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## THE PROBLEM OF CLERKING

### INTRODUCTION

On the 6th June 1975 a General Meeting of the Bar overwhelmingly resolved that —

“this meeting recognizing the energy and endeavours of the Bar Council recommends that the Bar Council investigates the problems of the clerking system in the light of the manifold views expressed by the resolutions of the various clerking groups and the views expressed at this and the previous General Meeting and that in the light of those views the Bar Council report back to the Bar at such times and in such manner as it considers fit.”

It would perhaps be surprising to an outsider that the resolution of a General Meeting of the Bar should be required in order that the elected representatives of that organisation should feel entitled to carry out an investigation into a service which touches all of its members. It would be more surprising to such a person to witness the passion with which the various advantages and deficiencies were discussed both in informal discussion and at the three General Meetings at which the subject was raised over the last month.

This surprise would be diminished if our outsider was familiar with the history of clerking since the War and particularly with the tentative modesty with which each member, jealous of his independence, reluctantly embraces any proposal of the Bar Council which touches him in the vicinity of his pocket.

The fact is that most Barristers see themselves to be well enough served by the present clerking arrangements, so as to be chary of venturing into an unknown system. At the same time most recognise that the present and expected influx to the Bar is imposing on this system stresses which it is not designed to bear. And it is fair to say that most are prepared to

adapt the system to meet this stress even at some financial expense to themselves. An indication of the extent of this influx is seen in the Table on page . The varying attitudes of the Clerking Group of each clerk appear from their correspondence with the Bar Council which is set out on page

The present policy of the Bar Council dates from early 1973 after the receipt of the Jenkinson Report which is summarised on page . This policy as set out in a circular to the Bar on 18th September 1974 is as follows:

- (a) maintenance of the present clerking system;
- (b) ultimate limitation of numbers in the clerking groups to 75 Barristers;
- (c) central regulation of access to the clerking groups so that newcomers to the Bar shall as between themselves have equal, although at present necessarily limited, opportunity to engage the clerk of their preference; and
- (d) supervision of the operation of each clerking group through its own clerking committee.

Its rationale summarised on page involved a partial acceptance of the recommendations of that Report. It will be seen that the proposal for a “nursery list” subsidised by the Bar is derived from these recommendations.

There are set out hereafter a number of proposals and suggestions from individual members which were received in response to the recent invitation by the Editors. The volume of response was small but covers all the points raised in debate until now. It is hoped that those who feel that they have a worthwhile contribution to make to the investigation which they have requested the Bar Council to undertake will approach the Bar Council members on an informal basis lest any point of view be overlooked.

Members of the Bar Council are as follows:

	CLERK	ROOM
R.E. McGarvie Q.C.	M	526
L.S. Lazarus Q.C.	H	625
K.H. Marks Q.C.	M	603
H. Storey Q.C.	F	1204
J.A. Gobbo Q.C.	F	1207
H.C. Berkeley Q.C.	S	1014
F.X. Costigan Q.C.	F	1206
F.P. Walsh	C	904
J.H. Phillips	F	133
J.L. Sher	F	1129
S.P. Charles	S	413
M.J.L. Dowling	M	1001
C.W. Porter	M	510
A.R. Castan	M	1210
A.C. Chernov	M	505
P. Mandie	D	314
R.M. Read	F	807
J.T. Hassett	D	137

### THE JENKINSON REPORT 1972

Bar Clerking since 1972 has been largely influenced by the conclusions and recommendations of the Committee chaired by Jenkinson Q.C. dated 26th June 1972.

The recommendations of this Committee may be summarised as follows: -

1. The existing lists should be run down to no more than 45 Barristers per clerk.
2. In the short term the Bar Council attempt to reduce lists D, F, H and S to 70 Barristers per clerk by every means at its disposal.
3. There be established as soon as possible two new clerks with lists of 45 Barristers each.
4. The Bar Council seek the approval of the Bar to apply Bar funds in aid of new clerks.
5. The Bar Council should from time to time establish further clerks for newcomers to the Bar and support them by subsidy drawn upon the whole Bar.
6. Tentatively, that the Bar Council should encourage without financial assistance the establishment of restricted groups of much less than 45 Barristers who desire to share a clerk.

### THE GROWTH OF THE CLERKS

The following table sets out the new members in active practice employing each clerk. No figures are available for Calnin's List prior to 1964.

	Foley	Dever	Calnin	Hyland	Harvey, then Spurr	Muir	Total
February 1962	78	50		36	37		201
February 1963	81	57		38	33		209
February 1964	85	52	23	50	44		254
February 1965	85	59	23	59	46		272
1st October 1966	84	60	24	60	44		272
1st September 1967	85	58	27	60	49		279
1st September 1968	89	64	26	72	53		304
1st September 1969	90	65	24	75	63		317
September 1970	92	74	14	83	74		333
November 1972	100	88	23	91	93		395
31st May 1975	100	79	75	86	87	72	499

The Committee considered that an acceptable system should seek to satisfy two requirements at least —

- (a) The Clerk should lack the power significantly to advance or retard a Barrister's career either by influencing a Solicitor's choice or by monopolising a particular class of work.
- (b) The system should be able to cope with expansion of the Bar without disruption of existing lists.

The Committee was of the opinion that the system then in force satisfied neither requirement.

It considered that Recommendation 1 and 5 would satisfy these requirements. The Committee with considerable prescience was of the opinion that the imposition of the burden of the establishment from time to time of a new list upon the Bar by a financial levy would avoid the embarrassment and worry, the disruption of personal relations between counsel and clerk and the possibility of the creation of bad feeling among counsel which, it was feared, would attend recruitment for the new list from existing lists by moral suasion.

It was envisaged that a new list should be established from time to time whenever there was only one of the existing lists (other than the groups referred to in Recommendation 6) below 40 Barristers.

Recommendation 6 was intended to cover the situation where small groups with special needs or preferences would join together to employ a clerk. Entry into these smaller restricted groups would have to be carefully supervised to prevent the possibility of patronage or nepotism.

Of particular interest in the present circumstances is the following paragraph in the report—

"All but one of us are of opinion that the best solution of the problems created by the present clerking system is the total abolition of that system, the performance of the functions of clerks by secretaries

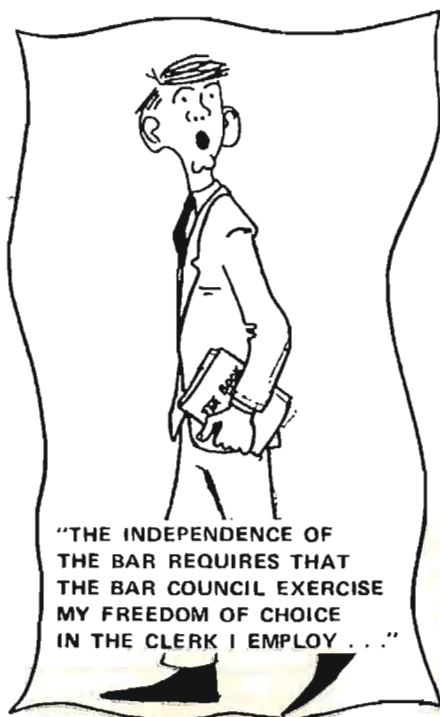
employed by no more than about 5 counsel and provision by the Bar (for those who desire to use it) of a bureau of information as to counsel's engagements, availability and whereabouts. But all of us thought that such a drastic proposal would not at present meet with the approval of anything like a majority of the Bar."

#### THE PRESENT SYSTEM

The Bar Council policy of limiting numbers of Clerks Lists to 75 evolved from policies of restriction imposed by Lists themselves.

In August 1971 the List engaging Mr. K. Foley, to accord with Bar Council policy, voluntarily closed its list. It then had numbers similar to those at present.

During 1972 other Lists employing Messrs. Hyland and Spurr followed suit and requested the Bar Council to appoint a further clerk.





The Bar Council appointed Mr. H.D. Muir who commenced as a self-employed Barristers Clerk in 1973.

By late 1972 the Bar Council, after much debate and receipt of a sub-committee report recommending a limit of 45, settled its policy in respect of clerking.

It had two aspects.

One was to limit numbers for new lists and set a goal of reduction for existing lists (save that of Mr. Cainin who then had less than 75).

The other was to encourage greater regulation of clerking problems at the List level through the "Clerking Committee".

In arriving at these policies the Bar Council accepted as fundamental —

- (a) A need to maintain accessibility to the Bar by newcomers.
- (b) The maintenance of high ethical standards, an independent Bar and the

minimisation of dependence on the Clerk for work.

- (c) The desirability of as much home rule as possible by lists themselves and consequently the increased participation of members of Lists in their affairs.
- (d) Discouraging any hierarchy of prestige between Lists and preventing as far as possible one List obtaining any undue advantage over another.

#### The Limit of 75:

Only two Lists have 75 or less at the present time. The other Lists have considerably more.

Nevertheless, under existing Bar Council rules, each List is entitled to maintain some balance by the accretion, in any event, each year of two newcomers to the Bar. Should a List lose more than four Counsel in any one year then in addition to the permissible two the List may take on one further Counsel for every two lost in excess of four. This policy has been seen to be necessary in order to be fair to existing Lists and ensure that they are not starved of very young Counsel. The result, however, has been that little reduction in the numbers of the four larger lists has taken place.

#### Why 75?

The figure 75 was arrived at against a background of a sub-committee recommendation that the limit should be 45. The limit of 45 was seen to be unachievable in the context of the existing system and in any event likely to be unfair to Clerks unless their commission was approximately doubled. Considerations leading to the adoption of 75 as the desirable limit may be summarised:—

1. It represents a number which can return a reasonable living for the Clerk.
2. It is manageable so as to assure the maintenance of an efficient service without loss of personal relationship between barrister and clerk.
3. It was sufficiently close to the numbers existing on Lists at the time of its adoption



so as to make it attainable in time as a working limit.

4. It represented a reasonable compromise between the 45 figure and higher figures suggested.
5. If, in the interests of proper Bar management and control, new Clerks were to be established then the limit on existing Lists would prevent new Clerks being strangled by the competition.
6. The limit of 75 would encourage establishment of new lists and plus tend to break up any corners or potential corners on particular kinds of work or work in particular jurisdiction on older or larger lists.
7. Any marginal increase in the limit of 75 is likely to produce a disproportionate increase in the costs of servicing by a particular clerk. The costs of increased staff are not likely to be offset by the commissions on fees from the extra number.
8. Group Clerking Committees  
These have been more active in recent times. They were first more active on newly established Lists. It is not clear whether they operate universally as well as hoped. Some members of Counsel still have difficulty on the clerking question in identifying with the Bar as a whole as distinct from membership of a List.

The Bar Council has encouraged clerking committees —

- (i) to promote discussion on matters of common interest by members of a List.
- (ii) to provide a ready channel of communication between the members of the List and their clerk.
- (iii) to facilitate consideration of problems of juniors who otherwise might be diffident about taking up matters with a well established clerk.
- (iv) to provide an avenue of communication to the Bar Council about clerking problems and vice versa.

#### 9. The Bar Clerking Committee

This committee which advises the Bar Council and administers the Bar clerking rules consists of 12 persons — 6 members of the Bar Council each employing a different Clerk and 6 appointees of the respective clerking groups.

Ken H. Marks  
Chairman,  
Bar Clerking Committee

### THE ATTITUDES OF THE CLERKING GROUPS

Prior to the General Meeting of the 6th June 1975 each of the clerking groups met and passed resolutions on the question of a centralised clerking system. These resolutions are included in the letters sent by each group to the Bar Council which letters are set out hereunder.

#### Letter from the Foley Clerking Group

"I forward herewith a copy of the resolutions passed by a very large majority at a well attended meeting of the Foley Clerking Group on 3rd June, 1975.

By way of comment Clause 2 is intended to indicate that in view of that meeting a centralised clerking system is not acceptable under any circumstances, but the Group would be prepared to consider the results of enquiries made e.g. into a centralised telephone or accounting system.

As to Clause 3, although not specifically stated, it was the clear opinion that before any seventh Clerk is appointed the present lists should be enlarged at least to give them the balance they now lack or at most until they reach such numbers that in the opinion of the various Committees the standard of service begins to fall.

In this regard, I would point out that as a result of its intensive study of the clerking system, and its objects at the time it intro-

duced computerised accounts, it is the firm opinion of the Foley Group Committee that with a list of up to 125 (and perhaps even higher), better and more personal service can be given by its Clerk than at present. There appears to be no reason at all why, if the results of our enquiries were made available to other Clerking Committees, that the Committees of at least the four established lists would not come to the same conclusion. It has always been the strongly held view of the Foley Committee that to ensure the best service to those on any list, the balance of the list is of far greater importance than the numbers.

### Foley List

Resolution passed at a General Meeting held on the 3rd day of June, 1975.

1. That the meeting is opposed to any proposal for the setting up of a centralised clerking system.
2. That this meeting is not prepared to endorse the continuing investigation by the Bar Council of such proposal but the meeting urges the Bar Council to investigate particular matters such as a common switchboard and improved collection of fees.
3. That it is conscious of the problems created by the continuing numbers of new members of the Bar and recognize that in the present circumstances and Bar should seek to meet such problems by a combination of the following namely -
  - (a) the entitlement of existing lists to increase in numbers over that permitted by the present Rules;
  - (b) creation of a new Clerk to operate as a self employed Clerk with a subsidy from the Bar."

### Letter from the Dever Clerking Group

"At a meeting of the members of list D held on the 4th June 1975 the following resolutions were duly moved and passed and I was requested to forward a copy of them to you -

- (i) That this meeting is opposed to any proposal for the setting up of a centralised clerking system.
- (ii) That this meeting is not prepared to endorse the continuing investigation of the Bar Council into a centralised clerking system but the meeting urges the Bar Council to confine its investigation to improvements within the existing system.
- (iii) That this meeting is conscious of the problems created by the continuing numbers of new members of the Bar and recognises that in the present circumstances the Bar should seek to meet such problems by a combination of, inter alia, the following, namely:
  - (a) the entitlement of existing lists to increase in numbers over that permitted by the present Rules,
  - (b) creation of a new clerk to operate as a self employed clerk with assistance from the Bar.
- (iv) That this meeting requests the Bar Council to investigate the advantages and disadvantages and the possibility of an independent fee collection service common to all members of the Bar.
- (v) That a copy of the above resolution be forwarded forthwith to the Chairman of the Bar Council and the Chairmen of the other clerking lists."

### Letter from the Hyland Clerking Group

"In the absence of Brooking Q.C., the chairman of the committee of Counsel on the Roll who employ Hyland as clerk, I am writing to inform you of three resolutions that were adopted at a meeting yesterday of Counsel who employ Hyland.



The resolutions were as follows:

1. That the meeting is opposed to any proposal for the setting up of a centralised clerking system.
2. That the meeting is not prepared to endorse the continuing investigation by the Bar Council of such proposal (scil., the proposal referred to in the first resolution).
3. That this meeting request the Bar Council to make a general investigation (including a general investigation to each member of the Bar to express his or her views) of the clerking system, in particular the provision of a common switchboard, a common accounting system, an improved system for the delivery of briefs and improved collection of fees, for the purpose of seeking to improve it and on completing such investigation to make a report and recommendations."

#### Letter from the Muir Clerking Group

"I am writing to inform you that at a General Meeting of the List "M" Clerking Group held on 4th June, 1975 the following motion was carried —

That the Bar Council be asked to consider and report on the following recommendation on Clerking — That every member of the Bar be entitled to stay with his present Clerk subject to the existing Rules and that the Bar Council establish a Bar Clerking Service to avoid the creation of new Clerks and that any member of the Bar who desires to use that service be entitled to do so and that the present Clerking Rules limiting the Lists remain in force unchanged and that the present Clerks retire at 65 and that to avoid infringement of restrictive trade practices the members of the Bar be not compelled to have Clerks.

I would be obliged if you would bring this recommendation to the attention of the Bar Council."

#### A SHORT CASE FOR LONGER LISTS

Any long term solution requires a very wide investigation and time for consideration. Perhaps one "middle of the road" solution which might be put partly into operation immediately would be:—

- (a) That all clerks, by computer or otherwise, provide both to Barristers on his list and Solicitors employing them, quarterly statements showing every outstanding account.
- (b) No additional Clerk to be established, but present lists to be opened to rise to not more than 125 keeping the option for a seventh Clerk open.
- (c) Every effort be made to have balanced lists irrespective of numbers.

The most strongly voiced objection to such a scheme would clearly be the allowing of Clerks to take up to 125 on their lists. These objections have so far been confined to two, firstly the fear of a repetition of the situation which arose in the late 50's, and, secondly that it would cause a reduction in the service provided by Clerks to Barristers.

As to the undesirable practice which arose in the 50's the fact is that it was then stopped and there has in my view been not one single sign of its repetition at least in the 14 year life of Owen Dixon Chambers. In the 1950's there were only three lists, the Bar had no Clerking Committee and there were no Committees for any of the then lists. The position now is that if any Barrister has a complaint he can go to any member of his own Clerking Committee or to any member of the Bar Council and be assured of a hearing. Further, even without these safeguards surely we are not children and do not need Big Brother looking over our shoulders to ensure we are able to control our own Clerks. Personally I am more than satisfied that the fear of the 50's is no longer a relevant consideration, but if I am wrong, surely the answer must be stronger Clerking Committees brought into more active operation by the Bar Clerking Committee.



It has been said, and repeated many times, that a Clerk cannot give such good service with say 125 on his list as he can at present. This I cannot accept.

Experience has shown that when Solicitors ring a Clerk to brief Counsel for a particular case they wish to speak to the Clerk personally. However, when a competent substitute has taken a number of their calls, they quickly realise that except in very special circumstances, where the additional experience of the Clerk himself is needed, the service from the competent substitute is just as efficient. Equally, Solicitors would quickly realise the advantage to them if, when more expert and experienced service was required, the Clerk himself was readily available to them. At present, particularly at peak times, no matter how important or urgent the matter a Clerk can give little time to any one particular enquiry, and the caller is indeed fortunate if he can speak to the Clerk at all.

It must be remembered that Solicitors are our Clients and good service to them is in our best interests.

Service by the Clerk to Counsel on his list is also vital. What hope has any Barrister of a serious discussion with his Clerk if, because of Court commitments, he cannot see him before 4 p.m.

The essential then is that the clerk cease to take the general "run of the mill" telephone calls and delegate that duty to competent assistants.

Particularly if the Clerk has the higher gross income derived from greater numbers on his list, he can employ (and train if necessary) two competent assistants to handle the general telephone enquiries. These two would sit together in the same office working on the same booking lists. The Clerk himself sitting in another office is in three particular ways able to give better service than at present. Firstly he is readily available to the Solicitor Client in any special circumstances, secondly he is more readily available to Counsel on his list, and thirdly he has the time to properly

supervise the conduct of the business he runs on our behalf. This is a vitally important factor too often lost sight of

Two further benefits to the Bar from this system are, firstly that if ever a Clerk has to be replaced or a new Clerk established there would be a larger number of experienced people from whom to choose, and secondly, if working hours are shortened, two "booking clerks" could stagger their hours over a two week period by commencing at a later hour each alternate week.

The most important factors which have to be kept in mind I believe are:—

- (a) The continued independence of Counsel
- (b) Service to Solicitors
- (c) Service by Clerks to Counsel on their lists
- (d) Balanced lists without which no Counsel — except Senior Silks — can attain their full potential within a reasonable period.

Finally it is to be noted that 6 lists of 125 each would cater for 750 Counsel and, if perhaps the collection of fees and sending of accounts went to a central organisation, Clerks may even be able to cater for greater numbers.

From my own experience as a Solicitor I can say the fewer the Clerks the more convenient the service.

H.C. Emery

#### THE MUIR GROUP PROPOSAL

At a general Meeting of the Muir Clerking Group on Wednesday 4th June it was resolved almost unanimously (two dissentients only) as follows:

"That the Bar Council be asked to consider and report on the following recommendation on Clerking — That every member of the Bar be entitled to stay with his present Clerk subject to the existing Rules and that the Bar Council establish a Bar Clerking Service to avoid the creation of new Clerks and that any member of the Bar who desires to use that

service be entitled to do so and that the present Clerking Rules limiting the Lists remain in force unchanged and that the present Clerks retire at 65 and that to avoid infringement of restrictive trade practices the members of the Bar be not compelled to have Clerks."

There is a very real risk of fragmenting the Bar. Indeed, that fragmentation has already started to occur and it has started to occur over the clerking issue. It is believed there are presently 7 persons practising as barristers outside this Bar and so practising because they either do not want to be compelled to have clerks or they were not prepared to have the particular clerk assigned to them.

Acceptance of the proposal put forward by Bar Council would be divisive because there are many at the Bar who would prefer to retain their present clerk on the present system.

On the other hand, retention of the present clerking system but without limiting the numbers on any clerking list would itself be divisive because there are those who feel strongly that the present limit of 75 should be maintained or alternatively is too high.

The alternative of appointing a new clerk subsidised by the Bar would be the most temporary of expedients. At the present rate at which persons are coming to this Bar, a new clerk's list would be filled in under 9 months. The Bar would then be faced with the same problem as it is faced with today and the continuance of the new clerk principle would lead to the appointment of a succession of new clerks. This itself would be divisive.

The achievement of a compromise that will meet both those who want to retain their existing clerks and the problem of the large numbers coming to the Bar is the basis of the Muir Group proposal.

It is essential to the Muir Group proposal that every person who wants to retain his existing clerk on the existing basis should be entitled to do so. The proposal is that a Bar clerking service (not involving any of the present

clerks) be set up solely to provide for those who cannot be accommodated on any of the existing lists from time to time. That avoids the need for a succession of new clerks and avoids the need for members of this Bar to be continually subsidising new clerks. At the same time it preserves the existing relationship with clerks for the many who desire it.

To avoid further fragmentation of the Bar on the clerking issue and to try to bring those now practising outside the Bar back within it, and also to avoid the stigma of what might be claimed to be in fact a restrictive practice, the Muir Group considers that members of the Bar should be entitled to practice without a clerk if they so desire.

The Muir Group believes that its proposal is a practical means of meeting the present situation of the Bar without causing disturbance.

### CENTRALIZING OF CLERKING

The Clerking system provides the Bar with:

- (a) A means for distributing floating work;
- (b) Administrative services, especially accounts, deliveries, telephone, pigeon holes;
- (c) Advice re solicitors, especially concerning fees.

### Floating Work

The Bar as a whole does not gain any benefit from (a) above. If any particular barrister gains an advantage, it is necessarily at the expense of some other or others. For many years it has been a great advantage to any barrister whose practice is not fully established to belong to a list which attracts a substantial quantity of floating work. Belonging to one list rather than the other can very often make the difference between success and failure at the Bar in the first few years, and in all cases secures a far larger income for those belonging to the strong lists. This is wrong in principle, and quite contrary to the ideal of equal opportunity for equal talent on which the Bar in theory prides itself.

Furthermore, from time to time problems occur in relation to the distribution of work within lists.

The distribution of work amongst barristers ought not be regarded as a service to the Bar, but to solicitors. It is really advice to them as to who is available and suitable for any particular brief. My own view is that this function should be performed by a joint organisation of the Law Institute and the Bar. Such a joint organisation could also deal with deliveries between solicitors and barristers. The present system is highly wasteful of valuable time in both directions of travel.

#### **Administrative services**

The Bar must be one of the few substantial employers (in the aggregate) in recent years to have done nothing towards using employees more efficiently. It is high time this was done in the face of escalating costs. Anything other than a unified delivery service is ridiculous. There is also considerable wasteful duplication of time in relation to telephones. A different system of switchboards would surely produce an economy of manpower. In many cases the interposition of a telephonist is quite unnecessary. In my own case I should prefer to be directly connected to an outside line. It would save me time in asking for one, and the switchgirl would be saved having to handle something like ten ingoing and ten outgoing calls a day. Many other barristers, especially the increasing proportion with secretaries, must be in the same position.

#### **Accounts**

Computerisation is inevitable, and it is most improbable that a single system for the whole Bar would not be cheaper than seven or more separate systems.

#### **Overdue fees**

Whatever the reason, the clerks have not proved effective in getting in overdue fees. I have an average of five month's fees outstanding at any time., and many fees out-

standing for over a year. Virtually all of these are owed in respect of clients who would have no difficulty at all in paying. Inflation and high interest rates make the situation now more unjust than ever. A fundamental alteration in the system is called for.

#### **Advice**

There is no obvious reason why, in a re-organised system, each member of the Bar should not be able to choose a particular experienced member of staff to perform the same functions of advice, in acting as intermediary with solicitors, as his clerk now performs.

#### **Costs**

If the Bar has an annual turnover of \$10 million, as recently suggested, the cost of the present clerking system is substantially in excess of \$400,000. (Disbursements must be added to the 4% or 5% clerks' fees as the case may be). This is about \$1,000 out of the pocket of the average barrister. For the benefits gained, the cost seems very high. The present system also involves a very high subsidy (rarely adverted to or appreciated) by the senior members of the Bar. Some subsidy of those who have recently come to the Bar is most desirable; but the extent and generality of the present subsidy is another matter.

#### **Flexibility**

Different barristers have different requirements. Some might like expanded services — e.g. a well organised and efficiently run central typing pool. Others might prefer to dispense with most of the services now provided by the clerks. A range of options in this respect should be catered for in any new system.

#### **Public Relations**

The present system seems to me to be inconvenient to solicitors. It fragments the Bar unnaturally from their point of view, requires numerous telephone calls, and constant explanations and instructions to their junior staff. To the community at large and



prospective barristers, it gives the appearance of inequality and a closed shop.

#### Generally

I have had two clerks and appreciated their help. I am admirably served by my present clerk and his staff. But I nonetheless think that the system needs drastic reform; and see no reason why this cannot be achieved whilst retaining the first class clerking staff currently employed by the Bar.

N.H. M. FORSYTH

#### OPEN DOOR OR ANNUAL ASSESSMENT OF NEEDS?

In the current controversy concerning the clerking system the basic problem facing the Victorian Bar appears to have been overlooked by the Bar Council. I assume that the uniform clerking system concept is rejected but there remains a basic dichotomy of approach.

The Victorian Bar can adopt the attitude that any person who wants to come to the Bar should be entitled to do so. Alternatively, the Victorian Bar could adopt the approach that the Bar provides a service to solicitors and make an annual assessment of the increased numbers (if any) needed at the Bar to perform this service. It would then permit only that number to sign the roll of counsel that year.

Recently the Bar Council has made decisions which seem to be opposed by most members of the Bar. First there was the decision to limit or reduce the number on clerking lists to 75. Next there was the unanimous decision of the Bar Council to investigate the possibility of a uniform clerking system. Why is the Bar Council so unresponsive to the views of the Bar as a whole? The answer I would suggest is simple. It is undeniable that the Bar Council is not representative of the Bar as a whole — a majority of the Bar Council are over 10 years call — a vast majority of the members of the Victorian Bar are under 10 years call; close to half the Bar is not represented at all — there is no representative

of under 5 years call. The structure of the Bar Council should be changed to reflect more equally the structure of the Bar as a whole and, so as to be less a mere status symbol or stepping-stone to judicial appointment.

The Bar Council appears to have adopted the open door approach without consulting the Bar as a whole as to whether this is the most desirable course — whether this approach be implemented by new clerking lists being continually established or by a revolutionary change to a uniform clerking system. The members of the Bar Council because of their seniority and long established practices are less affected by an open door approach than their junior brethren. Can the Bar as a whole tolerate such an approach if it affects existing practices, does not necessarily improve the quality of the Bar and leads to undesirable clerking practices? What does a clerk with 30 counsel available on a particular day tell a solicitor wanting to brief on that day?

In my view the Bar as a whole and in particular its more junior members should be given the opportunity, perhaps by questionnaire, to guide the Bar Council as to which approach should be adopted.

The open door approach is of course a fair one, but in my view impossible to implement and not in the long term interests of the Bar or the profession as a whole. As well, I wonder whether it can be considered fair to allow a raw but perhaps talented junior to sign the roll and spend a couple of years finding out that it is uneconomic to practice as a barrister by reason of the continuing dramatic increase in numbers resulting from this open door approach.

The annual assessment of needs approach could I think be fairly implemented by the Bar Council by for example —

- (a) Canvassing and considering the views of the existing clerks in making the annual assessment;
- (b) Permitting an annual maximum to each existing clerk determined by ballot;

- (c) Permitting some clerks a higher annual intake with a view to having equal numbers on each list;
- (d) Granting unsuccessful ballot applicants preference in subsequent annual ballots;
- (e) Abolishing the existing rule aiming at reducing or limiting the numbers on each clerking list to 75;
- (f) Appointing new clerks only if there is a need for them having regard to the service that the Victorian Bar provides and to the view of the Bar as a whole as to the maximum desirable number on each existing clerking list.

To preserve the quality of the Bar, graduates of the 6 months course replacing Articles conducted at the Leo Cussen Institute (who are not entitled to full practising certificates until they have spent six months in practice as employee solicitors) should not be permitted to sign the Roll of Counsel until they have similarly spent six months as employee solicitors and thought should be given to only permitting University graduates to sign the Roll.

There are startling rumours as to the numbers expected to sign the Roll within the next 12 months — it has been suggested anything up to 150. The Bar should not become a refuge from any employment problems there may be in the solicitor branch of the profession. I would envisage the result of an annual assessment of needs approach to be an annual intake of around 30 to the Bar with say a minimum of approximately five new members on each clerking list.

There is much talk of service, in discussions about the clerking system by those who wish to reduce or limit the numbers on existing clerking lists. I personally have some doubt about those who wish to be continually served and wonder whether they expect or need a valet and perhaps a psychiatrist to deal with personal problems rather than a clerk. What the Victorian Bar needs is an increase in the quality of service its own members provide and not continuing dramatic increases in quantity.

David Bell

## A SPECIAL LIST FOR THE JUNIOR BAR

The present problems attending the clerking system are principally those of coping with a large influx of junior barristers who have insufficient financial independence and repute to survive their early years without support. No serious complaint has been heard from the middle or senior Bar.

Previously this support has been provided by the clerks who have at their disposal a varying volume of unallocated briefs, generally in inferior jurisdictions. With the influx of large numbers of juniors and the desirability, for various reasons, of containing the numbers of counsel employing any one clerk within manageable limits, there is no real alternative but to establish a new clerk.

There have been suggested various ways in which such a new clerk might be established and subsidized until he is able to compete with existing clerks with balanced lists.

The fact is that this new clerk will never have a balanced list as do the existing clerks. His list will commence as a nursery list and will achieve its full complement with a list of barristers all of about the same stature. It basically remains this way as it matures because there will be little wastage, at the outset at any rate, in favour of judicial office or by reason of retirement or for other reason. For the same reason, the new clerk will never be fully competitive with the existing clerks.

Let us therefore forget this idea of creating a seventh clerk in the image of the old. I suggest that the problem can be overcome by establishing a seventh clerk to whom all newcomers are attached and to be employed by the Bar Council on a basis to be negotiated. As a vacancy occurs on an established list once it has been reduced to acceptable numbers then the senior man on the seventh list has the right to that vacancy if he so desires. It may be thought desirable for a barrister to have three or five years standing before he transfers to a senior list.

The advantages of the proposed system are evident —

- (a) since all new counsel must start on the new list strict equality is preserved.
- (b) the seventh list will in effect provide an accessible pool of talent for the solicitor seeking counsel of junior standing, instead of the present situation where this pool is distributed unevenly among six.
- (c) the avowed Bar Council policy of seventy five per clerk can be preserved since the seventh clerk can serve as a buffer against the uncertainties of the future numbers.
- (d) the seventh clerk can be geared to meet the special problems of the first years of practice.

I therefore commend this a satisfactory means of preserving the advantages of the present system but in a more flexible form.

### A THREE PIPE PROBLEM

I recall that Sherlock Holmes somewhere said that when seeking the answer to a problem, he first eliminated the impossible, and that whatever remained, however improbable, was the solution. The present clerking controversy is caused not by dissatisfaction among those presently at the Bar, but by a natural and proper consideration for those still to come, whose numbers we seek to accommodate in an all embracing scheme, rather than to leave them to fend for themselves. The problem being one merely of increasing numbers, the solutions to the problem are three in number, namely —

- (a) to prevent further additions to the Bar.
- (b) to make newcomers join, permanently, or temporarily, a "nursery" list (or Y.T.C. for short).
- (c) to permit increases in the numbers on each existing list.

In my view, (a) is absolutely impossible, (b) is so undesirable as to be impossible for all practical purposes (and is really only a method of avoiding the problem, to the advantage of those already at the Bar), leaving (c) as the only solution remaining.

Are larger lists so unsatisfactory? The present clerking system fulfills at least three functions, all of which must be borne in mind when considering the problem.

They are:

- (a) a personal management service for Barristers.
- (b) a Barrister-finding service for Solicitors.
- (c) a means of finding and distributing work for newly arrived Barristers.

In the two latter respects, the Victorian system may be unique, and it may not be of value to look to the English system, or to any other system, as a paradigm. The smaller the list, the better function (a) is performed, but not so for the others, which require a largish list, although not of such numbers to be unmanageable. To ignore function (b) is to do a disservice to the administration of the law in Victoria, and to ignore function (c) is to do a disservice to newly arrived Barristers.

The clerking system adopted must properly balance all three functions. The exigencies of the present situation, if they result in larger lists, may cause some diminution in the personal management aspect, but provided that the clerks are required to employ sufficient senior executive staff for the numbers on their lists, and are required to use modern management and other procedures, an increase of each list to say 150 ought not to result in an unacceptable diminution.

Six clerks each with lists of 150 would cater for a Bar of 900, enough for the foreseeable future. If the Bar grows to more than 900, then it may be easier at that stage to find enough persons willing to start a smaller balanced list of 50-100 from a total Bar of 900, then it is from the present numbers. If the service proves to be inadequate, there will be persons who will want to start a new list. The simple fact is that at present nobody is dissatisfied at all.

I realise that the real objection to larger lists is on the ground of possibilities of patronage, and on the thought that they restrict our independence. I am not too sure that the possibilities for undesirable influence are not greater in a small list, than in a large one



with say two or three senior persons running it. Further, the answers to such matters in the final analysis rests with ourselves, and I think it unwise to distort irrevocably the system which has grown up by some sort of natural selection in our own circumstances, merely to protect us from our own inadequacies, actual or feared. Larger lists, with a good list committee taking (and being made to take) an interest in and a part in the policy of the management of the list may be the answer.

A.G. UREN

**Obituary: Jack Cullity****OBITUARY: JACK CULLITY**

The death of John Michael Cullity was remarked on widely in the legal profession as marking the end of an era. Jack Cullity was a legend in his own time.

The central feature of his life was his service to the people and his outstanding integrity as a human being.

He mainly acted for people in trouble of some kind or other, many of whom were poor and many of whom had fallen foul of the law.

He identified himself with their cause, spared no attention to detail to which he gave punctilious attention and gave unstintingly of his great ability. No matter what was said against his client, Cullity could always find good in him. There were many "bad" characters who could and did often turn to him for ordinary human advice. His rapport with ordinary people was extraordinary good: it served him in good stead in court and in life.

The daily press spoke of his greatness as a cross-examiner and his greatness as a trial advocate. They were correct. He was certainly among the greatest. He was a great advocate in the old tradition, a master tactician capable of dominating any court and largely commanding the course of a trial. He knew his law, he knew human beings, he knew life. He spoke the language of the common people and had a profound contempt for anything in the way of pretension.

One of the great attributes of an advocate is courage. Jack Cullity had abundant courage. Nothing could divert him from the course of his duty as he saw it. He appeared in many seemingly unpopular causes and for people involved in matters that aroused public hostility. His conduct in them was governed only by the interests of his clients. He declined to be in any way deflected from his duty by "popular" prejudice. It spoke highly for his independence of mind, his tenacity of purpose.

Every barrister could learn much from a study of Jack Cullity. He had been very close to Leo Cussen to whom he attributed much of the success he himself had. He said that Leo Cussen had taught him that if the proper points couldn't be made to a jury or a judge or in cross examination in 20 to 30 minutes, they were probably not worth making and he had taken this as something of a rough guide. To hear a trial conducted by him was a lesson rich indeed — rich in grip of legal principle, rich in opening, rich in examination and cross examination, rich in final address, rich in every respect. Like everyone else, he made mistakes and he never tried to hide them. He often told the story of the occasion when on a plea he had a client sentenced to 6 years imprisonment when the maximum was 5 years. On the other hand, he never bragged of what was probably an unequalled record of successes.

To some he seemed abrupt and austere. This really belied him. No fellow practitioner or anyone else for that matter turned to him in vain for advice and assistance. He would go to no end of trouble to give what assistance he could.

It is sometimes thought that Jack Cullity confined himself to the criminal courts. In fact, he had practised widely in many jurisdictions and had a great mastery of general legal problems.

His interests extended beyond the law and reached into wide reading, into sport of all kinds, travel and other fields. He was a familiar figure at boxing, football, cricket, racing. His knowledge of these stood him in good stead in many a court appearance.

One of the outstanding characters of the Bar and of Australia has left us. His work enriched the Bar and life. It will not be forgotten.

**FAREWELL: Mr. JUSTICE NORRIS**

On the 10th June the legal profession farewelled His Honour Mr. Justice Norris who on that day completed his first half century of membership of the Victorian Bar.

His Honour has given great service to the legal profession and the State of Victoria over many years. He was a member of the Bar Council on two occasions, 1934-1939 and 1952-1955, and served as Chairman of the Ethics Committee during the latter term of office. As well, His Honour was Treasurer of the Bar from 1936-1938 and Secretary from 1939-1950.

Mr. Justice Norris has always displayed friendship and courtesy to all who appeared before Him, and this enabled all to do their best without unnecessary tension.

His Honour has also displayed a determination to be fair and to ensure that justice was achieved in the cases over which he presided. Throughout his judicial career, the parties who appeared before him invariably felt that their cases were treated as important and deserving of the fullest consideration. Whatever the result, they felt that the judge had paid proper respect to the arguments and evidence put before him.

Mr. Justice Norris has had the unusual experience of being an Acting County Court Judge, a County Court Judge, an Acting Supreme Court Judge and a Supreme Court Judge. Throughout his judicial career his Honour displayed high standards of ethics and high standards of learning and workmanship. His work in these high offices has added to the respect with which the community views the courts in our State.

The Bar wishes His Honour a happy and satisfying retirement.

**WELCOME: Mr. JUSTICE GRIFFITH**

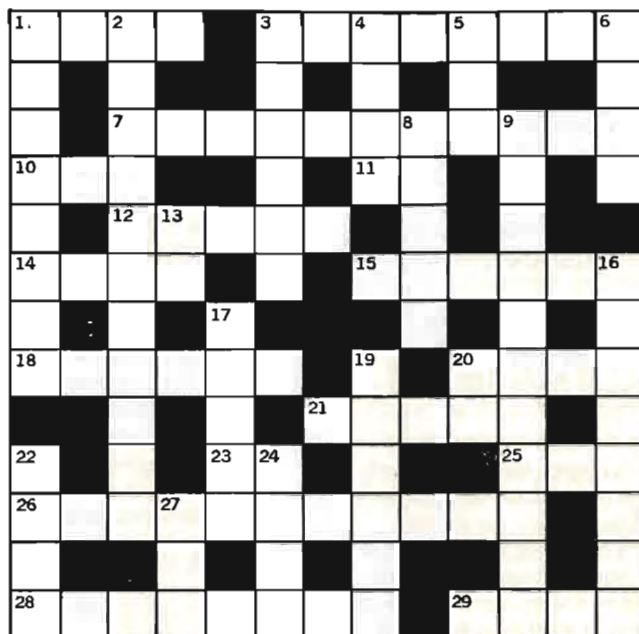
R.G. DeB. Griffith has been appointed to the Supreme Court Bench upon the retirement of Mr. Justice Norris. His Honour was educated at Brighton Grammar and within the Melbourne University where he received his Master of Laws. He was the Supreme Court Prizewinner in his year. Prior to commencing his legal studies, he had served for a time in the Royal Australian Air Force. He has had an extensive practice in the equity and commercial field as well as land valuations. He took silk in 1967. Recently he appeared before the Environment Appeal Board in the marathon extravaganza concerning The Newport Power Station which gave all participants an insight into the vagaries of the "scientific mind". There have been five readers in his chambers, McPhee, Ormiston, Kaufman and Ostrowski, where they have had the advantage of receiving not only the benefit of his keen legal mind, but also a liberal education in such topics as gardening and basic carpentry.

He has always been generous to his juniors as well as those who may call at his chambers for assistance. We would congratulate him on his appointment to the Bench and look forward to the courteous attention which he has always shown to fellow practitioners.



# CAPTAIN'S CRYPTIC

No. 12



## ACROSS

1. Gawk at the leaf (4)
3. Third most junior of the most senior (8)
7. Intruders spare stress (11)
10. Manta's beam of light (3)
11. Perform (2)
12. Those fertile resting places (5)
14. The name of anything (4)
15. Complete justice must be to done (4, 2)
18. Swift sailers (6)
20. The clue could have been quite skinny (4)
21. Crawl on the belly like a snake (5)
23. Transmitter of correspondence (1, 1)
25. The Government can be a chum (1, 1, 1)
26. Notice of an Offence (11)
28. He is a houseowner, and droll (8)
29. A figure of worship, was once a cabaret (4)

## DOWN

1. An enforceable warrant when written (8)
2. Present your argument (3,4,4)
3. Held to a religious diet (6)
4. Clue forbidden in examination in chief (4)
5. The law is one of these (3)
6. Ascend from a father (4)
8. Everything's coming up ulcers (5)
9. Liberated (11)
13. agram (2)
16. A legal right to stop Pele (8)
17. Member of colloquial judiciary (5)
19. Edged and falsely charged (6)
20. Any one male person (2)
22. Behold, father, a precious stone (4)
24. Right on (4)
27. The turf seethed (3)

Solution Page 23.

## RECENT RULINGS OF THE ETHICS COMMITTEE

**Counsel returning Brief (18/11/74, 4/12/74, 16/12/74)**

The Ethics Committee received a complaint from a Solicitor to the effect that Counsel who was briefed in a case in the Magistrates' Court and which case was adjourned to a particular date, and who became engaged in the interim period in a Supreme Court action, returned his Brief in the Magistrates' Court case shortly before 5.00 p.m. on the day prior to the adjourned date.

The Ethics Committee considered that on the material before it, it had reason to believe that a disciplinary offence has been committed and that it would deal with the matter summarily. The Committee then dealt with that matter summarily and after hearing Counsel and Counsel appearing for him, it resolved that pursuant to sub-rule (g) of Rule 32A that the Committee refrain from determining whether or not Counsel has committed a disciplinary offence, but that the following advice and expression of views be given to him, namely, that he should in the circumstances have made arrangements to inform his Solicitors as soon as it became a substantial possibility that he would be unable to continue with the case in the Magistrates' Court on the day prior to the adjourned date, bearing in mind —

- (i) The prime importance of the Solicitor being kept informed at all times of all facts known to Counsel pertinent to the client's litigation and particularly Counsel's availability;
- (ii) That the Solicitor would then have been better able to consult and warn his client as he thought desirable;
- (iii) That the Solicitor would then have been better able to make appropriate alternative arrangements;

- (iv) The necessity for Counsel to obtain instructions wherever possible as to the course to be followed in litigation, including the arrangement for adjournment.

### Duty of Counsel at Trial (26/11/74)

Counsel who appeared as Prosecutor in a criminal case sought a ruling of the Ethics Committee as to what course he should take in the following circumstances. During the course of the trial, a prosecution witness gave evidence on oath and in cross examination denied a matter that was put to him by Counsel for the accused. From something that was said by that witness to the Prosecutor prior to the commencement of the trial, the Prosecutor formed the view that in making such a denial the witness was being untruthful. The accused then gave evidence to the effect that the events that were so put to the witness did in fact take place. The issue that was put in dispute in this matter related indirectly to the question of credit of the accused and the prosecution witnesses who had given evidence at that trial.

The Ethics Committee resolved, in effect, that in its opinion the Prosecutor should announce to the Judge that he is professionally embarrassed and that he proposes to withdraw from any further part in the prosecution.

### Counsel Practising in Country (11/12/74)

To date there are three Counsel who have permanent Chambers in the country, two in Ballarat and one in Bendigo.

### Senior Counsel Settling Conveyancing Documents (7/2/75)

The Ethics Committee resolved that as long as the matter remains primarily in the area of advice, it is permissible for Senior Counsel to advise as to the adequacy of conveyancing and the like documents submitted to him by a Solicitor. If and when Senior Counsel forms the view that the

settling of the document requires substantial re-casting, he should require a Junior to be briefed with him to settle the document in consultation.

**Senior Counsel accepting Brief as Junior  
(7/2/75)**

The Ethics Committee has been requested by Senior Counsel for a ruling as to whether or not he could, in the following circumstances, accept a Junior Brief. Before taking silk, Counsel was engaged as Counsel in litigation at first instance which concluded before he took silk. An appeal was brought, but Counsel had meanwhile taken silk. Another Senior Counsel was retained to lead in the appeal, but the Counsel in question was sought to be briefed as junior to him.

The Ethics Committee resolved that in its view it was permissible for Counsel to accept the Brief tendered and to appear accordingly.

**LEGAL AID BILL 1975**

Copies of the Legal Aid Bill introduced in the Australian Parliament on 5th June 1975 have been made available to the Law Council by the Attorney-General. The Bill provides a statutory basis for the Australian Legal Aid Office to operate under a Board of Management. It sets up a Legal Aid Commission to advise upon the provision of legal aid by the Australian Legal Aid Office and other schemes of the private legal profession and State Governments. It specifies in effect that legal aid is to be provided in all areas in which the Australian Parliament has power to legislate. It provides that legal aid is to be provided to those who cannot afford to pay. A special meeting of the Law Council is to be held at Canberra on 1st July, the day before the commencement of the Convention, to consider the Bill in all its aspects. Constituent bodies will be responsible for the expense of sending delegates unless their delegate is already attending the Convention at his own expense. Brennan, Q.C., President of the Queensland Bar, and Mr. John Nosworthy, Law Council representative of the Law Society of Queensland, have been requested to prepare a discussion paper on the Bill as soon as possible for circulation to constituent bodies to assist them in giving consideration to the Bill prior to the special meeting on 1st July. The secretariat of the Victorian Bar has taken steps to have copies of the Bill made available to all members of the Bar Council.



## VISITS BY PROMINENT AUSTRALIAN LAWYERS TO PAKISTAN

The Secretary of the Attorney-General's Department, Mr. C.W. Harders, has brought to the attention of the Law Council of Australia a request that eminent Australian jurists and lawyers visit Pakistan. The Department is not in a position to finance such a visit but it would support the visits in principle. The visits would be open to be made by prominent Australian jurists and lawyers who might be passing through Pakistan while overseas. Any persons interested could contact the Law Council for implementation of arrangements.

It would be appreciated if you could arrange for publication of this within your society or association.

## LAWYERS

Brokers of facts  
Peddlers of platitudes  
Well paid upholders  
Of middle-class attitudes  
Masters of sophistry  
And legal fiction  
Skillfully greasing  
All social friction  
Passionate lovers  
Of concepts of law  
Financially friendly  
With hoodlum and whore  
Despised and resented  
By Plaintiff, Defendant —  
Pity those bastards  
Completely dependant!

Coldrey

## MOUTHPIECE

The waistcoat settled deeper into his chair and warmed to the discussion that had been festering around him for half an hour.

Clerks or King makers, socialists or independent practitioners, nursery lists or geriatric lists, everyone had had his say and was unconvinced. There is nothing more satisfying he thought to himself than finely honed minds discussing a well defined issue. And then, when the discussion eased sufficiently he leant forward to make his contribution.

"What are we all talking about?"

The pertinence of this enquiry was compelling.

The pale wig ventured —

"Whether or not there should be equality of opportunity for those just starting."

"How to maintain the present services in the face of the large numbers of newcomers."

"No, the services should be improved!"

"We've got to slow the clerks who is employing whom?"

"If we have computers it will demonstrate that we really are coming to grips with the twentieth century."

With a lapse of concentration which was entirely uncharacteristic, the waistcoat wondered at what point of time the Greek City states achieved such a size that direct democracy was no longer feasible.

BYRNE & ROSS D.D.

# SOLUTION TO CAPTAIN'S CRYPTIC No. 12

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## Corrigendum

On page 11 of the previous issue it was reported that in April 1975 the Australian Government agreed to pay \$807,682 to Legal Aid. In fact the agreement was to pay \$307,682 only.

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CLICK -  
... YOUR ~~OWN~~  
BARRISTER N°  
46 P/0007/3A  
AGE 38 YEARS  
EQUITY PRACTICE  
FEE RANGE -  
MODERATE TO  
HIGH - PERFORM-  
ANCE - ATTENTIVE  
& RELIABLE  
CLUBS ....ah

