VICTORIAN BAR NEWS
No. 106
SPRING 1998

THE 1998/99 BAR COUNCIL

Welcomes: Justice Carter, Justice Weinberg, Judge O'Connor and Judge Anderson

Equality of Opportunity for Women at the Victorian Bar

Jeanette Richards Interviews Merkel J. on the "Docket System"

The Bar's Reception for the Judiciary

Family Law Bar Dinner at the Australian Club

An Interview with Victoria's First Legal Ombudsman, Marg O'Donnell

ISSN 0150-3285

VICTORIAN BAR NEWS

No. 106 SPRING 1998

Contents

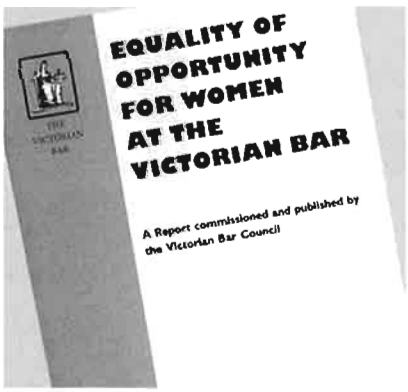
Cover:
The newly elected 1998/99 Bar Council, photographed in the Bar's refurbished library at Owen Dixon Chambers East.

Welcome Justice Carter

Welcome Justice Weinberg

Welcome Judge O'Connor

Welcome Judge Anderson



Equality of Opportunity for Women at the Victorian Bar — Report

The Bar's Reception for the Judiciary

VICTORIAN BAR COUNCIL
for the year 1998/99
* Executive Committee

Clerks:

B *Curtain Q.C., D.E. *(Chairman)*
A *Derham Q.C., D.M.B. *(Senior Vice-Chairman)*
R *Redlich Q.C., R.F. *(Junior Vice-Chairman)*
M Richter Q.C., R.
A Phipps Q.C., M.B.
B *Kaye Q.C., S.W.
H *Rush Q.C., J.T.
F Dunn Q.C., P.A.
B *Ray Q.C., W.R. *(Honorary Treasurer)*
W Brett Q.C., R.A.
A Pagone Q.C., G.T.
G Santamaria P.D.
P Allen D.
D Beach D.F.R. *(Assistant Honorary Treasurer)*
H McGarvie R.W.
D Dixon Ms. J.
D McLeod Ms F.M.
D Riordan P.J.
W Burnside Ms C.M.
W Neal D.J.
G Hinchey Ms S.L.
A Moloney G.J. *(Honorary Secretary)*
R Burchell Ms S.E. *(Assistant Honorary Secretary)*

Ethics Committee

B Zichy-Woinarski Q.C., W.B. *(Chairman)*
D Lyons Q.C., J.F.
D Bongiorno Q.C., B.D.
A Wright Q.C., H.McM.
A Macaw Q.C., R.C.
F Bryant Q.C., Ms D.L.
H Young Q.C., P.C.
B Hill Q.C., I.D.
G Lacava P.G.
G McMillan Ms C.F.
B Maidment R.J.H.
G Crennan M.J.
B Grigoriou, Ms G. *(Assistant Secretary)*
D Davies Ms J.
S Connor, Mrs F.J.S. *(Secretary)*

Chairmen of Standing Committees of the Bar Council

Applications Review Committee
R Redlich Q.C., R.F.

Bar Constitution Committee
D Barnard Q.C., J.E.

Child Care Facilities Committee
R O'Brien Ms F.I.

Conciliators for Sexual Harassment and Vilification
G Castan Q.C., A.R.

Counsel Committee
F Curtain Q.C., D.E.

Equality Before the Law Committee
G Lewitan Q.C., Ms R.A.

Ethics Committee
B Zichy-Woinarski Q.C., W.B.

Human Rights Committee
D Fajgenbaum Q.C., J.I.

Indonesian Legal Aid Committee
D Fajgenbaum Q.C., J.I.

Legal Education Committee
G Burnside Q.C., J.W.K.

- *Readers' Course Sub-Committee*
  G Burnside Q.C., J.W.K.
- *CLE Sub-Committee*
  S Santamaria Q.C., J.G.

Past Practising Chairmen's Committee
D Francis Q.C., C.H.

Professional Indemnity Insurance Committee
B Curtain Q.C., D.E.

Victorian Bar Dispute Resolution Committee
S Martin Q.C., W.J.

VICTORIAN BAR NEWS

Editors
Gerard Nash Q.C. and Paul Elliott

Editorial Board
David Bennett Q.C.
Julian Burnside Q.C.
Graeme Thompson

Editorial Consultant
David Wilken

Editorial Committee
Peter Lithgow (Book Reviews)
Richard Brear (Editorial Assistant)
Carolyn Sparke, Mal Park, Bill Gillies, and Gary Cazalet
David Johns and Michael Silver (Photography)

Published by The Victorian Bar Inc.
Owen Dixon Chambers,
205 William Street, Melbourne 3000.
Registration No. A 0034304 S

Opinions expressed are not necessarily those of the Bar Council or the Bar.

Printed by: Impact Printing
69–79 Fallon Street,
Brunswick Vic. 3056

This publication may be cited as (1998) 106 Vic B.N.

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

Humour Therapy in Court

LET THERE BE NO SMILING AT THE BAR

ACCORDING to recent newspaper reports judicial jocularity is now *verboten*. The Chief Justice of the High Court has, quite properly, drawn attention to the fact that, when humour creeps into the proceedings, litigants may get the impression that their cases are not being taken seriously. We agree that it is important that no such false impression be given. However, litigation, both at first instance and in the appellate courts, involves a high degree of stress and tension. Humour can in many cases ease the stress and the tension, lower the level of formality and reduce the clinical atmosphere.

Gravitas and responsibility can reside, and can be seen to reside, behind a warm personality and a smiling face.

Legal argument involves more than the making of submissions to be accepted or rejected by the court. It involves (or certainly should involve) an analysis of the problem through the exchange of ideas and arguments between Counsel and the Bench. The flow of such ideas is not inhibited, but may be facilitated, by the occasional touch of humour.

All of us would prefer that our medical advisers and the surgeons who operate on us were efficient, competent and businesslike. We would not, however, want them to be brusque, doctrinaire and aloof. The very word "clinical" conveys an impression of inhuman (and uncaring), antiseptic efficiency. Confidence in the surgeon is much greater, not less, when the patient discovers that the surgeon is a warm caring human being with a sense of humour than it is when the surgeon shelters himself behind a mask of cold technical efficiency. Similarly, witnesses are more at ease and litigants less tense when they see the human side of justice.

The courts are in the service industry and, while judges should take care not to make light of the problems of litigants, they should not present to the public the cold face of clinical detachment.

JUDICIAL INDEPENDENCE AND CUSTOMER SATISFACTION

We have consistently in these pages stressed the importance of judicial independence and the need to ensure that the role of legislature, executive and judiciary be kept separate. At the same time, we have acknowledged that, as a matter of political reality, in many cases there is no real separation of executive and legislature. This fact, not contemplated by the draftsman of Magna Carta or the Bill of Rights, makes it even more important that the judiciary's independence be preserved in every way.

The judiciary is not, however, above the law; and, in this consumer-oriented society, it is not even above the law of supply and demand. The judiciary, like all members of the legal profession, provides a community service, one which is basic to the maintenance of our democratic society. It is necessary, in an increasingly iconoclastic age, that this service be provided expeditiously and well. The development of "managed" lists is a major step in ensuring such delivery.

It is important that the determination of cases not be unnecessarily delayed, whether by pleading amendments, by unnecessary interlocutory steps, by the unavailability of judicial personnel or by delay in the delivery of judgment.

It is not uncommon for there to be significant delays between the completion of a hearing and the handing down of judgment. It is also quite common for a litigant to amend his, her or its pleadings not just once or twice, but many times. One cannot help but wonder whether a statement of claim might be more precisely prepared and more carefully fitted to the available evidence if the plaintiff were required to swear that the allegations in the statement of claim were true. Equally one cannot help but wonder whether many defences, filed in the hope that the plaintiff will be unable to prove his or her case, would disappear if a defendant could only deny a fact which he or she was prepared to swear was false and could only refuse to admit a fact if he or she was prepared to swear that he did not know whether it was true or not.

As the cost caused by delays in litigation and the greater amounts of paper that can now be marshalled on either side have increased, the accessibility of justice to the average member of the community has proportionately declined. There is a great need for the system to become both speedier and simpler. If it does not, there will be more and more pressure upon, and tendency for, the executive to seek to organise the running of the judicial system.

JUDICIAL INDEPENDENCE AND THE USE OF REMOVAL POWERS

Judicial independence is also challenged, it would seem, when s.72 of the Commonwealth Constitution is used to provide a basis for a witch-hunt focusing on the actions of a member of the judiciary which occurred prior to his or her appointment. The section was not

designed for such a purpose. It was designed to remove from office a person who has misused or misbehaved in his or her office or who has become incompetent to carry out the duties of that office. To use the section to analyse the pre-appointment behaviour of a member of the court may provide Australian taxpayers with a circus of the kind which U.S. Senate enquiries into proposed appointees provides for the citizens of that country. It does not, however, enhance the standing of the judiciary. It erodes its authority.

EQUALITY BEFORE THE LAW

In the Autumn issue this year we pointed out that there were now two classes of accused in Victoria. We suggested that this introduced a degree of inequality unacceptable in a civilised society.

Since then, of course, what appeared to be a "rat-bag fringe" has emerged as a political force. It is no longer universally accepted even among our legislators that all citizens of this country should be treated equally before the law and should have equal rights under the law. A political force has emerged which feeds on the disappointed expectations and financial deprivation which many people in our community have suffered since we had "the recession we had to have".

It has emerged because the major political parties have in great measure failed to meet the needs of people in rural communities and people living at the bottom end of the socioeconomic spectrum. This new party is not, however, concerned with establishing equality of opportunity or equality of responsibility. Its mouthpiece seems to say there shall not be equality of opportunity for all Australians. Each Australian should not bear the primary responsibility for his or her own fate. Rather it says loudly and clearly, if not always grammatically, that there shall be unequal treatment of certain groups in society and that those groups should bear the responsibility for the woes of others.

It is not surprising, therefore, that the 10-year-old daughter of one editor, watching an ABC program on the rise of the Nazis, commented: "The only difference between Pauline Hanson and Adolf Hitler is that Hitler had more power".

This statement may appear both exaggerated and alarmist. It must be remembered, however, that there was a time when Hitler and his followers were regarded by the German establishment as being rather comic. As is Ms Hanson today. Hitler passed beyond that stage. Ms Hanson's racist policies, though discriminatory, are as yet vague, as were those of the Nazis before they came to power.

This is not a column in which political comment is normally appropriate, nor do we normally indulge in it. We have, of course, been critical of the present State Government, and we were critical of the Government before it, in relation to matters legal. But we find it impossible to sit quietly by and say nothing while the very principles of the rule of law are being threatened — and seriously threatened — by ignorant and not very intelligent bigots who, if they know anything of history, know nothing of the lessons that it should teach.

Australia today is not the Weimar Republic in 1933. The Australian basic philosophy is one of equal opportunity, egalitarianism and that of giving everyone "a fair go". One Nation would seem anxious to change that.

In Animal Farm some animals were "more equal than others". In the One Nation Utopia, as in Nazi Germany, some animals would be "less equal" than others. Concepts such as separation of powers and the rule of law would almost certainly impose an unacceptable restraint on the power of a One Nation executive.

Should any real element of power come into the hands of Ms Hanson and her followers, an independent judiciary will be the major, if not the only, bulwark of our freedoms. The Premier of Victoria was one of the first political leaders to articulate clear and total opposition to One Nation. And for this we congratulate him. He should now recognise that the legal profession and the judiciary are an important ally against intolerance and injustice.

In the fight to maintain democracy and freedom it is important that the independence and strength of the judiciary be affirmed and consolidated, not whittled away.

The Editors

We Were Wrong

OUR last edition contained an excellent article on the "Victorian Bar's Centenary Celebrations Revisited". The "I" and the author of the article was not identified. It was, of course, His Honour Justice Charles of the Court of Appeal, who was, in 1984, Chairman of the Bar Council and who made the memorable speech in reply to the Chief Justice of Australia. This omission has been noted by James Merralls in the correspondence column. A quick reading of the article may have made it appear that Michael Crennan was the author. He was simply the mischief maker.

Council Committed to Elimination of Gender Discrimination at the Bar

THE recent Bar Council elections produced a field of candidates of great talent and ability. For the Bar to continue to function effectively, it is important that able members of the Bar offer to contribute as members of the Council, and as members of the various Bar Council committees. I thank all the Bar Council candidates, both successful and unsuccessful, and look forward to the challenges ahead with confidence that the Bar Council will be able to meet such challenges and enable the Bar to continue to thrive. With the changes we are constantly undergoing, and the steady flow of new barristers, it is encouraging to see how much membership of the Bar is valued, and the number of people prepared to ensure this continues.

The business of the Bar Council in recent months has been dominated by the *Equality of Opportunity for Women at the Victorian Bar* Report, which was commissioned, and has now been published, by the Council. It is the first independent report in any jurisdiction to focus specifically on the position of women barristers, and on the extent of gender discrimination in an independent Bar. I recommend that you read the summary of the Report which is set out in this issue of *Bar News* on page 26. Copies of the Report are available for inspection in the Bar Library, and can be obtained at cost from the Bar Council offices.

The Bar Council has welcomed the Report, and has restated its commitment to the elimination of gender discrimination at the Bar. Gender discrimination runs counter to all the ideals of our Bar, which include justice, fairness, and an unbiased recognition of merit. The Bar Council has always taken pride in its open-door policy, and has always taken pride in the success of its members, regardless of race, ethnicity, or gender.

The Bar Council has never been so naïve, however, as to believe that women

at the Bar experience no discrimination. In 1993, in response to a Senate inquiry into gender issues and the judiciary, the Bar Council conducted its own research into gender discrimination at the Bar. The Council reported to the Senate the finding that a majority of women then at the Bar (57%) "had experienced discrimination, insult or denigration on account of her own gender, her client's gender or her witness' gender from a member of the Bar or person holding judicial office or had experienced judicial failure to understand gender issues". The research also found that approximately 20% of male barristers harboured "a latent hostility to or resentment of women as barristers".

In response to these findings the Bar Council acted to assist women barristers. The Council appointed an Equality Before the Law Committee, implemented a system of parental leave, and appointed sexual harassment conciliators. At that time the Bar made a number of public statements regarding gender discrimination in the legal profession, and in particular submitted the view to the Senate that more women should be appointed to the courts. The Bar Council believes that these actions had a significant effect upon the position of women at the Bar.

However, anecdotal evidence made it clear to the Bar Council that these earlier actions and statements had not delivered a comprehensive solution. Although the numbers of female readers were steadily increasing, the Council was particularly disturbed by rates of attrition of women barristers from the Bar. It was also clear to the Council that it lacked the resources and expertise to gather for itself the relevant data needed to define the problem.

For these reasons, the Bar Council commissioned this latest Report from independent researchers Associate Professor Rosemary Hunter (of the Melbourne University Law School) and Ms Helen McKelvie (an independent legal researcher). After many months of research, the Report confirms the view that problems of gender discrimination at the Bar have not vanished, and that the Bar Council requires the assistance of a number of bodies, particularly those organisations that brief barristers, in order to implement an effective solution to the problem. The Report also highlights attitudinal problems within the Bar. From this Report it is now clear that the Bar Council, together with its committees and associations, with the clerks, with courts, with solicitors and with public agencies, needs to consider a much wider range of activity in order to eliminate, so far as possible, barriers to women's careers at the Bar.

The Report challenges the Bar Council to "lead from the front", and sets out a number of recommendations which are directed specifically at our organisation. Foremost of these is the recommendation that the Bar Council hold workshops to discuss the Report. The Council acted on this recommendation immediately, establishing a working party to consult with the relevant bodies, to conduct workshops on the Report, and to draft

the Bar Council's preliminary response to the other recommendations in the Report. The working party is a sub-committee of the Bar Council, with representatives from the Women Barristers Association and the Equality before the Law Committee. The working party has already consulted widely with the clerks, with the Women Barristers Association, and Australian Women Lawyers, with the Law Institute, law firms, and with a number of Commonwealth and State statutory bodies.

The Bar Council is pleased with the level of cooperation that has been shown in these consultations. We are particularly grateful to the Law Institute for information they have provided, and for their willingness to work closely with the Bar on the Report. The Bar Council is planning to officially launch both the Report, and the Bar Council's preliminary response, at a seminar and dinner on Friday 9 October 1998. Papers on the position of women at the Bar will be delivered by Phillips CJ, Susan Crennan Q.C., Law Institute President Andrew Scott, Professor Marcia Neave from the Monash University Law School, and Catherine Walter. Invitations for the seminar have been sent to a wide range of people and organisations, in Victoria and throughout Australia, who have expressed interest in the Report. The Bar Council is particularly pleased and honoured that Justice Mary Gaudron has agreed to speak at the dinner.

The speed with the which the Bar Council has acted on this Report is a reflection of the Bar Council's belief that gender discrimination is an extremely serious issue, and that no time should be lost in addressing it. However, it is now clear that, even if the Bar Council were to execute immediately every recommendation set out in the Report, the issue of equality of opportunity for women would not disappear overnight. The preliminary response now being prepared by the working party will be only the first step in a long-term plan of action which will not limit itself to the relatively narrow scope of the recommendations. We hope that the seminar and dinner on 9 October will provide further inspiration for ways to address the problem of gender discrimination, and we will ensure that the working party, as a standing committee of the Bar Council, will continue in the role of recommending to the Bar Council ways of addressing gender issues.

I would encourage all members of the Bar, having considered the Report, to present the working party with their written views as to how the Bar Council might proceed with this long-term plan. Not all members of the Bar will agree with all of the Reports' findings and recommendations. Gender discrimination in any field or profession is a complex, and sometimes contentious, issue. However, we must all accept that gender discrimination, as with any discrimination based on prejudice, is intolerable at the Bar; and we must recognise the need for a response to this significant Report which is substantial, multi-faceted, and sustained.

David Curtain
Chairman

Three Legislative Reviews Reviewed

WHEN considering possible changes to the law, it is always desirable that all points of view are taken into account. The following reviews, which I imagine will be of significant interest to members, involve substantial consultation and input from the public.

RIGHT TO SILENCE REVIEW

Despite some statements to the contrary, (mostly by the media), the right to silence is not about to be abolished nor has the Government reached a decision on any change to the law.

As members would be aware, the matter has been referred to the bipartisan Scrutiny of Acts and Regulations Committee, which I requested inquire into such issues as the appropriateness of allowing comment and the type of comment that might be made where an accused remains silent. I also requested the Committee consider the desirability of introducing legislation equivalent or similar to the English scheme.

While the Committee was given three terms of reference, it decided to consider only the *consequences* of exercising the pre-trial and at-trial rights to silence, and not the rights themselves. That is, the inquiry is *not* concerned with the abolition of these rights — a suspect will still have a choice about whether he or she answers police questions and an accused will still have a choice about whether or not to testify.

It should be noted that there are different approaches across Australian jurisdictions to the issue of allowing comment where an accused person exercises his or her right to silence. Only Victoria and the Northern Territory have legislation which forbids comment on an accused's right to silence at trial either by the judge or prosecutor.

There have been suggestions that this state's prohibition on comment may now be anachronistic: as the jury will be aware of the accused's failure to testify, they may be assisted by some comment from the judge. It is arguable that the accused may suffer detriment by remaining silent if a jury reads more into the silence than they are entitled.

I understand that the United Kingdom's changes in 1994 now have bipartisan support from the Conservative and Labor parties and have not received any adverse comment from the Judiciary.

The Committee released its discussion paper for public comment and has recently held public meetings to obtain written and oral submissions from interested groups and individuals. These findings will be presented to Parliament in the Spring session. In addition, the Committee embarked on an extensive fact-finding mission to the United Kingdom to investigate the systems in place there.

A decision is yet to be reached. Any changes that may be made will be carefully considered and will take into account all views presented at the public hearings.

SALE OF LAND ACT REVIEW

Members would also be aware that the Government has been reviewing the *Sale of Land Act* 1968, and since March has sought and received substantial input from both the legal profession and interested property and consumer groups.

The function of the existing Act is to regulate important aspects of the sale of land in Victoria — namely, aspects of terms sales, subdivisional sales, deposits, cooling off and pre-contract vendor's disclosure.

While the Act has generally been well received, various bodies over the last decade have requested that in addition to fine tuning, further reforms were needed.

I commissioned a review which began as a discussion paper circulated to interested parties at the beginning of the year. The submissions received were then considered in a report by a consultant who made recommendations which were then considered by a government interdepartmental steering committee.

Both the discussion paper and the final report of the consultant, Peter Shattock of Phillips Fox, Solicitors were circulated to a number of government departments and groups, including:

- Law Institute of Victoria
- Australian Consumers Association
- Consumer Credit Legal Service
- Real Estate Institute of Victoria
- Estate Agents' Council
- Victorian Conveyancers Association
- Registrar of Titles.

The proposed Bill reflects a balance and seeks to rationalise and update the existing Act, reduce conveyancing costs, is fairer for vendors regarding the release of deposits and technical breaches of the Act, and makes it fairer for purchasers by providing for vendor warranties and by expanding the vendors' disclosure obligations, the cooling-off provisions and the ability to rescind where the property has been destroyed.

The amendments also confer concurrent jurisdiction on the Victorian Civil and Administrative Tribunal for conveyancing disputes.

I anticipate that the new Bill will be introduced into Parliament during the Spring 1998 sittings.

SURVEILLANCE DEVICES BILL

Public consultation is also being sought on a proposed Surveillance Devices Bill which will be introduced shortly.

Since the *Listening Devices Act* 1969 was passed, there have been significant advances in technology. The use of video cameras, tracking devices and data surveillance devices, although already being used fairly widely, are not covered by current legislation.

To address this, a small working party was set up to recommend changes. The changes identified are extensive enough to warrant repeal and replacement of the current Act.

Last month, my Policy Unit released a discussion paper which contained an exposure draft of a proposed Bill. The purpose of this was to allow interested groups and other members of the community to have input into the Bill which aims to:

- provide the police with access to the technology necessary to achieve effective law enforcement; and
- achieve an appropriate balance between individual privacy and the enhancement of community security.

The paper was released for public comment last month and submissions closed on 21 August. The paper explains the operation of the Bill in plain language, explains how the Bill sits in the context of related legislation and raises issues on which interested members of the community (particularly private investigators) may wish to comment, including:

- the scope of operation of the proposed Bill
- the use of surveillance devices by police at the request of the occupier of the premises — for protection of the lawful interests of the occupier
- the use of overt or covert optical surveillance devices to record activities in areas open to the public, for example, changing rooms
- use of surveillance devices by the media
- the question of what is private activity and how it should be covered.

Under the Bill, the covert use of surveillance devices by the police is subject to judicial supervision in the same manner as the use of listening devices under the 1969 Act. Provision has been made for telephone warrants and emergency authorisations to allow for flexibility on urgent situations but the police *remain* accountable to the courts.

While there is very little in the way of legislation to protect a person's privacy, the Australian community considers it an important issue. However, while the protection of personal privacy is important, protecting society against crime is a competing public interest. Given that many criminals now have access to the most advanced technology, it is important that the police have access to surveillance technology to detect and prevent serious crime. Any legislation regulating non-consensual surveillance by the police must therefore seek to balance these two competing public interests.

I believe what is proposed achieves that balance — although the final result will depend on what submissions are received.

Jan Wade MP
Attorney-General

The Victorian Bar Inc.

LEGAL PROFESSION TRIBUNAL — PUBLICATION OF ORDERS

UNDER section 166 of the *Legal Practice Act* 1996 ("the Act"), the Victorian Bar Inc., as a Recognised Professional Association, is required to provide certain information in relation to orders made by the Legal Profession Tribunal ("the Tribunal") against any of its regulated practitioners. On 25 August, 1998 *Bar News* Supplement 8/98 was issued to advise details of an order of the Tribunal dated 2 June 1998 regarding a regulated practitioner, Mr Ivan Himmelhoch.

LEGAL PRACTICE (AMENDMENT) BILL 1998

On 4 September, 1998 the Victorian Bar received a copy of this Bill following its second reading in Parliament. The Bill is a response to discussions between the Department of Justice, The Legal Practice Board, the Law Institute and the Bar on ways in which the *Legal Practice Act* 1996 can be improved. The Bar Council will prepare an analysis of the impact of the Bill on the Bar for the information of members.

Cellar Notes

Dear Sirs,

ANOTHER tailpiece, this time to the revisiting of the Bar's centenary celebrations in the Winter issue, which I assume was contributed by Stephen Charles.

Readers with an historical bent may think that S.E.K. Hulme and I relied too readily upon a secondary source, Sir Arthur Dean's history, in adopting various dates. But reference to that source will reveal the absence of more satisfactory pieces of primary evidence. Minutes, if any, did not survive and Sir Arthur had to rely upon notes in the Australian Law Times. The fact that the Bar committee or council had to be re-established from time to time indicates that early attempts to constitute a continuing body failed. Three reasons may be suggested. First, after the fusion Act, there was strong opinion that a body professing to regulate a group practising exclusively as barristers would have been an illegal organization. Second, most of the leading members of the Bar were actively engaged in politics and the federation debate and so had more pressing concerns. For other members of the Bar, after the crash of '93 the struggle to survive in gainful activity was paramount. Meagre though the evidence may have been, twenty years on I should give the same advice.

As to the wine: a red of the '76 vintage *was* found and a stock was set aside. In those days probably only Bests, Chateau Tahbilk and Brown Brothers made wine in Victoria in sufficient quantities for such an operation. A Brown Brothers wine was chosen, to be labelled at the time of celebration. When the centenary came in 1984 the wine had vanished. The Hickinbotham family, who leased the Maltby vineyard near Geelong, came to the rescue and the centenary was celebrated with an Anakie Cabernet Sauvignon '83. The surplus was sold through the Essoign Club. Possibly because it was selected for immediate consumption, the wine's staying power proved no longer than that of the early Bar committees. My cellar book records "complex berry flavours: long finish: attractive wine" on 16 August 1989. I did not broach it again until 9 September 1994 ("past its peak"). By 22 April 1995 it was "fading" and by 13 May of that year "gone".

If appropriate wine is required to celebrate the centenary of the Bar Council on 20 June 2000, a multitude of sorcerers can be found from within the Bar's own ranks. I can think of Port Phillip Estate, Yarra Edge, Peerick, Riddoch Estate, Britannia Falls and, of course, the vineyard owned by one of the authors of the 1978 report, Arthur's Creek Estate, which I am reliably informed has a supply of '91 cabernet sauvignon, made to last and bottled in magnums, double magnums and Imperiales (= eight standard bottles).

James Merralls

"Verbatim" Undoctored

Editor/s

I note your references to *Osland* v. *The Queen* in the latest column "Verbatim". As the column indicates, his Honour Justice Callinan had the courtesy (and precision) to refer to me by my correct title. Does this mean that I am bound to refer to the books (if any) of the editor/s of "Verbatim" in court before "Verbatim" has the courtesy (or precision) to recognise it?

Jocelynne A. Scutt (Dr)

PS. Incidentally, although I hold two doctorates of law, I do not, of course, hold it against his Honour that he did not adopt the German approach in this regard. JAS

It appears that Dr Scutt's complaint is that we quoted verbatim from the transcript of the proceedings in the High Court. We thought it inappropriate to "doctor" the transcript. We do, however, regret that our failure in this respect may have caused Dr Scutt some unhappiness.

The Editors

Justice Carter

THE Honourable Justice Heather Carter was welcomed to the Family Court of Australia on 27 May 1998, before a large crowd of well-wishers, including her family, solicitors, members of the Bar, and her many friends. It was very apparent that Her Honour's appointment was not only popular, but was also perceived as one that will make a significant contribution to family law in Australia.

Her Honour was born in 1944 in Newcastle. There she grew up and while at the university met and married her husband Dick. At a time when they had three young children, Her Honour felt the need to make a busy life even busier, and began to study law in her imagined free time. Thus began a career that was to become, second only to her family, foremost in Her Honour's life.

On 1 June 1972 Her Honour was admitted to practice in Victoria and was employed as a solicitor with Tony Rose, and later, with Colin Lobb at Mount Waverley, where she was then living. Her Honour signed the Roll of Counsel on 14 September 1978. Reading with Brind Woinarski Q.C. she served her apprenticeship in the Magistrates' Courts, which were then scattered throughout the suburbs of Melbourne and country Victoria. She served it well, developing her skills as an advocate and relishing the role of cross examiner in a great variety of cases. She has always held the belief that advocates who spend their early years in the rough and tumble of the Magistrates' Court gain experience which is invaluable in later years. At this time Her Honour also managed to accommodate the needs of her growing family and the increasing demands of an executive wife, as well as indulging her passion for rugby, gourmet cooking and fine wining and dining. Her Honour seemingly had time for everything. Her curry parties on the Queen's birthday weekend in June were legendary.

An outstanding memory and exceptional organizational skills have always helped Her Honour. Problems have never been daunting to Her Honour, only challenging. Her full attention and expertise were always given readily, as her two readers, Robin Hines and Keith Nicholson, and the many junior barristers who have sought her advice, will attest.

Justice Carter

At the Bar Her Honour fast developed her reputation as a feared advocate, who would steadfastly pursue her client's interests, giving the same detailed attention no matter what their cause.

In the early 1980s, Her Honour began to practise exclusively in family and de facto relationship law, and soon became a leading advocate in that area. She appeared in numerous cases in the Supreme and County Courts as well as the Family Court, which included both interstate and circuit work. She attended the Bendigo circuits over a period of many years, not only gaining many friends, but also a first-hand knowledge of the particular difficulties of country practitioners and litigants. Her concern when many circuit courts were closed is well known.

Her Honour's willingness to participate in the activities of the Bar,

particularly in her chosen area of family law is illustrated by her interest in reviving the Family Law Bar Association, which had become less active after its then president, Justice Kay, was appointed to the court in 1986. She became its secretary, and worked tirelessly for the association until she left for Perth at the end of 1990. Her Honour reorganized the social life of the sixth floor of Four Courts, and did the same when she went to the tenth floor of Owen Dixon West.

Of the considerable successes Her Honour had during her years of practice, it is perhaps one of her losses in the Supreme Court which stands out, because it helped to bring the issues concerning all children, not only those of married partners, under the umbrella of the Family Court. In 1981 the High Court decided in the case of Vitzdamm-Jones that the Family Court had no jurisdiction to entertain the applications of a step-mother to either bring her own proceedings for custody or access or to intervene in the previous proceedings between her then dead husband (the father) and his first wife (the mother), such proceedings having abated on his death, the parents at that time being the joint custodians of the child in question. Her Honour became involved in the case some 12 months later, when she valiantly sought access on behalf of the step-mother in the Supreme Court. While she did not succeed in her application, due to the particular facts of the case, Her Honour nonetheless brought into focus the difficulties, inadequacies and possible injustices of a system that distinguished between children. The state referred its legislative powers with respect to the custody, guardianship and access to children to the Commonwealth in 1986.

It was a well-known fact that Her Honour did not readily concede any advantage to the other side (whether real or perceived). On one occasion, before Justice Smithers in the Family Court, Her Honour's opponent had an obvious ankle injury, with plaster, walking stick, etc. His Honour was sympathetic, "stay sitting down, tell me if you are in need of a break, etc.". Her Honour was at the time suffering from sciatica and was also in pain, but without any obvious signs. She told his Honour that she was also suffering. His Honour responded, "Mrs Carter, there is no need; you will not be disadvantaged."

All barristers know that, if possible, cases could and should be discussed and negotiated in convivial surroundings. Her Honour adhered to this fine tradition of the Bar, and where possible, always suggested lunch. The late Justice Treyvaud of the Family Court was aware of this (and indeed, had participated in some of these lunches). On one occasion, when Her Honour and an opponent of like mind, were appearing before him on a Monday morning, but in the second case in his list, Justice Treyvaud said, "You can both go and have lunch; you will not be reached before tomorrow". His Honour's directions were followed day by day, as the case continued not to be reached. By the Thursday, Her Honour invited Justice Treyvaud to redirect the representatives to chambers rather than lunch, as they were fast becoming financially insecure, lacking in work incentive, and too accustomed to the good life.

During the 1980s, some of the women Family Law practitioners, (most poor and struggling), decided that birthdays should be celebrated. Her Honour was given the job of organizing the first venue. Used to eating well, Her Honour chose Mietta's. Many participants took one look at the price list and immediately lost their appetites. Even those who only ordered a salad had to return to husbands and partners that evening explaining why there was a large shortfall in the next mortgage payment. In spite of her organizational skills, Her Honour was never allowed to arrange a down-market function again.

It was a great loss to the Bar, her children and grandchildren, her colleagues and friends when Her Honour's husband Dick was transferred to Perth at the end of 1990. Her Honour's career took yet another turn. While there she expanded her interests and experiences, visiting mines, travelling extensively in Africa, South America, Chile and Japan, learning new languages, and enthusiastically and wholeheartedly entering into this new career.

However, the law was firmly embedded in her system, and she could not remain away from it for long. Refusing the safer option of a solicitor's office, she joined the small Perth Bar, and during the first few months became even more of an expert at crossword puzzles. Perth, being slow to accept easterners, took a while to appreciate Her Honour's worth; but when they did, her career again began to blossom. It was at this time, that she added the West Coast Eagles to her sporting interests. Within a few years, Her Honour was appointed a Magistrate in the Family Court of Western Australia, where her ability, hard work, and dedication made her a great asset to the court.

Never being settled for too long, by 1996 she was on the move again, Dick being transferred back to Melbourne. In March 1996, she recommenced at the Melbourne Bar. This time it was different. As soon as it was known that Her Honour was back, it was as if she had never been away. Her career had only been on hold. Her Honour resumed her very busy practice with her usual energy and application.

In Her Honour's reply at her welcome, she said she brought no Olympic achievements to the court. If Olympic achievements are measured in terms of courage, ability, dedication, and hard work, Her Honour has an abundance of these. She brings these with her to the bench, and they will well serve all the litigants who come before her.

We all hope that Her Honour has at last found a permanent home. Her Honour is well supported by her husband, Dick, her children Bronwyn, Neil and James, her grandchildren, Stephanie, Ewan, Nicholas, Katherine and Meagan, as well as by her colleagues and friends, all of whom wish her a long and rewarding career on the Family Court bench.

What is Voluntas?

VOLUNTAS is the name of a Secretariat conducted by the Victorian Law Foundation to co-ordinate the provisions of information about Pro Bono legal services of which it maintains a national register. Practitioners looking for Pro Bono work can use the register to find conveniently located services where their particular interests and services are needed.

If you are interested in doing Pro Bono work, contact:

Voluntas
Ms Noelene Gration
C/- Victorian Law Foundation
Level 8, 224 Queen Street,
Melbourne Vic. 3000
DX 491
Telephone: 9602 2877
Facsimile: 9602 2449
Email: noeleneg@viclf.asn.au
URL: http://www.vic.alf.asn.au

Justice Weinberg

AT a ceremonial sitting of the Federal Court, judges of the Federal, Supreme and High Courts, academics, and a former Governor-General gathered with members of the Victorian Bar to welcome the Honourable Justice Mark Samuel Weinberg. Together with His Honour's family and friends they joined in welcoming one of Victoria's most respected and admired lawyers to the bench of the Federal Court. The crowd was so large that television monitors were used to permit people outside the courtroom to hear the proceedings, a fitting tribute to someone so universally admired.

This entire welcome to His Honour could be done by merely reciting his achievements in the law, which are so numerous that they would run for pages. His Honour is, however, more than just an outstanding lawyer, he is also a husband, and is friend and colleague to many people both within and outside the Bar.

His Honour was born in Sweden in 1948 where his parents fled from the Nazis. From there the family went to America and finally to Australia in 1958. He attended Melbourne Boys High School matriculating in 1965 with outstanding results, and received the Monash University Undergraduate Scholarship for Law, among other prizes, in that year. In 1970 he shared the Supreme Court Prize at Monash University and then attended Oxford University, undertaking a Bachelor of Civil Law, where he became both the Vinerian Scholar and the winner of the Wadham College Prize. These achievements are all the more outstanding when it is realised that His Honour completed in one year, a program that normally takes two years.

Justice Weinberg

His Honour completed his articles in Sydney in 1974 and then returned to Melbourne briefly before taking up the position of visiting Professor at York University in Canada in 1975 at the ripe old age of 26. This was the beginning of his Honour's "flirtation" with academia. He returned to Melbourne and commenced as a lecturer in law at Melbourne University where he remained until 1985 when he resigned from the university whilst Dean of the Faculty of Law. During the time that His Honour was teaching at the university he also was practising at the Victorian Bar, having signed the Roll of Counsel in December 1975. Despite the amount of time that was involved in his lecturing responsibilities, his abilities as an advocate, most particularly as an appellate advocate, became quickly apparent and in the period 1979–81 he was involved in *Alexander*, *Keeley & Alexander*, *Ditroia & Tucci*, and *Bonollo*, among many other cases. After 11 years as a junior, His Honour took silk on 25 November 1986. He was appointed to the position Commonwealth Director of Public Prosecutions in 1988, a position he agreed to undertake for three years, returning to the Bar in 1991.

His achievements in terms of important cases cannot be overstated. He was, as an advocate, involved in most of Australia's important decisions in the criminal law. His love of, and belief in,

the law also cannot be overstated. This can be seen from comments he made during his welcome:

I make no apology for the fact that my career led me into the criminal law, a branch of practice which is both challenging and of vital importance. No dispute about any amount of money can never ultimately be as important as the rights of an individual to due process.

His Honour has been married to Rose in excess of 25 years and they have a daughter Ingrid, aged 10. Rose and Mark worked together very seldom, possibly as a result of that immortal line uttered by Chris Dane Q.C., when opposed to Rose. She had at a late stage brought His Honour in to lead her on a matter of law. When Dane heard this he yelled out across the courtroom — "O.K., so are mum and dad coming too?"

His Honour's activities outside the law are varied, including the intellectual pursuit of bridge, the ferocious devotion to the wide world of wrestling, his love of the golf game on his computer (sometimes even while pretending to be working), his kickboxing, with his own personal trainer!!! His Honour's sartorial elegance has certainly improved over the years in his working life, but unfortunately the process has not been noted in his sporting attire. His Honour played tennis on a regular basis and his preferred clothing consisted of a pair of beige two-way stretch tight shorts, black socks and white runners, or as Rose would describe it — "Rumanian resort wear."

The "reserved" breakfast table at Dominos has been domain of his Honour for many years and reputations have been made and destroyed at this table, with his active participation. More importantly friendships have been forged that will endure, advice has been freely given and taken, and much camaraderie and fellowship of the Bar has been generated. The laws of defamation prevent some of the more memorable moments from the table being repeated. He has made many lasting friendships at the Bar and his loyalty to, and belief in, his friends is strong.

Weinberg J. will be missed by the Bar, but there is no doubt that he will be an asset to the bench of the Federal Court, a model of patience, lucidity, good humour and above all just.

How those at the Bar perceived his Honour can be summed up by an event that happened shortly after the news of his elevation became public. The doors of my chambers burst open and a very worried looking Chettle stood there and said:

Who will we get to replace Weinberg? Who is going to do the cases that involve *real* law?

No one knows the answer to that. The Federal Court is very fortunate.

Judge O'Connor

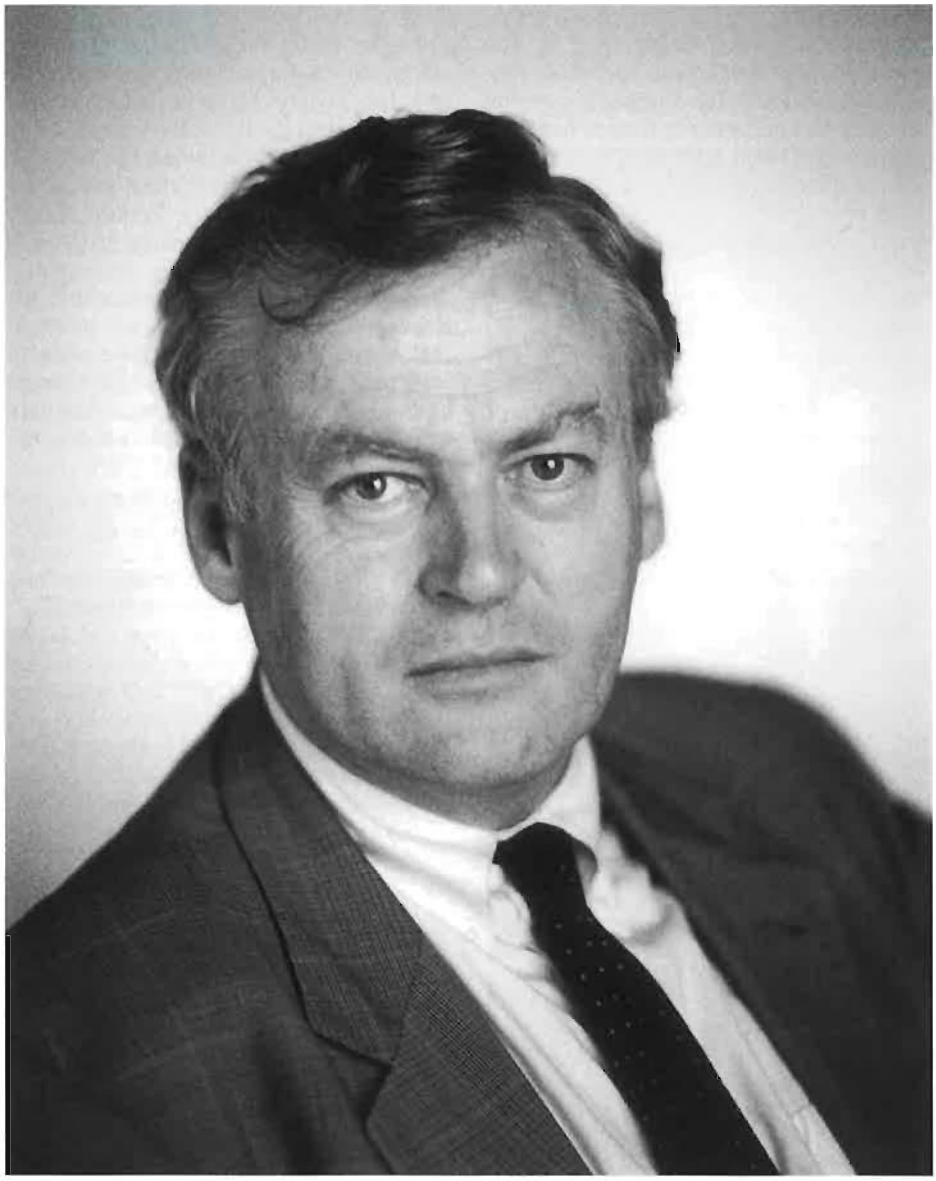
Former Victorian on NSW District Court and to head State Administrative Decisions Tribunal

ON 10 August, Kevin P. O'Connor was sworn in as a judge of the NSW District Court, the largest and busiest trial court in the country. He was welcomed to the bench by the NSW Attorney General the Hon. Jeff Shaw Q.C. MLC. Present at the bar table was another former member of this Bar, and Victorian judge, Justice Alwynne Rowlands of the Family Court. Mr Shaw separately announced that Judge O'Connor had been appointed to a three-year term as the inaugural President of the NSW Administrative Decisions Tribunal, its just established equivalent of Victoria's VCAT.

Judge O'Connor's appointment marks another highlight in a career of a western suburbs boy, a former member of this Bar, and one who has given significant public service to this state's and the nation's legal infrastructure.

Born in London of Irish stock, Kevin Patrick O'Connor arrived in Australia at the age of five. His family settled in Sunshine where he was educated at the local parish school and St Joseph's CBC, North Melbourne. He attended the Melbourne University law school and subsequently, on a Fulbright Scholarship, the University of Illinois at Urbana-Champaign. In the mid-1970s he returned to lecture in contract at the Melbourne law school. Among the "egos in orbit" there at the time were the now Sackville and Weinberg JJs, RRS Tracey, Marcia Neave, and Cheryl Saunders. In 1976 he commenced his Hume Highway commuting when he was coaxed to Sydney to join the newly established Australian Law Reform Commission. Under the energetic chairmanship of Kirby J he joined an illustrious band of law reformers that included John Cain, F.G. Brennan Q.C., G.J. Evans, Murray Wilcox Q.C., J.J. Spigelman, J.H. Karkar, Bryan Keon-Cohen, and Jocelynne Scutt. As principal law reform officer he led the team that was responsible for the research and discussion papers for a number of important early reports of the ALRC including Complaints Against Police, and Privacy.

In 1980 he returned to Melbourne, joined the Bar and read with Craig Porter in Latham Chambers. He developed a general practice with a focus on administrative law. One of his notable cases was *Australian Conservation Foundation* v. *Environment Protection Appeals Board* [1983] VR 385 where he appeared with Dr Gavan Griffith Q.C. and Susan Kenny. He left the Bar in 1983 to take up the position of Director of Policy and Research in the then Law Department. In this role he was the intellectual force behind the team that drove the extensive law reform agenda of the early years of the Cain government under Attorneys General John Cain, Jim Kennan Q.C., and Andrew McCutcheon. He assembled a formidable team that included Tom Gyorffy, Spencer Zifcak, Alison Champion, Neil Rees, and Des Lane. Significant legislation that Judge O'Connor



Judge Kevin P. O'Connor

was involved with included freedom of information, regulation of in vitro fertilisation, establishment of the Victorian AAT and early initiatives to reform the police powers and the criminal law. In addition to directing the legislative program he was Secretary of the Standing Committee of Attorneys General for five years. Over that period this institution, too, made a deal of progress on a number of uniform law projects. While maintaining an onerous day job His Honour found time to produce the weekly 3CR program, compered by June Factor, of the Victorian Council for Civil Liberties as it was then known.

In 1988, having been promoted to the position of Deputy Secretary of the Law Department under Attorney-General Kennan, Judge O'Connor was appointed to the position of Australia's first Privacy Commissioner. With that appointment came an ex-officio position on the Commonwealth Human Rights and Equal Opportunity Commission and relocation to Sydney with his wife, Bernardette, and three school-age children.

As Privacy Commissioner his first task was to guide the implementation in the federal bureaucracy of the information privacy principles that emanated from his old stamping ground, the ALRC. He also worked behind the scenes with departments and agencies to ensure that the Australia card substitute, the tax file number system, met the high privacy standards that he brought from his civil liberties background. He was also responsible for the controversial but ultimately smooth extension of the Privacy Act to private sector credit reference providers. At the time that his appointment expired in 1996 there was bipartisan agreement to extend the Privacy Act to the entire private sector. While this was later abandoned, the fact that the Commissioner had been able to facilitate a climate of acceptance of such an extension is testament to his expertise and respect in the area. Under Judge O'Connor the office of Privacy Commissioner also produced a number of leading-edge discussion papers on community attitudes to privacy issues, medical records, genetic testing, and data matching. The Privacy Commissioner also acquired an international reputation with Australia regarded as having one of the most advanced privacy protection regimes in the western world. He addressed and convened a number of conferences on privacy issues. After his term as Privacy Commissioner he was retained as a consultant on privacy by the Hong Kong government. As a member of HREOC Judge O'Connor presided over a number of hearings of discrimination cases, represented Australia at the UN Commission on Human Rights, and acted as executive Commissioner on a number of occasions.

In 1997 Judge O'Connor was appointed as Chairman of the NSW Commercial Tribunal, that state's peak credit and home building tribunal. He is also honorary Chairperson of the Public Interest Advocacy Centre.

Despite being increasingly drawn into the Sydney milieu Judge O'Connor has retained his links with Victoria. He maintains contact with a number of friends and colleagues from his days in the public sector, has an annual family skiing trip to Mt Hotham and is usually seen at Flemington in the spring racing season. He remains an avid Geelong supporter and, in the absence of a better alternative, is sometimes seen at Sydney Swans games.

NSW has turned to Judge O'Connor to preside over the bringing together of a number of merits review tribunals and formerly court-based appeal rights. His journey to the Bench in Australia's oldest jurisdiction has not been conventional — but what is conventional? In an era of national law firms, reciprocity of admission and uniform professional conduct rules, state borders are now of

less significance in legal practice. Similarly professional careers often now include stints in academia, the bureaucracy, and law reform or other agencies of government. There is now no typical career in the law just as there is now no conventional route to judicial appointment. As he remarked at his Welcome, "perhaps this appointment represents a small milestone in the journey in seeing ourselves as lawyers belonging to a national legal profession rather than a series of state Bars."

In any appointment to public office it is the professional and personal qualities and values that are important. In his career to date Judge O'Connor has displayed intellectual rigour, integrity, impartiality and a sense of fairness. He is admirably equipped for the challenges ahead. New South Wales' gain is Victoria's loss.

Judge O'Connor's friends and colleagues joined him to celebrate his appointment at a reception at Donato's Restaurant on 3 September. The Victorian Bar congratulates him on his appointment and wishes him well in his judicial career.

Damian Murphy

Judge Anderson

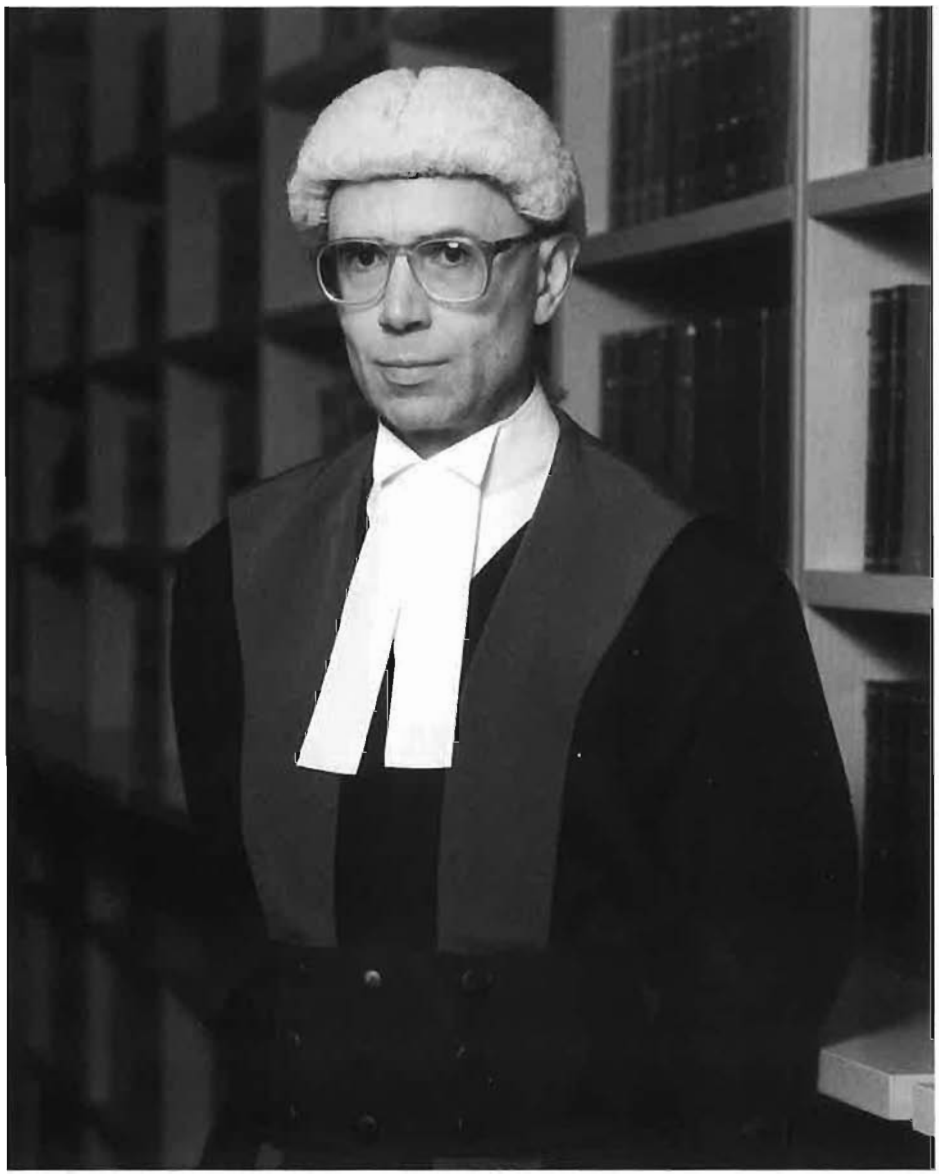
GRAEME Anderson was born in 1947 and educated at Wesley College before commencing a law degree at Melbourne University, from which he graduated in 1969.

He commenced articles at A.G. Allaway & Son and was admitted to practice on 2 March 1970. In the same month he signed the Roll of Counsel and read with Peter Liddell Q.C. His practice quickly developed from a specialist chambers practice into general commercial cases but particularly in engineering and construction contracts, banking and insurance disputes, trade practices, charities law, wills and general equity matters, as well as commercial arbitrations. The reports of the former Planning Appeals Board record his forays into the planning jurisdiction, particularly in relation to matters affecting the Macedon Shire Ranges.

As an "in demand" commercial barrister he developed and maintained a very busy practice, impressing all with industry and acuity. There were few barristers who could match the depth of his preparation of cases and he was one of the first barristers to integrate the use of computers with the preparation of a case for trial.

He had six readers, Phillip Cain, Paul Santamaria, Steven Howells, Ian Dallas, Graeme Hellyer and Andrew Donald, before taking silk in 1989.

Lest anyone suspect that his Honour's practice left no time for "extracurricular activity", he also had a very full life outside the Bar. He has five children, Sally, Hamish, Patrick, Jana and Lija and is a devoted father. He is close to each of his children and vitally



Judge Graeme Anderson

interested in their education and development.

His wife Anita is a solicitor employed in the Office of Public Prosecutions and is Latvian by birth. His Honour is very involved in the Latvian community and a strong supporter of the Latvian push for democracy. In April 1989, he and Anita visited Latvia and, in particular, the offices of the Latvian Popular Front in Riga. The Latvian Popular Front was at the forefront of the popular national uprising in Latvia. The Foreign Relations Officer encouraged them to establish a branch of the Latvian Popular Front in Australia. This they did on their return. In November 1989, the Chairman of the Popular Front visited Australia and they accompanied him to meetings with Bob Hawke in Canberra and B.A. Santamaria in Melbourne. This might be said to be covering the field. In May 1990, at the first free elections the Latvian Popular Front won control of the Parliament. The Chairman of the Popular Front became Vice President of Latvia and the aforesaid Foreign Relations Officer became the first Foreign Minister.

His Honour studied Latvian at University level and Latvian is the first language at home. There have been a number of other visits to Riga. It is unusual for the Anderson home not to be hosting at least one visitor or relative of Anita from Latvia.

Prior to 1983 his Honour's home was in Mount Macedon. On Ash Wednesday of that year, the family home was destroyed by bushfire. The story of the Anderson family's survival is both frightening and miraculous. After the fire swept through the family home, Graeme was separated from his wife, who had one child, while he had the other two. His common sense and preparedness almost certainly saved lives.

His Honour had previously been a councillor of the Shire of Gisborne from 1976 to 1978 and after the fires was a member of the Macedon and Mount Macedon District Reconstruction Advisory Committee. He was also a Director of the Australian Foundation of Aftermath Reactions, which provided trauma therapy and training of trauma therapists in association with the Cairnmillar Institute.

As a barrister Graeme Anderson Q.C. has done many pro bono cases including for the Cairnmillar Institute which was determined to be a public benefit institution, for the Playbox Theatre, and for other worthy causes.

His Honour's record keeping is remarkable and he has an index listing just about every book he has ever read. He has always devoured novels and has a genuine love of literature and poetry. Particular interests in his Honour's life include reading and collecting modern Australian and Scottish literature, canoeing, rock climbing and roganing. His interests in the law are broad and he will look forward to conducting trials in the criminal and personal injury jurisdictions of the Court as well as in the familiar commercial jurisdiction.

As everyone knows, roganing is a sport of long-distance cross-country navigation, and his Honour was introduced to this by his reader, Hellyer, in 1992. His Honour has competed in the world championships in Western Australia in 1996 where his team came 47th in a field of approximately 300 teams. His Honour is admitted in Western Australia. It would be quite wrong to suggest that being admitted over there allowed a tax deductible trip to the championships. His Honour competed at 24-hour event, sleeping for approximately 30 minutes. This is no doubt similar to the amount of sleep he was allowed per day by his leader, E.W. Gillard Q.C., in the marathon case involving St Andrew's Hospital, one of Australia's longest running cases, and one of many major construction cases in which he has appeared.

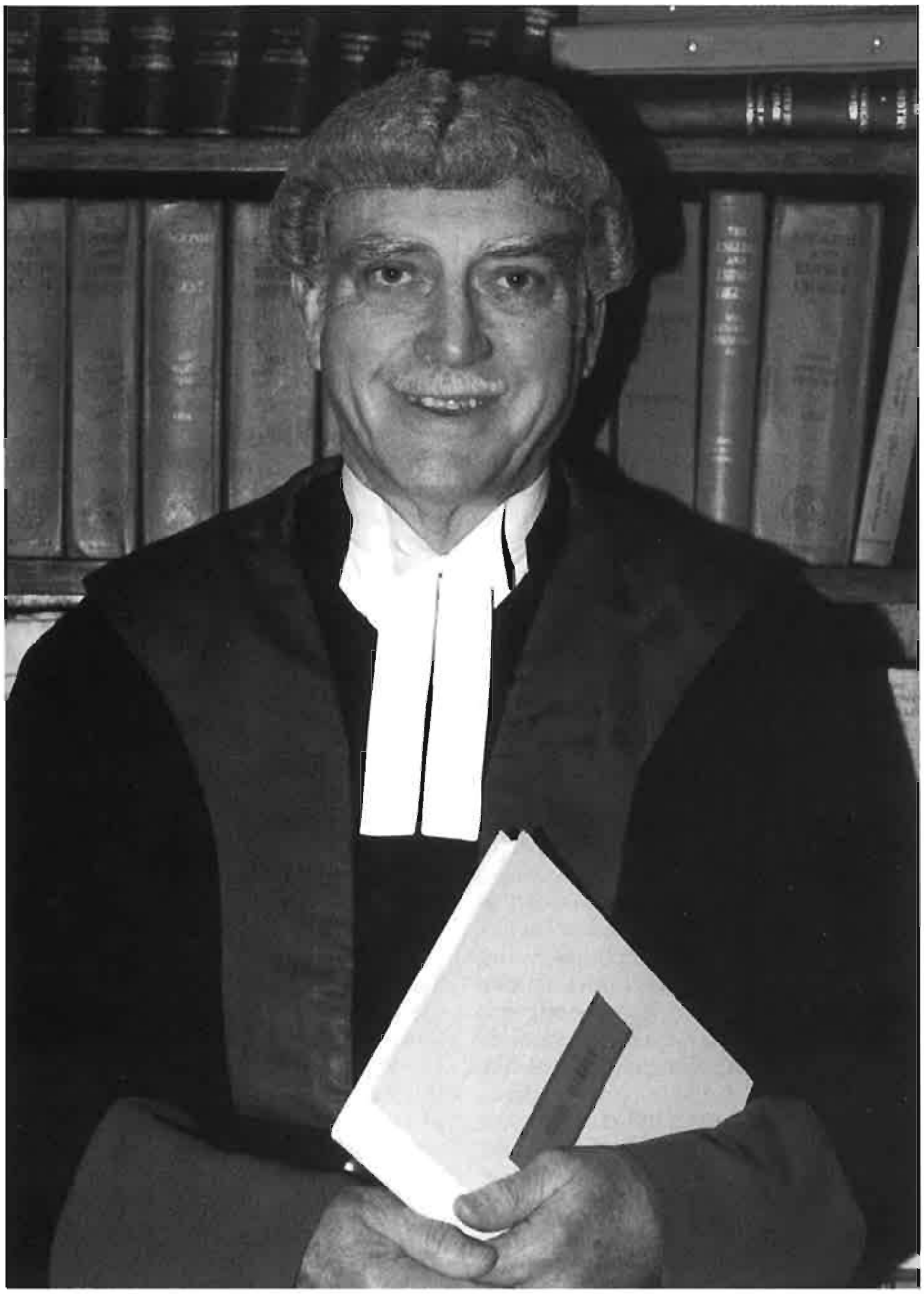
Perhaps the most telling illustration of His Honour's versatility is the case of "Sherbert the duck". In 1972, when other matters such as the change of the Federal Government after 23 years were occupying some elements of the media, His Honour grabbed the headlines in all the papers by bringing a claim on behalf of a Mrs McGindle who sued her neighbours in the Supreme Court to stop Sherbert the duck quacking. The press clippings of the day were replete with every painful pun in a sub-editor's repertoire. One columnist, Bill Peach paraphrased the Latin motto of the duck as *dum spiro, quakko* and attributed to Sir Thomas Aquinus the epithet "The essential thingness of a duck is its quackitude. No quack, no duck". Indeed, the duck was brought to Court and spent some time in a clerk's office, perhaps a relative improvement for the clerking staff!

The Bar wishes his Honour a long and fulfilling career on the County Court Bench.

Judge Norman Vickery

Major General His Honour Judge Norman Alfred Vickery CBE MC ED (1917–1998) passed away at his home on 14 August 1998, after a long illness. He signed the roll of the Victorian Bar in 1951 and was appointed a Judge of the County Court of Victoria in 1962 where he sat until his retirement in 1985.

The eulogy by his son, Peter Vickery Q.C., was delivered at St Georges Anglican Church, Malvern on 10 August 1998.



Major General His Honour Judge Norman Alfred Vickery

ON Sunday evening of 3 September 1939, Astor household radios throughout Australia crackled, those haunting words of the then Prime Minister, Mr Robert Menzies:

Fellow Australians, it is my melancholy duty to inform you officially that, in consequence of the persistence by Germany in her invasion of Poland, Great Britain has declared war upon her, and that, as a result, Australia is also at war.

No one who heard those words was ever likely to forget them. They were heard by a 22-year-old Lieutenant who had gained his commission the year before with the Sydney University Regiment. That young man was Norman Vickery.

Having completed the first part of his education at Shore Sydney Church of England Grammar School and having graduated with an economics degree from Sydney University, he was more than ready to answer the call to arms.

Like many others, he considered it his unquestionable duty to enlist for active service. Many young men of his day caught taxis to the enlisting office so as not to miss out. Thousands of men who had somehow survived the First World War managed to persuade the recruiting officers that 10 years of their lives had not existed. Many others who were under-age pretended that they had become victims of a mysterious physical phenomenon of time acceleration.

Lieutenant Vickery was one of the first to join the rush and was assigned one of the lowest Active Service Numbers — NX130.

The 2/1st Australian Field Regiment

was formed at Holesworthy, New South Wales on 31 October 1939. Its ranks were drawn from civilian recruits who had left behind the office desk, the tractor, the shop counter and the factory bench. This was to be Lieutenant Vickery's regiment.

As a young commander his first responsibility was to mould 30 Queensland miners into a disciplined battery of gunners. They were not angels. They were raw and untrained. They were undemonstrative, facetious, fiercely independent, suspicious of authority and they probably would have looked at their apparently "toffy" young Lieutenant with a more than critical eye — at least to start with. He was aged 22 years and a number of men in his battery were almost twice his age.

Lieutenant Vickery, with his extraordinary understanding of people and enduring capacity for the "common touch" was soon able to gain their undying trust and respect as their leader. These characteristics were to remain with him for the rest of his public life.

Field-Marshall Sir William Slim described a 30-man platoon as one of the four best commands in the service, because, as he said: "It is your first command, because you are young, and because, if you are any good, you know the men in it better than their mothers do and love them as much". Norman Vickery was very good at his first command. However, not even he could ever get those miners to salute officers.

On 10 January 1940 his regiment pulled out of Pyrmont wharf on Sydney Harbour aboard His Majesty's Transport *Orford* bound for service in the desert war in North Africa. The voyage was over when they arrived at El Kantara on the banks of the Suez on 12 February 1940 before travelling by train to Palestine across the Sinai desert. It must have been an enthralling sight for the young man from Sydney. In every sense it was the start of his journey through adult life.

By 16 August 1940 the unit was considered to have reached a sufficient level of training to carry out an active war role as an anti-aircraft regiment. It manned Bofors guns at Aboukir and later at Sidi Bisr and at Port Fuad.

On 4 January 1941 the then Captain Vickery was engaged in a remarkable action in Gaza.

He was detailed as Forward Observing Officer for 2/11th Battalion during the battle of Bardia to look for likely targets for the artillery. It was 4 January 1941, the second day of the Bardia battle and the Australian Army's first battle of the war.

The funeral was conducted with Military Honours

To carry out the assignment he travelled in a Bren carrier. This was a lightly-armoured, open-topped tracked vehicle, about the size of a large golf buggy; the carrier was on loan to the under-equipped Australians from the British Army. In the driver's seat was British born Lance-Corporal Syd Barker of the Queen's Own Regiment. Crowded into the vehicle were two other Australian diggers, John Fairleigh and Burnie Anley.

They suddenly found themselves in the right rear of an enemy four-gun battery which was engaging our infantry. The enemy battery was supported by a full garrison of infantry, 1000 men in all. The post was heavily armed with machine guns and anti-tank rifles as well as the four-gun field battery.

Certainly resistance had not been strong from some of the Italian forces. Many were conscripts who did not share Mussolini's grandiose dreams. Yet Vickery could not help but know that during the battle many of their gunners, professional soldiers, had tenaciously resisted, firing to the last from behind their stone emplacements.

As a gunner himself, he was well aware of the effect a high explosive shell would have on the flimsy carrier, should even one of the guns be swung around to engage it.

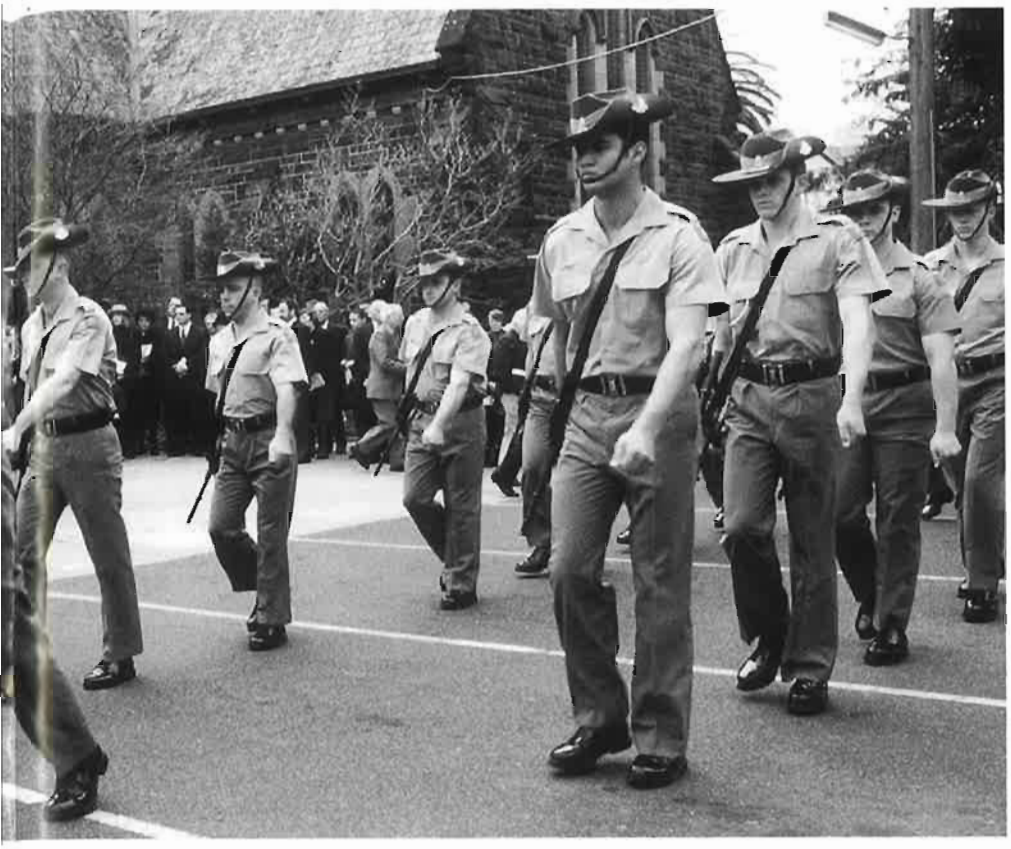
The temptation was too great, despite his carrier being armed with nothing more than an anti-tank rifle, Captain Vickery ordered the carrier up to full revs and went hell-for-leather charging at the enemy with his carrier at full bore.

The unconventional plan was to bluff his opponents into the belief that the headlong rush was the forerunner of a full frontal assault by the whole of the Australian Army.

The concept was utterly outrageous. But the luck held. "A couple of shots across their bows from the anti-tank rifle did the trick," as he once described it.

His action succeeded. He somehow persuaded the entire battery and infantry garrison to surrender.

Unruffled by his heady accomplishment the day before, on 5 January, as his official record reports, "Captain Vickery again carried out his duty with conspicuous success moving all the time in the



rear of the tanks and sending back continuous information concerning the progress of the battle."

For this courageous piece of bluff, as the regimental history describes it, Captain Vickery received the Military Cross, and Lance Corporal Barker the Military Medal. It was the first Military Cross to be awarded to an Australian during World War II. Vickery cut off two segments of his medal ribbon and privately gave a piece to the other two Australian diggers, Fairleigh and Anley, who were with him in the carrier.

The action has become something of a legend and to this day is known as "Vickery's Bluff".

It may have been through this event that he recognised his penchant for dash and persuasion, which set him on a course ultimately leading to the Victorian Bar.

As a gunner he earned the nickname "Hawk-eye", no doubt derived from his extraordinary technical skill for accuracy as a gunner. But one suspects that it may also have had something to do with that twinkle in those bolt blue eyes of his.

If it was possible to be humane in war, Vickery was such a man. In another engagement, which required shelling a town prior to its capture, the commander, the late Sir Edmund Herring, called upon Vickery's guns to keep the enemy pinned down. Hawk-eye aimed his twenty-five pounders into the town square, which he knew was vacant at siesta time. His objective was to prevent his shells causing civilian casualties.

The calculations done and double-checked by Vickery using, by the standards of today, the relatively crude printed gunnery tables, the calibration controls on the guns' sighting mechanisms whirred into action.

The town was captured with no civilian casualties caused by artillery fire from Hawk-eye's guns.

He always regarded the desert war as a relatively clean war. That is, by and large it was conducted according to norms which professional soldiers on both sides understood and adhered to. In this way, if there had to be armed conflict, at least it was possible to conduct it in the most civilized way possible. They were principles which he understood and honoured, and by fine example, exercised outstanding leadership in their application.

His humanity was also directed towards his men, with his meticulous eye for their health and well-being. He used to tell me with some pride that his first point on any tour of inspection was the cook-house grease trap. He knew full well the importance of scrupulous hygiene for the welfare of his troops. Many an ex-digger more than likely came home from those six terrible years in better health than otherwise thanks to his care and attention to detail in those very unromantic areas of soldiering.

In 1941 his appointment as Captain was confirmed and he was seconded to the Australian naval bombardment group. This carried with it the awesome responsibility of directing naval gunfire onto enemy-occupied shores ahead of our invading infantry. It took extraordinary skill and accuracy to avoid casualties among our own men and allied troops.

Jack Starke was another digger appointed to naval bombardment. I recall as a very junior barrister dealing with a simple unopposed application which the late Mr Justice Starke of our Supreme Court requested be conducted in his chambers. The formalities having been concluded, His Honour leant back in his leather chair and said: "So you're young Vickery are you? Your father and I had a *very* good time in Cairo!"

It will remain a dark secret as to precisely what they did get up to. Whatever else, one suspects Jack Starke had more than solid grounds for his comment.

He saw action in the Middle East, Ceylon, New Guinea, Borneo and the Philippines. He was appointed to the rank of Major in 1942.

It was during this time that he developed an enduring fascination with the Americans and their strange cuisine. He sometimes recalled the story when he was posted to an American ship and attended the mess with an American naval officer for breakfast. Vickery observed aghast as the American proceeded to pile his plate high with potato fritters, eggs, bacon and finally capping off the whole thing with maple syrup. The American probably became acutely aware of the bemused stare of Hawk-eye, and no doubt hoping to avert it quipped: "Say Major, would you please pass me the strawberry jelly!"

In September 1945 he was awarded the MBE for services in the South-West Pacific area prior to the termination of his active duty at the conclusion of the war in October 1945.

Following the war he pursued his first professional love as a soldier with vigour and enthusiasm.

Given the extent of his career it is not possible to detail every significant point within it. However, there were some notable landmarks, including his appointment as a Lieutenant Colonel and service as Commanding Officer of the Melbourne University Regiment from 1951–54, a period he shared with a young captain Neil McPhee as his adjutant.

To this day the Melbourne University Regiment hat badge is backed with a flourish of green felt — an inspiration of Norman Vickery's.

His further military career was graced with appointment as Commanding Officer of the 31st Medium Regiment Royal Australian Artillery in 1955, his appointment as a Brigadier in 1956, his appointment as a Major General and the Commander of the Third Infantry Division in 1963 and his appointment as the CMF Member to the Military Board in 1966 where he served until 1970 with the late Sir Philip Lynch and Malcolm Fraser, the then Minister for Defence and M.H.R for Wannon, Victoria. My father was posted to the retired list in 1974.

Even on retirement his interest in the services was never failing — he took up two honorary positions so he could never be far from his beloved guns — he became Colonel Commandant for the Royal Australian Artillery (3rd Military District) from 1976–80 and became Colonel Commandant for the Royal Australian Artillery from 1978–80.

His allegiance to his guns is recognised today with the gunner colours, the distinctive maroon and dark blue, in the ribbons on the order of service.

At the age of 71 years, the now retired General Vickery called upon the Federal and State governments to honour the 50th anniversary of the Australian Imperial Forces by paying for the pilgrimage of former diggers to their place of enlistment. As he was reported in the *Weekend Australian* of 22 April 1989, "many frail, ageing veterans will be unable to return to their units on ANZAC day without government assistance". Unfortunately, the call probably came too late. Nevertheless it was a grand and humane plan.

A feature of his service life was the many and enduring life friendships which he made — too many to name or count. Some of you are here today.

If one is to be particularly mentioned it is his former aide Captain Graeme Collins who has been of enormous help and support to the family in recent days.

The Australian Army and its serving diggers always remained dear to his heart. It is represented here today by its Official Mourner, Brigadier Graham and by the military honours provided by the Army School of Artillery, 2/10 Medium Regiment, the Army Band Melbourne and troops from Victoria Barracks, with the drill under the ever-watchful eye of the Victoria Barracks RSM, W.O.1 Mark Mason.

I know he would have loved it.

LEGAL AND MATRIMONIAL CAREERS

To catch a glimpse of Norman Vickery's careers in the law and matrimony, we need to retrace our steps a little to the end of the war in 1945.

Following his discharge he was asked by Brigadier Cremor to assist with the resettlement of discharged servicemen into university courses. This happily took him to Melbourne University.

As various accounts would have it and faded photographs would suggest, he had the dashing looks of Clarke Gable, except, as my mother recalls it, without the big ears.

He commenced his law course at Melbourne University in 1946. Another first-year student who commenced in the same year was Helen Cumming who, having completed her Bachelor of Arts degree became ambitious and took on a law course, while working as a publications officer at Melbourne University.

There the two were thrown together in what was the forerunner of what is now known as "Introduction to Legal Method".

His wife Helen describes Norman Vickery as a long streak of a thing who was very undisciplined in his attendance at lectures. He was always late for classes and often missed them.

However, there was one unerring and predictable element in his behaviour, and that was that, when he did attend, he always sat next to the beautiful but shy Helen Cumming.

At the end of the year between them they only had one set of notes my — mother's. With exams looming on the horizon and the Trinity College oak in full leaf, Norman Vickery, recognising his personal plight, advanced the following proposition to Helen Cumming: if she lent him her notes, he would marry her after the exams.

As my mother described it, it was an offer that was impossible to refuse.

He passed the exam and she failed. However, my father found it equally impossible not to honour the bargain to the full and, madly in love, they were married on 7 December 1946. That was the beginning of a 51-year partnership.

Norman Vickery graduated in law in 1950. He then commenced reading for the Bar with a renowned advocate of his day, Mr Reginald Smithers. It was in those chambers that he learned the craft and forged the skills of a professional barrister. Sir Reginald took silk the following year and was later appointed to the Federal Court of Australia where he was a long serving and distinguished Judge.

His association with Sir Reginald presented a God-sent opportunity for Norman Vickery to build upon his natural affinity for the less fortunate in society and to observe how compassion and a sense of scrupulous fairness could be applied within the legal framework.

My father went on to a thriving criminal and common law practice at the Bar. A feature of his senior practice in its later years was the number of murder cases in which he was briefed. Those were the days when if you lost such a case for your accused client, the sentence of the Court was death by hanging. The pressure must have been enormous.

He related to me one such case where the accused, faced with a charge of murder, had blurted the following unfortunate passage in his police record of interview:

Sen. Detective: So how do you explain the stab wounds?
Accused: He fell on my knife.
Sen. Detective: What, 14 times?

Somehow Mr Vickery of counsel was able to advance a defence which miraculously resulted in a manslaughter conviction.

No doubt the courage and razor-sharp accuracy of Hawk-eye of the desert put him in good stead — none of his clients ever lost their lives at the hand of the State.

Somehow, in the middle of all this, having spotted a chink in the armoury of the legal textbooks of the day, his extraordinary energy compelled him to write *Vickery's Motor and Traffic Law*, which he maintained as a service to the profession for many years. The family always thought there was a challenging irony in this project — for if he had one

obvious failing, it was his appalling driving.

Then, at the height of his career, at the age of only 44 years, he accepted an appointment to the bench of the County Court. The appointment was remarkable in its day as he was the youngest ever judicial appointment in this State.

Our most eminent of jurists has asked this celebrated question — who is the most important person in a trial? The answer is this — the litigant who loses the case, for if that person can leave the court believing that there has been a fair trial, then justice is likely to have been achieved.

This principle found a natural home in Judge Vickery's court. I recall that one day, after what had appeared to be a particularly heavy trial before my father, involving multiple counts of theft alleged against a well-known Melbourne recidivist, followed by an appropriate sentence to imprisonment, my father, to his eternal surprise received a letter from the offender — bearing the address of Her Majesty's Prison, Pentridge. It went like this:

Dear Judge, I just wanted thank you for a very fair trial. You did the right thing. I now have the opportunity to *re-habitate* [sic] myself.

Although, for obvious reasons I could never appear before him, by all accounts Judge Vickery was a well-respected and well-liked member of the Court. He was ever courteous and considerate to whoever appeared before him. His courage and independence of thought have also been described as hallmarks of his judicial career — strong but gentle; resolute and industrious; wise and tolerant — in every sense a true gentleman.

His judicial career took him to the Police Service Board where he served for ten years as its Chairman between 1972 and 1982 alongside his dear comrade, the late Graham Davidson. Clearly he was well-suited to having an involvement with service life once again and he enjoyed the work very much. His service at the Board earned him a Life Membership of the Police Association. His membership plaque hangs in his study to this day.

From 1983 until his retirement from the Bench in 1985, he was Chairman of the Workers Compensation Board of Victoria. This gave him the opportunity to give vent to his compassion for workers injured in industrial accidents who, no doubt to the ongoing horror of the insurance companies which had to pay, he probably saw as his beloved ex-diggers. Nevertheless, his even-handed approach was reflected by the fact that he was rarely, if ever, appealed.

LODGE OF FREEMASONS

In freemasonry, my father was well recognised for his contribution, rising to the position of Senior Grand Warden of the Grand Lodge of Freemasons of Victoria, which he occupied from 1973–74. The Lodge insignia are present in the church today.

HIDDEN TALENT

Norman Vickery was a man of unusual complexity, intellect and artistic talent. This latter quality was not commonly recognised in his public life.

The family had produced some fine painters, including his mother, Lillian. He himself was a painter. However, it is his photography, particularly during wartime, which deserves to be singled out. It is a truly remarkable body of work which attests to an artist's eye and a poet's heart of outstanding calibre.

He loved things of beauty and admired great craftsmanship. His own woodwork, particularly the bookshelves for each of our homes, were so perfectly crafted and fitted that they always remained as fixtures. Even the whelping box he built for our Borzoi dog Laska not only housed her and the 11 large pups she produced in one litter, but it was so precisely dowelled and dove-tailed into the wall cupboard that it could not be removed. On the sale, the estate agent was able to take much comfort in being able to lawfully represent the family home as: "Stately home in Malvern, complete with master-crafted whelping box!"

Dad loved classical music. He even took a small portable gramophone and a collection of records — old 78s — with him to the desert war as a young soldier.

Throughout his life he continued to listen to his ever-increasing collection, whilst preparing cases or writing judgments or revising *Vickery's Motor and Traffic Law* in his study. The great themes of his favourites — Rachmaninov, Mahler, Bruckner, Beethoven and Shostokovich — became second nature in our home.

THE FAMILY

There is a myriad of memories of family life with my father for myself and my sisters Marian and Karen — trips to the drive-in; eating chocolate and peanuts on Friday nights; Sunday roasts after church at St Johns, Camberwell; planting trees at Sorrento; watching Robin Hood on the Admiral television in black and white; summer journeys to Elwood beach and the agony of winter trips to Kyneton.

As a grandfather to Ingrid, Sarah, Natasha and Alexander and as a step-grandfather to Tom, Anna and Laura he showed a close, if not a doting interest in their lives. They all have deep and loving memories of his warmth, sense of fun and good advice when it was called for.

Yet no one could have experienced this multi-faceted career and been part of a family of children without remarkable support from an extraordinary wife — Helen Vickery. He was always free to pursue his public life with the confidence that his children and our home were in the very best of care.

Particularly in his last years, when he was suffering from his prolonged illness, my mother has shown extraordinary commitment, self-sacrifice and unswerving devotion to my father.

For this, I know, my father was deeply and eternally grateful.

Norman Vickery — we salute you.

Alan Kelly

ALAN Kelly signed the Bar Roll on 12 February 1976. He came to the Bar late in his professional life having both admitted to practice as a barrister and solicitor on 1 May 1935. He read with John Coldrey, now Honourable Justice Coldrey of the Supreme Court. Alan Kelly died on 26 June 1998.

The 1998/99 Bar Council

Seated Front Row (left to right):
Mark Derham Q.C.
(Senior Vice-Chairman)
David Curtain Q.C.
(Chairman)
Robert Redlich Q.C.
(Junior Vice-Chairman)

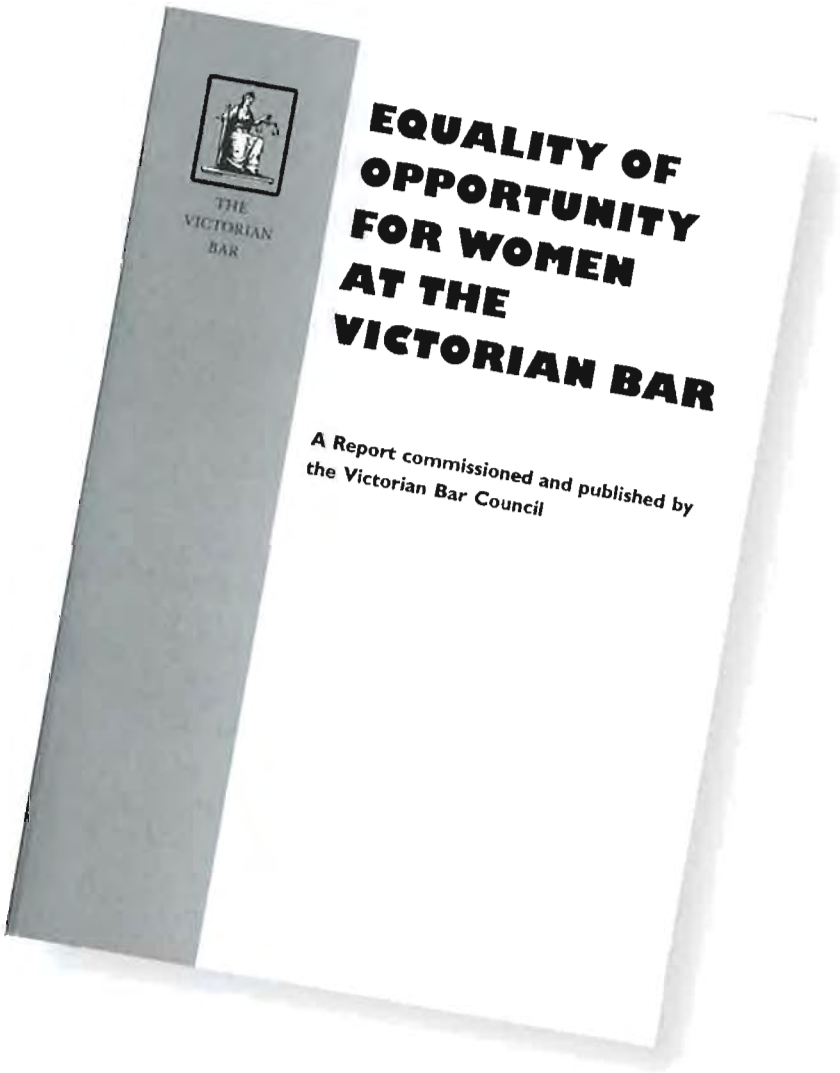
Seated Second Row (left to right):
Philip Dunn Q.C.
Robert Richter Q.C.
Jack Rush Q.C.
Ross Ray Q.C.
(Honorary Treasurer)

Standing at Rear (left to right):
Sara Hinchey
Fiona McLeod
Maurice Phipps Q.C.
Stephen Kaye Q.C.
Peter Riordan
Richard McGarvie
Carolyn Burnside
David Neal
Duncan Allen
Samantha Burchell
(Assistant Honorary Secretary)
Garrie Moloney
(Honorary Secretary)

Absent:
Robin Brett Q.C.
Tony Pagone Q.C.
Paul Santamaria
David Beach
and
Jane Dixon

Equality of Opportunity for Women at the Victorian Bar

In July, 1998 the Bar Council published a report entitled "Equality of Opportunity for Women at the Victorian Bar". The Report was prepared for the Bar by Associate Professor Rosemary Hunter and Ms Helen McKelvie under the guidance of a Steering Committee of members of the Bar chaired by the Honourable Mr Justice Charles. The Bar Council is indebted to the Steering Committee and the researchers for this well-researched, extensive, and challenging Report. It is the first report in any jurisdiction to focus specifically on the position of women barristers, and on the extent of gender bias in an independent Bar.



THE Bar Council commissioned the Report out of a commitment to the equality of opportunity for all its members, and to the elimination of practices and attitudes which discriminate against women. The aim of the Report, therefore, was to gather systematic and reliable quantitative and qualitative data to assess the current status of women at the Victorian Bar, and to identify any barriers to women's advancement, including any discriminatory practices.

The Report confirms that the position of women barristers at the Victorian Bar has improved significantly over recent years. The majority of the male and female barristers who were interviewed expressed satisfaction with their current position and progress at the Bar; over a third of both women and men saw no barriers to the achievement of their aspirations; and none of the women barristers interviewed listed any aspect of the structure and environment of the Bar itself as barriers to their success.

In recent years the Bar Council had taken steps to minimise barriers to women's careers at the Bar through measures such as subsidies to women barristers to assist them in paying annual Bar subscriptions and in maintaining their chambers for periods of up to six months while on parental leave. The Council has also been conscious of the need to appoint women to its committees and to support the activities of the Women's Barristers' Association, the Bar's Equality Before the Law Committee, the Bar's Child Care Facilities Committee, and Australian Women Lawyers. The Bar has, for many years, had a panel of concilia-

TABLE OF CONTENTS

tors to deal with cases of sexual harassment and vilification.

However, the research findings indicate that women generally find it more difficult to gain entry to, and support from, the mainstream of the Bar. This difficulty may have significant effects for individuals in terms of peer recognition, work satisfaction, and success. Women at the Bar are less likely to be briefed as regularly as men, and have a lower representation in longer cases. The

interview data emphasises that the roles and attitudes of judges, solicitors, clerks and clients are crucial in determining the experience of women at the Bar.

The recommendations set out in the Report are directed at the Bar Council, Bar committees, the general membership of the Bar, solicitors and the judiciary. There may be some barristers, male and female, and other people who are involved with the justice system, who will disagree with some of the findings. However, the findings cannot be ignored. The research clearly shows that barriers to women's advancement at the Bar do exist, and that further steps can be taken to achieve equality of opportunity for all women barristers.

In response to the Report, the Bar Council is reviewing the recommendations contained in the Report, and has appointed a working party to develop a plan of action on gender bias. The Bar Council has also invited a representative from each of the Women Barristers Association and the Equality Before the Law Committee to join the working party. The working party's objective is to deliver a response to the Report at a seminar to be held on 9 October, 1998. In the meantime, the working party is consulting widely with groups such as the Law Institute, the Courts, Government briefing agencies and committees of the Bar who have a direct interest in the issue of equality of opportunity. Discussions to date have indicated that the working party's response on 9 October will be a provisional response and will probably contain many initiatives some of which can be implemented immediately and others that will be implemented over the longer term.

Copies of the Report can be purchased from the Bar Council Office at a cost to members of $14 to cover printing. The executive summary from the report is shown below.

EXECUTIVE SUMMARY

1. Introduction

1.1 In 1997 women comprised around 50% of law graduates, 28% of solicitors, 15.8% of barristers and 6% of Q.C.s in Victoria. This research project arose out of concerns expressed to the Equality Before the Law Committee of the Victorian Bar Council about the under-representation of women in the senior ranks of the Bar, and the perceived high attrition rate of women coming to the Bar. While many have argued that the proportion of senior female barristers will increase naturally with time, the Equality Before the Law Committee wished to determine whether there were any barriers impeding the advancement of women at the Bar. The aim of the project was therefore to gather systematic and reliable quantitative and qualitative data to assess the current status of women at the Victorian Bar, and to identify any barriers to women's advancement, including any discriminatory practices. Questions of fairness and equality are important in an institution which plays a central role in the administration of justice. They are also important for graduates planning career paths in the legal profession.

In response to the Report, the Bar Council . . . has appointed a working party to develop a plan of action on gender bias. The Bar Council has also invited a representative from each of the Women Barristers Association and the Equality Before the Law Committee to join the working party.

1.2 The report examines the motivations and aspirations of female and male barristers, the impact on women barristers of the culture and environment of the Bar, the roles and attitudes of solicitors, clients and clerks in briefing processes, issues involved in combining practice at the Bar with family responsibilities, and the ways in which women operate and are regarded in the courtroom, as advocates or as judges.

1.3 Three main research methods were used to capture different kinds of data:

- a literature review, which entailed a review of recent studies, reports and articles dealing with the status of women in professional occupations in general, and in the legal profession in particular, both in Australia and overseas;
- confidential face-to-face interviews with a range of legal personnel, designed to identify and compare any differences in the values, opportunities and experiences of female and male barristers at the Bar, in briefing processes and in the courtroom;
- a study of court and tribunal appearances over a three-month period, to provide an objective measure of whether equality between female and male barristers exists in an important area of practice — courtroom advocacy.

These sources yielded a complex and multifaceted picture of women's status and opportunities at the Bar.

2. Barristers' motivations and aspirations

2.1 The research findings in relation to barristers' stated motivations and aspirations clearly indicate that women are serious about their careers at the Bar. While there are minor gendered patterns in relation to reasons for coming to the Bar and measures of a successful barrister, there is also a considerable variety of views among both women and men on these points.

2.2 The majority of both women and men are satisfied with their current position or progress at the Bar, although there is limited evidence of a higher degree of dissatisfaction amongst women. A striking gender difference arises, however, in relation to perceived barriers to success. Women and men mentioned quite different barriers and women perceived more barriers standing in their way. Some of these barriers, such as those identified in briefing processes and in combining work and family responsibilities, are overtly related to gender difference.

3. Bar culture and organisation

3.1 The culture and organisation of any workplace play a significant role in determining the experiences of those operating within it. Analysis of the findings reinforces conclusions reached in other studies of workplaces with a low proportion of women — that culture represents a pervasive source of gender-biased attitudes and behaviour, which are very difficult to challenge.

3.2 The research findings indicate that women generally find it more difficult to gain entry to, and support from the "mainstream" of the Bar, which may have significant effects for individuals in terms of peer recognition, work satisfaction, and "success" as a barrister. Cultural factors contributing to this situation included a high level of criticism of female barristers around the Bar; exclusion or alienation of women from social net-

works, lunching rituals and other social events; and issues of sexuality being used to undermine women's professional credibility. Different experiences of mentoring at the Bar for female and male barristers were also highlighted in the interviews.

3.3 In terms of the formal organisational structures at the Bar, the interviews revealed a significant amount of dissatisfaction with the level of representation of women, and recognition of their needs, by those controlling the power structures. At the same time, some interviewees expressed opposition to the formation and operation of the Women Barristers Association. Lack of institutional support and a strong tradition of "no dobbing" inhibit women barristers from making formal complaints about gender-biased or other inappropriate treatment.

3.4 Overall, the values of the Victorian Bar and the way it is run have not changed significantly to accommodate women who do not share the background, attitudes and assumptions of the traditional membership. Even if, as individuals, women do not experience this directly as discrimination, at a systemic level, the culture and organisational arrangements of the Bar can be seen to play a large part in creating an environment in which women are not supported and may choose not to join the Bar, or make the decision to leave.

4. *Briefing practices and prejudices*

4.1 The interview data emphasised that the roles and attitudes of solicitors, clerks and clients are crucial in determining how and whether barristers receive work. The interviews show that in the abstract, solicitors did not hold gender biased views about the qualities of a good barrister. In practice, however, personal contacts and rapport between barristers and solicitors are all-important in the briefing process. To the extent that senior male solicitors have control over briefing, this tends to advantage male barristers through the operation of homosocial networks, although women's networks are beginning to have some impact. More generally, many solicitors lack knowledge of women barristers practising in their areas, and some employ directly or indirectly discriminatory criteria in selecting barristers for particular cases. Solicitors are generally unaware of the gendered impact of their decisions. Client preferences, either express or assumed, also have some impact on briefing opportunities, although some solicitors' assumptions about what kind of barrister their male client would prefer are connected with their own gendered preferences and beliefs.

4.2 The interview material suggests that while clerks may not have the ability to influence the growth of barristers' practices through the allocation of floating work as might have been the case in the past, the atmosphere of the list and the clerk's and other list members' attitudes can still have an impact on women's experiences at Bar.

4.3 The court appearances study provides evidence of the outcomes of briefing processes. Data from the study suggests gendered patterns in the briefing opportunities afforded to women and men in the courts and tribunal studied, with individual women and women overall enjoying a narrower range of briefing opportunities than their male colleagues. Specific findings include:

- a higher proportion of men than of women on the Bar Roll appeared in the higher courts in Victoria during the study, and this disparity was not simply attributable to the relative seniority of female and male barristers at the Bar;
- male barristers appeared to have greater opportunities for junior work than did female barristers;
- female barristers were less likely to receive multiple briefs;
- women made a higher proportion of appearances in cases of shorter duration and in Family Court cases, and a lower proportion of appearances in the trial division of the Supreme Court and generally in commercial and personal injuries cases, yet the case sample indicated a significantly higher volume of work available in the commercial and personal injuries areas than in family law;
- female barristers were significantly under-represented in jury trials, both criminal and civil, with criminal prosecution work providing virtually the only means for women to gain trial experience;
- there was a difference between private and public sector briefing patterns, but apart from the Victorian OPP, neither sector was noticeably supportive of women barristers.

5. *Family responsibilities*

5.1 In relation to the relative family responsibilities of barristers, the research findings show that, like many women in the workforce, many women at the Victorian Bar play multiple roles: as spouses, primary parents and barristers. Currently, most of their male counterparts are not attempting the same degree of commitment to these different roles. Despite the notion that the Bar offers a degree of flexibility conducive to combining practice with an active parenting role, particular characteristics of the Bar appear to exacerbate the problems of taking time off for childbirth and of ongoing multiple role-playing, including the need to maintain solicitor contacts, the importance placed on experience and continuous practice, the

THE AUTHORS

The report was researched and written by Rosemary Hunter and Helen McKelvie.

Rosemary Hunter, LLB(Hons), BA(Hons) (Melb.), JSM (Stanford) is an Associate Professor of Law in the Law Faculty, The University of Melbourne. During 1998–99 she holds the position of Principal Researcher at the Justice Research Centre in Sydney. She has taught and researched extensively in the areas of anti-discrimination law and women's employment. She is the author of *Indirect Discrimination in the Workplace* (Federation Press, 1992) and co-editor of *Thinking About Law* (1995), and has also published numerous articles, book chapters and contributions to loose-leaf services, and undertaken several consultancies in her fields of expertise. From 1994–97 she was appointed as a part-time Hearing Commissioner of the Federal Human Rights and Equal Opportunity Commission.

Helen McKelvie, LLB, BA (Melb) is a freelance legal researcher. After graduating she worked for a short time as a solicitor, and then as a research officer for the Victorian Law Reform Commission, National Road Transport Commission and Victorian Department of Justice, during which time she gained significant experience in legal and social research design and methods, community consultation and policy development. She has also worked in the field of plain language drafting for lawyers. She has been a columnist for the *Alternative Law Journal* and, with Melanie Heenan, is the author of the *Rape Law Reform Evaluation Report* (Victorian Department of Justice, 1997). She currently holds the position of Manager, Program Development, at the Victorian Institute of Forensic Medicine.

requirement of fitting around court timetables, and the fact that optimal years for childbearing and being involved with parenting small children coincide with the time when barristers "should" be putting in maximum effort to establish their practices. In addition, the prevailing attitude around mothering and part-time work amongst members of the profession associates these with lack of commitment or even incompetence, creating an environment that is particularly unsupportive of pregnant women and mothers attempting to maintain their careers at the Bar. Despite the fact that some women have made the best of it, competing family responsibilities, and attitudes at the Bar towards them, appear to be possibly the largest contributing factors to women leaving the Bar.

5.2 Interviewees also described the entrenched work ethos at the Bar — working weekends and long hours on a continuous basis — which makes it difficult for women with parenting responsibilities to compete effectively and for all barristers to participate in family life. Not only do women at the Bar generally lack the domestic support systems upon which male barristers have traditionally relied, but it is increasingly difficult for male barristers to find (and keep) partners prepared to be barrister's wives. Thus, social changes are challenging the ongoing viability of the traditional model and producing a need for the role of barrister to be redefined for a single actor with a life outside the Bar.

5.3 Recent changes to the Bar Rules to accommodate barristers with non-traditional work arrangements have benefited women with parenting responsibilities, although according to interviewees, further adjustments are needed.

6. In the courtroom

6.1 The findings in relation to the operation of the courtroom show that women barristers are required to overcome the preconceived notion that barristers are male. This is manifested in heightened visibility of women amongst their male peers, treatment highlighting their status as women first before being acknowledged as barristers, attitudes to their competence, and their own confidence as advocates. The traditional courtroom as a physical setting also has some "inherent disadvantages" for women in terms of projecting voices of a higher pitch and, for those of smaller stature, making their presence felt. Nevertheless, it appears that female barristers have been largely successful in finding effective ways of being advocates.

6.2 In addition, the findings suggest that male barristers are more likely to initiate and be comfortable with game-playing tactics, and that while some women learn how to play them, they are more likely, at least initially, to find them alienating and confusing. Interviewees stressed the role of judges in censuring inappropriate courtroom behaviour, and also considered that the senior Bar has a role to play in setting standards. With regard to rude or hostile treatment from the bench, most female and male barristers reported only isolated incidents of this type of behaviour, and that they approached them as "part of being a barrister". Only a couple of women contended that treatment they had received from judges or magistrates was motivated by gender bias.

6.3 The interview findings also suggest that the increased number of female barristers practising in Victoria has generally had a positive impact on the way in which proceedings are conducted. The majority of interviewees also responded positively to questions about increasing the number of women on the bench. Suggestions regarding how a more gender-balanced bench may be achieved reinforced the need for greater acceptance and support for women at the Bar, to enable more women to gain the experience and maturity required for judicial appointment.

7. Conclusion

7.1 The research shows that barriers to women's advancement at the Victorian Bar do exist, and that the situation will not simply be remedied by "natural increase" over time. Positive intervention is required in order to achieve equality of opportunity for women barristers, and the report contains a number of recommendations for ways in which identified barriers may be addressed. The Bar also has an important, ongoing role to play in discussing the research findings, and devising, adopting and implementing strategies for change.

Gender Equity Report: a Personal Response

Carolyn Sparke

LET me say at the outset that this report is a good stimulus for the Bar to consider our structures and our direction. Whether or not we make changes as a result, any changes must be the result of vigorous debate, which this report certainly promotes.

I provide the synopsis below, no doubt with some slant reflecting my own views. Those views are not necessarily those of the editors of *Bar News*, and they are not necessarily those of "the Bar", but are unashamedly mine. To give readers some idea of my own background and prejudices, I was one of the people who was interviewed for the report, and my experiences may not be reflective of the overall experience of women at the Bar. I have a commercial practice and dabble little in the harder worlds of criminal and family law. I have rarely, if ever, encountered direct prejudice or gender-based comment in my time at the Bar, although I have certainly seen people — men — who fit the worst of the descriptions in the report. I too have let sexist jokes and language "go through to the keeper" for the sake of preserving harmony and career. I do not have children, so my home life may be simpler than it is for some. I am tall, and have a loud voice, so I fit into the "male model" for advocacy.

(Feel free to engage me in debate about the report and my views — open debate is the real achievement of this report.)

WHAT THE REPORT ACHIEVES

The report holds a mirror to ourselves. As individuals, hearing only the anecdotal experiences of ourselves and our groups, we know little about the world we work in. The report finds an interesting (and apparently commonplace phenomenon) of interviewees stating "I have never felt gender-based problems" but describing scenarios which do in fact reveal gender-based problems. The primary finding of the report — that there are systemic gender-based barriers for women in our profession — is the view of the "outsider looking in".

Carolyn Sparke

Whether we agree or not, the mere fact that the view has been expressed, based on reported and observed patterns of behaviour, must give us good reason for review. We are blind to our own shortcomings, and the report must force us to ask of ourselves — "am I really judging her skill, or am I uncomfortable with her gender"; "am I comfortable with the sexist jokes because they are part of the normal level of humour between adults, or am I 'putting up with them' to comply with male expectations in order to smooth my career path?"

The report highlights that it is the subtle, pervasive cultures at the Bar which are the most damaging, the hardest to identify and the hardest to change.

Perhaps most importantly, the report holds up the comments of *solicitors* as a mirror of ourselves. Solicitors speak of briefing practices but also of their attitude towards us. Many disapproving comments were made about women adopting egotistical male attitudes, in order to conform. Solicitors also believe that we are a profession ruled by the old school tie — "they all went to boys school together and they haven't moved on". Whilst solicitors state overtly that they have no concerns about briefing women, in fact their structures ensure that women are marginalised.

The report disagrees with the view, often expressed by women and men, that the problems will cure themselves with time and that generational change is all that is required. It is not until women reach a "critical mass" in a workplace, where they are no longer seen as "the unusual one", that they begin to achieve equal opportunity through generational change. As the attrition rate of women at the Bar is so high, there is a fear that the Bar will never reach such a critical mass. Given that I was told the Irish Bar now had approximately 25 per cent women, we have further to go than we imagine. In the meantime, young male barristers still hold many of the attitudes they are presently learning from their older colleagues.

The report also makes a number of recommendations, many of which are profoundly sensible ("that List dinners should not be held at male-only clubs" — yes, we are that archaic), some of which are "wishful thinking" ("that the systemically adverse impact of the culture of the Bar on its female members be acknowledged"); some of which are certain to create "backlash" ("that the issue of pay equity for women be the subject of future study") some of which are great ideas, but which will be difficult to give real meaning ("engage the courts in dialogue about family-friendly work practices").

The report is very positive about the role of the Women's Barristers Association as a source of support and networking for women. It also suggests a practical role for the WBA in conducting advocacy workshops for women (or, in my view, for anyone who has something other than the "standard" courtroom style).

The report also strongly suggests that the senior Bar has a strong leadership role to play. The senior Bar and mem-

bers of the Bar Council are encouraged to identify and discourage sexist behaviour among their own circle of influence, and to visibly support women's opportunity and equality. Whilst this may seem a "motherhood" statement, it puts the onus on the senior Bar to act. It is undeniably a good idea, and I look forward to the senior Bar — largely the older men who are criticised in the report — acting as allies to women when it becomes necessary.

OVERVIEW

The report examines many issues relating to the Bar, including briefing and clerking practices, the Bar "culture", the balance with family life, sexist comments and language and the role of women on the bench. (There is much more than I have set out here.) It draws upon interviews with 50 barristers (25 women, 25 men), chosen randomly and spread across all levels of experience; 40 solicitors; 5 barrister's clerks and 20 judicial officers, from a variety of courts. It also analyses a three-month study of appearances in the superior courts. Records were made of the frequency of appearances by women, but more tellingly, the "seriousness" of the appearances (whether long trials, jury trials or smaller "practice" matters).

The report also draws on a literature review, which essentially establishes that the experience here is similar to that of other places where studies have taken place (personally, I am cynical about literature reviews, as they are often used to reinforce assumptions already made, or to fill gaps in data).

Who we are

It seems we all begin life at the Bar with similar expectations, goals and measures of success We also perceive ourselves in similar ways, whether women or men. Women are more ambitious (that will raise a few eyebrows!). Women come to the Bar with fewer contacts, network less and rely on the "old school tie" system less.

The differences seem to lie in the need identified for women to have a mentor or friend. The need for support at a more personal level is available as a matter of course for men — ". . . what if we began a men's barrister's association? . . . We've had one for years — it's called the Victorian bar".

The culture of the bar

The Bar reflects, and perhaps intensifies, many social ideas about women. The gender of women is used to undermine their professional credibility; it is seen as the "woman's fault" when two barristers have an affair; a commitment to motherhood makes a woman "uncommitted" to being a barrister, whereas a commitment to fatherhood makes a man "a good block".

BRIEFING PRACTICES

Solicitors usually expressed no concern about using women, and some made quite positive statements about changing the mind of a client who wanted to brief a man. However, the systemic problems abound. Solicitors rely on their own networks in briefing, many of which are part of the school network. They tend to be unfamiliar with women at the Bar, and may find it difficult to generate rapport with women when they do brief them. Given the personal nature of the briefing relationship, that rapport is quite critical.

Often, it is not solicitors who make assumptions about a woman's capacity for work, but her clerk. They may be well-meaning and protective, but destructive.

Further, presumptions abound as to the inherent aggressiveness of men (and the presumption that such aggression is the best courtroom technique). Jury trials, criminal trials and large commercial matters are plagued by this attitude. The report shows that the absence of women in these areas is not simply explained by seniority — women appear in lower proportions than their seniority would dictate.

I am troubled by some of the recommendations which flow in this area. The report recommends positive intervention, by publishing lists of women, by asking the LIV to promote the briefing of women, asking solicitors to review their in-house lists of counsel and so on. Techniques which smack of "positive discrimination" often create a backlash and I do not see solicitors taking too kindly to being told "who they should brief". We all react badly to "tacky" promotions, and I am very concerned that these recommendations might make matters worse. I wonder whether we might not be better served having women write more articles for the LIJ, submitting "profile"-style articles about women who have successfully run a large case or made some other achievement. Put the women out there, without actively asking for them to be briefed.

CLERK'S ATTITUDES

The clerks themselves generally expressed no overt gender discrimination. However, many women felt they were treated differently, either by being directed to traditionally "female" areas, or by receiving less "floating work" than men. This is one area where comments were quite vehement, but quite untestable: ". . . described a female . . . having a brief taken away from her by her clerk and given to a male barrister who supposedly had more experience than her, but discovered he had just commenced at the Bar . . ."

The recommendations are practical ones — have the clerks keep records of the allocation and distribution of floating work. (This would accord with the view that our clerks, as our employees, should be accountable generally for management of list work).

FAMILY STRUCTURES

By far the biggest reason identified for leaving the Bar, the lack of family support structures is seen as a real barrier. Although analysed at some length in the report, it will not come as any surprise, as the Bar reflects the same problems as encountered by working women everywhere. The hard question, of course, is what is to be done about it. The report recommends many attitude changes, and recommends the support of the childcare sub-committee, but little in the way of concrete recommendation arises (my own view is that some enterprising person could probably start a private child-care facility in chambers and make a fortune. Then again, I don't have children — this could be a crazy idea).

The report does identify some specific problems at the Bar. These are attitudinal, and quite serious. Many people assume a working mother is "part-time" and therefore not committed. A "part-time" working father is "coping with a heavy load". Working "part-time" at the Bar is more destructive of a career than "part-time" in other professions. The variety of court demands means that a woman cannot simply commit to working "10–3" or "2 days a week" as she

could in a standard workplace. The fact that the profession is so driven by seniority means that her loss of a few childbearing years actually puts her behind in the system. A man who is unable to make a weekend conference because of "son's football match" is forgiven, but a woman with a weekend commitment is seen as being insufficiently committed to the Bar. A woman who has made adequate childcare arrangements to come back to work full time is nonetheless presumed to be unavailable. Both women and men may have to flick briefs for all kinds of reasons, but women are criticised if they fall pregnant during preparation for a long case.

Critically, the report highlighted the role of clerks in supporting mothers. Often, it is not solicitors who make assumptions about a woman's capacity for work, but her clerk. They may be well-meaning and protective, but destructive.

Attitudinal expectations do differ. I can recall being told, in reference to a barristerial couple — "*he* has sacrificed a lot so that she could have a family and career". You never hear it said that "*she* has sacrificed a lot . . ." — *her* sacrifice is the norm.

Many of the structural issues affect both working mothers and working fathers, but the report identifies the double-standard which still exists as far as our attitudes are concerned.

ADVOCACY AND COURTROOM EXPERIENCE

Positively, the report identified very few problems with gender discrimination from the bench. Whilst often reported by older practitioners, it is largely a thing of the past (although the report has recommended continuing judicial education).

The report identified some "performance" problems — women with smaller stature and higher voices often lack credibility in a courtroom setting.

The report also stated that women were disadvantaged by some of the "game playing" of men.

Whilst I believe these things to be true, it is difficult to see how they are solely gender-related. The small man may also suffer, as will the new practitioner of either gender. The unknowable factor is whether the small man is simply taken for granted as being small, while the small woman is seen as "insignificant".

The recommendations as to training and workshops in "alternative" courtroom techniques, and "dealing with game playing" are good ones. Whether they should be confined to women is quite a different question.

Some of the other identified problems show our profession at its worst. One would not think a recommendation like ". . . the Bar Council promote uniform standards of courtesy and politeness towards advocates" would be necessary. Whilst we all face the heat of court, rudeness is unnecessary — from any gender. There are many days when the bench and advocates alike should be ashamed of ourselves.

WOMEN ON THE BENCH

The report recognises that this is a very tricky question. Men and women at the Bar both want to avoid "token" appointments being used to "prop up" the numbers of women. Most interviewees believe it would simply be "a matter of time". However, given the structural problems that work against women getting the large high-profile cases, time alone will not be enough. By clerks or solicitors making assumptions about women which inevitably channel them towards smaller cases, women do not get the experience required to be considered for the bench.

It is difficult to see how this can be remedied. The recommendation is made that "a broader range of selection criteria be used for selection to the bench". But what? Surely merit and experience are essential! The report focuses on the definition of "merit" — "merit" is currently defined within the long-standing norm — that of the middle-class white male. The challenge for us all is to create alternative norms which serve society equally well. For example, women who have had some experience running a household and dealing with the day-to-day demands of society may not face the common allegation of living in an "ivory tower" Naturally, such an overhaul would lead us to profoundly challenge our social norms and would not be achieved lightly.

Again, our attitudinal double-standards come to the fore. There have been many bad appointments to the bench. We moan and groan about them, but we simply say "bad Judge" rather than pointing to the specific reason. But imagine a bad female appointment — she would stand out simply by reason of her gender. She would carry an enormous burden to perform perfectly well, otherwise it will not just be "bad Judge", but "token appointment", "lack of merit". That in turn will reduce the opportunities for other women.

PROBLEMS

The report has limitations — the sample size is small, the literature review apparently seeking to support the presumptions made by the researchers.

In assessing the "critical mass" of women at the Bar, the report ignores the changing view of young men in society as a contributing factor. Whilst the "unusualness" of a woman in court might lead to her being treated as a "token", it might also lead to her being remembered, whereas a male performance would fade into the mass.

On a larger scale, the report addresses issues that apply to a normal "workplace". Given that we are self-employed, there is little that can be done by way of positive financial support which discriminates between members of the Bar. It is argued, and with some merit, that barrister A should not be required to pay additional fees so that barrister B — possibly a direct competitor — can have childcare support.

Each person who is self-employed, runs a business, or works in a two-income home, has to achieve the balance of work and family life. Single fathers (although fewer in number) face the "career vs home life" challenge as much as women do. For barrister couples, the access to Bar support networks weigh equally on the father as the mother. It is argued, again with some merit, that each of us takes these risks on board when we choose to leave a salaried position for the uncertainties of the Bar. Each of us must negotiate whatever is necessary at home to enable us to follow our careers.

CONCLUSION

Having said all of the above, I hope this report sets us arguing and squabbling as to the best for our futures. I look forward to arguments over drinks as to what constitutes a sexist remark, embarrassed looks as men are chided by other men for their patronising treatment of women, sharp retorts from both women and men when personal remarks are made.

The report repays reading — it is at times idealistic but often challenging and describes us in a way we cannot see. The report contains an executive summary and list of recommendations, for those who don't want to digest the lot. Recommended reading, indeed.

Jeanette Richards Interviews Merkel J. on the "Docket System"

Melbourne practitioners have now been exposed to the Federal Court's "Docket System" for 18 months. Jeanette Richards speaks with Justice Merkel regarding the operation of the docket system, one of the aims of which is to foster co-operation between the Court and those coming before it.

JER: What would you regard as the hallmark of the Docket System?

Merkel J: The Federal Court has always adopted a case management system. Until recently all cases were judge managed but not necessarily by the judge hearing the case. That changed with the "docket system", which was implemented on 1 January 1997. On commencement a case now forms part of the docket of a judge who is responsible for its management and hearing. The system is now tri-partite — the Judge and the parties concerned have a primary responsibility for ensuring that the dispute is resolved fairly but expeditiously. Timetables are laid down and are to be adhered to in a Court where the judge can no longer be regarded as a "passive spectator". Adherence to timetables is expected to ensure that the process of litigation is managed, coherent and orderly. Hopefully, too, there will be an atmosphere and spirit of greater co-operation between the participants in the process. In cases where there is difficulty in compliance with orders, the docket judge will expect this to be raised with the judge's associate prior to the expiry of the deadline.

The retention of a single "docket judge" throughout the conduct of each proceeding enables a store of knowledge about the dispute to be built up and the judge can assist the parties to focus on the real issues in the proceeding. Shorter and fewer interlocutory hearings will result as the judge will be familiar with the proceeding. A new feature of the tripartite nature of the case management system is that it is open to, and desirable for, practitioners to liaise more and to contact the judge's associate when a problem arises. It is hoped that practitioners will be able to resolve most difficulties without recourse to the docket judge. However, in cases where resolution is not achieved, then docket judges will be able to schedule hearings as required, at the mutual convenience of the parties and the Court.

JER: The docket system has been in operation in Victoria for approximately 18 months. Has it lived up to the Court's expectations?

Merkel J: Victoria was the first major registry to operate the docket system, which it did as a pilot project for 12 months from 1 January 1997. By the end of the pilot, a finely tuned system for active case management had been developed, and there is a broad consensus within the Court that the system appears to have operated as the Court had

hoped. All registries of the Court now operate under the docket system. The object of the docket system is to dispose of all cases within 18 months of filing. There is no doubt that the docket system ensures that cases are brought on in a more orderly fashion than that which previously operated. Since the docket system was introduced a significant number of cases have been dealt with under it. Some matters have been capable of disposition after only one directions hearing; more complex cases obviously require more management prior to hearing. The docket system has produced the results which the court has hoped for in that there has been a marked reduction in interlocutory contests, better adherence to timetables and generally more orderly and efficient case management and trials. Gradually, I believe that the culture of practitioners is also adapting itself to the new approach.

JER: Has the review of the docket system since its commencement resulted in any major refinements to that system?

Merkel J: The changes have mainly been minor. One example is the migration list, which was maintained to deal with the vast increase in migration cases. It was found that in this jurisdiction it was far more efficient to maintain a special list under control of a judge until a matter is ready to proceed to a final hearing; it is then "docketed" to a judge.

Another example is the continued management of lists by registrars, such as the bankruptcy and Corporations Law lists. These proceedings are docketed only after the registrars have completed their involvement in the proceedings.

We have also employed "offensives" to deal with backlogs. Judges from other registries have been brought to Melbourne to assist in the hearing of cases to remove the backlog here. This is one of the benefits flowing from a system which operates on a national basis. A similar offensive was held in Brisbane to deal with its backlog. In the offensives trials were set down with a running list but with all cases heard on the day on which they were listed. This way, if matters were going to settle, they would do so quickly and if they were not, then they were dealt with in a very short timeframe. Another important feature is the system's flexibility. For example, when we had migration cases in which the applicants were in detention, special arrangements were made for the early hearing of those cases.

JER: How does the "panel" system operate, as opposed to the "list" system?

Merkel J: Since its inception, the docket system has been refined by the introduction of "panels" of judges for taxation, intellectual property, industrial relations, admiralty, Corporations Law, Parts IIIA, IV, XIB and XC of the *Trade Practices Act* and native title. Each member of the panel is available to hear cases, the subject matter of which falls within the scope of that panel. Judges on the panels develop more specialist knowledge and skills as a result of sitting on these panels. Judges may, of course, be members of more than one panel. The panels also assist in the formation of appeal courts, where judges with particular knowledge can be brought together, perhaps from different registries, to create an appeal court with an extensive background in the applicable area of law. This is a new approach which will integrate the docket system with the appeal process, creating a more progressive, modern and efficient dispute resolution system. The Federal Court, with its large number of judges, geographic distribution of registries and specific jurisdictions, is well-placed to create an integrated system of trial work with a national appeals system. With the benefit of the docket system, judges are able to manage more efficiently their various commitments as a docket judge at an interlocutory level, as docket judge at hearing stage and their Full Court commitment.

With the benefit of the docket system, judges are able to manage more efficiently their various commitments as a docket judge at an interlocutory level, as docket judge at hearing stage and their Full Court commitment.

JER: How can a judge in another registry provide the close cooperative involvement required by the docket system?

Merkel J: Video and telephone conferencing facilities are available at the Court for directions, which will, as closely as possible, take place in the same way as if all participants were in the same court-room.

JER: Is it necessary to keep the judge who has had the management of the proceeding up to trial, for trial?

Merkel J: It would be wrong for us to divide the docket system into two segments. The docket system provides case management up to and during trial, if the matter has not resolved sooner. In the few cases where potentially prejudicial material arises in interlocutory hearings the court has a procedure in place for enabling another judge to hear the application. If for any reason it is inappropriate for the docket judge to hear the case, then there is no difficulty in the system accommodating a change in docket judge. I have heard it suggested that a fault with the system is that a judge might form a view of the strengths and weaknesses of a case prior to a final hearing that misconceives the role of a judge. If there are possible weaknesses which are revealed prior to hearing, then it is better that they are raised earlier rather than later. If a judge has a view which is expressed in the context of a particular interlocutory application on the evidence then before the Court, I do not believe that it could reasonably be considered that that judge has formed a final view of the proceeding or that the judge would necessarily express the same view after a full hearing. Further, there is no reason to expect that any other judge would necessarily hold a different view at the interlocutory stage. Our experience in the Court to date does not suggest that there is a problem In this area.

Also a docket judge is well placed to raise before trial how expert evidence, might be given. This is an example of an area that may be less adversarial under dockets than is often the case.

The bottom line is that litigation in the Federal Court is a tri-partite exercise; the days are gone when the judge is a mere spectator. If all of this results in a reduction in tactical forays, then I don't think the law or justice is worse off as a result. My overall view is that the way the docket system is working out is that is producing a fairer and more efficient system all around. If for some reason some unfairness arises at an interlocutory stage, then the docket judge, who is familiar with the case, is better able to redress the unfairness on a later occasion or avert it altogether. This is at the heart of good case management.

JER: How is mediation incorporated into the docket system of case management?

Merkel J: Mediation (whether by a

mediator nominated by the parties or a Judicial Registrar or registrar of the Court) can occur at any stage during the course of a proceeding. Of course if parties are able to resolve their dispute, then this is a preferred course. However, I am sensitive to procedures such as mediation being forced on the parties. It is unusual for unwilling partes to be forced to mediate. A docket judge may be expected to be reasonably well placed to gauge when mediation may be effective. However, my experience is that a culture change has occurred and there is a co-operative approach between the courts and the profession in relation to mediation.

JER: What role do consent orders filed under Order 35 Rule 10 play in the docket system?

Merkel J: Parties should forward a copy of proposed consent orders to the docket judge's associate. The order will then be considered by the docket judge and, if thought appropriate, the orders will be made without the need for any attendance. However, on some occasions practitioners reach agreement on a timetable providing for steps for which there is no demonstrated need. The docket judge may see fit to intervene for the purpose of exploring whether a more efficient approach may be taken.

JER: Have there been any unexpected consequences of the docket system?

Merkel J: The reduction in interlocutory contests is a major benefit. Also, in general matters can progress more quickly than was previously the case.

JER: How does the docket system impact on the workloads of the judges?

Merkel J: The docket system has enabled judges to manage their own calendars to a greater extent than was previously possible. It is now possible for judges when planning their year to allocate in advance time for hearing and judgment writing. This improves the quality of judicial life as well as lifting the efficiency of the Court. Within a registry case numbers are broadly equal as between the judges.

As a national system, it is apparent that as between registries there are variations to case numbers for judges. However, on occasions there is flexibility to transfer judges between registries for the purpose of managing and hearing cases, although there is some added costs to the Court in doing so.

Of the difficult problems which has not yet been solved concerns the parity of case loads within and between registries. Obviously, a simple comparison between numbers of cases managed is not an accurate guide to workload. Perhaps this is a problem which will never be fully solved. However, if a problem arises, for example, where a judge has a long hearing, the system's flexibility enables assistance to be obtained from other judges or registries.

JER: Are any refinements to the docket system planned for the future?

Merkel J: "Panel co-ordinators" have been appointed to each of the panels. It is intended that the panel co-ordinators will initiate contact with users of the panels for the purpose of discussing the operation of the panels.

Software systems are being developed for the docket system to assist and support case management. One of the practical benefits of maintaining an appropriate database will be that docket judges will be able to obtain up-to-date reports on their cases. Computerisation will also enable statistics to be maintained to monitor how the system is operating within the Court.

It is likely that there will be larger numbers of litigants in person before the court in the future. The numbers of litigants in person varies greatly between registries, with Melbourne having fewer than in some other registries. Litigants in person appear more frequently in the bankruptcy and migration jurisdictions. The Court has already embarked on discussions with the Victorian Bar regarding a pro bono program under which members of the Bar may be asked to provide assistance to unrepresented persons, in cases where assistance is thought by the docket judge to be appropriate. It is obvious that if a judge has managed a case through to a hearing stage then that judge will be well placed to determine whether a particular case requires the assistance of counsel for the unrepresented litigant.

A further matter under consideration is the practice of filing documents at Court. It may be that in future documents can be filed electronically or perhaps not filed at all until they are actually needed by the Court.

The docket system is an important change to the Court's procedures. It has been designed to reduce both the costs and the time taken from the commencement of a proceeding to disposition, and has been tailored to the nature of the jurisdiction and operation of the Federal Court.

Chinese Justice on Trial

Graham Fricke Q.C., Visiting Professor, Deakin University Law School

CHINA is in a similar position to other developing countries, such as Turkey, which are seeking to enter the global economy: its recent economic growth is not matched by its advances in human rights. President Clinton was not the first observer to comment on this disparity.

A group of Deakin University students and staff who followed hot on the heels of the Clinton visit had no difficulty in witnessing China's astonishing economic expansion. We saw all around us striking modern buildings and a surprising incidence of ownership of cars, few of them more than five years old. And the modern large law firms we visited were all less than fifteen years old.

It was harder to get a fix on the human rights situation. There was no obvious military or police presence in the places we visited. People seemed to move around freely and we had no difficulty in talking to the locals, using our own Mandarin-speaking students and staff as interpreters. So we looked forward to a planned visit to a criminal trial for the insights it might present into one area of human rights.

Our hosts assured us that things were looking up in the Chinese criminal justice system. Accused persons were now entitled to be represented by counsel. If the accused could not afford legal counsel, the trial judge had power to direct a lawyer to act for the defence.

In the case which we observed — a trial for car theft and assault — the accused did indeed have legal representation. His counsel looked a little lonely as she sat at her desk wearing a yellow dress, one of only three people on the stage who were not attired in military uniform.

That was the first shock. When the court opened, the three judges marched in, resplendent in uniforms appropriate for top-ranking military brass: smart officer-style caps, epaulettes with gold stars on their shoulders and so on.

I then noticed that the two prosecutors were also wearing military uniforms. A slightly different shade of khaki, perhaps. But I wondered how I would feel if I were defence counsel, dressed in civvies, with the prosecution and the court all manifestly part of the same establishment.

There were two guards who sat behind the witness box and the dock, and who conveyed documents to the judges with military precision, clicking heels and executing smart about-turns. The court reporter was also dressed in military uniform.

That made a total of eight uniforms on the stage, compared with three persons in mufti — the accused, the witness and defence counsel.

Oddly, all of the participants were oriented to the audience. The lawyers were arrayed on each corner of the front section of the stage, at desks set at 45 degrees to the bench, so as to face the audience rather than the bench. The rich velvet curtains behind the judges and nameplates identifying the roles of the performers added to the impression that it was all a piece of theatre, enacted for the benefit of the visitors.

Did that perhaps account for the high incidence of female participants? For we were all impressed by the fact that the chief judge, the lead prosecutor and the defence counsel were all women — until we learned later that day that less than twenty per cent of China's judges were women.

The performers were clearly conscious of the presence of the audience, which included a large contingent of visitors from Hong Kong. At one stage, the prosecutor was vilifying the ac-

Basic peoples court (not in session)

Graham Fricke Q.C. and Toni Ladanyi

cused, who had been shown the screwdriver which had been employed as a weapon in the assault. He had denied that it was his screwdriver. In the course of her denunciation, the prosecutor declared that the accused was so brazen that he had even denied his culpability in the presence of such a large audience!

This was the Basic People's Court, the lowest in the Chinese judicial hierarchy. It operated with efficiency and with what some would regard as a refreshing concern for the rights of the victim, who remained seated at a special desk throughout the short trial. Each witness would at the outset of his evidence sign a statement undertaking to tell the truth. When his evidence was concluded, one of the military guards would collect the record of his evidence from the reporter and deliver it to the witness for his perusal and signature.

When one witness gave his evidence, the defence counsel began to confront him with a prior written statement which was inconsistent with his current testimony. It all sounded familiar to a common lawyer, and I wondered if the Chinese had begun to use some system like our committal procedure.

But it soon emerged that this course was unusual in China. "Where did you get that statement?", asked the chief presiding judge, in obvious surprise. "At the police station", replied counsel for the defence.

On the Great Wall.

Not all the evidence was open to cross-examination. Some of the forensic and medical evidence was simply tendered in documentary form and then displayed on a screen.

Nine years after the Tiananmen Square massacre, it seems that human rights are still not high on the list of priorities in China. But the Chinese are becoming more sensitive to world opinion and are moving in the right direction: with a right to representation and a public display of at least some of their trials.

We were escorted out of the court at the conclusion of the evidence and legal argument. It took a few days of persistent inquiry to ascertain the outcome of the trial. Rather predictably, the accused had been convicted. He had been sentenced to four years' jail, a result within the range one might expect in our own system.

Graham Fricke Q.C. was a County Court judge between 1983 and 1995. He currently teaches Federal Constitutional Law and Trial Practice and Advocacy at Deakin University.

He has observed trials in a number of common law jurisdictions in Australia and overseas. This was his first visit to a trial conducted under the inquisitorial system. The experience has not induced him to clamber onto rooftops to proclaim the virtues of the system.

But, being open-minded and judicious, he is prepared to give the system another chance — perhaps in France.

The Law *v.* the Press

IN late July the Melbourne Press Club held a debate between barristers and journalists. The topic was "That journalists have higher ethical standards than lawyers". The law was represented by Simon Whelan Q.C., Julian Burnside Q.C. and Paul Elliott. The press was represented by Lawrence Money, the "Spy" columnist in *The Age* newspaper, Bob Hart, the gossip columnist in the *HeraldSun*, and Jill Singer, who was formerly a TV current affairs journalist and now does bits and pieces. The debate was chaired and was to be adjudicated by Richard Ackland, a Jeckyll and Hyde soul who claims to be both a lawyer and a journalist. He is better known for replacing Stuart Littlemore on the "Media Watch" television program on Channel 2.

The venue was a dinner at the Riverview Room at the Casino. It was excellently organised by the Melbourne Press Club, which as well as journalists contains a large number of lawyers.

Readers of this journal, undoubtedly, could not understand how the proposition, that some how or other, journalists had higher ethical standards than lawyers could possibly be argued. Simply stating the topic caused great hilarity in the Essoign Club, but debate we did.

Of course the journalists' case was the usual tirade against lawyers, liberally interspersed with lawyer jokes. Jill Singer was particularly vitriolic about lawyers. Her over emotion even caused her to use the "f" word. This shocked many in the audience and caused Simon Whelan to remark that "if he knew it was going to be a blue night he would have rewritten his speech".

The barristers were, of course, brilliant. Simon Whelan made the relevant and telling point that, if it was found that there was no difference between the standards, lawyers had to win. Therefore it was irrelevant as to how bad each party could paint each other. Julian Burnside was Julian Burnside. He thought it was all a question of taste and it was obvious that journalists had less taste than lawyers and in particular barristers. Further, they were not ethical people as they would arrange their affairs so as not to pay out defamation damages. Paul Elliott noted that the ethics of the media is like a diet — something that you are always going to start on Monday. He examined in depth the reporters who stand upon the steps of the Court trowelling make-up upon their faces, the cameraman with his glued on camera and the soundman with a phallus-like moccasin stuck above his head, following a suitably solemn barrister down William Street.

Julian Burnside was Julian Burnside. He thought it was all a question of taste and it was obvious that journalists had less taste than lawyers and in particular barristers.

The journalists of course meandered around with the usual insults to lawyers. Of interest was the code of ethics of the journalists. It makes for risible reading. It is intriguing that the journalists honestly believe that they follow this code in some way or another.

In the end it was supposedly left to Richard Ackland to adjudicate. He, of course, squibbed. He allowed the decision to go on the applause of the audience. On an objective view the audience actually clapped louder for the Bar team, which was a surprise to all present including Ackland. He therefore had to declare the debate a draw.

Later he reported the debate in the *Sydney Morning Herald*. He stated as follows:

> In the final analysis, there are infinitely more vicious lawyer jokes on the Internet, but hardly anything beastly about saintly journalists. That clinched it.

One wonders why Mr Ackland did not say that on the night, perhaps for fear of disagreement by the audience.

However, he has found it safe to state this in the *Sydney Morning Herald*. As usual this is incorrect. A search of the phrase "journalist jokes" on the Internet will produce pages of these jokes. Of interest is that in surfing the Internet under this heading, the Code of Ethics for Australian Journalists was produced. Does this mean that those who put the Internet together regard the code of ethics for journalists a joke?

Mr Ackland also stated that the junior editor of this magazine — "looks spookily like a younger version of another Melbourne identity by the name of Elliott".

Advice concerning those words is presently being sought.

The Bar's Reception for the Judiciary

August 1998

THE powers that rule Australia (whoever they may be) have prepared a Guide of Conduct for Judges. Committees, Councils and the like have been formed to rectify much of the off-field behaviour of the judiciary.

The early discussion has centred around whether the use of prostitutes can be acceptable judicial behaviour. Most present at the recent Bar reception for the judiciary were totally unaware that this was a pressing problem for judges. However, this may be just the conventional Victorian approach to life. We cannot speak for the other states.

Of greater concern is the proposal to limit the social activities of the judiciary. There is a strong view that judges should not only avoid mixing with those appearing in front of them, but those who potentially *might* appear in front of them.

Now this could cause problems. First there could not be any further Bar receptions of the nature pictured upon these pages. Secondly judges could not remain members of the Essoign Club. In fact it would make it almost impossible for judges to mix with barristers or solicitors at all. Would an annual Bar Dinner be regarded as an exception?

Judges would have to give up memberships of clubs to avoid a possible meeting with a lawyer. Of course membership of single-sex clubs is very much considered to be politically incorrect.

On the other hand, the judiciary is being criticised for being out of touch with modern day society. Won't these restrictions make judges even more remote from what is going on? But lawyers don't know what is going on, and their views must be avoided. Solitary cut lunches in chambers seem to be the future, interspersed with a monthly meeting or two with switched-on social scientists.

Whatever the future holds, the pictures on these pages testify to the fact those proposals have not yet adversely affected relations between Bench and Bar.

Left to right: Kim Galpin, Justice Balmford, Rosie Tremayne, Joseph Tsalandas and Cornelia Fourfouris-Mack

Left to right: Judge Pannam, Chief Judge Waldron AO and Judge Duckett

Left to right: Garrie Maloney and David Bremner

Left to right: Carolyn Burnside, Justice Coldrey and Heather Gordon

Left to right: Bryan Keon-Cohen Q.C., Kathryn Rees and Mr D. Murphy, Judicial Magestry, Federal Court

Left to right: Justice Buchanan, Judge Harrison, Justice Wilczek and Judge Morrow

Left to right: Ross Ray Q.C., Justice Weinberg, Robin Brett Q.C. and Fiona Connor

Left to right: Justice Brooking, Douglas Graham Q.C., Solicitor-General, and Judge Shelton

Left to right: Neil Young Q.C., Justice Hayne, Justice Finkelstein, Chief Justice Phillips

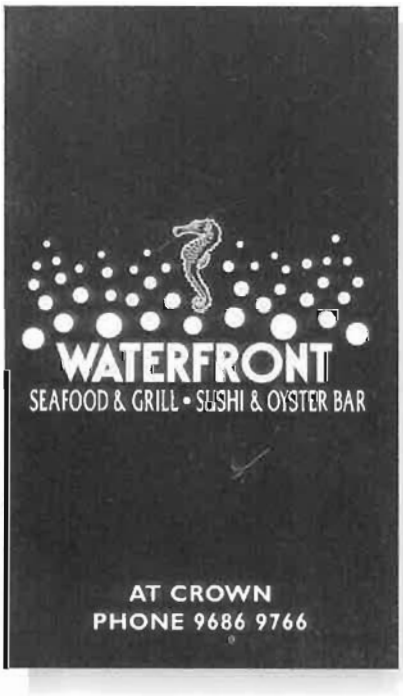
Left to right: Elspeth Strong, Justice Northrop and Paul Willee Q.C.

Left to right: Justice Northrop, Peter Gray, Daniel Star and Justice Batt

Left to right: Justice George Hampel and Barbara Walsh

The Waterfront Seafood & Grill

THE Waterfront is a seafood restaurant situated at the Crown Casino. This may cause concern to some. It has become fashionable to denigrate the Casino. The "Camberwell stay-at-home-and-rake-the-leaves set" go to great pains, over a glass of non-sparkling mineral water, to emphasise that one has never attended the Casino and indeed one would never do so. The place is vulgar. Also, the prices in the restaurants are too expensive. Also, one should not be seen supporting the coffers of those owning the Crown Casino company.



These are all misconceptions in the case of the Waterfront restaurant. It is privately owned by the Zampelli family and, compared to many other seafood restaurants in Melbourne, its prices are reasonable.

But most important of all, the Waterfront seafood is excellent. This good food is served in a stylish environment next to the Yarra. There are tables outside for the warmer weather and indeed for those hardy enough in the colder weather warmed up by large braziers. This is not a vulgar restaurant.

The key to a seafood restaurant is freshness. There must be a good supply of a wide variety of fish and shellfish. Of further importance is the fact that frozen seafood is kept to a minimum and a high turnover in the restaurant ensures that the fish on the plate is fresh.

On one of my visits to the restaurant I spoke to the second chef Steve Witherinson, an articulate young man with a love of fish cooking. He explained that the aim of the cooking was to keep it simple. Not to overwhelm the fish with cream or other heavy sauces. He further explained that the restaurant has a good fish broker with direct contact with the Melbourne wholesale fish market. The chefs are able to assess the availability and cost of fish through the Internet. As long as you are willing to buy a Warwick of fish, a Warwick being a 30-kilogram container of fish, you too can buy from the wholesale fish market on the Internet.

As you walk into the restaurant, the first thing to catch the eye is a large display of fish and seafood on a bed of ice. This is surrounded by an oyster bar where you can choose what you want and is complemented by an excellent sushi and sashimi bar. Tables are nicely covered with linen and the service is attentive. I recognised one of the waiters from his days at France Soir. But he had overcome that style of waiting. The starters, apart from the varieties of cocktail, tuna tartare and seared oysters, run to shrimp scallops on skordalla with fried leek and Russian blinis and smoked salmon. There are two soups, the Waterfront seafood chowder and to cater for the Asian market, the Laksa noodle, seafood and coconut soup.

I had the chilli prawns and my companion the seared scallops. Both were excellent. The chilli prawns were straightforward, and came in a bowl with a large amount of rice. They were good prawns and the sauce can be adjusted to suit your tastes. The seared scallops were a standout. Skordalla is a type of mashed potato with garlic. The scallops had been nicely seared on the grill with the fried leek accompaniment. The serving was unstinting in size.

The main courses emphasise grilled seafood and of course there is fish and chips. There are live lobsters and crustaceans which can be cooked with cracked black pepper, grilled with lemon mayonnaise or chilli style.

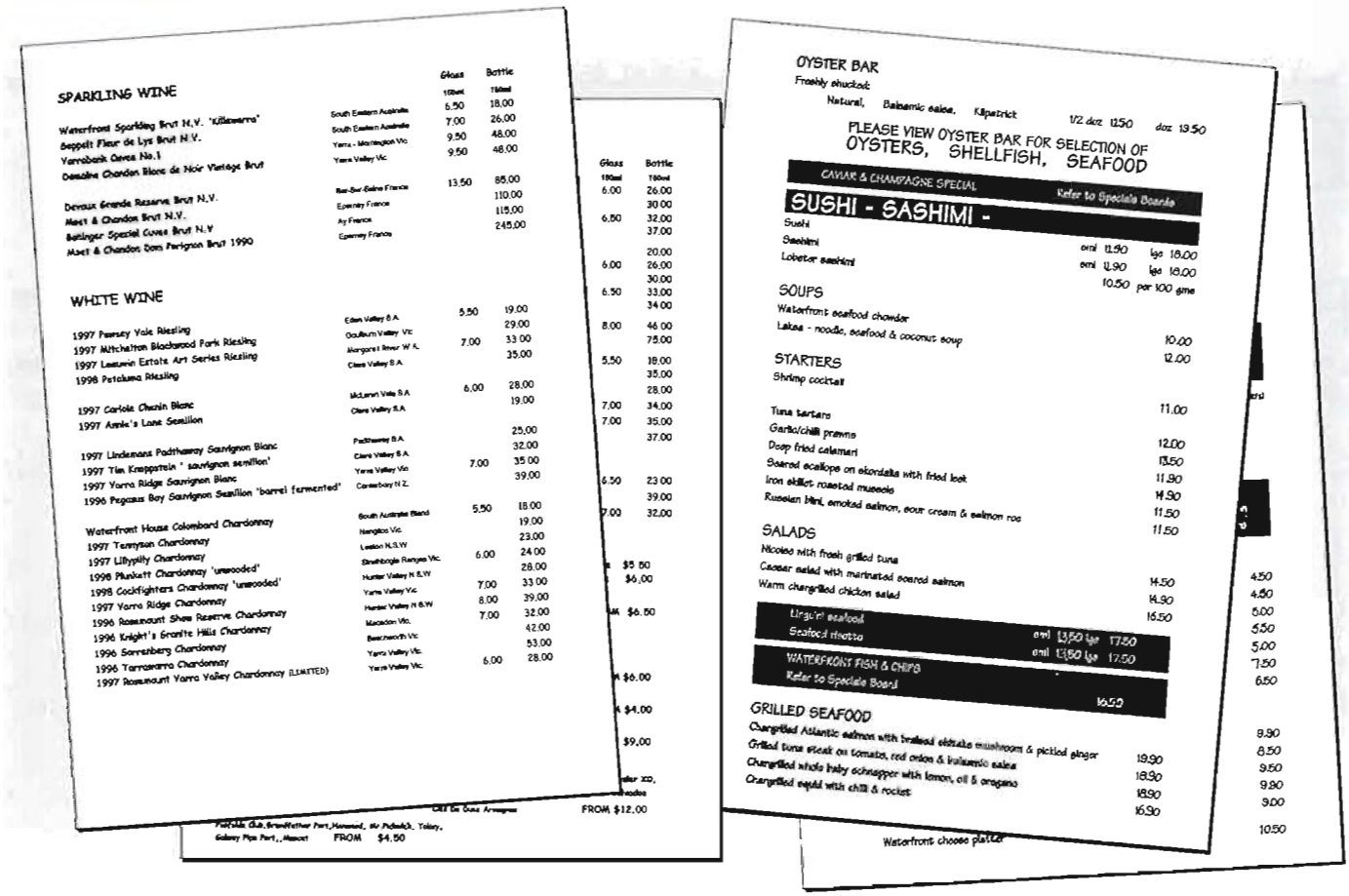
On another occasion I shared the Waterfront platter with a group of fellow barristers. The platter comes in two varieties: $70 and $100. It contains crabs, prawns, oysters, sushi, sashimi, octopus and smoked salmon with caviar. The difference in price depends on whether you are going to have the more expensive crustaceans.

Seafood platters in seafood restaurants vary greatly. Many are large showy affairs. They come out looking very impressive with all sorts of displays of garnishes, crab claws and shells. Unfortunately the shells often turn out to be empty or dry. Much of the accompaniment turns out to be commercial calamari rings and it becomes obvious that the seafood is of the tired frozen variety. This was not the case at the Waterfront. There were ample quantities available and the seafood was obviously very fresh. The platters are easily enough for four people.

One of the highlights of the restaurant is the grill. On my latest visit I had the grilled flounder in meuniere sauce. Flounder seems to have gone out of fashion somewhat. I was told that the size of flounders vary greatly. This was an excellent medium-size creature. It brought back memories of my youth when the RACV Club used to serve my father huge flounders on large tin dishes. Alas this is no longer the case at that establishment.

There was no attempt to over encumber the fish. It came with chips, which were real chips not American fries. We also ordered a good side salad.

My companion had a deep sea fish, the name of which now escapes me. I



believe it was something like Marwong. It was an excellent cutlet on a bed of salad. Again it was lightly prepared.

Apart from the grilled salmon, tuna and whole baby schnapper there are some more exotic main courses. Double-stuffed whole garfish with chilli mayonnaise and rocket, steamed whole live baby barramundi and roasted cod with clams all sounded good. For those who are unable to eat seafood there are also steaks, racks of lambs and pot roasted chickens available.

A tarte tartine was shared as a dessert. This was not the high point of the meal. Other desserts ranged from a grilled berry platter through to a passionfruit and mango trifle to a bread and butter pudding. A cheese platter is available.

Prices are not high for a place of this nature. Chilli prawns were $13.50, the scallops $14.90. A shrimp cocktail is $11. The grilled seafood runs from $16.90 to $19.90. Apart from the crustaceans the main courses are all under $20. Of course, any side dishes that are ordered must be added. Desserts are all under $10 and the cheese platter is $10.50.

As to the wine list, there are 8 sparkling wines, 21 white wines, 17 red wines, 3 dessert wines together with the usual aperitifs, cognacs and liquors.

The house white is a Colombard Chardonnay at $18. The most expensive white wine is a Tarrawarra Chardonnay at $53. The red wines range from the house red, a South Australian Cabernet Shiraz at $18, to a Penfolds 1995 Bin 389 at $46. Perhaps the only criticism of the wine list is that there could be a few more special wines and perhaps some French and Italian reds and whites.

For a fresh and uncomplicated meal with good service and a great view the Waterfront is an excellent option. Whatever criticisms can be levelled at the Casino cannot be levelled at this establishment. Indeed the whole complex of restaurants flanking the Yarra is a welcome addition to Melbourne's lunch scene. Judging by the popularity of this restaurant, those who doubt the need and continued existence of the Casino are in a minority. If you do intend to visit the Waterfront ask for the Manager Mr Lee Kanbur when making a booking. He informs me that barristers will be welcome. One perhaps can draw the inference from this statement that not many barristers have attended this establishment to date.

Paul D. Elliott

WATERFRONT SEAFOOD & GRILL — SUSHI & OYSTER BAR

Opening hours:
Lunch: 12.00–3.30 p.m. 7 days.
Dinner: 6.00–11.00 p.m.
Sunday to Thursday.
6.00–12.00 Friday and Saturday.
Reservations are advised.
There are no reservations on Saturday nights.
Executive Chef: Steve Cumper.
Second Chef: Steve Witherinson.
Manager: Lee Kanbur.
Owners: The Zampelli family.

Grant Fraser: Watching Barriste Beneath their Wigs

BARRISTERS lend themselves to caricature, from beneath the anonymity of wig and gown a strange metamorphosis occurs: barristers grow new faces. Jowls that were limp begin to tremble with ruddy aplomb; lips that otherwise might be pursued in petulance swell into curves of righteous anger; webs of drinker's veins become trails of wise experience. Pomposity remains

Boniface Keen

Barrister-at-Law

Young advocate; has yet to master the fine art of not spitting on his instructing solicitor in bouts of furious advocacy.

Practices rigorous cross-examination on his budgie; so far the budgie hasn't cracked.

Andrew Loath-Chunderly

Barrister-at-Law

No brain, no sense, rows, but looks good as a Junior.

r's Grow New Faces

pomposity [only louder], and one can only marvel at the way that the phrase "As your honour pleases" manages its passage through gently gritted teeth.

Grant Fraser

Buffin Huge Q.C.

Barrister-at-Lard

Once ate a Junior.

Fuming Joe Bluster

Excitable Barrister-at-Law

Once threatened to beat a short Tipstaff, the Tipstaff complained to the Judge; Bluster then threatened to beat the Judge's wife.

The Judge's wife thought that a good idea.

Family Law Bar Dinner at the Australian Club

THE opulent dining room of the Australian Club was the venue for the Family Law Bar Association Dinner held on 23 July 1998. The dinner is an annual event, which careful examination of the records reveals occurs every three years, was to acknowledge the contribution made by the Honourable Justice Guest as Chairman of the Family Law Bar Association from 1986 to 1998.

The speeches were mercifully short which gave the members an opportunity to inflict their wit on each other, one subject of which was the muslin-wrapped lemon that accompanied the smoked salmon. One can only ask, how do they serve their lemons at home? By the time dessert was served the ambience of the evening was more subdued. Whether this was due to the rather humourless sticky date pudding or the intake of fine wines remains unanswered.

The Chairman of the Association, Michael Wattt Q.C., presented His Honour with a very respectable briefcase to acknowledge his years of service to the Association.

The Chief Justice warmly welcomed both His Honour and the Honourable Justice Carter to the Family Court, a sentiment shared by all of those present.

The dinner was extremely well attended due either to the popularity of His Honour or the generous subsidisation of the event by the Association. Photographs of the evening once again reveal a pathological aversion to colour amongst the female members of the Bar save for Debbie Wiener who refused to be intimidated by the gothic fashion decrees of others.

Critiques of the dinner have been encouraging, so encouraging that the annual event may now occur every two years.

Norah Hartnett, Carolyne Kirton, Debbie Weiner and Chief Justice Nicholson

Paul Staindl, Noel Ackman Q.C. and Michael Watt Q.C.

Rosetta Stoikowska and Justice Hannon

Joan McIntosh and Justice Guest

Peter Nedovic, Judith Lord, Paul Fildes and Caroline Counsel

Naughty Words

SAMUEL Johnson defined *fart* as meaning to *break wind behind.* He illustrated the usage with a quotation from Swift:

As when we do a gun discharge,
Although the bore be ne'er so large,
Before the flames from muzzle burst,
Just at the breech it flashes first;
So from my Lord his passions broke,
He *farted* first, and then he spoke.

I have not been able to find out who was the object of Swift's attention. Probably Lord Chesterfield, who was much despised by Johnson. Johnson described Chesterfield's letters to his son as ". . . *teaching the morals of a whore and the manners of a dancing-master*". However that may be, it is apparent that *fart* was not treated in the 18th century with the reserve now accorded it. The OED2 says *fart* is "not now in decent use", which is about a 6 on the lexicographer's Richter scale of naughtiness. Compare *damn*: (no caution, but best not said to Duchesses or in Court, say 2 on the Richter scale); *bum, turd*: "not in polite use" (say 3); *wank*: "slang" (4); *bugger*: "low language" (5); *fuck* and *cunt*: "for centuries, and still by the great majority, regarded as a taboo-word; until recent times not often recorded in print but frequent in coarse speech." (off the scale). *Bloody* gets a "foul language" rating in the OED2, which is about 7, but in Australian usage, it is about a 3. *Arse* is noted as obsolete in polite use, which puts it with *bum*: appropriate anatomically, but in my view it rates a 5. Oddly, there is not much naughty language available above 6 unless you want to go off the scale.

Of course, these ratings are my own invention and highly subjective, although I doubt there would be much disagreement about the ranking. But the ranking was not always so. *Fart* was in more or less polite use until the 18th century. Chaucer used *fart* freely, and the English translations of Aristophanes have him also using it frequently.

Florio's Dictionary of 1598 defines a *fizzle* as "a close farte", which suggests that *fart(e)* was itself regarded as standard English at that time. The same inference is supported by the publication in 1722 of a pamphlet entitled "The Benefit of Farting Explained". By contrast, the OED2 gives as one meaning of *raspberry* "a breaking of wind or 'fart'". The use of inverted commas clearly signals that the word is used with diffidence.

According to John Aubrey's *Brief Lives*, Edward de Vere, 17th Earl of Oxford, accidentally broke wind "while making low obeisance" to Queen Elizabeth I. He exiled himself for seven years, and when he returned and again met the Queen she said "My Lord, I had forgotten the fart". So far as I can find, Shakespeare did not use *fart*: too regal, perhaps. Coming to the present time, Elizabeth II is unlikely to use the word, although the same cannot be said of Princess Anne.

Nowadays, *fart* as a word is heard only about as often as the thing it describes. As is the case with many other naughty words, the thing it describes is known to all, done by most, but spoken by few.

Shit and *turd* are words with similar meanings and similar histories. They are both old saxon words, found in written English from the earliest times. Bailey's dictionary of 1742 and Johnson's of 1755 give definitions of *turd*, with no suggestion that it is a word to be avoided. Bailey also has *shite*: "to ease nature; to discharge the belly", but Johnson does not. Both words were used liberally by Chaucer. Shakespeare uses *turd* once only (Merry Wives of Windsor (Act 3 scene iii), in a pun for *third.* He does not say *shit,* preferring *dung* and *ordure.*

Just as the fortunes of these naughty words have fluctuated, so have the fortunes of naughty. Originally, naughty meant "having nothing, needy", from *naught/nought.* Soon, the need was principally a need of virtue, and to be naughty was to be morally bankrupt. So, in the King James version of the *Bible*:

Proverbs 17:4. A wicked doer giveth heed to false lips; [and] a liar giveth ear to a *naughty* tongue.

It also applied to inanimate things, which lacked the qualities for which they were otherwise valued:

Jeremiah 24:2. One basket [had] very good figs, [even] like the figs [that are] first ripe: and the other basket [had] very *naughty figs,* which could not be eaten, they were so bad.

And at about the same time, Shakespeare often used *naughty*, and invariably to convey real wickedness, as the context shows. So, in King Lear, the unlovable Regan, whose treachery has been discovered by Gloucester, is addressed by him thus:

Naughty lady,
These hairs which thou dost ravish from my chin
Will quicken, and accuse thee. I am your host.
With robber's hands my hospitable favours
You should not ruffle thus. What will you do?

(The question is rhetorical, but an answer is swift: Regan's husband tears out Gloucester's eyes).

In 1748, Nathaniel Bailey's dictionary defined *naughty* as "wicked, lewd"; and Johnson (1755) defined it as "bad, wicked, corrupt", but notes that it is "now seldom used but in ludicrous censure". By degrees, *naughty* came to be the mildest rebuke. So, in Wuthering Heights (1847):

"I attempted to persuade him of the *naughtiness* of showing reluctance to meet his father . . ."

At least until the end of the 16th century, then, it was probably safer to call a person a *fart* or a *turd*, than to suggest they were *naughty.*

Julian Burnside

Poison Parker Pen

DOROTHY Parker was a critic, writer, poet and wit, but it is for her bitchiness she is best remembered.

When told a women friend broke her leg in England she rejoined, "Probably sliding down a barrister".

An Interview with Marg O'Donnell

Victoria's first Legal Ombudsman has resigned to take up a position with the new Queensland Government. Marg O'Donnell gave this interview to *Victorian Bar News* prior to her departure for Brisbane.

Marg O'Donnell

VBN: Firstly, what are you going to be doing in Queensland and how do you feel about it?

O'DONNELL: My new job has two parts. I am going to be the director-general of Aboriginal & Torres Strait Islander Affairs and the director-general of the Department of Equity & Fair Trading. I am very excited by this job opportunity because it is two new departments that have been pulled together.

I feel very sad about leaving the Ombudsman position as it is a great job and I was enjoying it enormously. But I was offered another great job back in Brisbane where I have two adult children and my family, plus the particular areas of work that my departments will cover are of vital interest to me. I leave, however, with great regrets.

VBN: Having established the Office of the Legal Ombudsman almost two years ago, are you satisfied about how it has developed?

O'DONNELL: I believe it is working and travelling extremely well. We would have handled and processed around 1200–1300 complaints, some of them extremely complex. We would have taken around 5000 enquiries. We have done a very detailed inquiry into multi-disciplinary partnerships in the legal profession. I have done another report to parliament about a particular long-standing complaint. We are involved in training the legal profession on ethical issues both as undergraduates and as practitioners. We have put together information for clients on how to deal with their lawyers more effectively. And we have watched over the complaint handling processes of both the Bar and the Law Institute. We seem to have done all this quite effectively and without too many agonising moments.

VBN: Under the *Legal Practices Act* 1996, there are three regulators for legal practitioners. To the consumer it can appear rather complex. Do you think it is working well?

O'DONNELL: I sometimes describe it as a *menage à trois* with all the inherent complexities and difficulties that such an arrangement brings. For the consumer it is difficult — you can complain to one of two bodies and you have to make a choice as to who you complain to. We all have to keep each other notified of complaints and I have an over-arching and monitoring role in the ways both RPAs do their complaint handling. This has involved all three bodies working in very close co-operation. This has worked okay and sometimes very well. I found working with the Bar Ethics Committee a very co-operative process. But the underlying issue remains whether the profession should be the body which investigates complaints against itself or whether an external regulator should be the one that does it and perhaps uses the profession in an advisory role.

VBN: Can you see the current system changing?

O'DONNELL: Yes, I think it is possible down the track that the regulation of the legal profession will be completely handled by an external body such as this office. For example, in NSW all complaints about the medical profession go to an external body.

While there are obvious advantages with that, I am sure that the legal profession would see some disadvantages. I agree that it is important, for instance, for the profession to know what people are saying about them. So while I can see both sides, I think I am moving towards there being just one external body to receive complaints.

VBN: What is the nature of the complaints your office receives about barristers?

O'DONNELL: While I know that costs is the single biggest issue, our office does not deal with those and the issues we receive are to do with poor communication, for example, barristers not fully following instructions, barristers being seen to be bullying their clients into settlement, barristers being patronising or rude, and barristers colluding with the other side. The latter is a very difficult matter for barristers who spend a lot of time at the courts waiting around. But they need to see it from the client's point of view. It is very difficult for clients, who are feeling anxious and almost paranoid, to understand why their barrister should be in a huddle, sometimes laughing and joking, with "the other side". Barristers should either not do it or explain very

clearly to their clients what is going on. Again you need to see it as a communication issue.

Another complaint we get is the failure on the part of barristers to prepare properly. Barristers will say that this is a systemic problem. They don't get the brief until late, sometimes only a few hours before they have to rush into court. My view is if you haven't got time to properly prepare, you shouldn't take the brief. If you do, the chances are you might end up with a complaint made against you. Clients often say the barrister didn't even know what my case was about! I believe that barristers should not just accept the current system, they need to be more active in reforming it.

My view is if you haven't got time to properly prepare, you shouldn't take the brief. If you do, the chances are you might end up with a complaint made against you. Clients often say the barrister didn't even know what my case was about!

VBN: How would you go about reforming that part of the system?

O'DONNELL: I can't see why the whole justice system can't be planned better. Why can't you have an appointment system at the courts? It is a waste of everyone's time, and the client's money, for people to be standing around for hours watching one another. The current system is so inefficient. The Bar could take a much stronger position and say that it is a waste of their time and their client's money and has to be reformed.

VBN: Do you have any views on the Bar's own complaints mechanism?

O'DONNELL: Yes, it is a very idiosyncratic way of dealing with complaints. A group of barristers very generously volunteer their time to serve on the Bar Ethics Committee to hear complaints against other barristers. However, the number of complaints has probably doubled in the past 12 months and it seems to me that a group that meets once a fortnight is going to find handling that volume of complaints an impossibility. I have suggested that they consider employing some professional complaint handlers and using the Ethics Committee as an advisory body. The processing of regular complaints could be handled by employed people in the same way as the Law Institute does. The way it is being done now is a little anachronistic. There are much more sophisticated and efficient ways today of handling complaints.

VBN: Your office has recently done a satisfaction survey among legal clients. How did barristers fare?

O'DONNELL: Barristers were really included in the general comments about the legal profession which said in a nutshell that the process that occurs between lawyer and client is very important to the client and that their sense of satisfaction at the end of their case has almost as much to do with that process as it has to do with the outcome. In fact some people can feel satisfied, although they might not have won the case, if they understand why. People said they liked being talked to. They liked being talked to frankly, and some said they often aren't. The terms "pompous" and "excluding" were used by some to describe their barrister. The fact is that barristers are usually very good at communicating in the courtroom, to the judge and to each other but not with their clients or at keeping their clients up to date with what is happening.

I know that some barristers say that it is the job of the solicitor to keep the client informed but in my view that is not good enough. You have to ask who is paying and the person paying is the client! They are paying for your services and have the right to understand and to be treated with courtesy and respect.

VBN: Part of your responsibilities are to review the Bar's Practice Rules, to consult with the Bar and to make recommendations to disallow any Rules you consider to be a problem. What have you done in this area of your work?

O'DONNELL: I have engaged this year in a protracted consultation process with the Bar Council, which I must say hasn't borne much fruit. Some of these Practice Rules have related to competition issues and some relate to service to clients. For instance, there is a rule which says that a barrister may not follow the client's instructions if in their forensic judgment it is not in the client's interest. What I would like to see added to the rule is that the barrister will consult with the client, where possible, to explain to them why they are not following instructions. However, the Bar has said no.

I am also interested in the rules prohibiting barristers talking to the media I believe that they are overly restrictive on a barrister's ability to speak with expertise about issues which are before us in the courts. I am as well trying to get them to include in their rules that the barrister, as well as being diligent and honest, is also courteous to the client. However, this has not been agreed to either.

I have now prepared a report to the Legal Practice Board recommending that these rules be disallowed or amended. I also propose to publish information about them in more detail in my annual report.

VBN: Are there any other comments you would like to make?

O'DONNELL: I have been very heartened by the amount of free work undertaken by many members of the Victorian Bar. Amongst many members there is a great sense of responsibility and commitment to social justice and I have been really impressed with what is being done.

Law Student Numbers

FOR some time there has been general concern in Australia that there are as many law students in Australia's law schools as there are practising lawyers in Australia.

The *Australian Legal Education Year Book* published by the Centre for legal education, a New South Wales body, indicates that this belief is not well-founded. According to the Year Book in 1997 there were 37,200 practising lawyers in Australia but only 21,500 undergraduate law students. The numbers are, however, an increase of almost 5 per cent over the 1996 figures.

There are 27 law schools in Australia, 10 of them in New South Wales. Those 10 law schools accounts for 6600 of the 21,500 law students in Australia and there are several thousand further students in New South Wales studying the non-degree course offered through the Legal Practitioners Admission Board.

In Victoria's three law schools there are a total of 3605 undergraduate law students.

Legal Representation of Children Project

LEGAL practitioners who represent children in the Children's Court negotiate ethical issues never faced by those who act for adults. The paradigm for client/legal practitioner relations is that a client of sound mind will provide instructions, receive legal advice, accept or reject the advice and give the legal practitioner final instructions. The practitioner is then bound by those instructions.

In the Children's Court, this model remains, even if the client is a child who is generally considered too young to make important decisions about his/her life. The result can be confusion by lawyer, client and family about the role of the legal representative.

What happens, for example, if you are instructed by a legal practitioner who has been retained by parents to act for their child, Sam, in the Criminal Division of the Children's Court. Sam has been brought before the Court after spending the night in custody. Your brief indicates that the matter is a straight remand. The parents, who are present at Court, confirm this. When you speak to Sam, you discover that Sam does want a bail application to be made. How do you handle this?

Or, you may have been briefed to act for an eight-year-old child, Sandy, who alleges that her stepfather has sexually abused her. Sandy instructs, however, that she would rather go home with her mother and stepfather and risk further abuse than go into foster care. She further instructs that she does not believe that her mother can protect her and that further abuse is likely. What do you do?

Legal practitioners retained to represent children are required by s.20(9) of the *Children and Young. Persons Act* 1989 to:

> [A]ct in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child.

Interpretation of s.20(9) is left to individual practitioners. Little practical guidance is given about how to deal with ill-advised instructions or to assess the child's capacity to give instructions. Legal practitioners are generally left to solve these practical and ethical problems on a case-by-case basis.

Issues directly raised by s.20(9) include:

- How does a practitioner determine the "practicability" of acting on a child's instructions?
- How does a practitioner determine the "maturity" of the child?
- What does a practitioner do if they determine that the child's instructions are impractical or that the child is too immature to give instructions?
- On what basis are the above decisions made? For example, is "maturity" determined by an assessment of the maturity of the child, or the maturity of the instructions as assessed by the legal practitioner?

The Victoria Law Foundation is conducting a project to develop guidelines for legal representation of children in the Children's Court. The Project responds to concerns that legal representatives of children in both the Criminal and Family Divisions of the Children's Court are often troubled by these ambiguities.

A Reference Group has been assembled to guide the project. The Group comprises Ms Jennifer Coate, Senior Magistrate at the Children's Court, Mr David Fanning, barrister, Ms Michelle Fischer, Attorney-General's Policy Department, Mr Andrew McGregor, Program Co-ordinator in the Youth Legal Service — Victoria Legal Aid, and Mr Danny Sandor, Senior Legal Associate to the Chief Justice of the Family Court.

Individual interviews and focus groups with clients, legal practitioners, social workers and youth workers will explore the practical problems lawyers and their clients encounter. Development of the guidelines will be informed by this consultation process.

In addition to this formal consultation process, the Foundation would welcome any input from legal practitioners who have acted for children in the Children's Court, particularly if difficulties were experienced in relation to the solicitor/client relationship.

The Human Rights and Equal Opportunity Commission in their recent report, *Seen and heard: priority for children in the legal process*[1] highlighted the need for the development of standards for the representation of children in all Australian states. This project seeks to begin that process in Victoria. The assistance of the profession is required to produce high quality guidelines, which are practical and assist practitioners in their work.

Practitioners are encouraged to send relevant information to the Victoria Law Foundation, "Legal Representation of Children Project", Level 8, 224 Queen Street, Melbourne or DX 491. Practitioners may wish to do so anonymously. If so, can they please indicate what their experience is, for example, "practitioner who regularly works in the Criminal Division of the Court" or "practitioner who has acted for a child once after being retained by the child's parents". This will assist in determining where practitioners are experiencing the most difficulty. The Project Consultant may like further details about your experiences in the Children's Court. If you are willing to be contacted, please provide your contact details.

Information can also be forwarded via e-mail to anniew@viclf.asn.au or you can telephone (9602 2877) or fax (9602 2449) the Victoria Law Foundation directly. Submissions need to be received by the Foundation prior to the end of October.

1. Australian Law Reform Commission Report No. 84 1997

The Living Legends Dinner

The "Living Legends"

THE Australian Football League has its Hall of Fame and the Americans make up for their lack of a royal family by constantly celebrating the lives of movie stars and actors (there is a difference), and now the Victorian Bar has amalgamated the two concepts by launching its own "Living Legends" dinner. The dual qualification for attainment of the honour "Living Legend" is that one is living and a legend, or more particularly, legendary. The *Oxford Dictionary* defines legend as a "collection of lives of saints or similar stories; traditional story, myth . . . famous". There is no question that the inaugural inductees for title of "Living Legend" were a mixture of saints, myths or simply famous.

A dinner was held at the Essoign Club to celebrate the contributions saintly, heroic and mythical to the Victorian Bar of S. E. K. Hulme Q.C., Neil McPhee Q.C., Michael Dowling Q.C., Paul Guest Q.C. (as he then was, his appointment as a Judge of the Family Court being announced that night), Jack Keenan Q.C., Brian Bourke, Brendan Murphy and Mary Baczynski. The evening was compered by the President of the Court of Appeal, Jack Winneke and the toast to the "Living Legends" was proposed by Hartog Berkeley Q.C. and responded to on behalf of the Living Legends by McPhee Q.C. Those who showed their support for both the Bar and the Living Legends, were treated to a feast that went beyond the morsels of partial sustenance provided as dinner, to hilarious and apocryphal stories of the Living Legends that exemplified their well-deserved reputation as great contributors and personalities of our Bar and above all, great

"Gentleman Jack"

Hartog Berkeley Q.C.

McPhee Q.C.

Michael Dowling

people. Having done so much to promote the camaraderie and *esprit de corps* which is so important to the successful functioning of our Bar as a whole, it was entirely appropriate that the Bar recognise their contribution by having the dinner in their honour.

Having granted the status of "Living Legend" to a few, whilst the Bar must be careful not to devalue the coinage of "LL", one would hope that this function may become a regular event on the Bar's calendar.

Simon Wilson

Hanry Hetherington (1792–1849)

from Sutherland (ed.), *The Oxford Book of Literary Anecdotes* (1975) 251–255.

AMONG the mass of penny periodicals, the one that made the most stir was unquestionably the *Poor Man's Guardian* [No. 1, 9 July 1831], the publication of which had preceded the *Penny Magazine* by several months. In those days of intense political excitement the working-classes hungered for political news, and this was the kind of intelligence the paper chiefly gave. It boldly announced in each number that it was "established contrary to law . . . and published despite the laws, or the will and pleasure of any tyrant or bodies of tyrant". It attacked kings, lords, and commons all round, protested against the new civil list and the proposed extra grant to the Duchess of Kent and her daughter, and denounced the Reform Bill as an accursed measure promoted in the interests of the middle classes.

Still, on the whole, the language of the *Guardian* was far less violent than that employed by several of its unstamped contemporaries, such as the *Republican* which talked of "the diabolical machinations of the villains in power", and the *Prompter*, which proclaimed "down with kings, priests, and lords, whose system is a system of murder, plunder, and spoliation". The most reprehensible article published in the *Poor Man's Guardian* was one which professed to be a review of a book by the aide-de-camp of the King of Naples, and gave what it called "Defensive instructions for the people", the illustrative engravings to which showed how civilians armed with long lances might rout cavalry successfully, and parry bayonet charges.

However, before many numbers of the *Guardian* had appeared, Hetherington, its publisher and proprietor, was summoned on the charge of publishing a newspaper without a stamp — every copy of a newspaper was then required to be impressed with a fourpenny stamp. Instead of obeying the Bow-street mandate, Hetherington sent a note to the magistrates informing them that he could not have the pleasure of the proposed interview, as he was going out of town; and he at once set off on a provincial tour to push the sale of his publication. In a second summons that was issued Hetherington was apprised that if he failed to attend, the court would proceed *ex parte*. To this he responded by a chaffing note asking the magistrate the meaning of the phrase, and why the English language, which he could understand, was not made use of.

This was too much for the Bow-street justices, and runners were started on Hetherington's track. They soon discovered from the public meetings he had been holding that he was at Manchester, but owing to their having invoked the assistance of a couple of local constables to assist in his capture, Hetherington was forewarned, and as the officers made their entrance at the door of his lodgings, he sprang out of the window and made his way to Macclesfield. His mother being seriously ill, he returned secretly to London; but spies were on the watch, and he was seized the very moment he laid his hand on the door knocker, and lodged in the police station. By the Bow-street magistrates he was ordered to be imprisoned for six months in Clerkenwell jail; and soon after the expiration of his sentence he was again consigned to the same prison for a like term. Still the *Poor Man's Guardian* continued to be published, and every week newsagents and street hawkers were sent to jail for selling a paper which it was contended ought to bear a fourpenny stamp.

But these repressive measures were of no avail; people suffered imprisonment again and again, and yet still went on selling the *Guardian*. Nor was this remarkable pertinacity confined to the humble vendors of the publication. Cleave, a fairlywell-to-do radical newsagent in Shoe-lane, whom I knew very well in after years, and from whom I gathered many of these particulars of the dangers and difficulties which beset the vendors of the unstamped press in the days I am speaking of, was more than once incarcerated. So was Guest, the largest newsagent in Birmingham, and so, I believe, was Mrs Mann of Leeds. Abel Heywood of Manchester, a man of considerable substance, who subsequently had the honour of being chosen chief magistrate of the city, after suffering alike in person and in pocket, resolutely refused to discontinue the sale of the *Guardian*.

Many of the more humble distributors of the paper sought to argue both the law and the justice of the case with the magistrates, and on being promptly silenced, hurled defiance at the bench, although they knew that by so doing they were increasing their sentences fourfold. One sapient city alderman sent a little boy, who had sold a copy of the paper, to prison for three months, on the pretence that a severe sentence was necessary, otherwise children would be made use of wholesale to set at naught the supreme majesty of the law.

All manner of ruses were adopted to evade the vigilance of the stamp-office officials, who were ever lying in wait to seize the *Poor Man's Guardian* in the hands of the London retailers, or on its way to provincial newsagents. Dummy parcels used to be made up and sent out of the office by apparent stealth, the bearers glancing furtively around before proceeding on their way. They had received instructions to throw themselves, as if unconsciously, into the officers' arms, and then to argue and dispute with them with reference to the contents of the parcels they were carrying, so as to detain the officers as long as possible, while the genuine parcels for country customers were being smuggled out the back way. The authorities, finding themselves foiled in this fashion, took to seizing parcels of the *Guardian* at the carriers' receiving offices, and from vans and stage coaches; but in order to baulk them in these proceedings the papers were packed, by arrangement, in cases containing shoes, chests of tea ordered by country grocers, and bales destined for provincial haberdashers, and were claimed by the newsagents on reaching their destination.

Bundles of the *Poor Man's Guardian* were also conveyed privately at night time from the printing office to private houses and other "safe places" in various quarters of the metropolis, where neighbouring retailers were enabled to obtain their supplies. These they wrapped round their bodies beneath their waistcoats, or stowed away in capa-

cious pockets, and concealed in tall top-hats, for so vigilant had the authorities become that people were stopped in the streets, and compelled to open any parcels suspected to contain unstamped publications. Hetherington announced that he lent the paper out to read at the charge of a penny, being able, he said, by this means to evade the stamp act, which only related to papers "published for, and exposed to sale". After his painful prison experiences — he having had to endure all the hardships to which a common criminal was subjected — Hetherington took every possible precaution to avoid being rearrested. He lived out of town, and entered his place of business in the Strand by a roundabout way through the Savoy, and generally in the disguise of a drab-coated quaker.

His time, however, came at last; but instead of being again dealt with by police magistrates, he was tried in a superior court before Lord Chief Baron Lyndhurst and a special jury. He made a clever and sensible defence, urged the jury not to accept a mere lawyer's definition of a newspaper, whether given by the Solicitor-General, or even by the Lord Chief Baron himself, insisting that his opinion as to what formed a newspaper was quite as good as theirs. Lyndhurst laughed heartily, and in the end left the matter entirely to the jury — the prosecution being instigated by the Whig Reform government, the Tory Chief Baron, likely enough, was not particularly anxious for it to succeed. To Hetherington's surprise the jury acquitted him, and he jubilantly announced in all future numbers of the *Poor Man's Guardian* that the paper, "after sustaining a government prosecution of three and a half years, during which five hundred persons had been unjustly imprisoned for vending it, had at a trial in the Court of Exchequer, before Lord Chief Baron Lyndhurst and a special jury, been declared a legal publication". Henceforth Hetherington gave no quarter to his Whig prosecutors, "those knaves", he said, "who used to split the ears of the groundlings with talk about the palladium of our liberties, and of a free press being like the air we breathe; which, if we have not, we die".

[from Vizetelly, *Glancina Back through Seventy Years* (1893) vol. I, pp. 90–94.]

The editors acknowledge that *Victorian Bar News* does not come impressed with a fourpenny stamp.

Corporations Legislation available in record time

Aunty Abha's new Website speeds the legal process

THE importance of electronic delivery of legal information has hit home with the release of consolidated Corporations Law (including the very latest round of Federal amending legislation—- some 2000 amendments) on the Internet this month.

Aunty Abha's used their website to make the legislation available weeks before it would have been possible for conventional print publishing and well in advance of other electronic and online sources.

While the information is still unavailable through the other hard copy or CD publishers, Aunty Abha's Internet subscriber service has had the consolidated legislation posted since July 17 — meaning that legal practitioners were able to access the service only two weeks after the July 2 amendments were made.

Aunty Abha's Internet Legislation Service is free to Aunty Abha's subscribers who purchase ten updates to any two of five jurisdictions.

Aunty Abha's Internet Subscriber Service actually posts the **consolidated legislation** on the net. It should not be confused with SCALE and AUSLII, which may post amendments quite early, but don't post the consolidated legislation until much later.

Rosemarie Gates, librarian at the Sydney law firm Norton Smith & Co whose lawyers have access to legal databases from their desktops, said that this legislation was particularly important, and many solicitors were sweating on its arrival.

"That is why we were so pleased to find it available on Aunty Abha's Internet service. If our solicitors hadn't been able to get the consolidated legislation, they would have had to continue the laborious process of referring to each amending Act," she said.

As there were 2000 amendments in this consolidation (approximately 15 per cent of the whole legislation), referring to each amending Act and then reading the change as part of the main Act would be a lengthy and painstaking task.

"We've had many firms ringing us asking when it would be available," said Abha Lessing, Managing Director of Aunty Abha's Electronic Publishing. "They were pleasantly surprised — some were even shocked — to discover that interim consolidations were already posted on our website," she said.

"This was quite a significant task considering the magnitude of the legislation," she said. "Not only were we dealing with large amending Acts such as the *Company Law Review Act* 1998, but we were also dealing with amendments to the amending Acts such as the *Taxation Laws Amendment (Company Law Review) Act* 1998 — all of which had to be incorporated."

Aunty Abha's is a leading innovator in the legal publishing market, providing legal and commercial electronic information. It is a friendly 100% Australian owned and based company.

Aunty Abha's website is at: www.auntyabha.com.au.

The Scottsboro Boys

Julian Burnside

FIFTY years ago, on 17 July 1948, Haywood Patterson escaped from Kilby prison, Alabama. He ultimately reached Michigan, where he was taken into custody. But the Michigan courts refused to extradite him.

When he escaped from Kilby prison, Haywood Patterson was serving a 75-year sentence for rape. That sentence was the result of his fourth trial on the same charge: three times he had been convicted and sentenced to death; three times the convictions had been overturned.

Haywood Patterson was the victim of one of America's most notorious miscarriages of justice. He was one of the Scottsboro Boys.

When he escaped, Haywood Patterson had been in prison for 17 years for a crime which, almost certainly, had not been committed. The conviction of Patterson and four others was the result of perjured evidence coupled with entrenched race-hatred in the deep South of the United States.

* * * * *

The saga, which ended on 17 July 1948, began on 25 March 1931. On that day, two white girls, Victoria Price and Ruby Bates, boarded a train in Chattanooga, Tennessee, to return to their homes in Huntsville, Alabama. Nine black boys[1] (aged 13 to 19) were riding on the train, sitting in an open freight car.[2] The boys got into a fight with some white boys. The blacks won, and threw all the white boys off the train other than Orville Gilley. The only serious injury suffered by the white boys was to their pride, and they informed the railway officials that they had been attacked. When the train arrived in Paint Rock, Alabama, about 30 minutes later, an angry crowd of whites awaited them and they were arrested.

Like the blacks, Ruby Bates and Victoria Price, had been riding the train illegally: like the blacks, they were unemployed vagrants, travelling around in a way common during the depression years. There had obviously been a fight on the train, and they were concerned that they would be charged along with the blacks. To spare themselves that inconvenience, they alleged that the nine blacks had raped them on the freight car. Within 90 minutes of arriving in Paint Rock, they had been medically examined. Meanwhile, the nine black boys had been taken into custody. Four days later, an all-white grand jury was convened in nearby Scottsboro, and all of the defendants were indicted.

The trials began in Scottsboro on 6 April. They had no worthwhile legal representation. A lawyer named Roddy appeared for them. Patterson recorded the following exchange between Roddy and the Judge:

Judge: You defending these boys?

Roddy: Not exactly. I'm here to join up with any lawyers you name to defend them. Sort of help out.

Judge: Well, you defending them or aren't you?

Roddy: Well, I'm not defending them, but I wouldn't like to be sent off the case. I'm not being paid or anything. Just been sent here to sort of take part.

Judge: Oh I wouldn't want to see you out of the case. You can stay.[3]

It did not get better.[4] The trials took two days in total. All defendants were convicted. Eight were sentenced to death. The conviction of one (Roy Wright) was set aside by the trial judge because Wright was only 13 years old. Later, the Alabama Supreme Court quashed the conviction of Eugene Williams because he, too, was a minor.

The case had already come to the attention of the International Labour Defence. It eventually succeeded in having the executions stayed, pending appeals. The case attracted worldwide attention, and eventually the US Supreme Court quashed the convictions on the grounds that the defendants had no effective legal representation.[5]

Patterson's second trial began in Decatur, Alabama, on 27 March 1933.[6] This time he was represented by Samuel Liebowitz (one of America's greatest trial lawyers ever[7]) and Joseph Brodsky. Although the trial judge, Judge James Horton, was scrupulously fair, the jury was made up of whites only, and most of them back-woods farmers. Patterson was convicted and again sentenced to death. However, Judge Horton heard, and allowed, a motion for a new trial. His ruling on the motion summarized the evidence in a way which makes the original conviction appear quite incredible.

The central allegation made by Victoria Price was that the nine Scottsboro Boys had raped her in the freight wagon. Her evidence was that they had hit her on the head with a pistol butt, torn her clothes off and held her down at knife-point, whilst each in turn raped her. Ruby Bates was treated in the same way. The whole incident had occupied less than half an hour. The Defendants had then let Ruby Bates and Victoria Price dress themselves just in time for the train's arrival in Paint Rock, where they made their allegations.

The freight wagon was loaded with chert, a form of flint. Chert is very sharp and hard. Yet the medical examination revealed no lacerations or bruising of the sort which an assault on sharp rock must certainly produce. It also revealed no evidence of a head injury; no fresh sperm, no bleeding, in short: no evidence consistent with intercourse during the previous 12 hours.[8] The clothing Victoria Price had been wearing showed no signs of tearing, nor any blood or semen.

Not only was there no forensic evidence to support an allegation of rape but, in addition, Victoria Price's version of events was denied by Ruby Bates. This time Ruby Bates was a witness for the defence. On 5 January 1933, she had written a letter to her boyfriend saying, in part: ". . . [it] is a goddam lie about those Negroes jazzing me those policemen made me tell a lie . . . i was drunk at the time and did not know what i was doing i know it was wrong too let those Negroes die on account of me i hope you will believe me because it is gods truth i hope you will believe me i was jazzed but those white boys jazzed me i wish those Negroes are not Burnt on account of me it is those white boys fault that is my statement, and that is all I know I hope you tell the law hope you will answer . . ."[9] (all spelling and punctuation as in the original letter).

Ruby Bates gave evidence for the defence at Haywood Patterson's second

trial. Orvill Gilley, the only white who could have witnessed the events if they occurred, was not called. In allowing the motion for a retrial, Judge Horton said: ". . . The testimony of the Prosecutrix in this case is not only uncorroborated, but it also bears on its face indications of improbability and is contradicted by other evidence, and in addition thererto the evidence greatly preponderates in favour of the defendant . . ." Judge Horton was thereafter shunned by the Alabama legal community, and failed in his bid for re-election to judicial office.

The Supreme Court's ruling had criticised not only the trial, but also the indictment, on the grounds that blacks had been excluded from the grand jury and the trial jury.

Patterson was tried a third time.[10] Judge William Callahan showed none of Judge Horton's fairness. Patterson was convicted and, for a third time, was sentenced to death. However, it emerged that in order to overcome the unexplained absence of blacks on the jury roll, a Court official had added seven fictitious names to the end of the roll. This piece of clumsy deception, coupled with evidence of the systematic exclusion of blacks from jury service in Alabama, persuaded the US Supreme Court to overturn the conviction.[11]

The Supreme Court's ruling had criticised not only the trial, but also the indictment, on the grounds that blacks had been excluded from the grand jury and the trial jury. On 1 May 1935, Victoria Price swore new warrants of complaint. On 13 November, a grand jury returned new indictments against all nine of the Scottsboro Boys. Although there was one black on the grand jury, a two-thirds majority was sufficient to return a true bill. Patterson's fourth trial, again before Judge Callahan, began on 20 January 1936. The trial took three days, and he was convicted again. Judge Callahan sentenced Patterson to 75 years imprisonment.

Alabama law provided that a person may not be convicted of rape on the uncorroborated evidence of the prosecutrix if her evidence "bears on its face indications of unreliability or improbability". Notwithstanding the difficulties inherent in Victoria Price's evidence, Judge Callahan's charge to the jury included the proposition that ". . . the law would authorize conviction on Victoria Prices's evidence alone . . ." On 14 June 1937, the Supreme Court of Alabama rejected Patterson's appeal.

For the other Scottsboro Boys, fate followed swiftly. On 15 July, Clarence Norris was convicted, and sentenced to death. On 22 July, Andy Wright was convicted and sentenced to 99 years. On 24 July, Charles Weems was convicted and sentenced to 75 years. The same day, Ozie Powell pleaded guilty to having assaulted a guard with a knife with intent to murder.[12] He was sentenced to 25 years, and the rape charge against him was dropped.

On the same day, the State of Alabama announced that the charges against the remaining four were to be dropped. They had all spent six and a half years in prison.

* * * * *

After Haywood Patterson's extradition was refused, he remained at liberty in Michigan for another three years until he was convicted of manslaughter. He died in prison.

In 1976, the only surviving member of the Scottsboro Boys, Clarence Norris, received a full pardon from the Governor of Alabama. Some governments find it possible, eventually, to say they are sorry.

NOTES

1. Haywood Patterson, Clarence Norris, Ozie Powell, Roy Wright, Andy Wright, Eugene Williams, Olen Montgomery, Charles Weems, Willie Robertson.
2. Referred to in the evidence as a gondola.
3. *The Scottsboro Boy* by Haywood Patterson and Earl Conrad (Victor Gollancz, 1951).
4. Judge Hawkins appointed a local lawyer, Milo Moody, to represent the defendants with Roddy. Patterson's account of the trial comments that Moody "didn't do anything for us, not a damned thing". Given his complete absence of preparation, that is not surprising.
5. *Powell* v. *Alabama*
6. He had succeeded in getting an order for a trial separately from the other defendants.
7. A good biography of Leibowitz is *Courtroom* by Quentin Reynolds (Victor Gollancz 1950).
8. The medical examination, however, did reveal that both girls had had intercourse the previous day.
9. The suggestion that she had had intercourse with the white boys is consistent with the medical examination, as there was clear evidence that both girls had had intercourse with two white boys the previous night.
10. This time, he was tried together with Norris. It was Norris' second trial.
11. *Norris* v. *Alabama*.
12. As the defendants were returning to gaol after Patterson's conviction, Ozie Powell attacked a warder with a knife. He was shot in the head, but survived. This attack was the basis of the charge of assault.

Bar Cricket *v.* New South Bar Association

THE annual cricket match against the Sydney Bar was played on 28 March 1998, at the Brighton Beach Oval. Finally, after six successive defeats (including a walkover), the Sub-Standard Trophy has returned to its permanent home, at least on a temporary basis. The heroes of the day were Steven Mathews (a wily and seasoned leggie with numerous interstate campaigns to his credit) and Rohan Skinner (a recent recruit to Bar cricket).

The match was played in overcast conditions on a slow wicket. The Bar won the toss, the Sydney Bar was sent into bat. With Tony Phillips (3/16), Skinner, Ross Middleton and Connor (2/23) bowling steadily, we were soon on top. The Sydney Bar struggled for runs but rallied late in their innings reaching 133 for the loss of 7 wickets from their 40 allocated overs.

Luncheon was taken by the locals amidst an atmosphere of confidence and congratulation. The target was well within reach. The chickens were counted. Upon the resumption, and following some excellent bowling and fielding, we collapsed. At 5 for 27, the position looked grim. Threatening clouds had moved in from across the bay and the forces of darkness had (once again) descended upon Victorian Bar cricket. Enter Joe Forrest (34) and Skinner (42) with a match saving partnership of 61 runs for the sixth wicket.

The clouds moved on. With God on our side, victory was within sight. Skinner reached the compulsory retiring score of 40. At his retirement, the Bar was 5 for 88. Even when Forrest was dismissed with the score at 112, victory would be achieved with overs to spare and wickets in hand. Then the unthinkable, a second collapse: 2 further wickets fell at 112 (including your correspondent!) — 8 for 112. Mathews strode to the wicket. By his own admission, his natural place was at the bottom of the order. Under great pressure, Middleton advanced the score to 130, before being bowled for 18 in the 39th over — 9 for 130. Skinner returned to the wicket: 3 more runs were scored in that over (Skinner 1, Mathews 2). The equation: 2 runs from 6 balls, 9 wickets down. Skinner (who was on strike) blocked the first ball and then took a quick single from the second. The scores were level — the big crowd roared. Collins Q.C. went on the defensive: 3 slips, 2 gullies, silly point, silly mid-off, silly mid-on, and a short mid-wicket. Mathews settled over his bat. The crowd hushed in anticipation. The match was won with a "delicate hoick" just out of the reach of the fielders on the leg side, the batsmen scampering through for the quickest of singles.

As usual, the match was played in good but competitive spirit. The Sydney Bar was magnanimous in defeat (I suspect they were glad we finally won one!). The Bar thanks Collins Q.C. and his colleagues for making the trip south and looks forward to defending the Trophy next year in Sydney. Representing this Bar were Mr Justice Gillard, Shatin Q.C., Connor, Mathews, Middleton, Denis Gibson, Kenyon, Forrest, Skinner, Phillips, Lachlan Wraith, Andrew Dickenson and Donald. Rohan Skinner was awarded the Keith Miller Award for man of the match.

Andrew Donald.

Conference update

26 September–2 October 1998: Heron Island (Great Barrier Reef). Pacific Rim Medico–Legal Conference. Contact: Karen Prior. Tel: (07) 3839 6233; Fax: (07) 3358 4196. PO Box 843, New Farm, Qld. 4005; e-mail: helix@thehub.com.au.

6–8 October 1998: Shanghai. 3rd Asia–Pacific Courts Conference. Contact: Tel: 0011 44171 824 8257; Fax: 0011 44171 730 4293.

22–24 October 1998: Hobart Family Law Arbitration Workshop. Contact: Ms Julie O'Donnell, Law Council Secretariat. Tel: (02) 6247 3788.

24–28 October 1998: Hobart. 8th National Family Law Conference of Family Law Section of the Law Council of Australia. Contact: Mures Convention Management. Tel: (03) 6234 1424; Fax: (03) 6234 4464.

6–9 November 1998: Noosa. The Engineer & The Law. Contact: Karen Prior. Tel: (07) 3839 6233; Fax: (07) 3358 4196. PO Box 843, New Farm, Qld. 4005; e-mail: helix@thehub.com.au.

9–10 November 1998: Tokyo. Third Law Asia Business Conference. Contact: Law Asia Secretariat, GPO Box 3275, Darwin NT 0801. Tel: 618 8946 9500; Fax: 618 8946 9505; e-mail: lawasia@lawasia.asn.au.

6–9 January 1999: Cortina D'Ampezo, Italy. Europe–Pacific Law Conference. Contact: Karen Prior. Tel: (07) 3839 6233; Fax: (07) 3358 4196. PO Box 843, New Farm, Qld, 4005; e-mail: helix@thehub.com.au.

3–9 April 1999 (Easter week): Shanghai/Beijing, China. East–West Legal Conference. Contact: Karen Prior. Tel: (07) 3839 6233; Fax: (07) 3358 4196. PO Box 843, New Farm, Qld, 4005; e-mail: helix@thehub.com.au.

28 June–2 July 1999: Bali. Criminal Lawyers' Association of the Northern Territory 7th Biennial Conference. Contact: Convention Catalysts. Tel: (08) 89 81 1875; Fax: (08) 8941 1639.

Intellectual Property: Cases, Materials and Commentary (2nd edn)

By S. Ricketson and M. Richardson
Butterworths, 1998
pp. i–lxi, 1–1004

INTELLECTUAL property texts always seem to be big, as though the authors had to fit as much copyright material as possible between the covers. They would make excellent doorstops or paper weights if you have no interest in the subject matter. This one is no exception. It is comprehensive, covers all the main points, and has extracts or references to most of the important cases. While obviously not as detailed as specialist texts on the different subject areas that make up intellectual property, it seemed to have a good coverage of every area I examined. It is primarily designed for students doing an undergraduate law course in intellectual property.

The book has major sections covering the general framework of intellectual property law in Australia, copyright and designs, confidential information, patents, trade marks and passing off. The discussion is from as much a practical as a theoretical viewpoint, as befits an area that is largely practical in nature. There is a treatment of the method of enforcement of rights, for example, as much as there is discussion of the scope of the rights themselves. Extensive reference is made to the statutes that provide the framework for much of intellectual property in Australia, but there is a good balance with case law and other material, such as academic writings and government committee and law reform papers. Having been active participants on the intellectual property law reform process in the last few years, the authors of this book are particularly well qualified to select and comment on materials of this kind.

The commentary contains questions designed to focus attention on important points about the other materials (particularly the cases) and to stimulate thinking about potentially contentious aspects of them. I think it is particularly useful for law students to be encouraged to think about the consequences of the result in a particular case, both for the litigants involved, and for other cases. As we know, real clients tend to be more interested in outcomes than anything else.

One might in some instances quibble with the choice of cases used as illustrations or the classic authority in a particular area, but then I suppose we all have our favourites. It is ultimately a question of taste. Similarly with the commentary, one may disagree with individual opinions and pronouncements. What really matters is the overall thrust of the book, which is to give a clear and often stimulating treatment of each area of the vast subject covered. I gather the first edition of this book has already established itself as a leading Australian student casebook in the area. I am sure the second edition will occupy a similar place.

Michael Gronow

Litigation, Evidence and Procedure (6th edn)

By Aronson and Hunter
Butterworths, 1998
pp. 1–lxxx, 1–1164

THIS is the latest edition of the book from which many of us learnt evidence and procedure. It has retained its quality and comprehensive nature. Even for practitioners it remains a good first port of call when faced with an evidence or procedure point, whether in a civil or a criminal matter.

In the civil procedure area, the book covers issue and service of process, preliminary discovery, interlocutory orders, parties, causes of action, pleadings and amendments. In criminal procedure, it has chapters on investigation, arrest, bail, confessions, warrants, search and seizure, improperly obtained evidence, criminal pleadings, and the conduct of the criminal trial. The evidence chapters (most of which cover both civil and criminal evidence) cover privilege, public interest immunity, relevance, burdens, standards of proof, evidentiary presumptions, hearsay, examination of witnesses, similar fact evidence, character evidence, opinion evidence, and evidence of tendency and coincidence. There are also chapters on gathering evidence, "Evidence from outside the Witness Box" (by video link, for example) and unreliable evidence in criminal trials.

The only subject I could think of that might have benefited from a fuller treatment was documentary evidence. This is an area that young barristers like me find confusing, notwithstanding Mr Justice Byrne's excellent classes in the Bar Readers' course. Just about everything else is more than adequately dealt with. All in all, it's a useful book to have to hand, whatever your state of knowledge or area of practice.

Michael Gronow

Cases and Materials on Contract Law in Australia (3rd edn)

By Carter and Harland
Butterworths, 1998
pp. i–lvi, 1–970

THIS is a student casebook by the authors of the leading contract textbook, and is intended as a companion to it. It rightly emphasises Australian authorities, turning to English cases only when there is no Australian one, or when necessary to capture an important statement of principle. There is also a good selection of articles and other materials, again with an appropriate degree of emphasis on the Australian. The contents of this book are a far cry from the Anglocentric contract diet many of us were fed at University only a few years ago.

The extracts are clearly set out and, on the whole, elegantly edited (though I spotted a couple of examples of what appeared to be needless repetition). There are references in each extract to the pages in the original, which is useful for quoting, or if one needs to locate a particular passage to refer to it in full. The linking commentary is lucid and well written, as one would expect from such distinguished legal writers. Overall, the book seems to me to be first rate. Had it been around when I first studied contract my ignorance of that subject may have been less profound.

Michael Gronow

Australian Corporations Legislation

Butterworths, 1998
pp. i–xxvi, Index xxvii–cxx, Current Legislation 1–1906, Pending Legislation 1–384 and 1–100

I was a little worried when I opened this legislation reprint. It began:

The publisher, authors, contributors and endorsers of this publication each exclude liability for loss suffered by any person resulting in any way from the use of, or the reliance on, this publication.

If they aren't guaranteeing to get the text of the Acts and Regulations right, what are they doing?

That said, I found this an excellent publication to use. Everything is easy to find. The index, while not perfect, seems more accurate and comprehensive than some I have used in rival publications. Generally speaking, it serves to guide rather than to confuse.

It is convenient to have the Acts and Regulations all in one volume, especially for use in Court. To achieve this, it has been necessary to leave out things like Court Corporations Rules. That is no great loss, since most practitioners will already have access to the rules of the courts they appear in.

Apart from the convenience, it is a lot cheaper to buy one of these reprints each year than to subscribe to a loose-leaf legislation service. For all these reasons, I am an endorser of the publication. I hope that means I can rely on the disclaimer.

Michael Gronow

Criminal Procedure (2nd edn)

By John B. Bishop
Butterworths, 1998
pp. i–lxxxvii, 1–647

THE first edition of this book was published in 1983 and has proved to be an enormous success. It was then the only narrative analysis of criminal procedure in Australia and remains so today.

The work is a sequential treatment of the criminal process dealing with pre-trial procedure (interrogation, arrest, search and seizure and bail); summary hearings; committal proceedings; trial by jury; and appeals. The second edition continues in the vein of the first edition expanding, upon the material in the first edition and adding to the topics covered.

The work covers criminal procedure in all Australian jurisdictions. References to case law and legislation in each of the Australian States and Territories is detailed and extremely useful. Indexing is thorough and careful.

The book will be of enormous assistance to practitioners at all levels. The detailed coverage and analysis of relevant reference material makes it attractive to experienced practitioners, especially at this time of substantial growth in case-law and legislation applicable to criminal procedure. Similarly, the style, layout and breadth of topics covered makes it attractive to those less familiar with some of the principles and procedures covered in the book.

In the forward to the first edition, the then Acting Attorney-General, the Honourable N.A. Brown Q.C., MP, said that he believed the book would be invaluable to the judiciary, to practitioners generally and more so to practitioners who conduct their practice in more than one jurisdiction, who are in Government service or who are involved in examining proposals for law reform. He also said that he thought that parts of the book would be of great value to persons interested in the rights of citizens in areas where a balance has to be drawn between those rights and the rights of society generally. These comments have proved to be true and are equally applicable to this second edition.

Kerri Judd

Occupational characteristics

A man is flying a hot air balloon and realises he is lost. He reduces height and spots a man down below. He lowers the balloon further and shouts: "Excuse me, can you tell me where I am?"

The man below says: "Yes, you're in a hot air balloon, hovering 30 feet above this field."

"You must be a lawyer", says the balloonist.

"I am", replies the man. "How did you know?"

"Well", says the balloonist, "everything you have told me is perfectly correct, but completely useless."

The man below says, "You must work in business."

"I do", replies the balloonist, "but how did you know?"

"Well", responds the lawyer, "you don't know where you are, or where you're going, but you expect me to be able to help. You're in the same position you were before we met, but now it's my fault."