VICTORIAN BAR NEWS

No. 115 ISSN 0150-3285 SUMMER 2000

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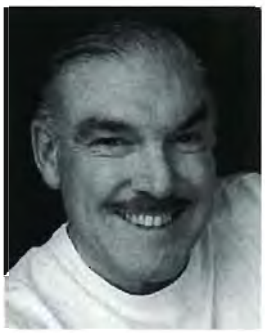

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Published by The Victorian Bar Inc.
Owen Dixon Chambers,
205 William Street, Melbourne 3000.
Registration No. A 0034304 S

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 (2000) 115 Vic B.N.

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Unionism in the Judiciary

DO unions have a role to play in the judiciary? The recent resignation of Chief Magistrate Michael Adams QC, following a vote of no confidence by the Magistrates' Association points to the answer "Yes". The Magistrates' Association, which originally appears to have been mainly a vehicle for the organisation of social functions and get togethers, now appears to wield power. Not content with a vote against its boss, its members now appear to be turning upon themselves.

In an article in the *Herald-Sun* of 29 November 2000, it is reported that other magistrates may be facing votes of no confidence from their colleagues. After voting against the Chief Magistrate, it appears that there are moves on foot against the three Deputy Chief Magistrates. It may well be that the Magistrates' Court is dividing itself along factional lines. Is it to be right wing faction against left wing faction? Is there a centre unity group within the magistracy? Or is it all to do with removal of those who supported Michael Adams?

There has been criticism of not only Mr Adams appointment but of his predecessor. A four-page document obtained by the *Herald-Sun* laments the Court as having been "spoken of mockingly by the legal fraternity and, in particular, by judges and barristers as well as magistrates from other States".

This comes as a surprise to some at the Bar. Is the Court really that bad? Or could it be that the spectacle of magistrates voting against their chief and other magistrates leads to a lowering of the reputation of Court? If all unions had such power then practically all bosses would be sacked from their positions. This therefore points to a very powerful union.

Will the practice spread to the Supreme and County Courts? Should all judges vote on each others' performances and their chief at the end of every year? Will there be regular spills within the Courts to determine the new leader?

Of course this is all nonsense. The judiciary is the judiciary. It is not an industry. There is no such thing as the law industry, but a legal profession. The judiciary under the Westminster system of government is a separate and independent part of government. As the Magistrate's Court is part of that judiciary, there is no role to be played for members of that part of the judiciary to be voting against its leaders or fellow judicial officers. This country does not have the American system of elected judges, magistrates, district attorneys and other such appointments. But perhaps this is the direction that some folk believe towards which we should be heading. Public dissention and open faction fighting can only bring the judiciary into disrepute and weaken its position in the Westminster system.

The legislation governing the appointment of magistrates provides for a procedure for the removal of the Chief Magistrate. The procedure is followed by complaints being made to the Attorney-General who, if he believes it is necessary, refers the matter to the Supreme Courts to establish whether any of the listed grounds in the legislation can be made out. This is the course of conduct that should have followed rather than votes of no confidence. The ground alleged against Michael Adams QC was improper conduct. The improper conduct appears to consist of smoking, drinking and strong language. At first blush these matters would not on their own, amount to improper conduct by any part of the judiciary. However, the full details and extent of these claims will never be known because of the political pressure placed upon the Chief Magistrate primarily through the vote of confidence against him. Overall there was not much evidence of natural justice.

The job of Chief Magistrate is being advertised in the newspapers. Whoever takes up the chalice faces a daunting task. It is inevitable that there will be dissention within the ranks of magistrates when there are difficult decisions as to their placement in remote and sometimes poverty-stricken towns in country Victoria. Many do not wish to be placed in courts in the less salubrious parts of metropolitan Melbourne where crime and difficult cases abound.

If the new Chief Magistrate is to avoid the factional fighting within the Magistrates' Court, then perhaps the Magistrates' Association should cease being a union. Only if this is achieved will the risk of being a "move" on the head of the Court be eliminated. Judicial heads are not appointed to be subject to the voting of disaffected members of that judicial body. Discontent and complaints can be,

and must be dealt with in a manner that does not attract public voting and unnecessary acrimony.

WE WERE WRONG

Enclosed is a letter from the Chief Magistrate of the Federal Court. We were mistaken in our welcomes (see letter) to the new Federal Magistrates. They are not to be known as Ms but FMs. The Chief Magistrate's letter explains this in detail. We apologise.

IN THE MONEY

The Bar is flattered that it continues to be a source of gossip for the *Sunday Age*'s "Spy" column written by Mr Lawrence Money. Mr Money seems to have ready access to editions of the *Bar News* together with a direct source from the Bar. Indeed in his column of August 2000, *Bar News* was very flattered to have been quoted verbatim as to the identity of the "snout" who is leaking stories to the *Sunday Age*, including his inside report on the exchange between speakers at the last Bar dinner. Mr Money's preoccupation with things barristorial seems to have continued with reports in his October column of Chairman Mark Derham sitting upon an electronic whoopee cushion and thereby causing glee at a Bar Council meeting. Recently, he has been reporting on the Bar's own carnivale and romantic matters in high places. In his last edition he even reports upon such a magnificent occasion as the Legal Aid and Director of Public Prosecution's Christmas party and the folk who attended.

Those who are regularly named in his column must be extremely flattered to have their comings and goings reported to such a wide circulation. (Although some would say that the *Sunday Age* does not have a particularly wide circulation other than true believers.) We are now delighted to report that after an intensive investigation we are in possession of material that reveals the source of Spy's Bar rumouring. All will be revealed in due course and a bottle of Essoign house claret will be delivered to the person who dobbed in the snout.

We now look forward to the next Spy column revealing its source so that we can send Mr Money a bottle of claret. But don't let it be seen that anybody wishes Spy to cease its ruminations. It's good to see that this part of the law industry can make people happy.

CARNIVALE

Contained in this issue is a lavish photographic spread and article concerning the Bar's Carnivale celebration. It must be noted that this event did not celebrate the centenary of the Bar which had been reported in some of its publicity. This milestone was celebrated in 1984 in the form of a Bar Review and other celebrations. The Carnivale eventually celebrated 100 years of Bar Council meetings or other matters of significance. In any event, it was a great success.

As no formal tables were provided for barristers, guests and friends, it was very much a mobile "work the room" night. Great exponents of the Bar "work the room" ethic were in action. Such champions as John Middleton QC, David Curtain QC, Colin Lovitt QC and even our present leader Mark Derham QC were in peerless form. Having to walk around the Plaza Ballroom looking at men on stilts, listening to Paul Jens impersonate Mick Jagger, eating hotdogs and sushi, and having an odd dance with a statue certainly amounted to an exhausting and exhilarating evening.

THE EDITORS

Out the snout! Wigs offer bounty

GOODNESS us, what a fuss. Victorian barristers have mounted a witch-hunt for our informant at the annual Bar dinner (you know, where Judge Bryant called Beach QC "son of Wanker"). Latest *Bar News* magazine asks: "Who was the mole at the Bar dinner?" and offers a bottle of best Essoign club claret for suggestions.

"It would greatly be appreciated by the Bar in general if the names of tattle-tales, leakers and gossips could be revealed.

"It may be that the person who leaked the Bryant-Beach story to *The Sunday Age* was not a barrister at all. There were other people present.

"Chronic leaking seems to be a problem for the Bar. In days gone by, when the Bar Council sometimes stood up to government, the so-called confidential comments of members and confidential documents would strangely turn up in various organs of the press.

"Indeed, Mr Money's Spy column often contains tales from the Bar and the profession in general. From where does he get these stories? We would love to reveal his sources."

Hear-hear. Spy can't wait to find out who it is.

Irish Royalty

BIZARRE advertisement from an Irish magazine selling Royal titles:

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All enquires will be handled with extreme discretion and confidentiality.

Trial by Media an Unfortunate Precedent

RECENT EVENTS IN THE MAGISTRATES' COURT

ALL members of the Bar would be aware of the recent events in the Magistrates' Court, which culminated in the resignation of the Chief Magistrate, Michael Adams QC. Much of the controversy as reported in the press centered on general allegations of inappropriate conduct about which there was furious publicity — but no detail. The Bar deliberately avoided the publicity surrounding the controversy. It did so because I formed the view that to say anything would only add fuel to the public fire, which was an entirely inappropriate mode of dealing with the dissention within the Court.

It is my belief that the Magistrates' Court is well regarded in the profession and the community. This is due in no small way to changes to the Court's composition, jurisdiction, facilities (even after allowing for the regrettable closure of the Prahran Court) and procedures over a long period, including in recent times under the leadership of Michael Adams.

It is, however, more important to observe that the Magistrates' Court exercises significant power in determining the rights of citizens in a large number of cases. It is common place to observe that the Magistrates' Court is the court with which members of the public are most likely to have contact. For many members of our community, it serves as the "public face" of the judicial system. Accordingly, the maintenance of public confidence in the Court is a vital concern to the entire legal system. Confidence in the legal system is an essential ingredient in one of the vital aspects our democracy, that is, the "rule of law". Anything that detracts from public confidence in the Court, and therefore the legal system, must be avoided.

Internal dissention within the Court, when carried out in the "media", may adversely affect the perception of the Court, and the whole legal system, in the eyes of the public.

The place which the Court holds in

the legal system, and the power which its members wield, bring with them equally important responsibilities and duties. It seems to me that some members of the Court, or other participants, have failed to recognise this obvious fact. Some person or persons have put their own misguided views of the best method of dealing with the matter before the interests of the Court as a whole and the legal system. The public airing of internal differences between members of the Court and the Chief Magistrate cannot be blamed on the journalists involved. The duty of the journalists is of a different kind.

In making these comments I do not forget that Michael Adams' rights have been unceremoniously trampled on, and a very unfortunate precedent has been set. It may not be forgotten, but it should not be repeated. I only hope that everyone involved has learnt from this unfortunate saga.

REVIEW OF THE LEGAL PROFESSION ACT

By the time this publication is released, the Bar will have forwarded its submission to the review of the *Legal Practice Act 1996*. The submission covers a range of matters. The most important is that the Bar should retain the role it has at present in the regulation of professional conduct. The Bar has always been proud of the standard it has maintained in the discharge of this regulatory function by the Ethics Committee.

The submission of the Bar suggests that much of the Act's complexity can and should be removed. One element in this simplification process is to increase the power of the Bar to deal with complaints, rather than transfer that power to the Ombudsman or anyone else. It recommends that the Legal Ombudsman should not be involved in the initial stages of complaint handling, but should instead undertake a role of review and supervision of the regulatory process.

The Issues Paper to which the Bar has responded is the first part of a wider review. The authors of the paper will produce an Options Paper in the New Year. This paper will outline in some detail the various possible strategies to be recommended to the Government. The Bar will be providing further submissions as the review proceeds.

LET'S CALL THEM SILKS

On the 28 November 16 members of the Bar were appointed as "Senior Counsel". I congratulate each new Senior Counsel. These appointments are notable because they are made as Senior Counsel, or SC, which from this year forward replaces appointment to the office Queen's Counsel. Senior Counsel are not "one of Her Majesty's Counsel". In all other respects (hopefully) the office remains unaffected. One thing that will probably not change is the reference to "silks". The court attire that gave rise to the most widely understood sobriquet for Senior and Queen's Counsel will, I trust, remain.

The Attorney-General has announced that he is examining the possibility of enabling existing Queen's Counsel to be accorded the new title of Senior Counsel, while maintaining their existing seniority. This procedure is to be voluntary, so each counsel can do as he or she wishes. There is much to commend such a flexible approach to change. What could be

wrong with giving people the option to choose?

LAW REFORM COMMISSION

The Law Reform Commission of Victoria will commence operation shortly. I am pleased to note that Professor Marcia Neave has been appointed as the first chairperson of the new Commission. Members of the Bar will remember that Professor Neave has had a longstanding involvement in law reform. It is not yet clear what projects the Commission will accord priority, but there is no doubt the wide-ranging powers of the Commission will enable it to provide a useful contribution by reporting and investigating on (potentially) all aspects of the law.

SENTENCING REVIEW

The Department of Justice has engaged Professor Arie Frieberg to conduct a major review of sentencing in Victoria. The review will examine the sentencing of drug offenders, including the changes would be required to sentencing laws if a "drug court" were established in Victoria, whether existing maximum penalties for drug trafficking are appropriate, and whether changes ought to be made to better distinguish between trafficking for profit and trafficking to support a drug addiction. The adequacy of existing sentencing options will also be examined, to establish whether greater use can be made of existing non-custodial sentencing options, and whether the range of such sentencing options should be expanded. The review will consider mechanisms to "inform" the sentencing process, in particular, whether it is possible to better incorporate community views within the sentencing process, and whether superior courts in Victoria should adopt a practice of publishing "guideline" judgments for categories of offences (which has operated in New South Wales for some time).

The review will also examine the desirability of introducing a "spent convictions" scheme, under which certain convictions may no longer able to be taken into account after a specified period of time. The Bar Council has previously raised this issue with the Government.

DOMESTIC RELATIONSHIPS BILL

The Government has introduced a Bill to remove discrimination against same-sex partners. The *Statute Law Amendment (Relationships) Bill* 2000 seeks to amend over 30 statutes, by introducing a consistent definition of "domestic partner". A "domestic partner" is defined as a person with whom a person is living as a couple on a genuine domestic basis irrespective of their gender. The Bill affects property benefits, compensation and superannuation schemes, health legislation, aspects of criminal law, consumer and business legislation, and a range of general legislation. It is, therefore, of interest to practitioners of all areas. By removing many existing discriminatory provisions, the Bill will also benefit heterosexual de facto couples in areas such as intestacy, where de facto partners of any gender currently do not enjoy the same rights as married partners. This last change suggests that the Bill is the natural consequence of a clearer and comprehensive legal regime of equal opportunity.

Mark Derham QC
Chairman

Forty Piece Introduced

THE close of the parliamentary year provides an opportunity to reflect on what we have been able to achieve in the Attorney-General's portfolio in the last 12 months.

As Attorney-General I have introduced over 40 pieces of legislation into Parliament in the last year, a figure which I am pleased to say is the highest in this portfolio for quite some time. However, it is both the content of the legislation and the process through which the legislative program has been developed of which I am most proud.

In the past twelve months we have reformed FOI legislation, restored the powers of the DPP, and introduced Whistleblowers legislation which I think will go a long way to restoring community confidence in the public sector. We have reintroduced pain and suffering compensation for victims of crime; prohibited discrimination on the basis of breastfeeding, gender identity and sexual orientation; and introduced a substantial piece of legislation to reduce discrimination against same-sex couples.

As discussed in this column previously, we have developed a progressive and effective Native Title policy and produced the Aboriginal Justice Agreement. We have commenced a review of the legal profession, improved court facilities, broadened the representative nature of juries, commenced an initiative to second solicitors to Community Legal Centres, and appointed six female magistrates and two female County Court judges to the Bench. Just recently I had the pleasure of swearing in 16 inaugural Senior Counsel, four of whom were women. (I should mention at this point that I did so minus a wig, and all went smoothly nevertheless.)

These are just a sample of the reforms

s of Leglislation

we have been able to achieve in the past year, most of it through groundbreaking legislation. Just as importantly, however, we have engaged in a process of consultation with our entire legislative program which, in my opinion, has produced a better quality of legislation. This process has heightened the profession's awareness and participation in our program, which of course is a double-edged sword for any government, as it attempts to respond to criticism it has invited and contemplates the possibility that it does not possess all the answers.

Nevertheless, it is a process to which I am completely committed. As Attorney-General I expect to grapple with the challenges the profession presents, and value its input immensely.

This expectation is not, however, limited to pieces of legislation. Often there are broader questions a government need examine which are greatly assisted by input from those who understand their complexities. One such question which confronts the legal profession is the question of what is often labelled the "law and order debate".

This Government entered last year's election with the commitment to ensure a more safe and just Victoria. Central to this commitment was the recognition that there had to be a balance struck between tackling crime and protecting the rights of individuals. This balance requires appropriate powers for the police and the DPP, while ensuring the rights of an accused to a fair trial.

However, this balance is a complex matter not necessarily appreciated in the broader community. The Victorian public, like any community, feels extremely passionate about criminal justice and community safety. The strident debate surrounding the conviction and sentencing of Peter Dupas is just one example of the strength of community opinion about such issues, further demonstrated by the furore that erupted when police revealed that they could not compel Dupas to be interviewed about other crimes of which he was suspected. Headlines such as "Nowhere to Hide" and media-operated hotlines on the issue tapped into community alarm and, to a great extent, exploited it.

This issue will not, however, be laid to rest with the passage of the Crimes (Questioning of Suspects) Bill. Recent proposals by the opposition to introduce a Private Member's Bill creating minimum sentences of seven years for convicted drug dealers have received significant media coverage. The Bill proposes minimum terms which would be mandatory, unless exceptional circumstances could be shown, thereby removing much of the judiciary's discretion.

It is taking the easy option to exploit community concerns by promising harsh punishment. However, it abrogates our collective responsibility to have a system which is unable to examine each case on its merits.

The challenge in administering the criminal justice system is to acknowledge the community's concerns about crime, but to maintain a system which is fair and offers hope for rehabilitation and integration back into the community. The push for tough penalties requires a response which signals a need for balance – balance between punishment and deterrence on the one hand, and on the other a criminal justice system which ensures that the rights of individuals are not undermined.

It is therefore incumbent on all of us who work in the justice system to reinforce that need for balance, whether it be in the media, or in dealing with individual matters. As many readers would be aware, Professor Arie Frieberg is currently conducting a review of the Sentencing Act and will be examining the issue of sentencing for drug-related offences, amongst other issues. He will be consulting widely, and will be speaking to the families of people who have been victims of serious crime.

I strongly encourage your involvement in the review of the Sentencing Act and urge you to combat the exploitation of community concern around sentencing issues. Rhetoric and symbolism are powerful instruments. Striking the appropriate balance in this debate is a challenge faced by all those committed to the law as a mechanism for justice. It is a challenge which will best be met together.

Rob Hulls
Attorney-General

From the Chief Federal Magistrate

The Editors

I am writing in relation to your recent article in the Spring 2000 edition of *Victorian Bar News* regarding the appointment of Federal Magistrates McInnis and Hartnett.

Upon seeing the errors in the article, although not wishing to be "precious" about this, I feel constrained to write and explain our nomenclature in the hope that it will assist in a better understanding.

The Act itself provides that we are to be called the Federal Magistrates Service or the Federal Magistrates Court or the Federal Magistrates Court of Australia — not Magistrates of the Federal Court, as described in *Bar News*.

The Act also provides that the magistrates are to be known as federal magistrates and can be addressed, for examples as Federal Magistrate McInnis and Federal Magistrate Hartnett, or alternatively Norah Hartnett FM and Murray McInnis FM, not "M" as described by *Bar News*.

The FMS website contains material about the correct way of describing the court and its judicial officers.

The establishment of the Court was to deal with federal matters and the nomenclature "Federal Magistrate" is one designed by the Government to indicate the jurisdiction of the court, and to differentiate us from state magistrates — which we are not.

The office of federal magistrate is quite unlike the office of state magistrate, both in its jurisdiction and the requirements for the exercise of jurisdiction, e.g. section 71 of the Constitution. The description of federal magistrates is to indicate that the justices of the court do not perform the more complex work of a superior court such as the Family Court of Australia or the Federal Court of Australia. The court is not, however, a court of summary jurisdiction. It is not subject to review by a superior court. Its decisions are subject to appeal in the same manner as a first instance judgment of a superior court.

It was disappointing to see *Bar News* refer to the Court and its officers incorrectly. I hope that this information assists you and members of the Bar to better understand the unique and novel character of the Federal Magistrates Service.

Yours faithfully

Diana Bryant
Chief Federal Magistrate

Amendment to Rules of Conduct

ON 19 October 2000, *Bar News* Supplement 10/2000 was issued to advise regulated practitioners of the Victorian Bar Recognised Professional Association that the Bar Council proposed to amend Rule 92 with effect from 23 November 2000. As is required under the provisions of the *Legal Practice Act 1996*, copies of the proposed amendment were forwarded to the Legal Ombudsman and the Legal Practice Board.

The amended Rule subsequently came into effect on 23 November 2000 and is shown below.

BRIEFS WHICH MUST BE REFUSED

92. A barrister must refuse to accept or retain a brief or instructions to appear before a court:
    (a) if the barrister has information which is confidential to any other party in the case other than the prospective client, and
        (i) the information may, as a real possibility, be material to the prospective client's case; and
        (ii) the party entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case;
    (b) if the barrister has a general or special retainer which gives, and gives only, a right of first refusal of the barrister's services to another party in the case and the barrister is offered a brief to appear in the case for the other party within the terms of the retainer;
    (c) if the barrister has reasonable grounds to believe that the barrister may, as a real possibility, be a witness in the case;
    (d) if the barrister was a witness in the court below in the case of an appellate brief;
    (e) if the barrister has reasonable grounds to believe that the barrister's own personal or professional conduct may be attacked in the case;
    (f) if the barrister has a material financial or property interest in the outcome of the case, apart from the prospect of a fee;
    (g) if the brief is on the assessment of costs which include a dispute as to the propriety of the fee paid or payable to the barrister, or is for the recovery from a former client of costs in relation to a case in which the barrister appeared for the client;
    (h) if the brief is for a party to an arbitration in connection with the arbitration and the barrister has previously advised or appeared for the arbitrator in connection with the arbitration;
    (i) if the brief is to appear in a contested or ex parte hearing before the barrister's parent, sibling, spouse or child or a member of the barrister's household, or before a bench of which such a person is a member (unless the hearing is before the High Court of Australia sitting all available judges) or before a judge whose relationship with the barrister is such as to make such appearance undesirable — unless, upon discovering that circumstance, the barrister cannot retire without jeopardising the client's interest;
    (j) [Deleted]
    (k) if there are reasonable grounds for the barrister to believe that the failure of the client to retain an instructing solicitor would, as a real possibility, seriously prejudice the barrister's ability to advance and protect the client's interests in accordance with the law including these Rules;
    (l) where the barrister has already advised or drawn pleadings and is then offered a brief from the other side in the matter, unless the first client, on being informed of the offer of the brief by the other side, states that there is no objection to the barrister accepting the brief;
    (m) where by reason of any connection with the client, it would be difficult for the barrister to maintain professional independence;
    (n) where the complexity of the matter is such that the barrister considers it to be beyond his or her capacity;
    (o) where the barrister has already discussed in any detail, even on an informal basis, with another party to the proceedings the facts out of which the proceedings arise, except with the latter's consent;
    (p) with respect to the internal affairs of a company which the barrister has investigated under statutory provisions at any time within the preceding six years;
    (q) where to do so would compromise the barrister's independence, involve the barrister in a conflict of interest, or otherwise be detrimental to the administration of justice;
    (r) where the barrister is a member of a local council and the brief relates to a case in which the affairs of the council are likely to arise in any material manner;
    (s) where the barrister is a member of a local council and the brief is to appear in any court for or against such council;
    (t) where the barrister is a direc-

tor of a company or a member of the committee or council of an organisation and the brief is for or against the company or organisation (whether to appear, advise, settle documents or otherwise): provided that such barrister may give legal advice at board meetings or committee meetings or council meetings while not accepting any remuneration in respect of such advice beyond that payable in the capacity of director or committee or council member;

(u) where the barrister is a member of parliament or of a local authority and is pursuing or has pursued a matter by political action and the brief relates to the same matter;

(v) for the plaintiff against a defendant who is insured by a company of which the barrister is a director;

(w) for a defendant to an originating summons issued by trustees where the barrister holds a brief for the trustees, notwithstanding that they are adopting an impartial attitude and are not opposed to the barrister holding the second brief;

(x) save where the refusal or return of the brief would not be proper having regard to the whole of the circumstances, where a conference with the lay client or a witness is necessary for the proper preparation for or conduct of the proceedings, but the barrister's instructing solicitor by endorsement on the brief or otherwise has refused the opportunity for such a conference;

(y) on an appeal from a decision in a proceeding in which the barrister has been briefed, without first giving the party by whom he or she was briefed in such proceeding the opportunity of delivering a brief to him or her for such appeal.

92A. Without limiting the generality of Rule 92, a barrister must refuse to accept or retain a brief or instructions to appear before a court (excluding a Statutory or other Tribunal) if the brief is to appear before a court of which the barrister was formerly a member or judicial registrar (other than in an acting capacity), or before a court from which appeals lay to a court of which the barrister was formerly a member (except the Federal Court of Australia in case of appeals from the Supreme Court of any State or Territory), and the appearance would occur:

(a) within two years after the barrister ceased to be a member of the court in question, if the barrister was a member of the court for less than two years;

(b) within a period after the barrister ceased to be a member of the court in question equivalent to the period for which the barrister was a member of the court, if the barrister was a member of the court for 2 years or more but less than five years; or

(c) within five years after the barrister ceased to be a member of the court in question, if the barrister was a member of the court for five years or more.

92B. Without limiting the generality of Rule 92, a barrister must refuse to accept or retain a brief or instructions to appear before a Statutory or other Tribunal if:

(a) the brief is to appear before such a Tribunal which does not sit in divisions or lists to which its members are assigned and the barrister is a member of the Tribunal;

(b) the brief is to appear before such a Tribunal which sits in divisions or lists to which its members are assigned and —

(i) the barrister is a member of the Tribunal assigned to a division or list; and

(ii) the brief is to appear in a proceeding in that division or list;

(c) the brief is to appear before such a Tribunal —

(i) which does not sit in divisions or lists to which its members are assigned and the barrister was formerly a member of the Tribunal — where the appearance would occur within two years after the barrister ceased to be a member of the Tribunal;

(ii) which does sit in divisions or lists to which its members are assigned and the barrister was assigned as a member to a division or list — where the brief is to appear in a proceeding in a division or list to which the barrister was assigned and the appearance would occur within two years after the barrister ceased to be assigned to that division or list.

Bar News Supplement 12/00

ON 5 December 2000, *Victorian Bar News Supplement* 12/00 was issued in order to notify regulated practitioners of the Bar of the issuing of a Practitioner Remuneration Order made on 7 November 2000 and effective 1 January 2001. Further copies of the Order can be obtained from the Bar Council Administrative office.

Her Honour Judge Coate

HER Honour trained as a primary school teacher at Frankston Teachers' College graduating in 1973. She then worked in Victorian primary schools, including Hampton Park and the Collingwood Education Centre. Hard work was her early companion.

Whilst working as a teacher she completed a Bachelor of Arts Degree at Monash University completing a double major in linguistics and literature. After a period of overseas travel Her Honour then commenced to study law part-time at Monash Law School graduating with a Bachelor of Laws in 1983. Her Honour completed Articles with PG McMullin & Co. in 1984 and was admitted to practice in 1985.

Judge Coate first worked as an employee with that firm before becoming a partner in 1988. As a solicitor she gained wide experience practising in criminal law, family law, and children's court work both in the criminal and family divisions, crimes compensation, personal injury litigation and equal opportunity law. Whilst in private practice Her Honour maintained an active commitment to financially disadvantaged members of the community.

Her Honour was a volunteer with various community groups including acting as a night-time volunteer with Womens Legal Resource Group Advice Line and also with the Alpha Line Emergency Service.

In 1991 she left the practice of McMullin Coate & Co. and commenced work as a duty lawyer for the Legal Aid Commission of Victoria. In January 1992 she was appointed co-ordinator of the Family Violence Prevention Committee Policy and Research of the Attorney-General's Department.

Her career as a solicitor was characterized by a determination to help others and a real sense of justice. It was no surprise she became a magistrate in 1992 and thereafter was involved in all areas of Magistrates' Court work including civil, family and criminal law, the Crimes Compensation Tribunal and the Coroner's Court. Her Honour was appointed as a supervising magistrate in committals in June 1995. This was part of the Pegasus Task Force to reduce delay in criminal trials. The task force was a great success and Her Honour' contribution was significant.

Her Honour Judge Jennifer Coate.

In December 1995 Her Honour was appointed the Senior Magistrate to the Children's Court and then to the position of Deputy Chief Magistrate in September 1996. Her Honour was actively involved in matters concerning the welfare of children and families and, in addition, chaired a number of committees. Between 1993 and 1996 Her Honour was involved with the Task Force for Violence Against Women, at the Attorney-General's Community Council against Violence. Her Honour is currently the chairperson of the Health Services for Abused Children Committee.

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Zia Reshid Bey Muftyzade

ZIA Reshid Gordon Chefik Bey Muftyzade lived a life as rich, intriguing and flamboyant as his name.

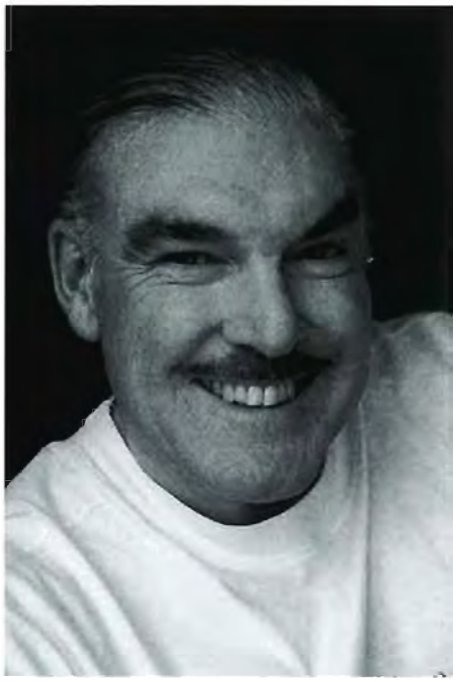
He was born in Melbourne in 1945 to his mother Judy, and father Reshid. Judy, who survives him, was bred of the Chirnside family. The Chirnside name would be well known to the reader as a great pioneering family. Reshid was an artist of some repute, and was of noble Turkish stock. Indeed, Reshid's grandfather was the famous Turkish ambassador, Reshid Pasha. (As a matter of interest, "Bey" is the title for a man; "Mufty" is a religious head, or governor of a province; and "Zade" means "son of".)

Educated at Grimwade House and Melbourne Grammar, Zia first turned to architecture at Melbourne University before deciding that a career in law was more suited to his tastes. After completing first-year law at Melbourne University in 1964, Zia and his parents travelled to London, where he commenced his legal training at London University in 1965. Eventually he was called to the Bar at Lincoln's Inn.

Nobody who met Zia could help being struck by his appearance. He was ever suave and fastidious in his dress. Although his clothes and jewellery bordered on ostentation, such was Zia's elegance that he was able to carry it off where others would have appeared tawdry. With tailored suits, hand-stitched shirts, and hand-made shoes, Zia was the epitome of style. He was certainly the only barrister I have ever known to wear pastel coloured shirts as part of his court attire (much to the consternation of one or more crusty judges).

Zia almost died at age 18 when he was involved in a terrible rollover collision while driving a sports car at Mount Martha. He was scalped in the accident, and suffered other severe injuries. Although he carried the fine scars of the plastic surgeon's scalpel for the rest of his life, he never let those — or anything else for that matter — dampen his enthusiasm for life.

After being called to the Bar in London, Zia returned to Melbourne where he read with Austin Asche. Over the next quarter of a century or so he spread his practice principally between Melbourne and Hong Kong. It was while doing his last trial in Hong Kong in November 1999 that he was troubled by a cough which was the harbinger of the disease which was to ultimately consume him. Despite being diagnosed with cancer in January of this year, however, he was more intent on planning the appeal in that case than worrying about his illness. Zia enjoyed the lifestyle and excitement that Hong Kong had to offer, and spent many happy periods there with his wife Lorraine ("Lauren"). Never to be outdone, Zia is the only Victorian barrister I am aware of who was admitted to practice in Brunei.



Zia Reshid Bey Muftyzade

In 1966 Zia married for the first time. With his first wife, Jenny, Zia had two children, Shefik, his first son, and Janan, his first-born daughter. Both were a great comfort to their father throughout his illness. (His mother Judy, too, was an ever cheerful tower of strength through what must have been a heartbreaking period.) He later married Liliana, who had been charmed by the always smooth Bey when a juror in one of his trials. In January 1993 Zia met and fell in love with Lauren. Zia's second daughter Leyla, aged five, and second son, Reshid, who was not yet one year old when his father died, were given to him by Lauren. All who saw them together were taken by the deep affection displayed one for the other. Lauren's patience and devotion during the period of Zia's ailment were awesome. Zia considered himself fortunate indeed that he had four beautiful children, and a loving wife and family.

Zia flirted with acting throughout his life — both stage and screen — and had a part in at least one Hong Kong film. He had an interest in all things theatrical — including African dance — and was a great fan of foreign film. In one trial in which we were involved, in his final address he asked the jury to imagine a beautiful woman in a flimsy negligee standing in a yard while somebody threw mud at her, some of which stuck. (This, of course, is an allusion to the opening scene in *Belle du Jour*, in which the strikingly beautiful Catherine Deneuve, clad only in a negligee, had mud thrown at her.) He likened the beautiful woman to the defence, and the mud-throwers to the prosecution. It was, as was typical of Bey, a very stylish and imaginative address. I rather suspect, however, that when the jury looked towards the dock, and saw Zia's psychotic Indian male client with his eyes rolling in his head (and who they had heard on listening device tapes threatening to commit murder in the most grisly fashion), they didn't see Catherine Deneuve. It remains, nonetheless, a very clever piece of advocacy.

Courage, however, is the word that best sums up Zia's advocacy. In the face of the most savage judicial barrage, Bey was know to smile sweetly and say, "As, your Honour pleases; your Honour is so wise". It was done with great charm, but left no-one in doubt (least of all the jury) as to Zia's views about the mental capacities of the particular judicial officer involved. (A sample of Bey's courage under fire can be found in *R* v *Pektas* [1989] VR 239 at 263.) One remarkable exchange took place during a long drug trial, many of which Zia did both here and in Hong Kong. The trial judge was ill-disposed towards the defence, and, so it seemed, took every opportunity to stick

the judicial boots into defence counsel, including Zia. Certain evidence thought by Zia to be crucial to the defence was kept out by the trial judge. While endeavouring to elicit the evidence, Zia was met by rebuke from an extremely angry judge. Zia said, "I'm sure that your Honour would be far happier if I sat down and did not defend my client, but there are some formalities that I feel I must go through". All of this delivered with a disarmingly charming smile.

His smile was a trademark. So was the raised eyebrow. I could never emulate it, but Bey's eyebrow could be wry, quizzical, and could display cynicism and agreement, in turn. He was unflappable as an advocate, and was unfailingly polite and cheerful. Good-humoured he remained until the end, even enjoying a joke while on his death bed.

In the last part of his life Zia examined the evidence for and against an afterlife. Having examined the evidence, I think it's fair to say that he came down in favour of there being another life after this one. If there is a heaven, I am sure that Zia will be there twisting the tails of supernatural judges, and twisting angelic juries around his little finger.

Zia Bey, as he was known to judges and counsel alike, was one of the Bar's great characters. He died on 26 October 2000. The Bar will be diminished by his passing. He will be greatly missed.

Phillip Priest QC

Her Honour Judge Coate

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She is on a number of boards and committees, including the Young Offenders Sentencing Advising Committee, Chairperson of the Co-ordinated Health Services for Abused Victorian Children, a member of the University of Melbourne Criminal Justice and Forensic Psychology Advisory Board, a member of the Vietnamese Juvenile Justice Youth Advisory Group, a member of the Family Violence Protocols Committee, a member of the council of the Australian Institute of Judicial Administration and numerous other bodies, councils and advisory committees.

Her Honour has never lost her zest to teach. She has been able to share her knowledge of the practice of law with others. Upon completion of articles her Honour lectured at various TAFE colleges. She presently teaches at the Leo Cussen Institute, the University of Melbourne and Deakin University in Family Law, the Bar Readers Course and the Induction Program for Child Protection Workers at the Department of Human Services.

Her Honour is author of a number of publications including chapters on family law in the Handbook of the Fitzroy Legal Service. It is with this wide background of knowledge and experience and commitment to the protection of children and families that she has been appointed to the Bench of the County Court. The Victorian Bar congratulates her on such a well-deserved appointment and wishes her well in the years ahead.

The Court of Appeal Five Years On: Some Reflections

by Phillip Priest QC and Paul Holdenson QC

Several years before the Court of Appeal was established in Victoria, Stephen Charles QC (now, of course, Charles JA) wrote an article calling for the creation of such a court.[1] The article, published in 1987, was later described as both "influential" and "provocative".[2] History records that a permanent Court of Appeal was indeed created in this State, the inaugural ceremonial sitting taking place on 8 June 1995. It was observed to be a "happy coincidence"[3] that the author of the article became one of the Court's original members.

NOW that the Court of Appeal has been in existence for a little over five years, we thought it might be worthwhile to look back in an endeavour to determine whether the aspirations held for the Court have been realised. Where possible we have sought to do so through empirical data. However, we also recognise that it is inevitable that a degree of subjectivity will intrude.

CRITICISMS OF THE FULL COURT

Charles JA lamented that, at the time he wrote, it was difficult to get civil appeals heard in Victoria. Cases rarely started on the appointed day, and were frequently adjourned out of the list to the next month's list. Of particular concern was said to be the difficulty of obtaining the expeditious review of a judge's decision to grant or refuse an interlocutory injunction. Litigants were heard to complain that, due to delays in having appeals listed, they were effectively being denied a right of appeal in Victorian litigation. The view of the profession was, so it was said, that the Full Court — already overburdened with work — did not respond adequately to the demands of urgent litigation.

Arguments in Favour of Establishing a Court of Appeal

Various arguments were put forward by Charles JA in favour of establishing a permanent Court of Appeal. The arguments are greatly abbreviated here. In essence, however, they were as follows.

(1) Appellate work involves different functions and skills to trial work. Repeated performance of these functions should enhance the quality of performance of judges of appeal.
(2) A permanent Court of Appeal is likely to lead to improved judicial performance by attracting judges of the highest quality to perform the special duties of an appellate court.
(3) The creation of such a court recognises that it will be the final resort for 95% of cases before it. Thus it is necessary to organise appellate arrangements to ensure that the results command the highest respect.
(4) Primacy can only be assured by the establishment of a permanent court of appellate judges, since there is "no obvious primacy" in a court comprised of a rotating membership of judges of equal status.
(5) Principled development of the law is best secured by a comparatively small court of judges operating in repeated interaction with each other.
(6) There is a need to avoid the appearance (or actuality) of appellate judges tempering their decisions concerning colleagues' work because of the prospect that those colleagues will at some future time be sitting in judgment of their judicial performance.
(7) Mechanical and practical problems which result from a rotation of judges will be obviated. Judges who have sat on appeal will encounter difficulties writing judgments upon return to trial work, and opportunities for consultation with colleagues will be reduced by dispersal of the appellate bench.
(8) A permanent Court of Appeal will be in a better position to ensure consistency between appellate decisions even when the Court is differently constituted.

Charles JA went on to suggest that a Court of Appeal "could fix cases well in advance and insist upon accurate estimates of the length of hearing". Further, it was hoped "that in these circumstances it would be possible at any time to find three judges for the hearing of urgent applications".

Statistical Comparison between the Full Court and the Court of Appeal: Civil Appeals

Figures quoted by Charles JA suggested that in 1985 the Full Court disposed of 76 appeals and 62 motions (total 138); and in 1986 disposed of 80 appeals and 50 motions (total 130). This compared unfavourably with NSW where the Court of Appeal in 1985 disposed of 227

appeals and 468 motions (total 695), and in 1986 disposed of 266 appeals and 459 motions (total 725).

The figures in Table 1 below are drawn from the Annual Reports for 1996, 1997 and 1998. Appeals only are set out. Those figures demonstrate a marked increase in the number of appeals disposed of.[4]

Friday of each week is devoted to applications. In 1997 the Court disposed of 113 applications (making total cases 221 when appeals are added), and in 1998 the Court dealt with 160 applications (making a total of 334 cases). Again, these figures demonstrate a marked increase in cases disposed of compared with the totals for 1985 and 1986 quoted by Charles JA. Indeed, the Annual Report for 1998 records that the "civil business of the Court has grown strongly over the years, and the number of applications made, particularly applications for leave to appeal, has grown proportionately".[5]

Some weeks during 1998 were so busy that it was necessary to sit three divisions of two judges each in order to deal with the applications filed. For interest's sake, the nature and number of the applications made in 1998 are set out in Table 2.

Table 2

To file and serve notice of appeal out of time	12
To reinstate appeals deemed abandoned	15
To stay orders appealed from	23
For security for costs of the appeal	15
Miscellaneous applications	21
For leave to appeal	74
Total	**160**

It has been our experience that urgent applications — in both the Criminal and Civil Divisions — can generally be accommodated without great difficulty. This is no doubt due to the fact that one day a week is specifically reserved for applications, and there is a ready pool of judges to sit. Our distinct impression is that the Court of Appeal is far more efficient in dealing with applications than was its predecessor. This impression seems to be supported by the figures. Even making due allowance for a general increase in litigation since the time of Charles JA's article, the figures describe a marked increase in the volume of cases dealt with. Indeed, the total number of appeals and applications disposed of in 1998 (334), is an increase of over 150 per cent on those dealt with by the Full Court in 1986.

The capacity of the Court of Appeal to deal with volumes of work that the Full Court could not is best illustrated by recourse to the year 1998. Because that year proved to be an extremely busy one for the Trial Division as well as the Court of Appeal, few members of the Trial Division were available to sit as Acting Judges of Appeal. Thus the work of the Court was disposed of, almost entirely, by the 11 permanent members of the Court (i.e. the Chief Justice, the President, and nine Judges of Appeal). The Court sat for 42 weeks of the year between 2 February and 10 December. Generally the Court sat two divisions of three members each, so that judges have time to write judgments on a rotational basis. The pressure of work was such, however, that in 1998 the Court sat in three divisions for 16 of the available 42 weeks. Thus, 100 divisions of the Court sat (42 + 42 + 16), 50 being devoted to civil appeals and 50 being devoted to the disposition of criminal appeals.[6] We venture to say that such a feat would have been neither practical nor practicable in the days of the Full Court.

Table 3
Breakdown of Criminal Appeals 1 January 1996 to 31 December 1999

Year	No. of Appeals on hand at 1 January	No. of New Appeals filed	No. of Appeals finalised	No. of Appeals at 31 December
1996	126	335	250	211
1997	214	287	325	176
1998	176	337	320	193
1999	193	332	271	254

CRIMINAL CASES

Applications for Leave to Appeal

Charles JA's article did not concern itself (except in passing) with criminal cases. A review of the current workings of the Court would not be complete, however, without attention being given to crime.

The figures in Table 3 cover the complete years since the Court' inception. They reveal that the numbers of new appeals filed were very similar in each year surveyed save for 1997, where markedly fewer appeals were filed. Numbers of appeals finalised in 1997 and 1998 were similar, while 1999 showed a noticeable decrease in matters finalised (reflected by a substantial increase of appeals on hand as at 31 December 1999).

In the 1998 Annual Report it was noted that of the 320 applications finalised during the year, 80 (25 per cent) were abandoned. The reason for this was put down to lack of sound advice given to unrepresented applicants early in the appellate process. So that the waste of time and expense resulting from late abandonments might be ameliorated, the Court flagged the possibility of utilizing s. 582 of the *Crimes Act* 1958. Thus, in November 1998 Winneke P heard the first applications made to a single judge pursuant to s. 582 for leave to appeal against sentence. The existing arrangement is that where leave to appeal

Table 1

Year	Total Number Listed	Settled, Discontinued or Adjourned	Number Determined	Number Allowed	Number Dismissed	Number Reserved	Average time for delivery of reasons
1995	78	9	69	35	34	34	2.3 mths
1996	140	20	120	59	61	72	1.5 mths
1997	108	20	88	44	44	42	2 mths
1998	174	69	105	40	65	62	1.75 mths

against sentence is granted by a single judge, Victoria Legal Aid grants assistance for the appeal. Should leave to appeal be refused by a single judge, the applicant retains the right to have the application determined by a bench of three judges.

Applications to a single judge for leave to appeal against sentence are now part of the ordinary practice of the Court. In Table 4 the total number of leave applications heard to the time of writing (30 September 2000), and the results, are set out. It appears that about a third of the total number of cases coming before a single judge resulted in a grant of leave.

Of the cases dealt with under s. 582, at the date of writing 19 have been the subject of decision by a bench of three judges. Of the three cases where leave to appeal had been refused, in each case the subsequent application has been dismissed by a full court. Of the 16 cases where leave was granted, ten appeals were subsequently allowed and six dismissed.

Table 5
Full Court Conviction Appeals

Year	Total No. Conv. App.	Total No. Allowed	% of Total Allowed
1992	69	18	26
1993	82	11	13
1994	80	19	23.75
1995 (to 15.6.95)	41	12	29

Table 6
Court of Appeal Conviction Appeals

Year	Total No. Conv. App.	Abandoned	Total No. Allowed	% of Total Allowed
1995	51	NK	19	37
1996	69	8	25	36
1997	88	12	24	27.27
1998	68	13	27	39.7
1999	65	14	15	23.07

Comparisons with the Full Court

In order to draw any conclusions concerning the performance of the Court of Appeal *vis-à-vis* the Full Court, it is necessary to compare figures pre and post 15 June 1995. Table 5 sets out the outcomes of conviction appeals dealt with by the Full Court between 1992 and 1995 (up to 15 June 1995).[7]

Table 6 sets out the statistics for conviction appeals disposed of by the Court of Appeal between 1995 and 1999.

Comparison of the days of the Full Court with those of the Court of Appeal seems to demonstrate that the numbers of conviction applications dealt with have not significantly changed. Thus the year 1992, and the years 1996 and 1998, are similar; and the year 1993 is similar to 1997. There does, however, seem to have been a slight increase in the percentage of successful applications following the advent of the Court of Appeal (although compare 1992 and 1994 with 1999, and 1995 (Full Court) with 1997). The figures for the Court of Appeal seem to show a slight decline in the percentages of conviction appeals allowed between 1995 and 1997, a rise in 1998, with a substantial decline in 1999.

Table 7
Applications 2000

	Total Number	Allowed	Dismissed
Applications for leave (conviction)	35	3*	32
Applications and appeals (sentence)	93	36	57
DPP Appeals against sentence	10	7	3

*In one of the three cases, argument was heard in the 1999 calendar year, judgment being given in 2000.

Table 4
s. 582 Application Statistics

Date/s	Judge	Total Cases	Granted	Refused	Other (Abandoned etc.)
29.11.99–9.12.99	Winneke P	31	7	14	10
14.3.2000–23.3.2000	Winneke P	37	12	18	7
5.6.2000–8.6.2000	Charles JA	27	9	9	9
19.6.2000–22.6.2000	Buchanan JA	20	10	8	2
1.9.2000	Chernov JA	8	4	3	1
8.9.2000	Brooking JA	7	1	4	2
15.9.2000	Batt JA	8	4	1	3
22.9.2000	Buchanan JA	6	4	2	0
29.9.2000	Callaway JA	7	2	5	0
Total to Date		**151**	**53**	**64**	**34**

YEAR 2000 — A NEW ERA?

Work on this article was almost complete when we sought figures on the number of appeals dealt with in the current year, together with their disposition. What was revealed by those figures came as a considerable shock. As at the time of writing (30 September 2000), the numbers are as shown in Table 7.[8]

The figures for 2000 show a remarkable — some might say a breathtaking — decline in the number of conviction appeals succeeding. What accounts for such a stunning decline? We feel ourselves unable to answer the question definitively, but some possibilities are:

- the 2000 figures to date are an aberration;
- trial judges are suddenly making fewer mistakes;
- trial counsel are making fewer errors; or
- the Court of Appeal has had a drastic change of approach to conviction applications.

The reader will have to draw his or her own conclusions.

Table 8
Sentence Applications Allowed

Year	Total No. Sentence App.	Allowed	Dismissed	% Allowed
1995	119	50	69	42
1996	156	49	107	31.4
1997	161	54	107	33.5
1998	149	47	102	31.5

For the sake of completeness, in Table 8 we set out the numbers of sentence applications allowed between 1995 and 1998.

From the figures in Table 7 it can be seen that the percentage of sentence appeals allowed to date in 2000 is 27.9 per cent (i.e. an apparently slight decline on the years 1996–1998).

CONCLUSIONS

In any event, our experience in the Criminal Division of the Court leads us to the view that it is possible under the current regime to have urgent matters dealt with expeditiously. When speaking of the period between June 1995 and December 1995, the Court said:[9]

> It is difficult to draw relevant conclusions from the production of these statistics because comparable statistics for previous years are not available However, the fact that the Court has sat in three divisions for 42 of the 68 available weeks gives an indication of its workload and the workload of the individual judges. The time which judges spend, outside court hours, in considering and writing judgments is considerable. As the figures demonstrate, the Court reserved its decision in approximately one-third of the 620 matters to have come before it so far. The records do show, however, that the Court has been able to fulfil what it regards as three significant objectives:
>
> (a) the fixturing of appeals from hearing dates and durations which can be and are strictly adhered to;
> (b) the ability to provide courts at short notice to deal with urgent applications and appeals;
> (c) the ability to manage "judgment writing" times so as to maintain reasonable time limits for the delivery of reserved judgments.

It seems to us that those remarks are equally apposite to the current position. Charles JA's suggestion that the Court could fix cases well in advance and insist on accurate estimates of length of hearing has, in the main, been realised. And it has been our experience that his suggestion that it would be possible at any time to find three judges for the hearing of urgent matters has also been realised. The figures also seem to bear out that — at least on the civil side — there has been a marked increase in efficiency. (If the number of cases disposed of alone is the yardstick in criminal cases, as far as we can tell, not much has changed.)

Of the eight arguments put forward in Charles JA's article in favour of the establishment of the Court, it seems to us that — if nothing else — the "mechanical and practical problems" of having a rotation of judges have been ameliorated by the creation of a permanent pool of appellate judges. The marked improvement on the civil side of the jurisdiction would, it seems, bear out the aspirations held for the Court.

NOTES

The authors wish to acknowledge the assistance of several people in the preparation of this article. We are indebted to Mr Bruce Gardner of the Office of Public Prosecutions who provided us with tables and useful data from which Tables 4, 5, 6 and 8 were compiled (with slight modification). Our thanks also to the Associate to the President of the Court of Appeal, Mr Michael Winneke, who kindly provided us with Annual Reports and other material. Mr Andrew Wicking, of the Court of Appeal Registry, was also unfailingly helpful in providing information and figures.

1. "A Court of Appeal for Victoria?", *Victorian Bar News*, Winter Edition 1987, p. 16.
2. *Speeches for the Inaugural Ceremonial Sitting of the Court of Appeal*, [1995] 1 VR xxxix at xli (per Solicitor-General).
3. *ibid.*
4. Although the Annual Report for 1999 is not yet available, figures supplied by the Registry indicate that in 1999 a total of 162 civil appeals were disposed of, either through decision or through discontinuance. The balance of "live" appeals as at 31 December 1999 was 212.
5. Report of the Judges of the Supreme Court of Victoria for the Year 1998, p. 18.
6. *ibid.*, p. 17–18.
7. It should be pointed out that the percentages in Table 6 relate to the total number of appeals allowed when compared with the total number of applications listed, including those abandoned. If cases abandoned are neglected for the purposes of arriving at percentages, so that one looks at the ratio of cases allowed only of those applications which were the subject of a *hearing*, the percentages are higher. Thus, for example, the percentage of applications allowed for the total of applications heard, rises to 40 per cent in the year 1996, 31.57 per cent in 1997, and so on.
8. Applications for leave to appeal against sentence dealt with by a single judge are not included.
9. Report of the Judges of the Supreme Court of Victoria for the Year 1996, p. 6–7. It should be noted that the Court did not have available to it court-kept records of appeals dealt with by the Full Court. Figures set out in Tables 5 and 6 are drawn from records held by the Office of Public Prosecutions.

The Coming of the Boat People to Australia

Brickbats and the Non-material Rewards of Pro Bono Legal Work

The following is an edited extract of a paper delivered by Mr Colin McDonald QC at the Commonwealth Attorney-General's "For the Public Good: The First National Pro Bono Law Conference" on 5 August 2000 in Canberra. Mr McDonald came to the Victorian Bar in 1980 and read with Mr Frank Vincent QC (as he then was). In 1981, restless and with the encouragement of Vincent, he moved to Darwin to work with the Northern Australian Aboriginal Legal Aid Service. In 1984 he joined the then newly formed Northern Territory Bar and has remained there since and works from William Forster Chambers. He took silk in 1997. In May this year he participated in an AusAid and University of San Francisco institutional strengthening venture with the Bar Association of the Kingdom of Cambodia and the Cambodian Department of Commerce. He conducted a seminar series and travelled with members of the Australian Criminal Justice Project to Kampot in Kampot Province, south-west Cambodia. He has been invited to become a Board member of Cambodia's "first independent legal think tank", the Cambodian Legal Resources Development Centre, which has published in Khmer and English the first legal textbooks for students and practitioners and is developing continuing legal education courses.

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IN a courtroom at Kampot, after making a formal presentation on ethics, I asked those present whether they had any questions of me. A senior prosecutor bowed politely to all present and asked first in Khmer and then in English: "May I ask you, do lawyers in Australia work for justice or the money?"

Eyes, interested eyes, focused on me and awaited my response. The Australian police members present were especially interested.

I thought for a fleeting moment of some of the people to whom I have dedicated my paper and responded confidently to the effect that there were lawyers in Australia who were motivated by both justice and also those motivated by the money.

The senior prosecutor was not deterred: "But what is the motivation?"

I squibbed the answer, partly because I wasn't sure, partly because I didn't feel I could answer except in the most qualified way, a question of this kind. My answer was to the effect:

All lawyers in Australia must have a commitment to justice and be frank and honest to the Court.

The eyes of the jury assembled were not convinced with the answer. Nevertheless, in typically Khmer fashion, I was asked politely another question. I was saved the embarrassment of a verdict.

On the drive back from Kampot to Phnom Penh the senior prosecutor's questions haunted me. I knew I had failed in the eyes of the jury. I asked team members what a judge, a prosecutor and a prison superintendent earned by way of salary. The answer was quickly forthcoming. A senior judge earned about $20 US per month, the senior prosecutor a bit less and the superintendent a bit less again. There was an additional allocation of rice, but that was about all. The senior judge was also a moto (motor bike taxi) driver; this was how he supplemented his income.

In my experience there is a value in doing pro bono cases at a personal and at a professional level. At a personal level the rewards are non-material, often unforeseen and in my case, certainly unexpected. At a professional level, pro bono work helps maintain a continuing social relevance of the legal profession and helps us, on a case-by-case basis, leave some impact on the image and reality of Australian justice.

So in deference to the senior prosecutor of Kampot Province, and in a gathering of colleagues who have a commitment to justice, I will reflect upon my journey. It is a personal account and merely one journey of the many various journeys undertaken by people involved in pro bono work.

BACKGROUND — TRAVELLING NORTH

My time at the Northern Australian Aboriginal Legal Aid Service were three years of hard, but interesting, advocacy work across the Top End of the Northern Territory. They were early days in

Aboriginal Legal Aid in Australia and I soon found myself privileged to be involved in the development of a number of justice issues for Aboriginal Australians.

I joined a proud tradition of barristers from the Victorian Bar who helped forge a place for Aborigines in the justice system in Northern Australia. It was a time when many other lawyers were giving of their time and skills to form Aboriginal legal services across the country. The values and spirit of pro bono work were very much alive and motivated a talented number of lawyers during the period. I experienced and valued a sense of belonging to a wider group of legal professionals who had as the primary goal in their working lives the attainment of practical justice for a group of the most disadvantaged Australians. This was my first taste of the non-material rewards of pro bono practice. The camaraderie of those early days and a sense of having belonged to an important legal/social movement in Australia has endured until today.

My second (and also enduring) sense of the non-material rewards in cases where there was no fee, and next to nothing in pay, was an appreciation of the openness of the Supreme Court and the Federal Court judges (who then acted as the Northern Territory's appellate court) to balanced, but novel arguments that sought to give Aboriginal people a fairer place in the system. The reward came in the form of an abiding intellectual satisfaction of being part of a living system, including the judges before whom I appeared, which helped develop a more just, meaningful and empowered place in Australia for Aborigines. That tradition continues.

Life at the Bar in the Northern Territory threw up many challenges. One had to be a jack or a jill of all trades. As the centre of disorganised crime, the Northern Territory has remained an interesting and not debilitating place to practise criminal law. Thanks to the frontier mentality of government and a robust approach to decision making, the once sterile pages of administrative law texts took on new and fertile meaning. I became fortunate to be one of those who helped develop the administrative law of the Territory, much of it around political and community based cases and much of it spec pro bono work. In this area I gained another insight and an appreciation into the value of pro bono work. The Territory, despite its geographic vastness, is a relatively small community. Court cases have a visibility and almost a tangible community impact. The cases gave me a very direct link with the community and the community's concerns of the day.

Involvement as a lawyer with others in these issues has given me personally, and our profession in the Northern Territory generally, a sense of continuing social relevance and justification. The pro bono cases give one a sense of community involvement and a sense of vindication of why one studied law in the first place.

Whilst one has to run one's chambers with solvency and profit as legitimate goals, the publicity and exposure associated with some pro bono cases brings about a hidden factor that can assist the commercial necessities of practice. In all of this work it is important to maintain a balance, and paying clients are not only welcome but essential to being able to take on any pro bono work. It pays not to get too starry eyed about the benefits of pro bono practice.

By the sheer luck of being in chambers in Darwin it has been my good fortune to have been involved in more than my share of interesting contemporary social issues. However, by far the most significant and, with the hindsight of twelve years, the most rewarding experience of my career has been in the area of refugee and migration law. Again it was the fluke of geography which was going to make the difference.

I turn to focus upon my involvement in refugee work out of Darwin. Refugee work has been, in my experience, entirely pro bono.

THE COMING OF THE CAMBODIAN BOAT PEOPLE

In 1989 the Khmer Rouge were making a bloody return in Cambodia. Decimated by genocide since 17 April 1975, then the Vietnamese invasion in 1978 and subsequent retreat some years later, Cambodia was locked yet again in a civil war. In 1989 the Khmer Rouge were advancing yet again. No one living in Cambodia needed to be reminded of what lay in store if the Khmer Rouge were again victorious.

The response of many was to flee. Some of those who fled, a relatively small number in all, trickled their way down in leaking and unsafe boats to Australia's northern shores.

On 3 June 1990 the telephone rang in my chambers. I recall I was celebrating a victory as junior to Dick Conti QC for a mining company. We had made luncheon arrangements. I was in good spirits and, of course, I would take the call. The caller identified himself as Peter Hosking SJ, a friend of Frank Brennan's and the Country Director of the Jesuit Refugee Service based in Sydney. Father Peter asked if I would investigate whether the human rights of certain Cambodian boat people were being protected by the Australian authorities. In an effusive mood, I readily agreed to his request. To my shame, I had no awareness that there were any Cambodian boat people in Darwin. I did not know that only days before

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HMAS Townsville had rescued them from their sinking boat north of Melville Island. They were being housed in makeshift tents at the Curragundi scout camp about 20 kilometres south of Darwin. I did not know then that this was a phone call that was going to affect my life profoundly.

So I went down with a fellow member of William Forster Chambers, Graham Hiley QC. At the camp, we were met by an APS guard whom we were to get to know well, Tom Lloyd. We stated our purpose and as we walked into the array of hastily prepared army tents, Tom said: "Do you two know what you are getting yourselves into?" We laughed, unconcerned. Then we were introduced to a group of the most anxious people I had ever seen. I remember their eyes and I felt their fear. It was clear that in Australia their human rights were not in any way being violated.

Then, through an interpreter we recognised the words "Pol Pot". We decided to help them. We consulted our colleagues back in chambers. We had no idea what we were getting ourselves into.

What ensued became a litigation saga. The arrival of the Cambodians heralded dramatic, at times almost paranoid and unnecessarily harsh reactions by Government to those who sought asylum and risked the journey to Australia by boat.

The members of my chambers and other volunteer lawyers pitched in and commenced the arduous work of bridging a communication chasm with the Cambodians (none of us had any awareness of the political maelstrom which we had entered). A Cambodian Support Group developed in Darwin, others developed interstate. The Darwin community rallied with moral and material support.

THE ARRIVAL OF THE BOAT PEOPLE IN PERSPECTIVE

In the period 1981 to 1989 there were no boat arrivals of anyone seeking refugee status in Australia. The relatively small number of people who sought asylum arrived with appropriate documentation.

In all, twelve boats arrived between November 1989 and 1993 carrying some 654 persons.[1] Of these, 271 were Cambodian nationals and there were some Chinese and Vietnamese and others who arrived in Australia without proper documentation. The Cambodians sought refugee status.

As we and other volunteers plugged away at the applications we realised it was not accident or economic opportunism that propelled the small number of desperate Cambodians to our northern shores. It was apparent in 1989 and 1990 the murderous Khmer Rouge were making a political comeback. At that time, and given its immediate past history of genocide, Cambodia was the type of country that people had an objective and well founded reason to leave.[2]

Over the next six years I and many others lived closely with the issues of asylum seekers from Cambodia, East Timor, Vietnam and China.

Although they comprised a distinct minority of asylum seekers in Australia, the arrival of the boat people produced knee-jerk political responses from the Federal Government and opposition alike. A cruel streak in our political consciousness was revealed.

The first response of Australia was to put all boat people into immigration detention. Vigorous community debate took place in Darwin as to why the Cambodians should be in detention. Alarm bells rang in Canberra.

Refugee status applications were made, albeit at a slow pace. All work was voluntary, the Cambodians had no concept of lawyers and, as I found out later, they concluded we must be some branch of government. The Cambodian support groups grew, fundraisers were held, the generous, compassionate face of Australia asserted itself. Calls for the release of the Cambodians became more focused. Canberra's response was swift. The boat people were to be shifted.

The Government had created a processing and detention centre in the remote and isolated town of Port Hedland in Western Australia. The Government could not have selected a place more isolated for asylum seekers obtaining access to community support groups or having access to independent legal advice. San Francisco used Alcatraz to isolate hardened criminals. Australia developed the Port Hedland facility to isolate asylum seekers. Yet, unlike the inmates of Alcatraz, the asylum seekers had committed no crimes.

The pro bono movement around the Cambodians developed and young volunteers travelled there to assist in the task of helping the asylum seekers make their refugee status applications

Not until about early April 1992 did the first decision on the Cambodians' refugee status applications start coming through. Almost all applications were rejected. Accompanying each application was the ominous letter for the recipient to prepare for removal from Australia. The grass roots pro bono movement was forced to move into higher gear.

On 7 April 1992, Justice O'Loughlin in the Federal Court granted a stay in respect of a group of Cambodian asylum seekers detained at Port Hedland whose applications had been rejected. Proceedings were instituted in Darwin and, subsequently in respect of another group of Cambodians in Melbourne under the *Administrative Decisions (Judicial Review) Act* ("ADJR Act"). The proceedings sought to have the decisions refusing refugee status reviewed and also sought declarations that each asylum seekers' detention was illegal and interim release from custody pending the determination of the judicial review proceedings. At the time it was still possible to obtain release from immigration detention pending hearing.

On 15 April 1992, on the return date of an application to strike out the ADJR Act application, the respondent Minister through his senior counsel acknowledged there had been flaws in the decision-making process concerning the decisions denying the applicants refugee status, and consented to all decisions the subject of review being quashed together with an order for costs.

It was then sought to have the Cambodians' applications for declarations for illegal detention and interim release heard by O'Loughlin J. The affidavit material filed in the Federal Court included affidavits from the respective heads of the Uniting Church and Catholic Churches and the Saint Vincent de Paul Society guaranteeing a home, education and medical facilities for each Cambodian asylum seeker pending judicial determination of the applications for review. His Honour directed that the Darwin applications be combined with applications brought in Melbourne and that the applications for interim release from custody be heard commencing 7 May 1992 in Melbourne.

Justice O'Loughlin never got to exercise his judicial discretion.

On 5 May 1992 *Migration Amendment Act* (No. 2) 1992 was rushed through both Houses of the Australian Parliament. On 6 May 1992 the Bill received Royal Assent. A new Division 4B of the Act became operative on that date.

By a combination of provisions, the Amending Act sought to keep a "designated person" in custody if already in Australia and to ensure that such persons be placed in custody if not. A "designated person" could only be released from custody if removed from Australia or granted an entry permit. A new s. 54R provided: "A Court is not to order the release from custody of a designated person."

Until the passage of the Amending Act, few could reasonably have anticipated the extent of the Government's concern about boat people seeking asylum and what a threat the 600 odd refugee applications at that time posed to the nation. Few would have thought that the Government was prepared to shackle the Courts in its bid for control.

The gathering of evidence in support of a responsible and humane release of the applicants all appeared to be in vain. On 7 May 1994 Justice O'Loughlin adjourned the proceedings sine die on being informed of the new Amending Act, that all 38 Cambodians had been made designated persons and that the applicants would be seeking relief in the High Court.

I remember 7 May 1994 well. It could

have passed for a part in a sequel to the film *The Castle*. In the great tradition of the Bar, I was commiserating in Fitzsimmons restaurant in Lonsdale Street, Melbourne with fellow counsel for the Melbourne Cambodian applicants, Peter Rose, one of the great fighters of the Victorian Bar. Peter was questioning me about my reference to "relief in the High Court" before Justice O'Loughlin before the adjournment.

As he poured me a generous glass of shiraz, Peter said to me: "Now what was that all about? When was the last time you read the Constitution?."

I had to confess it had been some time. With characteristic cynicism Peter continued: "This is serious. We are talking about the Constitution here. This means all seven of the bastards are going to be looking at this," said Peter swallowing more shiraz defiantly. "I'm telling you, Col, the High Court is for real disasters. We need to get silk into this disaster. I'll talk to Castan and you better get on the line to your mate, Sir Maurice in Sydney."

Thanks to strategic thinking of Sir Maurice Byers and Ron Castan, and excellent advocacy by Brian Shaw QC the High Court sequel can be found in *Chu Kheng Lim* v *Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR1. The Court held sections 54L, 54N to be valid and the majority (Brennan, Deane, Dawson and Gaudron JJ) held section 54R invalid.

The Court also held that the incarceration of the plaintiffs before the passage of the Amending Act had been unlawful. Whilst this in part vindicated the claim before Justice O'Loughlin that the applicants were entitled to a declaration that their detention was unlawful, it was a hollow victory in respect of the application for release from custody. Section 54L having been declared valid, the Cambodian and other boat people "designated" were to remain in custody. The detention regimen continued.

The decision in *Chu Kheng Lim* was handed down on 8 December 1992. In mid-December 1992 approximately 65 writs were filed in the High Court and served on the Commonwealth claiming damages for false imprisonment.

A few days after the service of the writs and in response to the High Court decision in *Chu Kheng Lim,* the Government passed *Migration Amendment Act* (No. 4) 1992 (Cth). The amending Act inserted a new s. 54RA which extinguished the right of action of the Cambodians for damages for false imprisonment. Section 54RA was enacted on Christmas eve. It provided that no action could be brought in any court for damages or compensation other than an action under subsection 54RA (2). Under subsection 54RA(2), the right to compensation was limited to $1 a day.

And so amendments to the Migration Act went on, in an almost punitive tit-for-tat response to any Federal Court decision the Minister for Immigration did not like.

In 1993, in an effort to defuse public criticisms and the increased burden of litigation, the Minister for Immigration offered Cambodian detainees who had sought refugee status a special assistance category (the SAC). This offer involved each Cambodian who accepted the SAC to return (at Government expense) to Cambodia and remain there for one year.

They would then be eligible to return to Australia as permanent residents provided they found a sponsor who would provide accommodation and financial support. Those who accepted also had to give up his or her claim to refugee status.

When the SAC was announced, many questioned the morality behind or the reason for such a strange alternative. The SAC was held like a gun at the detainees' heads. Many had now been in detention for three years. Faced with continued detention at Port Hedland and all its privations, many of the Cambodians took the SAC and the risks of return. Some returned having survived the necessary 12 months in Cambodia. Others remained in detention in Australia defiant in their claim that they were refugees. I was at Darwin airport when the last of these came out of detention, five and a half years of it.

The SAC helped alleviate an immediate political problem, but did nothing to alleviate the problems occasioned by the whole mandatory detention policy. The SAC also highlighted the now obvious preference for maintaining a control policy irrespective of the impact that the policy might have on the commitment made to refugees in the Refugees Convention. If there was genuine commitment to the Convention, why send any of the asylum seekers back in such circumstances?

RESTRICTIONS ON JUDICIAL REVIEW

In 1994 judicial review to the High Court was curtailed. The amendments to the Migration Act restricted severely the grounds upon and the time in which an asylum seeker could seek judicial review of a decision concerning his or her refugee status. Given the isolation of Port Hedland, the time limits became a further means of excluding judicial scrutiny of decision making. Further amendments to the Migration Act purported to deny certain asylum seekers even so much as the right to apply for refugee status in Australia. The relentless course of amendments to the Migration Act has even had the effect of encroaching on the High Court's ability to discharge its appellate and constitutional functions (see *Abebe* v *The Commonwealth (1999)* 73 ALJR 584 at 597 per Gleeson CJ & McHugh J) and Ex *Parte Durairajasingham* [2000] 168 ALR 407 at 409–11 per McHugh J).

After the Cambodian asylum seekers, came one boat load of East Timorese. Then there have been the Christian women of conscience who fled the one-child policy and the persecution of forced sterilization.

THE UNEXPECTED RETURNS

I have referred to the sequence of amendments to seek to demonstrate how the arrival of the boat people triggered irrational and now counterproductive policy changes that impact on the very system for the administration of justice itself.

The sequence of amendments also caused many of us to expand our advocacy from individual cases to parliamentary committees, journals and the media, highlighting more widely the injustices visited upon so many of the boat people.

So determined were those of us to obtain refugee status for the different groups of people who bobbed up on our shores, that few, if any of us, foresaw that the world, even that persecutory world from which our clients had fled, would change.

Desperate people who we once saw in detention in Darwin, Broome or Port Hedland are now occupying desks in new ministries in Cambodia and East Timor. And it is my experience that they do not forget the assistance and the charity they felt when, at their most desperate, they fled to Australia.

In the last three years, I have felt and experienced great generosity in return for the work I and many others did. I know this has also been the experience of others. Lawyers who may have been thorns in the side of government and the

Minister for Immigration were seen in a different light by the refugees who return. I have felt the generosity from those who I met in pro bono cases and have returned to Indonesia and East Timor.

The coming of the Cambodians has opened up a lasting network of professional friends across the country. Our chambers had a new lease of life with the experience of shared determination to assist those who had fled.

What we sow can well be what we reap and I have no doubt that the lawyer who engages in pro bono work gets her or his karma.

However, the abiding experience of pro bono work is to have enriched me not just intellectually, but also spiritually. Without in any way being emotional, the experiences with Aboriginal people in the early '80s and beyond and the witnessing of human suffering of asylum seekers, sometimes of a profound kind, have allowed me insights into the human condition that are lasting. The relegated and the refugees have helped me refine my values and give a zest and an edge to legal practice. Involvement in causes suits me as it does so many others.

The coming of the Cambodians has opened up a lasting network of professional friends across the country. Our chambers had a new lease of life with the experience of shared determination to assist those who had fled. I was given a new sense of respect for so many of my professional colleagues who I would otherwise deal with simply as opponents.

The Cambodians say 47 years of age is the age of change and re-evaluation. The asylum seekers who have become clients and others who had so little in material terms and no power whatsoever, nevertheless their resilient strength, their capacity for hope and the power of their example have ensured that I have not grown cynical, stale or harbour the feeling I was hovering on stale ideas.

My experience has been that the value of pro bono work and the giving of oneself brings more personal and abiding rewards than what one gives. The values of kindness, generosity of spirit and compassion are values recognised and appreciated across cultures. When they are brought to bear in the law, I believe they enhance legal practice and at the very least, provide a balance to the more black-letter issues we as lawyers must deal with.

Above all, the motley array of pro bono cases has given a sense of purpose to my professional life, empowered me with the power of compassion and through having travelled north so many years ago and settled in Darwin, I have had my eyes opened to the world.

CONCLUSION AND A THOUGHT TO THE FUTURE

A proselytiser I am not, but an optimistic realist I am. It is fantasy to suggest that the problems thrown up by the global movement of refugees are capable of easy solution. Despite determined efforts, people continue to flee war and oppression.

The challenge thrown up by refugees has wider scope than the four Convention reasons of nationality, religion, political opinion or membership of a particular social group. Urgent world consideration needs to be given to the modern phenomenon of human movements across and beyond national borders.

But one thing is clear. The challenges facing Australia by reason of the phenomenon of refugees is not addressed by ad hoc policy making which seeks to repel asylum seekers or to divert their flight to somewhere else. The challenges are certainly not addressed by curtailing judicial review or by denigrating the efforts of lawyers to give asylum seekers access to courts. It is the antithesis of a sensible approach to the administration of justice to restrict the very ability of the Federal courts to discharge their intended roles.

Government reactions in this area have been ad hoc.

Justice Kirby is right when he opines:

> There is a tendency in life, which I see constantly in the law, to tackle symptoms, affixing band-aids whilst the underlying problems continued to grow unattended. The underlying issues that give rise to the global tide of refugees should be recognised and tackled.[3]

In our own country, with the disparities in wealth accelerating and certain economic policies challenging our values of egalitarianism, tolerance and freedom, I envisage that the pro bono work of lawyers and their candid reflections arising from that work will contribute to a more sensible and generous debate and perhaps a more just Australian society. Through pro bono work the lawyers of Australia will enhance their contribution to discerning the Australian social conscience.

Having said all that, the provision of pro bono legal services is not a right enjoyable by all those who need access to justice but can't afford it. The fact remains that legal aid services in Australia are chronically underfunded. If there is a role for pro bono advocacy in this context, it is for lawyers to employ all their skills to persuade the Australian Government that denial of access to justice to ordinary people is a blight on the Australian social conscience and needs to be corrected.

NOTES:

1. M Crock, *Protection or Punishment. The Detention of Asylum Seekers in Australia* (1993), The Federation Press, pp. xx–i.
2. D Shoesmith, *Cambodia After the Paris Agreement — The Continuing Case for Asylum* (1993) Uniya Publications, Sydney.
3. Michael Kirby, "Refugees: Their Need Has Never Been Greater", Chapter 2, p. 21 *Through the World's Eye*.

Launch of the Castan Centre for Human Rights Law

The Honourable Justice Michael Kirby AC CMG,* Melbourne, Tuesday 31 October 2000

Australia honours two fine men, champions in the field of human rights. The first is the late Ron Castan QC whose name has been given to the Castan Centre for Human Rights Law at Monash University in Melbourne. The other is the late Dr Jonathan Mann. He was remembered at a function in Sydney organised by the AIDS Trust of Australia on 3 November 2000. There, the Federal Minister for Health and Family Services (Dr Michael Wooldridge) announced scholarships, supported by the Australian Government, to honour Mann's name.

*Justice of the High Court of Australia.

CHAMPIONS OF HUMAN RIGHTS

BOTH Ron Castan and Jonathan Mann were friends of mine. Both were young men lost at the height of their powers. Ron Castan died last year of a complication following surgery. Jonathan Mann was killed in September 1998 when a plane, on which he was travelling from New York to Geneva, crashed off the coast of Canada. Both men were charismatic, courageous and dedicated to fundamental human rights, not only in their own countries but far way. Ron Castan was a first-rate technical lawyer whose brilliant legal mind planned and executed the change in Australian law regarding Aboriginal land rights known as the *Mabo* case[1]. Jonathan Mann was an outstanding epidemiologist. He was serving in Zaire (now Congo) when HIV/AIDS first appeared. He immediately saw the mighty challenge for humanity and for medicine. He perceived the paradoxical link between protecting the human rights of those most at risk of HIV and stemming the spread of the epidemic. Both men were Jewish — proud of their faith and culture. But neither took a narrow view of religion. Each had a big heart, only matched by a big mind driven by great love for humanity.

It is no accident that these two men were Jewish. Each of them learned at their parents' knees the vital importance of *chesed* — the Hebrew word for the loving-kindness that God manifests towards every living creature. That word "loving kindness", or some similar notion, is found in all of the world's great religions. It is the essence of the idea that underpins the global movement to uphold fundamental human rights.

It is not entirely coincidental that Castan and Mann were champions of human rights. The world movement for the protection of such rights is itself, in part, the outcome of the settlement that followed the establishment of the United Nations after the Second World War. In the aftermath of that war were discovered the grim horrors of the Holocaust. They revealed the many victims of Hitler's tyranny. These included members of many minorities — communists, Gipsies, Jehovah's Witnesses, the intellectually impaired and homosexuals. They were victims of hate because they were different. However, by far the greatest suffering fell upon the Jewish people of Europe. Their stories are heart-rending. We must never forget them. Ron Castan and Jonathan Mann did not forget. They turned the dreadful experiences of their people into a zeal for action to protect fundamental human rights wherever they were threatened.

The gesture of the Australian government to honour Jonathan Mann with the award of scholarships for research by Australians into aspects of HIV/AIDS is most welcome. There can be no better memorial for a creative scientist than an intellectual commitment of that kind. It is also wholly fitting that the new Centre for Human Rights Law at Monash University should bear Ron Castan's name. With such a name, and under the leadership of Professor David Kinley, there is no doubt that the Centre will mix, in proper proportions, the demands of dispassionate scholarship and a full understanding of the high moral cause which underpins the international movement for human rights.

David Kinley brings from his birthplace, Northern Ireland, a realisation of the importance of respect for the human rights of everyone, if law and order are to be based on more than the power and force. He has built up a strong reputation in Australia. His book on human rights explores every nook and cranny of the law in this country as it operates to protect fundamental rights.[2] Australia is now one of the few countries of the world without a constitutional Bill of Rights. I have no doubt that the Castan Centre will contribute to the ongoing de-

bate on whether we should change that situation, as Britain did,[3] or stick with the legal approaches of the past.

THE AGENDA

The Centre starts its life with bright hopes on the part of its members, the friends of Ron Castan and his family and other supporters. I wish to venture a few suggestions about topics which should be included in its agenda.

Indigenous human rights: Out of respect for Ron Castan, and his leadership in utilising the law as a means of protecting and upholding the human rights of Australia's Aboriginal and Torres Strait Islander peoples, it must be expected that the Centre will include in its program particular items relevant to those human rights. This will not be difficult. In the international literature of human rights, the rights of indigenous peoples in settler societies (Australia, Canada, New Zealand, South Africa, the United States and Zimbabwe) have attracted much scholarship. Some of it concerns the implications for the rights of indigenous peoples within a developed polity of the promise in the common first articles to the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* that "peoples" will enjoy a right to self-determination. It is important to make the point that this right does not necessarily mean political independence. But it does involve the concept of effective participation in aspects of governance specifically relevant to such peoples.

In approaching the human rights of the indigenous peoples of Australia, it may be hoped that the Centre will exhibit the same questioning approach to the law as Ron Castan did. Before the *Mabo* litigation, he had a junior brief in Papua New Guinea to John Kearney QC of the Melbourne Bar. They were engaged in a claim for land rights of indigenous peoples against the Crown in right of Papua New Guinea. Nellie Castan, in that questioning way for which all lawyers are grateful to their spouses and partners, demanded to know why such a claim could not be made against the Crown in right of Australia. Ron Castan gave the orthodox explanations: a Privy Council decision; established law over a hundred and fifty years; the special need for stability of land law and so on. But in the end, he himself began to question the orthodoxy. The affront to basic human rights and dignity of the old law was challenged. The result was a tectonic shift of the law.

All of us need to be alert to similar blind spots in the law. Fundamental human rights law can often be a stimulus to re-examination and change of established doctrine.

Bangalore Principles: A second issue to which the Centre must contribute concerns the utilisation, in Australian courts, of the principles of international human rights law. This involves the application of the *Bangalore Principles,* devised in 1988.[4] According to those principles, international human rights law is not, as such, incorporated in Australia's domestic law unless lawfully introduced by an Australian lawmaker. Ordinarily, this means an Act of Parliament or valid action of the Executive Government pursuant to statutory authority.

However, in a common law country such as Australia, the judiciary also have lawmaking functions, albeit in the minor key. In appropriate cases, it is permissible to the judiciary to invoke international human rights principles, introducing them into domestic law by judicial decision. The warrant to do this is stated in a most important passage in Justice Brennan's reasons in *Mabo* v *Queensland [No. 2]*.[5] Indeed, that passage, which formed an essential step in the reasoning of the High Court in *Mabo* may, in retrospect, come to be seen as the most significant contribution of that case to our law. In a sense, it has an importance transcending even the issues of indigenous rights with which the case was concerned. Justice Brennan said:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination and the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

According to this notion, then, international human rights law may legitimately be invoked, at least in cases of ambiguity, to resolve uncertainties in legislative interpretation and to fill gaps in the common law.[6] My own view is that the same principles may be invoked in construing the Australian Constitution which is, after all, a statute, although one of a particular character. In *Newcrest Mining (WA) Limited* v *The Commonwealth*[7] I proposed an interpretative principle which I regard as appropriate to the elucidation of the meaning of our Constitution in the contemporary age:[8]

> Where there is ambiguity in the meaning of the Constitution, . . . it should be resolved in favour of upholding such fundamental and universal rights. The Australian Constitution should not be interpreted so as to condone an unnecessary withdrawal of protection of such rights. At least it should not be so interpreted unless the text is intractable and the deprivation of such rights is completely clear . . . [Its] purpose is to be the basic law for the government of a free people in a nation which relates to the rest of the world in a context in which the growing influence of international law is of ever increasing importance.

Mabo may, in retrospect, come to be seen as the most significant contribution of that case to our law. In a sense, it has an importance transcending even the issues of indigenous rights.

Whilst this principle has not yet been accepted by all members of the High Court of Australia, I do not doubt that a major challenge of the coming century will be the reconciliation of international law with Australia's domestic law — including that of its Constitution.

Bill of Rights: A third project for the agenda arises in a connected context. It concerns the question whether Australia should now move towards a national legislative, and possibly constitutional, Bill of Rights. With the coming into force of the United Kingdom *Human Rights Act* of 1998 on 2 October 2000, Australia is now one virtually alone amongst the developed countries of the world in having no general or constitutional charter of rights which citizens can invoke when they allege that their fundamental rights have been infringed. With the centenary of federation, it is important that we reflect upon the changes that have occurred in a hundred years that may make

it appropriate, now, to re-examine this question.[9] When in the constitutional debates at the end of the nineteenth century the proposal for a Bill of Rights was voted down, Australia was substantially a monochrome society with shared values and fewer minorities. The situation, in part, is different today. That is why there is a keen and growing interest in the Bill of Rights question. I would expect that this Centre will contribute to the national reflections about it.

The Asia-Pacific region: I would also hope that the Centre will reach beyond Australia and involve itself in the human rights issues of the region. In my own life, I have had the privilege to meet, and work with, some of the leaders of the struggle for human rights in Asia and the Pacific. Amongst the most notable of these is President Kim Dae-jung of the Republic of Korea. His courage, imagination and fortitude have lately been recognised by the award to him of the Nobel Prize for Peace. That prize was earlier awarded to His Holiness the Dalai Lama of Tibet. These two men contradict the suggestion that there is an exception to human rights in the countries of our region — that somehow the nations of Asia are exempt from the universal development of human rights law.

President Kim has been subject to four attempts on his life. He was imprisoned for more than six years during his struggle. He never lost faith in, and commitment to, fundamental human rights.[10] Similarly the Dalai Lama has constantly emphasised the need for a peaceful resolution to the Tibetans' dispute with China. The Australian Foreign Minister (Mr Alexander Downer) informed me recently of his knowledge of the contributions which Ron Castan made, during his lifetime, to the attempts to build a dialogue between the Dalai Lama and the leaders of the People's Republic of China. Mr Downer paid tribute to those efforts. I am glad that the connection of the Castan family with the Dalai Lama has continued to this day. May some of his grace and compassion shine upon the Centre and inspire in it a concern for human rights law beyond Australia, and particularly in the region and the countries surrounding us.

Human rights in the future: I also hope that the Centre will involve itself in future issues of human rights. Within days I will be travelling (economy class as the United Nations requires) to Quito in Ecuador. There I will be attending a meeting of the UNESCO International Bioethics Committee. Our topic will be the Human Genome Project. Contemporary developments in genetics present many new issues for human rights and human rights law. Can there be any issue of more fundamental importance for the future of human rights than who "humans" will be in the coming century? With the capacity of genetics, potentially, to alter the building blocks of human life, this is not a theoretical issue.

Other topics must be placed on the agenda. They include, I think, human rights of drug addicted and dependent persons. I suspect that, in a decade or so, we will look back on our treatment of drug dependence with something of the same embarrassment with which we now look back on the criminalisation of private adult consensual homosexual conduct twenty years ago. The fact that we now appreciate that such laws constituted an over-reach of criminal sanctions, diminishing the human rights and dignity of those targeted, should make us alert to the danger of similar laws which operate in today's society.

Contemporary developments in genetics present many new issues for human rights and human rights law. Can there be any issue of more fundamental importance for the future of human rights than who "humans" will be in the coming century?

One reviewer of David Kinley's book (Professor Robert McCorquodale) has suggested[11] that its authors were excessively optimistic about the impact of human rights law in Australia and about the future of such law. Professor McCorquodale argued that such impact, in default of enforceable rights under a general or constitutional Bill of Rights, depended too much on the vagaries of legislative initiatives and judicial imagination.

Recently I received a similar criticism of an essay I have written for *The Stanford Journal of Law and Policy.* My essay, to be published in 2001, concerns the contrast between the law affecting homosexuals in the United States and Australia. Certainly, in Australia, we can look with pride on the fact that, with the assistance of international law, criminal offences against adult homosexual conduct have been abolished in all parts of the country. Likewise, in the Australian Defence Force, there is no ban on homosexuals and no "don't ask, don't tell" policy, as in the United States. Nor is there any prohibition on homosexuals in the Boy Scouts in Australia, unlike the American counterpart.[12]

The reviewer of my article suggested, however, that I was unduly optimistic. That attitudinal change in Australia concerning sexuality was still slow in coming. That legal discrimination is still common. That basic human rights are not impartially accorded. Indeed, that in my own case, I would not have been appointed to the High Court of Australia if I had not earlier gone along with the "don't ask, don't tell" demand of Australian society. If these criticisms are, even in part, true, the issues of sexuality will also present a challenge for the future agenda of human rights and this Centre. Clearly there will be plenty to do. One hopes that the Centre will have support, both intellectual and financial, to ensure that it can fulfil the challenge of these and other agenda items.

THE CRITICS

It should not be assumed that human rights law, especially that originating in international bodies of the United Nations, enjoys the support of every Australian citizen. A prominent newspaper,[13] commenting recently on the criticisms of Australian legislation within UN Committees declared: "The attempts by various UN Committees to regulate Australian social policies threaten their own credibility more than that of the [Australian] government. The UN Committee system is a third-rate, unaccountable, opaque irrelevance that is unfit to comment on Australian policy."

To like effect was a comment by the well known iconoclast, Padraic McGuinness.[14] Writing in September 2000, he declared in a newspaper column: ". . . These treaties have been used by zealous and inadequately supervised diplomats and lawyers as implements for extending their own political power . . . The glaring problem of the UN is what has been called the democratic deficit . . . [It] is worsened by the active interference in UN activities of non-governmental organisations (NGOs) which themselves are entirely unrepre-

sentative, undemocratic and concerned with their own special agendas."

Writing in a Melbourne newspaper a few weeks ago, Michael Barnard voiced a similar view:[15] "We live in an age where minority (and sometimes extreme) elements . . . are increasingly inclined to seek the overthrow of domestic law through appeals to a hotpotch 'international community.'" To Barnard, the problem was the "rights industry" which "either through manipulation or a bloated sense of mission, keeps expanding its horizons" threatening the autonomy of the nation state.

It will be important for the Castan Centre for Human Rights Law to listen to, and answer, these critics.[16] I know and respect Paddy McGuinness for his work as editor of *Quadrant*, a journal that undoubtedly contributes greatly to Australia's intellectual life. I am aware, from a letter from a parishioner, that he, Phillip Adams and I were recently included in an "unholy trinity" that a congregation was commanded by their priest to pray for, to save our otherwise lost souls. So we have shared prayers in common. But the weakness of the opinions of the unidentified newspaper editorialist, Paddy McGuinness and Michael Barnard, is that they do not tell us what they would put in place of the United Nation's efforts to defend human rights on the planet. Surely, would not there be more of the power of unbridled nation states, unrestrained by human rights law and world opinion. Surely, we have made some progress in the twentieth century and can learn from its awful errors. Ron Castan did. Jonathan Mann did.

From my work for the United Nations in Cambodia and elsewhere, I know only too well that there are weaknesses in the UN system. But the answer is to strengthen it and especially to strengthen the elements of law, consistency, efficiency and accountability. It will probably never be possible to cure the "democratic deficit" by holding a global election for the UN Secretary-General. So the only way the United Nations will work for us all is by our active participation in its human rights and other affairs, by the active involvement of the nation states, including Australia. Despite occasional interruptions, Australia's steady commitment to the United Nations remains stalwart. It was signalled recently by the announcement of the federal government of Australia's intended ratification of the International Criminal Court.[17] We are, as usual, one of the first nations to take this step. It will be followed by Australian legislation. Australia remains a good international citizen. It is helping to build a world that is governed by law, not brute power. A world respecting fundamental human rights, and not condoning genocide, oppression and other abuses of the vulnerable and minorities.

The strongest input into the global movement for human rights is not that of "unrepresentative NGOs" or "loony extremists". It is that of nation states, like Australia, that wish to learn from, and to help, others. Input also comes from the work of strong professional organisations. Knowledgeable or courageous NGOs and individuals with a commitment to human rights and the rule of law.

This is what Ron Castan and Jonathan Mann would be saying to us in Australia this week as we honour their memory and commit ourselves, in these new institutional ways, to expanding their efforts through research and other work, fired by a proper sense of impatience. Human rights is not just an idea or words. For me, human rights is the nameless Australian soldier patiently teaching Cambodian farmers to rid the fields of landmines. It is my last year's legal associate, Joe Tan, working for the conduct of a fair election in Kosovo. It is UN High Commissioner for Human Rights Mary Robinson working tirelessly for the downtrodden and oppressed. It is Ms Sadako Ogata, High Commissioner for Refugees, working for forgotten Vietnamese boat people bundled to the Cambodian border by Khmer who dislike them. It is the Ugandan judge helping to establish rudimentary courts in East Timor. It is Jonathan Mann fighting for the voiceless against the spread of AIDS in Africa. It is Ron Castan turning his great gifts to the advantage of Australia's indigenous peoples.

Ron Castan's memory, and his achievements, will inspire those who follow in the law, including in this Centre, to strive for legal excellence whilst committing themselves to the building of a better Australia and a better world.

NOTES

1. *Mabo* v *Queensland* (1988) 166 CLR 186; *Mabo* v *Queensland [No. 2]* (1992) 175 CLR 1.
2. D Kinley (ed.), *Human Rights Law in Australia (1999).*
3. *Human Rights Act* 1998 (UK) which came into force on 2 October 2000.
4. The *Bangalore Principles* are set out in (1999) 63 ALJ 497.
5. *Mabo* v *Queensland [No. 2]* (1992) 175 CLR 1 at 42 per Brennan J.
6. J Spigelman, "Access to Justice and Human Rights Treaties" (2000) 22 *Sydney Law Review* at 141.
7. (1 997) 1 90 CLR 517.
8. (1997) 190 CLR 513 at 660.
9. A recent development is the introduction into the Senate by the Australian Democrats of the Australian Bill of Rights Bill 2000 (Cth). The Bill is based on the Australia Bill of Rights Bill 1985 (Cth) introduced by the Government during the early years of the Hawke Government but abandoned. See also G Williams, *A Bill of Rights for Australia?* (UNSWP, 2000).
10. Kim Dae-jung, Congratulatory Message (2000) 1 *Asia-Pacific Journal of Human Rights and the Law, 1.*
11. R McCorquodale, review of *Human Rights Law in Australia* (1998) Australian Yearbook of International Law, 16 at 17.
12. *Boy Scouts of America* v *Dale* 734 A 2d 1196 (2000).
13. *The Australian,* quoted M Barnard "Nations hostage to global rights", *Sunday Herald Sun* (Melbourne), 22 October 2000, 47.
14. P P McGuinness, "Bending the agenda of the UN's democratic deficit" in *Sydney Morning Herald,* 2 September 2000, 31.
15. Barnard, above n 13.
16. There are others, see e.g. P Akerman, "Judiciary no place for crowd-pleasers", *Sunday Telegraph* (Sydney), 29 October 2000.
17. "Ratifying the International Criminal Court", Joint News Release of the Attorney-General (D Williams) and the Minister for Foreign Affairs (A Downer), 25 October 2000.

Reflections on Appointments of Her Majesty's Counsel or Senior Counsel for the State of Victoria

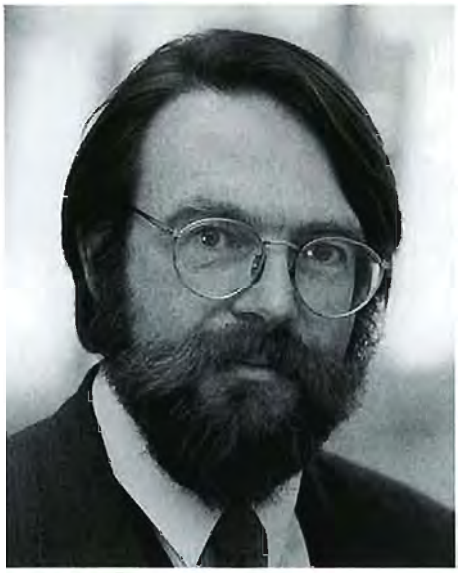
or *Plus Ça Change, Plus Ça La Même Chose!*

I: BACKGROUND — APPOINTMENTS OF HER MAJESTY'S COUNSEL HITHERTO

IT has long been the practice in Victoria for the Governor in Council by Letters Patent to appoint certain senior advocates to be of Her Majesty's Counsel for the State of Victoria. The appointments have been made from time to time, usually annually, upon judicial recommendation from amongst those who have applied.

In origin, the practice of granting a commission to an advocate as Her Majesty's Counsel was ad hoc, was related to the provision of leading advocates to plead for the Crown, and was also eventually a means of supplanting the serjeants-at-law who, for five centuries or more, were the leading advocates of the common law Bar in England. Until relatively recently (1920s in New South Wales), it was necessary for Her Majesty's Counsel to have the licence of the Attorney-General to appear for the defence in a criminal trial, as this was an appearance against the Crown from whom their commission comes. (*Cf. Attorney General for the Dominion of Canada* v *Attorney General for the Province of Ontario* [1898] AC 247 (Privy Council) (Herein cited as *"A-G for Canada"*)

It has for many years been the case, however, that appointment to be Her Majesty's Counsel has chiefly been a public recognition of the leading advocates in various areas of law. There has arguably been some benefit thereby both to the public and to the advocates so commissioned.



Anthony Krohn

II: A NEW ORDER? — APPOINTMENT "OF SENIOR COUNSEL"

The Victorian Government has announced that it intends henceforth not to appoint "Her Majesty's Counsel for the State of Victoria" but "Senior Counsel". The first appointments under this system have now been made. They were appointed by the Governor in Council, and announced by the Attorney-General, following the same selection process as hitherto. The only change was the title.

A. "Senior Counsel for the State of Victoria" is an office.

There is only an apparent change from the previous system. If the Governor in Council appoints "Senior Counsel for the State of Victoria", His Excellency appoints to an office within and for the sake of the State of Victoria. This is inherent in the manner of appointment:

> The appointment of counsel for the Crown, and the granting of precedence at the Bar to certain of its members, are matters which do not appear to their Lordships to stand upon precisely the same footing. In England the first of these rights has always been a matter of prerogative in this sense, that it has been personally exercised by the Sovereign with the advice of the Lord Chancellor, the appointment being made by letters patent under the sign-manual . . . appointing the grantees to be of counsel for the Sovereign, subject to the condition that they are to take precedence inter se according to the priority of their appointment . . . The effect of an appointment as Queen's Counsel is that the holder cannot appear in court as counsel for any party litigating with the Crown unless he has obtained a licence from her Majesty.
>
> The exact position occupied by a Queen's Counsel duly appointed . . . is in the nature of an office under the Crown . . .; and it is also in the nature of an honour or a dignity to this extent, that it is a mark and recognition by the Sovereign of the professional eminence of the counsel . . . But it does not necessarily follow that, as in the case of a proper honour or dignity, the elevation of a member of the Bar to the rank of Queen's Counsel cannot be delegated by the Crown, and can only be effected by the direct personal act of the Sovereign . . . *(A-G for Canada*, pp. 251–2*)*.

The appointment of "Senior Counsel for the State of Victoria" is an appointment to an office in Victoria also because there is no proper function of the Gover-

nor in Council other than to exercise the powers and functions of Her Majesty in respect of the State of Victoria, i.e. for the purposes of government (cf. *Australia Act 1986,* section 7(2)). It follows that for the Governor in Council formally to appoint certain advocates as leading or "Senior Counsel for the State of Victoria" is actually to appoint those persons to an office under the Crown for the better government of the State.

The new regime is not a change from an appointment to an office to a conferring of a title of honour or a dignity as distinct from an office. This is because the Crown is the fount of all honour, and the creation and bestowal of honours, e.g. awards under the Australian Honours system, is a personal prerogative of the Sovereign (*The Prince's Case* (1606) 8 Co Rep 1, 18b; 77 ER 481, 502). It is not a matter on which the Sovereign is obliged to act following the advice of Her Ministers, although there is consultation within the Government, and it appears that in Australia Her Majesty may delegate the exercise of the prerogative, e.g. such awards of honour, to the Governor-General as Chancellor of the Order of Australia, or to the Governor of a State. (*Cf.* also e.g. delegation to the Kings of Arms of power to grant arms, *Manchester Corporation* v *Manchester Palace of Varieties Ltd* [1955] P 133, 147, per Lord Goddard, Surrogate (High Court of Chivalry).)

B: The office is created by the Crown, under the Crown and for the Crown.

Whatever the Governor in Council does, it must always technically and strictly be an exercise of Her Majesty's executive power by the Governor, Her Majesty's representative (*Australia Act 1986,* section 7(1)), upon the advice of the Executive Council pursuant to s. 87E of the *Constitution Act (Victoria) 1975.* While His Excellency acts upon advice *(cf. Australia Act 1986,* section 7), the exercise of executive power is done by the Governor or the Governor in Council in the Queen's name and by that authority alone, subject to the Constitution of Victoria, the Constitution of the Commonwealth of Australia.

It follows that the "Senior Counsel" are in fact "Her Majesty's Counsel", not only because they serve the Crown in an office, but because they are created by an exercise of Her Majesty's power.

III: CONSEQUENCES OF THE CHANGE

For the reasons given above, a change of appointments from "Her Majesty's Counsel" to "Senior Counsel" is a change of title alone but not of substance. This is in itself an insufficient and undesirable reason for change. If this were the only fault, it would be a trivial matter, but this particular change gives the impression that somehow previously Her Majesty was involved, but now is not. This is to give the impression that there has been some kind of change in the operation of the Constitution. This is highly undesirable. It is especially undesirable within a year following the referendum vote by which a majority of voters in each State, including Victoria, rejected a proposal to change the Constitution of the Commonwealth by replacing Her Majesty with a President.

A most regrettable impression is given either that the Constitution or its operation has changed, or that Her Majesty's Government for the State of Victoria, in contempt of the voters of the State, is pretending that the referendum vote was different.

IV: CONCLUSION

For the reasons given above, I most strongly urge the Government that, if there is to be recognition of leading advocates by the Executive, it should be done as hitherto, and with the same issue of Letters Patent granting the same title of "Her Majesty's Counsel".

If, on the other hand, the Government believes that the Executive ought not to be involved in the recognition of leading advocates, as is now the case in, for example, New South Wales, then no problem arises. The courts or the legal profession can separately recognize leading advocates, such as by reviving the degree and dignity of serjeant, or by using some other title, and His Excellency in Council is not troubled by the matter.

Great evil flows from obscuring the truth of the workings of the Constitution. The points made above are equally valid, whether one thinks the present Constitution as a constitutional monarchy is very good, very bad or an acceptable second best. My criticism of the change of title is made vigorously because any pretense about the Constitution is a grave disservice to the people of Victoria. If there is change, let it be brought about openly and in accordance with the provisions of the Constitution, and the welfare of Victoria generally.

Anthony Krohn

The Arrival of Senior Counsel

ON 28 November 2000 the Governor in Council appointed as Senior Counsel the persons listed below, in order of precedence:

Kenneth Ross **Howie**
Geoffrey Michael **Horgan**
Roy Francis **Punshon**
Peter Holloway **Clark**
John Anthony **Jordan**
Graeme Geoffrey **Hicks**
Paul Gregory **Lacava**
Clyde Elliott **Croft**
Cathryn Faye **McMillan**
David John **Brown**
John Anthony Hugh **Foxcroft**
Olyvia **Nikou**
Helen Mary **Symon**
Michael Joseph **Crennan**
Norman John **O'Bryan**
Jennifer Jane **Batrouney**

The new silks announced their appointment to the Supreme and Federal Courts on Tuesday, 5 December 2000. The Bar congratulates each of them as the first Senior Counsel appointed in Victoria.

Key to Appointees

1. Foxcroft
2. Jordon
3. O'Bryan
4. Hicks
5. Symon
6. Howie
7. Lacava
8. Batrouney
9. Brown
10. Punshon
11. Horgan
12. Clark
13. Nikou
14. Croft
15. McMillan

Absent: Michael Crennan

Name:	**Ross Howie**
Date of Signing Bar Roll:	May 1982
Areas of Practice:	Native title, Aboriginal land rights, administrative law
Readers:	Alexander Crawford, Eugene White, Angus Frith
Reaction on Appointment:	Grateful for the friendship and goodwill
Reason For Applying:	—
Do you have any comment on the change of title from QC to SC?:	—

Name:	**Roy Francis Punshon**
Date of Signing Bar Roll:	14 June 1973
Areas of Practice:	Criminal law
Readers:	Michael Cosgrave, Mordy Bromberg, Chris Beale, Sean Cash, Michael O'Connell, Moira Jenkins, Gerard Mullaly
Reaction on Appointment:	Very pleased
Reason for Applying:	—
Do you have any comment on the change of title from QC to SC?:	—

Name:	**Geoffrey Michael Horgan**
Date of Signing Bar Roll:	September 1973
Areas of Practice:	Criminal law
Readers:	Bruce Heathershaw
Reaction on Appointment:	Apprehensive as to a heavy responsibility.
Reason for Applying:	27 years is a very long time to be a junior.
Do you have any comment on the change of title from QC to SC?:	Not at this stage.

Name:	**Peter Holloway Clark**
Date of Signing Bar Roll:	13 April 1972
Areas of Practice:	Common law, insurance, banking and inquiries
Readers:	Nemeer Mukhtar Q.C., Darrell Browne
Reaction on Appointment:	Made it.
Reason for Applying:	Because it is there.
Do you have any comment on the change of title from QC to SC?:	A sensible step.

Name:	**Graeme Geoffrey Hicks**
Date of Signing Bar Roll:	17 May 1973
Areas of Practice:	Criminal law
Readers:	Ms R Carlin, Mr R Barry, Mr C Triscott, Mr R Stransky
Reaction on Appointment:	Honoured.
Reason for Applying:	It was an appropriate time.
Do you have any comment on the change of title from QC to SC?:	No comment.

Name:	**Paul Lacava**
Date of Signing Bar Roll:	9 October 1980
Areas of Practice:	General practice
Readers:	Gyfteas, Galatas, Anne Duggan, Julian McMahon
Reaction on Appointment:	Pleased.
Reason for Applying:	It's time.
Do you have any comment on the change of title from QC to SC?:	No comment.

Name:	**Clyde Croft**
Date of Signing Bar Roll:	1979 (resigned 1990)
Areas of Practice:	Property and commercial law
Readers:	None
Reaction on Appointment:	Very pleased and honoured.
Reason for Applying:	Seemed the right time.
Do you have any comment on the change of title from QC to SC?:	No comment.

Name:	**Michael Joseph Crennan**
Date of Signing Bar Roll:	1982
Areas of Practice:	Fairly general, commercial work with emphasis on trade practices and administrative law.
Readers:	Connor (nee Story), Wardell, Campbell and Hanson
Reaction on Appointment:	The usual mixture of pleasure and apprehension.
Reason for Applying:	—
Do you have any comment on the change of title from QC to SC?:	The title Queen's Counsel has a long and honourable history in our profession. On the other hand the title Senior Counsel has an honourable history both outside this country and increasingly within it. Further it is, perhaps, appropriate to the temper of the times and I, for one, am very glad to be in the first wave of Senior Counsel so designated in this State. In any event, the responsibilities which flow from the possession of either title are identical.

Name:	**Norman O'Bryan**
Date of Signing Bar Roll:	1993
Areas of Practice:	Commercial
Readers:	None (much to my regret)
Reaction on Appointment:	As I have always felt on the starting line in a big and important race.
Reason for Applying:	To run that race.
Do you have any comment on the change of title from QC to SC?:	As a very committed republican (in my heart and in my head), I am very pleased to be amongst the first in Victoria.

Name:	**David Brown**
Date of Signing Bar Roll:	13 September 1979
Areas of Practice:	Family law
Readers:	Ross Hutchins, Patrick O'Shannessy Nicholas Gardiner, Heather Gordon, Keith Nicholson, Laura Colla.
Reaction on Appointment:	Good
Reason for Applying:	I needed to stem the flow of paperwork coming into chambers.
Do you have any comment on the change of title from QC to SC?:	I think it's a very good idea.

Name:	**Jennifer Jane Batrouney**
Date of Signing Bar Roll:	30 May 1991
Areas of Practice:	Revenue and superannuation law
Readers:	None
Reaction on Appointment:	Exhilarated.
Reason for Applying:	The challenge.
Do you have any comment on the change of title from QC to SC?:	If I were pressed for a straight answer I would say that, as far as I can see, looking at it by and large, taking one thing with another, in terms of the average acronym, then in the last analysis it's probably true to say that, at the end of the day, you would find, in general terms that, not to put too fine a point on it, there really isn't very much in it one way or the other — as far as one can see, at this stage (apologies to Jonathan Lynn and Antony Jay *The Complete Yes Minister* BBC Books 1997 at p. 107.).

Name:	**Cathryn (Kate) Mcmillan**
Date of Signing Bar Roll:	1981
Areas of Practice:	Commercial, professional negligence/misconduct, property, contract, wills & estates.
Readers:	Richard Waddell, Kerr: (with S Laye QC), John Francis, Dominic Lay, Richard Wilson, Colin Campbell (with C Maxwell QC & N. Mukhtar QC) and Leonie Bird
Reaction on Appointment:	Delighted and honoured.
Reason for Applying:	It was time.
Do you have any comment on the change of title from QC to SC?:	No comment.

Name:	**John Anthony Hugh Foxcroft**
Date of Signing Bar Roll:	19 November 1981
Areas of Practice:	Construction Law
Readers:	Dr Donald Kinder
Reaction on Appointment:	—
Reason for Applying:	—
Do you have any comment on the change of title from QC to SC?:	—

Name:	**Olyvia Nikou**
Date of Signing Bar Roll:	May 1983
Areas of Practice:	Family law
Readers:	Mary Sevdalis
Reaction on Appointment:	First reaction: Stunned, elated. Second reaction: Good grief!! What have I done? There is so much responsibility that goes with this honour . . . I had better set the alarm even earlier to match the standard set by those who have gone before.
Reason for Applying:	Time for new challenges. I'm tired of getting up at 4–5 a.m. each day to get through my workload. I want to do fewer cases at the highest standard.
Do you have any comment on the change of title from QC to SC?:	Magnificent effort to modernize the profession. Proud to be in the first ever group.

Name:	**John Anthony Jordon**
Date of Signing Bar Roll:	15 November 1973
Areas of Practice:	All personal injury work, professional negligence, sporting claims and disputes, mediations, farming disputes, general civil litigation, a lot of crime but many years ago.
Readers:	Greg Doran, Angus MacNab
Reaction on Appointment:	Very humble when I think of the great silks of the Victorian Bar over my time.
Reason for Applying:	After 27 years of constant trial work I thought I had done enough hard yards to try the next step as an advocate. I saw it also as a change to again broaden my practice because over 17 years of circuit work I appeared in all types of civil cases and prior to that I had 10 or so years in crime. Sometimes as a senior junior you tend to get a lot of work in only one or two areas.
Do you have any comment on the change of title from QC to SC?:	I was quite comfortable with it until my daughter asked me if SC meant I was now a Senior Citizen!

Carnivale 2000 — Viva!

IN my experience, the best functions invariably result in the commission of a tort. The incident may be only the nuisance created by loud music disrupting the neighbours' quiet enjoyment, or perhaps the threat of imminent bodily contact, however, one rule stands fast — the magnitude of the tort (or the number committed) is directly proportional to the success of the evening. So when a promising criminal barrister narrowly escaped suffering a head injury as the centre piece toppled over in spectacular fashion, grazing his temple and smashing on floor (the result of some over-enthusiastic advances from one who should have been in bed much earlier), it confirmed just how good this night had been.

The evening was the result of Gorgeous Dave's idea to celebrate the coincidence of the millennium, and the centenary of the Victorian Bar and Federation. The project took on a life of its own and in the words of our illustrious Chairman, "had it been a flop, it was David's function". As it was a thumping success, you can all imagine what he said next.

The crowd was entertained throughout the evening by live statues, a percussion group extraordinaire, roving entertainers and stilt walkers, DJ Simon McGregor (who was so chumpy you could carve him), and live band, Havanna Moon. A scrawny American rock star wowed the enthusiastic crowd with a few Rolling Stones numbers, before announcing his retirement from public life. After

Dyson Hore-Lacy, Jeanette Marrish, Margaret Fried and Roy Punshon.

Ron and Margot Meldrum.

Chris and Danni Blanden.

Paul Jens does his impersonation of Mick Jagger.

Don and Sally Farrands.

Heather Gordon, Anna Boymal, Fiona and Paul Connor. (The living statue is from "Born in a Taxi".)

Geoff Nettle QC, Wendy Nettle, Sally and Tim Tobin.

Carnivaling!

the mysterious guest had left the stage, many commented that Mick Jagger looked remarkably like he had spent most of his life swimming at Torquay and looked exceedingly fit for his age, especially considering his penchant for excess and women.

Those who had the energy, danced until they dropped. Many climbed onto the catwalk brought in by Mr Jagger for his performance and a number fell off it. The Attorney was seen teaching many admirers how to dance — with such success that Lawrence Money (that wit who entertains us each Sunday) felt compelled to include a piece about Carnivale in his column, cleverly disguised as a tribute to Mr Hulls' private life.

Food abounded, Domaine Chandon wines flowed, flights and other prizes were handed out and still the crowd clamored for more. Then finally, Lex and the Lex Pistols took the stage and the crowd went wild.

Much thanks for the success of the evening must go to Megan Tait, who was employed by the Bar Council to execute its ambitious plan for a party. Megan was a delight to work with and her infectious enthusiasm added an excitement and atmosphere to the night which I am assured, has hitherto not been seen at a Victorian Bar function.

Lest the sceptics among you still require some evidence that the night was a roaring success, a final observation ought be made. As the Lex Pistols marched wearily from the stage, the lights were turned on and the staff breathed a huge sigh of relief (the centrepiece incident had not yet occurred), a leopardess lit a cigarette and threatened to commit a tort upon any person who came near her. Thankfully for all concerned, she was tranquilised and removed from the glittering ballroom, so that others could exit in safety — but that's another story . . .

AAP Reuter
New York

Owen Dixon Chambers Entrance

Maurice Phipps QC

IN 1984, when the building, which is now called Owen Dixon Chambers West, was designed, the intention was that its main entrance would be from William Street through a foyer to be constructed where the State Bank of Victoria then had its William Street Branch. The Lonsdale Street entrance was to be a secondary entrance.

The Bar Council decided that the two buildings should be treated as one complex and named Owen Dixon Chambers, and East and West was adopted to distinguish between the two.

For various reasons the planned entrance was not constructed until this year. The new entrance was opened and then the original one closed off on 1 December 2000. The photographs on this page were taken a few days before that happened.

The original entrance was combined with the lift lobby, and with the traffic generated by both buildings it was often congested. It is now solely a lift lobby and the congestion has gone.

The signs at the new entrance will be Owen Dixon Chambers without either East or West. The doors leading from the entrance lobby to each building will have signs Owen Dixon Chambers East and Owen Dixon Chambers West respectively. A reception desk will be in the new entrance on the carpeted area and so confusion suffered by many people unfamiliar with the buildings will be eliminated.

The work will not be completed until after Christmas. The main items will be the reception desk and the new mail room, which is now near the Owen Dixon Chambers East lifts. The concrete of the new steps and ramp has to be left for at least 40 days before tiles are applied. The aluminium cladding and tiles on the front wall will not be done until after Christmas.

Given the complexities of having to do the work in an occupied building, the project has gone remarkably smoothly. Barristers Chambers Limited is grateful for the efficiency of the builder Bovis Lend Lease and in particular its site supervisor Mr Geoff Spink.

The Bar can now start the new century and the new millennium with a brand new face for the world.

Maurice Phipps QC checks the progress of the Owen Dixon East renovations with site supervisor Geoff Spink.

Owen Dixon East renovations project engineer Carolyn Patterson exits through the soon-to-be-relocated main entrance.

Verbatim

Cannabis and Independence

County Court, Melbourne

15 November 2000
R. v *Ali Ali & Tahir Cakici*
Judge Anderson had completed his charge as to the elements of the 15 offences, including one of possession of cannabis.
Juror: (from back row, ignoring protocol of passing questions through the foreperson) Judge, is smoking included in the charge of possession of a drug of independence (sic.)?
Same Juror: (after being thanked for their work in arriving at the 30 verdicts) Do we get our money now?

Recollection and Denial

21 November 2000

His Honour: Well, it does not follow because you cannot recall a conversation that you cannot deny something was said. Take a proposal for marriage . . .
Mrs Kenny: I will accept that, your Honour.

Memory and Repression

Federal Court of Australia

23 October 2000
Dismin Investments Pty Ltd v *Commissioner of Taxation*
Coram: Heerey J
Brian Shaw QC and Helen Symon for Application
Christopher Maxwell QC and Ian Stewart for Respondent

Mr Shaw: So the transaction that your Honour is concerned about is the transaction which involves the disposal of the X class shares to 101 Ontario in exchange for the shares in 101 Ontario itself. Your Honour, if I might come to Part X of the Act — has your Honour met it before?
His Honour: No.
Mr Shaw: I'm sure if your Honour had you would recall.
His Honour: There is such a thing as repressed memory.

Guest speaker Richard Ackland

Richard Ackland Addresses the Commercial Bar Association

ON 2 November 2000 David Denton, Senior Vice President of the Commercial Bar Association, welcomed some 85 members of the Commercial Bar to an evening seminar and cocktails with Richard Ackland. He introduced Ackland as the editor of *The Gazette of Law and Journalism* and also the editor of the legal magazine *Justinian*. *Justinian*'s motto is "a journal with glamour — yet no friends".

Ackland revealed his first foray into journalism was as a junior on the Sydney *Daily Telegraph* when it was owned by late Sir Frank Packer. He is reported to have stated that he was required by the closed-shop rule of the day to join the Australian Journalists' Association and duly sent in his application and subscription, but heard nothing. He is quoted saying "apparently the paperwork had been lost by the union so you can imagine my surprise and terror when, one day Sir Frank came wheezing into the News Room and bellowed: 'Who's this Ackland. Stand up Ackland, so we can all get a look at you — look at him. The only man I've got here with the courage not to join the union. Well done.'"

Since those humble beginnings Richard's interest in journalism is a matter of public record. He is certainly a man that we have all "looked at". More recently he has been the public face of the ABC Media Watch. In this role he excelled with his ability to always sound politely surprised at the cynical goings on of our community. His period at the helm of Media Watch culminated in the segment devoted to "Cash for Comment". This exposé won for himself, Deborah Richards and Anne Connolly the 1999 Gold Walkley Award for Journalism.

It has not all been plain sailing, and Ackland has not been without critics in

David Denton introduces the speaker.

Kate Anderson, Melanie Sloss and Gavan Griffith QC.

Mirella Trevisiol, Philip Crennan and Jonathan Evans.

Chris Horan, Stephen McLeish, Damian Murphy and Michael Shand QC.

his own right. Ray Martin in particular was most displeased with the goings on of that young cult personality John Safran and his accomplice Shane Paxton which was aired by Media Watch. Also Ian Barker QC as President of the NSW Bar Association has responded in the *Sydney Morning Herald* to Richard's article on legal aid entitled "Dragging the law out of its bottomless pit".

Richard writes widely and can be found published in many journals, newspapers and on the internet.

He is perhaps improperly described as a commentator upon events. He is more of an analyst on the matters leading up to an event. Having analysed these he then goes on fearlessly to put forward his own view on an issue.

His views do influence decision makers in Australia. It was only in July 1996 that Mr Justice Kirby, in delivering the St James Ethics Centre Forum on Ethical Issues, publicly responded to Richard's article "On a Silk Road to Status and Money" when His Honour said in passing "one does not have to wholly embrace Richard Ackland's view that lawyers are members of a Broederbond, or criticism from within that the Bar is simply a cartel, to accept that external perceptions are actually often useful and legitimate".

In his own way Richard made his own comment on the state of the judiciary writing in the 1999 *University of Technology Sydney Law Review*:

> There is much about which the media should be legitimately concerned in view of the recent spate of restrictive, uncreative, unimaginative judicial determinations. To that extent the judges reflect the mood of the country and the time. Nervous, and unexciting.

Richard Ackland then addressed members of the Commercial Bar.

Robert Shepherd, Russell Moore, Samantha Marks and Temi Artemi.

Little Orphans

MANY words are members of a recognizable family, of which the principal members are generally nouns, verbs (and participles), adjectives and adverbs. So: *a home*, *to home* (*homing*), *homely*; *a friend*, *to befriend*, *friendly*, and so on. The family tree expands when prefixes and suffixes are used as modifiers.

Apart from members of the immediate family, there also arise parallel families, cousins if you will: *friendship*, and *friendliness* are both nouns which extend the concept in *friend*. In a slightly different way, *ellipse* (geometrical shape), *ellipsis* (a truncation, especially in speech or writing), *elliptical* (the adjectival form of both ideas).

Our language has thousands of examples of this. However, not all words follow this comfortable domestic trend. Some are so ungainly in shape or sound that they are ill-adapted to the rules which generally govern the relationship between the various parts of speech. *Reductio ad absurdum* is a useful expression, but it is incapable of being modified into an adjective or an adverb, let alone a verb. Where grammatical flexibility is needed, the only option is to use *apagoge*, *apagogical*, *apagogically*. Derived from the Greek, it has exactly the same meaning as the Latin.

Generally speaking, words borrowed from other languages do not take variant forms. Words like *Schadenfreude*, *raison d'etre*, *hoi polloi*, *glasnost*, and *perestroika* do not readily lend themselves to variation in English. However, as some loan-words become naturalised, they spawn offspring, generally to the despair of the purists. So, *liaison* was, until recently, considered a foreign word and treated with the courtesy reserved for visitors. But it has stayed on, and is now treated familiarly as a verb *liaise*. A similar fate has met *ballet* (adjective *balletic*); *brusque* (noun *brusqueness*); *charlatan* (parallel noun *charlatanism*); *chauffeur* (used also as a *verb*); *clique* (adjective *cliquy*); *elite* (adjective, noun and parallel noun *elitism*); *prestige* (noun and adjective, and parallel adjective *prestigious*) and so on. It is interesting to consider that all of the French words in this paragraph were treated by Fowler as truly foreign words in the first edition of *Modern English Usage* (1926).

Compound words are difficult to transmute from one word form to another. *Lighthouse* does not readily turn into a verb or adjective; *bookcase* likewise. *Showcase*, on the other hand, is used as noun and verb (courtesy of television) but does not yet boast an adjective or adverb form.

Some words have been conjured into existence because their form suggests that they are already a member of a family. This process — backformation — is a prolific source of new words. So, the adjective *grovelling* existed and its form suggested that it was the present participle of an imagined verb *grovel*. *Grovel* came to be used as a verb and later produced a noun with the same form. An identical process accounts for *ablute* from *ablution*; *automate* from *automation*; *choreograph* and *choreographer* from *choreography*; *co-ordinate* and *co-ordinator* from *co-ordination*; *emote* from *emotion*; *extradite* from *extradition*, and so on. Thus the apparent child begets the imagined parent.

But some words are just themselves, all alone, admitting no variant forms and used only in a single context. These orphans have lived much longer than their relatives, whose remains may be found in large dictionaries. *Offing* is an example. The *offing* now is only encountered in the phrase *in the offing*, meaning that the thing referred to is imminent. The *offing* is *the part of the visible sea distant from the shore or beyond the anchoring ground.* A boat lying at anchor to await a favourable tide before entering the harbour is in the offing. William Dampier said in 1703 *By Nine a Clock at Night we had got a pretty good Offin*, i.e. a pretty good distance from the shore.

Another orphan is *fell* now used only in expressions of the type: *one fell blow*; *one fell swoop*. It is unrelated to the verb *fall*, and unrelated to the verb *fell* (to cause to fall). A *fell blow* is a cruel blow. It derives from the Latin *fello-*: fierce, cruel, savage. *Fell* meant cruel, harsh, destructive, or spirited, doughty. It has more vigorous relatives: *felon* also derives from *fello-*. Its living relatives include *feloness*, *felony*, *felonry*, and *felonious*.

Figment is confined to a corner of the workhouse where its only companion is *the imagination*. Its original sense is *something fashioned or made*. It comes from the Latin *fingere* to form or mould, which is also the root of *feign*, *fiction* and *figure*. Whilst each of those has its own family and is often seen out in company, *figment* has not flourished. It is an invention of the mind, and it is perfectly sensible to refer to someone's perjurious story as a *figment of the mind*, a *figment of desperation*, a *figment of the imagination*, or simply a *figment*.

Another orphan, whose parentage is not obvious, is *het*, as in *het up*. If a plaintiff knocks back a generous offer at the start of a difficult and dubious case, their counsel is likely to get het up. Although it has the appearance of a dialect word, it is the participial adjective from *heat*, built on the pattern *feed/fed*, *lead/led*. So it simply means *heated up*. It is rarely enough heard, and then only with reference to a person's emotional temperature. I heard it often as a child: generally it was directed at me.

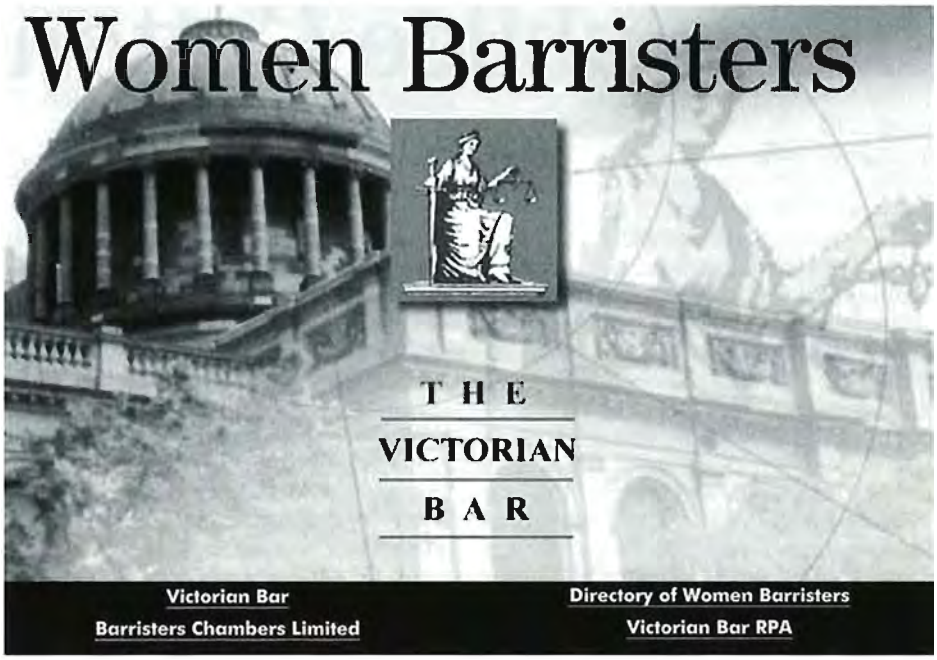
We use diminutives with children without thinking. The commonest suffix which implies smallness or youth is *–let*. *Booklet*, *piglet* and *droplet* are obvious examples; *bracelet* is less obvious, since the stem *bracel* is now obsolete. *Farmlet* and *leaflet* are common words constructed on the same lines. Much less familiar, but no less legitimate, are *fanglet* (small fang), *doglet*, *froglet*, *goslet* (small goose), *sharklet* (small shark), *squirelet* (small squire).

Interestingly, every branch of the nobility has its corresponding diminutive. It must have been hard, as a member of the aristocracy, to be disparaged as a *dukelet* or *kinglet*. So Florio said in Montaigne (1603) *So many petty-kings, and petty-petty* kinglets *have we now adayes.* The most unkindest cut.

(Incidentally, we use *orphan* nowadays to signify a person who, as Lady Bracknell would have it, has been so careless as to lose both parents. But originally an *orphan* meant person who has lost one or both parents.)

Julian Burnside

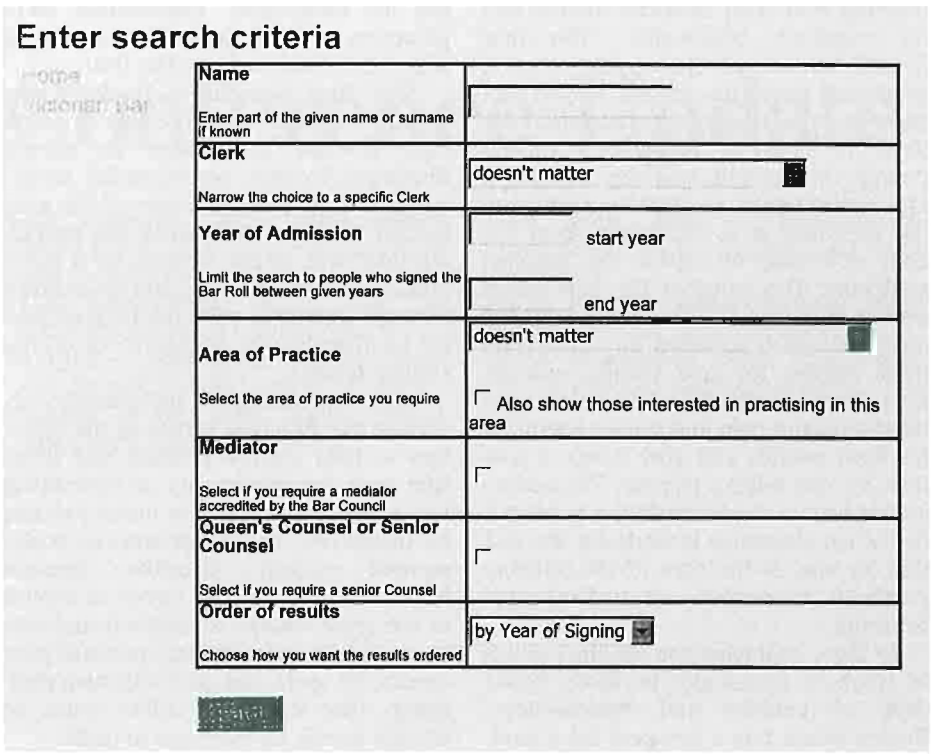
Launch of Women Barristers Directory



ON 6 December 2000 the Attorney-General of Victoria, the Honourable Rob Hulls MLA launched the Victorian Bar's directory of women barristers. The Attorney was welcomed by the Chairman of the Bar, Mark Derham QC. The Convenor of the Women Barristers Association, Jenny Richards, also spoke at the launch.

The directory is linked to the Bar's website address www.vicbar.com.au. The site contains a new link, which leads users to the women barristers directory. At the time of the launch the directory included entries for 218 women barristers. Each entry contains useful biographical information, such as the qualifications and experience of each practitioner. Entries note each practitioner's preferred area of practice, and also other areas in which the barrister is willing to accept briefs. The directory can be searched by name or a particular area of practice. The ability to search areas of practice is especially useful because it can provide users with a range of suitable barristers, and ensures that information is relevant to the needs of the inquirer. This should also reinforce the depth and breadth of skills of women at the Bar.

The launch of the directory continues the implementation of the report on *Equality of Opportunity for Women at the Victorian Bar*, which was published in 1998. The report rejected the suggestion that the even gender balance of law students and graduates entering the profession would inevitably lead to the greater equality of opportunity for women barristers at the Bar. It found that the Bar should take active steps to redress the disadvantages faced by women at the Bar. The report concluded that one reason why women barristers were less likely to be briefed for appearance work in proportion to their number was that solicitors lacked information about women barristers. The report recommended that the Bar establish a regularly updated catalogue of women barristers, to provide a resource of information. The directory fulfils that recommendation by providing information that can be searched easily.



Mark Derham QC stressed that, while the directory was a useful resource, it was vital that users should take the initiative and rethink their briefing practices. He cited the findings of the equality of opportunity report that many existing attitudes and practices surrounding the briefing worked to the disadvantage of women. For this reason, the Bar will be promoting the directory actively, to raise the awareness of the great range and quality of women barristers at the Victorian Bar. The Attorney-General also urged practitioners to make full use of the site. He stated he "strongly encouraged all legal firms who undertake government legal work to develop briefing practices which are consistent with and reflect equal opportunity policies, and promote the briefing of female barristers where possible".

In re Jubilee Cotton Mills Ltd

In re Jubilee Cotton Mills Ltd arose out of a company promotion in which the business of the newly floated company was sold to it by the promoters for a gross overvalue. It was a misfeasance summons, heard by Astbury J (reported at [1922] 1 Ch 100; on appeal at [1923] 1 Ch 1; in the House of Lords [1924] AC 958). However, it is interesting in a quite different way, as the last visible reminder of England's most charismatic corporate fraudster, Ernest Terah Hooley. Hooley's story is an eloquent reminder that some things never change.

In 1897, Hooley was one of the best known men in Europe. He was feted by the public, lauded in the press and befriended by the titled heads of Europe. He was a financier with the Midas touch; a man of charm, wit and huge generosity. Unfortunately, he was also inclined to take liberties with the truth and other people's money. This led him in turn to vast wealth then bankruptcy (twice) and ultimately to gaol. The curious thing is that, despite Hooley's popularity and fame during his lifetime, he is now all but forgotten.

Hooley was born into a modest middle-class family in Nottingham. He was tee-total and a nonsmoker. His only hobby was playing the harmonium for the Baptist Church. He gravitated to the city of London and came to prominence in the 1890s. In 1896, he saw that the bicycle trade was on the cusp of great expansion, and he recognised that rubber tyres were an important commodity for the bicycle trade. He floated the companies which manufactured Swift, Singer and Raleigh bicycles respectively. He bought the company which made Schweppes products and sold it into a public float. But his greatest coup was his float of Dunlop.

He negotiated to buy the Dunlop Pneumatic Tyre Company for three million pounds. He borrowed the amount stipulated as the deposit and floated a public company. The proceeds of the float were used to pay the balance of the purchase price and he then sold Dunlop into the newly floated company for five million pounds. The transaction was completed within a few months, and Hooley's personal profit out of it was two million pounds.

In the two years 1896 and 1897, Hooley made personal profits totalling seven million pounds. This is a handsome amount even now: but it was a staggering figure at the time: a time when the great leaders of the English Bar (who were later to profit handsomely from Hooley's business dealings) might earn 40,000 pounds in a prosperous year.

As Queen Victoria's diamond jubilee approached, it seemed certain that Hooley would receive a baronetcy. He was at the height of his wealth and fame. He had given vast amounts to the Conservative party, which was thought to be helpful to his quest for a title even though Maundy Gregory's lucrative trade in royal honours lay several decades in the future. But the 1897 list did not include Hooley's name; and in 1898 he went bankrupt with a deficiency of 1.5 million pounds.

* * * * * *

Hooley's chief characteristics were his dazzling skill with financial figures and his magnetic personality. The first helped him see an opportunity when it presented itself; the second helped him carry an opportunity into completion. He liked to deal in millions: a million pounds, he thought, was tidy amount, a nice round figure. In 1900 he negotiated the purchase of a concession from the Czar of Russia to exploit the Siberian goldfields. The price of the concession was 75,000 pounds. He floated a public company which acquired the concession from Hooley for one million pounds. Even more striking, he acquired the Newfoundland pulp and timber operation for 3000 pounds and sold it into a new float for one million pounds. The audacity implicit in these mark-ups is magnified when allowance is made for the fact that he was, at the time of the Siberian goldfields concession, an undischarged bankrupt.

In these examples you see the pattern of Hooley's technique. In those heady days of bubbles and bucket-shops, Hooley would buy a prospect for a modest price on borrowed money, and then sell the idea to an enthusiastic public by the medium of a public float. His personal charm helped him get the seed capital, and was invaluable in selling the idea to the public who saw in Hooley a new Midas.

Hooley's successful floats were helped along by several things. First, he could spot an emerging trend: his successful harnessing of the cycling boom has much in common with the recent boom in dot.com businesses. He later latched onto the emerging motor car industry — with a kindred spirit, Harry Lawson he floated a number of motor car companies.

Second, he offered secret deals to financial journalists who obliged him by ramping his floats in the press. (In the wake of Hooley's bankruptcy, the periodical *Nineteenth Century* noted in May 1898 that it was now well-known that: ". . . the City has a large number of 'reptile' journals, which will praise — and for that matter condemn anything as long as they are paid for it . . ."). Among the expenses paid by Hooley and revealed during his bankruptcy examination were payments to enable journalists to take up shares in advance of a public float.

The third element of Hooley's successful technique was the use of members of the aristocracy as puppet directors. To give respectability to his companies he paid members of the aristocracy to sit on the boards: the prevailing tariff was 10,000 pounds for a duke; 5000 pounds for a baron, and so on down through Debrett's, although he paid Earl De La Warr 25,000 pounds to sit on the Dunlop board.

His prospectuses — prominently disclosing the glittering names of the directors — held out the promise that those who took the opportunity of subscribing for shares would stand to make fortunes for themselves. And the promise of wealth seemed entirely plausible, because Hooley himself was the owner of several of the great estates in England and was known for his extraordinary personal generosity. He spent and gave with such profligacy, that it seemed there must be enough money for everyone to profit.

Hooley was the squire of Risley Hall in Derbyshire, and of Papworth Hall in Cambridgeshire. Each of these great estates had been bought for huge prices, and Hooley lavished more money on them in improvements. When he bought Papworth Hall, Hooley thought it would be appropriate to become High Sheriff of Cambridgeshire. He put the proposition to his solicitor, who objected that these things had to be done in accordance with tradition ("one has to be nominated, the Privy Council has to give its approval . . . a fellow can't just *decide* to join Boodles . . ."). There were already two candidates ahead of him. In short, Hooley could not simply buy his way to the office. Hooley told him not to worry about the details: he got hold of the names of the candidates and enlisted the help of a friend who had more noble blood than ready money. Between them, they discovered the personal weaknesses and financial difficulties of the candidates and shortly afterwards those candidates withdrew. To everyone's astonishment Hooley became, overnight, High Sheriff of Cambridgeshire.

* * * * * *

Bankruptcy cramped Hooley's style somewhat but it did not suppress his enthusiasm. He became active in land transactions. One of these led to his first conviction. In 1911 he sold a parcel of land to George Tweedale for 6000 pounds, with 2000 pounds on the signing of the contract. Hooley signed a statutory declaration stating that the land was not charged. That was false: in fact, not only was the land subject to several charges, when Tweedale tried to enforce the transaction, it emerged that Hooley had also charged his interest in the sale transaction!

Although the offence was a relatively trifling one, the Crown briefed Sir John Simon, Sir Richard Muir, Travers Humphreys and Ernest Wild. Tim Healy (later Governer-General of the Irish Free State) appeared for Hooley. His defence was carelessness: he had not read the document. He was convicted and sentenced to 12 months imprisonment.

In 1920 Lancashire experienced a cotton boom. It is no surprise that Hooley saw an opportunity. The float of Jubilee Cotton Mills Ltd had all of Hooley's hallmarks. Because of his past, Hooley had used others to advance his scheme, including a retired Cardiff ship-owner Tom Lewis. The company foundered soon after the float. The liquidator issued a misfeasance summons which was heard by Astbury J. Those at the Bar table included Sir Patrick Hastings KC, Luxmoore KC, Jenkins KC, Tomlin KC, Mathew KC, Norman Birkett, and six juniors. The main factual issue was whether Tom Lewis had been a promoter of the company, or whether he had been Hooley's unwitting tool. The same facts gave rise to conspiracy charges against Hooley, Tom Lewis and others involved in the float. The trial lasted five weeks (a long trial for those days) and Hooley was convicted and sentenced to three years imprisonment. He was quite philosophical about his fate: he treated it as part of the game, and arranged to work in the prison library which he regarded as a quite congenial occupation.

* * * * * *

Hooley died in 1947. He is the exemplar of a pattern which has been seen many times before and since. His contemporaries included Whittaker Wright, Horatio Bottomley and Gerald Lee Bevan. His successors can be identified readily enough in any financial boom in any country. But from first to last, Hooley had a measure of personal charm which captured all who met him. Sir Richard Muir, who prosecuted him in 1911 and in 1921, reckoned him the most genial, and the most able, person he ever prosecuted.

Julian Burnside

Conference Update

9–15 January, 2001 (and 2002): Cortina D'Ampezzo, Italy. Europe Pacific Legal Conference.
21–27 April 2001: Venice, Italy. Pan Europe Pacific Legal Conference.
29 April – 5 May 2001: Stratford-upon-Avon, Britain. Pacific Legal Conference.
30 June – 6 July 2001: Dublin, Ireland. Celtic Pacific Legal Conference.
8–14 July 2001: Positano/Praiano, Amalfi Coast, Italy. Europe Asia Legal Conference.
12–19 August 2001: Thredbo, NSW. The Australasian Legal Conference.
20–26 September 2001: Rome, Italy. Pan Europe Asia Legal Conference.
29 September – 6 October 2001: Heron Island (Great Barrier Reef, Australia).
23–29 June 2002: Lake Como, Italy. Europe Asia Legal Conference.
7–13 July 2002: Jerusalem. North South Legal Conference.

Veterans' Entitlement Law

By Robyn Creyke, Peter Sutherland and Pauline Ridge
Federation Press, 2000
pp. v–xiv, Table of Cases xiv–xxxix, Table of Statements xl–xlii, Introduction xliv–xivii Index 572–592.

THIS a most welcome reference for those who seek to make sense of the daunting legislation that governs the entitlements of our service veterans.

The concise introduction summarises the key threshold tests for eligibility, available benefits and the system for determining claims.

The case law on each provision of the *Veterans' Entitlement Act* 1986 is presented in the numerical order of the sections of the Act and is an innovative and "user friendly" approach. The case law is often referred to in extract form but is used to enhance the point being made rather than appearing to be mere elaboration.

The principal legislation in this publication is as amended to 10 February 2000, and the decisions are of the High Court, Federal Court and Commonwealth Administrative Appeals Tribunal up to 1 April 2000. There have been important decisions since that date and this text should be read in that context.

Overall this text is best suited to the serious practitioner and will prove to be an excellent source. It is to be hoped that regular updates of the same high standard will follow.

The qualifications of the contributors are exemplary, with special mention to be made of Bruce Topperwein. His years of practical experience and his understanding of the problems of veterans and their families add to the credibility of this text.

John L. Bushby

Government Contracts Federal, State and Local (2nd edn)

By Nicholas Seddon
Federation Press

THIS book was first published in 1995. Since that time there have been important movements in the law in relation to government contracts. One is with respect to government tendering. As was shown in *Hughes Aircraft* v *Air Services (1997) 146* ALR 1, the Federal Court was prepared to imply a term of fair dealing into the terms of the tender that the Civil Aviation Authority would conduct itself fairly and in a manner that would ensure equal opportunity to each of the tenderers.

The second development was concerned with whether the Commonwealth was bound by the Trade Practices Act in respect of ordinary government purchases and sales.

Both of these matters are dealt with fully by the author in the new edition. With the increasing importance of government contracts, privatization and tenders, this book is a valuable aid to those who need to advise in relation to a government or quasi government body.

The author examines in considerable detail the power of a government to contract, and discusses the fetters imposed upon Parliament and the executive by the constitution. This is contrasted with the unfettered powers of the State. Mr Seddon inquires whether there are any inherent limits to a State entering into a contract. Of specific importance to the contracting public are those agreements that are entered into with statutory corporations and local governments, together with the difficulties that are faced when making a restitutionary claim arising out of a void contract.

Hand in hand with the power to contract is necessarily the formation of any agreement. This carries with it the power of the particular person in the department to enter into such contractual relationships on behalf of their government or semi-government body. Importantly, the author examines the legal status of statutory agreements and the various approaches by which they may be examined. Of particular concern is always the right of a government to legislate in terms which may be contrary to the provisions of such statutory agreement. Clearly parliament cannot be fettered, but equally clearly the government cannot breach the terms of an agreement.

As it would be expected Mr Seddon discusses the role of crown privileges and immunities as they presently exist.

As I have previously mentioned, the author discusses the effect of the Trade Practices Legislation upon the Commonwealth, the States and the various instrumentalities as well as law as it exists in relation of government tenders.

For those called on to advise in relation to government and quasi government contracts, this book is an essential starting point where many of the answers will be found. The author discusses with clarity the effect of government and quasi government contracts and the remedies that are available to members of the public who may find themselves in difficulty.

John V Kaufman

Equity and Trusts Commentary and Materials (2nd edn)

By G E Dal Pont, D R C Chalmers and J K Maxton
LBC Information Services, 2000
pp. i–x, Table of Cases xi–xlvii, Table of Statutes xlix–lxii, 1–1143 including Index

SUCH is the rapid pace of change in the field of equity that a second edition of this work has been prepared within only three years of its first appearance on the market in 1997. While some changes have been made to every chapter to bring the whole edition up to date (and to eliminate some unavoidable first edition glitches), the substantial changes have been the additions and revisions to the following topics:

- equitable interests in property, including equitable assignments (chapters 2 and 3);
- fiduciary relationships (a new chapter 4),
- undue influence (chapter 7),
- the statutory expansion of unconscionability, e.g. in Pt IVA of the *Trade Practices Act 1974* (in chapter 9),
- superannuation (a new chapter 26)
- equitable compensation (in chapter 32), and
- constructive trusts (chapter 36).

Some appealing features of this new edition include:

- A reordering of the chapter numbering and sequence to align with those in the companion text Dal Pont and Chalmers, *Equity and Trusts in Australia and New Zealand* (LBC, 2nd edition). This facilitates the use of the two references in tandem, and enables cross-referencing to be undertaken economically. However, the "cases and commentary" work could also be used effectively as a stand-alone resource.

- Longer portions of the major cases are extracted and reproduced, with the intention of being both a better resource for students and to obviate the necessity of having to consult the complete report for the essential ratio and reasoning. Minor cases have correspondingly been omitted or relegated to a footnote.
- An emphasis on the modern law, its interpretation and contemporary relevance including discussion of a number of very recently decided cases, for example, *Cardile* v *LED Builders Pty Ltd (1999)* 162 ALR 294; *Wily* v *St George Partnership Banking Ltd (1999)* 30 ACSR 204; *Duke Group (in liq)* v *Pilmer (1999)* 17 ACLC 1329; *Re Scientific Investment Pension Plan Trusts* [1999] Ch 53.

The structure of the book is presented in a well thought out scheme, and the topics and treatment of them follow a natural progression, which makes the reference easy to use and stylistically pleasing. In general, the equitable principle under discussion is introduced and explained, then follows the relevant case or statutory extract (statutory material is highlighted with a grey background screen to distinguish it from the surrounding text); thereafter appear notes, questions, and further critical commentary to reinforce, highlight, or distil the essence of the case or statute under discussion, all designed to challenge an understanding of the law and its complexities.

For those not already committed by long usage, history, or student exposure to the rival publication on cases and commentary on equity by Heydon & Loughlan now in its 5th edition, this new offering will serve very well as an ample and complete up to date reference on the law in the field. Not only that, it will delight with its clear and well spaced format of typesetting (kind on those with the onset of age-related eye defects) and its Tables and Index which are a pleasure to consult. Nor is this meant only for students. The practitioner will find within these covers a quintessentially useful and current first port of call for any equity problem under consideration.

Contents:

The Nature of Equity (chapter 1)
Equitable Interests in Property (chapters 2 and 3)
Relationships of Trust (chapters 4–7)
Unconscionable Conduct (chapters 8–10)
Unfair Outcomes (chapters 11–14)
Trusts (chapters 15–27)
Equitable Defences (chapter 28)
Equitable Remedies (chapters 29–37)

Judy Benson

Understanding Contract Law (5th edn)

By Daniel Khouty and Yvonne Yamouni
Butterworths, 1998
pp. i–viii, Table of Cases ix–xvi, Table of Statutes xvii–xxi, 1–399, Glossary 401–7, Index 409–18

THIS is a succinct student summary designed largely to supplement and support a broad range of the publisher's other flagship contract law titles — Carter & Harland's *Contract Law in Australia* and *Cases and Materials on Contract Law in Australia,* and Cheshire & Fifoot's *Law of Contract* — and is successfully in its fifth edition.

Each chapter opens with an overview, expressed in diagrammatic form as a flow chart, which sets out and describes visually what is covered in the chapter to follow and how the various parts and topics intersect and /or interrelate. It provides structure to the material and indicates what directions the chapter takes in its coverage of the topics. There follow explanations, definitions, or discussion of terms, principles and their application, and extracts setting out key cases with their facts, legal issues and reasoning, and the ratio. There is provision of a valuable additional resource — a list of further reading — and questions and revision at the end of each chapter to test comprehension and understanding of the contents of each chapter.

In its setting out, its concentration on the basics, and its endeavour the make lucid the complexities of contract law, this offering is recommended as a self-contained teaching and learning guide.

Contents:

1. Contract law in Australia
2. Agreement
3. Consideration
4. Intention to be legally bound
5. Contents of the contract
6. Formalities
7. The right to contract
8. Rights and liabilities under a contract
9. Genuine agreement
10. Illegality
11. Discharge of a contract
12. Remedies for breach
13. Quasi-contract

Judy Benson

Human Rights in International and Australian Law

By Ryszard Piotrowicz and Stuart Kaye
Butterworths, 2000
pp. i–xiii, Table of Cases xv–xviii, Table of Conventions xix–xxii, Table of Instruments xxiii–xxiv, Table of Statutes xxv–xxvi, 1–282, Index 283–94.

IN this recently published and topical book the authors set out to chart a map of the overall state of human rights in Australia and internationally, rather than explore any of the highways and byways in particular or significant detail. Having said that, this overview treatment of a substantial subject is nevertheless a useful one. It presents an up to date account of the main developments in international human rights law, and then portrays them, their impacts and their effects on the emergence of a distinctive human rights law in Australia by reference to concrete examples of legal and political human rights-related activity.

In the first part of the book the various conventions, covenants, declarations and other instruments establishing international norms and standards are set out and briefly discussed. While some are seen to be mandatory in language and have binding force on those who subscribe to them, others are stated in aspirational terms. This latter group allows for gradual or differential application of the treaty according to the state of development and capacities of the particular signatory state or party. The expectation is that the aspirations will be pursued in good faith as circumstances permit. Some, of course, are more expediently able to achieve this than others.

The second part is a distinctive feature of this book and looks at the operation of human rights in times of conflict or war. In particular (chapter 9) there is coverage of the relatively recent trend of pursuing individuals for crimes against humanity and genocide, and for individual criminal liability for war-related offences. This chapter contains a number

of case studies which the authors draw upon to illustrate their theory that the human rights landscape has changed dramatically over the past decade.

While the actual efficacy of international human rights law in protecting individuals from murder and rape in either past or future Bosnias and Kosovos is arguable, applying and invoking the role of human rights law is both symbolic, and in practice designed, to set and insist upon standards to which all must conform and from which serious consequences may flow if flouted.

In the final part, there is a discussion on the status and application of human rights law in Australia, and (in chapter 12) an up to the minute status report on the Commonwealth government's tinkering with the role and responsibilities of the Human Rights and Equal Opportunity Commission. There is also mention (in chapter 14) of a Bill before the Commonwealth Parliament to nullify the effect of the High Court's *Teoh* decision, while this Bill had lapsed at the time of writing the book, at the time of writing this review (mid October 2000) it had just been reintroduced into parliament. Indeed, the whole subject of the present Commonwealth government's attitude to UN conventions, committees and processes is an ongoing and unresolved one.

Although there are far more dense and intense tomes on human rights available in publishers' catalogues, this one is an easy and interesting read for those who need only to view the forest without inspecting any of the trees.

Contents:

Part I — The International Protection of Human Rights in Time of Peace

1. Nature and origin of human rights law
2. Generic measures for international human rights
3. Specific Measures for the International Protection of Human Rights
4. Regional Protection of Human Rights
5. Emerging Issues in International Human Rights

Part II — International Humanitarian Law

6. The origins and structure of international humanitarian law — making the best of a bad situation
7. Fighting by the rules — protecting human rights during armed conflicts
8. Arms control and human rights — case studies in reality and theory
9. Does crime pay? The development of individual criminal responsibility for breaches of international humanitarian law

Part III — Human Rights Law in Australia

10. International human rights law in Australian law and policy
11. Human rights and the Constitution
12. Legislative mechanisms for the protection of human rights
13. Commonwealth–State relations and human rights
14. Subsidiary mechanisms for protection

Judy Benson