VICTORIAN BAR NEWS

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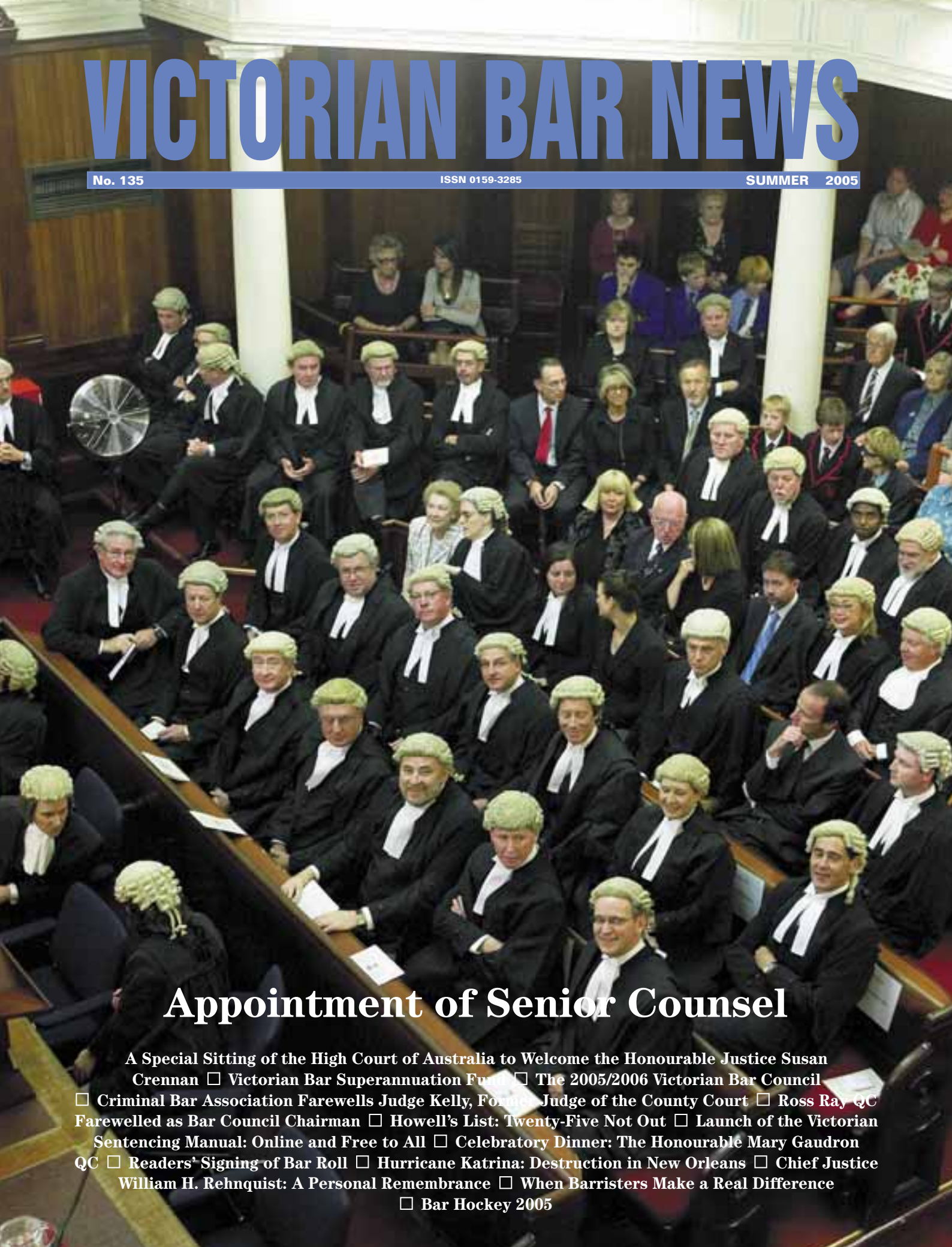

Appointment of Senior Counsel

A Special Sitting of the High Court of Australia to Welcome the Honourable Justice Susan Crennan ☐ Victorian Bar Superannuation Fund ☐ The 2005/2006 Victorian Bar Council ☐ Criminal Bar Association Farewells Judge Kelly, Former Judge of the County Court ☐ Ross Ray QC Farewelled as Bar Council Chairman ☐ Howell's List: Twenty-Five Not Out ☐ Launch of the Victorian Sentencing Manual: Online and Free to All ☐ Celebratory Dinner: The Honourable Mary Gaudron QC ☐ Readers' Signing of Bar Roll ☐ Hurricane Katrina: Destruction in New Orleans ☐ Chief Justice William H. Rehnquist: A Personal Remembrance ☐ When Barristers Make a Real Difference ☐ Bar Hockey 2005

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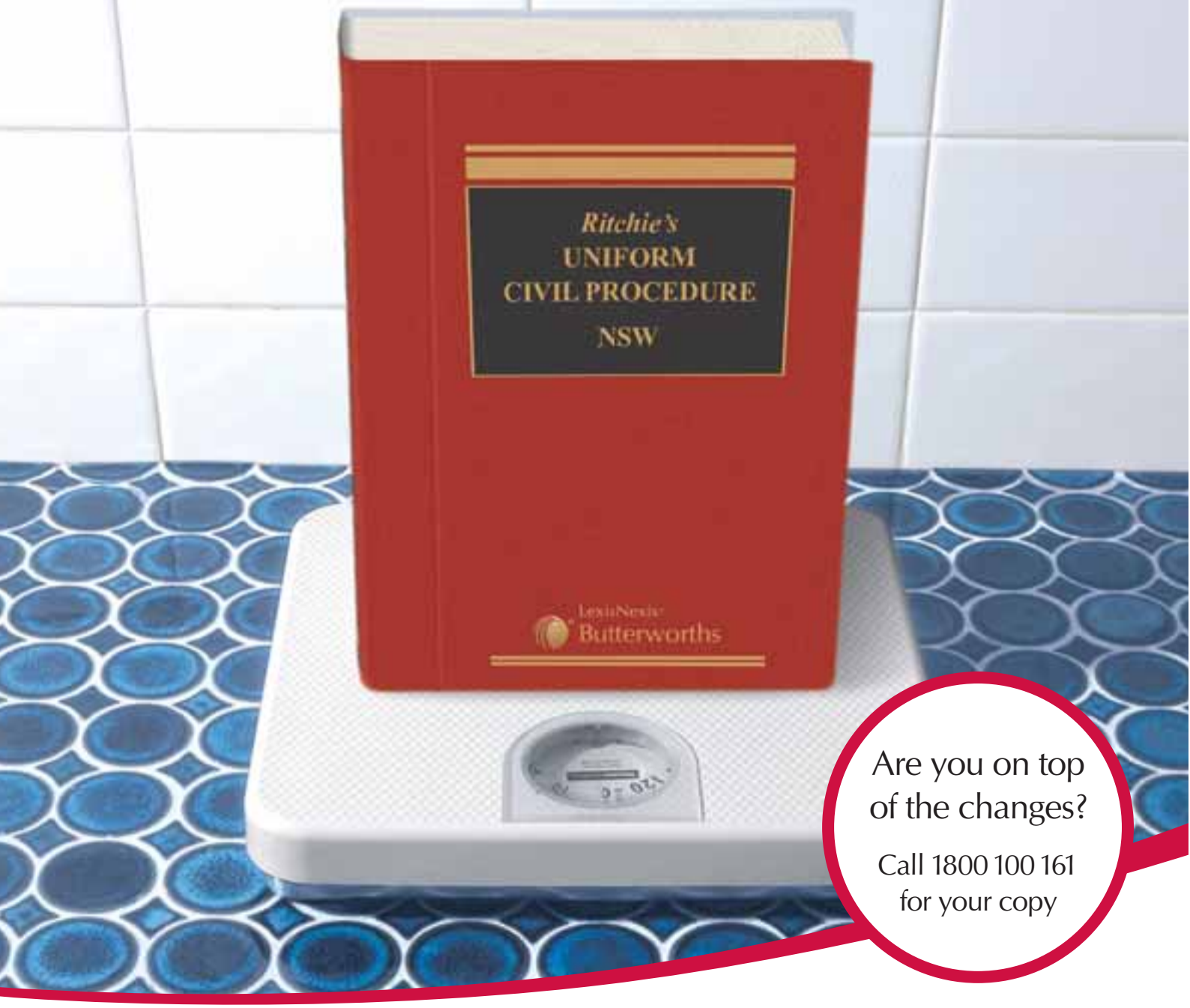

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Do Barristers Exist?

Is the Victorian Bar a mirage? Is there a small group in society who are under the influence of some potent, mind-altering substance who believes that there are things called barristers?

Evidently, the Deputy Lord Mayor of Melbourne, Mr Gary Singer, doesn't believe that barristers are real people. Mr Singer, in his guise as a solicitor, was fined by the Legal Profession Tribunal for having some problems with cheques meant to be paid to barristers; those tiresome things sometimes sent to solicitors by other parties, such as insurance companies, as a disbursement to be forwarded on to those strange entities known as barristers. Therefore, under some quaint rules, they are to be paid into a trust account and then paid out to those other illusion-like things: barristers' clerks. It seems Mr Singer wrote the cheques out but they never went out — got stuck in a drawer or somewhere else.

When all this was reported on the front page of the *Herald Sun* newspaper, and the question posed, "Shouldn't Mr Singer resign as Deputy Lord Mayor?", one of his reported responses was to the effect that: "None of the clients were affected".

Well, that's all right then Mr Singer — no *people* were affected by your actions, no one was hurt, because barristers don't really exist, do they? They don't have families, mortgages or school fees so it didn't really matter that you hung on to their fees. If the Law Institute hadn't undertaken an audit on the firm Simon Parsons & Co (at which you used to be a partner) and discovered the cheques, when were you planning to pay the barristers? When those irritating barristers' clerks came chasing, months or years after you had received payment to pass on to the barristers who had completed the work for your firm?

It is this attitude that continuously sees barristers being paid months and years after their fees were due, a practice that mystifies bank managers and financiers to such an extent that they don't believe that barristers are real things.

The media also believes that there is no distinction between barristers and

solicitors, all being "lawyers". Those 6.30 "current affair" programmers on television regularly have stories about "greedy lawyers". Recently, the one hosted by Ms Naomi Robson had a sensational story which cut to footage of people dressed up in wigs and gowns. These were not the "lawyers" that were the subject of the program. But it is quite acceptable to lump barristers in there, as we all know they don't really exist. Only greedy lawyers really exist, no matter what part of the profession they inhabit.

The legislation governing the registration of "lawyers" in Victoria also seems to have difficulty in recognising the existence of barristers. Because barristers don't have trust funds and are not in "firms" then where do they fit in to the fabric of the law industry? They are not legal practitioners but exist in the *demi-monde* of "legal person" persons. The confusion increases when inspection is made of the two forms that are sent out to barristers in order for us to be registered. These forms ask some very strange questions of barristers which, in many cases, are unanswerable. They continually ask a barrister to nominate his partners, managing partners, CEOs and where he stands in a firm. As barristers cannot answer these questions, does it means they do not exist? If you write on the form: "I am a barrister and unable to answer these questions" does the great computer in the sky that registers law industry members cough and splutter and disgorge such non-conforming creatures? It makes you worry in bed at night.

Because barristers don't have trust funds and are not in "firms" then where do they fit in to the fabric of the law industry? They are not legal practitioners but exist in the demi monde of "legal person" persons.

Finally, perhaps and most significantly, there is the new legislation governing fees. The Committee that thought up this monster obviously does not believe in the existence of the barrister. As most are slowly becoming aware, the new legislation requires the entering into a fees agreement that requires disclosure, disclosure, disclosure. However, the import of the legislation and the fees agreement requirements seem to be directed to

solicitors rather than barristers. Not much thought has been given to the situation where briefs are flicked through the night before or on short notice. It seems that a barrister has to sit down and spend a few hours drawing up a detailed new agreement disclosing all sorts of things down to the colour of underpants to be worn during the course of a trial. Non-compliance means non-payment and, ultimately, a trip to the Debt Collection List, VCAT, where the chances of barristers' success don't appear to be very high. But it doesn't matter because you don't have to pay barristers anyway as, in reality, they don't exist.

Not much thought has been given to the situation where briefs are flicked through the night before, or on short notice.

APPOINTMENT OF SENIOR COUNSEL

The Honourable Chief Justice Marilyn Warren AC has appointed as Senior Counsel the persons listed below, in order of precedence:

Christopher Joseph Wren
David John Neal
Barry John Hess
Brendan Michael Griffin
Anthony Aloysius Nolan
Christopher James Ryan
Paul James Cosgrave
Michael Richard Pearce
Christopher John Blanden
Gregory John Lyon
Stewart Maxwell Anderson
Michael Phillip McDonald
Simon Edward Marks
Michele Muriel Williams
Michael William Thompson

The new Silks will announce their appointment at Ceremonial Sittings of both the Supreme Court and the Federal Court on Tuesday 6 December 2005: at 9.15 am to the Supreme Court in the Blanco Court; and at 10.15 am to the Full Court of the Federal Court in Court One, Level 8, 305 William Street Melbourne.

Counsel are invited to attend the ceremonies, robed (without wigs in the Federal Court). Families, friends and children of the newly appointed Silks are also welcome to attend the sittings.

The Editors

Judicial Dichotomy

The Editors

THE Attorney–General, Rob Hulls, in his column in *Victorian Bar News* No. 134 Spring 2005, seems to have set the bar too high, even for himself. He expresses the hope of achieving the impossible — "It is my hope that we have turned the dichotomy on its head …"

The OED defines dichotomy as:

> Division of a whole into two parts … Division of a class or genus into two lower mutually exclusive classes or genera.

The tone and language of his column prompted me to provide for readers the following dictionary definitions (for brevity from *Collins English Dictionary*, Aust. Ed):

> *Blather* 1. to talk foolishly; 2. foolish talk, nonsense. (see also *blather-skite*)

> *Cant* 1. insincere talk, esp. concerning religion or morals, pious platitudes; 2. stock phrases that have become meaningless through repetition. (see also O.E.D definition 6 to affect pietistic phraseology, esp. as a matter of fashion or profession; to talk unreally or hypocritically with affectation to piety or goodness.)

> *Rhetoric* 1. the study of the technique of using language effectively; 2. the art of using language to persuade, influence or please; oratory; 3. excessive use of ornamentation and contrivance in spoken or written discourse; bombast; 4. speech or discourse that pretends to significance but lacks true meaning.

Michael A. Adams QC

Oops!

The Editors,

ON page 30 of the current *Bar News* you have what is alleged to be a photo of barristers signing the Bar Roll on 3 August 1948.

The photo is in fact a photo of practitioners signing the Victorian Supreme Court Roll on Monday 2 August 1948. From left to right the people are Eric Hewett, T.A. Miller, A.J. (Bob) Scurry, John Ellis, G.P. Healy, E. Hayes, I. McC. Stewart, J. Toohey, Brian Thomson, Kerry Horton and J. Gough. Seated and signing is W.L. (Bill) Ross and opposite him is an Officer of the Prothonotary's Office.

Hewett, Scurry and Thomson signed the Bar Roll on 9 September 1948. Also admitted to practice on 2 August 1948, but not in the photo, were Sir John Young and Mr Justice Peter Murphy.

John (Jock) Ellis had in fact been a fighter pilot in England, who survived the War, but sadly was killed in a tractor accident about five years later. Ian Stewart had been Australia's 100 metre freestyle champion in 1939 and represented Australia then against Japan and the United States. Bill Ross served in the 2nd A.I.F. at Tobruk, El Alamein and the South Pacific. He was wounded in action and promoted to Captain. He is now 88 and lives in a home in Canterbury, but is physically fit and very mentally "on the ball".

With kind regards,

Yours sincerely

Charles Francis

Mournful Error

Dear Editors

YOUR reviewer of the 2nd edition of the *Oxford Companion to the Supreme Court of the US* ("Lawyers' Bookshelf", No. 134 *Bar News*, Spring 2005) has appended a "(sic)" to the "morning clothes" description of the garb worn by attorneys appearing before the US Supreme Court. While such advocates may wish to convey to the court their mourning the injustices suffered by their clients for whom they seek relief, this does not affect their style of dress.

Morning clothes are to evening clothes what Morning Prayer (Matins) is to Evensong or Evening Service. No one would suggest Matins are prayers for the recently deceased such as the Jewish *Kaddish.* A toper may well mourn the morning after the evening before and an imprudent woman might mourn the need for a morning-after pill lest she later suffer morning sickness.

It may be that the reviewer has confused US with English advocates where the English barrister's dress traditionally includes the white cuffs or "weepers" adopted following the death of Queen Anne and retained ever since despite the passage of nearly three centuries. See, for example, Sir Walter Scott's *Guy Mannering* and James Joyce's *Ulysses*. See, for example, the portraits of Sir Owen Dixon and Sir Frank Gavan Duffy hanging in the lobbies of Owen Dixon Chambers West and East and that of Isaacs CJ in the *Oxford Companion to the High Court of Australia.*

If I am wrong the same error com-

plained of by the reviewer was committed in the *Oxford Companion to the High Court of Australia* (see the entry for "Court attire" at page 168). If I am wrong (I sometimes am but I never doubt), I am in good company with *Webster's Third New International Dictionary* (1961) and the *Oxford English Dictionary* (2nd ed., 1989) among many others.

Although I have disclosed my identity to you, for the reason already tendered and published ("Letters", No. 133 *Bar News*, Winter 2005), I wish to remain

Your anonymous correspondent

Culture at the Bar

To the Editors

READERS of this journal will no doubt take heart that the Bar is graced by renaissance men like Geoff Steward. They will be relieved that there are individuals who declare themselves a misogyny-free zone and who generously count female barristers among their acquaintance.

The point seems to be lost on Steward, however — as it has been time and again on his profession — that the law has been reluctant to relinquish much of its exclusive and "exclusionary" nature. The reality is that, in some corners of the legal profession, a culture lingers — as it does in all pockets of privilege — that rewards similarity and discourages, even penalises, difference. The push to be "one of the boys" — even if it means being the butt of a joke that would never be directed at a bloke — is strong, and while this culture persists many women are reluctant to stand out lest it be for the "wrong" reasons. Importantly from my perspective, they may also be reluctant to accept the mantle of judicial office when it means being exposed to disrespect or to completely distorted forms of scrutiny and evaluation by a self-styled panel worthy of the shabbiest talent quests.

We need look no further for an example than Steward's appraisal both of his colleagues at the Bar and his superiors on the Bench. In charging that some women, like some men, are "devoid of talent, wit, intelligence or skill", we can only assume that his assessment is as happily objective — and as absent in irony — as his measure of those female appointments to judicial office who, in his humble opinion, have not been based on merit. I am curious to know whether Steward would suggest with as much confidence that, in the past, some men were appointed on the basis of homogeneity or the old school tie, rather than purely on merit, but these nuances may well dissipate in the heady atmosphere of the Essoign.

Despite the assurances of those who benefit from its existence, I still believe that the culture at the Bar — and in the wider profession — needs to change. I am determined to press on with the campaign to reclaim the term "merit" for a better legal system and encourage the emergence of a profession that is truly inclusive and respectful of all in its ranks – for the benefit of all practitioners and, more importantly, for all Victorians.

Yours sincerely

Rob Hulls MP
Attorney-General

The *Winston Churchill*

Dear Editors

MANY thanks for the generous welcome contained in the Spring 2005 Edition of the *Victorian Bar News*. There is unfortunately one error which I should correct.

At the time that I sailed in the Sydney to Hobart Yacht Race on the *Winston Churchill*, it was then the only yacht from the original 1945 field which was still afloat. It is a matter of great sadness to me, and all who sailed on her over some 50 years, that the *Winston Churchill* was lost at sea with the tragic loss of life during the course of the 1998 race. For those interested, the full details are contained in Rob Mundle's excellent book *Fatal Storm*.

Yours faithfully

Kim Hargrave

Grants of Silk

Dear Editors

IN both of his letters published in your Winter edition, John A. Riordan claimed that in New Zealand the decision has been made to abolish Silk. I don't expect that the New Zealand position will have much bearing on yours but I write simply to set out the current position.

It is true that the matter has been under review but the only decisions taken by the Government appear in the Lawyers and Conveyancers Bill, which is still before the House of Representatives with no assurance that it will ever be passed. If it is passed, then the changes to the office of Queen's Counsel will be:

- the name will be changed to Senior Counsel;
- it will be lawful for appointments to be made of lawyers who practise either alone or in partnership with any other lawyer (including solicitors) and such appointees would be able to continue to practise either alone or in partnership with any other lawyer.

Otherwise, the power to appoint under the Royal Prerogative is set to continue.

Yours sincerely

Alan Ritchie
Executive Director
New Zealand Law Society

Competition

The *Bar News* thanks Mr Jack Hammond QC for providing it with copies of the *California Bar Journal*. The journal has an excellent page headed "Trials Digest" in which there is a summary of trials and awards in civil cases. The amounts of damages awarded makes most interesting reading.

Therefore, *Bar News* provides the summaries of the trials and asks readers to give their estimate of the damages that have been awarded. Those entrants whose awards come closest to the amount published in the *California Bar Journal* will win a bottle of claret from The Essoign.

Motorcyclist injured
A motorcyclist was thrown onto a guardrail when he swerved to avoid a tractor/trailer on a winding mountain road (*Baldau* v *Berkins*, El Dorado County Superior Court).
Award:?

Benzine exposure
A man who worked as an aircraft painter alleged that he contracted leukaemia as the result of exposure to benzine (*Komizzey* v *Axo Products Inc*, Los Angeles County Superior Court).
Award:?

Sign installer electrocuted
A 36-year-old sign installer suffered burn injuries when he came in contact with a live power line (*Baez* v *Summit Media*, Los Angeles County Superior Court).
Award:?

Outstanding New Appointments

JUSTICE NEIL YOUNG

ON 23 November 2005 the Executive Council announced the appointment of Neil Young QC as a judge of the Federal Court of Australia to take effect from 30 November 2005. Justice Young has been an outstanding practising member of the Bar, a distinguished leader of this Bar and has been a great role model for all barristers. He has demonstrated his intellect, dedication and commitment to the law during his working life. He was Chairman of the Bar Council for 18 months from March 1997 to September 1998 and President of the Australian Bar Association from January 1999 to February 2000. The Bar warmly acknowledges and welcomes the appointment of Justice Young.

JUSTICE SUSAN CRENNAN

On 8 November 2005 Justice Susan Crennan was sworn in as a Justice of the High Court of Australia. Members of the Victorian Judiciary and the Victorian Bar were well represented at her welcome, with the heads of all Victorian courts present: 25 Judges and Magistrates from Victoria; 37 Victorian Senior Counsel and 7 Junior Counsel from Victoria. The large Victorian attendance in Canberra showed the high regard and affection in which Justice Crennan is held by the legal profession in this State.

NEW SILKS

On 24 November 2005, the Chief Justice of the Supreme Court announced the appointment of 15 new silks. At ceremonial sittings of the Supreme Court and of the Federal Court on 6 December, the new silks announced their appearances. The photograph taken that day adorns the cover of this edition of *Bar News*. The details of the new appointments will be published in the Autumn 2006 issue. I congratulate the new silks on their appointment and wish them the very best in this next step in their careers.

NGUYEN TUONG VAN

Recently, the Bar Council wrote to the Attorney-General of Singapore, to the Law Society of Singapore, to the Prime Minister of Australia and to other relevant Australian Cabinet Ministers, calling for re-consideration of Mr Nguyen's petition for clemency.

So far as I am aware, this is the only occasion in its 120-year history that the Victorian Bar has sought to be heard in relation to the merits of a petition in an individual criminal case. The call for re-consideration of the petition for clemency set out Australia's substantial and significant interest on the facts of the case based on one ground for clemency enumerated in the relevant provision of the Singapore Constitution.

The Bar has received one response from the President of the Law Society of Singapore. That response is, in essence, that the Society is unable to act on the request contained in the Bar's letter.

LEGAL AID

In the last edition of the *Bar News* I referred to the Bar Council's attempts to increase the brief fees paid to barristers for Legal Aid work. Recently, the Bar Council was informed by Victoria Legal Aid ("VLA") that the Board of VLA had resolved to adopt a protocol for the indexation of fees paid to legal practitioners for state and criminal law legal aid services: "Annually at the commencement of the financial year the VLA Board will review state law and criminal law fees with a view to adjusting those fees by an indexation amount having regard to the financial position of the VLA and the operational demands on VLA at the time of the review. Following the review, if the Board determines to pay an indexation amount in a particular year, the Board shall determine the quantum of that amount."

The work of the specialised group of Bar Councillors charged with the task of increasing Legal Aid brief fees continues with the aim of increasing to a realistic level the brief fees paid to barristers.

LEGAL PROFESSION ACT 2004

The *Legal Profession Act 2004* ("the 2004 Act") will commence with effect from 12 December 2004. Representatives of the Bar Council have met with the Legal Services Commissioner, Ms Victoria Marles, to consult with her as to the extent of the Bar's role in the regulatory regime under the 2004 Act and, in particular, the status of rulings and guidance given to barristers by the Ethics Committee. It is hoped that these issues will be determined prior to the commencement of the 2004 Act.

PROPOSED RE-DEVELOPMENT OF THE SUPREME COURT

Recently, there has been publicity concerning the proposed re-development of the Supreme Court. One aspect of the proposal is the demolition of the old High Court Building in Little Bourke Street, a building of historical and architectural significance. To enable members to be fully informed on the proposed re-development, the Bar Council has arranged for the Department of Justice

to give a presentation on the proposals. At this stage, the Bar Council has not resolved on any particular position in relation to the proposals.

READERS' COURSE 25 YEARS

The Bar Readers' Course is celebrating its 25th anniversary this year. In 1980, under the Chairmanship of Hartog Berkeley QC, the Bar Council established the Readers' Course. Federal Court Chief Justice Michael Black was the foundation Chairman of the Readers' Course — refered to by some as "the Headmaster". Stephen Charles, Professor the Honourable George Hampel QC and retired County Court Judge Michael Kelly QC were all significantly involved in the establishment and early years of the course. David Ross QC designed the educational objectives and Rex Wild QC, now Director of Public Prosecutions in the Northern Territory, structured and co-ordinated the first course. The first Readers' Practice Course Committee consisted of retired Chief Justice Phillips, Master Michael Dowling QC and David Ross QC.

Paul Santamaria S.C. has completed two years as Chairman of the Readers' Course Committee and is now stepping down and has been replaced by Ian Hill QC. On behalf of the Bar, I thank Paul for his enormous contribution and for his work as Chairman of the Readers' Course Committee. There is an account of the Readers' Course Dinner held in the Essoign on 10 November 2005 in this issue of *Bar News*. At the dinner, Samuel Vavala, a public prosecutor, and Aaron Mane, a public defender, both from the Solomon Islands, presented the Bar with an intricately carved dark wooden sculpture depicting sea creatures central to life in the Solomons, which now has pride of place in the Neil Forsyth Room.

ADVOCACY TRAINING IN PAPUA NEW GUINEA 15 YEARS

This is the 15th year the Bench and Bar have conducted the Advocacy Skills Workshop at the Legal Training Institute of Papua New Guinea. This workshop is the advocacy component in the final examinations for admission to practice in Papua New Guinea. Those teaching in the course held in October 2005 were Paul Coghlan QC, Director of Public Prosecutions, Ian Hill QC, Her Honour Magistrate Lesley Fleming and barristers Geoffrey Steward, Julie Condon, Martin Grinberg and Ronald Gipp. On behalf of the Bar, I thank all of the people who provided their time and expertise in conducting the workshop. In addition, I also thank Barbara Walsh for her contribution in organising and assisting at the workshop. Barbara has done this work over the entire time that the workshops have been conducted and the Bar is grateful to her for her work over this long period of time.

SUCCESS FOR BOBSLED COACH WILL ALSTERGREN

Congratulations are due to Astrid Loch-Wilkinson and Kylie Reed who have claimed Australia's first bobsled medal, driving to silver in the opening Europa Cup event of the season in Igls, Austria. Congratulations are due to their coach, barrister Will Alstergren. Will is also the team captain and pilot for the bobsled "Aus 4" team currently competing in Europe in the qualifying races for the Winter Olympic Games in February 2006.

FINALLY

On my own behalf, and on behalf of the Bar Council, I extend best wishes to all members of the Bar for the vacation period.

Kate McMillan S.C.
Chairman

State-sanctioned Homicide the Antithesis of Every Value We Share with Other Nations

BY the time this edition goes to print, the fate — the ultimate fate — of an Australian citizen will have been decided by an Executive Government of another country. At the time of writing, the Government of Singapore has just set a date for the execution of Mr Nguyen Van Tuong and, while thousands around the nation and even across the globe stage demonstrations of their support for Mr Nguyen and for their abhorrence of the death penalty, state and federal governments make their final pleas for clemency.

It is surreal, in the extreme, to think that, in the 21st century, we could find ourselves in such a situation. Obviously it would be naïve to suggest that countless acts of brutality do not occur every day around the world. State-sanctioned homicide, however, is the antithesis of every value we share with other nations who, like Singapore, have inherited the tradition of the rule of law. I believe — and the Bracks Government believes — that the right to life is the most fundamental human right of all and that the authorisation — the imposition — of its calculated and detached termination is, quite simply, an abomination that must be reviled no matter what the circumstances, no matter the gravity of the offence.

As readers will appreciate all too keenly, Mr Nguyen's case makes the circumstances in which this penalty may be imposed even more horrifying. Having admitted to attempting to traffic a substantial quantity of heroin to Australia through Singapore, he has demonstrated significant remorse, pleaded guilty, cooperated at every stage with police and even agreed to testify against those on whose behalf he was transporting the

contraband. He has done what, in the tradition of most Commonwealth legal systems, would earn him a reduction in sentence. Yet the relevant law not only authorises but demands the imposition of death, demonstrating no flexibility or consideration for the individual and inevitably differing circumstances of each case.

This is an extreme example — and I wish it were only a theoretical one — of why the Bracks Government utterly rejects any form of mandatory sentencing. In flouting the discretion of Singapore's judiciary — in requiring a penalty, no matter what the situation — this law abdicates its primary responsibility to be the instrument of justice — yes, a device that implements punishment, but also one which offers an opportunity for redemption, for rehabilitation — one that is capable of leniency and compassion.

I know that various members of the Bar, and the Bar community as a whole, have been working tirelessly on behalf of Mr Nguyen. I'm also aware of the ongoing work of many at the Bar for others around the world who face a similar fate and, on behalf of the Government and the people of Victoria, I take this opportunity to express our appreciation. I know that, whatever the outcome of Mr Nguyen's case, Victorians share in your reverence for the value of Mr Nguyen's life, no matter what his actions; and condemn a penalty that is utterly disproportionate to any offence, let alone the offence to which Mr Nguyen has admitted — one that, ultimately, devalues the lives of us all.

This is why it is crucial that governments, and in particular the Federal Government, do everything within their power to restate our veneration for human rights and aggressively lobby other countries around the globe that apply a mandatory death penalty. Just as the efforts of individuals at the Bar and of organisations like Amnesty International became a global campaign to save the life of one man, so our collective efforts must begin to turn the tide against a form of punishment that needs to be relegated to the annals of history.

Our collective efforts must begin to turn the tide against a form of punishment that needs to be relegated to the annals of history.

Rob Hulls
Attorney-General

Bar Defence

Looking at the *Legal Profession Act 2004* from an insurance and risk management perspective

The LPLC has received a number of requests for advice as to any specific insurance or risk management implications for barristers arising from the *Legal Profession Act 2004* ("the Act") which takes effect on 12 December 2005, and repeals the *Legal Practice Act 1996* ("the old Act").

THIS article is a brief response to those questions. Key features of the Act are explained below.

- Creation of the Legal Services Board, to replace the Legal Practice Board as the peak regulatory body for the Victorian legal profession.
- Creation of the position of Legal Services Commissioner, to replace the Legal Ombudsman. The Legal Services Commissioner will now be the sole gateway for receiving civil complaints/ disputes (including costs disputes) and disciplinary complaints made against barristers. The Legal Services Commissioner may choose to refer such complaints to the Victorian Bar for investigation, though whether she does so, and the extent of any delegation, remains to be seen in practice once the Act commences. There are some powers the Commissioner cannot delegate (see section 6.3.12).

  A client may make such a complaint within six years after the conduct complained about allegedly occurred (see section 4.2.5). The Act now provides that they will first be investigated by the Commissioner, and suitable cases will be subjected to a mediation process. If the complaint cannot be resolved, the Commissioner will notify the parties, and the client then has 60 days to apply to VCAT (the Legal Profession Tribunal is now constituted as a division of VCAT) for the complaint to be heard. VCAT has the same range of powers to make orders as under the old Act, with the exception that the jurisdiction to make compensation orders is increased from $15,000 to $25,000.

  Note, that as the LPLC professional indemnity policy responds to civil complaints by a client alleging pecuniary loss caused by a barrister's negligence, such complaints should be notified immediately to the LPLC upon receipt.
- Facilitating interstate legal practice by granting locally admitted lawyers the designation of "Australian legal practitioner". The Act provides (see section 2.2.2) that a person must not engage in legal practice (a term which is not defined by the Act, and is therefore left to case law) unless the person is an Australian legal practitioner. This reservation of the right to practice is mirrored in corresponding laws in other States.
- New provisions relating to Incorporated Legal Practices and Multi-disciplinary Partnerships are of no relevance to barristers whose legal profession rules will continue to require that barristers engage in sole practice — refer to Victorian Bar Practice Rule 114.
- Provisions relating to legal practice generally are largely unchanged, with the provisions of the old Act restated, including the prohibitions against compul-sory clerking, compulsory chambers and compulsory robing. Co-advocacy and direct-access briefs are preserved, as well as trust account rules for approved Clerks, and the right of the Victorian Bar to make rules and standards for the conduct of legal practice (subject to approval by the Legal Services Board).
- Professional indemnity insurance through the LPLC is unchanged.
- Advocates immunity from liability for negligence is preserved (see section 7.2.11).
- Costs and disclosure obligations are the most significant area of change for barristers, with the new regime representing a general tightening of laws designed to improve disclosure and provide clients with even greater rights to withhold payment if disclosure obligations have not been observed, and to have costs reviewed.

There is no substitute for a full review of these laws by all barristers, and readers are referred to Part 3.4 of the Act, particularly sections 3.4.9–3.4.45 inclusive. In reading these sections, readers should note that a

barrister is regarded as a "law practice" for the purposes of the Act.

Some sections which are noteworthy from a "risk management" perspective (paraphrased for brevity) are:

- Section 3.4.10(2) — a barrister retained by a solicitor must disclose to the solicitor the basis on which the barrister's costs will be calculated; an estimate of the total legal costs, or range of estimates with an explanation of the major variables affecting the calculation; and details of billing intervals. This information is necessary to enable the solicitor to in turn comply with his/her obligation to make the necessary costs disclosure to the client.

  In the case of direct access briefs, the barrister's disclosure obligation is much broader than where the retainer is via a solicitor. Section 3.4.9 details all of the matters that must be disclosed to the client, and these generally repeat the provisions of the old Act. Exemptions from the disclosure obligation are set out in section 3.4.12 and are also similar to exemptions under the old Act — they include where the costs do not exceed $750; where the client has waived disclosure; where the client is a public company or a foreign company, or subsidiary of either; or where the client is another lawyer.
- Section 3.4.13 — This is a new obligation, and one which barristers should carefully note. Before settlement of litigious matters, a barrister must disclose to the client a reasonable estimate of the legal costs payable by the client if the matter is settled (including costs payable to the other party), and a reasonable estimate of any costs recovery available from another party. When the barrister is instructed by a solicitor (as will usually be the case), then the barrister does not have to make this disclosure if the solicitor has done so. However, the obligation would seem to be on the barrister to satisfy himself/herself that the instructing solicitor has in fact made the necessary disclosure — and if not so satisfied, the barrister could not say he/she has discharged his/her own disclosure obligation. As a matter of practicality, it would seem to require the barrister to call upon the solicitor to produce a copy of the solicitor's disclosure as part of the materials briefed.
- Section 3.4.17 — any failure to make a required disclosure under the Act relieves the client of the obligation to pay the legal costs rendered, and proceedings cannot be maintained for recovery of costs unless and until the Supreme Court Taxing Master has reviewed the bill. This section also provides that any failure to make a required disclosure may amount to unsatisfactory conduct or professional misconduct.
- Section 3.4.35 — all bill of costs must be accompanied by a written statement explaining the various avenues open to the client to dispute the costs charged.

As costs disputes can and do often escalate into a much larger professional negligence claim, barristers should think carefully when considering their options for recovering outstanding fees. The Act now contains more "consumer safeguards" than ever, and it would be advisable to seek independent and objective opinion from a professional colleague before initiating Court action.

Unreported Judgments

THERE is an increasing tendency, in Court and Tribunal proceedings, to cite unreported decisions obtained on the internet, without regard to Rule 85 of the Rules of Conduct. That Rule states:

> If a barrister intends to rely on an unreported decision then, before doing so, it should be brought to the attention of opposing counsel, and if necessary a copy supplied in sufficient time for proper consideration of it.

Depending on the circumstances, and the course of submissions, it can be unfair and embarrassing to not bring the decision to the attention of opposing counsel until the moment of reliance on it.

In addition, discretion should be exercised before using such reports in Court proceedings. In the Supreme Court of Victoria counsel are expected to adhere to Practice Note 4 of 1986 which, in essence, states:

- Leave should be first obtained to cite unreported judgments.
- Before leave is sought notice of intention to apply for leave must be given to the Court and to all parties in the proceedings.
- Counsel should give an assurance that the unreported judgment contains some statement of principle relevant to an issue in the matter before the Court that is either binding on the Court or entitled to special consideration and of which the substance, as distinct from mere choice of phraseology, is not to be found in any reported judgment.

In the Federal Court of Australia, counsel should adhere to Practice Note 19 issued by the Chief Justice on 14 August 2003. It states that a party who intends to cite from an unreported case must provide photocopies of the case for the use of the judge or judges and each party during argument.

The Committee recognises that different or other practical considerations may apply to State and Commonwealth administrative tribunals. But to the extent that such proceedings will involve the use of unreported Court cases, Rule 85 nevertheless applies.

Opening of the Legal Year

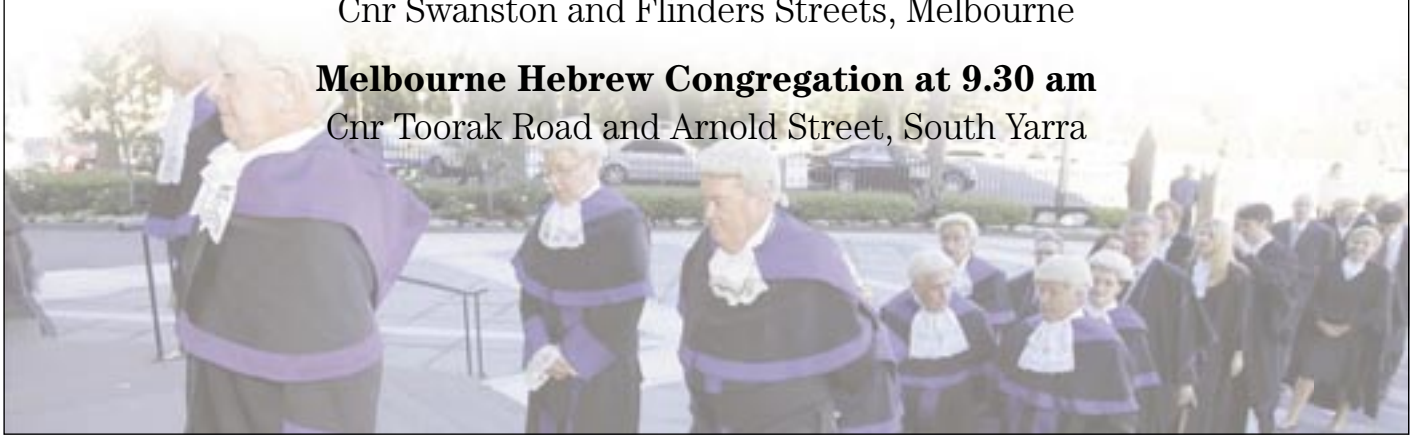
Monday 30 January 2006

The services for the Opening of the Legal Year are as follows:

St Patrick's Cathedral at 9 am (Red Mass)
Albert Street, East Melbourne

St Paul's Cathedral at 9.30 am
Cnr Swanston and Flinders Streets, Melbourne

Melbourne Hebrew Congregation at 9.30 am
Cnr Toorak Road and Arnold Street, South Yarra



A Special Sitting of the High C the Honourable Justice Susan

Courtroom 1, High Court of Australia, Canberra on Tuesday,

Attorney-General The Honourable Philip Ruddock MP

MAY it please the Court.

On behalf of the Government and the people of Australia, it is both an honour and a privilege to be present at this special sitting to welcome the Honourable Justice Susan Maree Crennan. I extend to Your Honour congratulations and best wishes on your appointment to the Bench of the highest court in our country.

Your Honour becomes the forty-fifth person to be appointed to this Court, the thirteenth Victorian and the second woman.

Your Honour's appointment is recognition of the intellect, skill, determination, and commitment to justice displayed throughout your career.

Born in Melbourne, Your Honour attended Our Lady of Mercy Convent in Heidelberg. Your former teachers speak highly of your intellectual, academic and leadership abilities — Your Honour was School Vice-Captain in your matriculation year.

They also speak warmly of Your Honour's sporting ability — particularly in netball — and the enthusiasm with which you took part in the school's social life — writing for the school magazine and attending St Patrick's Day parades.

Your Honour also revealed a wry sense of humour.

Court of Australia to Welcome Crennan

, 8 November 2005

Chief Justice Murray Gleeson presenting the oath of office to Justice Susan Crennan. Watched by former Justice Sir Daryl Dawson, High Court Chief Executive and Principal Registrar Chris Doogan (standing in front of the Bench), the Chief Justice's Associate Greg O'Mahoney, Chief Justice of the Federal Court Michael Black (partly obscured), and Justice Michael Kirby.

In 1962, in your last year at the school, tired of the very steep climb up Cape Street to the main gates, Your Honour and another friend placed an advertisement in one of the school magazines.

The advertisement read: "Wanted. One old bomb and driver to transport two travel-weary Matrics to school." Failing that, you asked if "some generous person" could install a ski-lift.

Your Honour, should not face the same problems here. I have been reliably informed that the lifts in this building have been recently refurbished ... Your Honour can travel express from the basement car park to your chambers on the ninth floor.

Since leaving school, Your Honour has had three distinct careers.

You began your first career — working as a trademark attorney ultimately qualifying as an Associate of the Institute of Patent Attorneys of Australia — after completing a Bachelor of Arts in English literature and language at the University of Melbourne.

You met your husband Michael during this time when you were both studying the compulsory subjects of Old Norse and Anglo-Saxon.

Your interest in English has continued. One colleague has said that you can become as impassioned about points of grammar as you can on the finer points of the law!

You then became a teacher in order to work part-time while your children were small.

Meanwhile, you also began studying law part-time — first at the University of Melbourne, then completing your degree at the University of Sydney.

Your Honour was also later to complete a postgraduate Diploma in History from the University of Melbourne in which you were awarded first class honours for a thesis on aspects of constitutional history.

Within weeks of completing your law degree, your third and final career change took place, when you were admitted to practice in February 1979.

From the beginning you kept very good company — reading with the present Commonwealth Solicitor-General, Dr David Bennett QC, who is also in court today.

Your Honour proved to be talented, energetic and extremely hard-working — also very fast on your feet. The Solicitor-General recalls an occasion when you attended six mentions across five courts in one morning!

At the end of that year, Your Honour returned to Melbourne with your family and began to practice at the Victorian Bar.

Your Honour built a successful broad-based practice, developing particular expertise in commercial, constitutional and intellectual property law.

You were regularly briefed by the Commonwealth, and a number of instrumentalities — as well as appearing for numerous other parties of different persuasions.

You also had the distinction of being led by successive Commonwealth Solicitors-General commencing with Sir Maurice Byers QC.

Your Honour appeared before this Court as a junior on a number of occasions, including for the Victorian Government in the landmark section 92 case *Cole* v *Whitfield*.

You have also written widely on a range of subjects — Your Honour's dissertation on "The commercial exploitation of personality" was widely recognised as an engaging and instructive account of Australia's approach to intellectual property.

In 1989, only 10 years after becoming a barrister, Your Honour was appointed a Queen's Counsel — a well-earned endorsement of your talents and ability.

Within a year, Your Honour was appointed senior counsel assisting the Royal Commission into the collapse of Tricontinental, a two billion dollar corporate disaster.

The issues were particularly complex and difficult. However, your hard work, intellectual and administrative ability — and your skills at cross-examination — were widely recognised.

One key figure in another corporate collapse from the same era likened being cross-examined by Your Honour to going up against some of the all time greats of Australian Rules Football.

"It's a bit like being picked for fullback against Gary Ablett," he said at the time.

The Royal Commission also provided one of the few occasions on which Your Honour has been professionally upstaged.

Your Honour was making your final submissions, with your back to the windows overlooking the Port of Melbourne.

As you spoke, opposing counsel, their instructing solicitors, and others in the commission, became increasingly distracted.

This was quite an unusual experience for Your Honour as Your Honour's submissions were normally received with at least polite attention.

But you persevered until finally even opposing counsel stood up to look out the windows.

At about this point, Your Honour turned and saw a gigantic fire blazing on Coode Island.

A lightning-strike had ignited more than eight million litres of toxic chemicals, forcing the evacuation of more than 250 people from the nearby factories and ships.

Total damage was estimated at about $20 million. It had taken an event of this magnitude to upstage Your Honour!

Just under two years ago, in recognition of your outstanding ability, Your Honour was appointed to the Federal Court where you have served with distinction. The leadership and community spirit you first demonstrated at school has also continued throughout your professional life.

Your Honour has served on numerous legal and community-based committees.

In 1993, you were elected Chairman of the Victorian Bar Council — the first woman to chair any Bar Council in Australia.

One of your most notable achievements was to establish a formal pro bono scheme, with the cooperation of the Law Institute, and the Victorian Government.

The following year, Your Honour became the first woman President of the Australian Bar Association. You have also served on the Human Rights and Equal Opportunity Commission; and on the board of the Victorian Legal Aid Commission.

Your Honour has maintained close ties with the University of Melbourne.

You have served as a member of its Law School Foundation, and you have championed a scholarship scheme for Indigenous people.

Despite the demands of a legal career, you and your husband, Michael, have raised three children — Daniel, Brigid and Kathleen — and share a love of travel, music, art and literature.

I know Michael — also a distinguished Victorian silk — and your family, including your granddaughter, Hannah, are here with you today.

They must be justly proud of your achievements.

I understand that your mother, Marie Walsh, who unfortunately passed away only recently, knew of your appointment to the High Court and was very proud.

I know that Your Honour's experience, expertise, wisdom and compassion will ensure that you carry out your new duties with distinction.

My belief is endorsed by one who has known you for more than 45-years — Sister Bonaventure, now known as Sister Mary — one of your former school teachers at Our Lady of Mercy Convent in Heidelberg.

Sister Mary set and marked the exam which won you a scholarship to the school.

She said your success had not surprised her.

Your Honour was, she said only a few days ago, "an outstanding student, but she also had a strong sense of justice and would champion a cause. If something needed to be put right, she would put it right to the best of her ability".

On behalf of the Government and the people of Australia, I extend to Your Honour warmest congratulations on Your appointment and very best wishes for a long and satisfying term of office.

May it please the Court.

Kate McMillan S.C., Chairman, Victorian Bar Council

MAY it please the Court.

It is my privilege to appear today on behalf of the Victorian Bar to welcome Your Honour on the occasion of your appointment as a Justice of the High Court of Australia.

The president of the Law Institute of Victoria, Ms Victoria Strong, is here today representing the solicitors of Victoria.

Our collective Victorian hearts are bursting with pride on your elevation to this Court.

We, in Victoria, are very proud that we now have two Victorians as justices of this Court. Two justices who reflect the essential qualities of the Victorian Bar — both Justice Hayne and you have been fearless and forthright advocates who have demonstrated a willingness to do the hard work and perform all manner of tasks diligently and without fanfare.

The Victorian Bar expresses its gratitude to both of you for your support of the Bar when at the Bar and, following appointment to the Bench, for your continuing support of the Bar in its activities.

Your Honour's considerable qualities and talents have been chronicled by others today and in the media following the announcement of your appointment to this Court.

However, not all joined in the general celebration of Your Honour's appointment. Your granddaughter, Hannah, a regular weekend visitor to Your Honour, had just one question: "If nanna's going to be working in Canberra, what is happening about our Sundays?"

The Age newspaper described you as a renaissance woman. Your local paper — the *Progress Leader* — community newspaper of the year — reported "Susan Crennan — local grandmother — appointed to the High Court".

The description of you as "renaissance woman" was coined by your friend of long standing, collegeaue and fellow judge, Justice Alan Goldberg at a dinner hosted by the Victorian Bar on 29 August 2003. On that occasion, you and others of the Victorian Bar were annointed "living legends" of the Bar. Justice Goldberg described you on that occasion as "very much a renaissance woman with a passion for English literature and Old Norse".

I suspect you are the only officially recognised and designated living legend on this Bench today.

In addition to your service referred to by the earlier speakers Your Honour has served on the Victorian Legal Practice Board, the Victoria Law Foundation and as a member of the Victorian Attorney-

General's Law Reform Council. You have also chaired the independent compensation panel of the Catholic Archdiocese of Melbourne.

Beyond the law, Your Honour has been a member of the Royal Women's Hospital ethics committee, a board member of Australian Book Review and a member of the council of the University of Melbourne.

In your non legal life, you are interested in literature, history and music especially for voice, piano, violin and cello. You also have strong interests in architecture and travel, and you are a keen cook.

You are an avid gardener, or at least a very good overseer of Michael and others who do the hard physical work, and the proud owner of a splendid garden designed by the renowned Edna Walling in the 1920s.

If further proof of your qualities as a renaissance woman were needed, one would merely refer one's audience to your postgraduate thesis in history — *Transplanted Chartist Spirit: Achieving Manhood Suffrage in Victoria: the Turning Point of 1854*. Your thesis earned you a Diploma in History in 2002 from the University of Melbourne (first class honours).

If further proof of your qualities as a grandmother were needed, one would merely refer one's audience to your most recent visit to your neighbours' adoring two-year-old, little Jimmy O'Meara. In order to attract your attention whilst you were telling his parents a story, Jimmy was climbing all over you and finally in desperation he gave you a toddler's whack on the face. With Your Honour's well-earned reputation for patience, you dealt with the issue fittingly by continuing on with your story, remaining unruffled and unperturbed.

Of course renaissance women are not always known for their mechanical aptitude — we have all read the reports about Your Honour's difficulties when you accidently leant on an emergency stop button and shut done the entire electricity plant. We note the Attorney-General's comments about the recent refurbishment of the lifts of the High Court. This may be a courteous way of saying that the building has been made "Crennan safe".

Your Honour is very proud of your family. No matter how busy you are, both you and your husband Michael regularly see a lot of your children and granddaughter, Hannah. Your son, Daniel, is at the Bar. Your daughter, Brigid, is a writer and historian. Your other daughter, Kathleen is an undergraduate studying arts/law at the University of Melbourne.

A welcome to any court is an important occasion and of enormous significance.

The importance with which we regard today's welcome is best demonstrated by acknowledging the efforts of so many of your colleagues and friends who have made the journey to Canberra to join in today's welcome for you.

The Victorian Bar and the Victorian solicitors wish Your Honour a long, distinguished and satisfying career as a judge of this honourable Court.

For Hannah's sake, we hope that you will be allowed to take more than the occasional Sunday off.

May it please the Court.

Her Honour Susan Crennan responds

CHIEF Justice, your Honours, Mr Attorney, Mr North, Mr Martin and Ms McMillan, ladies and gentlemen, I thank you all for coming here today and thank the speakers for the generosity of their words of welcome and the expressions of goodwill from those they represent.

I am honoured by the presence here today of Justice McHugh.

The Court is honoured today, as I am, by the presence of Senator Calvert, the President of the Senate, Mr Hawker, the Speaker of the House of Representatives, Senator Ellison, the Minister for Justice and Customs, Sir Anthony Mason, Sir Gerard Brennan and Sir Daryl Dawson, the Chief Justices of the Federal Court, the Family Court and the Supreme Courts of the States and of the Australian Capital Territory, the Solicitors-General for the Commonwealth, and the States of New South Wales, South Australia, Victoria and Queensland, and the leaders of many Bar associations and law societies.

I thank family members, friends, judicial colleagues and former professional colleagues from the Bars for their attendance. It means a great deal to me that my two brothers and my three sisters have travelled here today not least because only they know fully the great debt I owe to our late parents. It is a great pleasure to have my husband Michael, my son, Daniel with his fiancée Laura, my daughter Brigid with her husband Paul, my daughter Kathleen, and my granddaughter Hannah, all here today.

When I was sworn in as a judge of the Federal Court of Australia, I recorded my many debts to others. I mentioned my gratitude to teachers in the different disciplines which shaped my life and mind and to professional colleagues, including great preceptors of the law, all of whom inspired and encouraged me. Without renaming them, I again acknowledge my indebtedness to them.

With the support of my colleagues who have all given me a most cordial welcome and of the profession, and encouraged by the trust and goodwill expressed today, I look forward to discharging my responsibilities as the 45th justice appointed to this court.

The last 16 years during which I was in practice at the Bar were spent on the 17th Floor of Owen Dixon West Chambers. It was home to two great leaders of the Victorian Bar in the common law mould — John Barnard QC and John Hedigan QC, the latter now a retired judge of the Supreme Court of Victoria. On the floor above was a great exemplar of the commercial and equity practitioner — S.E.K. Hulme QC. In the building next door there were two of the great exponents of general practice with wide experience of juries — the late Neil McPhee QC and John Winneke QC, the recently retired, inaugural President of the Court of Appeal of Victoria. There are others I could have named but for the fact they remain in practice or are serving judges. As barristers those mentioned all played a vital

role in the administration of justice. They inherited and were masters of the high techniques of the common law. They passed these on. No advocate of any consequence at the Victorian Bar during their time was oblivious to their powers or indifferent to their example.

The period from 3 February 2004 until 31 October last, which I spent as a judge of the Federal Court, has left me with an indelible impression of the differing claims of trial work and appellate work and the need for enough time for reflection when undertaking both.

Sir Nigel Bowen charted a distinguished course for the Federal Court, which has been maintained by the hard work and high calibre of its judges who now deal with a much expanded volume of work. My working relationships with all the judges were extremely cordial and constructive and I learnt a great deal from them about the tasks of judgment writing and the efficient management of a judge's workload.

I particularly record my gratitude to my former Chief Justice, Michael Black, not only for the support he gave his judges, but also for his many kindnesses.

The work of this Court is, of course, very different. This Court is an integral part of the life of the nation, with the responsibility of maintaining the Constitution and interpreting it in accordance with what Alfred Deakin called "the needs of time".

The Court is also the final court of appeal in criminal and civil matters and determines disputes between citizens and government and between governments within our federal system. Because judicial power must be exercised in accordance with judicial process it is the final protector of the rights of citizens. It is impossible not to feel the weight of the responsibilities involved.

Alfred Deakin introduced the Judiciary Bill into the Parliament on 18 March 1902 with a perfect sense of the distribution of sovereignty under the Constitution and within our democracy. He said of the Constitution:

> . . . the statute stands . . . but the nation lives, grows and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present is the judiciary of the High Court of Australia.

He compared changes to the Constitution which could be effected by a referendum with developments by this Court and he said:

> . . . the court moves by gradual, often indirect, cautious, well considered steps that enable the past to join the future, without undue collision and strife in the present.

Half a century later, on 7 May 1952, on the occasion of first presiding as Chief Justice of this Court in Melbourne, Sir Owen Dixon said the High Court had always administered the law "as a living instrument not as an abstract study". When I first took judicial office I remarked that a living instrument has a past, a present and a future and encompasses both continuity and change.

Now, over a full century later, which has seen the abolition of appeals to the Privy Council in 1986, the High Court has had the ultimate responsibility for the development of Australian common law matching a conception of Australia's history and nationhood in which all Australians can expect justice according to law.

Over time, particularly the last two decades, there have been many changes in the practices of the Court, the work which comes before it and the variety of the legal issues of public importance in respect of which special leave is granted. Those developments have occurred against a background of significant social change and major shifts in public and private values.

But the images to which I have referred of a judiciary which transfuses "fresh blood" into our polity and of "the law as a living instrument" conjure up the human qualities needed for the impartial dispensation of justice according to law. It has been the high reputation and abilities of the judges of this Court, which have commanded the confidence of the Australian community, which in turn is so essential to the authority of the Court and to the maintenance of our civil society.

I am conscious of such matters and the responsibilities they entail, and, in that connection, I am especially conscious of the loss to the Court of my predecessor, Justice McHugh. He had a commanding presence and a powerful voice on the Court. He always showed an acute understanding of the way history illuminated the principles of the law and could guide the resolution of a legal problem. He made a great and enduring contribution to the development of the common law.

With the support of my colleagues who have all given me a most cordial welcome and of the profession, and encouraged by the trust and goodwill expressed today, I look forward to discharging my responsibilities as the 45th justice appointed to this court.

Victorian Bar Superannuation Fund

Annual General Meeting held on Wednesday 16 November 2005

Philip Kennon QC, Chairman

I have described Barfund's financial year results as satisfactory, for three basic reasons.

First, on an after tax, manager and administration fees basis, the result of 12.1 per cent for the balanced investment option (which holds 75 per cent of members' funds) is in line with the Mercer Median Manager (MMM).

Secondly, over the longer term, especially five years, Barfund has outperformed the MMM.

Thirdly, and perhaps this is the most satisfactory point, Barfund's balanced option has not had a negative result since its inception in December 2002, unlike many comparable funds over the same period. So Barfund's performance continues to hold true to its fundamental objective, which is that members should not lose their money.

Accordingly, Barfund's two core Australian equity managers 452 Capital and Maple–Brown Abbott are value-style managers who have sold down equities and now hold higher balances in cash and other conservative assets than the average manager. This repositioning should place the fund in a sound position if there is a retreat in equity markets going forward.

This solid and steady performance over the longer term may explain why about 75 per cent of members have chosen the balanced option.

However, Barfund does offer three investment choices — capital stable, balanced and high growth — each having a different asset mix, volatility and risk.

A higher growth option may become more attractive to members with the advent of the allocated pension.

A member who on retirement takes an allocated pension may now be looking at a much longer investment horizon in relation to equities than was often the case, for example, where a member took out a lump sum on retirement. In this new allocated pension environment the greater volatility of the higher growth option may be less of an issue than it has been in the past.

Philip Kennon QC.

With these considerations in mind, Barfund is considering the introduction of a fourth member investment choice (MIC) option. This option would invest 100 per cent of its assets in Australian equities through listed investment companies (LICs) at a low management cost. The track record of the quality LICs has been very good over long periods of time. These LICs basically invest in leading Australian stocks which pay generous fully franked dividends. There is no exposure to exchange rate risk as is the case with international equities.

Barfund would welcome any feedback from members as to whether this proposal would be attractive to them.

I must point out that this general discussion this evening should in no way be construed as investment advice. Members should seek advice from a licensed financial investment adviser on all investment matters including which investment option is appropriate for them.

On 30 May this year Barfund, assisted by its assets consultants, Jana Investment Advisers, conducted a well attended seminar. A wide range of superannuation topics was covered, including an investment market update and the important 2005 Budget changes to superannuation.

Again, the Directors thank David Holston and Greg Clerk of Jana Investment Advisers for their tireless contribution to the affairs of Barfund.

Again, I thank our dedicated secretary, John Ames, and my fellow directors Jonathan Beach QC (Deputy Chairman), Melanie Sloss S.C., Ross Macaw QC and Paul Cosgrave for their great work and sound judgment.

The 2005/2006 Victorian Bar C

Council

1st Row Seated (L-R):
Mr Jack Fajgenbaum QC
Mr Michael Shand QC
(Senior Vice-Chairman)
Ms Kate McMillan S.C.
(Chairman),
Mr Mark Dreyfus QC
(Junior Vice-Chairman)
Mr Paul Lacava S.C.

2nd Row Seated (L-R):
Mr Philip Dunn QC
Mr Cahal Fairfield
Ms Liza Powderly
Mr Iain Jones
Ms Kerri Judd
Dr David Neal
Standing (L-R):
Mr Michael Colbran QC
Ms Rachel Doyle
Mr Peter Riordan S.C.
Mr Anthony Burns
Mr John Digby QC
Mr William Alstergren
Ms Fiona McLeod S.C.
Mr Justin Hannebery
(Assistant Honorary Treasurer)
Mr Charles Shaw
Ms Kate Anderson
(Honorary Secretary)

Absent:
Mr David Beach S.C.
(Honorary Treasurer)
Ms Penny Neskovcin
(Assistant Honorary Secretary)

Criminal Bar Association Farewells Judge Kelly, Former Judge of the County Court

Speech by Sir Daryl Dawson

WILLIAM Michael Raymond Kelly. Most of us have only three names, but Kelly, appropriately, has four. Appropriately, because His Honour has never been an inconspicuous person. Many of you here tonight have only known Kelly as a judge — a very distinguished judge of the County Court of Victoria. But some of us have known him for a very much longer time than that. And he's always been a man with considerable flair and panache.

If nothing else, his dress has always marked him out in a profession not noted for its reticence. If a black jacket and waistcoat, striped trousers and a Homburg or Bowler hat doesn't invite attention, then a monocle and a watch-chain with a large Hunter at its end certainly does. It can be an experience to walk down a city street with Kelly and realize that all eyes are turning in your direction. And the waiter and the other diners in a restaurant are invariably galvanized when he flourishes his monocle before proceeding to read the menu.

Sir Daryl Dawson.

Kelly has always maintained that he dresses in this way because it's economical and saves him from thinking about what he has to wear each day. He can buy two or more pairs of trousers for every jacket. But the real reason, as he confessed one day, is that in this world, which is grey and dreary to many, he feels a duty to add a little colour to brighten their day.

Of course, Michael can even manage to create an effect unconsciously, as he did on the day on which he caught fire. He was appearing in General Sessions before the late Judge Cussen and a jury. In those days the County Court sat in the Supreme Court building. During the luncheon adjournment Kelly was smoking his pipe. Before going back into court, he shoved it into his pocket. Some way into

a no doubt very skilful cross examination of a witness, he noticed that the jury were giggling and nudging one another. The reason was revealed when the old reservist policeman, who manned the door, tapped him on the shoulder and whispered in his ear, "Mr Kelly, you're on fire". Kelly stopped his cross examination and said to the Judge, "Your Honour, I appear to have set myself on fire". "Well", replied His Honour calmly, "You'd better go and put yourself out, Mr Kelly". That's what Kelly did, or thought he did. He came back into court and resumed his cross-examination. Within minutes there was more merriment in the jury box. Kelly was on fire again. This time he adjourned to the corridor and put himself out with the water jug from the bar table.

Of course, Kelly carried the incident off with great urbanity. He was a born barrister. Perhaps he inherited some of his aptitude from his father, Sir Raymond Kelly, who was the Chief Judge of the Commonwealth Court of Conciliation and Arbitration. But the main thing that he seems to have inherited from that lineage was a determination not to practise in the industrial jurisdiction.

Kelly began his practice at the Bar in 1958 by appearing in Petty Sessions. Most of us did then. They were happy days. Work was relatively plentiful and the sum total of those practising at the Bar was less than 200. About half a dozen came to the Bar each year. We all knew one another very well. The work in Petty Sessions was not onerous, but it kept you in touch with the realities of life. You developed your skills in advocacy at a basic level and your mistakes had no very serious consequences. And you had plenty of time hanging around the courts or afterwards in Gibby's Coffee Lounge to relish your successes or lament your failures.

Kelly's practice developed and he moved out of Petty Sessions. Crime began to overtake civil work. He began by prosecuting for the Crown and briefs from that source were supplemented by others from the Public Solicitor. In the end, Kelly was doing mainly, although never exclusively, criminal work.

Of course, Kelly had a life apart from the Bar. He has always been an instinctive bon viveur. Life at the Bar in the sixties provided plenty of scope for good food, good wine and good company. I don't know how many nights Kelly never actually made it home to Kew. This became easier when he acquired a motor car. Not, of course, any old motor car, but a very large, pre-war Citroën. It was powerful and known in France as the Bandit's Delight and in England as the Big Six. It was the car that Maigret drove and all Citroëns of that model in Europe were acquired for use by the Gestapo during the second world war. It was a car that suited Kelly.

At about this time Kelly was about to enter a wonderful marriage and regularise his social life. Its beginnings were, however, not altogether auspicious. The happy couple set out in the Citroën for their honeymoon. On their way back from the Hawkesbury River they got as far as Seymour when the Citroën started to throw a con-rod. Kelly managed to find a service station and there contemplated the heap of white metal which he scooped out of the sump. Now it was not easy to have major repairs done to a veteran Citroën Big Six in a place like Seymour. The couple found an indifferent motel opposite the service station, but Seymour in winter was not exactly a vibrant place to end your honeymoon in a befitting manner. It was winter, raining and the summer dust had turned to mud.

After four days, in need of comfort, Kelly repaired with his bride, Michelle, to the nearest pub. That turned out to be fortunate because members of the Homicide Squad were in Seymour for a committal and were at the pub. On learning of Kelly's plight, they offered him a lift home in the back of the squad car. Kelly hesitated to accept such an ignominious return to Melbourne. Michelle didn't hesitate for one minute — she accepted for both of them with alacrity — and the couple ended their honeymoon in the back of a police car driven by the homicide squad.

Kelly has always enjoyed the criminal law, both in its practical and theoretical aspects. In practice, he was fascinated by the challenges which it presents to an advocate and by the insight it provides into the human condition, often starkly revealed in the criminal courts.

In the early 1970s, shortly after I took silk, Kelly reminded me of the duty of silks to accept briefs from the Public Solicitor. He prevailed on the Public Solicitor to brief me with himself as junior to appear for a man, aptly named Lawless, who was charged with murder. "It'll be very easy", said Kelly, "There are only two bits of evidence against him: his girlfriend

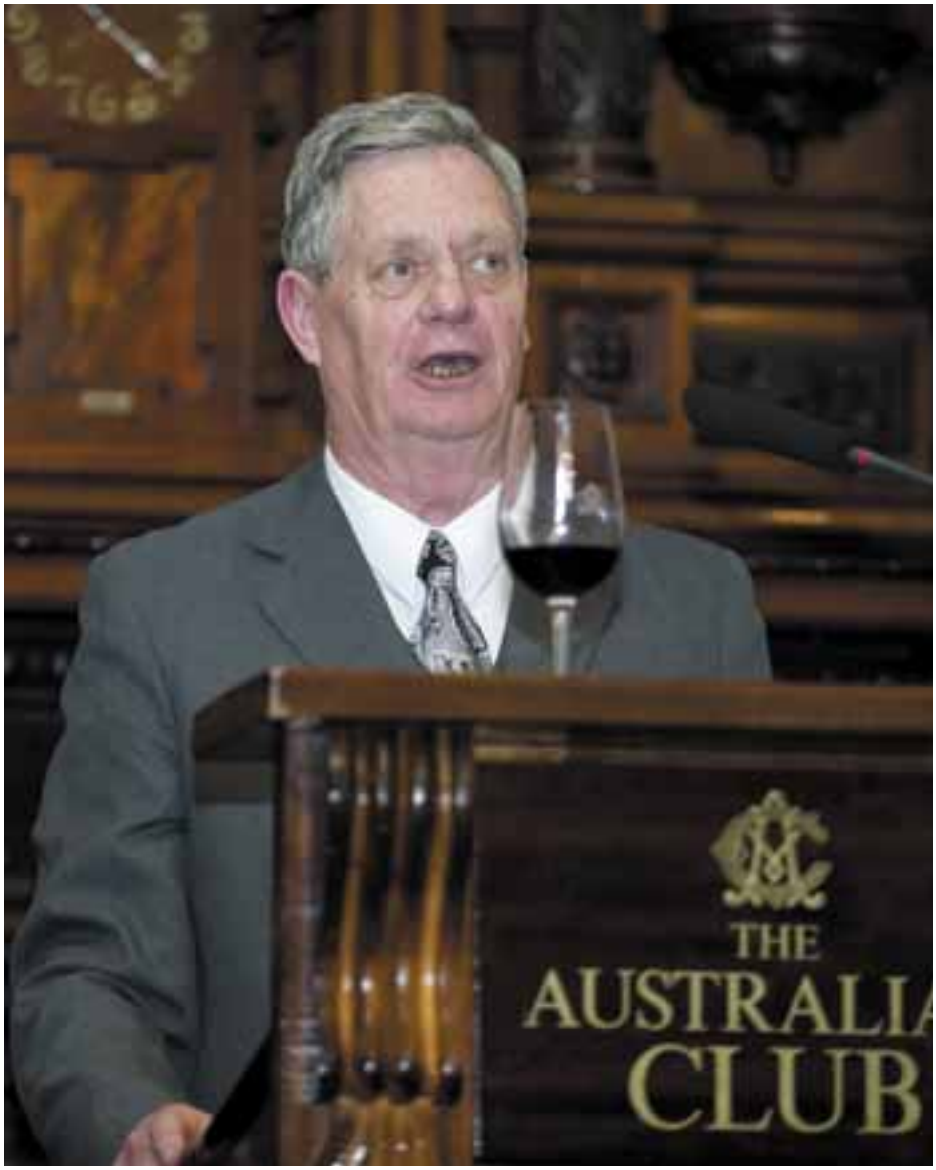
who says that she saws him shoot the deceased and a cigarette packet with Lawless's fingerprint on it, said to have been found at the scene of the crime." "You get rid of the girl", said Kelly, "And I'll get rid of the fingerprint".

Now it may seem strange in these days of sophisticated techniques such as DNA testing, but at that time it was not known, although it was suspected, that a fingerprint could be transferred from one object to another. One day, as we were preparing for the trial, I wandered into Kelly's chambers to find him leaping about in delight saying, "I've done it! I've done it!". He had indeed done it. He'd transferred his fingerprint from one glass to another with cellotape and was doing it again and again.

In the end, our efforts were to no avail because Lawless dispensed with our services at the close of the Crown case and proceeded to convict himself by calling a string of unsuitable witnesses, including one on a charge of murder himself. We were briefed on the appeal, but were again sacked, only to return in response to entreaties from the cells by Lawless "on his bended knees". This time we returned by arrangement with the Chief Justice on condition that Lawless remained in the cells for the remainder of the hearing. Thus Kelly and I have the dubious distinction of having appeared for the last man in Victoria to have been sentenced to death. The sentence was, of course, commuted. After his release from prison, Lawless suffered a stroke which acted as a sort of frontal lobotomy. He is now a gentle character occupied in doing good works in the community.

In 1977 Kelly himself took silk. This was seen then as a brave move for one who practiced in the criminal law. But it wasn't really so for Kelly. By this time he'd developed a healthy appellate practice and there wasn't much competition at that level. His appellate work flourished and led to a number of memorable appearances in the High Court.

One of them was in *Ward* v *The Queen* in which I appeared for the Crown as the Solicitor-General. Kelly appeared for the Appellant who had been convicted of murder. The murder had taken place on the Murray River down below the bank in the Victorian side. Kelly successfully argued that the whole of the River Murray between the banks was in New South Wales and that the Victorian court had not had jurisdiction, thus rendering me the first Solicitor-General in history to have lost territory to New South Wales.



Judge Michael Kelly.

Another case was O'Connor's Case which, as you all know, concerned the defense of intoxication at common law. Again I appeared for the Crown. Kelly won that appeal too, but before the case began Kelly had accepted an offer of appointment to the County Court. That was not generally known. The case was heard in Sydney and Kelly and I had a standing arrangement that when a case finished in Sydney, we'd go out and have a really good dinner. After O'Connor's case was over, I was making final arrangements with Kelly outside the court in Darlinghurst when someone came and summoned him to the Chief Justice's chambers. I guessed that Sir Garfield Barwick had heard from somewhere about Kelly's pending appointment to the County Court and when Kelly came back I said to him, "He tried to nobble you, didn't he?" Barwick had done just that. He tried to dissuade Kelly from wasting his outstanding talents as an advocate by going on to the Bench. Fortunately, Kelly was unpersuaded and so began a long and distinguished career as a County Court Judge.

Kelly has asserted that it was difficulty with provisional tax, that dictated his decision to join the Court, but in fact life on the County Court greatly appealed to him. He had always enjoyed good company and was the best of company himself. There was a good deal more fellowship in the County Court than in other courts. He could indulge his interest in the criminal law without having to justify his existence by writing interminable judgments. And

Colin Lovitt QC.

there was a security in being a judge of that court which would enable him to enjoy his family life in a way that practice as a criminal barrister, however successful, would never enable him to do. The result was fortunate indeed for this State. The County Court acquired a judge of the highest calibre with a deep knowledge of the criminal law, both substantive and procedural.

Kelly didn't relinquish his individuality as a judge. He remains a memorable member of the legal profession notwithstanding a quarter of a century on the Bench. But he was a careful and accurate judge. True it is that Kelly has an intuitive grasp of the law, particularly the criminal law, but that intuition is born of great scholarship. It involves a capacity to strip a doctrine to its fundamentals before applying it to the circumstances at hand.

Inevitably, his fellow judges, particularly new judges, have over the years, sought Kelly's advice in sorting out the problems which they inevitably encounter. Kelly has given that advice freely — if sometimes at length — and by dint of learning and experience it has invariably been correct. He has, however, been capable on occasions of tilting at the Court of Criminal Appeal with a provocative ruling, but only where it would not harm an accused. It may be that these were the only occasions on which he was overturned by that court.

The individuality which Kelly retained on the Bench may have tried those given the responsibility of administering the Court. Over time, the Court has become larger and its administration has become more complex. It has become necessary to put new procedures in place. Kelly regarded many of these innovations as a threat to his independence, which he took very seriously indeed. He hated what he thought to be the new managerialism. Computerism as an end in itself, particularly the internal website, was an anathema to him. But he was forced to succumb and was even forced, in the end, to give up smoking cigars in chambers, but only after threatening to join, fully robed, the gaggle of smokers outside the building. Notwithstanding the strains which Kelly must have placed on the ever-patient Chief Judge, he was inevitably forgiven because of the enormous contribution which he made to the work of the Court.

Notwithstanding an undeniably strong personality, Kelly was, as I've written elsewhere, probably a lenient judge. He had a toleration for the miscreants appearing in his court and even a liking for many of them. He believed that it was his duty to keep people out of gaol if possible. And despite the occasional expostulation about the law, the profession or things in general, he treated counsel with tact, understanding and humanity. The guidance which he gave was unobtrusive and sympathetic. I know that counsel enjoyed appearing in his court and the presence of so many here tonight is testament to the respect and affection with which he is regarded by the profession.

This dinner is to mark the retirement of one of the great judges of the County Court. If that were all that it was, it would be an occasion to regret the loss to that Court of the immense strengths of His Honour Judge Kelly. But this dinner also serves to mark the appointment as from next year of William Michael Raymond Kelly as an Acting Judge of the County Court of Victoria. It's an occasion, therefore, to reverse the old salutation and to say instead of *Ave atque Vale*, *Vale atque Ave*.

Ross Ray QC Farewelled as Bar Council Chairman

Thursday 27 October 2005 at The Essoign

DISTINGUISHED guests, guests and fellow members of the Bar — on behalf of the Bar Council, I welcome you all to this special dinner in honour of: the retiring Chairman, Ross Ray QC; retiring members of the Bar Council; and members of the Bar who have given their services to the Bar over the past year and, in many cases, over many years.

I particularly welcome the Honourable Justice Ken Hayne and the Shadow Attorney-General, Andrew McIntosh. Both lead extremely busy working lives. Justice Hayne's lifestyle has been described as similar to working on an oil rig — two weeks on and two weeks off. Andrew's lifestyle may not be quite like that. In any event, we are grateful that both of you have made the time to come here tonight.

Traditionally, the Bar holds a dinner for the retiring Chairman and the retiring Bar Councillors. They are the members who are on the public record as having made a contribution to the work of the Bar. Traditionally, we have also included other members who have assisted the Bar during the past year.

Kate McMillan S.C.

In 2000, when I became Chairman of the Ethics Committee, I had cause to meet with Frank Costigan QC, professionally that is. We got talking, as you do, and one of the things we talked about was the enormous amount of work done by Bar members on a voluntary basis that largely goes unrecognised. It is unrecognised because the work is done; done without a fuss; and it is something our members expect to be done. By and large, the members do not mind doing the work, but they do not often get any thanks for it.

So, tonight we have included in our thank you's the members, whom Philip Kennon QC has described as the "unsung heroes" of the Bar. Tonight's guests include retired members of the Ethics Committee; members who have assisted with advice and submissions for the Bar; the Trustees of Law Aid; the Directors of the Bar Super Fund; the members of the Board of Examiners; the Directors of BCL; Gordon Ritter QC, representing the Library Committee; Neil Young QC and Michelle Gordon S.C., representing the CLE Committee; the Editors of the *Bar News*; and Colin Lovitt QC, representing The Essoign. Asked, but not able to attend, were: Lex Lasry QC, Chairman of the Criminal Bar Association; Paul Santamaria S.C., Chairman of the Readers' Course Committee; David Denton S.C., retired Chairman of the Commercial Bar Association; Colin Golvan S.C., Chairman of the Aboriginal Law Students Mentoring Committee; and Alex Richards QC, Chair of the EBTL Committee.

Let me deal firstly with those members who are the public face of the Bar — the elected Bar Councillors.

At the top of the list is the former Chairman of the Bar, Ross Ray QC. Ross was a member of the Bar Council for 13 consecutive years — always in the senior category. For the first five years, he was a junior. He took silk in the course of the fifth year. His 13 consecutive years on the Bar Council says a lot about his persistence, and the regard in which Ross was held by the members.

In his first week as Chairman, I did not hear from Ross at all. However, Anna

Whitney called me to say that I was Acting Chairman, and that Ross had gone to Mildura to run a case. A week later, I answered the telephone. The display showed a number I did not recognise, but a vaguely familiar voice said "The Eagle has landed". It was Ross! And so, as the year unfolded, a pattern emerged — from time to time we found the self-described "Eagle" would take flight, then return, collect his flight plans for his Chairmanship; and on we pressed.

Ross's major personal contribution and lasting legacy is in legal education and training. He was a member of the Readers' Course Committee for 15 years and he chaired that committee, and the Legal Education and Training Committee, for six years.

Ross went to Papua New Guinea with the Bench and Bar advocacy training team on six occasions: the first four visits in 1990–93, under the leadership of the late Robert Kent, who established the program; then again in 2002 and 2003, as leader of the team.

Other retiring members of Council are: Michael Crennan S.C., who served for three years, chaired the Counsel Committee for those years, worked on major legal submissions, and was a member of the Essoign Advisory Panel; Michelle Quigley S.C., who served for three years, served as Assistant Honorary Treasurer for two of those years, and was one half of the Charitable and Sporting Donations Committee; Chris Townshend, who served for a year; Anne Duggan, who served for three years; Paul Connor, who served for two years, and who is continuing to serve as a Director of Barristers Chambers Limited; and Kim Knights, who served for two years. All served the Bar and the Council well, and we thank them for their commitment.

In addition to the retiring Bar Councillors, there is a well deserved thank you due to Kate Anderson and Penny Nesckovcin for their ongoing work as Honorary Secretary and Assistant Honorary Secretary of the Bar Council. The Bar is most fortunate that Kate and Penny have agreed to continue their appointments. The work they do is time-consuming and thankless. These two undertake their work diligently, patiently and efficiently. We are extremely lucky to have them and the Bar is very grateful to them.

The unsung heroes: first, the members of the Ethics Committee. The work of the Ethics Committee is an enormous commitment by the members of that committee. Paul Lacava S.C. is now the Chairman of the committee and has entered his ninth year on the committee. Also here tonight on the Ethics Committee are Bill Lally QC, Michelle Gordon S.C., and Anne Duggan. The work that this committee does is enormous and constant — the members are available 24 hours seven days a week.

Four members of the Ethics Committee retired in October 2004: Mark Dreyfus QC, Martin Bartfeld QC and Gerry Lewis S.C. — each having served for four years — and Neil Clelland S.C., who served for two years.

I mentioned earlier that I had cause to consult with Frank Costigan QC. The Bar owes Frank a great debt for all of the work he has done over his long career at the Bar. He is a valued elder statesman of the Bar. One of the reasons he is here tonight is to thank him, and acknowledge his per-

Margaret and Colin Lovitt QC.

Lisa Powderley, Daniel Harrison, Neil Clelland S.C., Rachel Doyle and Daniel Flood.

Tony and Deborah Burns.

Jane and Peter Riordan and Ian Jones.

Will Summons, Sara Dennis and Justin Hannebery.

John Noonan S.C., Ross Ray QC, Mara Ray and Marg Noonan.

Kate McMillan S.C., Gerry Nash QC and Gail Owen.

Charles Shaw, Kate Anderson, Penny Neskovcin and Cahal Fairfield.

Paul Anastassiou S.C., Sandra Anastassiou, Peter Joplin QC, Justice Hayne and Michelle Gordon S.C.

sonal skills, that are called upon from time to time by the Ethics Committee, when it is considered that a matter may be better dealt with by using his mediation skills. This type of request takes a lot of time and effort; and, so far, I think it is fair to say that his success rate has been 100 per cent.

Many members of the Bar give professional advice to the Bar without fee. Many write, or contribute to, the Bar submissions made to government and law reform agencies. All are done without fee. Some are here tonight, but all deserve mention:

- Alan Archibald QC — professional standards
- Neil Young QC and Chris Caleo — ACCC advice
- Anthony Lang — associations incorporation act;
- Mark Moshinsky — human rights submission
- Jim Kennan S.C., Jack Rush QC, Jack Forrest QC, Frank Saccardo S.C. and David Martin — torts law reform.

LAW AID

Peter Galbally QC has now retired from practice. For a long time he was Chairman of Trustees of Law Aid, and for 10 years he was a Trustee. In June this year, The Age reported that Galbally was about to set off with a horse and cart to trudge along the dusty roads of Southern NSW. It was his first trip with a cart. He pleaded age, not size, as a defence.

The trustees of Law Aid, David Beach S.C., John Noonan S.C., Frank Saccardo S.C. and Mary Anne Hartley, generally give at least one day a month to perform their obligations in assisting in the administration of the scheme. Every month, they assess in excess of 20 new applications. In addition, where aid is granted, they must monitor reports of those proceedings. The scheme has been remarkably successful, due to the strength and industry of this formidable team. I also suspect that the time spent by them on this work is far in excess of one day per month.

BAR SUPER FUND

The next group is Philip Kennon QC and his fellow Directors of Barfund: Ross Macaw QC (also Chairman of the Legal Assistance Committee), Jonathan Beach QC, Melanie Sloss S.C. and Paul Cosgrave. Philip became chairman two years ago, taking over from Ross Robson QC. Philip has been a Trustee of the Bar Superannuation Fund, and then a Director of Bar Fund, for more than 14 years. The work of the Directors is done at a cost in terms of time devoted to the job. Philip spends at least one day a week on the Fund; and the other trustees also devote a substantial amount of time to the job.

This year's draft annual report for the fund. It's to have luxury yachts on the front cover. It is apt — Kennon is a keen sailor; Macaw is also well known for his sailing skills, and owns a very nice yacht; Melanie has a fine reputation as an accomplished crew, and for persistence — she is the only person I know who sleeps out overnight to make sure she secures tickets for the tennis. Whilst maybe not sailors, both Jonathan Beach and Paul Cosgrave are easily included in the metaphor, in that all of the Trustees have adopted a steady hand on the tiller, and they have successfully navigated a winning strategy for the Fund.

BOARD OF EXAMINERS

Bill Lally QC is the Chairman of the Board of Examiners. Peter Jopling QC and Ron Meldrum QC are both past Chairmen. Bill and Peter are each in their sixth year on the Board. Ron Meldrum is in his eleventh year. Joseph Santamaria QC and Melanie Sloss S.C. are also members.

Gail Owen, who is also here tonight, leads the solicitors' contingent on the Board. She has been on the Board longer than Meldrum — I think, at least 15 years. She has been Chairman of the Board many times, and an outstanding member and contributor. All of the members have served with distinction, and for a long time. The work of the Board is done out of hours — with hearings at night time; with sittings at least 20 times a year; with judgments to be written and delivered; with appeals to be contended with and, on one occasion, a special sitting of a Full Court.

Bill Lally QC is retiring from the Board at the end of the year. Bill is known as a person with great compassion and dedication to the job. Recently, a young applicant was terminally ill, and it was thought that she would not survive until the usual admission date. Bill moved heaven and earth with the Chief Justice and the President of the Court of Appeal and, through his efforts, arranged a special admission ceremony for this young woman, by video link. The Chief Justice herself presided, with the President and Justice Nettle. This shows the measure of Bill Lally's qualities. The profession is indebted to him for his outstanding contribution to the Bar and to the profession.

BCL

Paul Anastassiou S.C. has been Chairman of BCL for the past two years, having inherited a well-run organisation from Ross Robson QC. Paul has been a director for 12 years, and Chairman for the past two years. John Digby QC and Michael Colbran QC are both long-serving directors — Colbran for 15 years. David Levin QC has retired after seven years, Michael Shand QC after two years. The other Directors of BCL are Peter Lithgow, who has served for five years — Caroline Kenny, Wendy Harris and Paul Connor.

The Board of BCL is made up of quiet achievers, with the company being run efficiently and frugally with the able assistance of Daryl Collins and Geoff Bartlett. The renovations in ODCE came in under budget, with substantially less funding that was anticipated. In fact, so frugal is BCL that the only benefit that the Directors receive for their hard work is that, after the annual AGM, they attend a dinner — and subsequently each Director receives a bill for the pleasure.

The Bar Library is run by Gordon Ritter QC, with the able assistance of Richard Brear and Joyce Massman. Gordon and his team have been doing this since 1997. Richard Brear and Liza Powderly do all the filing and organising of the library, and Joyce organises Gordon. Gordon, you will be pleased to know that Paul Lacava is now on the Grants Sub-committee of the Victoria Law Foundation, so your computers for the library should be in the bag.

CLE COMMITTEE

Neil Young QC heads up an impressive and large group as Chairman of the CLE Committee. The smaller Accreditation and Dispensation Sub-committee includes Robert Richter QC, Jack Rush QC, Jeremy Ruskin S.C., Michelle Gordon S.C. and David Neal, ably assisted by Barb Walsh.

The Bar CLE program has been well and truly launched. The initial launch was by Federal Court Chief Justice Michael Black in July 2002. Then, in December 2003, Justice Nettle, the inaugural Chairman of the new CLE Sub-Committee, spoke at the launch of the Compulsory CLE progam.

Those in attendance at that second launch will remember that Justice Nettle put on his usual polished and erudite performance. At the time, I was standing next to Justice Hayne, who commented *sotto voce* "Look, mum! No hands." The same can be said for this group, and the Bar is very proud of the CLE program and its quality.

In fact, the quality of the group has become known internationally. Recently, Michelle (and Ken) were asked to lecture in Japan. I am reliably told that Michelle has been asked back to lecture next year.

BAR NEWS

The editors of the *Bar News* are Gerry Nash QC, Paul Elliott QC and Judy Benson. *Bar News* began in Easter 1971, with the late Richard McGarvie and Justice Peter Heerey as co-editors. The first edition was a modest four typed pages.

Paul Elliott QC joined the editorial committee over 20 years ago in the Winter of 1984. Paul has been sole editor more than once — first in Autumn 1986 — and has been editor or co-editor ever since.

Gerry Nash QC joined the editorial committee in the Spring of 1986, and became co-editor with Paul in Winter 1991.

Judy Benson joined the editorial committee in Winter 2002 and became co-editor with Gerry and Paul in Spring 2002.

There are four editions of *Bar News* each year, and members look forward to each edition. On average, it takes the editors a week to prepare each edition — four weeks each a year — a massive commitment. And with each edition there is usually something a little controversial to engender debate for the next issue. In addition to his commitment as an editor, Paul Elliott QC also makes an admirable commitment each year with his role as Santa at the Children's Christmas Party.

THE ESSOIGN

Colin Lovitt QC — he of the broad shoulders, call a spade a shovel — has, one way or another been associated with the Essoign for a long time. He was, last Thursday, re-appointed Chairman of the Essoign Board of Directors. Colin can often be seen prowling around his domain welcoming members, and generally seeing that everything is in order.

As a business, the Essoign is turning around — it is breaking even. Colin and his crew, as you would expect, have developed an excellent wine list.

Michael Colbran QC and John de Koning have just been made life members — a rare honour — in recognition of the work done by them. David Beach pops up here on this committee as well and, Colin, mate, don't worry. Tonight Beach made sure that your application for further funding for the Essoign was in the bag.

Tonight, I have touched on many members who have contributed substantially to the work of the Bar. I could not hope to cover all of the members and the work that they do on behalf of the Bar.

In addition to the members, the Bar Council also recognises the partners and families of these people. For every slice of time spent on Bar work is a slice of time spent away from them. This night is also a thank you to them.

Ladies and gentlemen, would you please charge your glasses and rise for a toast — To the retiring Chairman and the retiring Bar Council members, and to the unsung members of the Bar and to their families.

Speech by Ross Ray at the dinner in honour of the former Chairman and retiring Members of the Bar Council

ON behalf of all the honoured and special guests who have contributed a great deal to this Bar, thank you to the Chairman and the Bar council for your kind words and your hospitality tonight.

Andrew McIntosh and I have known each other for a long time. Andrew, your contributions at this Bar are well known.

I particularly enjoyed working with you in PNG with many people including the late Bob Kent, Barb Walsh, Justice Vincent, Justice Coldrey, and others. You were a fine contributor and teacher in frequently difficult circumstances.

My strongest memory of you is when we went to Rabaul to visit the local court house. We were being looked after by Graham Powell, a former member of this Bar. We later went out to a village at Matapit and took a small boat across to see the active volcano. We timed our visit well. The volcano was active, but did not actually erupt until about 12 months later. As we crossed the waters off Rabaul, the hot PNG sun was beating down. To shade your delicate fair complexion you placed an empty carton of South Pacific beer on your head. It somehow matched your

Ross Ray QC

T-shirt and shorts at the time. The fine citizens of Kew have seen nothing like it — nor should they.

Climbing that volcano was a lot like running a murder trial against Colin Lovitt. There was an abundance of

smoke and steam and it could go off at any time.

The work done by the Victorian Bench and Bar commencing in 1991 forged a great bond between us and the profession in PNG. I have recently had a thorough clean out of my chambers. It was long overdue. My friend John Noonan had started calling me the "tip dweller".

One of the things I found was a 1991 letter from R.J.L. Hawke when he was Prime Minister thanking the Victorian Bar for the valuable work it was doing in PNG — rare recognition indeed from the world of politics.

Since 1987 — a total of 95 lawyers have attended our Readers Course from PNG, Vanuatu, the Solomons and Indonesia.

During my time on Council, 85 members of the Bar have served on the Council. This represents a very significant commitment by many people. The strength of the Council is in the range of seniority and diversity of practice of the members. It was a privilege and, collectively, a pleasure to have served with those people.

I recently looked at the 30 June 2005 annual report. It notes:

- Twenty-three Bar Associations (or sub-associations) — 106 members
- Twenty-one Standing Committees of the Bar — 270 members
- Six Joint Standing Committees of the Bar — 39 members
- Bar appointees to specific positions (such as the Appeal Cost Board — court user groups etc.) — 157 members

Further evidence of the great work of many people to this profession.

The Victorian Bar is also very well served by the staff in the Bar office. We have recently restructured the office with the appointment of Christine Harvey as our CEO in October last year.

Transition is never easy; the staff and Christine particularly have done an outstanding job. The loss of corporate memory through the retirement of David Bremner and Anna Whitney was a further challenge that has been very capably dealt with.

I want to thank Christine for the assistance she has given me during the last year. I also want to thank Barb Walsh for the enormous support she has given me both as a member of the Bar Council and more particularly a member and chairman of the Readers Course over a very long period of time. The Bar cannot function without the contribution of such genuinely committed people.

The work of many people, particularly Michael Shand, came to fruition in January this year when the Bar was permitted to insure with the LPLC. This will lead to significantly increased benefits to members over many years as our premium pool increases.

The Victorian Bar is rightly held in high regard nationally. This is not merely because of the ability of its members but because of its contribution to a national profession. The most recent example is the submission done by Ross Nankivell and others from the Bar in relation to advocates' immunity. We produced two excellent documents which were provided to SCAG. They were adopted unanimously by all branches of the Australian profession through LCA and ABA. I note that the New Zealand Law Society is also using the submission to assist in their defence of the immunity with the impending appeal before the New Zealand Supreme Court in *LAI* v *Chamberlain* later this year.

What will I miss?

- The tax effective diminution of income — no.
- The flashback to the two grumpy old men in the Muppets on the balcony as I looked down the Bar Council table to Beach and Fajgenbaum squabbling.
- I will miss the unusual build-up of tension between two members of the Council as a meeting was drawing to an end. General business was the last item. Fajgenbaum spoke — a hand punched the sky in jubilant success. A bet that Jack would speak on every topic had come home and money changed hands.

The issues dealt with by the Council are all important. They are frequently, however, recycled. The fact that they're recycled does not mean that we should not maintain an appropriate position in relation to them.

It highlights the importance of dealing with the ACCC and the ATO as we have done over the last 12 months to protect the interests of the Bar. I should point out the ACCC's interest in the Victorian Bar related to an issue first dealt with in 1998. It was either resolved or lapsed. In the 2003/04 Annual Report, it was referred to. That rekindled Graham Samuel's interest — proof that someone actually reads our Annual Report.

Much of the work is frustrating but it is all worthwhile to sustain a strong independent profession.

I looked recently at an old *Bar News* — Spring 1991. The *Bar News* is an excellent journal and I thank the editors for their sustained input over a very long period of time. In that edition, I saw a radical young Michael Shand, without a hint of grey hair, advocating the abolition of compulsory clerking — horror. A young and not so radical Michael Crennan was warning of the "shape of legal practice to come" after the Victorian Law Reform Commission has its way with the profession. It was proposing:

1. Lay access to the Bar.
2. Practice from non BCL Chambers.
3. Dispensing with Clerks.

4. Incorporated Bar practice.
5. Partnerships of barristers.

He warned also of the growth of economic rationalism pursued by the ACCC. I say your crystal ball was functioning very effectively 16 years ago, Michael. Some of those changes have of course been implemented and some have not for good reason.

I note that the national profession project has led to an attempt to introduce uniform legislation across Australia. The 2004 Legal Profession Act is a product of that attempt and is far too complex. It comes into operation on 12 December this year. A great deal of work has been done by the Council and members to make the legislation work.

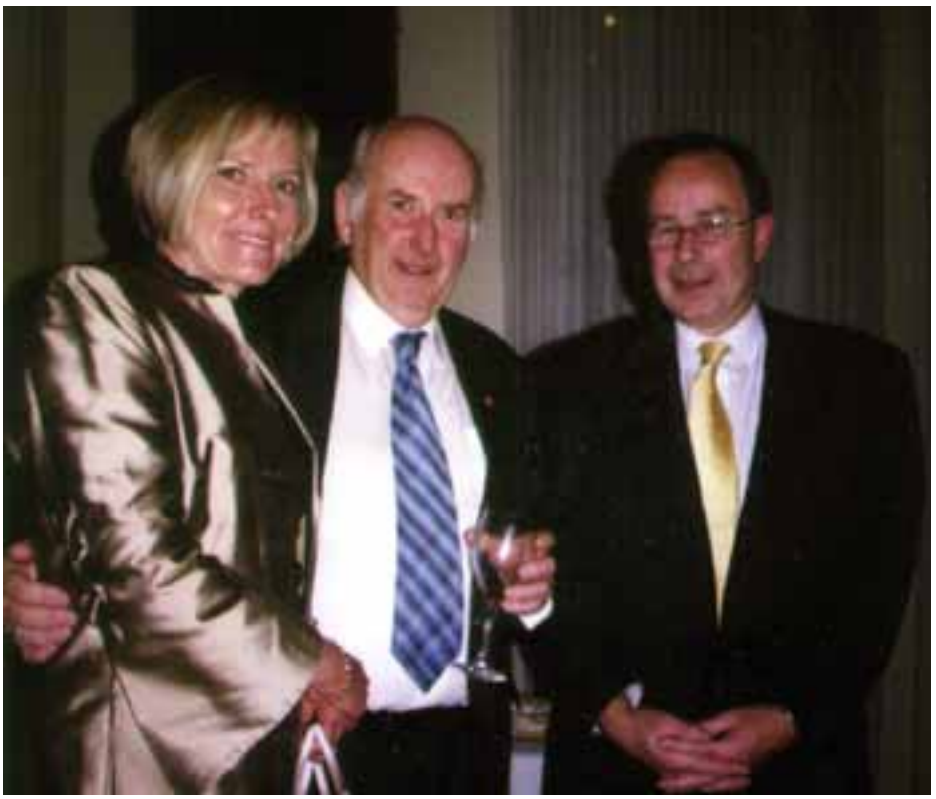
I note also that one of the Bar Council's tasks in this coming year is to reconsider and redraft our constitution — it is no longer one that reflects the structure of a modern professional organisation. I have a plain English template that may be of some help in both tasks.

The Hells Angels Australian by-laws — obtained by me in the course of a trial in 1983.

1. Patches — the equivalent of our robing rules requiring uniformity of presentation. Note the optional city patch — a little akin to the Federal Court waiver of wigs. I note the fine is $100 — much simpler than an indexed penalty unit.
3. Explosives — we require an equivalent rule to moderate conduct in the Bar Council chamber — particularly to moderate the provocative contribution of Beach after being seduced into a Middleton lunch.
4. Guns
5. Brothers — This simply restates our advocacy rules.
6. No narcotic burns — A good Common Law Practice Note.
9. Kick out — the ethics committee and the new Legal Services Commissioner will be very interested in this provision. I draw to the attention of the shadow Attorney-General that mandatory sentencing was introduced 20 years ago by this robust group. I note also that a tattoo is significantly simpler than the Victorian Bar Roll.
11. No leave — is not surprising that approximately 4 months ago I sent a copy of this to Kevin Andrews and John Howard — it has recently reappeared in the public arena.

Thank you once again for your hospitality and enjoy the balance of the night.

Howell's List: Twenty-Five Not Out



Ric Howells (centre) with his wife Leigh and member of the List Committee Tom Keely.

ON Friday 2 September 2005 over 100 members of Howells' List gathered at the Treasury restaurant in Collins Street to celebrate the twenty-fifth anniversary of the List's formation. Unique among the lists in how it came into existence, its origins were in the allocation of three complete intakes from the Bar Readers Course, two intakes in 1980 (June and October) and the March intake in 1981. As Ric fondly puts it, "I started out in June 1980 with 19 'baby' barristers."

What a difference two and a half decades makes. In the past 12–18 months alone, members of the List have been appointed to the Federal Magistrates' Court (Victoria Bennett, who on 30 November 2005 was formally welcomed as a justice of the Family Court); to the County Court (Felicity Hampel QC); and to the Supreme Court (Kevin Bell QC and Kim Hargrave QC).

The celebration was hosted by Fran O'Brien S.C., chairman of the List, entertained by an address replete with humorous anecdotes from Judge Michael Bourke, a former member of the List; and Ric of course responded in his typical humble fashion.

And so the occasion was duly marked, honoured guests and list stalwarts alike toasting the successful passage of time.

Launch of the Victorian Sentencing Manual: Online and Free to All

Wednesday 16 November 2005

One of the most challenging tasks for judges is sentencing. One of the most challenging tasks for the public is to understand all the factors involved and the complexities of the sentencing process.

On 16 November in County Court room 3.5 His Honour Chief Judge Michael Rozenes, Chief Judge of the County Court of Victoria and member of the Board of the Judicial College of Victoria, launched the electronic Sentencing Manual. The President of the Court of Appeal, Justice Chris Maxwell, responded on behalf of the community announcing that the same manual that is being used by judges and magistrates to sentence is now available to the legal profession and to the community free of charge through the Judicial College's website.

The President stated that this new manual is an example of judging in the 21st century — open, transparent and up-to-date. Making it freely available electronically to the legal profession and the community is a significant step in modernising Victorian Courts and improving service delivery to the Victorian community.

A short DVD was played at the launch showing features of the manual being used by Supreme Court Justice Kevin Bell, County Court Judges Michael McInerney and Irene Lawson, Chief Magistrate Ian Gray and Magistrate Lisa Hannan in their chambers and on the bench.

Over the past 18 months the Judicial College of Victoria has completely rewritten the *Victorian Sentencing Manual*, last published in hard copy in 1999.

Victoria's Judicial College is leading the way. Gone are the days of ploughing through dusty books — now judges can access all necessary sentencing law and practice at their fingertips electronically. This is judging in the 21st century.

Now, the same information used by judges and magistrates to sentence is available to the legal profession and the community free of charge through the Judicial College's website — www.judicialcollege.vic.edu.au

The regularly updated electronic manual is only a "click" away, not only for judges but for the public too.

The President congratulated CEO of the College, Lyn Slade, on this important initiative and the College's work to ensure that Victoria's judicial officers are kept in touch with the community, aware of pressing social issues, in tune with technology, and up-to-date with latest developments in the law.

To access the *Victorian Sentencing Manual*, and for more information about the Judicial College of Victoria, visit: www.judicialcollege.vic.edu.au

His Honour Chief Judge Michael Rozenes

YOUR Honours, distinguished guests, ladies and gentlemen.

This morning I have the pleasure, on behalf of the Board of the Judicial College of Victoria, to launch the new electronic Victorian Sentencing Manual.

First a little history.

Shortly after I was appointed in November 2002, and together with His Honour Judge Wodak, who has more than just a passing interest in matters educational, we reviewed the Bench books and manuals then available to the Judges of the County Court. The three that form the tools of trade for any judge sitting in the criminal jurisdiction were the *Victorian Sentencing Manual*, the *Victorian Trial Manual* and the *Kelly* (that is, His Honour Judge Kelly) *Charge Book*.

To my concern I saw that the *Victorian Sentencing Manual* had last been revised in 1999 and that the *Victorian Trial Manual* had not been revised since it was first published in 1998.

Worse still the author of both those publications was His Honour Judge Paul Mullaly and he had retired on 8 July 2001.

At that time I also knew that judicial officers in NSW enjoyed the benefits of a computerised sentencing manual and database that was available not only to them but to prosecutors, defence counsel and even members of the public. This system contained sentencing statistics, recent judgments, case summaries, sentencing principles and details of sentencing practice.

All this was available at the click of a mouse whether one was on the Bench, in chambers or at home.

When we had a demonstration of the NSW service here in Victoria, it was clear that the judicial officers of this State had been left behind.

Not only was the sentencing manual out of date, but the previous government had let the Higher Court Sentencing Statistics lapse for a number of years and we certainly had nothing approaching a judicial intranet.

In short Victoria's judges and magistrates did not have available, in convenient and instantaneous form, current sentencing information.

The first step was to capture the years of missing data, a laborious but relatively easy chore soon completed by the Department of Justice.

But the job of updating the *VSM*, which was a necessary step to be taken before the addition of any concept of computerisation, was a formidable one and could not in my estimation have been undertaken by the Court.

The first edition of the *Victorian Sentencing Manual* was a mighty task undertaken by His Honour Judge Paul Mullaly in the early 1990s.

The law of sentencing by its very nature is dynamic, so despite Judge Mullaly's best efforts, being in hard copy, even before it was published in 1992 — it was out of date.

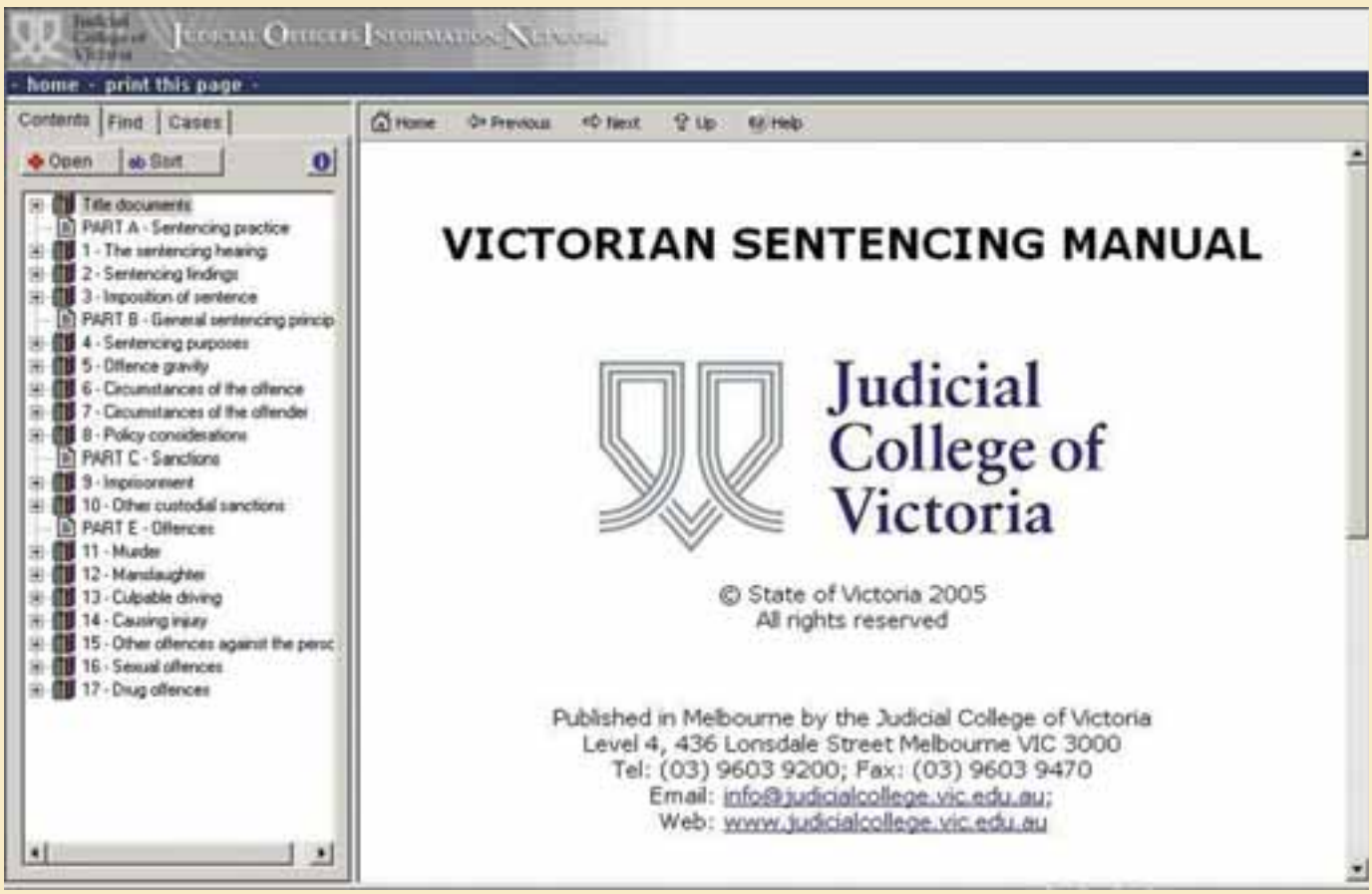
A few years later Judge Mullaly again faced up to the task, publishing the second edition in two hard copy loose-leaf volumes in 1999. Shortly thereafter in 2002, his Honour also produced a hard copy *Cumulative Supplement.*

Judge Mullaly's *Victorian Sentencing Manual* was one of the most valuable resources for those who practised in criminal law — judges, magistrates and members of the profession alike.

At the time of his Honour's retirement from the Bench it was widely acknowledged by the judiciary and the profession that he was owed a significant debt of gratitude for his work in this area. It is unlikely that in the foreseeable future a sitting judge of any court will have the capacity let alone the permission of his/her head of jurisdiction to take the time out of court to produce such a work.

And so it was fortuitous that, at about the same time as Judge Mullaly retired, the Attorney-General established the Judicial College of Victoria.

Shortly after the College commenced operations, a number of priorities, three



of which I mention here, were identified by the College Board.

These were to:

1. update Judge Mullaly's *Victorian Sentencing Manual*;
2. update the Michael Kelly *Charge Book*; and
3. develop a judicial intranet.

At the outset, the College was indeed very fortunate to secure the services of Patrick Tehan QC as editor. As a very senior member of the Victorian Bar practising primarily in the Court of Appeal, Patrick's expertise and experience in this area have been invaluable.

As editor he was joined by a first-rate editorial committee to oversee the project from its inception through to completion.

1. Justice Frank Vincent, Court of Appeal (as chair);
2. Judge Carolyn Douglas, County Court;
3. Magistrate Lisa Hannan, Magistrates' Court;
4. His Honour John Hassett, formerly of the County Court;
5. Professor Arie Freiberg, Dean of the Law School at Monash University and chair of the Sentencing Advisory Council; and
6. Mr Bruce Gardner, Office of Public Prosecutions.

The editorial committee's first task was to decide the parameters of the project.

The decision that the new manual would be an electronic resource inextricably linked to the development of the College's judicial intranet — JOIN (Judicial Officers Information Network), and this in turn dictated that a full rewrite was in order, both in terms of content and structure.

As work commenced on the Sentencing Manual, the Judicial College's online judicial working party commenced developing a JCV intranet to deliver information and resources, including manuals and benchbooks, electronically to judicial officers.

Implementation was a collaborative effort with the courts, judges and magistrates and the Department of Justice, which provided valuable technological expertise and software.

And so by early 2004 the development of JOIN was well underway.

Working closely with Patrick Tehan and the editorial committee was a team of researchers engaged by the College.

The primary research team, led by Chris Michell, were Tien Tran and Jennifer Collis.

Valuable research contributions were also made by Tamara Heffernan, Helen Freyne, Stephen Farrow and Brett Sonnet.

Chris and his team were committed to producing a resource of the highest quality and worked tirelessly to achieve this.

All but one of the researchers were seconded from the Office of Public Prosecutions to the College for varying periods.

By allowing several key staff to be seconded to the College, the OPP played a significant part in the success of the project and its role is gratefully acknowledged.

Work progressed throughout 2004–05 and, because of the dedication of all concerned, the electronic Sentencing Manual is now complete.

The completed electronic VSM comprises over 2000 pages, the main features being:

1. A comprehensive table of contents.
2. Search functions by case-name and by word.
3. Latest Court of Appeal cases for each offence.
4. Hyperlinks from cases to full text of cases on Austlii.
5. A "Last updated" date function on each page.
6. An Index of all cases with direct links to relevant pages in the manual.

I'm pleased to say that Chris Michell is now on staff permanently at the College and will be updating the content on a regular basis.

The two interlinked projects, JOIN and the electronic Sentencing Manual, have been outstanding achievements for the College, and its staff and are to be congratulated.

But wait, there is more!

With the establishment of the Sentencing Advisory Council in July last year, the College is working with the Council and the Department on the next stage of this project — the provision of timely and accurate sentencing statistics linked to the electronic manual.

Completion of this next stage is some way off, but work is progressing well.

Our next goal — the *Kelly Charge Book* — is well underway with researchers appointed and an editorial committee selected. Watch this space.

The College Board gratefully acknowledges the support of the Attorney-General, Rob Hulls, for the College generally, and specifically for providing additional funding to develop both the Sentencing Manual and JOIN.

Without the Attorney-General's support neither of these projects could have been undertaken.

It is unfortunate that due to an unexpected and pressing engagement elsewhere the Attorney-General was unable to be present today and so I have the pleasure on behalf of the Board of the Judicial College, to congratulate and thank all who have made this project such a success and to officially launch the Electronic *Victorian Sentencing Manual*.

Justice Chris Maxwell, President of the Court of Appeal

IT is an unusual experience to be standing in for the Attorney-General. I rather like it, actually. I must talk to him about a broader approach to job-sharing. There are a few difficult decisions that I'm sure I could make on his behalf — budgetary decisions and so forth.

You've already heard about the productive first three years of the Judicial College. Lyn Slade, the Director of the College, was one of the early visitors to see me after my appointment. It was clear then, and it's become clearer since, what a dynamic organisation the College is. It is very much part of what I think is an exciting prospect for the administration of justice in Victoria.

On behalf of the Court of Appeal — which will be a key beneficiary of the publication of this manual — I want to acknowledge the extraordinary work of his Honour Judge Mullaly in the earlier editions of the manual. He created the concept of the manual, and demonstrated the absolute necessity for it. I want also to congratulate the editorial committee, chaired by my colleague, Justice Frank Vincent. As you've heard, the committee was unstinting in its commitment to developing a work of the highest quality. A work of this kind takes long hours of exacting, careful work and we — the legal community and, at a broader reach, the Victorian community — are very fortunate to have had the work done so well. The quality of the work reflects

Chief Judge Rozenes; Justice Chris Maxwell, President of the Court of Appeal who launched the Manual on behalf of the Attorney-General; and Lyn Slade, CEO of the Judicial College of Victoria.

particular credit on the editor, Pat Tehan, and the college researchers, led by Chris Michell.

Now for the announcement. On the Attorney-General's behalf, I am pleased to announce an Australian first. (This doesn't happen often in the Court of Appeal. We usually leave such matters to the High Court!) From today, the *Victorian Sentencing Manual* will be available online to the Victorian community, free of charge, through the College's website. The same information which is being used by judges and magistrates in their sentencing will be readily accessible to the legal profession and to the public at large.

It is entirely right that there should be public access to the manual. Free access online will significantly improve understanding — amongst the public at large and amongst the media — of the factors involved in the sentencing process. As judges have often said, sentencing is a very complex task, requiring the best information available. Sentencing is a balancing act — delicate and difficult. There are important, intangible interests to be quantified and balanced and weighed. There are the interests of the State, the victim and the offender; and there are the general aims of sentencing — retribution, deterrence, denunciation, rehabilitation, and protection of the community.

The *Victorian Sentencing Manual* collects together the latest sentencing law across a comprehensive range of offences: culpable driving, drug offences, rape and other sexual offences, murder and manslaughter. Speaking from the perspective of the Court of Appeal — and I'm sure Chief Judge Rozenes would say exactly the same — the importance of a manual like this cannot be overstated. In the Court of Appeal, we have up to 200 sentencing appeals a year. Many fail but some succeed. In every case, we need to decide whether there is a reasonable argument that the sentence was manifestly excessive or that the law was misapplied or that some relevant matter was not taken into account.

Applications for leave to appeal against sentence under s.582 of the Crimes Act are heard by a single appeal judge each Friday. The analysis I have referred to takes place at the leave hearing and again — if leave is granted — at the appeal hearing before three judges. One is constantly reminded of the already huge body of sentencing law in Victoria — and I am only talking about recent years. To have a well-organised, well-ordered, comprehensive, up-to-date manual will be of the greatest assistance to the court and, no doubt, to practitioners who present their arguments in our court.

The advent of the new manual seems to me to exemplify the modern approach to judging. It will make decision-making open, transparent and up-to-date. Those are objectives that as judges we all aspire to. It seems to me to be right and proper that sentencing decisions are the subject of close public scrutiny, as everything that courts do should be. We are public functionaries, discharging very important public functions, and very substantial public monies are spent on our doing so. It seems to me to be absolutely right that our decisions are examined and scrutinised, and criticised where appropriate.

At the same time, commentators in the media need to take the time and the trouble to read what is said by judges, particularly in relation to sentencing. To read only the sentencing conclusion is to ignore the careful thought — often anxious thought — that goes into the sentencing decision. No one should express a view about whether a sentence is appropriate or not without first reading every word spoken (or written) by the sentencing judge in arriving at that decision.

A manual like this, which collects together all the comparable decisions on a particular offence and the sentences imposed, should enhance the prospect that there will be better informed discussion of sentencing decisions. For the manual to be available free of charge online is a significant step in demystifying

Interview with Magistrate Lisa Hannan con new manual

Question: *Lisa, firstly, as a judicial aid, how would you rate the importance of the contribution of the new electronic sentencing manual?*

Lisa Hannan: I would regard it as being a core tool in terms of any judicial officer who's called upon to conduct a sentencing task. It contains necessary legislative provisions; it contains a substantial amount of case law by way of hyperlinks. It really is a core tool.

Q: *Now you've been involved in this development from day one, what were the sort of parameters you started with, because it's impossible to put everything on here. How did you work out how you were going to do it and manage it?*

LH: I was very lucky to be involved in the editorial committee right from the start. We were indeed very fortunate to have Patrick Tehan as our editor and the research staff led by Chris Michell, who were extraordinarily dedicated. The role of the editorial committee was very much at the start as a sounding board, I guess, in terms of what the parameters might be. As you may be aware, there has been in Victoria, for a large number of years, a very good sentencing work that His Honour Judge Mullaly compiled some years ago. It was not in an electronic format and had not been updated for some time, so I guess the first task of the editorial committee was to look at whether this was going to be simply an update of that work or a complete rewrite. In the end, it was decided that a rewrite was necessary in terms of both content and structure, given that we are now using it as an electronic tool.

Q: *On a day-to-day practical basis, how would a magistrate or a judge make use of this facility?*

LH: In the Magistrates' Court there would probably be two ways in which we would do that. One would be from the Bench. Magistrates have access to the *Sentencing Manual* directly from the computer terminal, which is located on the Bench. If, for example, I needed to check a maximum penalty provision or a piece of legislation, I could certainly do that from the Bench. I would also use it in Chambers in terms of a research tool, so in relation to matters where there may be a more complicated issue, which I needed to research, I would use it in my chambers.

Q: *So what would you have had to do before this?*

LH: Well, that involved leaving the Bench on all occasions and going to the library, hoping the Librarian was there, if not conducting the task personally more often than not in the Magistrates' Court. That obviously isn't very efficient in terms of the use of judicial officers' time. This is a very easy-to-access tool and it's a very user-friendly tool. I've been lucky enough to along the way have had an opportunity to use it, and I've really found it to be interactive and easy to use.

Q: *We keep hearing that perhaps the judicial system is a bit clogged up and there's a bit of a backlog. To what extent might this speed up proceedings in terms of getting cases through the system?*

LH: I think any time that a judicial officer doesn't need to leave the Bench is a time that is utilised in Court, that obviously has an impact, but I think there's a more subtle way that also has an impact and that is through the profession. Where the profession are well informed and making submissions, which are well informed, that increases efficiency in itself. So, access by the profession to this material will also have an impact in that regard.

Q: *Now I gather it's going to be available to the rest of the legal profession and to the community. What can you tell us about that?*

LH: I think this is a very exciting development. As I alluded to before, I think that the fact that the profession, as I understand it, will have access to this material on a no-cost basis means that it will be accessed by a large number of practitioners. That being the case, it has

the sentencing process and in modernising Victorian courts.

As still a very new arrival, I can say that it is a great privilege to join a justice system under a reforming Attorney-General and with heads of jurisdiction of the calibre of Chief Justice Marilyn Warren, Chief Judge Michael Rozenes and Chief Magistrate Ian Gray. They are modern judges and modern administrators, who believe in utilising modern aids and modern information; who believe in rolling up their sleeves and talking about how we can do things better; who are open to good suggestions and constructive criticism. I am proud to join such a high quality group of leaders.

Just last week we had the second of two round table discussions between judges of the Court of Appeal and judges of the County Court — the first time in its history that the Court of Appeal has crossed Lonsdale Street. We've done it twice now, with no accidents reported!

Everybody agrees that one retrial is one too many, because of the cost and the anguish and the diversion of resources. If by these meetings we can avoid a single retrial, they will have been well worth having. In addition, the meetings have enabled me to convey to the County Court judges that we are equal participants in the criminal justice system. There is no hierarchy, other than the formal one. What County Court judges do every day, conducting trials and sentencing — that's the hard part. In the Court of Appeal we do not have to deal with juries or witnesses.

On the other hand, there are issues of law which require Court of Appeal intervention from time to time. The reason we are having these meetings is to enable the judges of the County Court to say to the Court of Appeal, "You need to explain more clearly what it is you think we should do, and why you think we should do it." That in turn gives us an opportunity to explain the minimum requirements which must be met, in directing juries and in passing sentence, while emphasising that there is no need to write a long essay. After two very productive discussions, the Chief Judge and I are resolved to continue them on a regular basis.

In addition to this *Sentencing Manual*, the Judicial College has produced the *State Coroner's Practice Manual*, a

cerning the use of the

the potential, firstly, to better inform those practitioners, which allows them to better assist the Court. In terms of the community, I think a community which is well informed is better able to understand the sentencing process, and I think it's a very important feature of this material that indeed the public will have access to it.

Q: *There's a lot of people, perhaps those of us who are getting older who are a bit IT resistant — what sort of take up has there been?*

LH: I think there will be a very large take up. As I've said, it's a very easy to use tool. When I came to the Bench some seven years ago, my computer skills were minimal, so I don't come from an IT background, and I find this a very easy tool to use.

Q: *What can you tell us about the role of the Judicial College in the development of this electronic sentencing manual?*

LH: The role of Judicial College was absolutely pivotal. It's a cross-jurisdictional tool, as you'd be aware, and the College was uniquely placed to enthuse, fund and coordinate the necessary resources, both in terms of manpower and funding. The College managed to procure the services of Patrick Tehan and a very dedicated team of researchers, and it was really the College's drive which led to the manual being launched today.

Q: *And is it a stand-alone facility or is it part of a broader intranet facility for the judiciary?*

LH: No, from the judiciary's point of view, it will be available through our JOIN portal. That's a judicial information network and it will be one of the tools, contained on that portal.

Q: *So, how user-friendly is it in terms of accessing it for the judiciary?*

LH: It's very easy to access. It's accessed by judicial officers through the JOIN portal, which is a judicial officers' information network. It's a case of simply going to the JOIN portal and simply clicking on the icon for the *Sentencing Manual*, thereafter it's relatively self-explanatory and the hyperlinks take you to the cases where that's necessary or appropriate.

Q: *One last question: how has it turned out compared with what you imagined three or four years ago?*

LH: It is a much more comprehensive work than I had initially imagined was possible within the timeframes. The task initially looked daunting in terms of writing a manual that covers all aspects of sentencing in this State, yet somehow our editor and our research staff have managed to do that and it's something I think all Victorians should be very proud of.

Magistrates' Bench Book and induction manuals for magistrates and VCAT members. It is very important that the College is working with the various courts to assist us in meeting the ever-increasing demands on our time and on our energies.

Chief Justice Warren chairs the College Board, which has set and will continue to set an ambitious agenda for itself. For example, there are cultural awareness programs, which so far have covered Aboriginal, Vietnamese and Horn of Africa communities. In these programs, judges, magistrates and VCAT members mix with diverse communities to learn how the law is viewed from those cultural viewpoints. The perspective from the Bench is only one perspective, and often it's a very limited one.

Finally, I want to mention the rewrite of the *Charge Book*. The *Charge Book* is literally a book of charges, containing written versions of directions which are appropriate for trial judges to give juries on particular offences or particular issues — for example, consciousness of guilt. As judges will tell you, they variously rely on a mixture of the oral tradition, and hearsay, and Judge Kelly's book (the current *Charge Book*), and what Justice Vincent wrote when he was a trial judge.

To ensure consistency and to reduce the risk of error, an up-to-date *Charge Book* is essential. It is very exciting that the Attorney-General is funding the College to completely rewrite the *Charge Book*. We are fortunate to have Justice Vincent chairing the Judicial Editorial Committee, which will review draft charges as they are prepared. I am told that the committee will meet in early December to review the first few drafts. If everyone is working from the same *Charge Book*, and if judges understand that the draft charge must be adapted to the circumstances of the case, there should be fewer errors, and fewer retrials.

I pay tribute to the Judicial College for getting this new project off the ground. I look forward very much to the product of that work as it unfolds over the next 12 months.

Celebratory Dinner: The Honourable Mary Gaudron QC

Or "things could be better – but they could also be worse"

Kydia Kinda

Thursday 15 September 2005 will go down in my memory as a bright and intellectually stimulating evening with the reminder that although things *could* be better they could be *far* worse.

ONE of the delightful things about The Honourable Mary Gaudron QC is her openness and collegiality. She is down to earth and the same person to all she comes in contact with, which is both encouraging and refreshing, especially for less experienced practitioners, like me. As well as taking pride in her achievements we are inspired by her to not sit back and relax.

Kim Knights, Convenor of the Women Barristers' Association, reminded us that we were gathered to welcome three intakes of Bar Readers (September 2004, March 2005 and September 2005) and also reminded us that the WBA aims to benefit "all" women. Kim extended felicitations to Judge Felicity Hampel of the County Court and Fiona McLeod S.C. for being the most recent winners of the Victorian Women Lawyers Achievement Awards.

This dinner was also celebrating the following appointments: the Honourable Chief Justice Diana Bryant of the Family Court of Australia, their Honours Justice Betty Kings and Justice Elizabeth Hollingworth to the Supreme Court of Victoria, Judge Felicity Hampel and Judge Jeannette Morrish to the County Court of Victoria, Federal Magistrate Victoria Bennet to the Federal Magistrates' Court, Coroners Audrey Jamieson and Dr Jane Hendtlass to the Coroner's Court of Victoria, Jennifer Davies S.C. and Suzanne Pullen S.C. as Senior Counsel. This formidable lineup of female appointments was toasted.

Standing: Lucy Cordone, Corporate Council for St Vincents (left) and barrister Lydia Kinda. Seated: Justice Mary Gaudron with the Solicitor-General for Victoria, Pamela Tate S.C.

In her introduction of Mary Gaudron QC, Kim gave us a potted history of her Honour's milestones in the law whilst raising a family, in response to which some of us felt totally inadequate or else wondered why we thought our lives were busy. As a retired Justice of the High Court, Mary Gaudron QC continues to serve people and the law at the International Labour Organization ("ILO") in Geneva. The focus of her speech was in relation to her work with this organisation in Belarus, a former Soviet Socialist Republic.

As with other speeches she has made since her retirement from the High Court, her Honour not only told a story, but like the good lawyer that she is, applied the story to make us think and wake us up from too easily accepted apathy. Her focus on how the law ought to improve lives and not just regulate them is a battle cry and a warning to guard what privileges we have. We should appreciate our rights, not take them for granted.

In her inimitably humble and humorous way, she told of how she (as both a constitutional and industrial lawyer) had been selected by the ILO to accompany a Finn and Croat to investigate complaints that trade unionists in the Belarus were being regularly jailed. A quick review of the Belarus Constitution indicated that any international treaties ratified by the newly independent republic were immediately incorporated into that country's laws which rendered the incarceration of the trade unionists anomalous.

Her Honour queried why the trade unionists who were being prosecuted under the Administration of Justice Act had failed to appeal their administrative detention. This draconian piece of legislation was likened by her Honour to some NSW legislation of similar ilk repealed in 1968. She was told by women lawyers that such sentences could be appealed, in fact Legal Aid was available to assist. So why didn't they appeal? Her Honour was told that they could "only" appeal once the sentence had been served.

Something akin to our Special Leave application could be made directly to the Belarus Constitutional Court but regrettably there was no Belarus equivalent of Section 75(5) of our Australian Constitution. No right to a Writ of Mandamus or Certiorari. A black hole situation for someone aggrieved by an administrator's decision seeking judicial review or even natural justice!

There were only two ways an aggrieved person could appeal: if the Chief Justice of the Constitutional Court in Belarus were to refer it, or if the Prosecutor General brought the action. Now I can see the latter happening if the trade unionists were being denied access to the local golf club, but would the Prosecutor General be keen to thwart a government action? Suddenly all those cases of people appealing direct to the High Court of Australia seemed less petty. Although, as Solicitor-General Pamela Tate said recently, a Charter of Rights as enshrined in the Canadian Constitution would be an advantage — things could be worse!

Kate McMillan S.C., Chairman of the Victorian Bar Council; The Honourable. Mary Gaudron QC, Guest Speaker and Kim Knights, Convenor of the Women Barristers Association.

Family Court Chief Justice The Honourable Diana Bryant with Anne Hudd.

In Belarus it seemed as though they were about to get worse. This Act was about to be used to strike off the President of the Belarus Women Lawyers Association and the Association itself was to be disbanded! How come?

Following the privatisation of the legal profession, lawyers started to make lots of money to the extent that in 1991 there was a Presidential decree that if you were making too much money you either disgorged your ill-gotten gains or went back to employment with the Ministry of Justice. Most men returned to the Ministry of Justice as public servants restricted in their activities. So by now only "women" lawyers remained as private practitioners able to represent "all" the dissidents. Her Honour again reminded us that maintenance of the Rule of Law requires vigilance.

Her Honour stated that there was no point in appointing women just to have women — she disagreed with Justice McHugh that we need women appointed because otherwise the public would lose confidence in our justice system. Advocates too had a responsibility to open judges' eyes. Judges should come from as widely differing backgrounds as possible and people of different sexes should be appointed. In one of her many discursions,

Judge Susan Cohen, Fiona McLeod S.C., The Hon .Judith Cohen and The Hon.Mary Gaudron QC.

Mary pointed out that in the past the noun was gender and people had sex, now it was the other way around.

No, we don't have equal representation anywhere you look — but things have improved from 100 years ago when women first attained the right to practice law. Her Honour said she preferred to date her recollection from when Neil Armstrong walked on the moon. That was when things started to change. Australia was very much involved in the moon landing. She remembered a friend living in the country acquired a very large transistor radio tuned to regional ABC radio so he could listen to the report about Neil Armstrong stepping on the moon. She shared how at the critical moment the radio station reverted to broadcasting racing at Menangle. He is now a professional punter.

Back then women couldn't drink in public bars. There was only one woman judge — Roma Mitchell appointed in 1965. There were 13 women at the Bar in NSW, a handful in Victoria and the only woman QC, Joan Rosanove, wasn't practising — there wasn't one practising woman silk. We now have women on every Supreme Court except Tasmania. There are very considerable number of judges in Queensland and here in Victoria, and we now have a second female Chairman of the Victorian Bar Council, a female Solicitor-General, and a considerable number of women silks. But the problem of no woman on the High Court of Australia remains.

There are now women in the House of Lords in the United Kingdom, two women on the US Supreme Court and four out of nine Judges on the Canadian Supreme Court are women, including the Chief Justice. There are even women on the Constitutional Court of Belarus.

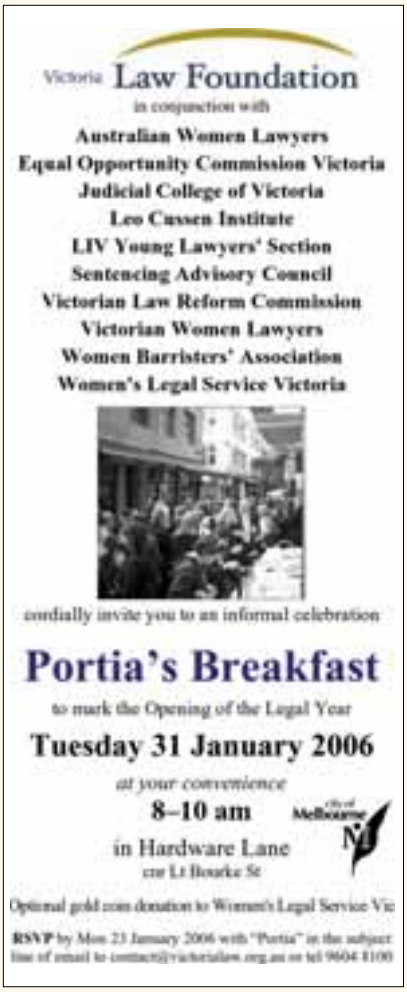
Since then we have achieved equal pay for women, before only female slaughterers had equal pay. Maternity leave has been introduced and the Anti-Discrimination Legislation. Under the Rule of Law there are rules — and her Honour estimated that at least 40 per cent of the Law applied consists of discretions and value judgments. Our only Constitutional avenue for grievances against State action or inaction is s.75. This means that review of discretionary decisions is very tightly and closely controlled. Grounds of appeal are very few. Under the *Administrative Decisions Judicial Review Act 1977* (Cth) ("ADJR") the grounds are wider. Her Honour stated that our only guarantee of equality of treatment in respect of bureaucratic decision making is the ADJR.

Following Her Honour's speech, Kim thanked her for her informative, entertaining and far-ranging speech, as well as thanking the dinner organizers for their huge efforts.

Postscript: How quickly the world changes, despite predictions by journalists reporting her Honour's speech that it was unlikely another woman would be appointed to the High Court — the Attorney-General Phillip Ruddock announced the appointment of Justice Susan Crennan QC of the Federal Court to the High Court from 1 November 2005.

So although things could be worse, that just got better — and no doubt they are still racing at Menangle.

Portia's Breakfast 2006



Portia's Breakfast is on again!

Come and celebrate the opening of the new legal year on Tuesday 31 January 2006 at this secular event, hosted by the Victoria Law Foundation in conjunction with 10 other agencies. Held from 8–10 am in Hardware Lane (corner of Little Bourke Street), the Breakfast is a festive, relaxed way to welcome in the year, and a great opportunity for informal networking across all sections of the legal community. Optional gold coin donation to Women's Legal Service Victoria.

RSVP to contact@victorialaw.org.au with "Portia" in the subject line, or call (03)9604 8100.

Readers' Signing of Bar Roll

Back Row: Frances Dalziel, Edward Moon, Jeremy Slattery, John Stevens, Laurence Liddell, James Rangelov, Dugald McWilliams, Travis Mitchell, Justin Brereton, Terence Guthridge, Anthony Beck-Godoy, Mitchell McKenzie, Rolf Sorensen, Wayne Henwood and Joanne Lardner.

Centre Row: Barbara Walsh, David Turner, Colin King, Charmaine Lye, Marita Wall, Mark McKenney, Vicky Priskich, Leonie Englefield, Jason Romney, Benjamin Fitzmaurice, Michael Borsky, Rory McIvor, James Greentree, John Snaden, Russell Rigby, Meghan O'Sullivan, Emily Latif, Lynne Featonby and Deborah Burns.

Seated Row: Bruce Anderson, Jagdeep Jassar, Aaron Mane, Kenneth Imako, Samuel Vavala, Meli Muga, Angela Ellis, Mayada Dib and Ingrid Braun.

Front Row: Arthur Bolkas, Patrick Bourke, Jonathon Redwood, Justine Raczkowski, Cam Truong, Peter O'Connor, Jeremy Sear, Kieren Naish and Tyson Wodak.

Readers Course 25 Years Old

UNDER the heading "Readers Course and Masters and Readers Dinner", the Autumn 1980 edition of the *Bar News* recorded the following news:

> The Readers Course for new members of the Bar is now being conducted. Those readers attending signed the Bar Roll on Thursday, the 13th March, 1980, at the Inaugural Masters and Readers Dinner held on the 13th Floor of Owen Dixon Chambers. Sir Gregory Gowans Q.C., was the chief guest of the evening which appeared to be enjoyed by all and is felt to be a most worthy innovation.

In welcoming guests to the Readers Course Dinner on Thursday, 10 November 2005, to mark the conclusion of the September 2005 Readers Course, the Chairman of the Readers Course Committee. Paul Santamaria S.C., said that the Bar was entitled to reflect with some pride on the institution of the Readers Course and the important place it has occupied in the development of advocates in the State of Victoria. He mentioned the work of barristers such as David Ross, Stephen Charles, George Hampel and others who were involved in the establishment and conduct of the Readers Course in its very early years and who had maintained, together with many others, their involvement in the Course over its 25 years.

The honoured guest speaker at the Dinner was Justice Stephen Charles, a member of the Court of Appeal. His Honour delivered a very amusing speech on his recollections of working with Queens Counsel, focusing upon appearances with the late John Starke QC, the late Keith Aickin QC and Ninian Stephen QC, now Sir Ninian. Charles JA left the Dinner a little earlier than most so that he could catch a plane to Vietnam later that evening. His Honour attended the graduation of his son, Thanh, on Saturday in Vietnam.

Other honoured guests at the Dinner

included Justice Peter Buchanan and Justice Geoffrey Eames, both of the Court of Appeal; Justice David Harper, Justice John Coldrey, Justice Kathy Williams, Justice Stuart Morris, and Justice Betty King of the Supreme Court of Victoria; Justice Peter Gray of the Federal Court; His Honour, the Chief Judge of the County Court, Michael Rozenes, Her Honour Judge Elizabeth Curtain and Her Honour Judge Felicity Hampel; State Magistrate Lesley Fleming (all three of whom are former members of the Readers Course Committee); the Honourable Professor George Hampel; Mr Paul Coghlan QC, the Director of Public Prosecutions; the Chairman of the Bar Council, Kate McMillan S.C., and some other current members of the Bar Council.

Some 45 new members of the Bar signed the Bar Roll earlier in the evening in the presence of the two readers from Papua New Guinea and two readers from the Solomon Islands, who also successfully completed the Course and signed the Bar Overseas Readers Register.

Kenneth Imako read with Declan Manly, and Meli Muga read with Ronald Gipp. Kenneth and Meli visited from Papua New Guinea. Samuel Balea read with Martin Grinberg, and Aaron Mane read with Peter Rose S.C. Samuel and Aaron visited from the Solomon Islands.

A highlight of the evening was the presentation by Samuel and Aaron of the gift of a magnificent wooden carving from the Solomon Islands to the Victorian Bar, in recognition of their attendance at the September 2005 Readers Course and the bond which exists between the Victorian Bar and the legal fraternity of the Solomon Islands.

Since 1987, 95 readers from the South Pacific region have completed the Course.

Each of the overseas readers expressed their gratitude to Barbara Walsh and Deborah Burns for their assistance and kindness throughout the Course.

Readers' Dinner in The Essoign

Guest Speaker Justice Stephen Charles.

Justice Eames; Justice Coldrey; readers from the Solomon Islands, Samuel B.Vavala and Aaron Mane; and Aaron's mentor Peter Rose S.C.

Justice Morriss, President of VCAT, and Chief Judge Rozenes.

Readers from Papua New Guinea, Meli Muga, left, and Kenneth Imako on the right, with Declan Manly.

Neil Clelland S.C.; Deborah Burns, Victorian Bar Legal Education Officer; and Tony Burns.

Hurricane Katrina: Destruction in New Orleans

Why was the brunt of this storm borne by poor people of colour in New Orleans?

Richard Bourke

After the destruction wrought by Hurricane Katrina in the southern states of the USA in September 2005, ReprieveAustralia organised an event to raise funds for the Justice Center in New Orleans, Louisiana. The Justice Center is a non-profit legal office providing legal and humanitarian support services to indigent defendants on death row in Louisiana. Reprieve has sent many Australian volunteers to work in this office over the years, including four members of the Victorian Bar. The evening was supported by PILCH, the Criminal Bar Association and the Victorian Bar. It was organised with less than seven days notice. On 13 September 2005, over 150 people from the Bar and the wider community attended The Essoign. Over $6500 was raised in donations for the Justice Center. Victorian barrister Richard Bourke, now living in New Orleans and working as an attorney at the Justice Center, spoke with eloquence and power on the reasons for the humanitarian disaster in New Orleans. He was introduced by Chief Judge Rozenes. Justice Maxwell spoke in reply. I record my personal thanks to both judges, to Nick at The Essoign, and to the Victorian Bar for its contribution.
I thank all members of the Bar who attended and who, with all who attended, contributed to the $6,500 raised for the Justice Center. The following is an edited version of the address delivered by Richard Bourke on 13 September.

Nicholas Harrington
President, *ReprieveAustralia*

AS a death penalty lawyer living in New Orleans, one of the things I have been trying to grapple with over the last couple of weeks, since Hurricane Katrina hit, is to understand this extraordinary coincidence that both the death penalty and hurricanes appear to target poor black people in the deep South. I am no meteorologist, but I'm willing to have a go at explaining this. It's not anything to do with the weather.

Although Hurricane Katrina hit a couple of weeks ago, the story starts at least a year ago, and probably more. A year ago I was living in New Orleans with Christine Lehmann, now my wife, and it was hurricane season, as it tends to be at this time of year. The alert went out on Hurricane Ivan, a huge storm brewing in the Gulf of Mexico that was pointed at New Orleans. Every year, New Orleans is at risk of hurricanes. Commonly the front page of the local newspaper will show a diagram of the deep "bowl" in which New Orleans

Death Sentence Lawyer from New Orleans, Richard Bourke, speaks at The Essoign.

His Honour Chief Judge Rozenes.

His Honour Justice Chris Maxwell President of the Court of Appeal.

sits. The text then describes what will happen when the levy system breaks, and which neighbourhoods will be inundated.

This is perhaps not quite as President Bush has portrayed the risk. The President is quoted as saying recently: "Who would have believed that the levies could break? Who would have believed that this could happen?"

I'm going to look like a fool saying this, but New Orleans at hurricane time is actually a pretty enjoyable place to be. All the tourists leave, and it gets a little quieter. All of the white middle-class folk from Metaire, Kenner, and all the suburbs of Jefferson Parish, flee at the drop of a hat — and the town actually gets to be a lot more fun. Most of the members of my office tend to hang around. We stay and ride out any threatened hurricane. Even though the authorities call a curfew each time, a bunch of bars stay open. It's like being there in the 1920s, and going for a drink at a speakeasy.

This is what we did during Hurricane Ivan. You go and do your shopping, and you buy a couple of cases of water, a couple of cases of beer, and a couple of packets of corn chips — hurricane supplies. You wait for the power to go out — which it does in the lightest breeze, because the New Orleans' energy infrastructure is so bad. Then you go and find one of the bars that's open. During Hurricane Katrina, there was a colourful local joint called "The John" where the seats are shaped like toilet seats. We'd go to any bar in a storm!

We did this with Hurricane Ivan, and it missed by two states. Ivan didn't hit Louisiana; it didn't hit Mississippi; it didn't hit Alabama. But it wiped out part of the Florida Pan-handle, which was disastrous. I drove through Pensacola and it was like the place had been bombed — it looked like Dresden.

There was an enormous scandal after Hurricane Ivan. This incredible storm had descended on New Orleans, and an evacuation had been announced. But there was a huge problem — people could not evacuate. There were traffic jams on the highways; there was an inquiry; there were press conferences; there were statements being made about what we were going to do about this evacuation. The government came up with a new contra-flow traffic system where drivers were permitted to drive on the wrong side of the road, so that all lanes of every highway were heading out. It set up a process of advance warnings.

When Hurricane Katrina threatened Louisiana, there was a call for mandatory evacuation — "evacuation by car". This actually worked very well, and that's how I got out. Evacuation was mandatory. It was no longer going to be fun to hang around in the city waiting for a near miss. We got in the car and we left. It took us 16 hours in the traffic to get out, but we got out. We never doubted we were going to get out. We were in a car; we were on the highway; and we drove away.

But the other truth about Hurricane Ivan was that it was discovered that there were 170,000 to 200,000 New Orleans residents who just could not get out. It was nothing to do with the traffic. These people simply didn't have the means to get out. There was no transport available for them, and they didn't have it themselves. Moreover, they had nowhere to go, even if they had tried to flee.

Who were these people? The poor African American population of New Orleans. There was an enormous scandal at the time, because so many white folk "in their four wheel drives" had to sit in the traffic jam on the freeway getting out of town. But there was not a whisper about the fact that maybe 200,000 African Americans couldn't get out at all.

So the level of devastation following Hurricane Katrina was absolutely no surprise. Images of almost exclusively African American residents of New Orleans, with devastated homes, on their roofs, and on makeshift rafts — deserted in this city. Keep this in mind when thinking about the aftermath and the "blame game", as President Bush has called it. It was a known factor.

A year earlier, there had been a dry run of trying to evacuate New Orleans. It had become crystal clear to everyone that, under the existing evacuation plan, about 200,000 people weren't going to get out. But nothing was done about that — nothing at all!

And that's what you need to think about when you think about: How did this happen? Why did this happen? Why was the brunt of this storm borne by poor people of colour in New Orleans? It's because the civil institutions of the city, the governments of the city and the state, were aware that those people were in mortal danger, and yet they chose not to act. They simply chose not to act. Those lives did not have sufficient political capital to make them worth saving. And that's the truth that runs through hurricanes in the deep South, criminal justice in the deep South, and particularly the death penalty in the deep South.

Before Katrina, my approach to hurricanes in New Orleans had been, perhaps, a little frivolous. I'll be a little more cautious in future and get out a little earlier. We decided to get out when the mandatory evacuation was called. We had a car. We didn't panic. We went to the office and made sure the office was boarded up. We got the back up tapes for the servers, so we had the electronic files. We packed two days clothing, because we really thought we'd be back in a couple of days — following what we thought was going to be another near miss.

But it was at the office that we started to get an inkling of what was really significant about the evacuation. We remembered the 200,000 people that weren't going to be able to get out.

There were a couple of Reprieve volunteers working at the office who were going to get out in the investigators' car. Richard Davies, this rather curious

English volunteer, had been sent to pick up the car to help the other volunteers get away. Richard is a lovely guy, but he can't drive. He was in a car park, just him and this car. He couldn't get the car started, because he didn't understand that you have to engage the clutch in American cars to start them.

While he was explaining to me that the car was broken, a gentleman called "CJ" came up — and he had had the foresight to have packed up all his belongings. In his case that only amounted to a small package, because he was a homeless guy. This was serious and he needed to get out. CJ, an African American, with no way out, had just been up to the greyhound station and they told him no buses were leaving. He was terrified. Here I was thinking "We've gotta get Richard organised with this car, and find someone that can drive. This is really annoying, and I'm really busy." But then to meet someone who actually didn't have choices, and who was absolutely terrified, was a real reminder that this hurricane wasn't affecting everyone in the same way. We sent CJ up to rescue our volunteers and drive them out of the city. It was serendipity, of course. Richard couldn't drive and CJ could. So they drove off together to Alexandria, Virginia.

That was when I first felt that this was really very serious. As we sat in the traffic for hours listening to the radio, thinking more and more about what we had learnt following Hurricane Ivan, and thinking about the number of people who couldn't get out, the sense of impending disaster just grew and grew.

And so what happened? How did this happen to all of these people? The short answer is this: nothing happened. That is, nothing new happened at all. The same thing that happens to poor black people in the South just happened with a hurricane — as it happens with everything else in New Orleans. New Orleans has the worst health care in the country — the worst or second worst every year. That's unfair. It has the worst or second-worst education system in the country every year. It has the highest or second-highest murder rate in the country every year. It has the highest incarceration rate in the country. Given America's penchant for locking people up, this means probably the highest incarceration rate of any government in the world.

Let me put this in context. There were only 30 less murders in New Orleans last year than there were in the whole of Australia — and New Orleans is a city of only half a million people. The incarceration rate in Louisiana is something to behold. The Orleans parish prison holds 7000 prisoners — in a city of half a million people. That is more prisoners — more than double the number of prisoners in fact — than the whole Victorian prison system. This is a community that criminalises, and brutally incarcerates, its poor and its marginalised. We saw that in the criminalisation of looters. I'll say a little bit more about that later.

There was an enormous scandal at the time, because so many white folk "in their four wheel drives" had to sit in the traffic jam on the freeway getting out of town. But there was not a whisper about the fact that maybe 200,000 African Americans couldn't get out at all.

I don't wish to be entirely unfair to New Orleans because, apart from the murder rate, which is a negative statistic, it has one positive statistic. Charity Hospital in New Orleans is widely regarded as having the best gunshot trauma unit in the USA — so it's not all bad.

Let's get back to the "blame game". My natural desire is to blame George Bush for everything. However, the fact is that this was a failure that was a long time in the making. It was a failure first and foremost of Louisiana and of New Orleans and of its civil institutions — and their failure to deal with the poor and disenfranchised people of colour in that state, and in New Orleans in particular.

In a speech where I am bracketed by the Chief Judge and the President of the Court of Appeal, representing a civil institution so vital to the running of our community here, it's worth thinking about those civil institutions in New Orleans. As a resident of New Orleans, I can say that the Mayor of New Orleans and the city of New Orleans were, until two weeks ago, a laughing stock. No one would, or could, rely on them for anything. If they had managed to provide even the most basic government services, it would have been a bonus to us as residents.

I don't know how many of you have been to New Orleans. The roads are like craters on the moon, and it looks like it's already been bombed. It's built on a swamp, and the roads are constantly subsiding and rising. Everywhere you can see potholes that no one is working on. Well, every now and again you come across a crew of people working on the potholes — and they'd be leaning on their shovels, and not working too hard, as is the wont of a road worker, it seems, worldwide. But I stopped complaining about those guys a couple of years ago, when the mayor of New Orleans announced that, in order to create a war on the 50,000 potholes in New Orleans, he was going to double the number of people working on them – from two to four. I realised it was the same two guys that I'd been seeing. They had 50,000 potholes on their schedule.

It's a simple enough example, but that's the level of social infrastructure we are talking about in New Orleans, and the level of dysfunction. City Hall existed to assist the casinos and the Port Authority to manage the money that runs through New Orleans. There was no sense in which City Hall, or the Department of Education, made a priority of some of the basic services of health and education, which those civil institutions should stand for.

We saw outbreaks of lawlessness following Katrina, so let's talk about the civil institution of law enforcement and order. You may have heard about the courts of the adjoining Jefferson Parish, which are the outlying suburbs of New Orleans. Suffice to say that when I go to Jefferson Parish, the people tell me they can't believe I live in Orleans because of the corruption there. Compared to Jefferson Parish, that obviously speaks volumes. The courthouse at Orleans Parish is a shambles — it's a wreck — there is no coordination. Judges run their individual fiefdoms. They come into work when they want to, and they leave when they want to.

Although this may not sound like a rude shock, it's at a level beyond anything I had ever heard of. The criminal justice system there is arbitrary; it is brutal; and it has an impact directly upon poor black people. You walk into the courthouses of Orleans Parish, and they bring in rows, and rows, and rows of African American men, shackled at the waist, shackled at the legs, seeing their public defender lawyers, who walk up to them and say: "Is your name Michael? Alright, you either plead now, or they're going to give you life without parole." They get 30 seconds to think about it, and to trust the stranger who has just greeted them like that.

These poor people get processed through this system with enormous brutality. These are people arrested by the New Orleans Police Department. It is not an exaggeration to say that the New Orleans police department is widely regarded by the citizens of Orleans parish as inept, lazy, corrupt and brutal. The acquittal rate for contested trials in Orleans parish is more than three times the rate of the adjoining parish, simply because the residents, the jury members, all know that the New Orleans Police Department are that corrupt. They cannot be trusted. And this was the civil institution that was expected to bring order; to have the trust of its citizenry, assisting in an evacuation and maintaining order.

It is no coincidence that when you have civil institutions that operate arbitrarily and brutally against the poor and the disenfranchised in the community those institutions are not going to be able to serve those members of the community when they are in need.

I have talked about race and poverty many times. So what do Americans think about race and poverty and Hurricane Katrina? A Gallup poll, released today in the US, asked people whether they think that the response was so slow because the victims were black. Twelve per cent of white people said no. Sixty per cent of black people said yes. Same thing in terms of poverty. Sixty-three per cent of African Americans surveyed said that the response was so slow because the victims were poor. Only 21 per cent of the white people surveyed had that insight.

This is the two Americas that we hear so much about. Working as a death penalty lawyer in the South, it's what we work with. One of those Americas is our client, and their families and their communities; the other America is our enemy.

In terms of the criminal justice system, I should say something about the looting. You'll all have seen by now the pictures of African American evacuees, or people caught in the storm, with goods from stores, labelled as "looters". You'll all also have seen whites, with the same sorts of goods, labelled as people who had "found" supplies, or who were "fighting for their lives". Fifty per cent of the white population in this survey said that most of those who were doing the looting were criminals. Seventy-seven per cent of the black population said they were just people trying to survive.

Make no mistake, there was serious non-looting criminality going on. There were murders. There were rapes, and other brutal crimes of violence. There were also some fairly ineffectual property crimes. I'm not sure what someone at the height of a flooding thought they were going to do, stealing a wall-size television — maybe hollow it out and turn it into a canoe?

There was some shocking offending, but this was in a city that already had the highest murder rate in the country, and 27 per cent of its population living in poverty, before they lost everything in Katrina.

At the Justice Center, there is a link between the death penalty work we do and the Innocence Project work for those who have been locked up for life without a fair trial, and who are in fact capable of being exonerated by DNA and the like. Our work is work for the poor and, for the most part, for the African American community of Louisiana and New Orleans.

I might say something about the census statistic for poverty. The "line" is a four-member household earning less than $17,000 a year. Twenty-seven per cent of the population are said to be living below this line — more than a quarter of the population.

Those people, without the civil institutions of a government that cared about its citizens, were largely simply trying to survive. I don't mean to minimise the brutal crime that occurred, and does occur every day in New Orleans. However, one needs to be very careful in listening to what's being said about the looters, and the criminality, and the way that impaired the efforts to rescue people. I point that out because we're going to hear that again and again.

But at some point the pendulum swung, and it was realised that you could not describe these people as criminals. And yet I guarantee the pendulum will swing back. As the "blame game" gets moving, what will happen is what happens to poor African American folk in New Orleans and Louisiana every day — they will blame the victim, and we will see that same rhetoric repeated. That's why I've gone to some effort to underline it.

Thinking about Louisiana's criminal justice system, you would all be familiar with the way in which the death penalty has a much more severe and disproportionate impact upon people of colour and the poor.

It is perhaps summed up best in one example of the jurisprudence of Louisiana. In fighting for a client's life in Louisiana, in front of a jury, in the penalty phase — where you are trying to persuade the jury not to kill your client — where you're trying imbue your client with the humanity needed to have a group of jurors decide to spare his life — a jurisprudence has evolved about what the prosecutor is allowed to say about your client, and whether the prosecutor, in calling for your client to be killed, is allowed to call the human being you have as a client, an "animal". Of course, in Louisiana, the answer is yes. The jurisprudence of Louisiana holds that it is permissible for the prosecutor, in an effort to persuade a jury to kill your client, to call your client, that human being, an animal — but only if the evidence supports that attribution.

This is the system that the poor African American community of New Orleans has lived under before Katrina, during Katrina and after Katrina. As an after-Katrina example, they had to evacuate Orleans parish prison — 7000 prisoners. We've heard about how shambolic that evacuation was. Prisoners who had no choice but to evacuate, after being stranded in water up to their chests, water up to their necks, having to break out in order to get out — people being drowned like rats in cages in the prison. We just don't know how bad it was yet, but that's what we are hearing from our clients who were there.

They set up a new prison at the Greyhound bus station. They did a press release, and an article on their first arrest for the new prison. It was someone who drove up to the prison, an African American man. He drove up to the new prison at the Greyhound bus station in a stolen car and tried to get a bus ticket out of town. This is after the mandatory evacuation, after the hurricane, after the levies had broken, after violence and murder had broken out on the street, and after the Mayor, the President and the Governor had said "Get out! Do anything you can to get out".

So this man commandeered a vehicle

and drove to the Greyhound bus station. He asked to buy a ticket to get out of town, and they arrested him. That was their first inmate in the new post-Katrina criminal justice system in Louisiana.

So for those of you who were hoping for dramatic change, do continue to hope as I do. But we are not seeing it yet. There are two last points I want to make. First, I've heard people talk about this incident as having ripped back the veil on poverty and injustice in Louisiana. This isn't a situation in which the veil was ripped back. There never was any veil. Everyone has known for a long time, but people have chosen to ignore it. Hurricane Katrina has made it harder to ignore, but this was a problem of which people were well aware, but chose not to act.

At the Justice Center, there is a link between the death penalty work we do and the Innocence Project work for those who have been locked up for life without a fair trial, and who are in fact capable of being exonerated by DNA and the like. Our work is work for the poor and, for the most part, for the African American community of Louisiana and New Orleans. We've suffered a hit with this hurricane, but it's not a hit that's anything like the hit that the poor African American population of New Orleans have suffered.

This is a fundraiser. I hope that you have all given consideration to making donations directly to the Red Cross and similar organisations. If on top of those donations to those who are most needy, you are able to make a donation to our organisation — to allow us to continue to try and help those who are the most marginalised in that community — we would be very flattered, and very grateful. We will do our best to honour that donation by working as hard as we can.

But if any of you think that my attempt to draw a link between the social underpinnings of the criminal justice system, and the death penalty, and the response to Hurricane Katrina, has been a little strange — a little too much — let me give you one last example, and then I'll finish.

Jefferson Parish is a 26 per cent black parish sitting next to Orleans, which is 67 per cent black. Jefferson Parish elected David Duke, the Grand Wizard of the Klu Klux Klan, to Congress. Jefferson Parish excludes, systematically, black members of the community from jury service. Jefferson Parish returns as many death penalty verdicts as any other parish in the whole state of Louisiana.

The Justice Center does a lot of work there. One of the things we came across in fighting the racism in Jefferson Parish — the way in which it had an impact on our clients, the way in which they sought the death penalty against poor African Americans — was to demonstrate this endemic racism by proving that the authorities were keeping African Americans off juries.

One of the other things that the government did in the late 80s, was to build a wall between Orleans parish, which is 67 per cent black, and Jefferson Parish, which is 73 per cent white. They built a wall down the middle of a street in a modern American city to keep out the black residents of Orleans Parish. The highway patrol came and tore it down, and said "What are you doing? You can't build a wall in the middle of the street!"

But that is the mentality. And for those of you who think that maybe the analogy with the death penalty and the criminal justice system is too strained — we received an email from two paramedics who were caught in the hurricane. They had been at a convention of paramedics — largely black paramedics. They got kicked out of their hotel, and went en masse to the police, and set up at Harrah's Casino, where the police had set up their base of operations. The police said: "You can't come here. It is every man for himself. Piss off!"

The paramedics knew that if they stayed outside the police headquarters, something would happen to them. So, the police came out and said "Alright, alright, we've organised buses for you. Go to the bridge over at Jefferson Parish, and on that bridge you're going to find buses that will take you to safety and higher ground." The paramedics said: "Hold on a minute. You're just trying to get rid of us." The police assured them they weren't.

So the paramedics left the police headquarters, and marched up to the Jefferson Parish bridge — to the supposed buses. Instead of saviours with buses, they found a line of sheriff's deputies, who fired bullets over their heads and said: "You can't come into Jefferson Parish. We're not going to have another Superdome here." The paramedics were forcibly dispersed by sheriff's deputies of Jefferson Parish. A police helicopter lowered its propellers to blow the wind under them.

So, coming back to the coincidence of the targeting by both hurricanes and the death penalty system — I hope the lesson that we all take away from Hurricane Katrina is that this is about the poor; this is about racism; and this is about the breakdown of our civil institutions, when those institutions fail to value human life — all human life — of all of the citizens in our community.

Laconic

IT is difficult to pin down the current, received meaning of *laconic*. A statistically meaningless straw poll suggests that in Australia at present it means something like "laid back, relaxed". I confess to having thought that was its proper meaning, but I lack a classical education.

In 1989, in *Pacific Dunlop Ltd* v *Hogan*, Sheppard J described Crocodile Dundee as being portrayed in the film of the same name:

> … in a laconic, laid-back style and yet [the feats of the character in the film] are all pervaded with a certain cockiness and insolence. All these characteristics are said to be dear to the hearts of many Australians and indeed to reveal the type of personality which Australians like to think they have, even if this involves a certain amount of self-deception.

In the *Wisdom Interviews* on ABC radio in December 2004, Bruce Petty said:

> But it's kind of a careless country I think, it's kind of a little bit indifferent. I mean we call it laconic and we call it nice names like laconic and casual and relaxed, but actually I just don't think we give a stuff about an awful lot of issues, because we've never had to.

The ABC website refers to another person as having "… a laconic attitude of having lived through personal reconciliation twenty years before it started".

Most people, I suspect, would hear the word used this way and understand without censure. Strictly, however, the word is misused in those quotations.

Laconic derives from Laconia, the kingdom ruled by Menelaus, according to Homer. Its capital was Sparta. The Spartans were noted for their simplicity, frugality, courage, and brevity of speech. The Laconic manner of speech was economical.

Johnson (1755; he spelled it *laconick*) defines it as "short; brief; from Lacones, the Spartans, who used few words".

Webster (1828) does not define *laconic*, but has an entry for *laconical*: "Short; brief; pithy; sententious; expressing much in few words, after the manner of the Spartans; as *a laconic phrase*".

The OED2 (1989) defines *laconic* as: "Following the Laconian manner, esp. in speech and writing; brief, concise, sententious. Of persons: Affecting a brief style of speech."

Washington Irving used *laconic* in the new sense, I think, when he wrote in *Alhambra* (1828): "By the time the laconic clock of the castle had struck two we had finished our dinner…". If *laconic* is used in its proper meaning, the sentence is difficult to defend.

On the other hand, Jack London used it correctly in *Son of the Wolf* (1900): "'Pack!' was his laconic greeting to Zarinska as he passed her lodge and hurried to harness his dogs."

And a fine example of laconic expression is found in, *The Young Immigrants*, by Ring Lardner (1920): "'Shut up', he explained."

Some of our judges reveal their classical learning and literary accuracy in their use of the word, although it is not often found in judgments. In *Grahamstown and Campvale Swamps Drainage Trust* v *Windeyer* Isaacs J said: "Some difficulty may be occasioned by the laconic direction of sub-s. 4." (the text of sub-s.4 is not given in the judgment, perhaps in the interests of brevity).

In *R* v *Sutton* Wells J referred to a witness having: "a curt, laconic, manner of speech".

In the Federal Court, *laconic* is favoured by Ryan and Sundberg JJ, and especially by Mansfied J who frequently notes that the reasons of the RRT are laconic (which they often are).

He might as well have said that the Tribunal's reasons were *delphic*, which is certainly true at times. *Delphic* also derives from a Greek place name. Delphi was a town of ancient Greece on the slope of Mount Parnassus. It was home to the sanctuary of the oracle of Apollo. The oracle generally spoke cryptically, a fashion later emulated by writers of horoscopes, who cover uncertainty with ambiguity.

Before 1975, no judgment of the High Court used the word *delphic* but, now that text is the start and end of meaning, *delphic* has slipped into a few High Court judgments. In *Australian Casualty Co Ltd* v *Federico* Gibbs CJ said:

> The judgments, in so far as they dealt with the question whether the injury was caused by accidental means, were short and a little delphic.

His Honour missed a chance to be demonstratively learned: he could have said "… laconic and a little delphic", but that might have been trowelling it on a bit.

Brennan and Mason JJ (as they were at the relevant times) also referred to the *delphic* qualities of judgments or documents, and Kirby J has done likewise. In the Federal Court, *delphic* has been favoured by Finn, Hill, Drummond and Dowsett JJ. And Gyles J got in an elegant shot in *Hart* v *DCT* when he commented "… nor do I regard what I have held as inconsistent with the rather delphic remarks of McHugh J in *Spotless Services*".

Spartan, geographically related to *laconic*, is still understood largely in its proper meaning: "Characteristic or typical of Sparta, its inhabitants, or their customs; esp. distinguished by simplicity, frugality, courage, or brevity of speech." (OED2). Few people these days would describe brevity of speech as *spartan*, but the balance of the definition accords with current usage. Sparta was originally called Lacedæmon. Byron used the original name when he wrote "The Lords of Lacedæmon were true soldiers, But ours are Sybarites."

Sparta was characterised by the austerity of its military leadership from the 6th to the 2nd century BC. The ruling class of Sparta devoted itself to war and diplomacy, and paid no heed to the arts, philosophy, and literature. This regrettable tendency has been emulated more recently in some places.

Spartan is used only once in the High Court before 1975, and that single judicial marker is, appropriately, in a tax judgment during Barwick's time. Mason J used it deftly in *FCT* v *Faichney*:

> The Commissioner has submitted that expenditure by a taxpayer on light and heating is deductible only if the light and

heating are provided for the benefit of the taxpayer's clients or customers, not if they are provided for the taxpayer's sole benefit. A concession is made for the case where the climate is so cold and rigorous that heating is essential to enable work to be done. This is a Spartan view of s. 51 and in my opinion it is quite incorrect.

Not only has *laconic* shifted from its origins, one component of the OED2 definition ("brief, concise, *sententious*") has also shifted from its original meaning. *Sententious* is not now understood as referring to brevity. It originally meant "Of the nature of a 'sentence' or aphoristic saying." But then drifted to "abounding in pointed maxims, aphoristic" and so by degrees to its recent meaning "affectedly or pompously formal". Not at all *laconic*.

The central characteristic of the *laconic* and *spartan* styles is terseness. But *terse* has also shifted its meaning since it came into English in the 17th century. OED2 gives its original (now obsolete) meaning as "wiped, brushed; smoothed; clean-cut, sharp-cut; polished, burnished; neat, trim, spruce". It comes from the Latin *tergere* to wipe. From there it drifted to "polished, refined, cultured".

Johnson's 1st edition (1755) defines it as "smooth; cleanly written; neat; elegant without pompousness". He illustrates this meaning with a quotation from Dryden:

> To raw numbers and unfinish'd verse,
> Sweet sound is added now to make it terse.

In Don Juan, Byron also used *terse* in its original sense:

> I doubt if any now could make it worse
> O'er his worst enemy when at his knees,
> 'Tis so sententious, positive, and terse,
> And decorates the book of Common Prayer,
> As doth a rainbow the just clearing air.

From there *terse* has moved to its current meaning "freed from verbal redundancy; neatly concise; compact and pithy in style or language". But it has an edge: to be terse is now understood generally in a bad sense, brevity to the point of rudeness. Curiously, then, *terse*, *sententious*, *spartan* and *laconic*, which once meant the same thing, have drifted apart, moving outwards from a common point, towards rudeness, pomposity, hardiness and amiability respectively.

Julian Burnside

Verbatim

Dogs v Bombers

Coram: Master Evans
Testators Family Maintenance claim — directions hearing.
Counsel explaining to the Master who the beneficiaries are under the will — one beneficiary is the Essendon Football Club.

McNab: I guess you might say it's not looking good for the football club.
Voice from back of the Courtroom: They don't deserve it.
Master: Who are the other legatees — are they other football clubs?
McNab: No, the Lost Dogs Home and the like.
Voice from the front of the Courtroom: Is there a difference between the Lost Dogs Home and the Essendon Football club?

Summary Not Correct

VCAT

Deputy President Aird presiding.
Witnesses sworn.
Danvale Constructions Pty Ltd v *Allscope Interiors Pty Ltd*

Mr Squirrel: You are a plasterer by trade with approximately 46 years experience. You were employed by Leepat for approximately 20 years. You worked on the Princes Views site for Leepat in March/April 2002 performing rectification work on existing plasterwork. You worked on the front townhouse unit fixing plaster in the stairways, the walls are out of plumb, you cut out plaster, realigned the plaster sheet and put in expansion joints as required and you completed the plasterwork. You worked in the apartments moving from apartment to apartment fixing defects, the defects were mainly due to defective jointing and poor stopping up of the nail holes. There were some knocks and marks on the walls due to following trades, these following trade marks were about average for this type of job. The majority of works was in rectifying previous plastering defective work. You kept records of the hours worked, the sheet was signed by Danvale's foreman and then given to Leepat Pty Ltd. The standard of work for previous plaster was below industry standard. Now is that summary correct?
Witness: No.

Technical Horns

Supreme Court of Victoria Commercial and Equity Division Melbourne

27 October 2005 (Ninth day of hearing)
Coram: Mr Justice Byrne
Aquatec-Maxcon Pty Ltd v *Barwon Region Water Authority*
and
Barwon Region Water Authority v *Aquatec-maxcon Pty Ltd & Ors*
Mr E.N. Magee QC, with Mr P.H. Clarke and Dr J.L. Beard, appeared on behalf of Barwon Region Water Authority.
Mr J.R. Dixon, appeared on behalf of JJP Geotechnical Engineering Pty Ltd.

Mr Dixon: Mr Frank Hall, an engineer from Fisher Stewart, has given evidence to this court that it was his responsibility within Fisher Stewart to check for construction drawings.
Mr Magee: Your Honour, I think that's very definitely what Mr Hall didn't say, I think Mr Hall said he had to review the drawings.
His Honour: I think they have been careful about the terminology they used, whether Mr Hall slipped from the terminology review, I'm not sure. If you can take him to the passage, I'm happy, of course, to accept. He was certainly looking after that aspect, whatever they were doing to it.
Mr Dixon: I simply wanted to move through that to some other point, Your Honour, I'm sorry that it caught Mr Magee's technical horns on the way through.
His Honour: I think he has to remind us he's still here sometimes.
Mr Dixon: I'm not sure that there's a need for that either, Your Honour.

Chief Justice William H. Rehnquist: A Personal Remembrance

Judge Mark R. Kravitz*

At Chief Justice Rehnquist's funeral service on Wednesday 7 September 2005, those who spoke in tribute of his life recalled a great Chief Justice, a great leader, a great thinker and scholar, a great protector of an independent Judiciary, a great husband, father and grandfather, a great patriot and American, and, of course, a great wit. He surely was all that and more. He was brilliant, innovative, courageous and consequential.

FOR me, he was also a great teacher and mentor. The nation got a glimpse of the Chief's educational talents through his marvellous books on American history, books that made him History Teacher in Chief. The Chief Justice's law clerks were fortunate to receive his many lessons first-hand. The lessons were not about substantive law or ideology. Instead, they were about our chosen profession and about life — how to be a good lawyer, a good thinker, a good writer and, most important of all, a good person.

The lessons came in different forms. Many we learned simply by observation. To say he was a quick study is an understatement. We were constantly amazed by his ability — noted by his son Jim at the funeral service — to do more in one or two hours than most of us could accomplish in a day. The ability to work quickly and efficiently was something he valued, and he tried to teach it to each of us, often by imposing artificial (and usually tight) deadlines for our work that no other Chambers laboured under. As he told me on more than one occasion, anyone can write well if given enough time. What a good lawyer must be able to do is to write clearly and effectively with little or no time at all. He also expected us to be able to think on our feet. Therefore, while other law clerks were busily preparing Bench memos, the Chiefs clerks were bracing themselves for an oral briefing with the Chief. One day, without any notice, he would bound into our office, name a case, and whisk the responsible clerk off for a brisk walk down the front steps of the Court and across the Capitol grounds. During those walks, the Chief expected us to discuss the parties' positions, lower court opinions and past case law, as well as parry his insightful questions, without notes or props, and all the while dodging bemused tourists and traffic. These lessons and others proved invaluable in my private practice and still come in handy in my current job.

Judge Kravitz being sworn in as a judge of the US District Court, District of Connecticut, by Chief Justice Rehnquist, at the Chief Justice's Vermont vacation home on 18 August 2003.

Most important of all, the Chief taught each of his clerks by example the importance of balance in their lives, a theme underscored at the tribute to him on Wednesday. The Chiefs law clerks daily saw a man at the very pinnacle of his profession who nonetheless always kept his job and himself in perspective — a man who was a loving husband; a doting father and grandfather; a great wit (who could also take a joke at his own expense); a player of games of all kinds from charades to poker, tennis and croquet; and a lover of knowledge with a vast range of intellectual interests, from music and poetry, to religion, politics, history, geography and even the weather.

Above all else, Chief Justice Rehnquist was a decent, gentle and honourable man who lacked even a hint of pretence. That was apparent to all who had the great good fortune to know him. I am certain that he hoped that the values and talents he embodied would somehow rub off on each of his law clerks. Our year with the Chief was an education like none we'd had before — or likely will again.

*Judge Mark R. Kravitz clerked for Justice Rehnquist (as he then was) in 1978. He practised as a litigator at the New Haven firm of Wiggin & Dana until 2003. President George W. Bush nominated him to be a Judge of the United States District Court for the District of Connecticut and was confirmed 1997–2000 by the Senate on 11 June 2003. Judge Kravitz will be teaching a course at the University of Melbourne on legal writing in March 2006.

When Barristers Make a Real Difference

Robert T. Burns

IT began with an email in March 2004 from Papua New Guinea. One of my sons had just begun a two-year stint as a volunteer teacher at Cameron High School, Milne Bay (at the far eastern end of mainland PNG).

His email contained a number of anecdotes about school life in a tropical climate, for example, students who failed to arrive at the start of school without a machete got detention; about one-third of the teachers failed to arrive at all; and more. The school was poor: floorboards were missing, or rotten in some of the classrooms; roofs leaked; and the facilities that we take for granted were few and far between. He also stated that the school had only 10 PCs (only six of which were in working condition) to share among 700 plus students. At least, I thought, we could do something to relieve the latter.

With the assistance of David Bremner, a notice calling for donations of unwanted computers was placed in *In Brief*. The response was nearly overwhelming. Not only did members of the Bar respond, but also donations came in from sources who somehow got to hear of the project from the ripple out effect. The AAT alone donated eight Compaq desktops. We also received a wealth of related material and financial support.

The net result was that on shipment day we had packed in 51 cartons: 34 desktop PCs; two laptops; one scanner; one video recorder; a mass of software; many computer books; and spare parts (salvaged from computers that did not work). Enough to clog up the whole of my dining room and hallway.

The Caulfield RSL Lions Club, of which I am a member, sorted and re-packed the computers after they had been checked and cleaned of any personal material. On 18 June 2004 Cameron Interstate Transport collected the cartons and delivered them free of charge to Brisbane, where they then sat. And sat.

The plan had been to deliver them to a contact in Austrade who was going to arrange shipment to Alotau free of charge. Rotary International had an agreement with PNG whereby donations sent by Rotary in Australia and received by Rotary in PNG would be entered "duty free". There then appeared to arise what can best be described as a demarcation dispute between the two Rotary groups. The Australian chapter was willing to send the PCs under their name via Austrade, but their PNG compatriots were unwilling to accept them. Eventually, and to its credit in April this year Austrade arranged for a container containing the PCs to be delivered at their own behest. It took a further two months for the container to arrive at the school. Time moves slowly in PNG.

I had the pleasure of spending two weeks at the school just before the container arrived. I saw the realities of trying to teach even the most basic of computing skills to a class where six to eight students at a time would sit for the hour long lesson each trying to share one computer. Not any more! Thanks to the support of the Victorian Bar each student has individual access to a computer to use during the lesson and the surplus computers have been set up for research purposes in the school's library where there were none before.

The photograph shows the donated computers in the library. Many of the books in the background are part of 1000 textbooks sent by Fintona school, which became aware of the PC project.

The staff and students of Cameron High School have asked me to pass on to the Victorian Bar their thanks and gratitude for the donations, and I am very happy to do so.

As a footnote, earlier this year Melbourne Water contacted me and asked if I was still looking for used computers. They had missed the boat (so to speak) for PNG, but I knew of a need in the Sudanese Australian Integrated Learning (SAIL) Program and 21 PCs were donated to support this worthy cause.

All in all, the Bar should give itself a pat on the back.

Bar Hockey 2005

Philip Burchardt

Victorian Bar Hockey Team's last win for some time — victory against New South Wales Bar

ON Saturday, 22 October 2005, the stalwarts of the Victorian Bar None hockey team played their New South Wales counterparts at the Hawthorn-Malvern Hockey Centre, the State ground being unavailable.

This is a fixture in which the away team often struggles for numbers, and this year was no exception. Having been forewarned, however, arrangements had been put in place to ensure that three club players from the Toorak–East Malvern Club were available to ensure that the New South Wales team had a full complement of 11.

The New South Wales side was probably stronger this year than in past years (particularly as an away team) and the first half commenced in a fairly even style.

We were very pleased to welcome a new recruit, Georgie Costello, who played with a fitness and endeavour that was in pleasing contrast to her relatively geriatric colleagues.

We gradually established a level of momentum, and started to discover that the New South Wales goalkeeper was in outstanding form. Fortunately, however, approximately half way through the first period, some excellent work by Niall led to a goalkeeper-circuiting pass to Parmenter who slotted from close range.

Play continued relatively evenly throughout the remainder of the half, but we were fortunate to obtain a short corner right on the half time whistle. Clancy's shot was saved but Michael Tinney was on hand to scoop the ball over the keeper into the net.

Michael Tinney in action.

The combined rabble and supporters after the game against NSW.

Every hockey player knows that a 2-nil lead is usually defensible provided you don't give away a goal in the first ten minutes, and by good fortune, combined with some excellent goalkeeping from Sharpley, we were able to do this.

The New South Wales team had brought down several fit and strong running players, and were getting a lot of help from their three ring-ins, and it was fortunate that we scored a scrappy third goal with about a quarter of an hour to play. Parmenter got a stick on a cross ball and it deflected into the net.

The game continued at a fair pace in humid conditions, and with a couple of minutes to go the New South Wales star centre half had the opportunity for a strong shot from the top of the area. Sharpley would have probably saved it, but regrettably I tried to do so also and succeeded only in deflecting it into the net. Thus, all four goals were scored by the Victorian team, but unfortunately mine was in the wrong net.

As ever, New South Wales proved excellent company after the game. Regrettably, Callaghan QC was not able to come down this year, but his after dinner speech will doubtless regale us again in twelve months time.

The game was very well umpired by Joe Hough from the Toorak–East Malvern Club and by Tom Lynch, who very decently volunteered when the mooted second umpire failed to materialise.

The action.

Game against the Law Institute

On Thursday, 27 October 2005, we played the Law Institute of Victoria team at the State Hockey Centre.

Word had reached us from other sources that the solicitors were likely to include a current national squad player as well as a State player and a number of State League 1 players.

Of the entire solicitors' squad of about 15, only one was as old as our youngest player.

This disparity in age, leaving aside questions of skill, always meant that we would struggle, and we did. It did not help that Parmenter went off injured after only a few minutes and was unable to return.

Notwithstanding this, we achieved a fair amount of possession and actually managed to obtain a number of short corners relatively early in the game, although we failed to convert.

The superior skill of the Law Institute team was shown by the fact that they got two short corners and put both in the net. They cantered away to a 4-nil score line, notwithstanding the fact that each member of the Bar team was playing well up to their respective abilities.

At that point, John Costello scored a very good goal for us and we went in 4-1 down at half time. The second half could be said to have been more of the same, although Ross Gordon scored a superb individual effort, and the final score was 7-2 to the Law Institute team.

In fact, we had far more short corners throughout the game and a better conversion rate would have made the score far closer. Against this, however, the solicitors did have a policy of player rotation and did not keep their strongest eleven on the ground all the time. Had they done so, the score would have been yet larger.

The umpires, Tony Dayton and an international umpire who helped us out by taking a whistle, selected, yet again, Ben Stockman as the best player on the ground and accordingly he was awarded the Rupert Balfe trophy for the year.

Stockman is also the Captain of their team and photographs will doubtless show him holding the Scales of Justice cup.

The team that beat us, in addition to being youthful, was almost entirely selected from players, both women and men, playing at the highest grades of hockey. This was so even though their international squad player and Victorian State representative player did not attend.

In the ultimate, it is a matter for the solicitors who they want to play but, as I pointed out to Stockman, there is not much point in a competition between a team almost entirely composed of players under 30 who are playing at the highest level against a team of players almost all of whom are over 40, and only a handful have ever played at the highest level.

The veiled threat that we would move this match to a veterans competition (which we would still probably struggle to win) may introduce some more reasonable selection policy on the solicitors' part next year. Equally, they may decide that reasonable does not mean pandering to our weaknesses. Time will tell.

Given that the New South Wales barristers are recruiting a current international player next year, this article may reflect our last victory for some time to come. We shall have to encourage some of the better younger solicitors to join the Bar at the earliest opportunity.

Those who played against the New South Wales side were Sharpley, Burchardt, Wood, Dreyfus, Clancy, Appudurai, Niall, Parmenter, Michael Tinney, Andrew Tinney, Ross Gordon and Georgie Costello. Against the Law Institute, all of those played, apart from Sharpley, Dreyfus and Niall, but we were augmented by John Costello and Tweedie.

The team who opposed the Law Institute.

Administrative Law Context and Critique

By Michael Head
Federation Press, 2005
pp v–xxv; 1–248; Appendix 249–250; Index 251–262

IT is generally accepted that administrative law is a complicated field of law, and Michael Head's book, *Administrative Law Context and Critique*, is a very useful guide that provides an overview of this difficult area of law as a primary guide for the student. However, practitioners will also find it an invaluable first point of reference.

The book is written in a clear and concise style and although it is a companion text to Douglas and Jones's, *Administrative Law Commentary and Materials*; it stands alone as an introductory text. It allows the reader to quickly establish the relevant principles and then consider the issues in more depth by reference to Douglas and Jones. A helpful comparison table is provided to cross reference to chapters in the Douglas and Jones text.

The author has provided questions for consideration at the end of each chapter which enable one to consolidate the information gained. As well, there are tables providing key points on each topic and where appropriate, a "useful links" section to relevant websites, such as the Commonwealth Ombudsman's site.

In putting administrative law into context, the author notes the increasing power of the executive, which is limiting the sovereignty of parliament, and reminds us of basic principles such as the separation of powers and the rule of law, and puts into perspective the framework in which administrative law functions.

The author reviews the relevant legislation and cases against the political, social and historical background in a concise and easy to understand format. He covers all of the essential principles and concepts of administrative law, including a brief review of the application of estoppel to administrative law: *Minister for Immigration, Local Government and Ethnic Affairs* v *Kurtovic* (1990) 21 FCR 193. The final chapter provides an overview of the administrative law jigsaw and a flow chart for considering an administrative law issue. The book achieves its purpose of making administrative law understandable, accessible and interesting.

Administrative law is a relatively new area of law but one that has increased in prominence in the last 30 years and can affect all of us at some time, whether at the local council or Commonwealth government level. For those of us who work in this area of law, Michael Head's book and is an essential addition to the library.

C.J. King

Judicial Brotherhood

US Supreme Court Associate Justice Anthony Kennedy is the narrator:

> Kennedy mentioned that he belonged to the board of an American Bar Association group that advises judges and lawyers in China, where he travels about once a year. "There was a dinner for one of their vice-premiers," he said. "I knew that I had to give a gift. We don't have a budget for these things, so I went down to the Supreme Court gift shop, and I found one of these calendars. It was in a nice leather case, and it had some anniversary from American constitutional law for every day of the year. So we're at this dinner, and I present the calendar to him, and he's so pleased, so I just say, 'When's your birthday?' 'Why don't you look it up?' And he says whatever the date was and hands the calendar to the interpreter. So the interpreter just stands there. He looks at me. He looks around. There was this silence. Clearly, he doesn't know what to do. So I say, 'Read it, read it.' And the entry is for *Dennis* v *US*, affirming prison time for 11 American Communists. There was this silence again. My security guy headed to the door. Then the guest of honor just laughed and laughed." Kennedy laughed, too, adding, "I am not a world-class diplomat."

Jeffrey Toobin, "Annals of Law: Swing Shift", 81(27) *New Yorker* 42 at 48 (12 September, 2005).

The Essoign Wine Report

By Andrew N. Bristow

DARLING PARK ARTHUR BOYD COLLECTION GRIOGNIER 2005

DARLING Park is a boutique, family-owned vineyard and winery on the Mornington Peninsula, producing handcrafted sophisticated wines. It is proposed to be certified organic by the end of this year. The Arthur Boyd label depicts one of his most famous paintings, "The Wedding".

This wine, the "Griognier", is a blend of Pinot Gris and Viognier. The Pinot Gris was sourced from the winery vineyard. Whole bunch pressing, barrel fermentation and extended lees contact were used to create intensity while retaining elegance. The Viognier from the Alpine Valleys was tank fermented to provide maximum fruit flavour.

The wine has a bouquet of apricots, fruit salad and spices.

The wine colour is a light pale straw. The wine is crisp and soft on the front palate. It has an astringent, but enjoyable back palate. It is ready to drink now and is a perfect summer wine. It is available from The Essoign at $28.00 a bottle or $6.50 a glass ($23.80 takeaway).

I would rate this wine as a pleasant and attractive "Reader", young, enthusiastic and able to be enjoyed now.

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