place, so it dismissed the Application.

Meagher J.A. said in addition that the words spoken were not offensive. He said: ". . . Undoubtedly, the behaviour of (Anderson) was unchivalrous and unbecoming of the office he occupies. This is, however, a long way from . . . being offensive in any sense. The evidence discloses that Sergeant Anderson habitually used the word 'fuck' or its derivatives; that everyone else did also; that Constable Cowin herself did so regularly. It was, so a witness said, part of what oxymoronically is called 'police culture'. Likewise, the word 'cunt' (is) used from time to time, although Sergeant Anderson never used this word to Constable Cowin. There was no evidence that persons in the public area were ever offended, nor that the public area was frequented by gentle old ladies or convent schoolgirls. Bearing in mind that we are living in a post-Chatterley, post-Wolfenden age, taking into account all circumstances, and judging the matter from the point of view of reasonable contemporary standards, I cannot believe that Sergeant Anderson's language was legally 'offensive'."

Fuck is an interesting word, linguistically speaking. It has the virtues of brevity, adaptability, expressiveness and is understood universally. It has a huge number of synonyms, ranging from coy euphemisms to acceptable jocular equivalents to coarse vulgarities.

Oddly, it has very few polite equivalents. Strictly speaking, *there is no single English word in current use which bears the same primary meaning.* It may be thought that *copulate* is an exact synonym for the verb *to fuck*, but *copulate* has a broader meaning († 1. *trans.* To couple, conjoin, link together. *Obs.;* † 2. *intr.* To become conjoined or united. Obs.) In its sexual meaning, it is primarily confined to zoology.

Fornicate is the second contender, but it is properly confined to sexual intercourse between a man and an unmarried woman.

According to the second edition of the *Oxford English Dictionary*, the only verb which has as its only meaning "engage in sexual intercourse" is *subagitate.* However, that word has not been recorded in use since 1693.

In order to refer to the activity which *fuck* describes, it is necessary to engage in circumlocution or periphrasis. Thus we get *make love to; sleep with; engage in sexual relations with,* etc.

Along with *cunt*, *fuck* was excluded from dictionaries and almost all writing from the end of the 18th century until 1960, when the Lady Chatterley trial was held, and both words were welcomed back from the Siberia of written English. Not without difficulty, it has since made its way onto stage and screen. It must be said that an activity which is so popular and widespread has been poorly served by polite language.

It was not always so. *Fuck* is recorded as being used in more-or-less respectable literature as early as 1500, and it is found in Florio's Italian–English dictionary (1598).

It is interesting to reflect on the social process which results in a (nearly) universal activity having no convenient and polite verbal tag to denote it: the activity becomes very inconvenient to discuss, and so it is not discussed, at least in Polite Society. Suppose a group of intelligent, decent and literate people wish to discuss sex. Instead of using *fuck* as verb and noun, they must resort to *have sexual intercourse with* (verb); *an act of sexual intercourse* (noun). Instead of the participial use *fucking*, they must say *having sexual intercourse*, and likewise for the verbal noun form *fucking.* And even these inelegancies involve a circumlocution, since *intercourse* is a word of wider application.

George Orwell wrote of the use of language to control thought (see especially his treatise on Newspeak in *Nineteen Eighty-four*). The same process has made talk about sex so difficult if social conventions are to be observed. Not surprisingly, a huge number of slang and colloquial words have sprung up to liberate thought and language in the middle ground between polite speech and the taboo word.

Although the following words all describe the same thing, they have won acceptance: if not in the salon, at least in the outer-rooms of polite society: *play mothers and fathers, go upstairs, make babies, get one's jollies, play hide the sausage, get into one's pants, have a tumble.* And then there are the earthier monosyllabic inventions: *stuff, screw, roger, pork, poke, bang, bonk, root, hump.* Note that these can be used both as verb and noun. Interestingly, it is easy to see that some of these synonyms are more acceptable than others, but all are more accepted than *fuck.* Generally, the more humorous the construction, the more acceptable it is.

There are many jocular noun constructions which also provide the same meaning, and range in acceptability, although none of them has the versatility of their one-word equivalents: *Ugandan affairs, country matters, parallel parking, horizontal folk-dancing, you know*

what, indoor sledging, knee-trembler. Again, as the allusion retreats from sex and approaches humour, it becomes more acceptable.

In April 1914, Mrs Patrick Campbell created a sensation in London by uttering the word *bloody* on the stage, in the first performance of *Pygmalion*. That word had been banned from books and stage since the middle of the 18th century: before then it had been accepted in polite use, but had gradually fallen into disgrace. Since Shaw took the daring step of writing it into *Pygmalion*, it has returned to acceptable use. Only in the most proper circles would it raise eyebrows now. Its only use (relevantly) is as an intensifier.

Looked at solely as a lexical unit, *fuck* is a very good, sturdy, versatile and descriptive word. If our social masters could reconcile themselves to the idea that sex is a legitimate part of human existence and is here to stay, it may be that *fuck* will eventually be accepted in polite use.

Julian Burnside

Wacky Sex Laws

- Lovers in Liberty Corner, New Jersey, should avoid satisfying their lustful urges in a parked car. If the horn accidentally sounds while they are frolicking behind the wheel, the couple can face a jail term.
- In the quiet town of Connorsville, Wisconsin, it's illegal for a man to shoot off a gun when his female partner has an orgasm.
- It's against the law in Willowdale, Oregon, for a husband to curse during sex.
- In Oblong, Illinois, it's punishable by law to make love while hunting or fishing on your wedding day.
- No man is allowed to make love to his wife with the smell of garlic, onions, or sardines on his breath in Alexandria, Minnesota. If his wife so requests, law mandates that he must brush his teeth.
- Warn your hubby that after lovemaking in Ames, Iowa, he isn't allowed to take more than three gulps of beer while lying in bed with you — or holding you in his arms.
- Bozeman, Montana, has a law that bans all sexual activity between members of the opposite sex in the front yard of a home after sundown — if you're nude. (Apparently, if you wear socks, your safe from the law!)
- In hotels in Sioux Falls, South Dakota, every room is required to have twin beds. And the beds must be a minimum of two feet apart when a couple rents a room for only one night. And it's illegal to make love on the floor between the beds.
- The owner of every hotel in Hastings, Nebraska, is required to provide each guest with a clean and pressed nightshirt. No couple, even if they are married, may sleep together in the nude. Nor may they have sex unless they are wearing one of these clean, white cotton nightshirts.
- It's safe to make love while parked in Coeur d'Alene, Idaho. Police officers aren't allowed to walk up and knock on the window. Any suspicious officer who thinks that sex is taking place must drive up from behind, honk his horn three times and wait approximately two minutes before getting out of his car to investigate.
- Another law in Helena, Montana, mandates that a woman can't dance on a table in a saloon or bar unless she has on at least three pounds, two ounces of clothing.
- In Carlsbad, New Mexico, it's legal for couples to have sex in a parked vehicle during their lunch break from work, as long as the car or van has curtains to stop strangers from peeking in.
- A Florida sex law: If you're a single, divorced or widowed woman, you can't parachute on Sunday afternoons.
- Women aren't allowed to wear patent-leather shoes in Cleveland, Ohio — a man might see the reflection of something "he oughtn't".
- No woman may have sex with a man while riding in an ambulance within the boundaries of Tremonton, Utah. If caught, the woman can be charged with a sexual misdemeanour and "her name is to be published in the local newspaper". The man isn't charged nor is his name revealed.
- An ordinance in Newcastle, Wyoming, specifically bans couples from having sex while standing inside a store's walk-in meat freezer!
- A state law in Illinois mandates that all bachelors should be called master, not mister, when addressed by their female counterparts.
- In Norfolk, Virginia, a woman can't go out without wearing a corset. (There was a civil-service job — for men only — called a corset inspector.)
- However, in Merryville, Missouri, women are prohibited from wearing corsets because "the privilege of admiring the curvaceous, unencumbered body of a young woman should not be denied to the normal, red-blooded American male".

The First Five Years: Centre for Legal Education Reports

THIS month marks the fifth anniversary of the establishment of one of the most innovative legal institutions in Australia. Legal education is the only discipline in Australia with its own research and development facility and information clearing-house

The Centre for Legal Education, an initiative of the Law Foundation of NSW, was set up in February 1992 with the objects of being:

- a research and development centre providing analysis, evaluation, policy formulation and information
- an information clearing-house and research centre providing statistically based information, a library and publications
- a provider of support and facilitation including secretariat support, meetings, and consultancy services.

The fifth year of the Centre's operations sees it undertaking an ambitious national project. There are now 28 law schools in Australia. While many in the profession and the community question the need for the large number of lawyers graduating each year, and as universities face funding cuts, there is no empirical data on the career intentions of graduating law students. It is in this context that the Centre will address with its major undertaking, The Australian Law Graduates Career Destinations Project.

Focusing particularly on those who are working outside the private legal profession, the Project aims to identify where law graduates are employed, what work they are doing and why they have chosen particular jobs. The Centre's earlier study Career Intentions of Australian Law Students suggests that as many as 50 per cent are planning careers outside the private legal profession. To verify whether this becomes a reality will be extremely important to universities and law societies around Australia. Recent Law Society of NSW research indicates that as many as half of the lawyers practising as private solicitors in New South Wales earn less than $50,000 a year, and there are concerns among practitioners that there may not be enough traditional work to support existing lawyers and new graduates.

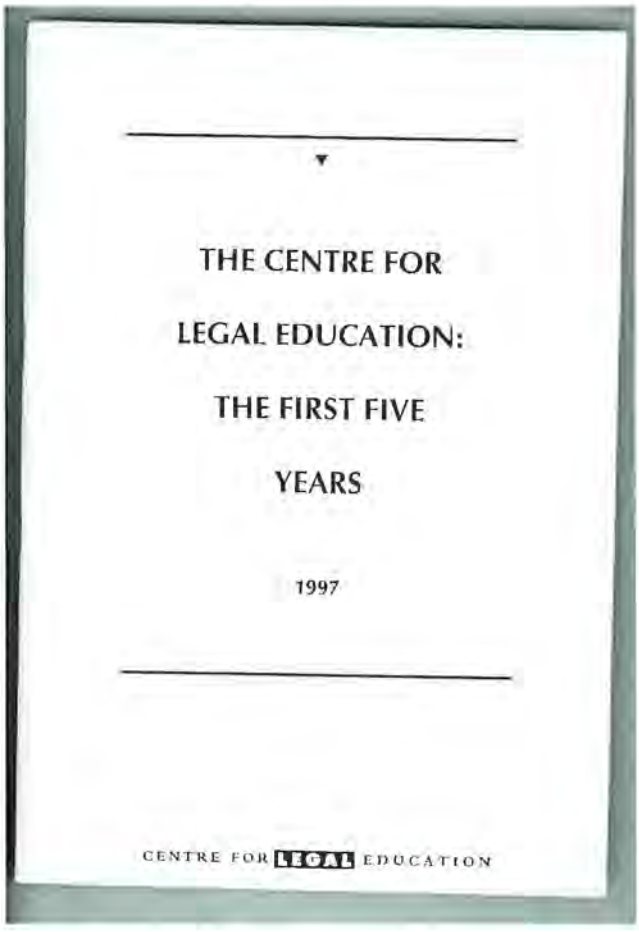
The Centre's reputation is evidenced by the diversity of organisations which call on it to consult.

The Centre for Legal Education's new Project will, for the first time, see informed debate on this important aspect of legal service delivery into the next century.

This exciting new Project is only the latest in a long line of important research projects and publications from the Centre.

Emeritus Professor Ken McKinnon said of the Centre in 1995: "It is difficult to envisage the Centre being able to accomplish more in the three years of its existence than it has accomplished in a variety of legal education domains. It is already regarded as indispensable."

The Centre has a consistent output of reports and monographs on legal education issues. A particularly important aspect of these publications is the statistical information they contain on aspects of legal education such as the costs of legal education, or the career intentions of Australian law students. It publishes an annual *Australian Legal Education Yearbook* which is a compendium of statistical information on all aspects of legal education and training.



The availability of the Centre as a facilitator for other organisations has been immensely important. Organisations such as the Committee of Law Deans, the LAWASIA Legal Education Standing Committee and the Continuing Legal Education Association of Australasia have benefited from the Centre's services.

The Centre's reputation is evidenced by the diversity of organisations which call on it to consult. The Centre has worked in Cambodia, China, Hong Kong, New Zealand and Papua New Guinea as well as numerous States throughout Australia.

The Centre has a homepage (http://www.fl.asn.au/cle/) which provides ongoing information about the Centre's work and a catalogue of their publications.

For more information please contact the Director of the Centre, Christopher Roper, on (02) 9221 3699.

Children's Christmas Party

AT least on one day a year the Bar cannot be accused of humbug. It is the day of the children's Christmas Party when children, good cheer and presents replace fee books and feuds. From small beginnings the Christmas party has grown to a very large event. Barristers young and old with their offspring stream to the verdant environs of the Botanical Gardens. Amidst sunshine, ducks and ponds they eagerly await the arrival of Santa Claus — Santa Claus in the form of Simon Wilson Q.C. Simon has become a beloved fixture of this annual event. However the number of presents has become so large that Simon must be driven into the gardens. Initially his vehicle was a golf buggy, but has now become a Ford 1 tonner.

After informing all assembled parents that he is indeed acting in the spirit of Christmas and performing pro bono, Santa Claus dispenses the presents with glee.

Children's eyes light up. Parents look proud. Mark Derham Q.C., as the photographs in the article show, demands Santa's knee. He is rewarded with his present for the year, an Auditor's Travel Guide to the Pyramids.

The weather even became festive. As the festivities continued multifarious liquids were necessary to sustain Santa in his toil. The organising committee are to be congratulated for much hard work that is put into an event that has become highly successful.

May Santa continue for many years in the future.

The Dos and Don'ts of Holidaying in Queensland

EACH year a significant portion of the Victorian population emigrates to Queensland and an even larger portion holidays there. It appears that even members of the Victorian Bar have been known to join the Northern exodus both permanently and temporarily. Below are some of the lessons learnt by one such voyager on his first ever holiday north of NSW spent at Noosa over Christmas and the Gold Coast over New Year.

DO consider driving to your chosen Queensland resort (unless of course it is in the northern half of the State) especially if you have a family size group. It is surprising what you can pack into a car boot! It will save you prohibitive air fares and high car rental charges once you get there. The Newell Highway is not a bad haul especially if you break journey once or twice. Your correspondent got away early on the Thursday and drove to Narrandera the first day; Moree the second; and, arrived mid afternoon at Noosa relatively well rested and ready to holiday right away. If you haven't seen it already, allow a few hours for a detour through the Western Plains Zoo at Dubbo.

DON'T believe everything you read in Queensland Sunlover brochures. For instance, AAA ratings are highly inconsistent. **** at Sunshine Coast apparently means something different on the Gold Coast. Although they had the same ratings and similar features (according to the booklet), our apartment at the Sunshine Coast (Noosa Crest) was significantly better than the one on the Gold Coast (Atrium Quest). The tariff for the former was deservedly higher than for the latter. The description given for the former was considerably more accurate than for the latter. It appears, on the Gold Coast at least that "Shops — 50m" really means "Shops at least 1.5km"! Likewise, "Kitchen with dishwasher and microwave" really means kitchen whitegoods packed into a 1.5m square with minimal bench space and insufficient room for one person to properly use the facilities. The "Gymnasium" was non-existent and the "Tour Desk" (actually the occasionally personned reception) did not even know the current opening times of the Theme Parks although it sold "discount" tickets thereto.

DO allow for visits to the various Theme Parks on the Gold Coast.

DON'T visit "Dreamworld" unless you visit it first. It is the least well organised and has in my opinion the least diverse and interesting attractions. It would be disappointing if you went there shortly after one of the others.

DO purchase your passes for the Theme Parks from the RACV before you leave Melbourne. Not only are they the cheapest but having prepaid tickets saves you at least one queue at the ticket box.

DON'T plan on the buffet lunch if you go to Dreamworld. Although it is good value you will be overrun by overseas group tours. You will notice they tend to bring back all their courses at once — usually two or three dessert dishes — much of which is left untouched.

DO visit Warner Brothers MovieWorld. It is a must. Its attractions are diverse and very interesting. Get to the Magic and Illusion and the Police Academy shows early. The crowd "warm up" activities are a show in themselves. Expect something extra on each attraction.

DON'T go to SeaWorld without your camera and your bathing gear. If you have kids with you they will while away many hours on the water rides.

DO ensure you get to each Theme Park very early. They tend to open earlier after Christmas so check the opening times. It goes without saying that you should preplan to get to the more popular rides very early lest you have to line up in long queues to have your ride. MovieWorld's queues move deceptively quickly.

DON'T expect to find a ready supply of good quality, cheap tropical fruit. Except for the "Big Pineapple" (see below) pineapples were small, unripe and expensive. Mangoes were cheap and plentiful by the tray shortly after Christmas but expensive otherwise.

DO visit the "Big Pineapple". It sounds gauche but it was well worth a visit. Apart from tours of the Macadamia Nut operation, pineapple farming (Surprise! Surprise!) and hydroponics it had a huge gift shop which had many extremely cheap items even in the jewellery area. It had superb pineapples at the cheapest prices we saw in Queensland.

DON'T be surprised at just how pleasant and helpful everyone is in the various manifestations of the tourist industry in Queensland (save for the management at the Atrium Quest who had obviously treated episodes of Fawlty Towers as training films).

DO eat upstairs at Grumpy's in the vicinity

of Fisherman's Wharf on the Gold Coast if you are into seafood. Its platters for two were ample for two and a half to three even if you treated them as three courses in one. They were superb.

DON'T eat at Saltwater at Noosa unless you want an expensive night out and either plan on eating early or booking more than a week in advance. The seafood is excellent there, the service is faultless but we wondered at the overall value when we got the bill. Our son's $35 whole coral trout didn't help matters but it was his birthday treat!

DO give each of Lindoni's, Cafe Vespa and Artis at Noosa a try. The first was a truly excellent Italian style restaurant, the second was a good value upmarket cafe and the last had quite different but great food. The service at all was terrific but DON'T ask for a strong caffe latte at Lindoni's!

DON'T plan on lunch if you go on the guided "Breakfast Walk" at the Noosa National Park. Prewalk features Champagne and Damper and post-walk includes: Champagne, orange juice, coffee, cereal, buffalo sausages, eggs, pancakes, bacon, fresh fruit. These aren't options — the lot is available for all.

DO give SAKS, Grumpy's downstairs and Aromas Coffeehouse at the Sheraton Mirage complex in or about the Fisherman's Wharf area a try.

DON'T expect too much of the Queensland road system around the Gold Coast — at least for a little while yet. Road works reduce major highways to one lane between Brisbane and the Gold Coast and to the north of Coolangatta.

DO consider Christmas Lunch at the Pavilion at Hyatt Regency Coolum Beach. Although it catered for around 650 and needed to be booked well in advance it was simply the best buffet imaginable — especially if you liked cold seafood. The buffet dinner in the Cafe at Hyatt Regency Sanctuary Cove wasn't too bad either.

DON'T leave home without huge beach towels and ample supplies of 15+ sunscreen.

DO visit the Currumbin Sanctuary a very short distance from Coolangatta. If you have a child besotted by aircraft you will get a bonus in that it is just under the final approach to the local airport — and a busy airport at that.

DON'T believe the slogan "Beautiful One Day, Perfect the Next". We had everything except hail and snow. Indeed, for most of the time it turned out to be hotter in Melbourne. We didn't complain — we could still swim most days and the electrical storms provided unbeatable pyrotechnics especially on New Year's Eve.

Graham Devries

Death and the Morning After in Massachusetts

APPARENTLY these "jokes" were extracted from the Massachusetts Bar Association Lawyers Journal. They are a set of questions asked of witnesses during trials and the author says they are true.

1. "Now doctor, isn't it true that when a person dies in his sleep, he doesn't know about it until the next morning?"
2. "The youngest son, the twenty-year old, how old is he?"
3. "Were you alone, or by yourself?"
4. "Were you present when your picture was taken?"
5. "Was it you or your younger brother who was killed in the war?"
6. "Did he kill you?"
7. "How far apart were the vehicles at the time of the collision?"
8. "You were there until the time you left, is that true?"
9. "How many times have you committed suicide?"
10. Q: "So the date of conception (of the baby), was August 8?"
    A: "Yes."
    Q: "What were you doing at that time?"
11. Q: "She had three children, right?"
    A: "Yes."
    Q: "How many were boys?"
    A: "None."
    Q: "Were there any girls?"
12. Q: "You say the stairs went down to the basement?"
    A: "Yes."
    Q: "And these stairs, did they go up also?"
13. Q: "Mr. Slattery, you went on a rather elaborate honeymoon, didn't you?"
    A: "I went to Europe, sir."
    Q: "And you took your new wife?"
14. Q: How was your first marriage terminated?"
    A: "By death."
    Q: "And by who's death was it terminated?"
15. Q: "Can you describe the individual?"
    A: "He was about medium height and had a beard."
    Q: "Was this a male, or a female?"
16. Q: "Is your appearance here this morning pursuant to a deposition notice which I sent to your attorney?"
    A: "No, this is how I dress when I go to work."
17. Q: "Doctor, how many autopsies have you performed on dead people?"
    A: "All my autopsies are performed on dead people."
18. Q: "All your responses must be oral, OK? What school did you go to?"
    A: "Oral."
19. Q: "Do you recall the time that you examined the body?"
    A: "The autopsy started around 8.30 p.m."
    Q: "And Mr. Dennington was dead at the time."
    A: "No, you dummy, he was sitting on the table wondering why I was doing an autopsy."
20. Q: "You were not shot in the fracas?"
    A: "No, I was shot midway between the fracas and the naval."
21. Q: "Are you qualified to give a urine sample?"
    A: "I have been since early childhood."

Submitted by Amanda Graham

Jonathan Brett receives Mont Blanc prizes for his winning Spring *Bar News* Competition entry

Author of the winning entry in the Summer issue reader's competition, Jonathan Brett (right), seen receiving his Mont Blanc Pen and Mont Blanc Notebook from the proprietors of Pen City, John Di Blasi and Terry Jones.

Enter the Autumn *Bar News* competition now — and you could win these handsome and useful prizes.

Here's how to enter:

The photograph shows some tufts of barristers' wig hair, found on a Friday afternoon in March, in the centre lift of the bank of three on the eastern (or William Street) side of the Owen Dixon Chambers West. The finder, who had got on at the 18th Floor, noticed the hair immediately, which was lying on the lift carpet just inside the door. The lift was unoccupied.

Readers are invited to:

- provide a caption for the photograph.
- provide a short (and apocryphal) explanation.

The entrant who provides what the editors believe to be the most entertaining caption and explanation will receive a Mont Blanc Ballpoint pen, and Mont Blanc Leather Notebook, supplied by Pen City, having a combined retail value of $365.00.

No member of the Editorial Board or Committee of *Victorian Bar News*, and no relative of a Committee or Board member, is eligible for the prizes.

Entries to Gerry Nash Q.C., c/- Clerk Spurr, Owen Dixon Chambers West by 30 May 1997.

It is a True Story!

Jeanette Richards' winning entry in *Bar News* Summer issue competition

WORD that the Victorian Bar had been deregulated soon spread as far as the United States, where Woody Allen was living. This was good news to Woody, whose troubles had led him to consider a new career and indeed a new life.

Woody obtained a copy of the *Legal Practice Act 1996* and began studying it. He was amazed to read that robing in Court was no longer necessary and could not be forced upon practitioners by the judges. This was indeed extremely progressive.

Woody joined List X and patiently waited for his first brief to arrive, which it did after not too long. Having spent a long night preparing, Woody stepped confidently onto William Street humming Sinead O'Connor's hit song "The Emperor's New Clothes". In doing so, Woody created quite a stir. Woody had taken the legislation a tad too literally and had, in his haste to get on with his new career, unfortunately omitted to read the explanatory memorandum, after which the legislation would have made perfect sense, even to an American.

The members of the local paparazzi, who had gathered to take yet more photographs of John Elliott, could not believe their luck. The afternoon editions of the newspapers carried full details, even before Woody had finished in court for the day.

This photograph records my attempt to provide Woody with cover from the photographer's lens . . .

On our way back to chambers after our own extremely gruelling day in court, Kurt and I were stopped dead in our tracks by Woody dashing back to O.D.C.E., having by now realised his terrible mistake. This photograph records my attempt to provide Woody with cover from the photographer's lens, although here Woody was obviously faster than this particular photographer. The newspaper vendor stands by without turning a hair, for he has been selling newspapers from outside O.D.C.E. for many years.

Jeanette E. Richards

Box Trophy Won by Solicitors

THE Box Trophy was again played on 19 December 1996, between the Bar, Bench and Solicitors at the Royal Tennis Courts at Richmond. The Box trophy has been kindly donated by Judge Kellam to be played as an annual event. Box was a judge in the early history of the County Court and was one of the founders of Royal Tennis in Mongan.

Unfortunately the Bar and Bench again lost to the Solicitors but a lot of fun was had in the process. This year the Bar was represented by S.E.K. Hume Q.C., John Lewisham and John Kaufman Q.C.

Unfortunately practice commitments precluded a number of regular players, including Judge Kellam, joining in the tournament. However, as the photo shows a good lunch was held by those that played. Lewisham was not reaching for his wallet to pay.

John Kaufman

Cricket: A Cause Célèbre at the Bar

THE Essoign Club Annexe filled with iced water and stronger good spirits and anecdotes, for the Inaugural Bar Cricket Dinner on Wednesday 19 March last.

Opening gracefully, a now retired District Cricket umpire (and now Minister at Scots Church, Collins Street) Revd. Jack Pilgrim cited an invocation in verse. Chris Connor then, quickly, caught the cup to toast cricket in the right mood.

An excellent meal of Fillet of Beef with a choice of sauces and platters of the garden came, followed later, by char-grilled peaches with amaretto and scented cream.

David Emerson, Victorian Cricket Association Marketing Manager, ex-Shield player and currently Camberwell-Magpies Captain, then spoke. In a quiet but deft style he traced a modest Shield career especially as a bowler on the receiving end from the bats of the Waugh boys and Ian Botham, Alan Border and others. His self-deprecation only underpinned the knife edge risks of a batsman — failure. Cricketers at the highest level all play at "terror" edge. His descriptions of the facts of the game and individuals' roles were in them, was fascinating. After 30 minutes, questions followed in a free wheeling manner, all answered with calmness, deftness and candour. His contribution to this "seeding" affair was then warmly applauded and some mementoes of the occasion presented to him.

Michael Shatin Q.C. in a consummate precise manner moved thanks to the Speaker and then to Sir George Lush, Mr. Justice Southwell (who was regrettably absent through injury), Bill Gillard Q.C. and Daryl Wraith, for their contributions to the life of cricket at the Bar.

The fare, the beverages, the prayer, the lore, all present, contributed to a most memorable night in a first for the Bar in its 117 years of Bar Cricket. A menu for all at the Dinner, contained pocket histories of Bar Cricket, of the Speaker and epitaphs of the game. The timing of the Dinner mid-way between the 2nd and 3rd Australian/South African Tests proved a point or two.

Based on the experiences of organising the Dinner, I ask that all members of the Bar respond early with due payment to Anna Whitney's calls, for the Bar Dinner in June.

Cricket is not just a game, it is an institution. The Bar as an institution of great standing is only strong if its members stand up to be counted. This requires boldness of spirit, commitment and great peer support. New Cricket Rules for the Bar will be mooted shortly, to assist in raising Bar standards in one game of life.

Tony Radford

Owen Dixon Chambers
205 William Street
Melbourne 3000

Urgent — report and request from Australian Text XI selectors? — see below

17 December 1996

J. Middleton Esq. Q.C.
Chairman
Victorian Bar
Dear Sir,

re: *BAR CRICKET* v. *L.I.V.*
Monday, 16/12/96

Magnum opus.
Gillard's away.
Connor unavailable for play.
20 regulars unavailable also.
Field 10 1/2 players.
Bar 9/156 off 40 overs.
L.I.V. 3/165 off 26 overs!

(Kenyon 42; Skinner 35 n.o.) Fun but undone.

I move for the adoption by the (new) corporation of rules that:

(a) any person with cricket skills who does not, prior to or within three months of signing the Bar Roll declare his/her past cricket experience and current skills to one of the Bar Cricket Selectors shall, if discovered (hiding the same), be drawn and quartered — and be selected and play for the next year plus five, without argument; and that

(b) a cricket dinner be organised by the Bar to encourage persons to come forward; and

(c) the Chairman liaise with Radford and Connor to address — *at leisure* — a question of pride in this area of the Bar's contacts with the L.I.V.

On a serious note, there remains great goodwill between the Bar and L.I.V. at this level. EWG QC and then Chris Connor in the 1st's and the writer in the 2nd's (when teams are available), have always sought to maintain the best of relationships. We are concerned, however that the Bar could be viewed as the 'whipping boys'.

Your interest, would be useful, therefore.

Regards,
Tony Radford

Education and the Law

By I.M. Ramsay and A.R. Shorten
Butterworths, 1996
pp. i–xiv, Table of Cases xv–xx, Table of Statutes xxi–xlii, 1-326, Appendix — Questions and Answers on the United Nations Convention on the Rights of a Child 327–330, Index 331–356

EDUCATION and the Law is a slightly cryptic title for a book that deals with the legal framework relevant to the organisation and delivery of education services in Australia. Principally the work examines aspects of the law relating to the employment of teachers, the relationship between the school and students as well as the structure and funding of educational institutes.

The law is not uniform and the work covers the interplay between common law and State and Federal legislation as well as being sufficiently detailed to distinguish important differences between the various State regimes.

Part I of the book deals with the legal framework of educational institutes (schools, TAFE colleges, universities, etc.). There is a specific section devoted to legislation relating to government sector teacher employment, particularly concentrating on matters such as appointment, termination and redundancy as well as disciplinary and appeal provisions for teachers. There is also a chapter devoted to the financing of education including both the financing of the educational institute and funding for students (i.e. the HECS scheme, Austudy, etc.).

Part II of *Education and the Law* is an analysis of specific issues relating to law and education. There is a chapter relevant to liability for physical injuries sustained by students. Although not discussed, the principles that underlie decisions such as *Smolden* v. *Whitworth* [1996] TLR 249 (liability of a player and referee in a rugby game) are clearly set out. There are further chapters devoted to topics such as anti-discrimination laws, teachers and family law (parental responsibility, children's welfare, the role of teachers as witnesses in family law proceedings) and educational negligence. "Educational negligence" is defined as where a student suffers harm as the result of incompetent or negligent teaching. It is noted that while teachers and school authorities owe a duty of physical care to their students, such a duty does not extend to the intellectual development of the student (at p.296). However this seems to fly in the face of the House of Lords decision in *X* v. *Bedfordshire County Council* [1995] 3 All ER 353.

Educational negligence causes of action have not met with success in the United States. (See *Donohue* v. *Copiazue Union Free School District* (1979) 47 NY 2(d)440 and *Torres* v. *Little Flower Children Services* (1984) 64 NY 2(d) 119), although the authors speculate the US courts may in the future allow a plaintiff student to recover damages for educational negligence (see *BM* v. *State* (1982) 649 P 2D 425).

As *X* v. *Bedfordshire CC* demonstrates the mere existence of statutory duties does not show there is a corresponding private law right to damages for breach of the statutory duties.

Second, the establishment of a duty either in contract or tort between a student and the educational institute does not seem problematical — it is the content of the duty and the proof of damage that raise the prospect that educational negligence is largely an academic mind teaser rather than a realistic cause of action.

Will the concept of educational negligence (if taken to its extreme) mean that boring lawyers can sue their schools on the basis that if the schools had made the now boring lawyer study harder, the lawyer would be a computer scientist with the wealth of Bill Gates, alternatively if the school had been more creatively orientated the boring and stressed lawyer would now be completely relaxed and living in Nimbin or would merely be a very interesting person and not a lawyer.

Part II also contains a chapter dealing with employment law as it relates to teachers and covers both the contractual and industrial relations regime as relevant to teachers. This chapter complements the section in Part I devoted to government sector teacher employment and at least to this reviewer's mind logically should have been placed in that part.

The work is an excellent digest documenting the law as it stands as well as providing some insights into possible developments and trends. It will no doubt be of much interest to those involved in education, particularly teachers, school administrators, school councils, those involved in teacher unions and public servants involved in the administration of the State School system. While the concept of "educational negligence" to a practising lawyer appears to be a distraction, the work is well researched, comprehensively footnoted and cross-referenced to relevant legislation and case law. Each chapter helpfully contains a list of further reading. It is a book which will be found useful by a wide readership.

P.W. Lithgow

Land Acquisition (4th edn)

By D. Brown
Butterworths, 1996
pp. i–viii, Preface xi, Table of Cases x–xxi, Table of Statutes xxii–xxviii, 1–192, Index 193–195

THE first edition of this work was published in 1972. It is a tribute to the author's dedication and scholarship and a recognition of the excellence and relevance of the work that this book is now in its fourth edition.

The book aims to be a general text applicable to both Australia and New Zealand. As the Preface notes the work is written as a specialist text and seeks to:

"... describe the issues which arise in each and every State and Territory of Australia and New Zealand when a Government institution sets in motion the resumption of privately owned land ... [and] ... to provide a lead into the statutory provisions and the burgeoning case law."

The work is broken down into four chapters. The chapter on "Acquiring" (Chapter 1) includes discussion of administrative law remedies to challenge or

object to the decision to acquire. Chapter 2 deals with "Procedure".

Chapters 3 and 4 deal with "Compensation" and "Valuation" respectively. It is in these areas that significant challenges and developments in the law may occur.

The various State and national land acquisition statutes do not make provision for payment of compensation to persons who occupy land under customary or aboriginal law. However, as a result of the High Court's *Mabo* and *Wik* decisions together with the as yet unresolved response of the Commonwealth and State Parliaments to these decisions, there may yet be a new area of endeavour for valuers and lawyers.

The *Native Title Act 1993* (Commonwealth) provides that once a claim is established such titles are equated with the concept of freehold, however cases such as *Mason* v. *Tritton* (1994) 34 NSWLR 572 demonstrate the right to fish based upon traditional laws and customs may be a recognisable form of native title at common law or pursuant to the *Native Title Act*. If such an interest is extinguished then this may raise new arguments and concepts in relation to the valuation of such rights. It is the chapter on valuation which highlights the scope for difference and variation in the valuation of interests in land.

The law has recognised that land may have a "special value" over and above its market value. (See *Pastoral Finance Assoc. Ltd* v. *Minister* [1914] AC 1083 and subsequent cases.) However, this "special value" is not based on subjective matters such as sentimental or emotional attachments and cannot exceed the commercial value of the special advantage of the land. Certain of the legislative regimes for compulsory land acquisition do allow for compensation for solatium but generally if available such compensation is restricted. Whether the law will develop in these areas awaits legislative action and judicial consideration.

Each chapter is in substance a "part" in turn divided into subheadings each with its own heading and numerical reference. At the end of each section relevant footnotes are found, however in general the citation of cases is done within the text. The Indexes refer the user to the relevant numerical reference enabling quick access directly to the relevant section within the chapter.

The 4th edition is sure to find ready acceptance with specialised practitioners, however this reviewer suspects that many in the broader community, particularly lawyers, valuers, politicians, public servants, native title claimants and landowners (whether by Crown grant, native title or otherwise) may seek guidance from this text in the coming years. Indeed it will be interesting to see whether a 5th edition contains new law either by way of statute or the development of traditional principles by the Court arising from the recent acceptance and recognition of native title in Australia.

P.W. Lithgow

Conflict of Laws in Australia (6th edn)

By P. B. Nygh
Butterworths, 1995
pp: i–lxxviii, 1–600

PROFESSOR Nygh's work is the leading Australian text on conflicts of law. Its focus is on how conflicts can arise due to interactions between legal systems and what laws are applicable in resolving these conflicts.

Conflict of Laws in Australia was first published in 1968. This sixth edition incorporates some of the major developments in the early 1990s in this area of the law. They include the Commonwealth's enactment of the *Foreign Judgments Act 1991* and the *Service and Execution of Process Act 1992*, the Government's ratification of the Hague Trusts Convention and the implications of several important High Court decisions.

The book is divided into nine parts, with 37 chapters. The first part involves a general discussion on conflicts of law within Australia. Parts 2 and 3 cover procedural issues and the enforcement of judgments. There is then an extensive analysis of choice of law in part 4.

Over 100 pages are devoted to family law issues in part 6. Obligations, property law, issues of bankruptcy and corporations are also given separate treatment in parts 5, 7 and 8. The last part examines devolution on death.

Peter Nygh's *Conflict of Laws* is a substantive work which clearly and thoroughly treats all aspects of the conflicts problem in its uniquely Australian context. By dealing with this area of the law on both theoretical and practical levels, not only students but also practitioners should find assistance and appeal in this book.

Anna Ziaras

A Civil Action

By Jonathan Harr
Random House, New York 1995

Wrongful Death: A Medical Tragedy

By Sandra M. Gilbert
W.W. Norton & Company, New York 1995

BOTH of these books relate to the aftermath of wrongful deaths leading to civil litigation that was less than satisfactorily resolved to the plaintiffs. The first is a well-researched tale of "toxic tort" litigation with the protagonist being the plaintiffs' lawyer and the second is the highly personal account of medical malpractice as seen by the widow of the deceased.

Harr's prize-winning book has netted him a multi-million dollar contract from Robert Redford for the film rights. This reviewer believes it to be too complex a tale to be the subject of a two-hour screenplay and the recent twenty-hour Steven Bochco "maxi" series *Murder One* springs to mind as a suitable treatment for its dramatic portrayal as all but 40 of its 500 odd pages is devoted to the litigation.

Jan Schlichtmann is a young and successful personal injuries lawyer with little trial experience. His success has been the result of tenacious investigation and pretrial diligence. He has been lucky in picking up some "good" cases and his expensive presentations to the defendants' insurers are powerful trial previews that persuade them in many cases to settle. When they don't Schlichtmann is ready to proceed to trial with all the hubris of one who has yet to lose a case. (In one case, upon the conclusion of the parties' cases and prior to it going to the jury, he rejects a $1 million settlement offer to the surprise of the judge and his fellow members of the personal injury bar. When the jury return with a $4.7 million verdict his decision is vindicated but the reader is left in no doubt that Schlichtmann is a person capable of sailing close to the edge.) Consequently Schlichtmann is brash and arrogant and some elements of his persona do not engender our sympathies. He goes to trial and both wins and loses after a monumental lawsuit that has the reader changing his opinion and bleeding for Schlichtmann who is the victim of less than honest expert witnesses, perjurious

defendants and a (perhaps unethical) opposing lawyer and a legal system that throws up its hands at the prospect of retrying an epic case and side-steps its responsibility on appeal.

The result is that after nine years on the one case we see every participant except Schlichtmann rewarded — at one stage the plaintiffs are concerned that their lawyer will commit suicide — he is left in debt and thoroughly disillusioned with the practice of law.

Harr's tale includes all the politicking and legal manoeuvring before, during and after trial and whereas there is a danger of boring the pants off the reader, Harr renders it a gripping yarn by making the procedure intelligible and explaining the motivation of the players to the reader — after it was all over the author extensively interviewed all the players including the jury members which is precluded in our jurisdiction.

Two companies have, over many years, solved the problem of disposal of their manufacturing waste by merely dumping it. The waste subsequently leached into the underground water table exploited by the local water authority which drew water from two wells in the vicinity of the dumping area. A number of local residents, including the children succumb to baffling cancers (acute lymphocytic leukemia) leading to premature death and artificially induced multiple sclerosis where one of the dumped chemicals, Trichloroethylene, has the effect of "degreasing" the myelin sheath of the nerves.

Harr's well-researched and detailed reporting is reminiscent of *The New Yorker* style and this reviewer was not surprised to see Harr's account of the investigation into the 1994 crash of a USAir Boeing 737 approaching Pittsburgh published in that magazine last year.

Sandra Gilbert, a published poet and Professor of English at the University of California at Davis has written a personal memoir of her grief following the "adverse event" whereby her husband, also an academic at UCD, failed to survive routine prostate surgery at UCD's Medical Centre, a leading teaching and research hospital. Her litigation was settled for an undisclosed small sum — her purpose in litigating failing — her purpose was to find out exactly what had happened during the surgery because none of the medical staff would explain — possibly had she been told there would have been no litigation. The failure of the medical staff to so explain was no doubt engendered by the hospital's legal representatives in addition to the inability of the medical staff to accept that their treatment could fall short of their own high standards. The hospital and the surgeon involved were of the highest repute (a family friend had made enquiry of colleagues at the National Cancer Institute to learn that the surgeon was held in the highest regard) and yet, the patient had succumbed to posthaemorrhagic anemia (i.e. bled to death) despite massive transfusions of blood in the post operation recovery room. Notwithstanding constant testing and monitoring, no one was following up on the tests which gave warning of the bleeding until three hours had passed by when it was too late despite the massive transfusions.

This highly personal account of a layperson's interaction with the professions (both medical and legal) is an interesting read but this reviewer cannot envisage it being made into an entertaining screenplay. I may be wrong; I often am, but I never suffer doubt.

MMP

Conference Update

April 14–15 1997: Buenos Aires. South American Regional Conference: Contact IBA.
17–18 May 1997: Cannes: Eighth Telecommunication Services Competition Law in Europe Seminar: Contact IBA.
24 May 1997: Sydney. Credit Code Update Seminar. Contact Tel. (03) 9699 5400, Fax. (03) 9696 4414.
28 April–2 May 1997: Kuala Lumpur. IPBA Seventh Annual Conference. Contact Phillip Bushby. Tel. (02) 9223 7888, Fax (02) 9223 7878.
1–5 May 1997: Hong Kong. Family Mediation Course. Contact Dispute Resolution Centre, Bond University. Tel. (07) 5595 2039, Fax (07) 5595 2246.
3 May 1997: Melbourne. Family Law Conference. Contact Patricia Palmon. Tel. (03) 9602 3111.
3 May 1997: Sydney. Alternative Dispute Resolution Association Tenth Birthday Conference and Dinner. Contact Stephanie Marcinow. Tel. (02) 9363 4029, Fax (02) 9363 2930.
7 May 1997: Washington. Fourteenth Annual Franchising Committee Seminar. Contact IBA.
7–9 May 1997: Ankara. West meets East — Intellectual Property at the Cross Roads Seminar. Contact IBA.
12–16 May 1997: Cyprus. Bonds, Guarantees and Insurance in International Construction Contracts Seminar. Contact the Study Group for International Commercial Contracts. Tel. 0181 7857050. Fax 0181785 7649
27–31 May 1997: Los Angeles. Mediation Skills Intensive Workshop. Contact Dispute Resolution Centre, Bond University. Tel. (07) 5595 2039, Fax (07) 5595 2246.
29 May–1 June 1997: Hong Kong. Conference on Constitutional Transition. Contact CGT 1997 Secretariat. Tel. 852 2528 6136. Fax 852 2865 1528.
1–6 June 1997: Thessaloniki (Salonika). Sixth Greek/Australian International Legal and Medical Conference. Contact Jenny Crofts Consulting. Tel. (03) 9429 2140, Fax (03) 9429 2140.
3–7 June 1997: San Francisco. Second World Congress on Family Law and Children's and Youths Rights. Contact Gail Hawke. Tel. (02) 9252 3388, Fax (02) 9241 5282.
10 June 1997: New York. Anti-Trust and Trade Law Seminar. Contact IBA.
11–13 June 1997: New York. International Bar Association Fiftieth Anniversary Celebration. Contact IBA.
12–13 June 1997: Hobart. Insolvency Practitioners Association of Australia Annual General Meeting and Annual Conference. Contact Conference Design. Tel. (03) 6224 3773, Fax (03) 6224 3774.
23–27 June 1997: Bali. Criminal Lawyers Association of the Northern Territory Sixth Biennial Conference. Contact Lyn Wild. Tel. (03) 9723 3173, Fax (03) 9723 3597.
2–9 July 1997: Gold Coast. Environmental and Planning Dispute Resolution. Contact Dispute Resolution Centre, Bond University. Tel. (07) 5595 2039, Fax (07) 5595 2246.
9–15 July 1997: Gold Coast. Family Mediation Theory and Skills Workshop. Contact Dispute Resolution Centre, Bond University.
10–11 July 1997: Brisbane. Beyond the Adversarial System: Changing Roles and Skills for Sports Tribunals and Practitioners. Contact Ngaio Buck. Tel. (07) 3864 5203.
2–19 July 1997: Bali. Australian Lawyers Mediation and Negotiation Conference. Contact Rona Bowrey. Tel. (02) 9692 9022, Fax (02) 9660 3446.
27 July 1997: London. Tenth Anniversary Congress of Society for the Reform of the Criminal Law. Contact Damian Bugg. Tel. (03) 6233 6649, Fax (03) 6234 2892.
10–15 August 1997: Reading, England. International Mergers and Acquisitions Seminar. Contact the Study Group for International Commercial Contracts. Tel. 0181 785 7050, Fax 0181 785 7649.
22–24 August 1997: Sydney. ALJA Asia-Pacific Courts Conference. Contact Carol (02) 9241 1478, Fax (02) 9251 3552.
27–31 August 1997: Manila. Fifteenth Biennial Law Asia Conference. Contact Law Asia Secretariat, Darwin. Tel. (08) 8946 9500, Fax (08) 8946 9505.
1–7 September 1997: Florence. Thirty-Fifth Annual Congress and International Association of Young Lawyers. Contact Michelle Sindler (02) 9210 4444, Fax (02) 9235 2711.
25 October–1 November 1997: Cape Town. Eleventh CMJA Triennial Conference. IBA Tel. 44 171 629 1206 Fax 44 171 409 0456.

Who Got Out on the Wrong Side of the Bed, Then?

JUSTICE Oliver Wendell Holmes, Jr. who served on the U.S. Supreme Court (1902–1932) was rated as one of 12 "greats" in an evaluation of the performance of the 96 justices who had served between 1789 and 1967 wherein the justices were accorded a grade of "great", "near great", "average", "below average", and "failure" by 65 American law school deans and professors of law.

In 1983 the director of the Texas State Law Library presented a distillation of "everyone's choice for the greatest justices of the U.S. Supreme Court" with Holmes as the leading votegetter in the company of such revered luminaries as Marshall, Cardozo, Brandeis, Hughes, Black and Warren.

However, in an article on the film *The People* v. *Larry Flynt*, writer Christopher Hitchens commented, in passing, on Holmes thus:

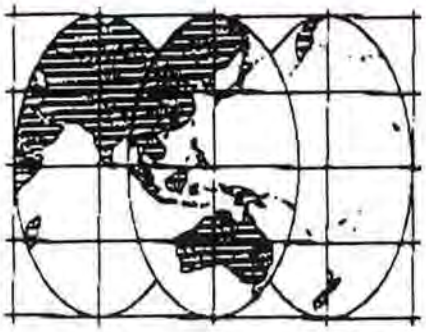
> . . . Oliver Wendell Holmes, one of the most overrated and hypocritical legal figures in modern American history.
> If a top-drawer creep like Holmes can be an American hero, why not a bottom-feeding pleb like Larry Flynt?
> . . ., [Flynt] won a landmark case before the Supreme Court of the United States — the very court once disfigured by the membership of O.W. Holmes

We understand that Hitchens doesn't think much of Mother Teresa either.

Henry Abraham, *Justices and Presidents: a Political History of Appointments to the Supreme Court* (3rd ed, 1992) Appendix A, p.412.

Christopher Hitchens, "Hustler with a cause", 435 *Vanity Fair* 92 at 94 (November 1996).

Brien Briefless



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"The extraordinary pace of growth and trade, technological innovation and the advent of the global village have propelled the role of lawyers in the region into unprecedented pre-eminence," according to LAWASIA President Mr. Donald Yap.

"The challenge for legal professionals is not only to stay abreast of developments in their field, but also to appreciate the ramifications of economic, political, trade and business developments in this dynamic region."

LAWASIA exists to help its membership remain at the forefront of their profession.

LAWASIA — in the Asia and Pacific Region

Formed to foster professional relations between lawyers, businesses and governments in the region, LAWASIA promoted the rule of law, the administration of justice and the protection of human rights.

LAWASIA is a unique organisation representing the legal profession in the Asia and Western Pacific region. LAWASIA membership extends from Iran to Pakistan in the west, through India and Sri Lanka to Japan, Korea and the Cook Islands in the east and Australia and New Zealand in the south Pacific.

LAWASIA has held consultative status with the United Nation's Economic and Social Council since 1981, as well as observer status with the World Intellectual Property Organisation.

LAWASIA — 1997 Biennial Conference, Manila

LAWASIA has convened 14 biennial conferences in locations across the region including Kuala Lumpur, Manila, Jakarta, Tokyo, Seoul, Colombo, Bangkok, New Delhi, Hong Kong, Perth, Sri Lanka and Beijing.

In 1997, the Biennial Conference will be LAWASIA's premier event. The five day conference will be held in Manila from August 26 to 31 and hosted by the Integrated Bar of the Philippines.

It will feature prominent keynote speakers including the President of the Republic of the Philippines, His Excellency Fidel V. Ramos, former President, Corozon Aquino, Malaysia's Deputy Prime Minister, His Excellency Anwar Ibrahim and from India the Hon. Andres R. Narvasa and Justice J.S. Verma.

The Seventh Chief Justices Conference will be held in conjunction with the Biennial Conference.

The conference promises to continue the well-established LAWASIA tradition of providing stimulating program content within a context of exemplary hospitality and enjoyment. Opportunities for exposure to the colourful Filipino lifestyle and tours of Philippine attractions should make this conference a memorable experience.

In fact, the relaxed social settings of LAWASIA's biennial conferences typically lead to delegates establishing steadfast professional relationships with their peers across the region.

Between conferences, LAWASIA's 24 Standing Committees provide opportunities for members to focus on specific areas of law. In 1996, for example, special interest conferences were held on general practice, labour law, energy law, intellectual property and comparative constitutional matters.

LAWASIA — A Professional Association

LAWASIA publishes a number of authoritative publications. The Business Law Section, LAWASIA's newest flagship section, has produced two Business Law magazines and a specialist publication on joint ventures and holds specialist conferences.

Civil and Human Rights are not forgotten as the Human Rights Standing Committee has produced several Human Rights Bulletins and has been pro-active in sending letters of intervention on behalf of individuals who have been improperly detained.

LAWASIA membership makes you part of a progressive, international, professional association. Membership inevitably brings unrivalled opportunities for development and networking in the region.

LAWASIA — Membership Benefits

LAWASIA members earn entitlements including:

LAWASIA publications such as the Update Newsletter, Directory of Members and LAWASIA Journal and the discounted registration at LAWASIA conferences. Section members receive relevant publications such as the popular Business Law magazine; the Comparative Constitutional Newsletter and The Human Rights Bulletin; additional discounts for early bird registration; discounts for young lawyers under 35, as well as for students and those from developing countries.

LAWASIA membership for individuals is excellent value at US$80 plus section membership. Special rates and benefits are available to law firms and corporations. LAWASIA Secretariat is located in tropical Darwin, Australia's north-most capital city. The Secretariat can be contacted internationally by fax on 61 8 89469 505 or 61 8 89469 500 by phone or E-mail on lawasia@lawasia.asn.au.