VICTORIAN BAR NEWS

No. 142 SPRING/SUMMER 2007

ISSN 0159-3285

VICTORIAN BAR NEWS

ISSN 0159-3285 No. 142 SPRING/SUMMER 2007

Cover: *The Negotiators*, Lithograph. Reproduced by permission of the artist, Christine Gibson, and Adam Galleries

Welcome: Justice Michelle Gordon

Welcome: Justice Lex Lasry

Welcome: Justice Paul Coghlan

Welcome: Justice John Forrest

Welcome: Justice Ross Robson

Welcome: Judge Chris O'Neil

Welcome: Judge Iain Ross

Welcome: Judge Duncan Allen

Lord Walker on human rights

A new military court

Palm tree justice

Opening of WMR Kelly Chambers

Registration No. A 0034304 S

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

This publication may be cited as (2007) 142 Vic B.N.

A tale of two cities

'It was the best of times, it was the worst of times'. Thus, famously, is the opening of Dickens' classic tale set in Paris and London around the time of the French Revolution. Let us advance more than two hundred years to the Antipodes – not forgetting that the First Fleet, under the command of Captain Arthur Phillip, was sailing into Port Jackson around the same time as Dickens' novel was set – to look at the state of play in another city on an island and another city on the (sub) continent.

Islamabad: General Musharraf is president and head of state, and a military dicatatorship exists. A state of emergency was declared some weeks ago, in circumstances where the country's Supreme Court was thought to be about to hand down a decision which would declare illegitimate the general's hold on power and occupancy of his position. From this it can be inferred the whole government's legitimacy was at stake. The entire Supreme Court has been sacked. Television footage reveals the extraordinary spectacle of lawyers demonstrating violently in the streets. Many are unceremoniously treated, and bundled into the back of the Pakistani equivalent of a divvy van. The Constitution has been suspended.

The unofficial head of the opposition party arrives back in the country from exile. Her arrival is met by large crowds. A terrorist car bomb wreaks havoc; many are killed and thousands are injured. Her intention to lead protest marches and speak at various cities is met by her immediate house arrest, for her own protection. House arrest is variously lifted and re-imposed. The international community calls for immediate free and fair elections to be held. There is the prospect that they could be conducted as early as mid-January 2008, but is there the political will for them in fact to take place?

Melbourne: For most of the year and intensively over October and November 2007, the city was in election mode. For the first time in over a decade there was a very real prospect of a change of government at national level. On a daily basis there has been newspaper coverage of various debates, or exchanges, which have taken place between government ministers and their opposition counterparts. These are often considered too dull to be broadcast in full on television. Unless someone lets loose with an expletive, or a gaffe, even the 10-second grab on the evening news bulletin will be abandoned. Political commentators, pundits and pollsters have been having a field day. Meanwhile the courts have continued their work unabated. There are additional provisions made in some quarters (such as the Family Court) for the imminent Christmas rush.

Judges undertake training – courtesy of the Judicial College of Victoria – on the scope and consequences of the Victorian *Charter of Human Rights and Responsibilities* which enters a new phase of operation and application in 2008. Barristers contemplate attendance at a CLE seminar scheduled early in December in which they will be told how the jurisprudence of human rights internationally is about to shed light on even the darkest recesses of all areas of the law. At the same time they begin to attend and plan end of year festivities and social encounters; and, for some, a break with family in January in which wind, sun and surf will almost certainly have some role to play is eagerly anticipated.

Given the difficulties of travel and communication in late eighteenth century England, and the fact that relatively few undertook the perils of travel at all, much less abroad, it was easy to pander to the prejudices exaggerated from received wisdom. So it was far too easy – and a real temptation – to depict all 'continentals' as foreigners, by nature prone to various excesses and peculiar habits, none of which would ever touch the robust mettle and common sense of a British gentleman. Women of course were not (to use the vernacular) on the radar.

From our knowledge of history we now know better. Or we should. The world may have grown smaller, in that vast numbers travel every day to every conceivable location around the world. (The mega-rich in the US even contemplate space travel whereas once they settled for Antarctica or the Seychelles.) Even vaster numbers travel intellectually or for pleasure and entertainment using the medium of the internet and other technologies which make communication and information availability immediate. We even sat down to our evening

meal while simultaneously images were broadcast on our plasma TVs showing the full horror of the war in Iraq. The question is, has all this made us any smarter? Provided greater insights? Endowed us with greater compassion and humanity? Fortified us with greater courage? And if the answer to any part of those questions is even a qualified yes, to whose benefit?

Clearly much of what we take for granted – society's freedoms, institutions and structures, albeit with all their human imperfections – are still being fought for elsewhere as hard won basics. We need only contemplate East Timor to our north to see another example of that. There is much to be done to ensure that everyone has access to the rights and freedoms we take for granted. Diplomacy of course has a role. But so does the law, and so does leading by example. Occasionally we will have to do and say – indeed, should do and say – something unpopular or worse, difficult, because it is right. Therein lies a challenge for the new government elected on Saturday 24 November 2007. It may well be that our relationships with those regionally close to us will experience some strain. So be it.

The alternative is to be cursed to re-live the horrors of the best and worst of times many times over.

DIRECTOR OF PUBLIC PROSECUTIONS

At the time of going to press, the announcement was made that Jeremy Rapke QC had been appointed to the position formerly occupied by Justice Paul Coghlan of the Supreme Court. The Bar congratulates the new DPP on his appointment and wishes him a personally and professionally satisfying and fulfilling tenure. A formal welcome will be extended in the next issue of Bar News.

A FRESH LOOK

Astute readers of Bar News will have discerned that this issue looks different. The Editors are pleased to welcome to the publication team Ron Hampton who is our new design consultant. From the autumn issue 2008 it is proposed to resume publication quarterly. In the meantime, we trust readers will find much of interest in our bumper Spring/Summer issue.

The Editors place on record their appreciation of the efforts of David Wilken in developing Bar News from modest beginnings and formats to the journal of record it is today.

THE EDITORS

Vale David Wilken

David was involved with *Bar News* as its editorial consultant for nearly 20 years. In the early days of his association with the Victorian Bar, the journal was published in a format just a little larger than half A4, the photographs were black and white and there was little if any colour. David took a fresh look at what the magazine was trying to accomplish and the image the Bar was trying to project of itself and its members and proposed a new format, full colour print throughout with more colour photography, and he also suggested the introduction of advertising to offset the advanced production values. David sought, obtained and managed prestigious advertising for the journal. He was enthusiastic about its publication and was unfailingly courteous and polite to all those involved with its production, to a fault. He was a gentleman of the old school. It would be true to say that he was the right hand man of the Editors.

Unfortunately David suffered serious ill health during 2007, including a significant period of hospitalization and surgery and was compelled of necessity to consider retirement from the project he had nurtured for two decades. The Editors were most saddened to learn that David passed away peacefully at home on 21 November 2007. They extend sincere sympathy and heartfelt condolences to his wife and family. His legacy will be remembered in the archives of the Victorian Bar.

An ambitious agenda building on a firm foundation

My very agreeable first responsibility as the new author of this column is to thank the previous Chairman and Bar Council for their service to the Bar.

RETIRING CHAIRMAN AND BAR COUNCIL MEMBERS

Michael Shand QC was an outstanding Chairman. Michael's committee service went back 25 years to 1982 when, very soon after he came to the Bar, he joined what was then the Young Barristers Committee. Michael had seven years on the Clerking Committee and five years on the Professional Indemnity Insurance Committee. He chaired the two Bar Website Committees that brought about the vast expansion of the website in 2001 and the new generation website in 2006.

Michael came to the Chairmanship after six years on the Council, having served as Honorary Treasurer for two years, followed by a year as Junior Vice-Chairman, then a year as Senior Vice-Chairman.

Last year saw a number of major initiatives and projects, including, from November 2006, the Governance Review; in February 2007, the Bar Council review of the process for the appointment of Senior Counsel; the Professional Standards Scheme; and the establishment of the Strategic Planning Committee. Christine Harvey resigned as Chief Executive Officer in April 2007. Mei-Leng Hooi served as Senior Manager until the appointment of Stephen Hare as General Manager in August 2007

I'm sure Paul Lacava and Michael Colbran share my appreciation that we served our pupillage for leadership on the Bar Council with Michael Shand, and that

we inherited from his efforts, and those of the previous Bar Council, a foundation on which to build.

A number of others left the Bar Council. Tony Pagone QC resigned in May upon his appointment to the Supreme Court. Tony had served the Bar over many years, including six years on the Council, seven years on the Ethics Committee and nine years on the Academic and CLE Committee.

Dr David Neal SC served on the Council ten years, with particular distinction in his contributions and leadership in Legal Aid, Continuing Legal Education, Criminal Law and Equal Opportunity, contributing to major and substantial submissions, and appearing on behalf of the Bar before various Parliamentary Committees. David was on the committee that guided through the Council the proposal for the landmark July 1998 *Equality of Opportunity for Women at the Victorian Bar* Report; and was the prime mover in commissioning the benchmark August 1997 Price Waterhouse *Review of Barristers Fees Scales*.

Kerri Judd SC – who is to be congratulated on her appointment as one of 14 new silks this year – served two years on the Council, including a year on the Executive Committee. She was a willing and significant contributor. Kerri and Cahal Fairfield were the only two juniors to the 4 silks working on the Professional Standards Scheme. Kerri previously served also on the Ethics Committee.

Will Alstergren served two years on the Council, last year as Assistant Honorary Treasurer. The August 2006 Great Debate, *Are Judges Human?*, was Will's inspired idea. Will transformed the Bar Dinner. He chaired, and still chairs, the committee that established the Duty Barristers Scheme, the pilot for which was launched in November, and is now up and running.

Cahal Fairfield served three years on the Council. He was a driving force in the Bar's active participation in Law Week 2007, including the first public screening of the Trial and Modern Re-Trial of Ned Kelly, and the Bar's co-sponsorship of the Law Week Oration by the Honourable Michael McHugh QC. Cahal worked on the Professional Standards Scheme, and on the review of the Bar Rules in the context of the new *Legal Profession Act* 2004.

Charles Shaw was one of the very active juniors in his three years on the Council, serving a year on the Executive Committee, and taking responsibility for, and working on, numerous projects and submissions.

Daniel Harrison served on the Council last year. He also served on the Applications Review Committee and the Legal Assistance Committee.

NEW BAR COUNCIL MEMBERS

I welcome the new members of the Bar Council: Terry Forrest QC, Phillip Priest QC, Jennifer Davies SC (who is also the new Chair of the Ethics Committee), Scott Stuckey, Sara Hinchey, Martin Grinberg, Daniel Crennan and Miguel Belmar Salas.

All our new Bar Council members have become immediately engaged in the business of the Council.

BAR COUNCIL AGENDA

John Digby QC was elected Junior Vice-Chairman, joining me, Paul Lacava SC (Senior Vice Chairman) and Michael Colbran QC (Honorary Treasurer).

We have an ambitious agenda. The Bar Constitution and Rules of Practice both require substantial review in the new regulatory framework of the Legal Profession Act 2004. We have also undertaken a review of the whole organisational framework of the Bar and its Standing Committees.

The review also encompasses the too often vexed question of how to develop an effective working relationship with the committees responsible for oversight of separate legal entities. Most often this boils down to improving the understanding of what the Bar requires and how this can best be delivered. The new Bar/BCL Liaison Committee is one example where, already, constructive outcomes are developing.

Douglas Meagher QC has done an Herculean task on proposed revisions to the Bar Constitution necessitated by the new Legal Profession Act 2004 framework, and otherwise desirable; and has reviewed, in particular, the statutory scheme of complaints and discipline. Paul Lacava SC and his committee have done substantial work on the Rules of Practice. We are working on this with a view to bringing it all to the Bar Council early next year.

Paul Lacava SC has also taken Chairmanship of the Bar Care Committee. Already a plan is in formulation for major organisational reform and significantly enhanced services to members.

Michael Colbran QC is Chairman of the Bar Clerking Committee, which is being reconstituted as a working committee of the Bar Council that will work with, and support, the various List Committees, and the Clerks, to ensure that the clerking system licensed by the Bar facilitates and supports best quality service to members of the Bar.

Mark Moshinsky SC – also to be congratulated on attaining silk – and his Bar Strategy Committee have been hard at work for a year now, and expect to have a five-year plan to the Bar Council early in the new year that will set an agenda for the long-term future of the Bar.

Greg Garde AO RFD QC has been appointed to chair the Law Reform Committee, of which I shall be a member.

LAW REFORM

The various subject-area specialty Bar Associations (such as the Criminal Bar Association, Commercial Bar Association and Common Law Bar Association, etc, etc) do an excellent job in responding to draft legislation and discussion papers from various arms of government and from law reform agencies.

Occasionally the importance and workload of a particular project has necessitated the establishment of a special ad hoc committee, such as, for example, last year the Civil Justice Working Group established to contribute on behalf of the Bar to the Civil Justice Review reference by the Attorney-General to the Victorian Law Reform Commission. Michael Shand QC, then Chairman of the Bar Council, chaired that committee, and it produced very substantial submissions to that review.

This new Law Reform Committee is intended to fill what I see as a gap, namely to provide a framework for law reform initiatives from the Bar. How often, in the course of our day-to-day practice, do we see ways in which law or practice could be improved, and really ought to be changed? At best, a judge may include a comment by way of obiter dicta urging reform. However, more often than not, the judge, counsel and solicitors express their frustrations to one another, but the matter goes no further.

I encourage every barrister, where we see the need for reform to document our concerns and submit them to the Bar Law Reform Committee. The Victorian Law Reform Commission is happy to accept suggestions from the Bar – and the Law Reform Committee provides a framework for institutional consideration and review of individual frustrations, concerns and suggestions for reform and for the orderly presentation of suggestions to the VLRC.

The Bar is in a unique position to identify matters that ought to be investigated and considered in relation to law reform. Nor is the contribution the Bar can make limited to responding to requests from government and law reform agencies for comment – or, indeed, to individual submissions.

GREATER CO-OPERATION IN LAW REFORM

There have been pleasing and promising developments over the last few years in the ways in which the Bar contributes to governmental initiatives for review and reform.

The Bar Council took the bold step of engaging McKinsey & Co as consultants to provide a fresh perspective to the Bar's approach to the Civil Justice Review. McKinsey & Co has been asked to advise not only how the litigation process can be better managed; but also to consider the importance of an effective court system and legal profession in the wider Victorian economy. If Victoria can achieve what Chief Justice Warren describes as 'a centre for excellence in litigation', there will be real benefits to the Victorian economy; but it will require a substantial commitment from the courts, the profession and Government. For example, McKinsey & Co will evaluate whether delays in Victorian courts are causing corporations to move to other jurisdictions for dispute resolution.

The consultants have consulted with a cross-section of members of the Bar, solicitors, judges and corporate users of the courts. Their ideas are able to be explored and tested, bringing to bear the global expertise of McKinsey & Co, and the combined results will be presented to the VLRC Review as part of the Bar's next submission.

BEST WISHES FOR THE FESTIVE SEASON

I wish all members of the Bar all the best for the festive season, and for the summer vacation, and look forward to a return to full pace in the new year.

PETER RIORDAN
Chairman

> 'The destiny of human rights is in the hands of all our citizens in all our communities.'
>
> ELEANOR ROOSEVELT

In this post-federal election period, we are entering a new era as the Rudd Labor Government seeks to write a different page in our nation's political history. While the changes at the federal level will be momentous, I want to remind people that Victoria will also be heading down a different path in the New Year following the full enactment of our *Charter of Human Rights and Responsibilities*.

For those people who may not be aware of the Charter or are still doubtful as to why we need one, let me say that the Charter is simply a way of formally recognising the rights and responsibilities of every Victorian.

Based on similar mechanisms which operate successfully in the UK, New Zealand and our own ACT, the Charter is a commonsense form of democratic insurance that holds Government accountable – one that ensures that those who make decisions make them in accordance with civil and political rights.

Over two years ago we began a process to ask Victorians what they thought about their rights, whether they wanted a Charter and what they might want it to contain. A consultation committee was set up, chaired by Professor George Williams, and supported by disability rights advocate Rhonda Galbally, Olympian Andrew Gaze and former Liberal Victorian Attorney-General Haddon Storey QC.

Victorians embraced the task and inundated the committee with more than 2500 written submissions that displayed an astonishing degree of unanimity. From the Country Women's Association, to Indigenous communities in regional Victoria, to

victims of crime organisations, more than 90 per cent supported new legislation to better protect human rights.

However, it was clear from the submissions that Victorians did not want radical change. What they did support was commonsense reform to strengthen democracy and set out their rights in one accessible place.

Reflecting the concerns of those Victorians who participated, the committee did not back the US Bill of Rights as a model, instead looking to comparable democracies like New Zealand for models which leave the final say with parliament, not the courts.

The Charter of Human Rights and Responsibilities legislation was introduced in May 2006 and has been progressively phased in to allow time for the training of courts, police, government and all other public authority staff.

During this year, all new legislation has had to be accompanied by a Charter Compliance assessment; 'human rights' is now a public sector value under the *Public Administration Act 2004*; and it is also unlawful for a public authority to act in a manner incompatible with a relevant human right or to fail to give it proper consideration when making a decision.

More than 800 crucial personnel have received training to provide support to staff in their Charter obligations. In addition, our rights watchdog, the Victorian Equal Opportunity and Human Rights Commission, will report to me annually on the Charter's operation; provide education; and when requested by public authorities, review their policies and practices for Charter compliance.

On January 1 2008, the Charter will become fully operational with the public authority and court obligations coming into effect. Public authorities will have to act in a way that is compatible with the Charter and gives proper consideration to human rights when making decisions. A person who believes their human rights have been violated by a public authority cannot seek damages for this under the Charter. However, if they are able to go to court or apply to a tribunal under another law, they can add a claim that the public authority acted unlawfully because they breached the Charter.

From next year, all statutory provisions must be interpreted in a way that is compatible with human rights. The Supreme Court will have the power to make

declarations of inconsistent interpretation where it is not possible to interpret legislation in a manner that is compatible with human rights.

For the first time in our state's history, key rights are protected in law including the freedom of expression, freedom of peaceful assembly and association and the rights of families and children. (This obliges public authorities to act in the best interests of children and recognizes that children are vulnerable individuals worthy of special protection.)

While the Charter seeks to protect human rights, it does not prevent the government from taking strong, decisive action on issues of state and national security. There will be situations in which rights will be limited in the public interest but such limitation must be fully explained and justified.

I believe this will provide a transparent process by which rights and duties can be appropriately balanced and it will encourage an open and healthy debate about what limits can be justified in a truly civilized society.

On New Year's Day, the Charter will become fully operational but that day marks an inception, not a culmination. As we celebrate the extent of what Victoria has achieved, we must not forget that big challenges still lie ahead.

It is incumbent on every one of us to become champions of human rights and nurture a rights culture right across Victorian civic and political life. We welcome the fact that the newly elected Rudd Government may also be considering the introduction of a national Charter based on the Victorian model and processes.

I am proud that in Victoria we understand the value of human rights – of recording them, promoting them, protecting and enshrining them.

ROB HULLS
Attorney-General

Ethics Bulletin

Appearances in criminal matters – mental impairment

An issue has arisen concerning barristers practising in the criminal jurisdiction as to the course to follow where an accused is unable to give instructions.

There may be many reasons why there is a lack of instructions. A client may refuse to instruct without disclosing a reason, or because of a lack of trust that a confidence will be respected, or out of an irrational fear of the consequences, and so on. Where this occurs, counsel is obliged to retain and act in accordance with the brief subject only to the application of Rule 98(b) which may authorise the return of the brief. Where resort is had to Rule 98 to justify a return of the brief, counsel must comply also with the statutory requirements for judicial leave to to withdraw, which if within seven days of the trial, is granted only if reasonable – see s.27 (2) *Crimes (Criminal Trials) Act 1999*. Rule 98(b) does not negate or diminish this judicial discretion. The duty counsel owes to a court requires, further, that return of the brief be done in sufficient time to allow the client to inform the court at the initial directions hearing whether or not he or she is represented – see s.5(4)(c) *Crimes (Criminal Trials) Act 1999*.

Some occasions have arisen where counsel has formed the opinion that the client's mental processes are disordered or impaired, with the consequence that there is a lack of understanding of the charge, or of the significance of a plea, or of the nature of the trial and the evidence to be or being led, or an inability to give any or any proper instructions. Rule 152 requires a barrister to take special care in these circumstances to ensure that the disordered or impaired mental processes do not work to the client's predjudice. The return of a brief by the application of Rule 98 is subject to Rule 152, and also subject to the application of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

A statutory presumption of fitness to stand trial (and thereby give instructions) is raised by s.7 of the Act. It binds counsel as it does all others concerned with the trial. It is rebuttable, but only by a judicial order made following investigation.

Until that occurs, counsel is not entitled to refuse or return a brief on the ground of an ability to obtain instructions by reason of mental disorder or impairment.

Where counsel forms an opinion that there is a mental disorder or impairment with a consequent inability to give instructions, counsel, if he or she retains the brief, is obliged to disclose that inability to the trial judge in accord with the duty owed by counsel to the court. This arises because an inability to give instructions directly affects the proper adnministration of criminal justice. That a client may fear the consequences of a determination of unfitness does not negate or lessen this duty.

Before disclosing the matter, however, counsel must inform the client and the instructing solicitor as soon as such an opinion is formed, and seek instructions from the instructing solicitor to follow that course. Counsel must allow the maximum opportunity possible for other opinions to be obtained and for other counsel to be engaged. This may not always be possible, where for example the mental disorder or impairment first becomes apparent close to or at the commencement of a trial, or after the trial has commenced. If the instructing solicitor declines to give such instructions, counsel, having obtained the permission of the court, should return the brief. If the court refuses permission, councel must continue to act, however difficult that may be.

If following the statutory investigation the court determines that the client is fit to stand trial, counsel must accept that finding, retain the brief, and conduct the trial as best can be done. Where it is determined that an accused is unfit to stand trial, the statutory 'special hearing' of the criminal charge will take place with the jury informed by the court of the mental disorder or impairment. Even though counsel may not be able to obtain proper or any instructions, the duty requires retention of the brief and conduct of the trial. There will be severe restrictions on what can be done by counsel and they need to be accommodated.

In due course the Practice Rules will be modified to reflect explicitly the duties imposed on counsel by reason of these statutory provisions.

Bulletin 1 of 2007

LETTERS TO THE EDITORS

Dear Editors

It was just a notice in 'In Brief' No. 354 31/8/07.

His Honour Judge Michael Rozenes advises in his letter to the Chairman dated 24/8/07 that following a determination by him under s.88 of the County Court Act 1958 wigs will no longer form part of the attire of judges sitting in the civil jurisdiction of the County Court from 1 September 2007.

It follows that counsel appearing before the court in civil matters will not be expected to wear a wig.

It does not say counsel may not wear wigs in civil cases, but it has the same effect. So I believe that it is now time for the Bar Council, after consultation with members of the Bar, to issue a guideline for counsel on the matter.

It is my view that counsel should continue to wear wigs in civil cases in the County Court and the Bar Council should issue a guideline to that effect. I believe that robes remain an important symbol of the independence, impartiality and integrity of the Bar and its role in the administration of justice.

When Mr Justice (Tom) Smith retired in 1983 after 33 years on the bench of the Victorian Supreme Court he was interviewed by the *Law Institute Journal*. One question he was asked was 'Is it necessary for judges to be wigged and robed?' and he replied 'I am in favour of preserving these traditional trappings. My feeling is that it promotes more efficient conduct of business between the judge and the Bar. It formalises the whole situation so that people are under strong pressure to behave well and with courtesy to each other and to keep to the point. I think that it makes the job of telling deliberate lies in the witness box much more difficult.' The Judge goes on to present further arguments in *LIJ* July 1983 p. 657.

Between 1950 and 2000 my practice at the Bar in Melbourne and on circuit throughout Victoria, both in the Supreme Court and the County Court, was mainly in civil juries where the public was directly involved in the administration of justice. And they accepted and respected our court attire. So did our clients and witnesses. I was never embarrassed by wearing a wig and believe our robes added immeasurably to the efficiency and seriousness and dignity of the occasion.

From my experience I concur with the opinion of Mr Justice Smith stated above on the retention of wigs.

Another way of putting it appears in the judgment of Justice Megarry in *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark* (1973) 2 WLR 1042 (at 1048):

> Robes are convenient in normal circumstances as an indication of the functions of those engaged in proceedings and as enhancing the formality and dignity of a grave occasion. In their appearance they also lessen visual appearance of age, sex and clothing and so aid concentration on the real issues without distraction.

The Family Court dispensed with wigs and then reintroduced them in 1988 after a series of attacks on judges.

In 1997 at a general meeting of the Bar and in a subsequent ballot the Bar voted decisively to retain wigs.

In 2000 in the face of a threat by the Victorian Attorney-General to legislate to ban wigs, the Bar Council declined to be pressured and said it was a matter for the courts to decide the appropriateness of our dress, not the executive. And the Victorian Supreme Court and County Court have uniformly favoured retention of wigs since then.

I regret that the Chief Judge of the County Court has determined that wigs will no longer form part of the attire of judges sitting in the civil jurisdiction of the County Court and his directive that counsel appearing in civil matters will not be expected to wear wigs.

I believe the District Court in NSW has made a similar decision recently. But I see no rationale for our County Court to follow such a break with uniformity and tradition unless for very good reason which has not been demonstrated. Further, I see no reason to distinguish between civil and criminal trials. Indeed no 'reasons for judgment' have been given by the Chief Judge on this very important issue. And the Bar, which is directly affected by the determination and has a very great interest and much experience on the matter, was not consulted.

GEOFFREY COLMAN QC

Dear Editors

If you would like to read the sports section of the *Herald Sun* over a cigarette (criminal barrister) or pretend to read the *Financial Review* in the morning over a cafe latte (commercial barrister) before popping across for some High Court Special Leave, why not make sure you buy that paper from John and brother Ron, our local newspaper men who reside each morning just outside Owen Dixon Chambers?

It will mean a lot to them and you will probably hear one of Ron's quips. This morning's contribution followed my reference to John eating a Big Mac hamburger for breakfast, to which Ron chipped in 'I'm on the "Inkitchen diet"' 'What's that?' I asked. 'If it's in the kitchen, I eat it,' said Ron. Put John and Ron into your morning routine.

ROB DEAN

BOARD OF EXAMINERS FOR LEGAL PRACTICE

Meeting and Admission Ceremony dates
January – June 2008

The Chief Justice has set down the dates for Admission Ceremonies for the first half of 2008; accordingly by application of the customary interval between Board meetings and admissions the meeting dates and admission dates are as follows:

Meeting Dates	Admission Dates
Monday 4 February	Tuesday 19 February
Monday 3 March	Tuesday 18 March
Monday 31 March	Tuesday 15 April Wednesday 16 April
Monday 5 May	Tuesday 20 May

Federal Court

Justice Michelle Gordon

Address by Michael Shand QC, Chairman of the Victorian Bar Council, on Friday 20 April 2007

It was no surprise when notices in the Owen Dixon lifts announced that Michelle Marjorie Gordon SC had been appointed a judge of the Federal Court of Australia. To those who knew her at the Bar her Honour had all the attributes of a fine lawyer; an extraordinary energy for hard and concentrated work, highly organized, logical in argument, a practical common sense, and an understanding of people – these were all attributes of Michelle Gordon the barrister and they are the qualities that equip her well for judicial life.

Michelle Gordon was brought up in Perth. After completing secondary education at Presbyterian Ladies College her Honour completed degrees in jurisprudence and law at the University of Western Australia. Typically, during full-time studies, her Honour worked two days a week with Perth's then leading commercial law practice Robinson Cox. After articled clerkship in 1987 at Robinson Cox her Honour practised in commercial litigation. Her Honour had a close involvement in a long and complex civil trial. She instructed TEF (Tom) Hughes QC. Working with Tom is an experience. Tom's approach is rigorous, methodical, thorough but his personality and zest for the law is infectious. It infected and motivated the young Michelle Gordon.

In 1988 her Honour crossed the Nullarbor to start work in the commercial litigation department of Arthur Robinson & Hedderwicks.

Over four years with that firm her Honour proved herself an outstanding practitioner. Commercial law is generic. Her Honour was equally comfortable advising in equity, tax, insolvency, banking, trade practices or company law. Her Honour was instrumental in the preparation and representation of the Bank of Melbourne in a massively complex Supreme Court trial instructing Ken Hayne QC (now Justice Hayne of the High Court) and Geoff Nettle (later QC and now a Justice of the Victorian Court of Appeal). Exceptional legal acumen was recognized by Arthur Robinson & Hedderwicks when her Honour was appointed Senior Associate in July 1992.

Whilst a career in one of Australia's largest firms had its appeal, her Honour rejected that attraction for another challenge. Her love of the law would best be fulfilled as a barrister. In September 1992 she undertook the Readers' Course at the Victorian Bar and on 26 November 1992 signed the Roll of Counsel.

Her Honour read in the chambers of Geoff Nettle and, when he took silk, with Nemeer Mukhtar. The combination of her Honour and Nettle in the one room has been aptly described as 'creating a vortex of intense concentration relieved by periodic chuckles of mirth'. The two have retained a close friendship.

Within a short period of time her Honour was in demand appearing and advising in commercial, trade practices and tax matters. Her Honour's ability to turn work around amazed those with whom she shared chambers on the 14th floor of Owen Dixon West. Couriers were constantly in and out of her chambers removing and replacing enormous volumes of paper and files. All were mastered in a short time. Advice was succinct, to the point. Preparation for trial left nothing to chance. The loyalty of solicitors and clients

throughout her Honour's time at the Bar did not come about by accident.

After only 11 years at the Bar her Honour took silk in November 2003, this short timeframe in itself testament to an outstanding career as a barrister. As junior and senior counsel her Honour appeared in all jurisdictions across the country. She regularly acted for the Commissioner of Taxation, the Australian Securities and Investment Commission, and the Australian Competition and Consumer Commission. Major Australian companies such as Orica, Multiplex, Mobil, Sun Alliance, Fosters and the major banks retained her Honour in significant litigation and for advice. She thrived in the work of senior counsel.

Her Honour's practice was diverse. She would argue an esoteric point on customs and excise law before the High Court and the next day the law of extradition on behalf of the United Mexican States before a magistrate. Her submissions were unfailingly thorough, and logically and powerfully presented. Her Honour was quick on her feet, adept at cross-examination, and she had an awesome command of legal authority.

Her Honour's engaging personality resulted in many friendships across the generations at the Bar and to the Bar she gave unstintingly of her time. The development, establishment and acceptance of continuing legal education at the Bar is due to the tireless work of her Honour. It would understate her Honour's role and contribution to say she headed the committee that established CLE at the Bar. Her enthusiasm, drive and leadership was responsible for the bringing together of the various associations and interest groups at the Bar to establish the scheme. This is no mean feat. Her Honour, as at the date of her appointment, headed the CLE Committee at the Bar.

Her Honour routinely and generously gave of her time to the Readers' Course and barristers were regularly in Her Honour's chambers seeking her advice on a large range of legal issues and problems.

It is not only the Bar that benefited from Her Honour's legal knowledge and experience. She was a Senior Fellow of the Masters Program of the University of Melbourne in Tax, a member of the Advisory Panel of the Faculty of Law and Business at Deakin University and a member of the Tax Committee of the Business Law Section of the Law Council of Australia.

Her Honour is married to Justice Ken Hayne, she is mother to eight-year-old son James. Despite all of the above, those that have witnessed it suggest her Honour's advocacy skills are severely tested as a surf lifesaving instructor of 'little nippers' during the summer months. Here logical argument has little sway. An authoritative voice does not always work. Her Honour leads by example – wet suit, fins and board – a sight to behold. The family obtain immense pleasure from the beautiful coast and beach around Cape Liptrap.

With her Honour's appointment the Bar has lost one of its true leaders. The Bar welcomes the significant contribution we know her Honour will make to the Court and to the community over the years to come. The Victorian Bar wishes Justice Gordon well for the future.

WELCOME

Supreme Court

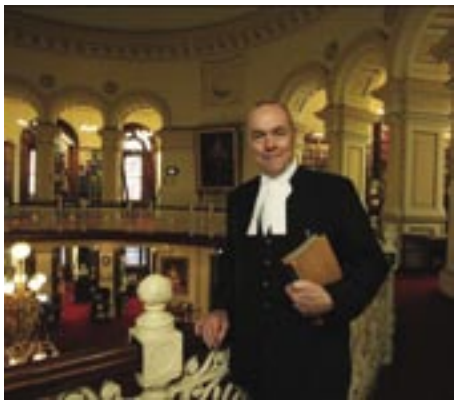
Justice Lex Lasry

Address by Peter Riordan SC, Chairman of the Victorian Bar Council, on Wednesday 31 October 2007

Your Honour was born and grew up in Healesville. You were an only child and your father was the local solicitor. You attended the local primary school. There being no secondary school in Healesville your Honour was dispatched to do your secondary schooling at Haileybury College. By all accounts your Honour was not enamoured of the discipline enforced upon you, and upon your matriculation you were given a bible by the Headmaster with an inscription relating to the school's efforts at your redemption. In 1967 you went to Monash University. It was there that your love developed for a number of things. It is unclear whether law was at the front of the list.

It was at Monash University that you met your wife Elizabeth, now 40 years ago. It was there that you also developed your passion for motor sports. On occasions the two passions became mixed.

In 1972, shortly before you married, you saw an advertisement for a chicken and champagne trip from Melbourne to Bathurst. Nice, you thought – a bit of romance, followed by a bit of racing. What could go wrong? You realized the answer to that question when you stepped onto the bus. Your wife to be was the only female bar one. By Seymour the entire bus had consumed way too much champagne (actually only one served in a paper cup, but made up for by a plentiful amount of



RICHARD CISAR-WRIGHT/*THE AUSTRALIAN*

other liquor) and not enough chicken. At West Wyalong the bus blew the clutch. To add to the romance, it poured rain all weekend. But, at the end of the weekend, Peter Brock had won at Bathurst for the first time. The trip was worth it. If anything bespeaks the perfect fit that you and your wife are, it is the fact that she must have enjoyed herself and saw past the dramas of this weekend away. She married you the following year. The influence of Peter Brock clearly endured – just recently she refused the offer of a lift from Julian McMahon because he was driving a Ford. She is Holden all the way.

Your Honour does not just enjoy observing the cars go round the track. You participate in it. You had your first race in 1972 at Calder Park in an MG. During the race someone's car rolled with tragic results. Your Honour finished last in that race but despite the events of that day, you were not to be deterred. By 1981 your Honour's driving skills had improved significantly and you finished 4th in the Australian Sports Car Championship. Currently your Honour holds a licence that allows you to drive in motor races.

For many years your Honour has also had a legendary love of Porsches, and you race them. You have also often been seen driving them into chambers, top down, with peaked cap and colours. On one such occasion in the days prior to Christmas in 1998 your Honour had popped into your clerk's office and parked your 1986 Porsche 911 Carrera in Little Bourke Street, just next to your Honour's new working home. Smoke began emerging from under the hood. A crowd gathered – a passerby cautioned your Honour not to open the hood. Knowing better, and then not knowing much about fire, your Honour could not resist the temptation. The fire underneath couldn't resist the sudden breath of oxygen and car caught fire in earnest. Your Honour describes how friends and colleagues you hadn't seen for years starting emerging from everywhere. The fire brigade was called. Recognising that nothing could be done, your Honour retreated to Illia to have a latte, and simply watch the Porsche burn. A stringer, sitting next to you looked at the burning car and remarked, 'Just look at that, some poor wanker's Porsche is on fire'. Your Honour agreed with the observation, and said how you hoped that the poor wanker was insured.

Your Honour finished your studies at Monash University in 1971 and the following year you were articled to Jim Hill at Slater and Gordon. At the end of your articles your Honour worked for six months as a solicitor with your father, who was by now practicing in Brighton, before going to the Bar. Your Honour read with David Bennett in 1973. They were interesting times, David Bennett having a close friendship with Andrew Peacock, the Whitlam Government having just been elected and the Liberals being in opposition for the first time in 23 years and clearly none too pleased about it. Your Honour found yourself surrounded by the likes of Barry Beach, Kevin Whiting, John Winneke and Peter Heerey.

In your last case at the Victorian Bar your Honour was opposed to amongst others, Chris Winneke. Your Honour remarked when you heard the familiar tones of a Winneke on his feet that your admission ceremony had been presided over by his grandfather. You spoke of being a junior opposed to his father and watching in awe as the outstanding advocate went about his business in the case of *R v Reid* in 1980. Your Honour ominously commented that having seen and heard the resonating tones of three generations of Winnekes in court, perhaps it was time to move on.

In that trial of Reid in which your Honour was junior to now his Honour Justice Cummins, the trial was dramatically interrupted by the shooting of three men outside of the courtroom. Some of the marks from the bullets can still be seen on the walls today. Your Honour saw first hand a gruesome scene, that most barristers only experience through photographs.

In 1981 your Honour was junior to the now retired Judge Hassett in the case of Clarkson, Flannery and Williams. You and John Hassett remain great friends to this day. Hassett, in that profound voice of his, had commenced his final address and the court adjourned for the day. That evening Hassett rang your Honour and said that he was not feeling terribly well, that he thought he was about to lose his voice. He was sending Val over with his notes and you would have to take over the final address. Your Honour almost died. It was a very long 10 minutes before Hassett rang back to end his joke.

During 1983 and 1984 Your Honour was involved in the Painters and Dockers Royal Commission headed by Frank Costigan QC. Doug Meagher QC was senior counsel assisting, and your Honour was recruited along with Rex Wild, as junior counsel assisting. From that time on Rex and Lex developed a lifelong friendship. Rex has most recently retired from his position as the DPP of the Northern Territory.

The case that likely propelled your Honour to a successful application to take silk was the case of Dennis William Smith, Ashford and Schevella in 1989. Your Honour was prosecuting and it was in this case that you met your junior, John Champion, for the first time. The case was before Justice Tim Smith, then a judge of the County Court. It was a long drug case involving many telephone intercepts and listening device conversations. Such drug conversations are often carried out in code, to disguise the true nature of the unlawful activities. The accused were colorful characters and many of the conversations had highlights but none more than one that simply had to be played. It was one in which Dennis Smith discussed with a Western Australian colleague certain aspects of his 'love life', which on this occasion involved Fatty Smith describing a recent interlude where he dressed in a 'gorilla suit with the crotch cut out', and his female partner wore a 'nun's outfit'. The description of the activity was full of colour that cannot be repeated here in full. It is a testament to your Honour's powerful skills of advocacy that you were able to persuade his Honour to admit the evidence as supposedly relevant to prove 'association'. In truth, by the time everybody in court who had heard the conversation during legal argument wanted it to be played. It was played, and at the very moment, everybody who understood what was coming, including the accused, turned to watch the jury and their reactions to what they were about to hear. Nobody was disappointed. The moment was one well remembered by all who were present. It was an illustration that although criminal cases are full of drama and tension, there can be moments where the use of humour can occur. To many, your Honour can appear quiet and serious. Those that know you well know that your Honour has a fine sense of humour.

The following year, in 1990, your Honour took silk. By that time your Honour

had four readers, Jim Dounias, John Trapp, Russell Mitchell and Gail Thompson. Your Honour was never without work – the big cases continued and you went on to work with numerous juniors, many of whom are now silk themselves.

In the mid 1990s your Honour became involved in the trial of *The Queen v Barker and Campbell*. In the opening days of the trial an event occurred that became known later in the Full Federal Court as the 'jury-room incident'. The Crown case was that Barker and Campbell defrauded the Australian Taxation Office of the very large sum of $3.5 million. A plan had been hatched involving the creation of a sham agreement with a UK company called Teckvest Pty Ltd, to use a computer share trading program called the Teckvestor to trade and, it was said, to make much money. The agreement, falsely put forward as legitimate, fraudulently defeated a Mareva injunction and deceived the ACT Supreme Court, and thus permitted the removal of the said monies overseas. The monies went straight into the English bank account of a man called Vincent Anthony Hillsdon, where they then mysteriously disappeared, never to be seen again. It was a sting on a sting. The case was an international fraud of significant proportions.

In the opening days of the trial Justice Gallop entered the court first thing in the morning and announced that he had been made aware of a complaint from within the jury room, alleging that there had been a theft of a small amount of coinage from a juror's backpack. The implication was that the money had been taken by another juror. In the true tradition of Judge John Deed, by the time the announcement was made to open court his Honour had already interviewed the juror in his chambers, had called in the Federal Police to take statements, and the investigation was well underway.

Needless to say, there was an application by the defence to discharge the jury. The application was refused and the trial proceeded, with convictions on most counts on the indictment. The report of the appeal in the matter, [1996] 809 FCA 1, records the application by senior counsel for one of the accused, in part, as involving the argument that there was a very damaging possibility if the whole jury was not discharged they might form the reasonable view that the alleged theft had been committed by one of the accused, who it was said, could have had the opportunity to enter the jury room in a quiet moment and commit the theft of what amounted to no more than parking money.

Justice Gallop refused the application for discharge and that ruling was upheld by the Full Federal Court. On many occasions your Honour has fondly repeated the very unusual circumstances of this story – the story getting better and better with the re-telling.

The case of *The Queen v Barker and Campbell* bears significance in your Honour's life for at least two important reasons. Being then an opponent, your Honour met Neil Adams, a barrister from New South Wales, with whom you formed a lasting friendship, as well as later becoming colleagues in chambers in the ACT Neil Adams is now a Crown Prosecutor in New South Wales and is present today.

The other reason for the importance of the trial of *R v Barker and Campbell* in your Honour's life may be unknown to many. Your Honour possesses considerable musical talent on the drums. The hearing of this trial in Canberra proceeded over many months, and over two separate years. As happens when counsel are obliged to work on the hard grind on long matters interstate there were inevitable periods of time spent waiting at airports, late on Friday afternoons and Sunday nights. It was during these occasions that your Honour was moved to reveal a long held fantasy – to pursue an alternative career as a rock and roll star. It happened that like yourself, your then junior, John Champion, had also been a member of a teenage band.

What was idle discussion in the Golden Wing thus became reality. So was formed 'Vinnie and the Teckvestors', named after key figures in the Canberra trial, later to metamorphose into the 'Lex Pistols'. Rehearsals began modestly in a room in the family home in Hampton where your mother lived. When ready for the public, the band, then comprised yourself as drummer; John Champion on guitar; Brent Young in the keyboard department; Michael Cahill as the bassman; and surgeon Steve Rodgers-Wilson as rhythm guitarist. The band debuted at your Honour's 50th birthday party held at the London Hotel in Port Melbourne. It was a captive audience – the best possible way to start an alternative musical career. With others appearing from time to time in cameo roles, so began a stellar career that saw the fulfillment of the rock star's dream of performing publicly at diverse venues ranging from Cherie Lee's back yard on a warm summer night; under the spire at the Victorian Arts Centre; the Hilton Hotel with a megasize televison broadcast; to the Carnavale held by the Bar to celebrate its centenary at the Regent Hotel. At that gig the band had the midnight to 1am shift. Images still resonate of Justices Hayne and Hampel, and his Honour Judge Walsh, and their respective partners, on the dance floor. The Lex Pistols did weddings, golf clubs, football clubs, birthday parties, dinner dances; anything really, which allowed your Honour to display your percussive talents.

Hardly a penny was made, and the Pistols played for the love of it, and for the friendship. A particular highlight occurred at the Celtic Club during one of the Xmas in mid-year functions jointly held by Victoria Legal Aid and the Office of Public Prosecutions. This now serves as a warning to those who may appear in your Honour's court – your Honour does not take kindly to being ignored. This night, much to your annoyance, the then inebriated crowd ignored the band – at their peril. Having had enough, the music stopped, and with your Honour taking microphone in hand, over the public address system, you remarked in the loudest possible terms, 'If you're not going to listen, then you can all just go and get f…..d'! Of course, no one took any notice, and the music continued, with the band playing the rest of the night strictly for its own enjoyment!

The band, which is now temporarily experiencing artistic recess to replenish energy, played a particularly important part in your Honour's life during the Ambulance Commission days. It allowed an important outlet during a very difficult period when the workload was crushing, and your Honour was frequently under attack, both professionally and personally. The members of the band, present today, and in the best traditions of Murph and the Magictones from the Blues Brothers, claim that 'the boys are putting the band back together', wish your Honour the best for the future. The band is resolved to make sure your Honour's feet are kept

firmly on the ground. Those present today should leave this court with an alternate image of your Honour in black T-shirt, jeans and baseball cap.

Following the Barker trial in Canberra your Honour developed a practice in the ACT and became a member of the newly formed Empire Chambers. During that period you appeared in a case that gained significant publicity. It was the murder trial that concerned the death of a young university student called Joe Cinque. Your Honour appeared for Madhavi Rao, a young woman accused of complicity in his murder. In the event, she was acquitted. The case involved tragic and bizarre circumstances and a literary account of the case appears in the book *Joe Cinque's Consolation*, by Helen Garner. Garner watched the trial and saw your Honour at work. Having formed some opinions of what she saw she later rang you and told you that she intended in the book to describe your Honour as a 'cold-hearted monster', and what would you think about that description. Your Honour objected. By the time the book was published the description she had proposed had changed to Mr Lasry 'not having a histrionic bone in his body'; and having a presentation that was 'lacklusture; unnaggressive; turgid and without pace and rhythm'. Your Honour has since expressed the strong view that 'cold-hearted monster' would have been preferable to the unfair description that is now consigned into literary history!

It was also during the 1990s that you were juniored by and forged a great friendship with Duncan Allen, now his Honour Judge Allen of the County Court. In the murder trial of Craig Dow in 1995, presided over by Justice Vincent, your Honour, defending, had beseeched the jury not to compromise under any circumstances. Four days later the jury was still out and Duncan commented to your Honour that perhaps a compromise wouldn't be a bad thing. The jury acquitted Dow about ten minutes later. Duncan later also endured the Ambulance Royal Commission with your Honour, which took up much of your time between 2000 and 2001.

In 1996 your Honour, again with Duncan Allen, was involved in one of the first of the baby-shaking cases where the accused was being held up to an angry and strident press. The case is now reported as *R v Gregory and Richards*. One of the accused was a woman who had originally been charged with murder. She ultimately pleaded guilty to manslaughter. She had an IQ of 58 and when your Honour was trying to explain the plea to her, not understanding really what was going on, your Honour recalls her pointing to the coloured post-it notes on your court folder and said, 'pretty colours'. This case was to be the first real unpopular cause that your Honour was involved in. It was the first of many. It was certainly the first that truly brought home to you how important it is that everyone deserves fearless representation.

In the late 1990s you were juniored by Mark Taft in the case of Fruitinet, which cemented another lasting friendship. Most recently you and Taft represented Jack Thomas. Thomas was arrested overseas in January 2003, arrived back in Australia in mid 2003, was not charged until November 2004, was committed in 2005, and was tried and acquitted of the most serious charges levelled against him in 2006.

During this time your Honour also acted as senior counsel assisting at the Canberra Coronial Inquest into the 2003 bushfires which had resulted in four deaths. Your junior was Ted Woodward.

The last case your Honour was involved in is still running. Without delving into the case, your Honour took on a civil case, involving a policewoman suing the State of Victoria and other police officers for mental injury. It was almost as if your Honour was playing out the old joke Judge Hassett had tried out on you, but this time for real. Some time into the trial your Honour was approached about your appointment. You told your most recent junior, Megan Tittensor, that she should prepare to cross-examine the four police defendants herself. She managed a 'congratulations' in amongst a collection of expletives.

Perhaps the case that stands out most, no doubt for your Honour, but also for those both in and out of the law and interested in justice, is that of Van Nguyen, the young Australian man arrested in Singapore carrying a relatively small amount of heroin. In December 2002 Van was arrested. In the days thereafter, a member of our Bar, Julian McMahon appeared at your door and asked for your help. You did not really know Julian, but immediately agreed to do whatever you could to assist. You had no real idea of the journey this would take you and Julian on. A few months later you went on the first of 17 trips to Singapore in your now well known and documented fight to save Van's life. Your Honour worked pro bono for Van on the case which amounted to many months of full-time work over three years at great personal and financial cost. On the last trip in December 2005 you and others brought Van's body back. You were a pall bearer at his funeral. Your wife developed a great bond with Van's mother during that period and still gives her incredible support to this day. The case has been a momentous experience in your life.

One of the things which emerged in preparing the many legal arguments in Van's case was your Honour's scholarship – your Honour brought in the analysis jurisprudence from the major courts around the world and conducted rigorous analysis of Singaporean law. No doubt we will see more of this in your Honour's rulings.

As your Honour had no right of appearance in Singapore, you and Julian engaged with a Singaporean advocate, Joseph Thesiera. Understandably, all three of you became very close and were all together with Van on his last day. Prior to that case, Joseph had been thinking of moving with his family to Australia. He and his family have now settled here and share social occasions with your Honour. Last year, your Honour was very proud to move Joseph's admission in the Supreme Court, and next year it is hoped that Joseph will read with Julian when he undertakes the Bar Readers' Course.

There were many negatives to take away from that experience – a young man, completely reformed, had his life extinguished for no good reason. It demonstrated that a system of law allowing no discretion was a fundamentally flawed system. But there were also positives. Van's situation and his reaction to it had a profound and positive affect on those around him, which rippled across the oceans and throughout Australia. The death penalty debate in Australia has now become a great deal more prominent. The Victorian Bar is rightly immensely proud of the way in which you conducted yourself on behalf of your client. You acted in the best traditions of the Bar. Your friends and colleagues saw

you now in a different light and saw you at your best, and consoled you during the low points. You well and truly put paid to the description earlier proposed by Garner that you were a 'cold-hearted monster'. People witnessed a man of immense humanity and compassion.

Since that time your Honour has been involved in a number of successful international cases. In 2005 your Honour traveled to Sierra Leone where along with Darren Bracken you represented Peter Halloran. Earlier this year you and Julian McMahon represented George Forbes, who had been convicted and sentenced to death for murder in Sudan. You and Julian quickly examined the evidence, gathered further expert evidence, and prepared submissions to their Court of Appeal. Within a very short time Mr Forbes and his three African work colleagues were free men.

In more recent times your Honour has again teamed up with Julian McMahon to represent two members of the 'Bali 9' in Indonesia.

During your work on the death penalty cases your Honour built strong bipartisan relationships with both the government of the day and the opposition, as well as the Department of Foreign Affairs and Trade, earning the confidence of all those groups in tackling the sensitive cases at both a legal and diplomatic level. The many flights overseas were in the main in cattle class which was no mean feat of endurance for a man of your Honour's size.

As an indicator of the esteem in which your Honour is held not only within our State, but around our country, in December 2004 your Honour was asked to attend at Guantanamo Bay as an observer of the Hicks 'trial' on behalf of the Law Council of Australia. Your Honour attended again earlier this year. Your Honour's collection of friends had not ended, and it was through this process that you met and became firm friends with Tim McCormack, the Australian Red Cross Professor of International Humanitarian Law at the University of Melbourne.

As a result of your observations your Honour produced three reports on the US military's detention, trial and conviction of David Hicks. Again your Honour saw the consequences to a system of law, and the recipients of its so-called justice when the rule of law was dispensed with. This year your Honour was awarded the inaugural President's medal by the Law Council of Australia for your contribution to the law.

Last year your Honour gave the Law Week Oration at the University of Melbourne. You and Julian McMahon were there presented by the Attorney-General with the Victorian Law Foundation Distinguished Pro Bono Award.

Since the 1990s your Honour has also made a great contribution to the Criminal Bar Association of Victoria. You spent around 14 years on the Committee, four of which were as Chairman. You devoted much time and energy to the Association, which involved weekly 8am Tuesday meetings, as well as various other submissions and committees that followed on from this involvement. Your Honour's great stewardship and service to the Association was recognized earlier this year with Honorary Life Membership.

Your Honour was also a member of the Council for the International Criminal Bar for counsel practicing in the International Criminal Court. As a part of this commitment, this year, your Honour traveled to Toyko for the Council meeting.

In very recent times your Honour was very pleased, and perhaps a bit wistful at the elevation of Duncan Allen to the County Court of Victoria. However, fast-forward a few months, with your Honour now also elevated, it has been very pleasurable to watch the obvious joy that you both have in your new positions as judges. The two of you can now be seen greeting each other in the style of Dan Ackroyd and Bill Murray in *Spies Like Us* – acknowledging each other: 'Judge', 'Judge'.

Your Honour has also expressed gratitude and thanks to your wonderfully supportive family. The life of a criminal barrister is hard, and it can be harder still on one's family. You and your wife have four fantastic children, and the highlight of the last year has been the birth of your first grandchild. Your Honour now proudly holds a photograph from your swearing in at Government house of your grandson being held by the Chief Justice whilst being entertained by the President of the Court of Appeal.

As is evident your Honour has been involved in the most serious of cases. You have managed in all of them to promote fairness and tolerance for all, not just to your fellow lawyers, but to the wider community. Your Honour brings the most exceptional qualities to the bench and there is no doubt that the State of Victoria will be served in an exemplary fashion.

The Duty Barristers Scheme pilot

On 16 November, His Honour the Chief Magistrate, Ian Gray, officially launched the Duty Barristers Scheme as a six-months pilot program in the Melbourne Magistrates' Court. The Scheme had begun operation the previous Monday with three barristers, all of whom had significant experience as solicitors, before coming to the Bar.

It is estimated that the Victorian Bar Legal Assistance Scheme, administered for the Bar by PILCH, delivered, in the last financial year, in excess of 11,500 hours of pro bono work by barristers – estimated very approximately at something in the region of $4¼ million in value. The Duty Barristers Scheme is another addition to the several schemes that operate through the courts; another addition to the Bar's commitment to more effective access to justice for more Victorians.

This scheme, together with other proposed initiatives, is part of the comprehensive legal aid program, which establishes the Bar's commitment to facilitating access to justice in Victoria.

Supreme Court

Justice Paul Coghlan

Address by Michael Shand QC, Chairman of the Victorian Bar Council, on Wednesday 15 August 2007

I appear on behalf of the Victorian Bar to offer our warm congratulations on your Honour's appointment to this Court.

Your Honour has practised law for more than 38 years: nearly nine years as a solicitor, and more than 29 years as a barrister. For the last six years you have been the Director of Public Prosecutions for the State of Victoria.

EDUCATION

You were educated at St Joseph's Christian Brothers College in North Melbourne, and at the University of Melbourne.

St Joseph's is known as 'North'. It was founded in 1903. 'North' was and is a working class school for boys. 'North' is on a small block on the corner of Queensberry and Capel Streets, North Melbourne. There is nothing of the playing fields of Eton – indeed, there's not a blade of grass.

In your Honour's day, the school overlooked a brothel in Capel Street, and shared a wall with Shane McGrath's Royal Park Hotel. I am told students frequented only the pub.

'North' has a strong academic tradition. It has produced many politicians. Arthur Caldwell, Jim McClelland, Frank McManus and BA Santamaria were all contemporaries at 'North'.

Your Honour is not the first 'North' old boy on this Court. You are preceded by Sir James Gobbo. On the County Court, Judge Ostrowski, went to 'North'. His Honour's farewell is on 6 September so you will soon be the only sitting 'North' judge.

Your Honour shares with Sir James Gobbo a passion for football learned at 'North', as Sir James has said, 'on a small piece of asphalt'.

Your Honour's talents lay more in the direction of administration than in the swift and sure handling of the ball. You were the perfect secretary of the re-formed North Old Boys Amateur Football Club, indeed its first secretary.

In the 1930s the Old Collegians had a team in the A grade amateur league. It was rubbed out for life for playing an unregistered player under a registered player's name in the grand final.

You cut a distinctive figure at the Old Collegians matches, patrolling the boundary line with a masonite clip-board, and always wearing a full-length, Stockman's Dry-as-a-Bone coat – long before that garment became fashionable.

You came by the Dry-as-a-Bone coat by family tradition. Your late father, Jack, was a prominent stock and station agent.

Under your Secretarial leadership, the club rose in the Victorian Amateur Football Association from E grade to A grade in record time. The club made the grand final every year, and even winning some of them!

After graduating Bachelor of Laws, from the University of Melbourne, your Honour served articles with Maurice Ryan of the firm of Maurice Ryan & Francis Greene.

PRACTICE

You were admitted to practice on 1 March 1969 and, after nearly nine years as a solicitor, you signed the Bar Roll on 9 February 1978.

Your Honour read with the late Fred

James. Fred was a modest man. He never took silk, but was a formidable advocate with a talent for elegant and graceful English. Your Honour developed the same talent, bringing it into the next generation of advocates.

Your early work at the Bar included prosecuting in appeals to the County Court. From the outset, you specialized in crime, in particular as a prosecutor.

You were briefed to prosecute in significant cases long before your appointment as a Crown Prosecutor – the corrupt policeman 'Dingy' Harris; the murderer 'Mr Stinky'; and the Silver Gun Rapist – all while you were at the Bar.

In 1990, you were appointed Associate Director of Public Prosecutions for the Commonwealth. You succeeded Judge

John Dee on his appointment to the County Court.

Justice Mark Weinberg, now of the Federal Court, was then the Commonwealth DPP.

It is fair to say Your Honour has never been a shrinking violet. One day, you stormed into the DPP's office. You'd heard of a prosecution against *The Australian* newspaper for contempt. 'Who's the [so and so] idiot who authorised this charge???!!!!'

The soft-spoken response was 'I am'.

The case went all the way to the High Court as *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. Mark Weinberg QC as he then was, led the case for the respondent informant. The Court agreed with your Honour, and struck down the charge. That case became the foundational authority for implied freedoms. As Brennan J stated –

> …where a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of that form of government. Once it is recognized that a representative democracy is constitutionally prescribed, the freedom of discussion which is essential to sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains.

1992 seems now a long time ago – separated by the events of 9/11 and other terrorist attacks; yet the observations of Brennan J have an enduring resonance.

After returning briefly to the Bar, on the first of July, 1994 you were appointed Senior Crown Prosecutor (Major Cases) in the Victorian Office of Public Prosecutions. That same day, the late Geoff Flatman was appointed Chief Crown Prosecutor and the late Bill Morgan-Payler a Senior Crown Prosecutor.

The very next year, after Geoff Flatman QC became DPP, your Honour was appointed Chief Crown Prosecutor. You also took silk in 1995.

DIRECTOR OF PUBLIC PROSECUTIONS

Then, in 2001, upon Geoff Flatman being appointed to this Court, your Honour was appointed Director of Public Prosecutions.

Parity

The one-armed artist's left stump
confronts and accuses.
It points the finger at those born with both arms
who insist on fighting with one hand tied behind their backs,
their manual advantage eroded by a mental slackness

His stump a handicap and a handy chap:
inert but obdurate, galling but galvanising

It will not go away.

NIGEL LEICHHARDT

The first English Director of Public Prosecutions was Sir John Maule in 1880 – but he was part of the Home Office, and brought only a small number of important or difficult prosecutions.

Ireland appointed the legendary Eamonn Barnes as its first DPP in 1975 – a post he held for nearly 25 years. Barnes' principal objective was to make the office independent of government, and that independence has been credited substantially to him.

Your Honour met Barnes at a meeting of HOPACC – the Heads of Prosecuting Agencies in Commonwealth Countries. Barnes was also inaugural President of the International Association of Prosecutors.

Your Honour holds Eamonn Barnes, now retired, in the highest regard, in particular for his wisdom that to prosecute is easy – the hardest decisions are those not to prosecute.

Barnes saw the severe and irretrievable damage and injustice that flow from prosecution of an innocent person. He said that every effort humanly possible must be made to get the prosecution decision right.

In 1973, Tasmania became the first State to establish an Independent Prosecuting Office – the Crown Advocate.

Victoria established the first Director of Public Prosecutions in 1982. The Commonwealth and other States soon followed.

Justice Kirby, then President of the New South Wales Court of Appeal, quoted the pre-DPP criticism that the process of prosecutions, both State and Federal, had been probably, and I quote, 'the most secretive, least understood and most poorly documented aspect of the administration of criminal justice'.

The object of having a Director of Public Prosecutions is, and I quote again Justice Kirby, 'to ensure…a high degree of independence in the vital task of making prosecution decisions [and] in exercising prosecution discretions'.

The first Victorian DPP was John Harber Phillips, later Chief Justice. He was succeeded, in turn, by Justices Coldrey, Bongiorno and Flatman, all of this Court.

Your Honour has been outstanding as our fifth DPP. You took to heart the wisdom and example of Eamonn Barnes. You also built on the work of your immediate predecessor, Justice Flatman, in meeting and speaking with victims and the families of victims of serious crime.

You led by example, continuing to appear personally in the most complex and demanding appeals in the Court of Appeal and the High Court.

Your Honour is renowned for your encyclopaedic knowledge of the criminal law, with instant recall of the authorities in astonishingly precise detail, of both facts and law.

You presented the most complex arguments in the Court of Appeal, and in the High Court, in a relaxed, almost conversational, style – and with the elegance of language you so admired in Fred James.

Because you put yourself on the line in complex appeals, the case discussions around the large table in the Prosecutors' Common Room were between fellow advocates. There was, however, never any doubt as to who was the first amongst equals.

You liked to think of these case discussions as a Socratic dialogue.

Experienced senior prosecutors say they had to run each case twice: once in court; and once before the Director.

There are no prizes for guessing which they most feared. The great aim was to avoid the outburst, 'You did WHAT?'

THE BAR

Your Honour had four Readers at the Bar: Christine Giles, Patrick Southey, Dr Chris Corns, and Dr David Neal SC.

You served significant terms on a number of Bar and related Committees: five years on the Executive Committee of the Criminal Bar Association; two years on the Bar Library Committee; four years on the Legal Education and Training – Readers' Course Committee; and ten years – the whole life of the committee – on the Bar and Law Institute Joint Standing Committee on Listing Problems.

Your service in the Bar's Advocacy Training Courses in the South Pacific has been remarkable. For 12 years, from 1995 through to this year, you instructed in a total of 12 Advocacy Skills Workshops in Papua New Guinea, Vanuatu and Fiji – a record number for an instructor. You led a number of those teams, the most recent to Fiji earlier this year. You and other members of the Bar including the judiciary, with Barbara Walsh, have given quiet but immensely valuable service in the Bar reaching out to our South Pacific neighbours.

Also in those 12 years you have taught in every Bar Readers' Course.

It was, however, not all work and no play in the Office of Public Prosecutions. A regular lunchtime diversion has been to do the trivia quizzes in *The Age* and *Herald-Sun*. Your Honour excelled – but then, although this was not generally known, you had 'form' in that regard. You had been a winning contestant in Roland Strong's Coles £3,000 Question.

Last week, on the morning that your appointment to this Court was announced, you were welcoming a group of young lawyers who had recently joined the Office of Public Prosecutions. You spoke of the need for commitment and passion – but also of the importance of work–life balance.

Your Honour has always been devoted to your family. As one daughter has said, how many fathers still delight in spontaneous gifts of jewellery to their adult daughters?

The affection is mutual. How many judge's daughters have the judge's two-year-old grandson, Joseph, word-perfect, within a day of the appointment, in the form of address: 'Your Honour'?

The Bar wishes your Honour long and satisfying service as a member of this Court.

WELCOME

Supreme Court

Justice John Forrest

Address by Peter Riordan SC, Senior Vice-Chairman of the Victorian Bar Council, on Tuesday 21 August 2007

I appear on behalf of the Victorian Bar to offer our warm congratulations to your Honour Justice Forrest upon your Honour's appointment to this Court.

Your Honour represents a continuation of this Bar's tradition of fine barristers of Irish breeding who have a close association with the racing industry.

Of course, Sir Eugene Gorman was a barrister in this tradition; but one needs to go no further than your late father, James Herbert Forrest, who was a County Court Judge, and Acting Chief Judge of that Court.

Your father commenced studying law after serving as a flying officer in the RAAF from 1941 to 1945. In 1946 he met your mother, Bebe, at the University of Melbourne Law Faculty. Your father was attracted to your mother not only for her unusual beauty but in particular because, during lectures, she would sit brazenly with her head in the *Sporting Globe*. To Jim this woman was irresistible.

In 1985, the year he retired from the County Court, Judge Forrest received the distinction of being made an Officer of the Order of Australia for service to the legal profession and the community.

It is a matter of great pride to you – and to the whole family – and to the Victorian Bar that your Honour now follows your father in being appointed to judicial office.

With respect to your education, your Honour attended Loreto Mandeville Hall. In those days, Mandeville was co-ed from kindergarten to grade two.

In grade three, you went to Burke Hall – where presciently your teacher Mrs Burgess reported on your year's work in these terms: 'This happy little worker will continue to improve.'

Your siblings Terry, Jim and Mary took great delight in Mrs Burgess' remarks and have reminded you of them frequently over the years.

You remained happy and continued to improve. During your time at Xavier College, the students were encouraged to establish student clubs as part of the House system. While the more mundane of us became involved in the chess club and debating club, and invited visiting academics or esteemed old boys to address us, you formed the Xavier Punters Club and got leading jockey Harry White to come to the school as the guest speaker.

More of your love of racing later but it would be remiss of me not to mention your Honour's outstanding sporting achievements in all seasons.

As a footballer, I have it on good authority from people, who claim to be your friends, that you had a distinguished career with the Melbourne Uni Reds. They say your Honour was a prolific winner of free kicks, an outstanding pack skirter and that nobody ever accused you of showing reckless disregard for your own safety. However, on one occasion you were injured when your circumnavigation of the pack was so wide that you crashed head on into the point post. Your team mates were uncharitably telling you to get up because you can't get a free kick for being shirt-fronted by a point post, but in fact your Honour was so seriously injured that at hospital you were administered the Last Rites.

As a cricketer you also demonstrated great prowess and, in the best traditions of Irish Catholics, you used your skills to wreak havoc on Protestants for 25 years in an event known as the Prot-Cath Cup. Your Honour was the anchor and, it is said, mouth of the Catholic team; and, as the wicketkeeper, I am reliably informed that behind the stumps your Honour not only showed the same great flair as Australia's then keeper Rodney Marsh; but like Mr Marsh you had to endure the unjustified taunt of being called 'iron gloves'.

While at university your Honour also completed a Bachelor of Laws in 1973; and you then served articles with Jim Cox of the firm Madden, Butler, Elder & Graham (now Deacons).

You were admitted to practice in April 1975, and signed the Bar Roll in September 1978.

You also completed a Master of Laws in that time, and while studying for the LLM, you took up horse training from the family farm at Malmsbury. You were immediately successful, and contemplated racing as a career.

You maintained your Victorian Racing Club licence when you came to the Bar. Perhaps a little wistfully, the last sentence in your most recent curriculum vitae as a barrister is: 'For many years, he was licensed by the Victorian Racing Club as an owner-trainer of race horses.'

Your Honour trained Eastern Show and Freemount to many successes as metropolitan gallopers.

The Forrest stable, much to your father's concern, became known as one that would back their confidence in the betting ring, and bookmakers would quake when the big money from Malmsbury arrived.

One day at St Arnaud, Freemount dead heated. You immediately fired in a protest. Your jockey was the later-famous Theresa Payne.

Walking to the stewards' room she said: 'Jack, why are we protesting?'

'Watch this', you said.

You then embarked upon what some say is the finest piece of advocacy ever seen at the St Arnaud racetrack. You persuaded the stewards that the slightest brush by the other deadheater 5 furlongs from home had denied your horse certain victory. Theresa, taking her cue from you, burst into tears at the very mention of this life-threatening incident and the protest was triumphantly upheld.

Would that we all had witnesses as quick on the uptake as Theresa Payne. It was after this episode that you concluded that advocacy, rather than horse training, may be your future.

Your Honour read with Richard Stanley QC and you built up a practice specialising in general negligence litigation and personal injury litigation – with an emphasis on asbestos-related diseases, medical negligence and compensation law.

In common law civil cases, your Honour appeared for both plaintiffs and defendants, although I understand that when your Honour was on the Shepparton circuit your Honour always acted for the bad guys. And you usually cleaned us up.

Your Honour appeared with Gillies QC, for the Red Cross in the HIV/AIDS blood supply case, which was the longest civil jury trial to go to verdict in Australia. The verdict was for the Red Cross.

In preparation for that case, with Gillies, your Honour conferred with leading haematologists and virologists, going twice around the world to London, New York and wherever, remarkably, without once visiting Scores Men's Club.

Although you also appeared for asbestos defendants, you appeared in the High Court in the landmark plaintiff's case of *Crimmins v Stevedoring Industry Authority*. Waterside workers and their dependants had previously been denied compensation because of the difficulty of fixing liability on a particular employer, because they were picked up for a matter of days by any one of many stevedoring companies. Your Honour appeared for the plaintiff in the High Court with Tom Hughes QC, Jack Rush QC and Rachel Doyle, and won.

Your Honour was extraordinarily generous in your advice on the common law to anyone who asked.

Your command of the law and the authorities made you, in the eyes of many, the pre-eminent appellate common law silk at the Victorian Bar.

Your Honour has given great service to the Bar:

(a) You were a key member of the Common Law Bar Association for very many years, serving as Treasurer and Vice-Chairman.
(b) You were a member of the Bar Supreme Court Litigation Committee and the Legal Education and Training Readers' Course Committee.
(c) You represented the Bar on the Supreme Court Personal Injury Users Group.
(d) You were on the Bar Committee that met with Government to discuss the so-called Tort reforms of recent years.
(e) You also worked on submissions and appeared on behalf of the Bar before Parliamentary Committees – recently, in relation to a review of the Coroners Act.

Pre-eminent silks accept judicial appointment as a matter of duty. Many are not prepared to do so until they have seen their children through their education.

Your Honour has accepted this appointment, although your son, Ellery, is only at the start of his education.

Of course we know that your Honour is able to afford such a luxury because you are a kept man.

Your Honour's wife, Deborah aka JK Rowling or is it Ellie Nielsen (one of those famous authors), has had great success with her recent book *Buying a Piece of Paris: Finding a Key to the City of Love*, which has become a runaway bestseller being Readings' Book of the Month and *Woman's Weekly* Best Read. It is available at all good bookshops – a steal at the recommended retail price of $29.95.

Reference to an excerpt in the *Woman's Weekly* reveals that, among your many talents, your Honour is a perfect husband:

My husband doesn't always see things the way I do. He would, for instance, prefer to listen to the cricket than to one of my brilliant ideas. We were back home in Melbourne driving to a friend's house for Sunday lunch when Waugh hit a six, and my husband hit the steering wheel and turned the radio up even louder.

'That's it,' I said. 'You never listen to a word I say.'

'Yes, I do,' said Jack (which I take to be a reference to your Honour) 'I think you're right. I think we should buy an apartment in Paris.'

'See,' he added, 'I was listening.' He turned the cricket up to screaming point.

I sat staring straight ahead thinking, this is it. This is one of those moments I'll remember for the rest of my life.

Does your Honour know the trouble you have caused? Since publication, whenever an ordinary bloke like me watches sport my wife chimes in with 'Will you buy me an apartment in Paris'? In response to my negative grunt, she says, 'Jack Forrest would.'

At his own ceremonial farewell in November 2002, Chief Judge Waldron said this of your father:

> [B]y those of us who had the privilege of serving with him [Judge Jim Forrest] was universally acknowledged as the greatest County Court Judge in living memory…

Big shoes to fill; but, on behalf of the Victorian Bar, we know you are well and truly up to it.

WELCOME

Supreme Court

Justice Ross Robson

Address by Michael Shand QC, Chairman of the Victorian Bar Council, on Friday 17 August 2007

Those who were fortunate enough to attend a packed Banco Court for the welcome of Justice Ross Robson on 17 August 2007 witnessed the elevation of one of this Bar's most gifted members to the Supreme Court Bench.

His Honour commenced his education at Hamilton State School, went on to Hamilton and Western District Boys' College (now Hamilton and Alexandra College) and then to Geelong College.

University saw the sharpening of a number of academic and other talents which young Robson began to demonstrate. His Honour graduated from the University of Melbourne with degrees in law (with honours) and commerce, followed by a Master of Laws several years later.

During a sabbatical year away from the Bar in London, his Honour graduated as a Master of Science (Economics) from the prestigious London School of Economics.

Later, his Honour returned to his alma mater and graduated Bachelor of Arts (with honours) and is currently enrolled in a part-time PhD in history.

This seeming obsession with the acquisition of further and higher degrees of learning may or may not have something to do with the fact that, as a junior, his Honour once spent a morning before a former Chief Justice being courteously referred to as 'Dr' Robson. During the

luncheon adjournment, his Honour was forced to confess to the associate that he neither deserved nor ought be addressed as 'Dr' and spent a miserable afternoon being referred to as merely 'Mr' Robson.

Perhaps it has more to do with a yearning for university life in which attendance at lectures or tutorials took a decidedly backseat role as his Honour became far too busy with social activities at Ormond College and his duties as President of the Melbourne University Film Society.

His Honour was admitted to practice in March 1972 after serving articles with Mr Roy Ricker at Mallesons. His Honour was immediately engaged as Sir Ninian Stephen's first High Court associate. Notwithstanding his Honour's rather miserly stipend, his Honour was able to acquire his first residential property during that year. This had something to do with travelling allowances, although it was never made clear what the connection was.

His Honour signed the Bar Roll on 22 February 1973 and became the first reader of JD Merralls QC. That special relationship of master and pupil remains to this day.

In those early days of practice, his Honour shared a house with Kennon QC and others in North Melbourne. They quickly realized that it was cheaper to go to work by taxi in the mornings rather than tram because they could split the fare four ways. Thus began a practice well-founded upon practical economic and commercial considerations.

With his great friend and colleague, the late Peter Hayes QC (and that well known nominal junior now Finkelstein J), his Honour dominated the old Commercial List. His Honour's prodigious hard work and exceptional ability as a lawyer kept him at the forefront of the junior commercial bar. His sagacity and wisdom was much sought after. A succession of counsel would be seen at his Honour's door seeking advice and guidance. This was always forthcoming and with great generosity of spirit.

At the same time, his Honour took on the role of mentor to an increasing number of readers. It was common for a new reader to join the old reader in the chambers of his Honour. The same process was happening next door in the chambers of Peter Hayes.

Back in these halcyon days when the commercial bar was going from strength to strength, these were happy days indeed in chambers. His Honour came to share chambers on the 21st Floor of Aickin Chambers with BJ Shaw QC, Hayes, Burnside, Houghton and Almond. When that floor closed, he went on to the 16th floor of Owen Dixon Chambers West. Many friendships which last to this day were formed and developed.

Sharing chambers with his Honour in those days was an absolute delight. A succession of the youngest and brightest of the Bar floated through these chambers and imbued them with intellectual vibrancy and good humour. The most distinguished leaders of the day would be constantly calling for the services of his Honour to assist in the biggest cases. The waiting area would be busy with clients and instructing solicitors, both before and after court hours. And at the end of the week, there would always be a convivial get-together in the best traditions of the Bar.

His Honour had no less than 12 readers, being Maxwell P, Peter Richards, Rodney Garratt QC, David Collins SC, the Honourable Andrew McIntosh, Peter Lithgow, Wendy Kozika, the late Chris Spence, Josh Wilson, Jonathan Beach SC, Barry Hess SC and Stephen Dewberry. His Honour was appointed one of Her Majesty's counsel in November 1988, along with Peter Hayes. His Honour's other great friend, Habersberger J, had taken silk the year before. There was a brief interregnum period. The readers departed. Something approaching calm seemed to prevail in chambers. But then the new briefs started arriving. And instead of the readers, chambers now rang to the bustle of the juniors. The work remained constant, except now the cases were bigger and longer.

It has to be said that his Honour's transition from leading junior to silk occurred almost seamlessly and with the minimum of effort. His Honour was always destined to be one of the leading silks.

His Honour appeared in many long and difficult cases, not only in this State but also in other jurisdictions, most notably South Australia and Western Australia. In *Remm Construction v Allco Newsteel* (1990) 53 SASR 471, the Full Court of the Supreme Court of South Australia upheld a momentous interlocutory injunction below which had been based almost entirely upon an obscure railways case from England in 1840. His Honour had discovered this case after the most meticulous legal researches with his team in the Supreme Court library. The High Court refused special leave, stating that the judgment below was not attended with doubt, let alone sufficient doubt.

His Honour's long career at the Bar culminated in *Bell Group v Westpac*, the decision of which is still reserved in the Supreme Court of Western Australia. His Honour was lead counsel for the

liquidators against a number of banks. The trial itself ran for more than three years. His Honour attended to that case with the same meticulous preparation, research and organization which his Honour brought to all his cases.

His Honour as an advocate was persuasive rather than earth shattering. His smile was his trademark. He could explain the most complex commercial or equitable doctrines in simple and direct language. He could swing the most truculent court with charm, good humour and, above all, skill.

His Honour is the proud father of Jessie, David, Alexandra, Victoria and Antonia. He has found great happiness with his second wife, Maureen. Between onerous court commitments, his Honour has been able to recharge the batteries with his family at Noosa, Queenscliff and his property, 'Dalmally', in the Western District.

Throughout the whole of his Honour's career at the Bar, first as a busy junior and then as a leading silk, his Honour always devoted a great deal of time to affairs of the Bar and toward advancing the interests of his fellow counsel. His Honour served as a trustee then Chairman of the Bar Superannuation Fund for some 23 years. The Fund grew enormously under his Honour's guardianship. His Honour served as director for nine years of Barristers' Chambers Limited of which his Honour was Chairman for five of those years. At the time that his Honour joined the Board of BCL, its financial position was very poor. By the time his Honour left, its balance sheet was positively glowing. No doubt this had something to do with his Honour's forensic skills as an accountant and as a Fellow of the Society of Certified Practising Accountants.

His Honour will bring to the Bench a mind of the utmost clarity with the ability to distil the real issues in a case from all those other issues which counsel tend to think might be important. His Honour was a most formidable opponent at the Bar and he will remain that way on the Bench. His Honour has long been a servant of the Bar and one of its most outstanding practitioners. The Bar is delighted with his appointment.

WELCOME

County Court

Judge Chris O'Neill

Address by Michael Shand QC, Chairman of the Victorian Bar Council, on Monday 30 July 2007

I appear on behalf of the Victorian Bar to offer our warm congratulations to Your Honour Judge O'Neill on your appointment to this Court.

Your Honour has practised law for more than 28 years: more than 12 years as a solicitor and more than 15 years as a barrister.

You were educated at Xavier College. A football coach, who rejoices in the nickname 'Porky', remembers you as 'a skinny kid', and a very handy full-back.

You were a good, all-round sportsman, and represented the school in both tennis and football.

After leaving school, you played with the Old Xaverians football team for about eight years, and served on the Committee for about six years, your committee service overlapping with your playing.

You coached the Old Xaverians under 19s in 1987 and 1988, and your team won the premiership in '87.

Your Honour was also a thespian. You had a named role in the 1968 school production of *The Gondoliers*.

The Gondoliers is the story of the brothers Palmieri, Marco and Giuseppi, Venetian gondoliers – 'two so peerless in their beauty that they shame the summer skies'.

It was your Honour's lot that you played neither Marco, nor Giuseppi. They were the days when Xavier's association with Genazzano College in matters theatrical was not as strong as now. You answered the call to play Vittoria – one of the 24 young maidens, 'All…young and fair, and amiable besides' – all infatuated with the two gondoliers.

Your Honour studied law in the Council of Legal Education course at the Royal Melbourne Institute of Technology.

That course, which ran between 1962 and 1978, was taught by practitioners, including distinguished members of the Bar such as Sir Daryl Dawson (in Legal Method), Justice Alex Chernov (in Equity) and Allan Myers QC (in Securities Law). It produced RMIT graduates, like your Honour, who now occupy senior positions in the legal profession.

As of the second semester of this year, RMIT's School of Accounting and Law now offers a postgraduate law program, the Juris Doctor, on a full fee-paying basis available for graduate entry only.

Your Honour served long articles with the late John McDermott Jones of the firm of Jones & Purcell.

You were admitted to practice on 1 March 1979 and, after more than 12 years as a solicitor, you commenced the Bar Readers' Course in September 1991.

Your Honour read with Paul Scanlon QC.

Scanlon notes that it is only a quirk of fate that the two of you remained in the law.

In 1973, when you were both students in the full-time first-year of the RMIT course, Scanlon says the two of you had the idea for what is now *Trivial Pursuit* – some six years before the two Canadian journalists credited with its invention.

Your Honour and Scanlon were camping at Cape Patterson. Justice Elizabeth Curtain, who was then doing law at Melbourne, was with you.

You were sitting on logs around a camp fire, and the two of you were firing series of questions on obscure subjects at Liz Curtain: questions on Picasso's Blue Period; on animal husbandry – including how to deliver a cow by Caesarean section. Whatever you asked, Liz Curtain had an answer.

Wanting to take the wind out of her sails, you made up questions on ancient Chinese history.

You didn't know the answers, and suspected that her confident answers were a bluff. You called her bluff and ruled an answer wrong. Justice Curtain launched into a lengthy explanation of her answer.

Then and now, you're none the wiser on ancient Chinese history. What you did know was that tragically you'd both been 'gutted', as Paul Scanlon put it, by the lovely Miss Curtain. You lost interest in the game, and went on to make a career in the law instead of making a fortune as the inventors of *Trivial Pursuit*.

As a solicitor, your Honour worked in litigation and did your own appearance work in the Magistrates' Court, in various Tribunals, and in the Family Court. Occasionally, you appeared in this Court and the Supreme Court.

Your Honour began the Bar Readers' Course in September 1991, and, as I've said, read with Paul Scanlon QC.

Scanlon recalls your Honour's first running-down case in this Court as a barrister. He coached you to open with the law; then describe your client's injuries; and then to go back to the law – spelling out the duty of care that every driver owes to every other person who is, or may be, on or near the highway.

Your Honour returned to chambers a little after one o'clock, looking uncharacteristically rattled and dishevelled. 'I did what you said. I opened with the duty of care, and Judge McNab asked for authority!'

'What?' said Scanlon. 'Bruce McNab interrupted your jury opening to ask for authority for the duty of care????'

'Oh no – there's no jury,' you said.

This was towards the end of the late Judge McNab's 25 years on this Court.

Scanlon, with characteristic delicacy and subtlety, said something about grandmothers and eggs. He said you were lucky to have got off with a growl and a snarl sending you scurrying for pointless authority over the luncheon adjournment.

In your turn, your Honour had six readers: John Fletcher, Georgia Tsirmbas, Tony Friends, Gino Pierorazio, Peter O'Connor and Bree Knoester.

All speak of your ongoing friendship and support; of your generosity and conscientious instruction; and of your openness.

One reader recalls your frankness in describing the first appearance you ever did. You represented yourself in a dog-bite case. Self-deprecatingly, you admitted that you went down, and so alas did your dog!

Just as you remained in the chambers of your master long…very long after your reading, so you were similarly generous with your readers.

Your Honour served for a year on the Bar Readers' Course Sub-Committee; and, for several years now, you have been on the Medico-Legal Standing Committee of the Bar, Law Institute and Australian Medical Association.

Your Honour entered wholeheartedly into the family move to the country. You re-invented yourself as a country man.

Your property, 'Athlone' looks out over Hanging Rock. It takes its name, I surmise, from the capital of the Irish midlands. It was a Jacobite stronghold in the 1600s and the scene of bitter and bloody battles. The Jacobite Colonel Richard Grace repelled an army of 10,000 men.

Your 'Athlone' by contrast is for the most part a scene of pastoral tranquillity; clean air and wooded bush, the house has open fireplaces and a combustion heater.

I said for the most part because story has it that on one occasion you joined your neighbours, collecting red-gum firewood. This expedition had all the hallmarks of a ritual rite of passage – city to bush. You prepared well. From Bolton's store, you bought your own chainsaw – a choice little model or so you thought.

No Jacobite struggle here but out in the bush a contest of sorts unfolded. Each man started his chainsaw. Their massive beasts gave out deep-throated, manly, throbbing sounds.

Your Honour started yours. To your chagrin, it gave out a delicate, high-pitched squeal, and your neighbours dissolved into helpless laughter.

They named your little chainsaw, the Lady Remington.

Putting the challenges of chainsawing behind you, you and the rest of the family took up horse riding. Your Honour joined the Macedon Ranges Adult Riding Group. That group concluded its rides with lunch at the Mount Macedon Hotel.

Sir Walter Scott wrote in 1808 of young Lochinvar that 'through all the wide Border, his steed was the best'. Now I have been given a little information about your steed called 'Jed' but suffice to say here that he got you home from lunch in one piece – sometimes!

Although you now have only five horses, it's said you once had 11 or 12 – not as many as Lloyd Williams, and not as fast. But then your Honour would surely never claim to be Roy Higgins in the saddle.

Others, when offered judicial appointment, wonder how they'll manage the school fees. Your Honour's concern was the horses. You can always sell the horses and horse-float but your Honour will doubtless

have to contend with your three daughters Brigid, Elsie and Lucy who are all here today.

Your Honour spent your entire 15½ years at the Bar on the 11th floor of Owen Dixon Chambers West, and will be particularly missed there.

You have been a loyal member of the Bar, and of those chambers. Your hospitality – your Irish jokes, easily told in a brogue that would ring true to St Patrick himself – your capacity for fostering community amongst disparate individuals – and your capacity for hard work – all added much to the 11th floor.

Judge Bourke observed that your Honour is the second member of the Fairhaven Surf Lifesaving Club appointed to this Court. He hopes the Attorney may consider a third, and then consider establishing a Fairhaven Full Court of this Court that could perhaps relieve the Court of Appeal across the road of part of its burden.

Your Honour's appointment has been well received at the Common Law Bar, and the Bar wishes Your Honour long and satisfying service as a member of this Court.

WELCOME

County Court

Judge Iain Ross

Address by Peter Riordan SC, Chairman of the Victorian Bar Council, on Monday 12 November 2007

I appear on behalf of the Victorian Bar to offer our warm congratulations to your Honour Judge Ross on your appointment to this Court.

Your Honour was born in Scotland. Your family emigrated to Australia when you were just six months old. Your father was a master mariner. In Australia, he also worked as a stevedore.

Your Honour attended high school, in the Shire of Sutherland, south of Sydney – wonderful beaches, and an outdoors, surfing culture.

New South Wales has a formidable system of academically selective high schools. Caringbah became selective in 1979, so your Honour has the distinction of having attended a selective high school without actually having been selected.

However, selective high school entry pales in the context of your Honour's subsequent academic distinction:

- Two Bachelors degrees: Economics and Law from the University of Sydney;
- Two Masters degrees: Law from Sydney and an MBA from Monash;
- Finally, a PhD in law from Sydney. Professor Ron McCallum, surely the doyen of Australian Industrial Relations scholars and teachers, was your doctoral supervisor.

Your Honour is such a perfectionist, such a stickler for detail that, for a very long time, you couldn't bring yourself to hand in your doctoral thesis.

Indeed, it's even rumoured in some quarters that you never did – that Professor McCallum lost patience and submitted his copy!

Needless to say, your Honour's quibbles had no foundation in fact.

Rarely does any doctoral thesis escape unscathed in the external examination process.

The process of reviewing a thesis has some points of similarity with that of senior counsel settling documents.

Even the most perfect document will undergo metamorphosis in the settling – or is it transubstantiation?

However, in the pedantry stakes, senior counsel are rank amateurs compared with the tag-team of doctoral thesis reviewers, who are, after all, professional pedants.

They employ a special term – 'emendations' – which the Oxford Dictionary defines as 'to remove errors and corruptions'.

Remarkably, your Honour's thesis had not a single 'emendation'.

It is said of your Honour that you have, and I quote, 'a ferocious work ethic'.

That goes back to student days. On graduating in economics, your Honour went to work as a research officer for the Electrical Trades Union, concurrently doing the final two years of your law course.

On finishing law, you became Federal Industrial Officer of the Commonwealth Bank Officers' Association, and then

Occupational Health and Safety Officer of the New South Wales Labour Council.

It was there that you met your wife Sarah.

In May 1985 you were admitted as a barrister of the Supreme Court of New South Wales.

In 1986, you came to Melbourne as Industrial Officer of the Australian Council of Trade Unions.

That was early in Bill Kelty's 17 years' service as Secretary of the ACTU. He'd been seven years as Assistant Secretary, and three years as Secretary.

For hours your Honour sat around, waiting to meet the Secretary. And when he did come, the interview was short. He told you: 'Do what you like, but don't mess up'. Mr Kelty used a somewhat stronger expression, but the gist of it was 'don't mess up'.

He said three things:

- The key to this job is confidence.
- You get confidence by not making mistakes.
- Don't make mistakes – or, 'don't mess up.'

That was the sum total of your initial instructions and guidance.

Working with Mr Kelty, your Honour was the chief architect of legislated national superannuation.

The Department of Industrial Relations said it couldn't be done. Treasury was strongly opposed.

Your Honour found a way. And you were selected to present the proposal to the parliamentary parties from whom the Labor government wanted support. You did so with thoroughness and persuasion.

You made a major contribution to the development and acceptance of the 1993 substantial legislative reforms to the framework of Industrial Relations.

In 1994, at the age of 35, you were appointed Vice-President of the Industrial Relations Commission – to head the new bargaining division.

Two manifestations of your Honour's extraordinary industry and research at the ACTU remained after you left:

- the mass of research files you left behind in the ACTU library – meticulously indexed, cross-indexed; and
- the printing and copying bill went down 66 per cent!!!

As a Vice-President of the Industrial Relations Commission, your Honour had the same rank, status and precedence as a judge of the Federal Court.

In the very first national wage case on which you sat, you wrote in dissent – what Sir Humphrey Appleby in *Yes Minister*, would describe as 'courageous'.

Professor McCallum says of that dissent that, whether or not one agrees, you took on the banks and attacked their statistics – and it was a carefully reasoned decision of immense learning and detail.

Another close reader of your Honour's decisions says you seem, in each decision, to have the objective of writing the last word; to cover all the cases and distil all the relevant principles.

On the Industrial Relations Commission, your Honour often wrote the decision of a Full Bench on appeal from the decision of a fellow Commissioner.

Your decisions were read carefully by every Commissioner as soon as they came out because it was not only the Commissioner whose decision had been appealed who was in danger.

Your Honour would not only correct that Commissioner's errors – but, in asides buried in the middle of the decision, you would point to the errors of other Commissioners in other cases.

And now, as a County Court Judge, you have the power of imprisonment and punishment.

One former fellow Commissioner has a vision of reading, by way of aside in the middle of one of your Honour's judgments in a Magistrates' Court appeal: 'and, by the way, Commissioner Smith really messed up in a recent decision, and is sentenced to three weeks of community service'.

Some members of counsel fear repetition in this court of a strategy your Honour occasionally employed in the Commission.

First thing in the morning, upon resuming a hearing, your Honour would hand counsel your written summary of an oral argument they had put the previous day.

Your Honour's summary was always accurate, and often devastating. What had seemed okay when counsel had been in full flight the previous day, was often decidedly unimpressive in hard written form the next morning.

There is one Senior Counsel, who is looking forward to appearing before your Honour, and being able to address you directly.

The last time he tried, you refused him leave to appear in the great Maritime Union dispute hearing.

Robert Richter QC had been itching to cross-examine Mr Chris Corrigan of Patrick Stevedores.

He'd been looking forward to it as 'the best fun' in what had already been a pretty good week.

Having been refused leave to appear, Richter remained at the Bar table, and prompted Greg Combet in his cross-examination.

Your Honour disallowed a series of questions on the basis that they had already been put.

Each time, Richter whispered to Combet, and each time, with classic Richter and Combet persistence, Combet put the question another way.

Looking piercingly at Richter, your Honour said: 'Mr Combet, it's not that I don't understand what's being put. The problem is that it has already been put.'

Your Honour served with distinction as a Vice-President of the Industrial Relations Commission for very nearly 12 years until your resignation in January 2006.

In addition to establishing the new Bargaining Division, you were Head of the Industry Panel and Head of the Organisations Panel.

As one of two Vice-Presidents, you sat on most if not all significant cases before the Commission.

You were awarded the Centenary Medal in 2003, and in 2005 you were made an Officer of the Order of Australia.

Upon your resignation from the Commission, Justice Giudice, the President of the Commission, publicly acknowledged the important contribution you had made to the work of the Commission and the valuable role you had played in industrial dispute resolution in Australia.

Your Honour, all who have appeared before you and worked with you, and know you, are confident that your Honour's 'ferocious work ethic,' your powerful intellect, your integrity, and the breadth of your experience will enable you very quickly to establish yourself in this different professional setting, and to make a very significant contribution as a Judge of this Court.

On behalf of the Victorian Bar, I wish your Honour long and satisfying service.

County Court

Judge Duncan Allen

Address on the swearing in and welcome by Michael Shand QC, Chairman of the Victorian Bar Council, on Monday 27 August 2007

I appear on behalf of the Victorian Bar to offer our warm congratulations to your Honour Judge Allen on your appointment to this Court.

Your Honour was educated at St Dominic's Broadmeadows, St John's Hawthorn and St Bernard's College Essendon – moving because of your father's transfers to different stations in his employment as a policeman.

You are in fact the third generation of your family in the law. Your grandfather was also a policeman – he worked in Bendigo.

Out of school and a sound Christian education, your Honour entered a seminary – Corpus Christi College at Werribee Park – to discern whether you were called to the priesthood.

You had by then already met your wife to be, Kathleen. A number of letters from her made it through to the young seminarian and the message got through from God, through Kath, that the priesthood was not your true path.

You and Kath, have now been married more than 32 years, and have five children.

In 1971, you entered the Commonwealth Public Service as a clerk in the Legal Section of the Department of Housing and Construction in Melbourne.

The following year, you began part-time studies for the law degree at the University of Melbourne, still working full-time with the Commonwealth.

You married in 1975. Also that year you were transferred to the Legislation and Policy Section of the Department of Health in Canberra, still studying law part-time.

In 1976, you gave up your job with the Commonwealth in order to study full-time for the final two years of the law course.

Or perhaps I should say in order to enrol for a full-time load of subjects – because you took on a substantial part-time job as a teacher. You taught Politics and Legal Studies in years 11 and 12 at St Joseph's College, North Melbourne, affectionately known as 'North'.

A member of the Bar, who was your student at 'North', remembers your Honour as 'a lamb in wolf's clothing'.

Conscientiously, you sought to present yourself in the Christian Brothers' tradition of stern control and discipline. The boys saw through you in about two seconds flat. However, they behaved anyway because you were a good teacher.

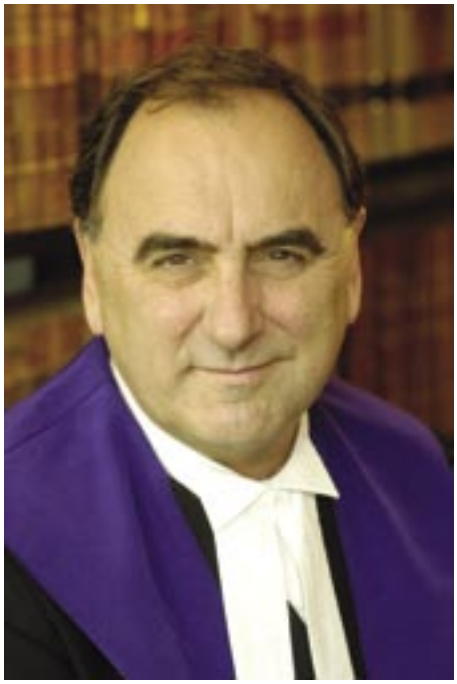
You graduated Bachelor of Laws in 1978 and served articles with the late Raymond Triado of Triado, Marshall & Co.

You practised as a solicitor for five years.

Your Honour was, in your youth, quite an entrepreneur. While teaching at 'North', you ran disco nights at a local civic centre. Indeed, you employed some of your Legal Studies students in distributing leaflets at St Aloysius College for Girls, also in North Melbourne. That must have been a real chore for the boys!

You came to the Bar in 1984. You read with his Honour Judge Wood.

When you came to do your first criminal jury trial, you had never even seen one. The late Mick Rush (who died in November 2004) prepared a detailed and complete script for you from the calling of the case, and 'May it please the



Court, I appear on behalf of the accused' onwards – exactly what to do: where to sit, when to stand, what to say.

Mick was a good friend. He had encouraged you to come to the Bar. He had introduced you to the 3rd floor of Equity Chambers – Gorman Chambers. In the theatrical production of the trial of Ned Kelly in 2000, Mick played the part of Constable McIntyre, the chief prosecution witness in the trial.

Having given you this complete script, Mick then worked with you on your closing address.

You won an acquittal, and the judge

particularly complimented you in court on your closing address.

Your Honour has a prodigious memory. On that first jury trial, you had your closing effectively committed to memory, and were able to deliver it with scarcely a glance at your script.

Later in your career, your memory enabled you to cross-examine, for all intents and purposes without notes. You held in memory, not only the witness's evidence-in-chief, but also his or her prior statements and evidence at the committal. Not for nothing were you called the master of prior inconsistent statements.

This encyclopaedic control of the fine detail of a case, together with an agility of mind on your feet enabled you to give a closing or a plea with few notes.

This is not to say you did not prepare carefully, but you were also able to change course on your feet. In one multi-accused fraud case, you were the most junior counsel and spoke last. Having heard the pleas of the silks before you, you put aside your notes and delivered a quite different plea from what you'd prepared – to the astonishment of your instructor, and with good result.

In the recent Australian Wheat Board Commission of Enquiry, your Honour represented a former Managing Director of the AWB. Your client had not been separately represented. He had, it's fair to say, been mauled in the witness box, and subject to serious adverse public comment, not only by counsel assisting, but also by the Commissioner.

Entering the fray after serious harm had been done, your Honour achieved huge success in turning things around. Not a single adverse finding was made against your client in the final report.

During your Honour's more than 20 years at the Bar, there have been periods of intense exercise. There were the Peter Power Fitness Group 6am classes in Camberwell. Things went well for a while but the final 20 minutes', run around the streets of Camberwell you found made it far too much exercise for one morning. You and your colleague, a certain tall dark criminal barrister who once worked closely with the Chief Judge, took a stroll in the gardens instead and for your efforts or lack of them it was suggested to both of you that you seek another group in which to exercise.

Appointment of Senior Counsel

On 28 November 2007 (as Bar News was going to press) the Honourable Chief Justice Marilyn Warren AC appointed as Senior Counsel for the State of Victoria the following persons, in order of precedence:

Ian Frank Mawson
John Denis Philbrick
David George Brookes
Nicholas Thomas Robinson
John Russell Dixon
Gavin Joseph Cohen Silbert
Peter Gregory Cawthorn
Ian Richard Lloyd Freckelton
Stephen Geoffrey Edwin Mcleish
Ian Graham Waller
Kerri Elizabeth Judd
Jeffrey John Gleeson
Karin Leigh Emerton
Mark Kranz Moshinsky

Bar news will publish profiles of the new silks and photographs in the Autumn issue.

Your Honour served for three years on the Bar Council. You served also on the New Barristers Committee, and on the Legal Education and Training CLE Subcommittee. You served, for 6½ years, on the Law Council of Australia Access to Justice Committee; and for nearly a year on the Law Council National Criminal Law Committee.

For very many years, you have presided over moots in the Bar Readers' Course, – and have done so for each and every Readers' Course.

Your Honour has been a stalwart of Gorman Chambers on the third floor of Equity Chambers whose members love all things Irish, take on the tough criminal cases and shun the niceties of modern offices such as air conditioning and fluorescent lights. And of course, they host the pre-eminent St Patrick's day celebration replete with Irish pipers, Guinness and, as I recall, some fine whisky.

Such is their fame that the members of Gorman Chambers were even the subject of a special ABC 7.30 Report some years ago. In that interview your Honour delivered some interesting insights. The transcript goes like this:

> HEATHER EWART, *Reporter*:
> In the heart of Melbourne's legal district are the oldest barrister's chambers in Australia.
>
> DUNCAN ALLEN, *Barrister:*
> You can just about feel it seeping out of the walls, the history of this place. You can feel your forebears in these rooms. It's wonderful. It's like there's a lot of very friendly ghosts wandering around giving you a bit of encouragement, whispering a word in your ear.

Now we know why your Honour was so successful! But we hope you're not going to feel lost here in this new building.

I don't wish to suggest that Gorman Chambers is exclusive of others. That same interview on the 7.30 Report reveals that Con Kilias (who played the Lebanese gentleman in *The Castle*) was also a member. He confessed to the reporter:

> My name on my birth certificate is Con Kilias, but to get up here I falsified a document and it's now Connor O'Killian.

Your Honour has been a member of the Criminal Law Association of Victoria for many years, and served on the Executive Committee for three years – two of those years as Vice-Chairman to his Honour Judge Punshon.

You had no fewer than 11 readers: Stephen Ballek, Richard Bourke, Michael Ramage, John O'Sullivan, Oscar Roos, David Littlejohn, Leighton Gwynne, Simon Zebrowski, Theodoros Kassimatis, Sarah Leighfield and Megan Tittensor. Five of your readers have remained with you in Gorman Chambers.

Your Honour took your first reader, Stephen Ballek, in September 1994 – the very first intake of readers after you achieved the required ten years' seniority. You took your last reader, Megan Tittensor, in September 2004 – only a little under four months before you were made Senior Counsel. In that ten years, you had 11 readers.

In every way, your Honour has been a major contributor to the Bar and with your mastery of the forensic process as counsel, to the administration of justice in Victoria.

On behalf of the Victorian Bar, I wish your Honour long and satisfying service as a judge of this Court.

Court of Appeal

Justice Geoffrey Eames

Address by Michael Shand QC, Chairman of the Victorian Bar Council, on Thursday 5 July 2007

I appear on behalf of the Victorian Bar to pay tribute to your Honour's professional life of service in the law.

In preparing this address, we remembered the newspaper photograph of your Honour as a young man carrying the torch (pictured opposite). In your paper on effective communication to jurors, you advocated greater use of audio visual aids and this has given us heart to show the photograph on the new video screen in court this afternoon. The photograph also appears in the Philip Opas section of the Bar's Oral History website. It was taken in 1967 on the steps of Parliament House in Melbourne in an all-night silent protest vigil by students. Ronald Ryan was due to be hanged the following Tuesday morning; your Honour was then studying law.

The image speaks to us now from more than 40 years ago – this young man (my daughter thought he was Jude Law!), dressed in undergraduate gown, suit and tie, neatly groomed. He is standing, torch in hand, a fixed gaze ahead, with a young woman. They're either side of a banner with four hangman's nooses, each framing the word 'No'.

The caption states in part: 'Patricia Maxwell, 21, of Burnley, and Geoff Eames, 21, of Blackburn, were the first of the relay of students.'

The reader of that newspaper in 1967 could only have imagined what might lay ahead for that young man in the picture. Certainly here was a young man of principle with a passion for justice, a concern for the underdog and the will to act on his beliefs.

Now as we look back on that image with the hindsight of 40 years and reflect on what the Crown Counsel, Dr Emerton, this afternoon has already observed of your career, we see that your Honour in that journey since has kept true faith with principle and justice.

On Tuesday, the awards were announced for Victorian of the Year. The Younger Victorian winner was Tom O'Connor, a 21-year-old student of law, politics and philosophy who spoke of his generation's expectation of moral leadership from government. That image from yesteryear reminds us how significant moral leadership in the young themselves can be to shape and inform both their future and those of others.

As we have heard, your Honour came to the Bar on 13 March 1969.

Your Honour read with the Honourable Peter Hase QC who later served for just short of 18 years as a judge of the Family Court of Australia. Peter Hase was, for many years, the leading personal injury union advocate at the Victorian Bar.

Your Honour swiftly built up a substantial practice in personal injuries and criminal law work, and it was a real sacrifice to leave that for Alice Springs.

Crown Counsel has mentioned that Your Honour's selection in 1974 for the full-time appointment at the Central Australian Aboriginal Legal Aid Service in Alice Springs was, at least in part, attributable to your being the tallest applicant.

The local, mostly Aboriginal, 'Pioneers' football team needed a good ruckman.

Your Honour did play for the Pioneers – and it's reported that they won the flag in the Alice Springs A grade competition.

Your Honour was widely judged a good bloke; a good advocate in the Aboriginal

Legal Aid Service; a good ruckman; but your success as players' advocate was mixed, to put it politely. Your Honour gave a less generous assessment of yourself, describing your work as players' advocate as, and I quote, 'appallingly bad'.

I am given to believe that in the five years that you were the players' advocate, not one of those you represented before the disciplinary tribunal was ever seen to play competition football again.

The tribunal told one player they were impressed by your Honour's plea – you'd done a good job, and they'd been persuaded to be lenient. They rubbed the player out for 16 years!

The player's scarcely *sotto voce* comment was: 'Christ! If that was a good job, what would I have got if you'd had an off day???!!!!'

In mitigation, it should be said that Alice Springs was a tough league. Many players didn't bother with boots for training. Violence was endemic. The player who received the 16 years' suspension had hit not only most of the 18 players on the opposing team but every umpire!

One day, when Frank Vincent QC, as he was then was, was visiting, some Aboriginals from the small settlement of Jay Creek came to you for help. The white supervisor had come into town with all the money for their allowances – and had been gone several days. They were afraid he would spend it all – or that maybe he already had.

With the confidence of a tall, fit young man, your Honour suggested that you and Frank Vincent pay the supervisor a visit. You'd been in the Alice long enough to pick up the colloquial. You knocked sharply on the door, and when the supervisor answered it, you said, 'We've come for the bloody money!', and just stood there scowling.

It worked – to Frank Vincent's considerable relief and, I'm sure, yours. Somewhat gracelessly, the man put his hand in his pocket and paid up.

After your Honour's service with the Aboriginal Legal Service in Alice Springs, the Central Lands Council, and the North Australia Aboriginal Legal Aid Service, your Honour went to the Bar in Darwin – an independent Bar of only five – and practised across the whole spectrum of the law.

In a provocation case, in Adelaide, your Honour appeared for a female accused who claimed to have been the victim of persistent and protracted domestic violence. The trial judge took provocation from the jury, in part because of your client's delay in going for the axe. Your Honour won a new trial from the Court of Criminal Appeal. On retrial, you won a complete acquittal – neither murder nor manslaughter.

Your Honour took silk in South Australia in 1989, and in Victoria in 1990.

In one of your last murder trials before appointment, your Honour represented a big, rough man with a something of a swastika motif in his many tattoos. One tattoo consisted of two short words with a dismissive message, permanently emblazoned, and remarkably legible, on his lower lip. Lord Denning once described

PHOTOGRAPH COURTESY OF *THE AGE*

that terse expression as 'a more emphatic version of "be off with you"'.

After a particularly vile outburst from your client, your Honour observed that the particular tattoo gave new meaning to the expression of President George Bush Senior, 'Just read my lips'.

Although your Honour returned to Victoria briefly in 1986, the Royal Commission into Aboriginal Deaths in Custody took you away again, all over Australia, occupying you until March 1991.

1992 was a year of notable appointments to this Court: Justice Harper in March, Justice Hayne in April, and your Honour in May.

At the time of your appointment, you had undertaken yet another inquiry – into losses suffered by the State Bank of South Australia.

However, everywhere you practised, you were identified as a Victorian barrister. Perhaps more significantly, you retained your association with the Victorian Bar, and regarded yourself, with pride and affection (evident in your response at your Welcome), as a Victorian barrister.

Your Honour has given distinguished service to the Bar. You have served as a consultant on the Readers' Course Committee, and regularly taught in that course. By invitation, you attended meetings of the Aboriginal Law Students Mentoring Committee. You have regularly taught in the Bar Continuing Legal Education program.

From 1994 to 2006, you instructed in the Bar's Advocacy Skills Workshops in the South Pacific, in no fewer than eight such workshops. Your Honour led a number of those workshops, including the Solomon Islands intensive workshop in September 2004 and the advanced intensive course in Papua New Guinea in May/June 2005. The Victorian Bar is a world leader in these programs and your Honour's contributions have been extraordinary.

Your Honour has been an outstanding Judge. In the Trial Division, your major areas were common law and crime. On the Court of Appeal, you have, of course, sat in whatever came your way, albeit with an emphasis on Crime. From time to time since your appointment as a Judge of Appeal, your Honour has also sat in the Trial Division.

Your Honour has done valuable work on the issue of better communication with jurors.

Your Honour has also made a considerable contribution to the work of the Committee established by Justice Maxwell to improve the trial process in criminal matters.

Your Honour's identification of important issues, your deep concerns, and your positive actions to address those issues are evident in your publications on the court website: the major paper on better communication with jurors; your opening addresses from the three Judicial Conferences on Aboriginal Cultural Awareness in 1997, 2000 and 2004; and, most recently, your address in presenting the 2006 Legal Reporting Awards.

Your Honour was in the Court of Appeal majority in the *Sims* case upholding a County Court suspended sentence for rape in that case – decisions which gave rise to considerable community debate.

Your Honour's address to the Melbourne Press Club Annual Conference on the Media and the Judiciary (which is also on the court's website) makes compelling reading, not only for the frank and powerful account in relation to all that occurred in the *Sims* case, but also for its central themes:

> First, the need for the media to report the reasons for sentences and for the courts to make those reasons readily available to the public; and
>
> Second, and most importantly, the need to uphold public confidence in our system

> of administering justice and for the media to acknowledge and respect that public interest.

As your Honour said, 'intemperate and unbalanced attacks on the judiciary can create a false impression of a failed legal system'.

And as your Honour concluded, the media and the judiciary need each other, in the public interest, and ought learn from informed and balanced criticism that each proffers to the other from time to time.

Throughout your more than 15 years on the Bench, Your Honour has been aptly described as 'ridiculously industrious' – and 'fiercely independent' in a manner that has not led to alienation – on the contrary, Your Honour is universally well regarded. You have given generously of your time and energy and have made an immense contribution to the court and to the law.

In the opinion of the Bar, and I'm sure beyond, your Honour has demonstrated all the qualities you so admired in Elliot Johnston as those of a 'great judge'. I quote but a part of the description from your response at your Welcome:

> He listened fairly, and with genuine interest, to all sides. He did not allow his personal prejudices and preconceptions to interfere with the search for truth. He had the courage to make unpopular findings… He had the courage to admit ignorance and to seek advice and assistance, and he displayed infinite patience…

On behalf of the Victorian Bar, I wish Your Honour a full and satisfying retirement and much joy and happiness ahead with Trish, your children and grandchildren.

FAREWELL

Supreme Court

Justice William Gillard

Address by Michael Shand QC, Chairman of the Victorian Bar Council, on Tuesday 31 July 2007

I appear on behalf of the Victorian Bar to pay tribute to your Honour's professional life of service in the law to date.

I say 'to date' because I understand that your Honour plans to practise in the future as a mediator.

As we have heard, this farewell is being podcast by streaming over the internet to your family overseas. The cameras cannot do justice to the sea of people, wigged and otherwise who have crowded into the Banco Court. It is a mark of the deep respect and enduring affection that we all have for your Honour.

For more than 45 years, your Honour has been a pillar of the profession: three years in the solicitor profession, 32 years as a barrister, and the last 10 years, as a judge of this court. Through all of 42 years, you have been a faithful and steadfast member of the Bar.

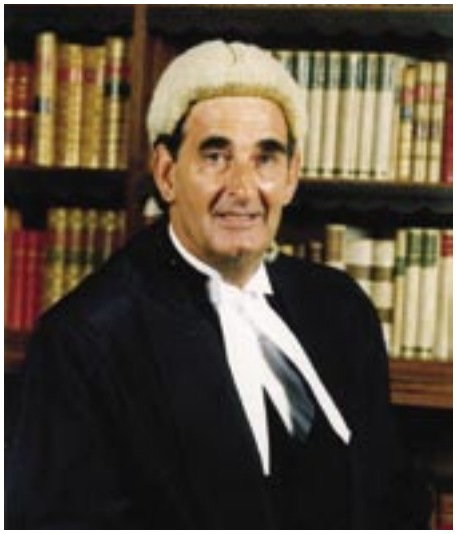
The portrait of your father Sir Oliver greets us daily in Owen Dixon Chambers East. He retired from this Court in 1978; 19 years later, on 8 May 1997, your Honour was welcomed here. As Neil Young QC said at your welcome:

> You are a true likeness of your father, a big outspoken Scotsman like your father, apparently aloof but in reality generous, big hearted and charming.

Before your appointment to the court, you revelled in life at the independent Bar with energy and exuberance in all things.

Occasionally perhaps an over-exuberance. When you were Chairman of the Bar Council, in the farewell address to Mr Justice Gray of this Court, you told this story against yourself:

> I drove to Sale on the first day of the Circuit, in my usual hurry to get there to confer before sittings began. I…was getting very frustrated by the traffic ahead



> …I observed a very long line of traffic… crawling along…I became incensed that the traffic was in the centre lane behind the slow-moving car, which refused to move to the left. I went up on the inside.

> As I…approach[ed] the slow-moving lead car…I started to toot…I raised my hand, with my finger pointing in an arrow-type motion to my left. Just as I got part-way through this…gesture, I realised that your Honour was driving the front vehicle. I immediately pulled my hand down, put my head down, planted my foot down, and cleared the scene with great speed… I thought, good God, what have I done?

Not a good start to an entire month before Mr Justice Gray at Sale. However, you described his Honour's scrupulous fairness in not allowing that incident in any way to intrude on the discharge of his judicial duties.

Those who know you well say that since your Honour's appointment to the Court, you have lost none of your fire. You have, however, always conducted yourself on the court with model restraint.

The closest the fire comes to your work is the punching bag you keep in chambers, near the door. Each morning, immediately before you leave for court, you give the punching bag a work out. Counsel owe a great debt of gratitude to that punching bag!

Your Honour has been a consummate trial judge. Your Honour's court saw our civil jury system working at its best. As Sir William Holdsworth said, rules of law must struggle for existence in the strong air of practical life.

> Rules which are so refined that they bear but a small relation to the world of sense will sooner or later be swept away.… The jury system has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense.

In England, there are no juries in personal injury cases and in New South Wales, only in defamation cases; Victoria remains the exemplar of the civil jury system. Your Honour brought out the best in that system and showed enormous respect for the role of the jury – our system of administration of justice continues as one in which by the jury the community participates directly.

You affirmed in the task of the jury the need to balance dispassionate judgment with natural human emotion.

During the opening of a trial that involved the alleged rape of a child by her stepfather, a female juror began to weep. 'I just want to bring to your attention,' she said, 'I can't stand hearing about any sort of sexual assault on a child.'

She asked to be discharged. Your Honour asked her to remain, saying:

> That is the wholly understandable response of every normal and decent person. You will bring to your task a dispassionate and fair judgment of the facts in the case even though like everyone you are repelled by those allegations.

The case was tried to a jury verdict for the plaintiff.

Your Honour never underestimated the capacity of the jury to decide the facts of a complex case.

In January of this year, your Honour tried an immensely complex claim on behalf of a plaintiff dying of mesothelioma. The plaintiff, who had contracted the cancer from brief exposure as a home-handyman, claimed to be on the verge of patenting the invention of a filtration system for swimming pools and industrial waste. The evidence was highly technical concerning how filters work; and whether the plaintiff was on the verge of a patentable invention that would profit him $50 million. There was detailed examination of taxation returns.

Your Honour's consummate management of the trial enabled the jury to follow all the evidence, understand the issues and equipped the jury to make the necessary findings of fact.

Every party felt it was getting a fair trial. There was a settlement well into the trial for a substantial sum and costs.

Some five years ago, you presided over a negligence suit against the State of Victoria which raised a novel point as to whether the State's duty of care to school children extended beyond school to matters in the child's home.

In final addresses covering numerous legal issues, counsel cited High Court authority that the duty of care was entirely for the judge. In the course of argument, your Honour responded: 'I know that's what they said; but I'm sure they didn't really mean it'.

Your Honour distinguished between, on the one hand, the question of the existence

One night at the flicks

(for Brenda Wearne)

One night while I was a boarder I sat in the school hall
Watching Alan Arkin play John Singer in *The Heart is a lonely hunter*.
His sensitivity as a deaf man had me in his thrall
As it did my school mates and every sentient punter.

When his world turned to shit he snuffed out his life
Leaving me and those around me down an emotional blind alley
Turning on its head our idea of how one responds to mortal strife
As we shrank from the screen to avoid a body tally.

I haven't thought abut that film for thirty-three years
Till tonight when my heart murmured 'a man can be a hunter and lonely'
And my memory replayed a scene where Singer's heart was defeated by his fears
Of love and hope giving way to rejection and melancholy
Of such a depth as to intermingle self-inflicted death and tears
By inverting the profane with a solution that was almost holy.

The hunt goes on, the lonely ride side saddle
As canoeists stroke up shit creek: none of them has paddles.

NIGEL LEICHHARDT

of the duty of care and on the other hand, the question of the content of that duty which depended on facts that should go to the jury for determination.

Your Honour's decision stood, and has since proved prescient of the High Court's acceptance of flexibility in relation to the content of a duty of care.

After the case was over, counsel for the State teased you that the State would have to impose a Gillard tax to cover negligence exposure beyond the school.

The response was a characteristic lightning flash of directness: 'In all my years at the Bar, I never lost a case for the State of Victoria. You did'.

Your Honour's ten years on the court have been marked by extraordinary industry and erudition. During that time you wrote some 500 judgments, including as we have heard the leading Court of Appeal judgment in *Herald & Weekly Times v Popovic*. Many of them grace the Victorian Reports although modestly, you yourself never sent a single one for publication.

Indeed, in the four Court of Appeal cases on which your Honour sat, that are reported in the Victorian Reports, you wrote the leading judgments in three of them, attracting concurrences from the President Mr Justice Winneke, Judges of Appeal Ormiston, Batt, Buchanan and Eames, and Justice Warren, then an acting Judge of Appeal.

Your Honour served 12 years on the Bar Council, as Chairman from 1988 to March 1990 and subsequently as President of the Australian Bar Association.

Every Chairman has faced challenges. Some major challenges in your Honour's years as Chairman were:

- the attack on the independent Bar by competition policy advocates;
- seriously strained relations with an Attorney-General and Government that moved to exclude legal representation in the Magistrates' Courts in claims under $5,000, and that sought to introduce Acting Judges;
- tense times with our Law Institute colleagues because of the establishment of a Solicitors' Default List.

Under your leadership, both Government moves were resisted, and relations with the Attorney-General and the Law Institute were restored.

It was also under your leadership that the Bar Council allocated $30,000 over three years for the conduct of an annual advocacy workshop at the Legal Training Institute of Papua New Guinea, led by the late Robert Kent QC; a foundation and core of the Bar's world-renowned South Pacific outreach.

Your Honour has taught in the Bar Readers' Course and CLE program. Indeed, since appointment to this Court, you have continued to teach every intake of the Readers' Course.

In your last major address to the Bar, you reminded the Bar of what Sir Owen Dixon had said in 1947 that, above all else, counsel must command the personal confidence not only of lay and professional clients but of other members of the Bar and judges.

As we have heard, your cricketing prowess is the stuff of legend. You are the Keith Miller of the law – first 11 of the Melbourne University Cricket Club, Captain, no less, of the Bar's first 11. As Neil Young QC noted at your welcome:

> Whether or not he won the toss, the Captain of the New South Wales Bar First Eleven would always implore you before each annual match, 'Go easy on us.'

In 1990, the Bombers bombed to Collingwood in the Grand Final – 89 to 41. You came in the following Monday to find your room festooned with black and white streamers. You took it in good heart. It has been a tough week but it is hoped you are now bearing up under the loss of the legendary Kevin Sheedy.

At one Law Dons Dinner, your Honour and Judge Wodak gravitated to places, one on the right hand and the other on the left hand of Kevin.

Your Honour was not reticent in advancing suggestions as to who should play in each position in the next match.

At the end of the monologue, there was a moment of silence – a long moment of silence, broken by Judge Wodak: 'Well, Kevin, I s'pose it's now your turn to tell Bill how to run his court.'

Nearly 30 years ago, Frank Costigan QC said in the Bar's farewell address to your father, the late Sir Oliver Gillard, that '[his] appointment to the Bench was a compliment to [his] talents, and an opportunity to stretch them'. Costigan went on: 'It was in your character to seize that opportunity to the full.'

Those words are as apt of you today as they were for your father then. You have been a great trial judge.

On behalf of the Victorian Bar, I wish your Honour a full and satisfying retirement. We look forward to seeing a lot more of you at the Essoign and about chambers as you go about your mediation work.

Justice Stuart Morris

Address by Michael Shand QC, Chairman of the Victorian Bar Council, on Thursday 19 April 2007

May it please your Honour, and may it please the Tribunal – this being the last occasion on which your Honour will sit as the Tribunal, I appear on behalf of the Victorian Bar and I am sure I speak for everyone here today and the community at large to pay tribute to your Honour's achievements in nearly four years' service as the President of this Tribunal.

In June of 2003, your Honour became President of the Tribunal. It had grown since 1998 on the firm foundation laid by the inaugural President, Justice Kellam.

VCAT plays a huge role today in the administration of justice in Victoria. At the late annual report, it had eight judicial members, seven Deputy Presidents, around 38 full- time members, 143 sessional members and 197 employees, total applications lodged last year of almost 89,000 and roughly the same number of cases finalized.

Your Honour has been an outstanding judicial administrator. You have been a champion of the Tribunal, giving strong and informed leadership and an effective voice to the public, explaining the workings of the Tribunal to countless community groups.

As the Attorney-General said, on the announcement of your Honour's intention to retire: 'VCAT is a leader in this country in the administrative law jurisdiction; this is due, in large part, to the efforts of Justice Morris.'

The President of the Administrative Decisions Tribunal of New South Wales, his Honour Judge Kevin O'Connor AM has written in the following terms:

> I am writing to record my appreciation for the contribution that Justice Morris made to the work of Tribunal members generally in New South Wales over the last four years.
>
> Stuart gave excellent presentations on the topic of giving reasons for decision. The quality and skill of those presentations continues to be commented upon very positively.
>
> His warmth and good humour will be missed.
>
> On behalf of the members of the Tribunal that I head – the Administrative Decisions Tribunal New South Wales – may I wish Stuart well for the future.'

Early in your Honour's Presidency, you made a tour of regional Victoria, designed to highlight the importance of courts and tribunals sitting in regional areas throughout the State.

You did of course have considerable experience in this regard. Your previous tour of rural shires was in 1985 and 1986 as Chairman of the Local Government Commission – to conduct hearings into forced amalgamations to reduce 211 Victorian municipalities to 40 – a sure fire way not to win a popularity contest!

Your Honour conducted one hearing in the Shire Hall at Metcalfe, north of Kyneton. Metcalfe had lost its railway-stop, its school, its post office and finally its pub. Metcalfe farmers had not, however, lost their spirit.

In a break in the hearing, your Honour went to use the conveniences. Over the electric hand-dryer was a hand written sign which read: 'Press button to hear Commissioner Morris.'

Nearly 20 years later, your Honour's 2004 tour as President of VCAT was immensely more welcome.

Throughout your Honour's presidency, you have spoken and listened to people in community groups, local councils, professional bodies and industry associations.

So I am confident in speaking, not only for the Bar and the legal profession, but also the public who have benefited from your Honour's service at VCAT.

Within only a few months of taking office at VCAT, your Honour initiated what you named 'Operation Jaguar' – a review designed to improve efficiency in the Tribunal, with particular focus on the Planning and Environment List. You aimed to achieve a process, you said, that was sleek, swift and efficient like the big cat.

Operation Jaguar was a great success. Times were reduced; new procedures introduced.

Over the period of your Honour's presidency, the median time for the determination of planning disputes has been reduced from 22 to 16 weeks; and the median waiting times in the Civil Claims List are down from 21 to 8 weeks.

As your Honour has said before, statistics are not the 'be all and end all'. your Honour gave leadership to all at VCAT, encouraging in them confidence to write timely and succinct reasons for decision and a strong sense of commitment to the objectives of the Tribunal.

Under your stewardship, VCAT has conducted a wide range of professional development activities for its members including its own decision writing course in June 2006 and a seminar for members deciding fair trading disputes.

Through your drive and energy, the Tribunal offers better amenities for its members and the public: the library on level four, the improvements to level six and, with the assistance of the former CEO, John Ardley, the new mediation centre on level two.

As one Deputy President said the other evening at a dinner in your honour: 'He's made it a great place to work.'

At the same dinner, the Justice Department Secretary Ms Penny Armytage singled out the introduction of Court Network in VCAT, in which she described your Honour's role as 'pivotal'.

Your Honour has been a strong supporter of the use of technology in the administration of justice. You have recognised the difference it can make to the transparency of the process. In particular AustLii combined with the websites of the courts and tribunals has, as you have said, 'made possible the rapid and widespread dissemination of decisions and the reasons for them'. And at no direct cost to the public. These are an important counter to the filter of what you have called 'shock jock' radio presenters and tabloids.

VCAT Online last year attracted an increasing number of users who lodged more than 51,000 applications online, representing 78 per cent of all applications made to the Residential Tenancies List.

By your Honour's leadership, you have strengthened VCAT in its core objectives to be cost effective, timely, accessible, fair and impartial and quality decision makers.

In the Tribunal and in the Supreme Court – both as a trial judge and in the Court of Appeal – Your Honour conducted proceedings fairly, efficiently and with dignity.

Typically, the Court of Appeal in planning appeals from VCAT would include either the Chief Justice, Justice Osborn or your Honour.

In a significant number of cases before the Tribunal, including complex planning cases, both parties are unrepresented. These can present considerable challenges to any judge or Tribunal member.

Your Honour displayed a particular gift in hearing these matters. Impeccably fair, your Honour struck just the right balance. Cases proceeded with a degree of informality such that the unrepresented litigant was not intimidated and felt able to put his or her case. At the same time your Honour upheld the authority and dignity of the Tribunal.

In one case, an unrepresented litigant was having difficulty making his point. He was from the Indian sub-continent, and your Honour took a wild guess that he might follow cricket. You asked 'Mr X, do you follow cricket?'

That elicited a rather puzzled, 'Indeed Sir, I do, very much.'

'Well, let me put it this way, you have just bowled a "wide".'

'Ah, thank you, Sir' and the man smiled – he understood.

His next proposition was much more on point – 'Now you are on the pitch.'

Your Honour has delivered significant judgments across the broad range of the Tribunal's jurisdictions – from (in alphabetical order) anti-discrimination through freedom of information, gaming, health, occupational health and safety and professional discipline to valuation and compensation.

Your decisions both on the court and the Tribunal, if not always popular, were bold, humane, compassionate and fearless. They were eloquent and well reasoned.

Your Honour gave intellectual leadership to the Tribunal, and as a fair and sound judge – true to the oath you took, and remarked upon in your welcome speech, you discharged '[your] duties according to law, and to the best of [your] knowledge and ability, without fear, favour or affection' – even though, on occasion, that involved offending government, developers, or objectors.

Your Honour will be much missed and on behalf of the profession and the public, I extend to you sincere thanks for your service as President of VCAT.

I wish you every happiness and new challenges for the future.

County Court

Judge Leonard Ostrowski

Address by Michael Shand QC, Chairman of the Victorian Bar Council, on Thursday 6 September 2007

I appear on behalf of the Victorian Bar to pay tribute to your Honour's professional life of service in the law.

We who grew up in Australia can only wonder at your Honour's remarkable story. You came to this country in 1950, at the age of 15, in your own words, and I quote, 'ignorant of the English language and with perhaps a total of four years schooling' behind you.

In 1951, you began at St Augustine's Christian Brothers College in Yarraville. At the end of that year, the late Brother E S Crowle left St Augustine's to become Principal at St Joseph's CBC North Melbourne.

Before he left St Augustine's, on the strength of knowing you in your first year there, Brother Crowle told you that, if you decided to do matriculation, you were to speak to him.

You did, and so, after you'd had only two years schooling at St Augustine's, Brother Crowle admitted you to St Joseph's, to 'North' for your matriculation year and you went on to achieve success in that year.

After articles of clerkship and work as a solicitor, your Honour came to the Bar in April 1967. You read with the late Dick Griffith, later Mr Justice Griffith of the Victorian Supreme Court.

Dick Griffith took silk during your pupillage, so you were his last reader – the last in a distinguished line. Every one of Dick Griffith's readers took silk, and two of the five were appointed judges. His readers were: the late Neil McPhee QC; Mr Justice William Ormiston of the Supreme Court and Court of Appeal; the late Neil Forsyth QC; John Kaufman QC; and your Honour.

You'd been at the Bar a little over a year when you appeared in the High Court with the late Richard McGarvie QC – later Mr Justice McGarvie and Governor of Victoria – appealing the capital conviction for murder in *Da Costa*.

Your Honour brought to your practice at the Bar for almost 17 years an intellectual rigour, an eloquence with dignity and authority and a commitment to our justice system serving all, weak and powerful. As we have heard, the cases that gave you the greatest satisfaction were the ones where the client was up against the odds, against a wealthy or powerful party.

At your welcome in September 1983, you said of our justice system and the Bar: '...we have a tremendous function and a great responsibility and the ability, to protect the individual from the almost overwhelming forces of an unyielding, but all-pervasive bureaucracy.' Plus ça change. If so, then, what now?

Mark Derham, now QC, read with you. He has long been an admirer of the standard of your written opinions. They were a model of clarity, conciseness, always very considered; they went to the heart of the matter and addressed the client's position with dignity and compassion.

Your Honour's other pupil was Barbara Hocking, now retired, who later appeared in the *Mabo* case led by the late Ron Castan QC and Bryan Keon-Cohen QC.

Since your appointment as a judge of this Court in 1983, your Honour has served with distinction. You have remained ever patient and judicial in demeanour.

One very practical aspect of your Honour's service as a judge, has been that you set to work immediately on reserved judgments, and you did your best not to begin another case until you had the substance of your reserved judgment written.

One day, about 10 past 4, your Honour looked at counsel waiting hopefully at the back of your court. They rose. 'I have just finished this very long and complicated commercial case. Under no circumstances can I take your case tomorrow.'

'But your Honour, may I say just three things: *Mabo*, *Wik* and the vibe.' Dennis Denuto, the solicitor in *The Castle*, would have been proud. The plaintiff wanted her day in court. Good humouredly, your Honour responded: 'I'll take your case at 10.30 tomorrow morning.'

And the case was interesting. Male counsel for the Transport Accident Commission was cross-examining the female plaintiff about her claimed physical and psychological injuries:

Verbatim

WPS Enterprises Pty Ltd v Radford
Coram: Judge Kennedy
County Court (commercial list)

Mr Stirling: When did that go in?

Witness: The gym equipment? Not long after the tenant that we had in there moved out, which I'm not exactly sure when that was, it was earlier.

Mr Stirling: Do you use the gym equipment?

Witness: I did.

Mr Stirling: Does Peter to your knowledge?

Witness: Yes, yes.

Mr Stirling: How regularly does he use it

Witness: A few – three times a week maybe – three or four, yes.

Mr Hayes: I object to this. This witness can give evidence what she sees rather than what she concludes as to whether it was being used…

Her Honour: You don't think a wife would know if her husband's going to the gym?

Mr Hayes: Wives don't know a lot of things about their husbands, your Honour.

'But, madam, you do get out…you do drive your car?

'Yes, but…'

'And you do visit friends and see people?

'Yes…but I can't form proper relationships – I can't get anyone to marry me. Would you marry me?'

'But you go to films?'

At that point, the plaintiff's counsel interrupted: 'Your Honour, my learned friend hasn't answered the question.'

Your Honour: 'Yes, Mr So-and-So, I've made a careful note of that.'

For the last many years, successive Chief Judges have made best use of your Honour's expertise in civil matters, rather than in crime.

At Wangaratta, your Honour once heard a plea from a man in his seventies to charges of certain sexual offences You announced a sentence of 12 months imprisonment. The accused disappeared from view, falling with a loud crash. It took some minutes to revive him to hear the magic words that followed: 'wholly suspended'.

Not all of your civil cases have gone without incident. As we have heard, the defamation case of *Pezzimenti* went to the Court of Appeal twice.

Plaintiff's counsel applied, as instructed, for you to disqualify yourself on the ground of ostensible bias.

Your Honour was visibly shocked: 'No-one has ever made such an application before. Please tell me the grounds.'

The best they could say was that you had agreed with everything the defendant's counsel had said, and nothing their counsel had said.

Your Honour reflected briefly, then said: 'I believe you're right. You may wish to reflect on what I've said – and to that reflection you may add my dismissal of this application. Please proceed.'

Your Honour had also in that case to contend with an imaginative jury.

The jury indicated that they had reached a verdict, and were brought into court.

Your Associate asked 'Members of the jury, have you reached a verdict?' 'Yes, your Honour' – so far so good.

'How say you, was the article defamatory?' – stony silence.

The Associate repeated the question – stony silence.

Your Honour asked, 'Mr Foreman, is there a problem?' 'Well, your Honour, can the third bloke on the jury answer for us?'

'That's a bit unusual, but we'll try.'

Your Associate then addressed the 'third bloke': 'How say you, was the article defamatory?'

In a loud voice, the 'third bloke' replied: 'We the jury find the first defendant guilty of libel. We the jury find the second defendant not guilty of libel. We the jury hereby award the plaintiff and his wife…'

'Stop!'

Not only had the jury not answered the questions they had been asked, but the plaintiff's wife was not even a party to the suit.

A Thought For Today

To live
In brown stone mansions,
And pour tea
For tepid old maids
In cups of egg-blue china,
Watching the hour glass empty.

The blue-green depths
That beckon
With trailing seaweed arms
Were warmer
Than dormant hearts
And brains that reckon
Paper profits.

Your Honour had in the end to discharge the jury and decide the case yourself – which you did – by way of dismissal.

And your consideration and courtesy went beyond your court and your court staff. On circuit at Bendigo, a local teacher had arranged to bring his class to your court. However, the list collapsed the day before.

You and your Associate robed and your court was opened in the ordinary way. You then explained to the class what had happened. You spoke to them about the court and the law. You took their questions. You made that an experience to remember for that teacher and those students – and it's also something your Associate remembered and singled out.

Your Honour is one of the great judges of the County Court. You have sat in every jurisdiction, but the civil jurisdiction has been your own. If Australia has been good to your Honour and your family, you have repaid your country many times over in the last 57 years.

You have been intellectually strong, invariably polite, fair and patient.

Your Honour will be greatly missed.

I understand the first project in your retirement is a visit to your children and grandchildren in the United States. On behalf of the Victorian Bar, I wish you and your wife Maureen a safe journey, and a full and happy retirement.

Judge Ostrowski bids adieu

Thank you also to the three of you at the Bar table. It is amazing how much people in your positions can find out about one's life, and pretty well all of it accurate, too.

On these occasions it is usual to thank all the people who have made one's life on the court easier. Certainly I have been privileged to work with and be enormously assisted by several people in my 24 years. There were, of course, my associates, starting with Captain Bergin of the Royal Australian Navy. Then for a short time Lou Vatussios, also from the Navy. Then for a lengthy period the inimitable Bernie Convery, who is here today, and for another lengthy period the indomitable Vic Bell, who is also here today, a man whose body has got more spare parts than McEwan's used to be able to sell.

Of tipstaves I had few. There was Reg Wood and Malcolm Carroll. When Reg Wood retired, at his farewell I described him as the 'Prince of Tipstaves'. I have had no reason to change my view of his services to me. Malcolm Carroll, who is here with me today, stepped into a very large pair of boots, and he has worn them with patience and efficiency. For his sake, I wish something I had never thought I would wish before. For his sake I wish that Geelong wins the Grand Final.

There are two secretaries who stand out: The first one was Joan Wells. She was outstanding. Then there was my present one, Anna Summers. All I will say of Anna is that it took never any more for me to say, 'Anna, would it be possible…?' and zip, she had done it. I really don't know how I am going to get on without her.

However, I do not wish this occasion to be a litany of thank yous. Those who have assisted me through the years know what they have done, and hopefully they know of my gratitude to them.

On the occasion of my welcome on 23 September 1983, I referred in passing to my 'somewhat unusual origins'. I did not say much about them at that time. We have heard about some of them from Dr Emerton today, but perhaps the real story has not quite come out.

Also, recently I noticed that my Instrument of Commission reads rather differently from the very curt statement which one sees in judicial commission instruments at present. My Commission told me that His Excellency Governor Murray appointed me in reliance on my 'loyalty, integrity, learning and ability'.

I do trust that the absence of these words in recent appointments does not mean that those qualities are no longer considered necessary.

Now that I am leaving, it may be an appropriate time to disclose my origins and to examine whether His Excellency's judgement in appointing me was correct. To find the answer to that, one does need to take a look at my origins and the journey through life which I had taken until I took on the law.

Jim Kennan QC, then Attorney-General, as we have heard, was no doubt instrumental in putting my name forward to the Executive Council. He took a risk in doing so. He knew no more of me than that I had come here as a stateless refugee, and of my time after that. But that time began only with my arrival in November 1950 when I was 15. My time in the law began in 1954. Let me say at once, I loved my time in the law. It consisted of one year as a law clerk, four years as an articled clerk, eight years as solicitor, 17 at the Bar, and a little less than two of those years, unfortunately, as silk.

I was surprised to be told by others that my reputation in 1983 was that of an arch conservative and reactionary. Jim Kennan, of course, was a member of the Australian Labor Party Government. On the day of my appointment, I received a telephone call from a journalist at *The Age*. He wanted an answer to just one question: 'Why would a Government like this one appoint someone like you?' I do not actually recall my answer, but it was probably along my usual arrogant lines, something like, 'Because it is a very wise Government.' It does seem that, according to this journalist at least, the Attorney-General was taking a real risk.

I have chosen to speak to you about my time prior to the law, not in order to inflict boredom on you – after all, you are a captive audience – but to try to get off my back some who have pressured me to write a book: namely my wife and children. That's a lot of pressure. We had six children. If you look in the jury box, however, you will see that only one of those children is present, and with our tenth grandchild. That's pretty typical of what my life has been like lately. The children, invariably with their mother's assistance, pressurise me to do this, that, or the other, like write a book, and then they flit off across seven seas and in the four winds going about their own business, and hardly ever in the country. In any event, if you wish to hear my story, then stay. If not, well, it is an open court, and you can all go at any time. Mind you, it would be very lonely up here if you all walk out.

I was surprised to be told by others that my reputation in 1983 was that of an arch conservative and reactionary.

These then are my origins.

I come on my father's side from the Polish landed gentry, with estates near Minsk in Byelorussia. You see, my nickname at the Bar was not altogether undeserved. My mother's family was a well-to-do industrialist family living in a town called Wolomin near Warsaw. She was one of three children. She had two brothers. My father

was one of five children. He had three sisters and one brother.

My father was born – hold your breath – on 10 August 1882. Can you visualise those times? No aeroplanes, no radio, no telephone. Energy was supplied by steam, horses and human labour. Poland officially did not exist at all. It had been partitioned between Austria, Prussia and Russia. My mother was 14 years younger than my father. Both the families were ruled by the Russian Tsar, as was the whole of Eastern Poland. My father was chosen by his father to be the one to run the family estates.

That did not appeal to my father. He disagreed with his father, something which in those days was not easily done. So my father packed his bags and went a long, long way away to the foothills of the Ural mountains, to a city called Orenburg. You might recognize the location of Orenburg when I tell you that it was not at all far from Ekaterinburg, the place in which Tsar Nicholas II's family was slaughtered. As it happened, there was within the railways a male choir. My father had a good voice and he joined the choir. All seemed well.

But then there came 1914. The Great War. None of Russia, Prussia and Austria trusted the Poles. The Tsar tried to forestall any problem from them by ordering that all Polish men should join his army. That applied to my mother's two brothers. To save themselves from this edict, they escaped deep into Russia: as fate would have it, to a place called Orenburg. My mother, then 18, and her mother, followed the men. One of these brothers had a good voice and he joined the railway choir. My father and he, both being Polish, befriended each other. One day they were both sitting on a park bench, and from a distance they saw a young woman approaching. My father said to his friend, 'This girl coming our way, I have been noticing her for months in the church on Sundays. I would so much like to be introduced to her, but how on earth can that happen?' 'Oh, very easily,' said his friend. 'I will introduce you. She is my sister.'

And so it came that my parents were married on 19 May 1917. That was not six months before the Communist Revolution. My mother was 20. My father 34. Despite my father having abandoned a life on the land, he was regarded by the Reds as a capitalist landlord. He was imprisoned. At that time, Alexander Kerenski was the head of the provisional Government. Somehow, and she never told me how, my mother knew Kerenski sufficiently well to be able to see him and have my father released. That caused them to begin almost three years of life as fugitives. In 1991, their first child, my sister Sabina, was born. Poland was reconstituted as a result of the Great War. Then, in 1920, the Russo-Polish War intervened. At its end my parents managed to cross into Poland.

My father obtained work with the Polish Railways. My two brothers were born. With the help of my mother's older brother, my father acquired a small home on a large allotment of land in Wolomin. In 1935, as somewhat of a surprise, I was born. I had an idyllic childhood. My earliest memories are of sunny days and of my father telling me to be proud of my origins, to be honest in all things, to value all men according to their work and never to despise any labour, however menial it might be. My mother taught me how to be courteous, how to address ladies, how to bow properly, and when to kiss a lady's hand and when to refrain from doing so. Courtesy and respect for all, she tried to instil deeply into my psyche. In June 1939 I recall the gala affair of my sister's wedding. My life really, even in retrospect, was paradise.

It lasted all of four years. Then there came September 1939, my fourth birthday.

I recall being held in my father's arms, cuddling up close to my mother. It was night time. They were looking at a beautifully red glow in the the sky, listening to distant explosions, and saying 'Warsaw is burning'. Later, there were men tramping through our house taking all that was of value. They spoke a language I did not know. I recall being massively surprised that my father did not throw them out. Surprised that my father looked helpless. In fact what they were doing was requisitioning everything. By everything, I mean the lot, including our house and land. Our house and land was to be part of the ghetto in Wolomin. In lieu of that, we were assigned an almost derelict shopfront in the main street. It had a shop, a kitchen and one room – no bathroom.

There was very little food. My two brothers had disappeared. Once or twice they visited, but they acted strangely and were very furtive. Rather quickly though, I learnt that the end of my paradise, this enormous change that had occurred, was due to the Germans. That word 'the Germans' became an expression of wide and unspecific ambit. It encompassed all that was evil. If something was evil, then it was German, and vice versa. I was learning the dreadful power of hate. That is a power that takes over all emotions and supplants all reason. It would be many years before my mother's earlier teaching of gentility and gentleness could reassert itself.

I lived in that one room at the back of the shop with my parents and a dog. My mother tried to run a coffee shop, but without much success. Most of the time there was no food to serve. I did not stay there very long. I found myself taken by my sister and her husband to Warsaw, to an apartment in a grey, unattractive, multi-storey building. It was one room and a kitchen, but it did have a bathroom. I guess I was five years old. Much later I found that my father had decided that my sister and her husband were more likely to be able to feed me than he could. He handed me over to them. My mother had disagreed. She wanted her child, but she was overuled by my father.

Of my time in my sister's apartment I have no pleasant recollections. I was locked in all day with a page of letters, a pen and ink. I had to copy the letters and remember the sounds. I was being taught to read and write. Once only, as I recall, my father visited me there, and brought me a small wooden horse on wheels. It was a treasure, but it did not make up for having to sleep on a mattress in the kitchen, a mattress which was full of bed bugs which came out at night and feasted on my blood. We moved two more times. Each apartment was better than the one before.

Then I suddenly found myself back in Wolomin. My father was lying dead in a coffin in that one room. There were four candles. There were people praying. I held my mother's hand as we walked behind the horse-drawn hearse, and as she sobbed at the edge of the grave. My father had died on his sixtieth birthday, 10 August 1942. To this day, I do not know the cause of his death. At the time it was simply put down to 'the Germans'.

After the funeral I was back in Warsaw with my sister. The third and final apartment was in a pleasant semi-detached building. It had a basement and three storeys. It was in the fairly august suburb of Zoliborz. It had three rooms and a kitchen and a bathroom. I could read well by now, and I loved reading all that I could lay my hands on. It was a wonderful escape. I was no longer locked in. I had my own key from the age of seven. But after my father's funeral, I was not to see my mother again for the 25 or 26 years Dr Emerton referred to.

According to Hitler's plan, Poles were to be slave labour. Anyone who had the capacity of leadership was in danger of execution. Teachers fell into that category. In any event, schools were prohibited. However, child-minding centres were allowed, and these became secret schools. I was sent to one of them, but it took me not very long to work out that if I did not turn up, nothing much would happen. So at the age of seven or eight I began life on the streets. I learned street craft, especially how to travel by tram without paying fares, how to steal, and how to make myself invisible. This latest talent was most important when there was *tapanka*, a frequent affair. Truckloads of soldiers would seal off a street and herd everyone in the street into trucks to be taken to labour camps. Of course, I did see worse. I saw young men lined up against the walls of city buildings and shot. Long lists of those executed appeared frequently pasted onto city walls. Death was common.

By eight years of age, I knew about the Polish Underground and the fact that my sister and brother-in-law were in it. I also knew that my brothers belonged to it. I envied them all. I was not at risk of disclosing anything concerning my knowledge, because I knew then that it was preferable to die rather than disclose any such knowledge. And, looking back, I am sure that had the occasion arisen – thank God that it didn't – that's how I would have acted. That's the power of hate.

The Underground army, acting on commands from the Polish Government in exile in London, was active throughout Poland. It was the AK. I was very put out that the AK considered me to be too young to be a member. That was particularly so when one of my street friends, who was 12 years old, told me that he had been taken on as a message runner.

My memory of being in my parent's arms seeing Warsaw burning was revived one night when I saw a similar glow in the sky and heard my sister say, 'That is the ghetto burning.' I knew that there was a part of Warsaw which the Germans had surrounded by a high brick wall. I knew it was the ghetto. When it burned, I knew that there were people burning in it.

Then came 1 August 1944. Long thereafter, I learnt that on that very day my mother was coming to Warsaw to reclaim her child, myself. Her journey was thwarted. A cordon had been thrown up around Warsaw, and all travel into it and out was prevented. I recall the day well. It was a beautiful sunny summer's day. I was in the apartment reading. About mid-afternoon there was a shot, then another, and another, then the rattle of a machinegun. I knew this was no normal day. Something of significance was taking place.

What was in fact taking place was that on that day the Warsaw Insurrection had started. Somehow, in the evening and late at night, firstly my sister and then my brother-in-law succeeded in reaching home. So began weeks of life in the cellar with what was left of the other tenants. Life in the cellar was not too bad, all things considered, apart from sanitation. A house not far away from ours had a pump in the garden. We all put in digging a trench from the exit from our cellar to that pump, and that gave us ample drinking water. Of course, food was very short. And then there was the artillery. I was used to air raids, but I had never been in a building that was actually hit.

During the insurrection, our building took quite a number of artillery shells. I

Ballad of a thin man

(on the occasion of Bob Dylan's 2007 Australian tour)

At the age of sixty-six
The Troubadour's legs resemble sticks.
The leader of a cowboy band's
Still making music of his own brand.

His voice, though shot, still leads the way
For those who come to see him play.
A nasal snarl, an incantation
Give vent to his imagination
That runs right through his lifetime's work
Now soft, now swift, now gone berserk.

The double bass, the pedal steel
Create a swirl of notes that heal.
Some understated guitar licks
Precede the drummer's upraised sticks.

The marionette, the master blaster
No make-up now of alabaster.
No repartee with any fans
Just words and music from his hands.

NIGEL LEICHARDT

recalled the first one. An apparently impenetrable wall of dust rolled down the stairs to the cellar. I thought it was smoke with fire behind it and I went berserk. Totally hysterical. I jumped up and pulled at the iron bars on the cellar window, screaming. I must have been a real spectacle. Eventually, with the help of a bottle of valerian, the others pacified me. It is interesting how familiarity does breed contempt. By the time of the last hit, I hardly took any notice, even though that last one found me on the stairs on the second floor and blew me down a flight of stairs and splat against the wall.

On 9 September 1944 was my ninth birthday. On that day we used up the last of our food – a mixture of flour and water. After that there was only water. There were apples and pears hanging on the trees in the rear garden, looking more enticing every day. Eventually I ran and climbed into the pear tree to get some pears. I am not sure if I only heard or if I actually felt the bullets going past my ears. It didn't bother me. I knew I was invulnerable. I did get some pears.

It didn't bother me. I knew I was invulnerable.

My view of my invulnerability was shattered when one day we heard cries for help from the street pavement. We tied a couple of brooms together and passed them out into the road. The person calling hung onto the end and we dragged him in. It turned out to be my 12-year-old mate, with one of his legs shattered, and his shinbone sticking out at a right angle to the rest of his leg. To this day I count it a mystery, that from the time of seeing him dragged in, onward, I have absolutely no memory of what happened to him.

Then there was the day when all of a sudden there was shouting and sounds of the main doors to the building being broken down. Then the soldiers were inside yelling the well-known, '*Hande hoch*' and '*Alles raus*'.

We were chased outside and shepherded into a small cluster of people, surrounded by rifles levelled at us but a step or two away. Looking at the muzzles of those guns I knew on the spot that I was about to die. But we were not shot. We were marched down the street, joined as we walked by other bedraggled people like us. The Warsaw we walked through was so damaged that the streets were barely recognisable, and still heaps of rubble were burning.

This was the beginning of a long journey packed into railway goods trucks so tightly that only some could sit while others had to stand and swap positions. In two weeks of travel we had only two occasions when we were let out next to the wagons and given something to drink. Whatever it was it was black and tasted foul, but it was something to drink. Of course we got no food. Firstly, we were taken to a camp near Berlin, then to other camps in Austria. There was fumigation of clothing. There were long lines of naked people being put through cold shower halls.

Eventually a small group of us was taken to a place called Landeck in the Austrian Tyrol. It was a small camp, only one hut, one *lagerleiter*, barbed wire, no guards. Of course, the war in Europe was drawing to a close. The camp inmates were taken out every day to work. No one seemed to quite know what to do with me. There were no restrictions put on me, on my movements, and so I walked and ambled around the town. On one occasion I recall one of the locals allowed me to use his toboggan for a bit of fun in the snow. It's amazing how things like this leave lasting impressions. Ever since then, until I was cured of my hate, I regarded the Austrians as people much nicer than the Germans.

In the spring of 1945, there came a day when my sister and brother-in-law told me that we would leave that night. My brother-in-law had been born and raised in Berlin. He spoke like a Berliner. He told me that under no circumstances was I to speak. If anyone spoke to me, he would deal with it himself. I was simply to look tired. So in the early evening we walked out of the camp and caught a train to the Swiss border. We did have to walk the last few kilometres. The Swiss Guards would not let us in that night, but they did the next morning. My brother-in-law had a brother in France, and we wanted to get to France, but the Swss would not allow that. We were interned. Again there were camps, barbed wire and armed guards. However, it did not last all that long. I was malnourished and was sent to a children's recovery home in a pretty place called Finhaut. With my sister and brother-in-law we were then shifted from place to place all over Switzerland.

The war in Europe ended in May 1945, shortly after our arrival in Switzerland. Its end, I recall well, was signified to us by all church bells ringing. I had five years in Switzerland. How it all happened I don't know, but I was separated from my sister and brother-in-law for most of that time. So much so that I practically forgot my Polish, but spoke like a native the Berner Oberländer dialect of German.

One day I was told to go with someone so I did. I spent some time looking after a couple of cows on the alps. Then again one day I was told to go with a priest, and so I did. He turned out to be the Catholic Parish Priest of Interlaken. I lived in his presbytery for a couple of years from the age of about 11. It was a good time. There was the Parish Priest, Pfarrer Wyss, his Curate, Albin Flury, and the housekeeper, Regina. I had my own room. I had a lot of free time. I attended a normal school for the first time. Pfarrer Wyss took me mountaineering, taught me to ski, and for the first time since I was a baby I got a ride in his car. I ate with the priests in a dining room, served by Regina. Life was normal and regulated. In the evenings Pfarrer Wyss would allow me into his study where we listened to music on his radiogram and he taught me to play chess. The Warsaw street kid thought that all his Christmases had come at once. I got to love Pfarrer Wyss. I wanted him to adopt me. I don't know about what legal obstacles to that there might have been, but I do know that my sister was aghast. She made it perfectly obvious to Pfarrer Wyss that she would not agree to any such proposition.

So, it was a great time in Interlaken, but I also learnt there about being part of a minority. I was a foreigner and I was a Catholic. Interlaken was mainly Protestant. In the whole of my school there were only half a dozen Catholics. So I learnt what it feels like to be spat on, and shunned by one's peers. for a while that was made easier to bear by reason of a ten-year-old Spanish girl coming to live at the presbytery. She

was being prepared for her first Holy Communion. Her father worked at the Spanish Embassy in Bern. She did not spit on me nor shun my company. That time was extra good. That bit of normal company of a child approximately my own age meant so much to me that to this day I remember the girl's name. It was Carmen Santaella. Apart from that time when Carmen was there, I enjoyed burying myself in the presbytery library. I read Greek mythology and adventure books, especially those written by Karl May. He was a German author, and he wrote of Germans who were quite different from the ones I knew. In that library, my armour of hatred began to crack.

I had enjoyed life with Pfarrer Wyss for about two years when he told me that it was time for me to go to collegium. I knew that a collegium was a higher type of school than the *primar schule* and *sekundar schule* which I had been attending, but I regretted the day when Pfarrer Wyss handed me a small siutcase packed by Regina and a railway ticket and told me that I needed to find a town called Sarnen, and there find the collegium, and that I would live there. I was not quite 13 years old.

The Benediktiner Collegium Sarnen, as we've heard, was a large boarding school for boys. It was an elite school. It was run by Benediktin monks and nuns. The discipline was strict. All activities were supervised. Those activities consisted of attending classes, performing sports activities, doing homework and attending chapel. Meals were eaten in silence, save for the readings by the lector. Ordinary small talk type speech between the boys was allowed for only two hours out of every 24. I enjoyed the collegium. I disliked the vacations.

When the vacations came I had to return to my sister and brother-in-law. Swiss authorities permitted them no ownership nor even a tenancy of property. All they could do was to board in one room. For me to sleep nights, my sister arranged with her boss to let me use a bed in his spare room. Every night I walked to his place, slept, and walked back to my sister's one room the next morning and sat and read until it was time to go to lunch, which invariably had to be at a cafe. I learned a great deal about being independent in those days. These days I blush a little when I recall how I used to order beer with my meals, even though I was only 14. But nobody ever questioned me about it.

There was one more surprise: just as I was getting to enjoy being a collegium student and wearing the distinctive student's sodality cap, the Swiss authorities decided that all internees had to leave within months. We were stateless. The Polish Communist puppet government had decreed that all Poles abroad had to repatriate or lose their Polish nationality. My brother-in-law had been in the Polish Diplomatic service. To return to Communist Poland would have meant a very precarious future. The NKVD had already killed my eldest brother. My younger brother had escaped by a miracle. We could not go back. We were stateless, no papers, and chased out of Switzerland. Only two countries at that time took people like us without having to join a waiting list. They were Argentina and Australia. The toss of a coin literally decided our choice. After six weeks at sea on the tiny 6000-tonne mass transport *Goya*. I arrived in Melbourne on, I think, 5 November 1950.

Well, that is my story. Of the rest of my life, you have heard in other places and other times and also from the other speakers today. The orderly, peaceful and predictable life in beautiful Australia, the company of friends made at schools – representatives of them are in the jury box – the love shown by a girl who agreed to marry me, all combined to allow me slowly to melt away the hatred which had marred my life. It took time, but eventually my parent's very early teaching reasserted itself. By the time of my appointment, I felt that I was not justifiably called a reactionary. By that time I had become convinced that following the path of a tooth for a tooth and an eye for an eye leads to a community becoming both toothless and blind, not a very desirable state of affairs.

So this completes, I hope, the picture you might have had of me. Did Jim Kennan make a mistake? Each of you can answer that question for himself. For my part, with my usual modesty, I say that I believe he should be congratulated for his courage, wisdom and perspicacity.

So the time has come for this judge to leave. I thank you all for coming and doing me the honour of your presence, and I thank the people of this country and especially of this state for allowing me the privilege of living in a community governed by the rule of law and not the whim of the executive.

Guard your liberty. *Guard your liberty*. I bid you adieu, and for the last time I say the words 'Adjourn the Court *sine die*.'

What difference can a Human Rights Charter make?

Right Honourable Lord Walker of Gestingthorpe

Address to the Anglo-Australian Lawyers Society, Melbourne, on 15 August 2007

Lord Walker

INTRODUCTION

The introduction of human rights legislation naturally provokes a good deal of discussion and some scepticism about citizens' human rights being put into the hands of unelected judges. Discussion of that sort must be welcomed, even if it is sometimes expressed in quite vigorous language. The enactment of human rights legislation is, after all, a change with far-reaching constitutional implications, even in a country like Britain which is said not to have a written constitution. Once it is enacted it is the judges' task to give effect to it in accordance with the spirit of the legislation, reminding themselves that this new responsibility has been allotted to them by a democratic legislature.

My career as a judge happens to have coincided with the introduction of our human rights legislation. There was a good deal of discussion about it in the mid-90s, and this intensified with the arrival of Mr Blair's first government in 1997. Our Human Rights Act ('the UK Act') was enacted in 1998 but its coming into force was postponed until 2 October 2000, mainly in order for the judiciary, the executive and other public bodies to prepare for it – in the case of the judiciary by a strenuous program organized by our Judicial Studies Board. I hope that a brief account of our experience over the past seven years may be of interest as you prepare for the full entry into force of the Charter of Human Rights and Responsibilities Act 2006. May I emphasize that these are simply my personal views: I have absolutely no authority to express any sort of collegiate or official view.

THE UK HUMAN RIGHTS ACT 1998

The UK Act is intended to reproduce in the domestic law of the United Kingdom provisions corresponding to its international obligations under the European Convention on Human Rights and Fundamental Freedoms, to which the United Kingdom has been a party since 1950. The Convention was intended to protect the peoples of Western Europe from any recurrence of the horrors of Hitler's Germany or any extension of the horrors of Stalin's iron curtain empire. The Convention (interpreted and applied by the European Court of Human Rights at Strasbourg) is now

more than 50 years old, and in places it is showing its age, especially in the fields of equality and non-discrimination. Section 32 (2) of the Charter permits reference to (among other sources) United Kingdom and Strasbourg authority, but sometimes there will be some sort of contextual misfit. I mention at this stage, without enlarging on, three significant respects in which the UK Act differs from the Charter: first (paradoxically) a company or other artificial person can enjoy some (but not all) human rights;[1] second, there is a new free-standing right of action against a public authority which infringes human rights, including a possible claim for damages, but only if the claimant is a victim;[2] and third, a court is a public authority.[3]

The UK Act was intended to bring home these rights (defined as 'Convention rights') by making them enforceable in our domestic courts rather than only in Strasbourg. Its coming into force has had a considerable effect on the work of almost every part of the criminal and civil justice systems. I say 'almost' with lawyerly caution as I do not think that the work of the Patents Court has been significantly affected, and there may be some other specialist havens which remain undisturbed. But most of the public law issues coming before the House of Lords (and at present public law makes up, I would estimate, at least two-thirds of our work) have some human rights element in them. Criminal courts at every level may have to consider whether recent amendments to the law of criminal evidence (intended, we are told, to rebalance the scales of justice) offend against the Convention requirement of a fair trial. District judges in county courts (the fifth and most 'coalface' level of our civil judicial system) may have to decide whether a peremptory order against a tenant for possession of a house or flat let by a local authority might offend against the tenant's right to respect for his home. Official predictions of the UK Act's impact on the judiciary's workload were for a mini-tsunami of human rights litigation which would break on the shores of the House of Lords in about three years, and would then begin to ebb away. In the event there was no unmanageable flood but there was a noticeable surge in human rights litigation which took much less than three years to get to the Lords, and my impression is that after seven years there are still some important human rights cases coming in.

The UK Act has also had a very significant effect on our other arms of government – the legislature and the executive – and on entities which are not part of central government but are public authorities for its purposes. Rather than try to analyse its operation in terms of numbered articles of the Convention (article 6 fair trial, article 8 respect for private and family life and home, article 10 freedom of expression, and so on) I want to look at how the UK Act has affected the different estates of the nation under four heads: Head 1, Parliament; Head 2, the central government executive in its various functions; Head 3, other public authorities apart from the court; and Head 4, the court itself. The court never leaves the stage throughout, since under the first three heads it is (as some Canadian human rights commentators like to put it) engaged in a continuing dialogue with the other estates involved in the business of government.

THE EFFECT ON PARLIAMENT

As to the legislature the UK Act has three important effects, replicated in relation to your Parliament by sections 28, 32 and 36 of the Charter.[4] The first is the requirement for proposed government legislation to be certified by the responsible minister as compatible with Convention rights. The certificate has no legal force, but it ensures that the government is, from the inception of any legislation, alive to possible human rights implications.

The second effect is that every enactment must be interpreted by the court, so far as possible, in a way that is compatible with Convention rights. The third is the power of superior courts to make a declaration of incompatibility (under the Charter, a declaration of inconsistent interpretation) to the effect that a statutory provision, even when mediated through the court's interpretative obligation, cannot be reconciled with Convention or Charter rights. A declaration of that sort does not affect the validity of the statutory provision, but it sends to Parliament the clearest possible message that it should think again: and in Britain Parliament has never failed to think and legislate again, even if it has sometimes done so through audibly gritted teeth.

But a declaration of incompatibility is a last resort. Logically and functionally the Court's first task is to see whether an apparently inconsistent enactment can be interpreted in a way that is compatible with Convention rights. Within the first year of the UK Act coming into force Lord Steyn said in *R v A (No. 2)*[5]:

> The interpretative obligation under s.3…is a strong one. It applies even when there is no ambiguity in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature…

That case was concerned with a classic problem under human rights legislation: whether a restriction in a statute on criminal evidence,[6] designed to prevent traumatising cross-examination of complainants in rape cases, threatened the fair trial rights of the defendant. The House of Lords used s.3 to restrict the statutory provision so that it did not exclude evidence so relevant to the issue of consent that its exclusion would endanger the fairness of the criminal trial. This interpretation confers a case-management discretion on the trial judge while preserving the central purpose of the enactment.

The interpretative obligation is not however a licence for the court to contradict the expressed will of Parliament, or to create new procedures which ought to be decided by Parliament. Thus in a case about mandatory life sentences[7] the Lords were faced with legislation[8] which on its face gave the Home Secretary the power to fix the minimum term of imprisonment to be served by a convicted murderer. This offends against the principle that sentencing is a judicial function. The Court of Appeal read in the proviso that the Home Secretary could not exceed the term recommended by the trial judge. Lord Bingham roundly rejected this:[9]

> To read s.29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from what Parliament intended.

Lord Bingham did not approve of the legislation, but he recognized that only Parliament could undo it.

The court's inability to invent new machinery was made clear in a family law case[10] decided in 2002. The case needs to be put in context. In the United Kingdom the *Children Act 1989* was a revolution in child law. It put onto a new, clear, footing the circumstances in which the state may, in the interest of children at risk, take them away from their parents and assume parental responsibility for them. The making or revocation of a care order is for the court; but during the currency of a care order, decisions about a child's welfare are for the social services of the relevant local authority, and not for the court. Two cardinal principles of the legislation are the high threshold before a care order can be made, and the exercise of parental powers by the local authority while it remains in force.

The Children Act was regarded as a major step forward. But inevitably its aims were not always achieved. Local authorities, short of human and financial resources, often failed to achieve the targets set out in the care plan which had been put before the court when the care order was made. Sometimes the failure was prolonged, inexcusable, and very damaging to the child. In two cases of particularly egregious failure the Court of Appeal (constituted by three very experienced judges including Hale LJ, who had at the Law Commission been one of the chief architects of the Children Act) decided to interpret that Act so as to permit the court, in making a care order, to lay down 'starred milestones' which, if not achieved, would lead to the care order being reviewed by the court. The intention was to ensure respect for the children's private and family life, under article 8 of the European Convention.

The Lords, while entirely sympathetic to the Court of Appeal's intentions, thought that this was going too far. Lord Nicholls said,[11]

> In applying s.3 courts must be ever mindful of this outer limit [possibility]. The Human Rights Act reserves the amendment of legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary… a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate.

Paul Elliott QC and Lord Walker

Similarly in *Bellinger v Attorney General*,[12] the Lords declined to interpret the words 'a man and a woman' in the Marriage Act 1950 so as to include a transsexual, even though the Strasbourg court had declared the United Kingdom in breach of the European Convention in not providing for the marriage of transsexuals. It was for Parliament, and not the court, to decide how the law should be changed (for instance, whether gender reassignment must include some surgical intervention.)[13] In both these cases the appropriate remedy was a declaration of incompatibility, the equivalent of a declaration of inconsistent interpretation under section 36 of the Charter.

Since then the Lords have continued to refine their views as to the court's true function. Various striking phrases have been used, but I think that the court must ultimately depend on its own intuitive judgment. If you were going to read only one British case in detail I would recommend *Ghaidan v Godin-Mendoza*, decided in June 2004.[14] The issue was whether, in housing legislation,[15] the words 'a person who is living with the original tenant as his or her wife or husband' – words naturally directed at an unmarried heterosexual cohabitant – include a partner in a homosexual relationship. The Lords decided, four to one, that they do. All the speeches

John Emmerson QC

CLOCKWISE Will Alstergren and Dr Kristina Stern, Paul Hayes addresses the dinner, the dinner scene

of the majority merit attention. I find the speech of Lord Rodger particularly helpful. At one point[16] he invoked A E Housman, whose standing as a classical scholar remains high, even if his reputation as a poet has had its ups and downs:

> When Housman addressed the meeting of the Classical Association at Cambridge in 1921, he reminded them that the key to the sound emendation of a corrupt text does not lie in altering the text by one letter rather than by supplying half a dozen words. The key is that the emendation must start from a careful consideration of the writer's thought. Similarly, the key to what is possible for the courts to imply into legislation without crossing the border from interpretation into amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted.

THE EFFECT ON THE EXECUTIVE

I move on to Head 2, the situation in which unelected judges may interfere with decisions taken by ministers with democratic legitimacy. That is the constitutional theory, though in practice all but the most high-profile executive decisions are taken by civil servants. In Britain judges have been criticized both as excessively activist and as excessively deferential to the executive. This is not a new problem[17] but the new Act has certainly exacerbated it. Perhaps I can start with an important case,[18] decided in 1995, about the official policy of excluding gay men and lesbian women from the British armed forces. Although the UK Act was not then even a Bill, there was at that time much political pressure for the domestic enactment of the European Convention, and a lot of Strasbourg authority was cited in the case.

The judgments reveal two emerging principles – two contradictory principles – which now dominate this part of the law. One is that where fundamental human rights are involved, executive decision-making must be scrutinized with particular care. One of the seminal pronouncements on this point was Lord Bridge in *Bugdaycay*[19] (an asylum case decided in 1987):

> The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put an applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

The other emerging principle is that courts should be particularly slow to interfere in executive decisions concerned with foreign policy, national defence and security, macroeconomic policy and the allocation of resources. Simon Brown LJ referred

to this (in the case about homosexuals in the armed forces) as 'super-*Wednesbury*' – that is, a category of political decisions on matters of high policy on which the court would set an even higher threshold from the traditional *Wednesbury*[20] test of this principle:[21]

> The decisions which shape them are for politicians to take and it is in the political forum of the House of Commons that they are properly to be debated and approved or disapproved on their merits. If the decisions have been taken in good faith within the four corners of the Act, the merits of the policy underlying the decisions are not susceptible to judicial review by the courts and the courts would be exceeding their proper function if they presumed to condemn the policy as unreasonable.

That is a quick snapshot of how matters stood when the UK Act came into force. The first landmark pronouncement as to the effect of the Act was by Lord Steyn in *Daly*.[22] It was a case about reconciling the public interest in prison security with prisoners' individual rights to privileged correspondence with their lawyers. As regards the intensity of review by the court, Lord Steyn identified three important points:

> First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence ex parte Smith* is not necessarily appropriate to the protection of human rights.'

The potential conflict between the two principles – 'anxious scrutiny' and 'super-*Wednesbury*' – becomes most acute where some of the most fundamental human rights – liberty from arbitrary arrest and imprisonment – collide with questions of national security against international terrorism.

PERSONAL LIBERTY

I want to spend some time on the topic of personal liberty, because it is so important in Britain at the moment. Discussions during the past week have brought home to me how important it is in Victoria also. It cuts across what I have called Head 1 and Head 2, because there are often two issues. Is Parliament's conferment on the Home Secretary of a statutory power to curtail civil liberties an infringement of Convention rights, however moderately and responsibly the power is exercised? If so, there is a problem under Head 1. If not, there is a question under Head 2: Has the power been exercised by the Home Secretary, in the particular circumstances of the case, so as to infringe the claimant's Convention rights?

For the last six years Britain has, like many other democracies, been struggling with the dilemma of how to guard against terrorism without destroying the civil liberties which are the hallmark of a liberal democracy. It is not a new problem, and Britain already had anti-terrorism legislation. But in the wake of 9/11 the British Parliament enacted the *Anti-Terrorism, Crime and Security Act 2001*, which went further in providing for the internment without trial of suspected terrorists who were not British subjects. This provision was used against a small number of suspected terrorists who could not be deported because of the risk of torture in their home states (including Morocco, Libya and Egypt).

In order to pass the 2001 Act the British Government had to make a formal derogation from its obligations under the European Convention.[24] Article 15 provides for a derogation in time of war or other public emergency threatening the life of the nation' but only 'to the extent strictly required by the exigencies of the situation'. In the so-called *Belmarsh* case[25] (Belmarsh is a new high-security prison in southeast London) nine Law Lords considered the legality of the derogation and decided by a large majority that although there was a public emergency of the requisite gravity, measures under which foreign nationals, but not British nationals, could be imprisoned without trial were irrational, disproportionate and discriminatory. The equal treatment of nationals and non-nationals is indeed a point of high principle, on which Lord Bingham cited the well-known judgment of Jackson J in the *Railway Express* case:[26]

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally…Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

The recent sequel[27] to the *Belmarsh* case raised another point of high principle, that is the admission of evidence that may have been obtained, directly or indirectly, by torture. Nine Law Lords unanimously ruled it out, although unfortunately they were split as to where the burden of proof should fall in such cases.

Parliament's response to the first *Belmarsh* case was to introduce a system of control orders – in effect a sort of limited house arrest. This measure also has been successfully challenged. The courts had to decide whether it was a 'deprivation of liberty' or a mere 'restriction on movement' (the distinction which emerges from the European Court of Human Rights at Strasbourg)[28] for a single man to be required to remain in a small flat except from 10.00 am to 4.00 pm, with all visitors vetted, electronic communications monitored, and trips outside the flat (during the 6-hour window) restricted to defined urban areas. The judge had no doubt that it amounted to deprivation of liberty and the Court of Appeal agreed. An appeal to the House of Lords has been heard and judgment will be given in October.

On the other hand all the English courts up to and including the Lords[29] have concluded that there was no deprivation of liberty in very brief detention for questioning and search under random 'stop and search' powers (exercisable without reasonable grounds for suspicion) under the Terrorism Act 2000. Both these cases ultimately turn, in the lawyers' phrase, on questions of fact and degree. It is simply not possible, in cases of this sort, to say precisely what balance between national security and civil liberty is the right one. It is impossible even with hindsight. But if ministers and their advisers are inclined

LEFT TO RIGHT Justice Susan Crennan, the British High Commissioner, Lord Walker, Paul Elliott QC, My Anh Tran, Paul Hayes, John Emmerson QC

to err on what they see as the side of caution, judges may need to lean the other way.

The saga of litigation about suspected terrorists is far from over. In matters of national security and civil liberties relations between the executive and the judiciary have been fairly frosty, at times, over the past 15 years or so, under both Conservative and Labour Governments. But that may be inevitable. Indeed, it may even be something we should welcome. I end this part of my talk with some remarks which Lord Bingham made last November in a lecture at Cambridge:

> Some sections of the press, with their gift for understatement, have spoken of open war between the government and the judiciary. This is not in my view an accurate analysis. But there is an inevitable, and in my view entirely proper, tension between the two. There are countries in the world where all judicial decisions find favour with the government, but they are not places where one would wish to live.

THE EFFECT ON OTHER PUBLIC AUTHORITIES

I come to Head 3. In the UK this group includes local authorities, hospital authorities, mental health authorities, governors of schools within the public sector, and statutory corporations of all sorts, from the BBC to the Human Fertilisation and Embryology Authority. I will not go into British case law on the meaning of 'public authority' as section 4 of the Charter contains a different and to my mind more satisfactory definition (though difficult borderline cases will no doubt arise). Your Parliament may have taken a wise decision, if I may say so, not to include the court (acting judicially) as a public authority. The court is a public authority under the UK Act, and that has given rise to some puzzling problems, especially in connection with what is sometimes called 'horizontal effect' (that is the effect of the UK Act as between one citizen and another, raising the question whether the court as a public authority was – for instance – under an obligation to create a new tort of invasion of privacy).

I can set out the basic position of Head 3 authorities fairly shortly, and time constraints require me to do so. Local authorities differ from most others in the group in that they have the democratic legitimacy of being elected bodies. Almost all the authorities in this group have a statutory framework and statutory functions and are amenable to judicial review. The UK Act, like the Charter, extends the grounds of judicial review that may be available so as to include human rights issues. These bodies differ from the central executive

in that their functions tend not to be concerned with the core activities of central government, 'super-*Wednesbury*' matters such as national security and foreign policy. But some of them are very much concerned with the allocation of resources to housing, social services, children with special educational needs, and other pressing problems which come within the wide scope of Article 8 of the Convention.[30] Others (especially broadcasters and broadcasting regulators) are concerned with freedom of expression and with balancing that right against the rights of others. Some (such as the HFEA) have special expertise in the discharge of their functions, which the court must recognize. Subject to these differences the same sort of problems arise, and the same principles apply, as under Head 2.

HUMAN RIGHTS ADJUDICATION AS A BALANCING EXERCISE

Most human rights adjudication is ultimately a balancing exercise. In a leading case decided as long ago as 1982 the Strasbourg Court observed:[31]

> The Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention …

In the Charter the key provision defining the balancing exercise is section 7(2), which sends a clear message to all the arms of government – legislature, courts and executive (and other public authorities). It is already well known to you but I will set it out:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including…

and then follows a list of five relevant factors. The carefully crafted language of section 7(2) is, I think, of absolutely central importance to the Charter. It reflects, though more comprehensively and more eloquently, with an added reference to human dignity, equality and freedom, language found in some articles of the European Convention. The requirement for any restriction on a human right to be 'under law' is, I suggest, a necessary but not always a sufficient condition (there is always the possibility of a statutory restriction being challenged under s.36). But in the European Convention the legislative pattern is for some articles to set out (in the first paragraph) a particular right and then (in the second paragraph) to qualify it. The freedoms given by these articles are sometimes called 'qualified rights'. Articles 8, 9, 10 and 11 are the leading examples.

The Charter does not in terms distinguish between absolute and qualified rights but I would confidently expect the courts of Victoria to make such a distinction and to hold that the prohibition on torture (s.10 of the Charter) is absolute and unqualified, while others such as freedom of expression (s.15) are qualified.

If you were going to look at only two British cases on the balancing exercise to be performed by Head 3 bodies, I would suggest the *Pro-Life Alliance* case,[32] concerned with a television party election broadcast on behalf of a group which campaigned against abortion, and the *Denbigh High School* case,[33] concerned with whether a teenage Muslim girl should be allowed to wear a garment contrary to her school's policy on uniform dress. I regret that I do not have time to go into these very interesting cases, but I commend them to you: note in particular how fact-sensitive they are, and how detailed evidence of the facts and the background may be needed in order to establish an evidential basis for the balancing exercise which the court has to perform.

Right Honourable Lord Walker of Gestingthorpe

WALKER OF GESTINGTHORPE (Life Baron), Robert Walker; cr. 2002
Lord of Appeal in Ordinary

Date of birth:	17 March 1938
Parents:	Son of late Ronald Robert Antony Walker and late Mary Helen Walker, née Welsh
Educated:	Downside School
Further education:	Trinity College, Cambridge (BA classics and law 1959)
Marital details:	Married Suzanne Diana Leggi 1962 (3 daughters, 1 son)
Career:	Barrister, Lincoln's Inn 1960 Queen's Counsel 1982 High Court Judge, Chancery Division 1994–97 Lord Justice of Appeal 1997–2002
Publications:	Articles in legal periodicals
Honours and decorations:	KB 1994; PC 1997
Honorary academic degrees, etc.:	Honorary fellow Trinity College, Cambridge 2006
Recreations:	Walking, gardening
Past activities:	Running, riding, cross-country skiing, (best time in London Marathon 1986 – 2 hrs 57 mins).

THE EFFECT ON THE COURT ITSELF

Under human rights legislation the court is not only engaged in a dialogue with the other estates or arms of government. It may also, when an issue of fair trial arises, have to be introspective. When such an issue arises, there may again be a cutting across Head 1 and Head 4. The first issue may be: Has Parliament enacted a rule of criminal evidence which is an infringement of the accused's Convention rights, however moderately and responsibly it is applied? If so, there is a problem under Head 1. If not, there may be an issue under Head 4: Has a trial, now completed, been fair? That is a familiar issue for any court of criminal appeal, though it is now enriched by Convention jurisprudence. There is a wealth of recent British case-law on issues concerned with reverse burdens of proof, comments to the jury on an accused exercising the right to silence, and unreasonable delay in the criminal process. Section 25(2)(c) of the Charter does not spell out the consequences of delay, an issue on which the House of Lords has divided 7–2.[34]

I have already referred to the court's role as to the 'horizontal effect' of the UK Act. Although it is a public authority under the UK Act the court is not, it seems, bound to create new torts to make good perceived deficiencies of the common law. But issues of horizontal effect may arise when theCourt is performing its interpretative obligation in relation to statutes.

CONCLUSION

So can a Human Rights Charter make a difference? After seven years' experience in the UK, I would say: undoubtedly it can. It can and does focus the legislature on the human rights implications of every single piece of proposed legislation. It gives the court far-reaching powers to remedy defects in legislation if possible, and if not to identify the defects and declare them incompatible with human rights values. It can and does require official decision-makers to exercise their powers and discretions so as to respect human rights, which often involves balancing one individual's rights against those of another, or against the general public interest. It focuses the court's attention on the fairness of its own procedures. It helps to keep a society which claims to be a liberal democracy up to the mark. In particular, encroachments on civil liberties in the UK, post-9/11, would have been even more severe without the UK Act.

It has to be said, however, that in Britain the UK Act has not had a particularly warm welcome. Prominent members of both the Labour Party and the Conservative Party have recently spoken in favour of repealing it or drastically amending it. The popular press, dominated by Murdoch's *Sun* and Rothermere's *Daily Mail*, regularly deride it. The reasons for this are no doubt complex, but I suspect that they include genuine and natural public concern about terrorism and immigration; a distrust in some sections of the British public of any political interference perceived as coming from continental Europe, without much discrimination between Brussels, Luxembourg and Strasbourg; and a sort of unfocused libertarian discontent encapsulated in the overworked expressions 'political correctness' and 'nanny state'. Does this matter? I think it does, because the effective promotion of human rights depends on winning hearts and minds, as well as on legislation and law enforcement. It does matter that so many British citizens are inclined to feel that the UK Act is threatening, rather than protecting, their liberties. This is, I think, in striking contrast to experience in other parts of the world, including Canada, New Zealand, South Africa and India.

I very much hope that your experience in Victoria will be more positive, though in conversation during the past week I have learned that there may be something of a 'hearts and minds' issue in Victoria also. I wish you well in the new year.

NOTES

1 See for example *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885.
2 Sections 6 (3) and (4) of the UK Act.
3 Section 7 of the UK Act.
4 The relevant provisions in the UK Act are sections 19, 3 and 4.
5 [2002] 1 A 45, para 44.
6 Section 41 of the *Youth Justice and Criminal Evidence Act 1999.*
7 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.
8 Sections 29 of the *Crime (Sentences) Act 1997.*
9 [2003] 1 AC 837, para 30.
10 *Re S (Care Order: Implementation of Care Plan)* [2002] 2 AC 308.
11 [2002] 2 AC 308, paras 39–40.
12 [2003] 2 AC 467.
13 Under the *Gender Recognition Act 2004* it is not mandatory, but information about any such intervention must be provided to the Gender Recognition Panel.
14 [2004] 2 AC 557.
15 *Rent Act 1977* Schedule 1 para 2.
16 Para 122.
17 See for instance, *Attacks on Judges*, Justice Michael Kirby's memorable address to the American Bar Association in 1998.
18 *R v Ministry of Defence ex parte Smith* [1996] QB 517.
19 *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531.
20 *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.
21 *R v Secretary of State for the Environment ex parte Hammersmith & Fulham LBC* [1991] 1 AC 521, 597.
22 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547.
23 See *Chahal v United Kingdom* (1996) 23 EHRR 413.
24 As it had when internment was used in Northern Ireland in 1971–2. *See Ireland v United Kingdom* (1978) 2 EHRR 25 and also Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain (1992).*
25 *A v Secretary of State for the Home Department* [2005] 2 AC 68.
26 *Railway Express Agency Inc v New York* (1949) 336 US 106, 112–113; the decision of the US Supreme Court in *United States v Verdugo-Urquidez* (1990) 494 US 259 makes an unhappy contrast.
27 *A v Secretary of State for the Home Department (No 2)* [2006] 1 All ER 575.
28 See especially *Guzzardi v Italy* (1980) 3 EHRR 333.
29 *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 AC 307.
30 For its width see *Pretty v United Kingdom* (2002) 35 EHRR 1, para 61.
31 *Sporrong & Lonnroth v Sweden* (1982) 5 EHRR 35, para 69.
32 *R (Pro-Life Alliance) v BBC* [2004] 1 AC 85.
33 *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100.
34 *AG's ref. No. 2 of 2001,* [2004] 2 AC 72.
35 *Wilson v First County Trust Ltd (No. 2)* [2004] 1 AC 816.

legalsuper

Buy and sell shares with your super

With **legalsuper**, you can buy and sell shares in any S&P/ASX200 company with up to 50% of your super, giving you more control over how your retirement savings are invested. It also saves you time, because **legalsuper** looks after the record-keeping and other compliance requirements.

legalsuper is Australia's largest super fund for the legal profession, with over $1 billion of funds under management.

In February 2007, the New South Wales Barristers' Superannuation Fund chose to close and merge into **legalsuper**.

- **legalsuper** returns all profits to members
- **legalsuper** earned members a 15% return in 2006/07 in the default 'Moderate' investment option, above the SuperRatings' all-fund median return
- **legalsuper** provides competitive insurance protection at group premium rates, including Income Protection, Life, and Total and Permanent Disability

TAKE CONTROL – INVEST DIRECTLY IN THE ASX200

For a confidential discussion or to make an appointment, contact either:
Scott Smith: 0401 107 093 or email **ssmith@legalsuper.com.au OR**
David Eastwood: 0438 779 228 or email **deastwood@legalsuper.com.au**

www.legalsuper.com.au

LEGS 27627

The Benthamite principle of open courts

Justice PD Cummins

This is a revised edition of a Paper presented to The Courts and the Media Conference held by the Centre for Media and Communications Law and the Australian Press Council at the University of Melbourne on 27 July 2007.

I

PREFACE

In each year of my twenty lecturing at this fine University I said to my students that truly to understand the law two books should be read. One was *Bleak House* by Charles Dickens, published in London in 1853. The other was Franz Kafka's *Der Prozess* (*The Trial*). It was published in Prague in 1925, a year after Kafka's death. He had directed the manuscript's destruction but fortunately his executors disobeyed him. Worth reading even once in your life and at peril of depression is the parable in *The Trial*. It is this:

> Before the Law stands a door-keeper. A man from the country comes up to this door-keeper and begs for admission to the Law. But the door-keeper tells him that he cannot grant him admission now. The man ponders this and then asks if he will be allowed to enter later. 'Possibly,' the door-keeper says, 'but not now.' Since the door leading to the Law is standing open as always and the door-keeper steps aside, the man bends down to look inside through the door. Seeing this, the door-keeper laughs and says: 'If it attracts you so much, go on and try to get in without my permission. But you must realize that I am powerful. And I'm only the lowest door-keeper. At every hall there is another door-keeper, each one more powerful than the last. Even I cannot bear to look at the third one.' The man from the country had not expected difficulties like this, for, he thinks, the Law is surely supposed to be accessible to everyone always, but when he looks more closely at the door-keeper in his fur coat, with his great sharp nose and his long, thin black Tartar beard, he decides it is better to wait until he receives permission to enter. The door-keeper gives him a stool and allows him to sit down to one side of the door. There he sits, day after day, and year after year. Many times he tries to get in and wears the door-keeper out with his appeals. At times the door-keeper conducts little cross-examinations, asking him about his home and many other things, but they are impersonal questions, the sort great men ask, and the door-keeper always ends up by saying that he cannot let him in yet. The man from the country, who has equipped himself with many things for his journey, makes use of everything he has, however valuable, to bribe the door-keeper, who, it's true, accepts it all, saying as he takes each thing 'I am only accepting this so that you won't believe you have left something untried.' During all these long years, the man watches the door-keeper almost continuously. He forgets the other door-keepers. This first one seems to be the only obstacle between him and admission to the Law…
>
> Before he dies, all his experiences during the whole period of waiting merge in his head into one single question, which he has not yet asked the door-keeper. As he can no longer raise his stiffening body, he beckons the man over. The door-keeper has to bend down very low to him, for the difference in size between them has changed very much to the man's disadvantage. 'What is it you want to know now then?' asks the door-keeper: 'you're insatiable.' 'All men are intent on the Law,' says the man, 'but why is that in all these many years no one other than myself has asked to enter?' The door-keeper realises that the man is nearing his end and that his hearing is fading, and in order to make himself heard he bellows at him: 'No one else could gain admission here, because this door was intended only for you. I shall now go and close it.'

Earlier in *The Trial* Kafka says the following of his protagonist Josef K:

> K. might care to remember that the proceedings were not public. They could be opened to the public if the Court thought this was necessary, but the Law did not insist on publicity.

In his phantasmagoric tale Kafka well understood that which in another century and another world the legal philosopher Jeremy Bentham wrote:

> Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial.[1]

This truth has since been rehearsed; but never better stated.

II

THE LEGAL PRINCIPLE OF OPEN COURTS

In *McPherson v McPherson*[2] the Privy Council stated:

> …publicity is the authentic hallmark of judicial as distinct from administrative procedure…

In *In Re S (A Child) (Identification: Restrictions on Publication)*[3] Lord Steyn stated:

> A criminal trial is a public event. The principle of open courts puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted…Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.

That was a decision under Article 6 of the European Convention on Human Rights as scheduled to the *Human Rights Act* 1998. In *In Re S (A Child)* the House of Lords followed European human rights jurisprudence.[4] Section 24(1) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) prescribes the right to a 'public hearing', just as does Article 6. Before the operation of the *Human Rights Act* 1998, the like principle under the common law was stated by Lord Woolf MR in *R v Legal Aid Board, ex parte Kaim Todner*[5] and who said that it was important:

> not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behavior on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely…

We should be alive to maintaining these values.[6]

But clouds can black out the sun. In words as apposite now as they were then, in 1913 Lord Shaw of Dunfermline stated in *Scott and anor v Scott*:[7]

> The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary – and they appear to me still to demand of it – a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves.

A like warning was sounded by Lord Woolf MR in *R v Legal Aid Board*:[8]

> The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases.

This well-known judicial methodology is another matter we need to be alive to.

Plainly, there will be instances where courts cannot responsibly be open or fully open. So much is recognized in sections 18 and 19 *Supreme Court Act* 1986 (Vic).[9] However, that Act empowers non-publication and closure orders only in cases of necessity. The common law should require necessity also.[10] In interconnected criminal trials and in parts of some terrorism trials there can be justification for limited prohibition of publication and, in exceptional instances, closure of courts. But scrupulous care must always be taken to preclude usurpation of openness 'little by little, under cover

of rules of procedure, and at the instance of the judges themselves' (Lord Shaw in *Scott v Scott*) and which 'grow by accretion as the exceptions are applied by analogy to existing cases' (Lord Woolf MR in *R v Legal Aid Board*). Especially in terrorism cases, care must be taken to preclude the development of a culture of non-publication or of closure. Non-publication and closure should only be a last resort and never a first resort.

The 'intense scrutiny' and 'glare of contemporaneous publicity' (Lord Steyn *In Re S (A Child)*) and 'the full glare of a public hearing' (Lord Woolf MR in *R v Legal Aid Board*) refer not only to the courts being open. They are reflections on the scrutiny and glare of the media upon the work of the courts. Today I would like us to consider the function of the media in the criminal justice process.

III

JUDICIAL CRITICISM OF THE MEDIA

The window of the courts to the world is the media. Accurate, fair and balanced reporting of legal proceedings is of great benefit to society. It brings the functioning of the courts to the community. Although analytically separate, reporting and editorialising at times merge through selectivity and sub-editorial heading and placement. I would like to consider some judicial criticisms of media presentation of legal proceedings. I shall confine myself to the criminal process.

Given the necessary reductionism by media in reporting ongoing proceedings, I think the media do very well in reporting ongoing proceedings, and often display a high sense of relevance in that reporting. There is not much judicial criticism in this regard. However, there is criticism as to reporting of sentences. In judicial addresses and articles it is often said that media reporting of sentences is not accurate, fair and balanced. Not accurate, because it omits the ameliorating factors taken into account judicially; and not fair and balanced, because it plays to emotion and to victim consciousness. Of course, sometimes the media make mistakes. So do judges. Because the stakes are high, mistakes have serious consequences. I would like us to examine not the occasional mistake but the matter systemically.

I think it is true that ameliorating factors in sentencing often are not reported upon by the media. Research shows that, at least initially, the more information the community has about an offence and an offender the less punitive are community attitudes.[11] The main factors the media consider newsworthy are usually the negatives. However, often too, the main factors in sentencing in major crime are the negatives: the egregious facts of the offence or the repeat criminal history of the offender. By contrast, in sentencing youthful offenders and first offenders, rehabilitation is often the most important consideration. Rightly so. So too in therapeutic justice, restorative justice, neighbourhood justice centres, the Koori Court and other responsible initiatives of the State Attorney-General, Mr Rob Hulls and our Chief Magistrate, his Honour Ian Gray and our magistrates. We are very well served by our Chief Magistrate and our magistrates. These matters are reported in the media. They are positive initiatives which ultimately benefit the whole community and are to be supported. There is much more to sentenc–ing than punishment; and punitiveness should never play a part. Excessive penalties breed their own significant problems. With other than major crimes, imprisonment should be the last resort. But there is a fault line. Major crime, which category includes domestic violence and violence against women and children, is on the other side of the fault line.

It is often said that media reporting of sentences fails to reflect the multi-factorial nature of sentencing. So it does. It is not difficult in sentencing to identify and isolate the many factors in sentencing – protection of the community, vindicating the rights of the victim, denunciation, punishment of the offender, deterrence, and reform and rehabilitation. What is difficult is the synthesis of the always competing, often contradictory, factors; the reaching of a just result. Courts are, and should be, places of reason and of consideration. It would be preferable if more of the sentencing factors judicially taken into account were reported. That they are rarely fully reflected in the media is a function of the reductionism inherent in media reporting of sentences. The media tend to concentrate on the sentence imposed rather than the reasoning process leading to it.

Verbatim

Malcolm Joseph Thomas Clarke v The Queen
Coram: Gleeson CJ, Gummow J
High Court of Australia

Gleeson CJ: What do you mean by 'free choice'?

Mr Tehan: What we mean by 'free choice, your Honour, is a choice unconstrained by any pressure, hope of advantage or benefit or force or coercion or compulsion, a true free choice.

Gleeson CJ: You would be surprised to know that there are places I would rather be than here at the moment and the psychiatrists might explain my presence at the moment by reference to a number of influences or pressures that produce that consequence, but I thought I was here as a result of a free choice. How is that consistent with your explanation?

Hayne J: Good luck, Mr Tehan.

Mr Tehan: It is always a matter of degree, your Honour.

Kirby J: I could not think of a better place to be than here.

Gleeson CJ: I am sure that is probably right.

Mr Tehan: There you go. It just shows that minds might differ over what choice is and that is why ultimately what we will be submitting is that you need a firm guiding rule and the firm guiding rule has always been the voluntariness rule.

Whilst reasons are essential for sentences, there is also good criminological lineage for attention to the sentence imposed. The respected criminologist Professor Norval Morris, once of this University and a beloved teacher of my generation, wrote:

> The punishments imposed on criminals… constitute society's official pronouncement

> of the gravity with which any criminal action is viewed, and therefore assist in re-inforcing that community's sense of right. This sense of right, this group super–ego, must never be exacerbated either by the too great leniency or the extreme severity of any punishment imposed. In other words, the community's sense of a just punishment will create the polarities of leniency and severity between which the criminal law may work out its other purposes.[12]

Further, the courts could do a lot better themselves in conveying the competing factors involved in sentencing. For years, judges opposed the provision of summaries of judgments and of sentences, principally on the ground that they diluted the reasoning process. It took more than a decade after the technology was available for the courts to utilize the web for publishing reasons for sentence. The courts still do not utilize television, radio, and internet dissemination of sentences. I do not consider that criminal trials, as distinct from sentences, should be televised, because the powerful and immediate nature of the medium could be oppressive to victims. Unlike politicians who stand for public office and are televised in Parliament, victims do not ask to be there. I do consider that the delivery of sentences and of judgments should be available for dissemination on television, radio and the internet as well as in print. There is no reason in principle why courts should prefer one mode of dissemination over another, if appropriate steps are taken to protect privacy and to respect persons. Thus parties, victims and families should not be shown in court; but judge and counsel may be. The medium of information of much of the population is electronic. The requirement of accurate, fair and balanced reporting applies equally to electronic as to print media. The media, not the courts, should decide what is newsworthy. Further, there is no reason why such emancipation should lead to consequences seen in the United States. Apart from cultural differences, we have no First and Sixth Amendment jurisprudence, which is the effective facilitator of much publication in the United States.[13]

Whilst I consider media reporting of sentences generally is appropriate and fair given the constraints of time and space under which the media necessarily operate, I think headlines are a different matter. I understand that a legitimate function of headlines is to attract attention. Even so, I do think that much more restraint should be exercised with headlines. They sometimes are exercises in vilification and punitiveness. They often are biased and a naked trigger to emotion. They often create a punitive psychological set for the item. They often undermine the good work of reporters who file accurate, fair and balanced reports.

Next, editorial comment and media analysis and opinion. Again, it is often said that such comment is not accurate, fair and balanced. Sometimes it is not. Certainly it concentrates on bad cases and often calls upon emotion. However, there also is excellent analytical writing and electronic presentation in the media. I encourage the media to give attention to issues rather than personalities, and to causes rather than consequences. The best way to solve crime is to solve the causes of crime.

Pre-trial media publicity should always be measured and circumspect and usually it is. The *sub judice* rule is vital. It is essential that trials are conducted in a fair atmosphere. Juries are much more robust, discerning and intelligent than generally is given credit for;[14] but care must always be exercised pre-trial.

Judges and magistrates daily do their best, with demanding work and often intractable problems. They are persons of responsibility, honesty and probity. These are necessary but not sufficient preconditions. The work, and the character, of judges and magistrates should not be overlooked and certainly should not be undermined. I strongly urge the media not to pursue personal attacks on judges and magistrates. That does not mean that our work should not be the subject of fair criticism, which includes strong criticism when justified. But criticism should always be responsible.[15]

It is sometimes said that media reporting of legal proceedings is 'entertainment' or that it is part of the business of entertainment. I think that is a condescension and should be rejected. It does no credit to the daily working lives of reporters and of editors.

In a speech to the Melbourne Press Club last year a judge spoke of:

> popular support, which is inevitably based on ignorance of the law and of the relevant facts.[16]

I am obliged to say that I do not agree. I think the public well understand the issues. So too do the media.

IV

MEDIA CRITICISM OF THE COURTS

It is rightly said that the protections – and they are significant – built into the judicial system are that it is public and that there is an appellate process to correct error. The value and the significance of the protections should never be overlooked. But they do not involve that the law cannot get it wrong, and sometimes seriously wrong; and the media, in my view, have a vital democratic function in that regard. Let us consider this at three levels: procedure, doctrine and sentencing.

First, procedure. The law places great emphasis upon process. Correctly so. That is why we do not accept, and should never accept, admissions induced by torture – physical or mental – or by unfairness. As Knight-Bruce VC stated more than 150 years ago:

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them… Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.[17]

The correct emphasis upon process involves that a conviction should not be obtained at any cost, but should be according to law. It does not involve the mindless aphorism: 'It is better that one hundred guilty men go free than one innocent man stands convicted.' Of course no innocent person should ever be convicted. That is essential and is non-negotiable. Nor should one hundred guilty persons go free. Process is vital. But it should not obliterate reality. There sometimes is a real question, especially at appellate level, whether emphasis upon process overshoots the mark: whether the process becomes more significant than the reality. The media play an important role in bringing this question to the public.

Second, doctrine. The common law, civil and criminal, developed by judges in the Anglo-Australian tradition is something which should be valued and supported by our community. It secures freedom and ensures responsibility. But it can be flawed. For decades the criminal law failed sufficiently to address the blight of violence against women generally and of domestic violence in particular. In the doctrinal context, appellate courts propounded and reinforced the doctrine of provocation, and obliged trial judges to apply it until at last in this State, Parliament had the wisdom to abolish it.[18] It was not the courts but the media and notable public commentators who led the way to reform. In so doing, the media were not engaged in 'entertainment'; nor was popular opposition based upon 'ignorance of the law and of the relevant facts'. Because of the media and public commentators, the public knew the relevant facts well, recognized that the law was wrong, and the law was changed.

Third, sentencing at trial and appellate level. Excessive sentences lead to oppression of offenders, a sense of injustice, and recidivism. Inadequate sentences lead to victim alienation, public disaffection and parliamentary circumscription of judicial discretion. Both errors should be avoided. It is sometimes said, in support of the proposition that sentences are generally not too low, that the vast majority of sentence appeals are upon the ground that the sentence is too high. I think that statistic proves very little, because the law developed by appellate judges is that prosecution appeals on sentence should be rare and exceptional.[19] Defence appeals on sentence are subject to no such limitation. Little wonder that most appeals are on the ground of severity.

It is often said that the appellate process involves the correction of error. It does. But forty years ago the insights of feminism revealed the frailty of such reasoning. Decades ago, it was demonstrated that the appellate process is of no use, and indeed is the problem, if the appellate court itself is blindsided by gendered assumptions and values. Likewise where the legitimate interests of victims are undervalued. Again, this is an area in which the media have fulfilled a valuable function, and continue to do so.

The media tend to concentrate upon victims; sometimes excessively so, to the exclusion of considerations of rehabilitation and of the rights of offenders. The rights of accused persons and of offenders, as developed by the common law and also articulated by statute, are not to be diminished or derogated from. They are a hallmark of a decent society. But has the curial system, in its proper attention to the rights of accused persons and of offenders, failed in major crime to give adequate recognition to the rights of victims? This is a legitimate question, and the media have a responsible function in its address. In this, and in the other respects I have touched upon today, the beneficiaries of a responsible media are not only the public but the judiciary itself.

I thank my colleague, Associate Professor Kenyon, for inviting me to address you, and I wish you well in your deliberations and in your daily work.

NOTES

1 Bowling J (ed.): *Works of Jeremy Bentham* (1843) vol 4, 316–317.
2 [1936] AC 177 at 200 per Lord Blanesburgh for the Board. See also *Russell v Russell* (1976) 134 CLR 495 per Gibbs J (as he then was) at 520.
3 [2005] 1 AC 593 at 607–608 and in whose speech the other Lords agreed.
4 As in *Pretto v Italy* (1983) 6 EHRR 182, *Axen v Germany* (1983) 6 EHRR 195, *Diennet v France* (1995) 21 EHRR 554 and *Werner v Austria* (1997) 26 EHRR 310.
5 [1998] QB 966 at 977.
6 A review of the history of open trials can be found in *Richmond Newspapers Inc v Virginia* 448 US 555 (1980) per Burger C.J. at 564–575.
7 [1913] AC 417 at 477–478.
8 Above at 977.
9 See also s.4 *Judicial Proceedings Reports Act 1958* (Vic).
10 See *Re Applications by Chief Commissioner of Police (Victoria) For Leave to Appeal* (2004) 9 VR 275.
11 Gelb, K: *Myths and Misconceptions: Public Opinion Versus Public Judgment about Sentencing* 17–18.
12 Morris, N and Buckle, D: 'The Humanitarian Theory of Punishment: A Reply' (1953) 6 *Res Judicatae* 231, 236.
13 *Richmond Newspapers v Virginia* 448 US 555 (1980) which applied First Amendment considerations to the Sixth Amendment requirement of 'public trial'. See also as to civil trials *Publicker Industries Inc v Cohen* 733 F2d 1059; *Westmoreland v Columbia Broadcast Systems Inc* 752 F2d 16 and *Newman v Graddick* 696 F2d 796.
14 *R v Glennon* (1992) 173 CLR 592 per Mason CJ and Toohey J at 605; *Murphy v R* (1988–1989) 167 CLR 94 per Mason CJ and Toohey J at 98–101; *John Fairfax Publications Pty Ltd & anor v District Court of NSW & ors* (2004) 61 NSWLR 344 per Spigelman CJ at 366–367; and *Munday* (1984) 14 A Crim R 456 per Street CJ at 457.
15 *Herald and Weekly Times Ltd & Anor v Popovic* (2003) 9 VR1; *John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 164; *Aust. Torts Rep*. 81–789.
16 25 August 2006 p.14.
17 *Pearse v Pearse*, De G and SM 12 at 28–29; 63 ER 950 at 957.
18 *Crimes (Homicide) Act 2005* (Vic) s.3.
19 *Everett v R* (1994) 181 CLR 295; *R v Dodd* (1991) 57 A Crim R 749; *R v Clarke* [1996] 2 V R 520; s.567A *Crimes Act 1958* (Vic).

Palm tree justice

Patrick Southey

Life as a Public Defender in Solomon Islands

At the scene of an arson

Like many of us, I had sometimes daydreamed about what it would be like to be marooned on a remote tropical island. Little did I suspect that it would actually happen to me, and that when it did, I wouldn't enjoy it one bit.

Yet the story of how I came to find myself in this predicament is fairly typical of the strange experiences that await you when you give up the familiar corridors of the Victorian Bar, and take up a post as a Public Defender in Solomon Islands.[1] These sorts of things happen all the time.

I had landed on the simple grass airstrip in the Shortland Islands, in the far north-west of Solomon Islands, with three others – a magistrate, a police prosecutor and, for my benefit, a pijin interpreter. We had been assured that there were lots of cases for us to hear, and not unimportantly, food and accommodation. We soon discovered there weren't any of those things. Mindful that I was in this obscure corner of the world to uphold the rule of law, my breaking into an unoccupied police house in an attempt to find somewhere to live – with a magistrate and prosecutor as my accomplices – did not seem a good start. Then there was the problem of food; I did manage to buy three live coconut crabs from some villagers, but they were hardly going to keep the four of us alive for a week until the plane returned. The final blow was to hear that the local police boat had broken down, with the result that they had been unable to serve the summonses around the various islands, and so there was very little work we could do.

It was quite enjoyable for the first day, going for a snorkel and investigating the remnants of Japanese planes and bunkers from World War Two. By the third day the boredom had set in. Our supplies had begun to diminish, and the heat and mosquitoes were taking their toll. When I began to covet my colleagues' cigarettes and betelnut (both repulsive habits) I really knew it was time to plot my escape. But how to escape? We were marooned near the lawless PNG border, miles from anywhere. The first plan was to hire a small boat in which we could safely island-hop, up past the dark and mysterious jungles of adjoining Bougainville, to the neighbouring province of Choiseul. There we might be able to get a plane back to Honiara. But we learnt the next flight out of Choiseul was still four days away, and in any event it was full.

The second plan was not without its risks: a five-hour journey in the same boat across the open sea to Gizo. But we were desperate by this stage. Setting out at 5am to maximize the chances of smooth seas, and navigating by nothing more than the Morning Star, our boatman guided us safely back to the relative civilization of Gizo, and from there we flew back to Honiara. When I walked in the door that

evening, haggard and half-starved, my daughters barely lifted their heads. Daddy's home from work. Big deal. I might as well have returned from a half-day committal at Ballarat as far as they were concerned. But with the greatest of respect to Ballarat, it is unlikely to provide you with the boy's own adventures you experience when you work in the Solomons, and which you will remember for the rest of your life.

THE VICTORIAN BAR & RAMSI

The Regional Assistance Mission to Solomon Islands (RAMSI) is a co-operative effort between Australia, New Zealand and other Pacific nations, aimed at restoring law and order and good governance to Solomon Islands, following the ethnic 'tension' (as it is euphemistically called) which erupted in 1999 between the warring militias from Guadalcanal and Malaita.

Since RAMSI's inception in 2003, a good number of members of the Victorian Bar have served over here, mostly in AusAid-funded positions. Nathan Moshinsky QC was Solicitor-General. Chris Ryan SC, Simon Cooper and Robert Barry were all Senior Crown Prosecutors in the DPP's office (and Robert has since married Nancy, a Solomon Islander). The current crop are Lydia Ruschena, who is a Crown Prosecutor, Barb Walsh's daughter Kylie, who used to work for the Victorian Bar, and is now the manager of the civil section of the Public Solicitor's Office, and me, a Senior Public Defender in the same office. John Myers (previously a Victorian Magistrate and a member of our Bar) is serving here as a Magistrate, and Rowan Downing QC and Nick Papas visit from time to time in advisory capacities. And last but not least, Lieutenant Colonel Ian Upjohn CSC has recently been spotted in his army greens, accompanied by his Regimental Sergeant-Major.

THE COURT HIERARCHY

The court hierarchy in Solomon Islands comprises the Magistrates' Court, the High Court, and the Court of Appeal. There are currently about a dozen magistrates, most of whom are Solomon Islanders (John Myers being one of the exceptions). The High Court, which typically hears murder, manslaughter and rape trials, together with the larger civil matters, currently comprises seven judges. Three of those are Solomon Islanders, including the Chief Justice, Sir Albert Rocky Palmer CBE, with the balance made up by an Englishman, a Fijian, an Australian and a New Zealander. One addresses these judges as 'Your Lordship', which sounds ridiculous at first, but you soon get used to it. Counsel are required to be wigged and robed when appearing in the High Court, which presents no problem in Honiara, where the courtrooms are air-conditioned. But it is a different matter out in the provinces; it is quite an experience to appear in a court which is little more than an open-sided shed, with the tropical downpour outside drowning out the voice of the witness, and the sweat streaming down your face and dripping all over the Bar table.

Trial is by judge alone in Solomon Islands. Juries would simply not work here: first, it would be nearly impossible to find

Justice Francis Mwanesalua going to court

12 men and women who were not *wantoks* (relatives) of a participant in the trial, and even if you could find such a jury, Solomon Islanders have such a fabulously relaxed approach to life that you would seldom be able to convene all 12 of them in the same place at the same time.

The Court of Appeal comprises three visiting judges who sit in Honiara twice a year to hear appeals from the High Court. The President of the Court of Appeal is Lord Slynn of Hadley, a Privy Counsellor and former Judge of the European Court of Justice, who amongst other things, was one of the Law Lords who took the unusual step of allowing Amnesty International to be heard in the *Pinochet* extradition case.[2] It would have certainly never occurred to me when I started out as a baby barrister making pleas at Frankston that I would one day be appearing before a Law Lord; it is surprising what unexpected twists and turns life holds in store.

PRACTISING IN A FOREIGN JURISDICTION

When I first arrived here I was quite apprehensive about practising in a jurisdiction where the law was unfamiliar, but it soon became apparent that the offences contained in the Penal Code, and the procedures set out in the Criminal Procedure Code, are reasonably similar to our own in Victoria. (There are, of course, exceptions. For example, s.190 of the Penal Code provides for a penalty of imprisonment for two months or a fine of forty dollars for Sorcery. I certainly don't recall a similar provision in Victoria.)

Perhaps a bigger challenge is the language. Although English is the official language of Solomon Islands and its courtrooms, only an educated minority speak it well. So one of the first things you do upon arriving here is to enrol in pijin lessons, and fairly soon you are able to parrot enough sentences to hold basic conversations, for example, '*Bae mi lukim iutufalla lo court lo Monday*' = 'I'll see you both at court on Monday'. But for taking more complicated instructions in conference, and then dealing with witnesses in court, there is a heavy reliance on pijin interpreters. These interpreters are also invaluable for explaining all the myriad cultural nuances and sub-plots which are invariably bubbling away beneath the surface, but your clients are too shy to tell you about.

The work in the Public Solicitor's Office is enormously varied, and very different from my previous existence as a Crown Prosecutor in Lonsdale Street. One week you might be in the High Court defending a Malaitan Eagle Force militiaman on a count of murder arising out of the ethnic tension, but on another day you might be the duty lawyer in the Magistrates' Court, or playing suburban solicitor and dealing with all manner of civil disputes and family law problems. (Domestic violence is a particular problem here. This must be especially galling for the women of Solomon Islands, who are expected to do the bulk of the hard physical work, while their husbands mostly idle the days away chewing betelnut.)

The other important role that we are expected to fulfil here is to mentor, or 'capacity-build', the young Solomon Islander lawyers in our office (bearing in mind that RAMSI should ideally stay here only as long as it takes the country to stand on its own feet again). It can be very rewarding and great fun to hand-pick a winning brief for your young Solomon Islander counterpart, give him or her some pointers on how to approach the case, and then cheer them on from the back of the court as they successfully expose the flaws in the prosecution case.

RECONCILIATION

To my mind one of the most interesting differences here is the role of custom reconciliation in dealing with criminal offending. Melanesians have a truly remarkable ability to forgive and move on, even after quite serious offending. (I presume this may be explained in part by their having lived together in villages on small islands for thousands of years, where life would quickly become intolerable if they were unable to sort out their differences.) Whatever the explanation, compensation and reconciliation ceremonies still play a large part in Melanesian life, and this is recognized in s.35 of the Magistrates' Court Act, which provides that proceedings for common assault and other less serious offences may be stayed or terminated if the court is satisfied that reconciliation has taken place. Even in very serious cases which cannot be dealt with in this manner, if reconciliation has taken place, it will be an important factor in mitigation (murder being the exception – the penalty is mandatory life imprisonment). The reconciliation ceremonies themselves can be elaborate affairs, presided over by village chiefs, with compensation paid in shell-money, cash, pigs or other food.

PRISON

Visiting clients in custody is the other aspect of practice here that is strikingly different. I always found the prisons back home intimidating places; the atmosphere of anger and frustration was palpable. But the mood in Rove Prison in Honiara is positively convivial, and I always enjoy my visits there (even if it means sitting in a dank interview room with juicy fat mosquitoes that are so engorged with malarial blood that they can barely fly). The inmates in Rove always seem to be laughing and singing and playing guitars, and they appear to get on brilliantly with their gaolers, who are always the first to congratulate them if they get a good result in court.

Indeed, two incidents in particular have made me wonder whether prison here has any deterrent effect at all. Once I saw a man walking out of a cell-block weeping pitifully, and when I asked the warders what was wrong, they explained he'd just finished his four-year sentence, and was very sad to be leaving his friends! The other incident was related to me by Magistrate John Myers. His Worship had just sentenced a defendant to a short term of imprisonment, but it was so late in the day that all the police and prison officers had long since wandered off, and no one was available to take the prisoner into custody. No matter. The obliging fellow simply paid his own bus fare down to Rove, and handed himself in at the front gate! Somehow I can't see that happening back home.

THE EX-PAT LIFESTYLE

Solomon Islands is one of the poorest nations in the Pacific, and downtown Honiara is not especially attractive: the stately rain trees were long ago cut down, to be replaced by ugly, jerry-built Chinese shops and offices. Mangy dogs scrounge amongst the litter in the dusty streets. But life in one of Honiara's leafy suburbs is very comfortable. It is also reasonably safe, notwithstanding the occasional riot, earthquake and tsunami.

My family and I live in a two-storey house with air-conditioning and a swimming pool, and we overlook a palm-dotted ridge, with the ocean beyond. Growing in our garden are paw paws, bananas, limes, eggplant and guavas, and we keep two dogs, five chickens, a Cardinal lorikeet and a python. And whilst the rent is astronomically expensive, there are lots of other luxuries that are very affordable, for example, a full-time housekeeper, fresh mudcrab, crayfish, sashimi tuna and mangoes.

My wife Prue teaches at the Woodford International School, where our two daughters attend. We also foster a 12-year-old Solomon Islander, Joe Maesusuia, who had never been to school before last year, but thanks to Prue's efforts can now read and write quite well. Contrary to what its name suggests, the majority of teachers and students at Woodford are Solomon Islanders, and it has been fascinating to watch our girls gradually pick up the expressions and mannerisms of the locals. For example, instead of simply saying 'yes', Solomon Islanders tend to answer in the affirmative with an almost imperceptible raising of the eyebrows. (No one explained this to me when I arrived; I was perplexed as to how the interpreters could answer

my questions when the clients remained mute.) Our children have been quick to adopt this mode of communication by eyebrow, which can be irritating at times, it being an especially ineffective means of communication when their backs are turned or they are in an adjoining room.

By modern urban Australian standards there is very little to do over weekends in Honiara. So unless you have the energy to hike to a waterfall or go snorkeling on a World War Two wreck, you are forced to spend the weekend floating around the pool with the kids, listening to old Beach Boys and Rolling Stones records, before perhaps retiring upstairs to read a detective novel or have a snooze. All very simple. It reminds me a lot of my own childhood, growing up by the beach in Mount Eliza in the '60s and '70s, and it makes one question the wisdom of the frantic 21st century lifestyle which most of us lead back in Melbourne. Certainly our time here has brought us closer together as a family.

The usual ex-pat topics of conversation here bear no resemblance to those back home either; mercifully there is little or no talk of real estate prices, plasma TVs, BMWs, the latest restaurants or designer bathrooms. The subject that usually dominates here is the future of the Solomons, and whether or not you are optimistic. Not that the topics of conversation over here are always pure and altruistic: some people endlessly compare the pros and cons of their various domestic staff – 'I do wish Mary wouldn't use so much starch on my shirts' – which, when uttered over a Pimm's or a gin and tonic, can sound appallingly colonial.

But perhaps the most all-pervading aspect of life here is the gentleness and friendliness of the local people. Though they are very shy and hard to get to know well, virtually every Solomon Islander you pass in the street will say hello and give you a warm betelnut smile. This tends to have an uplifting effect on your spirits every single day, and makes all the other frustrations of living here bearable. Of course, the Melanesians are capable of exploding into violent action, as the April 2006 riot demonstrated. But these outbursts never seem to last long, and soon enough everyone slides back into their usual torpor. (And it is worth bearing in mind that whilst several police were badly injured in the 2006 riot, not a single person died. Honiara is certainly no Baghdad.)

Scarlett and Pip Southey with their Solomon brother Joe

CULTURAL DIFFERENCES

Another joy of living here is to observe all the curious little cultural differences, some of which have their humorous side. Like the Balinese, Solomon Islanders are very tactile people, and it is quite normal to see people of the same gender walking down the street holding hands. (Although I had to laugh at the prisoner and his guard sitting holding hands in court.) They are also spectacularly inept drivers, and tend to meander all over the road, preoccupied with opening the doors of their moving cars to spit lurid orange jets of betelnut juice all over the tarmac. (Fortunately this is usually done at a ponderously slow speed, which gives the pedestrians – who seem to have even less road sense – some chance of escape.)

Solomon Islanders can also be breathtakingly candid; don't ever make the mistake of asking your client in conference the leading question 'And is this the only time you've done this?' because the answer may not be very helpful. One particular ex-pat magistrate learnt this lesson very early on: wishing to give the unrepresented defendant every chance to explain himself, he helpfully asked, 'Is there any reason you want to give me as to why you drove carelessly?' 'Yes' came the answer, 'because I was really drunk.' His Worship just rolled his eyes.

Political correctness has certainly not reached these shores: to get drunk is to get *spaka*, an habitual boozer is *spakamasta*, and children are called *pikininies*. An ex-pat is a *white man*, and one of the very dark-skinned people from Western Province is called a *black man* (which always sounds odd coming from a man you would swear was black himself).

Another curious sight here is the clothes that people wear. They are dressed for the most part in garments from the brotherhood bins back in Australia, and they are clearly none too fussy about whichever slogan is emblazoned all over their T-shirt, however inappropriate it may be. Some are very amusing. I recall hiking up to a waterfall with my brother when a solitary figure emerged from the jungle, clad in a T-shirt which announced 'I have nothing to declare except my genius'. Just last week my attempts to persuade the Court of Appeal that my client was a gentle soul who was not complicit in the crime were rather undermined by his wearing a shirt which warned 'Don't Mess With Me!' And perhaps the best one of all was related to me by my colleagues: the fearsome-looking warrior who was on remand for murder, and glared through the bars sporting 'Princess in Training' – this written in lovely bright sparkles.

It is also testament to our obscenely affluent consumer society in Australia that these brotherhood bins also contain some very expensive clothes which have obviously never been worn. Certain ex-pat wives here have cottoned on to this, and can be spotted on their days off, rolling up their sleeves and packing into the scrums of stout Melanesian women who sift through these bales of clothing, searching for that designer-label bargain which can then be repatriated all the way back to Australia and worn to a cocktail party.

GOING ON TOUR

Going on circuit in Solomon Islands is called 'going on tour', which I can never get used to, sounding as it does like a reference to a cricket team or a rock 'n roll band. Now whilst Honiara may be a bit of an eyesore, the 992 islands which make up the rest of the country are simply beautiful. Compared with so many other countries, which have been overdeveloped into such a dreary state of McUniformity, getting out into the provinces of the Solomons is like stepping back into the pages of a Somerset Maugham short story. It is just fantastic.

There are basically two ways of going on circuit here. The first is to fly to your

destination and live in a local resthouse (as they are called). This can be a gruelling experience: the accommodation is basic, there is no electricity, not enough food, rats chew on your feet in the night, and by the end of the week you are dying to return to the relative comfort of Honiara. The other way to go on circuit is to go on the MV *Silent One*. The *Silent One* is a 30-metre former dive yacht which is chartered by AusAid to take justice to the many isolated parts of the Solomons. Magistrate, prosecutor and defence counsel all live aboard for a week or two at a time, and sail to some of the most remote locations you could ever encounter. Having anchored off your destination, each morning after breakfast you all pile into a dinghy and speed across a shimmering turquoise lagoon to work. Nearby your clients can be seen paddling to court in their dugout canoes, in answer to their summonses. This is a glorious way to commute, and the ashen-faced zombies ascending the escalators at Flagstaff Station for another day's drudgery seem a million miles away.

Then when court rises at the end of the day, you all go back to the *Silent One* for a swim, before the French-trained Vanuatu chef prepares a magnificent dinner, after which you might watch a movie and then retire contentedly to your air-conditioned cabin for the night. I think I have been as happy as I have ever been, standing on the bow of the *Silent One*, with the wind in my hair and the dolphins and flying-fish playing below. No holiday could ever compare with it, because unlike a holiday, here you gain the enormous satisfaction of doing something constructive and making a real contribution.

Unfortunately AusAid may not be renewing the *Silent One*'s contract, which would be a shame, because its crew are some of the best ambassadors that RAMSI has, and for the people of the outlying provinces, the big blue outline of the *Silent One* on the horizon is the most visible symbol of justice and the rule of law in Solomon Islands.

HAVE I MADE A VALUABLE CONTRIBUTION?

Sometimes during the inevitable periods of despondency and frustration that we all encounter here, I think that my most useful contribution to the Solomons has been bringing Prue over; she has worked tirelessly as a teacher and Deputy Principal at Woodford School. But perhaps I have, with the help of others, helped to improve some things. Bail is one area. When I first arrived there seemed to be little respect, particularly in the Magistrates' Court, for the prima facie right to bail and the presumption of innocence that underpins it. Defendants were regularly being remanded in custody for weeks at a time on the flimsiest of pretexts, only for the charge to be later withdrawn when it transpired that there was never really any evidence against them in the first place. But through a constant barrage of submissions, appeals, seminars and quotes for the paper, a group of us has been able to change that culture, at least for the time being.

I also had another personal hobby-horse, which although perhaps small in itself, I felt strongly enough about to some take action over. It came to my notice that some of the Queensland and Western Australian prosecutors working here were teaching their local counterparts to adopt the practice of refusing to lead into evidence an accused's record of interview if it contained only denials and 'self-serving statements', but no admissions. They justify this on the basis that it is the admissions which are the exception to the hearsay rule, and hence anything else which might assist the accused is just self-serving hearsay. But that approach is arguably inconsistent with a prosecutor's duty to lead the whole of the relevant evidence, and it is certainly not the practice in any of England, New Zealand, Victoria or New South Wales; nor had it been the practice in Solomon Islands. The Victorian Court of Appeal explains the rationale behind our approach as follows:

> Such material is traditionally led by the Crown, whether incriminating or not, both as a matter of fairness and to show the 'first opportunity' response by the accused to the allegations made against him by his accuser.[3]

As a consequence, I wrote to both the Chief Justice and the DPP, drawing their attention to this Queensland/WA practice which seemed to be creeping into usage, and both wrote back nice letters, firmly indicating that from now on they would expect prosecutors to adopt the fairer approach.

But despite whatever determination to make a difference you arrive here with, the realisation eventually sets in that the many problems which Solomon Islands faces cannot be solved single-handedly or overnight. So you just have to do the best you can, enjoy the experience, and remember that some aspects of life here are actually better than they are in Australia. And hopefully many more members of the Victorian Bar will get their chance to make a contribution to this beautiful country, with its lovely people.

NOTES

1 It is customary to drop the definite article, rather than referring to '*the* Solomon Islands'. And if you've forgotten where it lies, it is visible in the very top right-hand corner of your TV screen during the national weather, to the east of Papua New Guinea.

2 See 'Immunity versus Human Rights: *The Pinochet* Case' by Andrea Bianchi, *European Journal of International Law*, Vol. 10 (1999) No. 2.

3 *R v Su & Ors* [1997] 1 VR 1, per Winneke P., Hayne JA & Southwell AJA at 64–65.

So how did you become a

BARRISTER?

Secret womens' business revealed

On Thursday 2 August 2007, about 75 female law students attended an event organized by the Women Barristers Association held in the Neil McPhee Room, called 'Woman's Day at the Bar', designed to provide to young law students some insight into the life of women at the Bar.

The function was opened by her Honour Judge Frances Millane. Judge Millane spoke about her own personal journey to the Bar. It commenced when, as a three-year-old, she accompanied her mother to her work as a secretary in a law firm. There she played on an old typewriter and assisted the tea-lady and the caretaker. Her Honour recounted that she resisted the pressure to attend a business college to learn typing and shorthand and instead enrolled in law at university, recalling that in her year no other girls from her school enrolled in law. Her Honour's headmistress was not impressed and counselled her not to waste her parent's money and to do something useful, such as teaching or nursing. Her Honour outstripped her headmistress's expectations and went on to become a senior associate at Philips Fox where she was on track to a partnership. However, her decision to come to the Bar was influenced by a desire for independence, the need for flexibility to accommodate care for elderly parents-in-law, four young stepchildren, her husband's commitments as a partner in a law firm, and her Honour's commitment to complete her post-graduate law studies.

As a barrister, her Honour described herself as a professional businesswoman operating a small business through which she provided specialist advocacy, advisory and mediation services. In due course she also held part-time and full-time positions as a Judicial Registrar of the Industrial Relations Court of Australia and the Federal Court, and as a sessional member of VCAT. Her Honour said that the Victorian Bar is an association which imposes exacting standards of training and professional practice and if one is minded to be involved in the administration of justice and legal reform, you may join the many associations the Bar supports which are dedicated to these pursuits. In this way, her Honour said, your journey in the law may be enriched whilst you learn how to influence and effect real change and form lasting friendships.

Her Honour told the students that she had never found anger or confrontation useful, and suggested that the students add a good deal of humour to their knapsack. Her Honour illustrated this point by recounting an occasion when a Master in the Supreme Court asked: 'Gentlemen, shall we have seniority or beauty first?' whereupon her Honour, the most senior practitioner remaining in Court, stepped forward and said that as she was the only person who could claim both attributes she was ready to proceed with her application.

Her Honour told the students that effective advocacy usually requires long preparation and confident delivery. While our client's victories are celebrated, their losses also have to be lived with. Her Honour reminded students that perseverance is a necessary but under-rated attribute of barristers who enjoy a successful career, and she drew on the words of Cicero who apparently said that it is 'perseverance and not genius that takes a man to the top' and 'Rome is full of unrecognized geniuses'. Her Honour ended by saying that too few women appear before her in her Court, and that she hoped to see all the students who attended appear before her in the future.

After this session, Caroline Kirton outlined the work of the Women Barristers Association and recent surveys that had been undertaken. This was followed by a panel discussion to inform students about various aspects of being at the Bar. Caroline Kirton spoke about the Readers' Course, Kim Knights spoke about the

clerks, Lydia Kinda spoke about renting chambers and other costs of getting started, Jennifer Digby recounted her experiences in court having signed the Bar Roll recently, and Simone Jacobson addressed work/life balance issues. After an opportunity for questions and answers, the students split into small discussion groups on open topics.

The final session was an informal one conducted by her Honour Judge Felicity Hampel and Jennifer Davies SC. They opened this session discussing their different career paths, and their friendship which has held them in strong stead since law school, and their appreciation of the role the WBA plays, in addition to its advocating for equality of opportunity, in providing a way for women at the Bar to find friendship and support from female colleagues.

Both came to the session (by chance!) in matching scarfs they had bought on a recent vacation together. Her Honour recounted how as law students they would imagine their legal careers. Her Honour referred to changes which have occurred at the Bar over time, such as having the courts no longer referring to women as gentlemen, and not getting into trouble for wearing pants. She thought the WBA had had a role in facilitating positive change. Reference was also made to how the number of women judges, now a critical mass, has changed the culture of the courts. Jennifer Davies urged students to be flexible in exploring opportunities and to consider taking work in previously unfamiliar fields, including areas requiring more written work and less oral advocacy and not to be in a hurry to do everything at once, especially if there is, for a time, a need to juggle career and family responsibilities.

All speakers received a box of chocolates, thanks to our sponsor for this event, KOKO Black.

Afterwards refreshments at the Essoign were enjoyed, and the Melbourne University mentoring scheme was launched.

Special thanks for this event are extended to Dr Michelle Sharpe, Assistant Convenor of the WBA, barrister and lecturer at Melbourne University, who organized this event and ensured its success.

SIMONE JACOBSON

One Trick Pony

Less give in his bones
which creaked as he negotiated
the steep stairs in his home.

More forgiving of his enemies now
but he made more demands on those
he loved.

The older he got, the greater his surprise
when he encountered virtue.

He was beginning to put a premium
on compassion.

Loved Europe.
But loved life more.
His cardiologist said he'd be lucky
to reach sixty.

Still, he was bent on doing Spain next year
if it killed him:
which it might.

NIGEL LEICHARDT

A new MILITARY COURT

In a significant milestone for military justice, in October the Australian Military Court was established and the inaugural military judges were sworn in. The new court provides members of the Australian Defence Force with an even more transparent and impartial military justice system, reflecting world's best practice.

The Australian Military Court replaces the system of individually convened trials by Court Martial or Defence Force Magistrate. The court will be a 'service tribunal' under the Defence Force Discipline Act 1982. It is an important part of the military justice system, which contributes to the maintenance of military discipline within the Australian Defence Force.

Establishing the court is one of many reforms to the military justice system. The enhancements ensure a modern and effective approach to military justice, while striking an appropriate balance between effective discipline to allow Australian Defence Force personnel to operate safely and effectively, and protecting individuals and their rights.

Brigadier Ian Westwood AM was sworn in as the first Chief Military Judge at a ceremony in Canberra on October 3. He has 24 years of military law experience gained through full-time Army service. He was admitted to the Supreme Court of New South Wales in 1978 and appointed to the Australian Army Legal Corps in 1983. Brigadier Westwood, who resides in Canberra, is responsible for ensuring the orderly and expeditious discharge of the business of the Australian Military Court and managing its administrative affairs. He will also sit as a military judge on the court and report to Parliament annually through the Minister for Defence.

Two permanent military judges, Colonel Peter Morrison and Lieutenant Colonel Jennifer Woodward, were also sworn in. Colonel Morrison, hailing from Townsville, has a combination of private and military legal experience spanning more than 26 years. He was a Judge Advocate and Defence Force Magistrate prior to his appointment.

Lieutenant Colonel Woodward was previously a senior prosecutor for the Australian Capital Territory and a commercial litigation practitioner. Prior to becoming a military judge, she was Director of Advisings, General Counsel Branch, Department of Defence. Lieutenant Colonel Woodward also spent seven years as a permanent legal officer in the Army.

At the swearing-in ceremony, Chief of the Defence Force Air Chief Marshal Angus Houston said Defence was strongly demonstrating its commitment to improving the military justice system and delivering impartial and fair outcomes through enhanced oversight, greater transparency and improved impartiality.

'Since the beginning of my tenure as Chief of the Defence Force, I have been absolutely delighted with the progress we have made to our military justice system,' he said.

It is critical to the Australian Defence Force's operational effectiveness and the

At the swearing in ceremony from left: Military Judge Lieutenant-Colonel Jennifer Woodward, Chief Military Judge Brigadier Ian Westwood and Military Judge Colonel Peter Morrison

TOP
Because of the unique nature of warfare, the Australian Defence Force applies a far greater level of regulation than that encountered in other forms of employment and demands behaviour which is consistent with its role as an armed force.

ABOVE
The enhancements to the military justice system are intended to strike an appropriate balance between effective discipline to allow Australian Defence Force personnel to operate safely and effectively, and protecting individuals and their rights.

protection of individuals and their rights that we have a strong military justice system – one that not only underpins our discipline and command structures but also enables our personnel to work in a fair and just environment.

The new court is judicially independent from the military chain of command and Executive and, although based in Canberra, is fully deployable and able to conduct trials within Australia and overseas, including operational areas.

The Australian Military Court has the same jurisdiction as Courts Martial and Defence Force Magistrates did previously. It only exercises jurisdiction under the *Defence Force Discipline Act 1982* where proceedings can reasonably be regarded as substantially serving the purposes of maintaining or enforcing discipline. The Australian Military Court meets the disciplinary needs of the Australian Defence Force in maintaining and enforcing Service discipline by trying more serious or complex Service offences.

HOW DOES IT WORK?

As well as the Chief Military Judge and two permanent military judges sworn in recently, there will be a panel of part-time (reserve) military judges. Military judges are independent from the military chains of command and executive in the performance of their judicial functions. They may sit alone or with a military jury. Military jurors perform a role akin to jury members in a civilian court system and determine on the evidence whether an accused person is guilty or not guilty of the Service offence.

Essentially, the trial procedures of the Australian Military Court are similar to those of civil courts exercising criminal jurisdiction. The general principles and laws of criminal responsibility as provided for within the Criminal Code (Commonwealth) apply in respect of Service offences prosecuted before the Australian Military Court, as do formal rules of evidence. The presumption of innocence to the accused

applies as it does in a civil court, which means that the prosecution is obliged to prove the case against an accused beyond reasonable doubt.

All prosecutions before the court are conducted through the office of the statutorily independent Director of Military Prosecutions, Brigadier Lynette McDade. This area consists of several full-time and Reserve prosecutors. The Directorate of Defence Counsel Services, led by Group Captain Chris Hanna, arranges legal representation for the accused. The directorate administers the Defence Counsel Services Panel, which contains more than 150 lawyers from Army, Navy and Air Force who are located across Australia. These lawyers are admitted to practise in a State or Territory of Australia and come from various branches of the legal profession.

A modern and professional defence force deserves a modern and effective system of military justice.

Further enhancements to the military justice system

The Australian Military Court is one of a range of enhancements to the military justice system being introduced by Defence. With the two-year implementation schedule due to finish at the end of this year, Defence is well advanced in putting in place the most significant changes its military justice system has seen in more than 20 years. Twenty-three of the 30 agreed recommendations from the 2005 Senate Report 'The effectiveness of Australia's Military Justice System' are now complete.

Colonel Geoff Cameron, who is the statutorily independent Registrar of the Australian Military Court, assists the Chief Military Judge with the administration of the court and discharges statutory functions.

Other changes to the military justice system include introducing rights of appeal from decisions of the Australian Military Court to the Defence Force Discipline Appeals Tribunal (presided over by tribunal members who may be Federal Court, State or Territory Justices or Judges). In the case of the accused it is available on both conviction and punishment or court order. In the case of the Director of Military Prosecutions it is available for punishment or order only. Following the next tranche of legislative changes, an accused will also have the right to elect trial by the Australian Military Court for certain categories of disciplinary offences.

If an accused is found guilty, punishment as provided for by the *Defence Force Discipline Act 1982* is imposed by the presiding military judge taking into account mitigation evidence, the sentencing principles applied by civil courts and the need to maintain discipline in the Australian Defence Force.

ENHANCING IMPARTIALITY AND FAIRNESS

The selection of the Chief Military Judge and military judges was through an independent merit process. They were selected from current qualified permanent and reserve Australian Defence Force legal officers and any other person who satisfied the statutory selection criteria.

Key features of the Australian Military Court include:

- statutory appointment of legally qualified military judges
- security of tenure (10-year fixed terms)
- remuneration set by the Commonwealth Remuneration Tribunal
- mid-point promotion during tenure
- the necessary para-legal support to be self administering
- judges to sit alone or with a jury in the case of more serious offences (military judge presiding)
- appeals on conviction or punishment to the Defence Force Discipline Appeals Tribunal.

The Australian Military Court proceedings are open to the public except where the military judge orders otherwise (for example, if it is contrary to the interests of security or defence of Australia, the proper administration of justice or public morals).

MAJOR ACHIEVEMENTS

- A new joint Australian Defence Force investigative unit now investigates serious incidents with a service connection.
- There is no longer a backlog of complaints and redresses of grievance due to the additional resources being provided and the hard work of Defence personnel.
- A civilian with judicial experience now presides over Chief of the Defence Force (CDF) Commissions of Inquiries into deaths of ADF members in service or other matters as determined by the CDF.
- The Learning Culture Inquiry Report into ADF Schools and Training Establishments was released in December 2006. It followed the military justice inquiry, which found that some aspects of ADF culture may be related to deficiencies in the military justice system. Action to reinforce ADF culture consistent with core values has reduced the risks of inappropriate behaviour, improved the care and welfare of trainees, and improved the management of minors in particular. More than half of the agreed recommendations are now underway.

For further information about the range of enhancements to the Military Justice System visit <www.defence.gov.au/mjs>.

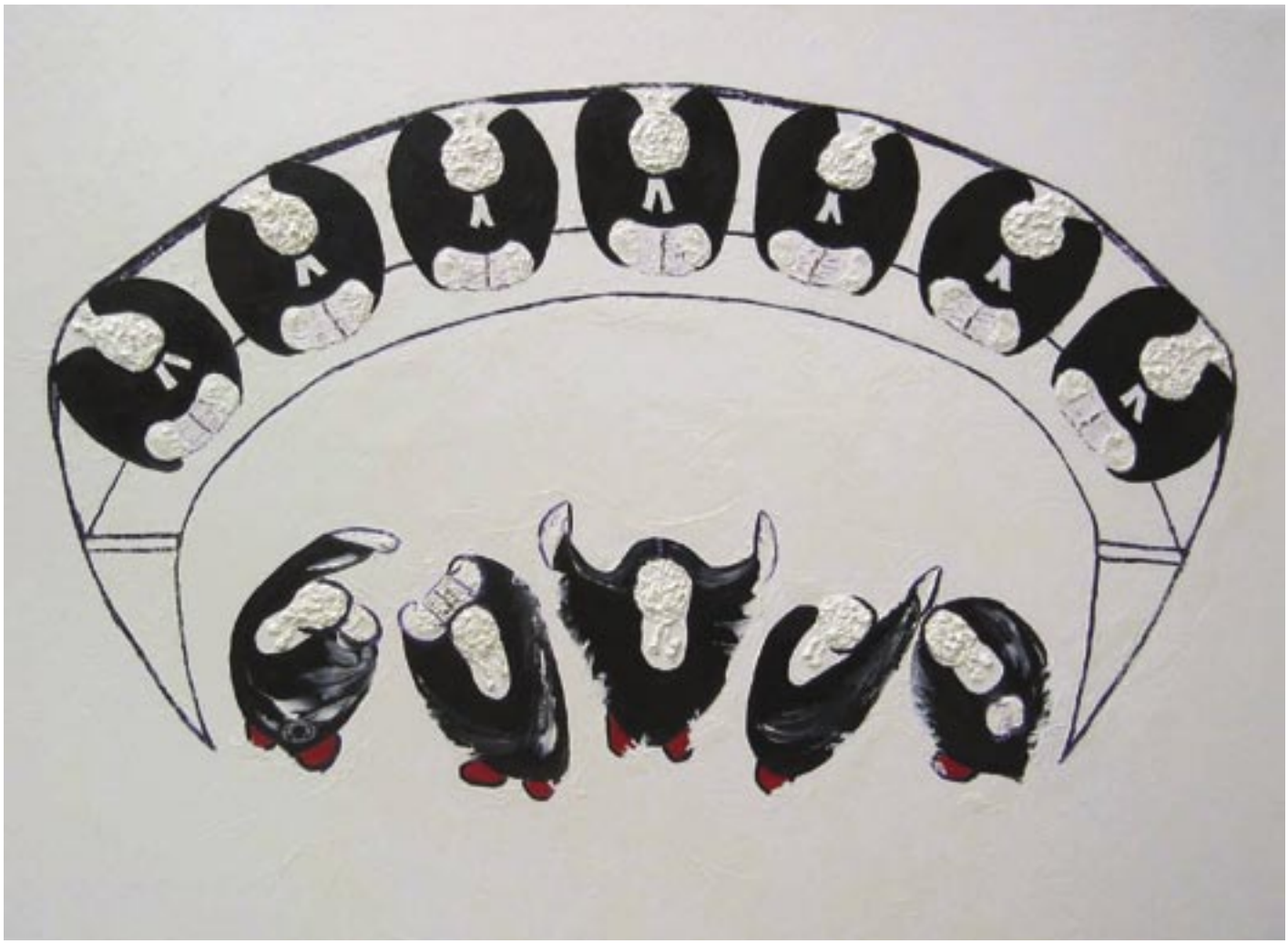
CRISTY SYMINGTON

Artful *in* law

The Negotiators, lithograph

Melbourne artist Christine Gibson has hit on an ideal collective noun for a gathering of lawyers: a billow of barristers. It is the curve of their gowns and sense of sweeping movement that first catches the eye in Gibson's paintings and lithographs of barristers and the judiciary. Few of Christine Gibson's court scenes are without humour and Gibson herself – despite an air of innocence – conveys in her recent 'Law Series' exhibition both humour and satire.

The sculptures in soapstone cover the artist's dynamic theme of the law. Gibson's art shows lawyers in pairs or bigger groups sometimes looking conspiratorial, or good and evil, sometimes proud and pompous. The works have titles such as 'The Negotiators', 'Your Honour', 'The Loss' and 'J'Accuse'. Gibson has watched the process



Opening the Appeal, oil on canvas

of the law in and out of court, has seen the tension, moments of farce or humour, and the final outcomes that determine the direction of people's lives. 'No matter what they are deciding upon, somewhere, sometime they have to come into a huddle,' she says. Gibson is trying to reflect the strengths and weaknesses, and the human spirit of the law.

SCULPTURE

Early in 1980, Christine Gibson met the renowned clay sculptor Robert Langley. His class rules were to work from your heart and mind through your hands with no copies. Originality was very important. She says: 'This way of working produces your own creativity whether you draw, paint or sculpt. I was always amazed at how free it made you feel. Sculpture embraces all dimensions making you laugh, cry and feel a need to touch. It was certainly his teaching that opened my mind to many aspects of art. Soapstone is a heavy but also fragile stone. I have carved into the stone to find the form and release it preserving the integrity within. Some of the soapstone sculpture appears to float in space, whilst others are grounded on a black base giving the feeling of timelessness or permanence.'

OPPOSITE PAGE LEFT
Noël Stott, Christine Gibson and Nathan Kuperholz having intense discussion on the content of the law series

RIGHT
At the opening, left Noël Stott, Director of Adam Galleries, Christine Gibson, George Beaumont QC and Bryan Keon-Cohen QC discussing the Law Series with the artist

J'Accuse, one of the soapstone sculptures on show.

At the opening of Christine Gibson's major exhibition, from left: Noël Stott, Manny Garantziopis SC, Christine Gibson, Nathan Kuperholz, George Beaumont QC, Bryan Keon-Cohen QC

LITHOGRAPHY

After drawing for three months, Gibson selected a number of drawings to turn into lithographs. Some are serious, others display great wit and humour. The figures are often characterised by their posturing and play-acting. Lithography commands a respect for the stone. To work on stone creates a new dimension of drawing. It is an extraordinarily peaceful and beautiful medium. It was a privilege, she said, to have Peter Lancaster of Lancaster Press do the hand printing.

PAINTING

The artist noted that a sculptural form back into a white space was very interesting for her. She wanted the paintings to become more sculptural, so raised the oil on the wigs and used a palette knife on the black gowns to give the thickness of paint, resulting in a finish that is low relief. She gave the lawyers red shoes. Red is a symbolic colour. 'Like theatre, opera or dance my aim was to create images that either stood still or showed motion.'

The Romanian sculptor George Turcu completed Gibson's technical training, instructing her in the complexities of the lost wax method. Turcu has been an important mentor. Another important influence is Bill Perrin of Perrin Sculpture Foundry.

Christine Gibson's 'Law Series' including sculpture, painting and lithography can be seen at Adam Galleries, 1st Floor, 105 Queen Street, Melbourne (cnr Queen and Little Collins Street).

Tel: (03) 96428677
Email: nstott@bigpond.com
Web: www.adamgalleries.com

Opening of WMR Kelly Chambers

His Honour Judge Michael Kelly

His Honour Judge Michael Kelly, who retired in 2006, and who is presently an Acting Judge of the County Court, was recently honoured, during his lifetime, when the 6th floor at 180 Williams Street was named 'WMR Kelly Chambers'. A group of ejectees from the 11th floor at Latham Chambers recently moved to the 6th floor at Douglas Menzies Chambers, which was then largely unoccupied, although there were four incumbents who had defied an earlier exodus from these Chambers.

Among those who moved were John Bleechmore and P Rosenberg, both of whom had read with his Honour back in the mid-70s, and John O'Brien who, although he read with Maurice Gurvich, spent so much time in Kelly's (as he then was) chambers, that he may as well have read with him, and Jennifer Batrouney SC, who, although she initially read with Greg Davies QC, again spent so much time in Bleechmore's chambers that she may as well have read with him and enjoys, therefore, the status as a granddaughter-in-law of Judge Kelly.

This serendipity led those concerned to propose that the 6th floor at Douglas Menzies Chambers should be named, in honour of Judge Kelly, 'WMR Kelly Chambers'. The proposal was formally approved by the Board of Barristers' Chambers Limited, and welcomed by those already in occupation in the chambers, most of whom practice vigorously in the criminal jurisdiction and know his Honour well.

A gathering was held on 11 October at which his Honour graciously agreed to be present, and at which a portrait of his Honour, wearing his distinctive Homburg, was unveiled. O'Brien was unable to be restrained from making a pretty speech. The occasion was also illuminated by the presence of old friends of Judge Kelly, such as Sir Daryl Dawson, Joan Mesiti, presently Associate to Justice Tim Smith, and Lou Hill, with Bleechmore and Rosenberg, the survivors of Kelly's 'clan of leaders': our late colleagues Bob Kent and Doug Salek, the other Kelly readers, were remembered with sadness. Dermot Connors, formerly of the Victorian Bar and another Kelly grandson 'in-law', and now senior legal counsel in London with a UK company, flew to Melbourne especially for the gathering.

Those present wished Judge Kelly to know what affection he has inspired. This is something felt by all who know him well. As a Master, his readers remember his elegance, his rigour, and peerless understanding of the deepest roots of legal principle, particularly in his beloved field of criminal law, and always expressed with matchless eloquence.

JOHN BLEECHMORE

LEFT TO RIGHT Judge Kelly, P Rosenberg, Magistrate Lou Hill and John Bleechmore
BELOW John Bleechmore admires the portrait.

On 14 August 2007 a new resource for legal practitioners jointly published by the Mental Health Legal Centre and Villamanta Disability Rights Legal Service was launched by the Victorian Attorney-General, Rob Hulls, at the Victorian Law Foundation.

Launch of the *Advocate's Guide to Guardianship and Administration Hearings* at VCAT

In introducing the Attorney-General, Morag Fraser said that the guide fulfilled the aims of the foundation by increasing access to justice and the law for people in this case with a disability, seeking to educate the legal profession, and producing a publication which would be disseminated and widely available. In his launching comments on a guide for legal advocates to the Guardianship List at VCAT, the Attorney-General said:

With the privileged practice of law comes responsibility – a responsibility not to judge, presume or preempt, but to give voice and dignity to one's clients. Nowhere could this responsibility be more acute than in the area of guardianship and administration law, a field with such profound potential effects on an individual's autonomy, and on a family's unity.

The publication that I'm proud to be launching today, then – *Advocate's Guide to Guardianship and Administration Hearings* – is an opportunity for the profession, and for the legal system, to make good on this very important responsibility. The information in this booklet will help lawyers better advocate for some of the most disadvantaged and voiceless people in our community; while helping family and friends better understand the system in which they find themselves.

After all, hearings before VCAT's Guardianship List determine who will be authorised to make crucial life decisions for a person, and how much say they have in those decisions themselves. Determinations such as these are inevitably emotional – potentially damaging – and much turns on an advocate's capacity to protect the vulnerable; to present the strongest possible case for their client.

It is not surprising, then, that Community Legal Centres have been at the forefront of work to make this process better. Organizations like Villamanta and the Mental Health Legal Centre embody the value of community law – what we can achieve when we speak up for what we believe: when we are passionate about assisting the disempowered, the disenfranchised and the disadvantaged; and when we know that reaching real heights in the legal profession is more than working on the 40th floor of the Rialto, but instead about having the courage of your convictions.

As famed as they are for public advocacy, sometimes the quieter work of CLCs can get overlooked. For over 30 years, however, CLCs have worked to make the law more accessible and indeed understandable to the wider community, removing its mystique by providing information in plain language on a range of issues to empower and inform Victorians. Given our community's ageing population and the consequent increase in guardianship rates, this particular example could not come at a better time.

So I say thank you, then, for your passion and dedication. Thanks also to the Victoria Law Foundation, who helped fund this initiative, and to all those who give their

OPPOSITE PAGE
The Hon Rob Hulls MP, Attorney-General of Victoria

CLOCKWISE
Professor Neil Rees, Victorian Law Reform Commission (VLRC), Susanne Liden, Victorian Civil & Administrative Tribunal (VCAT)

Phil Grano, Office of the Public Advocate and Professor Morag Fraser AM,Victorian Law Foundation Board Member

Phil Grano, Deirdre Griffiths, Shauna Hearity, Vivienne Topp

skills and time to promoting the rights of others. We – all of us – have an obligation to give voice to – and to *hear* – those whose independence is compromised and, as we work together to recognize the dignity of all Victorians, it is my great pleasure to formally launch this publication.

Following the launch, three speakers – Vivienne Topp from the Mental Health Legal Centre, Phil Grano, from the Office of the Public Advocate, and Deirdre Griffiths from Villamanta – each spoke from personal experience about a case study where someone who had had experience before the Guardianship List at VCAT had benefited either from legal assistance, legal advice or legal guidance.

The express purpose of the Guide is to demystify the process of appearing in the Guardianship List at VCAT and to provide specific guidance in relation to matters of consent, informed decision-making and taking instructions. The Guide then moves progressively through the whole VCAT process. The authors, Shauna Hearity and Dr Jonathan Clough sought to pull together comprehensive and accessible information on the approach to advocacy and the law and procedure in this specialist jurisdiction to benefit not only advocates but the families and community supporting those whose futures are determined at VCAT.

Written in a plain English style and replete with case study examples and practical handy hints, the Guide covers the following broad topics: Introduction (to the legislation, the Tribunal, taking instructions, capacity); the law relating to guardianship and administration; before the hearing; at the hearing; after the hearing; enduring powers of attorney; useful contacts.

The publication is available online at <www.communitylaw.org.au/mental health> or in hard copy form direct from the Victorian Law Foundation.

Tenth anniversary of Australian Women Lawyers

Australian Women Lawyers (AWL) celebrated its 10th anniversary on 7 September 2007 with a dinner function held at Zinc, Federation Square. The Honourable Chief Justice Marilyn Warren of the Supreme Court was the guest speaker. The Honourable Mary Gaudron QC, patron of AWL, gave an impromptu speech in reply.

There were 200 guests, comprising many barristers and solicitors from around Australia. Other judicial guests included the Chief Justice of the Family Court, Diana Bryant; Masters Kings and Lansdowne; Justices Williams, Coldrey and Hollingworth of the Supreme Court; Justice Neave of the Court of Appeal; Chief Justice Peter Underwood AO; Justice Victoria Bennett of the Family Court; Judges Kennedy, Hogan, Nicholson, Sexton, Lewitan, Cohen, Pullen and Lawson of the County Court; Justice Ruth McColl AO; Magistrate Jane Patrick; and Coroner Audrey Jamieson. The Victorian Solicitor-General Pamela Tate SC was also a guest at the dinner.

A feature of the celebratory nature of the evening, at which there was a toast to the future of AWL, was slide show highlighting some of the achievements of AWL, including video footage of the speech Mary Gaudron gave at the launch of AWL. Fiona McLeod SC, the now President of Australian Women Lawyers, hosted the evening.

Fiona McLeod SC said:

As you know, Australian women lawyers is made up of our individual state and territory members and represents those members in issues of national concern.

We stand on the shoulders of and are inspired by the pioneering women who fought, more than 100 years ago, for the right to practice and since that time to be appointed to high office.

AWL is made up of its member organisations. Each state and territory organisation has its own strengths and its own character, evolving and shaping depending upon its strength of membership, the concerns of the day and the resources and enthusiasm of its volunteer members.

A journalist called me on Thursday and asked me why AWL was still relevant. I thought this was an interesting question.

In the past the need has been so obvious. A little over 100 years ago, as Australian women were seeking admission to practice here in Australia and abroad, Chief Justice Ryan of the Wisconsin Supreme Court said of an application by Miss Lavinia Goodell to be admitted as the first woman practitioner in that State:[1]

> The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. [2]

While the quiet revolution has been under way over the last 100 years, as recently as 1992 the well known televangelist Reverend Pat Robertson, speaking at the Republican Convention in the lead up to the 1993 Presidential election, spoke of the drive by women for empowerment in these terms:

> Feminism encourages women to leave their husbands, kill their children, practice witchcraft, destroy capitalism, and become lesbians. [3]

History records that following this speech Bill Clinton was elected to the White House!

Our pioneers faced hurdles, but what is left for us to do today?

Ten years ago, almost to the day, the hours and months of work and ideals of a small committee of enthusiastic individuals bore fruit in the launch of Australian women lawyers. Ten years ago our patron Mary Gaudron stood before us, about a city block away from where she now sits, in the company of then founding President of AWL Alexandra Richards QC representing the pinnacle of our achievement in the profession and we were launched.

When Justice Gaudron retired from the High Court she said, and we suspect she was only half joking, that she had blundered, because she thought her resignation would force the appointment of a woman as her replacement.[4]

Now we have Justices Crennan and Kiefel, not one but two women on the High Court.

In the last ten years we have seen the appointment of women to the bench in numbers – two High Court appointments, Justice Marilyn Warren, Chief Justice of Victoria, Chief Magistrate of the Federal Magistrates Court and now Justice Diana Bryant Chief Justice of the Family Court, Justices of the Supreme Courts and Courts of Appeal, Justices of the Federal and Family Court and the Federal Magistrates Court, Judges of the County and District Courts, Judges and Magistrates of the Local and Magistrates Courts, Tribunals and Boards, our Victorian Solicitor-General, Directors of Public Prosecutions, silks, heads of our bars and solicitors', bodies, partners, professors and deans of law schools.

OPPOSITE PAGE
LEFT Jeanette Richards, Mary Gaudron QC, Fiona McLeod SC. RIGHT Meg O'Sullivan, Simone Jacobson

THIS PAGE
LEFT Justice Marcia Neave, Master Kathryn Kings, Justice John Coldry.
RIGHT Judge Rachelle Lewitan, Michelle Quigley SC, Susan Pryde.

We have worked for the introduction of model briefing or equitable briefing policies, flexible working practices, equitable pay and workplace conditions, made submissions on public policy and law including discrimination laws and laws that discriminate, seeking to protect the rights and standing of women before the law and the interests of justice.

We have supported each other with formal and informal mentoring and networking.

We thank each of our board members for their contribution throughout this time and thank our past presidents for their leadership – Alex Richards QC, Audrey Mills, Dominique Hogan-Doran, Jennifer Batrouney SC, Noor Blumer, Caroline Kirton and Jeanette Richards. We thank the former Presidents of AWL and their committees for their contribution and dedication. We all know how hard it is to juggle the demands of practice with life and acknowledge particularly the work you did in creating and supporting the organisation and its goals – all without wives!

Today AWL is a meeting ground, a place for the sharing of ideas and encouragements, an opportunity to dissolve borders in friendship to support greater goals.

We remain a catalyst for change, prompting and nudging, occasionally in boisterous tone and always with enthusiastic spirit. Our end is the improvement of the practice of law for women lawyers and the improvement of the law itself.

We are a national voice in a climate of Commonwealth assertion of powers.

As we move towards a national profession, the organisation will be increasingly relevant.

After Fiona Mcleod's speech, Chief Justice Warren delivered an inspiring speech which reflected upon the challenges which women lawyers had faced in the past and also upon the future challenges which lay ahead for women lawyers.

The Honourable Mary Gaudron QC then gave an impromptu speech, urging women lawyers to use their best endeavours to create justice not only for themselves, but also for the community as a whole. Mary Gaudron received a standing ovation from the guests for her comments.

SIMONE JACOBSON

NOTES

1 Quote provided by Callinan J in his toast to new silks 31 January, 2000.
2 (1875) 39 Wisc. 232 at 244–246.
3 'Equal Rights Initiative in Iowa Attacked', *The Washington Post*, 23 August 1992.
4 AWL Reception in honour of Justice Mary Gaudron, 25 January 2003.

ABOVE LEFT Jeanette Richards, Chief Justice Marilyn Warren, Fiona McLeod SC

ABOVE Aileen Ryan, Caroline Kirton, Justice Elizabeth Hollingworth

LEFT Simone Jacobson and Susan Pryde.

BELOW Presidents of AWL: Alexandra Richards QC, Audrey Mills, Dominique Hogan-Doran, Jennifer Batrouney SC, Noor Bloomer, Caroline Kirton, Jeanette Richards, Fiona McLeod SC

Victorian Bar Hockey

Narrow defeat to LIV – New South Wales Bar fails to front

Our nemesis – Schokman – poised, balanced, fit

On 25 October 2007 the stalwart hockey recidivists of the Victorian Bar hockey team turned up to the State Hockey Centre for our annual game against the Law Institute.

Things did not look good. Clancy, Tweedie, Wood, Parmenter and Michael Tinney, amongst others, were unable to play.

Those named are amongst our fittest and/or more skilful players.

I had vision of a record defeat, but we were buoyed by the return of Hawking and the recruitment of James, O'Neill and Michael Dever.

Michael Dever fortunately is young and can run a lot, the quality most clearly missing in so many of us in the team.

The game started quite brightly but, as usual, Ben Schokman of the solicitors was a thorn in our side. As usual, he controlled the game in mid-field and before long Sharpley was being called upon to make a number of excellent saves. The LIV went ahead about a third of the way through the first half.

Thereafter, however, with Robinson, Niall and Gordon performing outstandingly as inners, we got well into the game. With Riddell and Morgan making good progress down the right, we had some incisive attacks, and following some broken play, Hawking scored an excellent poacher's equalizer.

At half time, much I confess to my amazement, we were still 1-all.

This was despite the fact that the Law Institute team contained, as is generally the case, not just Schokman but a number of other players (both male and female), playing at the highest level. We did well indeed to hold them out.

During the second half, we had a lot of the play. We missed Michael Tinney at

Burchardt – none of the above

In the thick of play

The defeated rabble

The LIV Team – note the obvious comparative youth

centre forward, whose skill as a finisher is renowned. A succession of short corners that we failed to convert and a number of other chances were all spurned.

Inevitably in these circumstances the superior fitness of the Law Institute team was always likely to lead to a further goal, and they scored with about ten minutes to go.

Thereafter, nonetheless, we pressed forward and had further chances to equalize which we were unable to convert.

Quite literally on full time the Law Institute attacked and the ball was raised into James' midriff on the goal line. Under the rules as they now stand, that is a mandatory penalty stroke, and the Law Institute's best woman player managed to score for a 3–1 result that slightly flattered the Law Institute team.

Particular commendation is due to James who played a sterling game on the back line, Elder, who was outstanding at left half, and Sharpley who, once again, had an outstanding game in goal. Everyone who attended played well.

The fact that the score was so close might be said by those who are unkind (or discerning) to be attributable to the possibility that Schokman simply did not put himself out any more than he had to. I am pleased to say that he has left employment with Allens Arthur Robinson and gone to PILCH. This is often a half-way house to coming to the Bar.

I propose to continue playing for a few more years in the hope that Schokman does come to the Bar, for then surely we must exact some measure of revenge.

The game, as always, was expertly umpired by Tony Dayton and Mark Fisher, who scarcely surprisingly chose Schokman to be the winner of the Rupert Balfe Award for best player on ground, for the fifth year in succession.

Those who played were Sharpley, Burchardt, James, Brear, Riddell, Dever, Elder, Evans, Gordon, Hawking, Niall, Robinson and O'Neill.

NEW SOUTH WALES BAR

All arrangements had been made to play the New South Wales Bar at the State Hockey Centre on the Saturday before Cup Day, but in the preceding week Scotting, who organizes their team, informed me that he simply was not able to raise a side. This is unfortunate, as the fixture against them normally allows us to regain some of our battered ego following the LIV game, as well as being a very pleasant social occasion anyway.

We look forward to going to New South Wales next year to play them up there.

PHILIP BURCHARDT

Pizer's Annotated VCAT Act Third edition

By Jason Pizer
Pages i–lxxxviii including Tables of Cases and Tables of Statutes, 1–764; index 765–785

The Jason Pizer publishing empire has struck again. In a swift, certain and timely fashion – timing being of course as vital to success in law as it is in life – the third edition has appeared three years after the second. It is hard to believe that it really is three years since the second edition of this work was published (in 2004, with the first edition in 2001) so rapidly yet surely has the reach and jurisdiction of VCAT expanded, flourished and thrived. Nor is the reach and jurisdiction static; it continues to grow: for example, since June 2007 VCAT has assumed responsibility for hearings previously determined by the Intellectual Disability Review Panel. Amendments and cases arising from this development will no doubt be included in the fourth edition of the work. Whether the dynamism and growth of VCAT has been due in some part to the existence not to mention the stature of this comprehensive work or vice versa is a moot point; perhaps the growth is naturally organic. What is undoubtedly the case is that *Pizer's Annotated VCAT Act* is an absolutely essential resource for anyone practising at VCAT. One could, without fear of hyperbole, go further, and say that a practitioner would be at a positive disadvantage without it, so frequently and authoritatively is it referred to by the Tribunal and its clientele alike as the bible of that bailiwick. As Judge Bowman – at the time of writing, Acting President of VCAT – so aptly puts it in his foreword to this edition: 'From time to time, a legal textbook becomes so well known in its particular area of expertise that practitioners in that area refer to it simply by the name of its author. Archbold and Fleming come to mind. [This work] is rapidly approaching that iconic status.'

VCAT disposes of more than 80,000 cases annually and that number is increasing. After the Magistrates' Court it is the busiest jurisdiction in Victoria and may well exceed the latter court in its civil dispute resolution. It follows from this statistic alone that the potential for significant rulings emanating from VCAT is substantial. What this book does is to locate those relevant authorities precisely on point to the matter at hand and organise and arrange them in a manner which practitioners consulting the Act will find useful, indeed invaluable. Even a cursory glance at this third edition reveals considerable refinements of great ulitity to the practitioner creating a resource which is simultaneously easier to read and easier to locate the direct authority on point. Whereas previous editions listed large numbers of cases, for example, under the annotations for section 109 relating to costs, the cases are now arranged under the respective general and specific factors taken into account by the Tribunal, making the organisation of the cases more focussed so that practitioners can zoom in to the precise point they require for their individual purpose. A similar approach is taken throughout the work in the main sections and is particularly useful for consideration of the principles involved in merits review and the slip rule.

The scholarship of the earlier editions is equally evident in this third edition, and the practical experience of the author at VCAT shines through like a beacon illuminating the dark recesses of doubt. The setting out of the text and type is clear, with the sections of the Act and Rules distinguished by a grey screened background and with the pertinent commentary/annotations following each section. Many of the current owners of a *Pizer* will be grateful for the arrival of a new edition of only on the basis that the earlier one is only hanging on by a thread, so well consulted have its pages been over the past triennium. If you have been putting off securing your own *Pizer*, or the chambers edition is exhorting retirement, now is the time to take the plunge. All amendments to the Act and Rules (1998) and Fees Regulations (2001) have been incorporated to 7 May 2007 and all references to cases are current to 1 February 2007. The work also includes the Forms regularly in use at VCAT for ease of reference. However, by far the greatest feature of the new edition is the greatly increased reference to cases decided by VCAT and taken on appeal to the Supreme Court and Court of Appeal since 2004 and over 2005–07. This alone has increased the volume of the work by about a third over the second edition.

It will be interesting to see how the *Charter of Human Rights and Responsibilities Act 2006* plays out in the VCAT jurisdiction. Something more to look forward to in the fourth edition, perhaps. In the meantime, there is a wealth of new authority to read and digest in the third.

And in a final strike of the Pizer publishing empire (potentially rendering booksellers obsolete?) practitioners who order a copy of the book directly from the author can have it personally delivered to their chambers. A new era indeed.

Further information is available from <wwwpizer vcat.com>.

JUDY BENSON

Australasian Marine Pollution Laws 2nd edition

by Michael W D White
The Federation Press, 2007
Pages v– xxiii, 1–213, Index, 214–232

This book is the second edition of the author's work, *Marine Pollution Law of the Australasian Region*, published by The Federation Press in 1994. Like its predecessor, this book remains the only book dedicated to a review of the Australian and New Zealand laws on this topic.

It will become apparent when reading this book that there is a vast amount of information drawn from a wide variety of sources relevant to this topic. This book has managed to compress the relevant information into a logical and user-friendly format. By way of example, the author has helpfully set out in Appendix 1 a summary of conventions as at 31 December 2006 and in Appendix 2 provided a status of the con-ventions applicable throughout the world. As one can imagine there are many acronyms and abbreviations relied on by the author and again the author has gone to the trouble of setting these out in a table at the beginning of the book.

The 11 chapters of this book provide the

reader with a thorough understanding of the law on this topic with the necessary historical background of how the law has developed to what in this area. It will become an invaluable resource in this important and expanding legal arena.

Since the publication of the author's first book we have seen the introduction and development of the Internet. Where relevant, the author has sensibly provided the Internet addresses in relation to a number of topics and areas of interest so the reader can obtain further and as time passes up to date in-formation.

I commend this book for practitioners with an interest in maritime and environmental law as the most comprehensive and ready reference to the relevant laws on this topic.

SAM HORGAN

Mental Capacity Powers of Attorney and Advance Health Directives

Editors: Berna Collier, Chris Coyne, Karen Sullivan
Federation Press, 2005

Mental capacity, like intelligence, is difficult to reliably measure. It is a variable, easily affected temporarily by things like over-consumption of alcohol or permanently by things like brain damage or illness. Yet, our possession of our own mental capacity is fundamental to our sense of self, as well as to our legal autonomy.

This is an evolving area. Our aging population and better survival rates following life-threatening accidents could lead to an increasing number of persons who lack mental capacity. Likewise, the way the law deals with the property and health care of persons who cannot make their own decisions is continuing to develop.

There is a need to protect the vulnerable who may lack the capacity to act in their own interests. However, this need to protect against exploitation needs to be balanced with the need to protect the individual's right to self-determination and autonomy. The line between the two is determined by means of establishing whether or not the person has mental capacity. The drawing of this line raises many questions, questions that are often as much ethical or medical as legal.

This book provides an overview of the law of mental capacity in Australia with respect particularly to powers of attorney and advance health directives. It sets out the legal requirements and practices, a discussion of the clinical and ethical issues, and an outline of competency testing methods.

This book provides a handy reference tool. It sets out the current tests, and explains how they are applied. It draws together the available case law, and relevant legislation. The fundamental medical information required to attack or defend a person's capacity in litigation are set out.

Each of the eight chapters is written by a different author. Four of the authors are health practitioners, and four are legal practitioners. The diversity and expertise of the authors is impressive.

The variations between the legislation and its interpretation in each State and Territory make hard work for the authors, as they set out in full the position of each State regarding each point. Undaunted, they call on decisions in New Zealand, England, Canada and America to further their discussion. They amplify the text with case examples to assist the understanding.

After reading this book, few practitioners would lightly conclude a client has capacity after a few straightforward questions. A case example is given of an inadequate investigation of a client's capacity. This case involved a lawyer who explained the relevant legal concepts to a client, asking afterward if the client had understood. Each time he was asked if he understood, the client agreed that he had. The solicitor relied on this agreeability, and erroneously treated the client as having capacity. Other examples are given. It becomes very clear that time and care are required to ascertain a client's mental capacity or indeed to identify when professional testing is called for.

The book is published as part of the Australian Legal Monograph Series. It is the intention of this series to publish works which because of the narrowness or brevity of their subject matter would be unlikely to be published otherwise. The topic covered by this book is an admirable choice for publication, and provides a much needed overview of the legal and medical dimensions of this area.

LEONIE M ENGLEFIELD

Lumb & Moens' The Constitution of the Commonwealth of Australia Annotated 7th edition

by G Moens & J Trone
LexisNexis Butterworths 2007
Pages i–xxxix; 1–449; Appendix – Section 92 450–472; References 473–501; Constitution 502–533; Index 535–544

The first edition of this work was published in 1974. Much has changed in constitutional law since then, although the text of the Constitution remains largely unchanged. This work is a commentary on each Constitutional section providing a discussion and cross-reference to cases and scholarly writings relevant to each section.

The introduction covers historical aspects of the Constitution together with discussion of the Federal nature of the Constitution and various conventions and methods or approaches to Constitutional interpretation. A specific appendix is devoted to the jurisprudence of section 92 and a further appendix provides the full text, unannotated of the Constitution.

The current edition includes discussion of a large number of recent important cases such as *NSW v Commonwealth* [2006] HCA 52 (the WorkChoices case), *Plaintiff s157/2002 v Commonwealth* (2003) 211 CLR 476 (privative clauses and section 75 (v) of the Constitution); *Al-Kateb v Goodwin* (2004) 219 CLR 562 (indefinite immigration detention); *Ruddock v Vadarlis* (2001) 205 CLR 694 (scope of executive power) and *Coleman v Power* (2004) 220 CLR 1 and *Mulholland v AEC* (2004) 220 CLR 181 (implied freedom of political communication).

This work provides excellent access for the interested reader to the meaning and operation of the Australian Constitution. The text provides both a commentary on each section and discussion of relevant Constitutional cases. The cross-references in the text allow for further investigation of the particular interpretation of each constitutional provision, starting with Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* published in 1901, through to contemporary writings of current constitutional experts whether published in book form, as journal articles or government publications. There is also reference to materials that can be accessed electronically.

Lumb & Moens' The Constitution of the Commonwealth of Australia Annotated provides an excellent and accessible resource for those interested in Australian Constitutional law. While the text's primary audience will be students, its format, ease of use and extensive reference to other sources of commentary and opinion will make it a valuable work for lawyers, politicians and others interested in this important area of the law and public affairs.

PW LITHGOW

Copyright Law and Practice

By Colin Golvan SC
Federation Press, 2007

It is always a pleasure to see a new contribution to the law of copyright come onto the market, especially from a practitioner who is an acknowledged leader in the field.

Lawyers for whom the law of copyright is something of a closed book will appreciate the style and substance of this handy publication, all the more when the title promises a discussion about the practice of the law in this area.

This reviewer in particular appreciated the simplicity, plain style and uncomplicated analysis of what is a complicated and at times frustrating area of legal method. Making a recondite topic readily comprehensible to those who do not possess the subtle mind of a Lincoln's Inn lawyer is no mean achievement.The complete and utter absence of footnotes is to be not only applauded but warmly encouraged. Its brevity is commended. Legal academics please take note.

The law of copyright is an area of practice for experienced and knowledgeable practitioners. Accordingly, a very real question arises about the audience to whom this publication is directed.

Golvan's publication may well (albeit unintentionally) gird the loins of those practitioners who, knowing little of this area of law, will suddenly consider themselves to be sufficiently competent and knowledgeable to represent clients who come to their offices with allegations of copyright infringement. This is both a compliment to the author and a criticism of the nature of the text.

Perhaps the book should appendix a list of experienced counsel who practise in this field. The Bar is unlikely to raise too many, if any, objections and members of the public may benefit.

There are a couple of questions that this reviewer immediately thought of when handed the book for review. Both questions arose from a casual pre-lunch shufti of the 'artwork' on book's cover.

First, is the work of so-called 'graffiti artists' protected by the law of copyright and, if it is, why isn't the government doing something about it?

And second, what are the required or necessary cultural underpinnings of the law of copyright? Are pictorial or three-dimensional representations of inarticulate grunts and roars (such as were in abundance at the recent Guggenheim Exhibition at the NGV) sufficient of themselves to attract or merit the protection of the law of copyright?

Regrettably, the answer to both questions seems to be 'Yes', but that probably has more to do with a pervading crisis and lack of confidence in Western culture than with the law of copyright.

Finally, one must mention the Foreword by the Honourable Justice Crennan. It is pleasing (and increasingly rare) to read the words of a judge that not only flow, but flow for such a short distance. It is to be hoped that this is the harbinger of the style, form and content of future pronouncements from the High Court.

NEIL MCPHEE

Australian Corporations Legislation 2007

LexisNexis Butterworths, 2007
Pages 1–2514, Index 2525–2633

With the commencement of operation of the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* on 15 July 2001 Australia had its first true national regulation of its corporations and financial markets by the Commonwealth Parliament. This position was arrived at by the States referring certain of their legislative powers pursuant to section 51 (xxxvii) of the Constitution to the Commonwealth Parliament and was the culmination of a long series of attempts at national company legislation that had its genesis in the 1961 uniform companies legislation.

Since 2001 further amendments have been made to the Corporations Act and indeed further changes are proposed (see for instance the Corporations Amendment (Insolvency) Bill 2007 currently before the Parliament) although generally Australian corporations legislation has remained without significant amendment since 2001. Further fine tuning and indeed substantial amendments may be enacted in the future, however much of the substantial 'renovation' of corporations and securities law in Australia took place during the 1990s both by and as the result of various court decisions and as a consequence of several high-level reviews of the corporate law regulatory regime in Australia.

Usefully LexisNexis Butterworths brings together in one volume the full text of the *Corporations Act 2001*, the *Australian Securities and Investments Commission Act 2001*, together with various regulations and ancillary Acts.

The text also contains useful commentary of the historical background and legislative structure of the previous corporations regulations regimes, and each chapter of the Corporations Act has a brief outline of the subject matter of the chapter.

For those requiring details of the legislative history of the Corporations Act there are several tables of changes which list the correlation between the provisions of the former Corporations Law and major amendments to the Corporations Act since 2001.

To aid the usefulness of the work there is a comprehensive index that refers the user to the relevant sections and regulations. The currency of the text is all legislation gazetted at 1 January 2007.

This excellent reference brings together in one volume Australian corporate law and securities legislation. The user can be confident that the legislation is up to date, easily accessible and able to be cross-referenced to the previous legislative regime. Amendments to the current regime are easily traced. This work is to be commended to all those who need a ready reference to Australian's major corporate legislation.

PW LITHGOW

– all you ever wanted to know about Australian criminal law, and a good deal more

A book review by Peter Vickery QC (illustrated by Patrick Cook)

Ross on Crime 3rd edition[1]

by David Ross
Lawbook Co, 2007
1433 pages, RRP $180

In this latest edition of his now famous work, David Ross QC exploits to the full his fecund talents as a legal writer and continues to evince a magpie's taste for the law. The volume spans a vast array of subject matter, from the high art of cross-examination to the social ills of overcrowded prisons, from the *res gestae* exception to the hearsay rule to the Kriol language spoken across the top end of Australia. Seasoned with plenty of pungent anecdotes drawn from the case law, a learned discussion of the principles and practice of the criminal law is brought alive.

Ross on Crime may be described as a 'commonplace' legal textbook. In an earlier era, commonplace books were what blogs and MySpace pages are today. They were collections of observations, clippings, quotations, proverbs, maxims and anything else that someone found worthy of saving for future reference or sharing with friends.[2]

In 1970 WH Auden, one of the greatest writers of the last century,[3] published a commonplace book, *A Certain World*.[4] This book contains quotations selected by Auden with his commentary, all arranged in an alphabetical sequence of topics from 'Accedie' to 'Writing'. Auden's book is the closest he would ever come to writing an autobiography; it was, as he wrote in the foreword, 'a map of my planet'.

In his textbook, David Ross QC has mapped his own professional world – an eminent career occupying some 40 years of practice at the criminal Bar. 'Why did you write it?' Ross was asked. 'I didn't', the response chipped in as quick as a flash 'It came about by accident. I'd been keeping track of the authorities for years and years. I still have the original thing'. Ross then paraded on his desk a decomposing bundle of hand drawn notes, reminiscent of Captain Cook's log after his return from Tahiti. The notes were neatly arranged with the precision of a 18th century naval navigator, each behind its allotted tab in alphabetical order. The depth of the content as much as the idiosyncratic calligraphy was remarkable. Like botanical specimens preserved in amber, the records of Cook's voyages capture a lifetime of experience[5] – so too with Ross's journal.

Matters could not rest there. As Ross explained:

> One of the blokes said if you can put it in a form we can understand, I will put it on the computer. A representative from the Law Book Company turned up. She dropped in to say hullo. Her name was Niloufer Selvadurai. She had a mind like a steel trap. Someone said, why don't you publish Rossy's work? I didn't think twice about it. The next thing I knew was that the first edition was published as a looseleaf by the LBC in 1998. Niloufer had done a wonderful job with my notes. It actually looked quite presentable. Now there have been over 30 updates on-line and the third edition in soft-cover has been produced this year.

'Like botanical specimens preserved in amber…'

Ross on Crime is a reservoir of learning on every aspect of the criminal law imaginable. This can be illustrated by reference to two chapters of which the author is justly proud, or in his words, 'rather pleased about': the chapter on 'Liberty' and the chapter on 'Justice'. Although these chapters occupy a modest two pages each, they are power packed with statements of principle.

'Liberty' commences where many would say it should, with a quotation from the French revolution: '*Ö liberté! Ö liberté! Que de crimes on commet en ton nom!*' ('Oh liberty! Oh liberty! What crimes are committed in thy name!')[6] It then moves to some current and, critically for our day, highly relevant observations of the High Court in *Williams v The Queen* where Mason and Brennan JJ said:[7]

> The right to personal liberty is, as Fullagar J described it, the most elementary and important of all common law rights… Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England without sufficient cause.

The 'Justice' chapter opens with the seminal text of Lord Hewart CJ in *R v Sussex JJ; Ex parte McCarthy*[8] where his Lordship said: 'Justice should not only be done but should manifestly and undoubtedly be seen to be done.' The chapter then travels to the familiar passage of Dawson, Gaudron and McHugh JJ in *Queensland v JL Holdings*[9] warning that case management is not to supplant justice. This well trodden reference is then counterbalanced with a humorous reminder drawn from *The Devil's Dictionary*,[10] where 'Justice' is defined as: 'A commodity which in more or less adulterated condition the State sells to the citizen as a reward for his allegiance, taxes and personal service.'

Ross on Crime, however, goes well beyond legal theory underpinning the criminal law. It is, above all, a practitioner's handbook without parallel, and a rip-snorting read into the bargain. 'Once upon

a time practitioners used to ring me up to ask about the law,' Ross explained. 'After reading my book, they now call me to talk about the tactics.'

Judge Smallwood of the County Court of Victoria is reputed to take nothing else onto the bench with him, and this is so whether His Honour is presiding over a criminal trial or a civil trial. 'It provides the answers to questions no one else has ever thought of,' His Honour says. In this respect it is notable that the only, and obviously unintended, reference to Judge Smallwood in Ross's work, appears under the chapter heading devoted to 'Ignorance'.[11] Whatever idle inferences are sought to be drawn from the unfortunate siting of this reference, the wisdom of His Honour's practice as an example to all on the bench and at the Bar is beyond question.

In 2002, Martin Fisher, a Northern Territory prosecutor, said about the book:[12] 'Open it at any page, at any topic, at any time. Read it on the bus. Read it on the loo. Browse. Read it in short bursts and then ponder, but read it.' With similar enthusiasm, but in a contrasting passage which is commendable for its judicial restraint, Nettle J said of Ross's work in *R v Alipek and Saltmarsh*:[13] '…a leading text on the practice of criminal law in this State'.

Among its other virtues, *Ross on Crime* is a treasure house of hand-picked judicial observations on all manner of things. Under the section heading 'Classical music'[14], take for example the summary of facts described by Charles JA in *R v P avlovski*[15] where his Honour spoke of cannabis production in that case: 'The search uncovered an elaborate hydroponic arrangement…Classical music was being played to the plants in every room and they were showing their appreciation of Mozart by growing profusely.' As to the principles of causation cited by Ross,[16] one is hard pressed to go past the observations of du Parq LJ in *Gibby v East Grinstead Gas and Water Co*,[17] where His Lordship is noted as having said:

> In happier days this case would have been tried before a jury…it may be believed with some confidence that the jury would have been spared any subtle or complicated direction. Unless the trial had taken place in a university city and it happened that the jury was composed mainly of philosophers and logicians, I doubt if a discussion on the theories of causation would have either assisted or interested them.

'…I doubt if a discussion on the theories of causation would have either assisted or interested them.'

A characteristic of Ross's work is the humour, which bubbles to the surface at every turn of the corner in this theme park of the criminal law. We challenge the medical profession to attempt a similar approach with *Gray's Anatomy*.

The chapter on 'Jazz' is an example. Wedged between 'Issue Estoppel' and 'Joinder', the reader stumbles upon this remarkable segment.[18] A range of topics is discussed: People of Jazz; Musicians shot dead; Musicians who gave up law for music; and Ballads and musical instruments proscribed, to name but a few. In each case a somewhat strained link to the criminal law is attempted, no doubt in an effort to maintain consistency of subject matter. Relevant case notes and legislation are carefully noted wherever possible. There is a reference to the colourful observations of Fullagar J in *Scott v Numurkah Corporation*,[19] where his Honour said: 'The strains of a lilting waltz may make no impression in the hero or villain of a raucous and boisterous drama, whereas the pathos of a heroine with a voice like Cordelia's may be murdered by an unholy conspiracy of saxophone and drum.' However, the practical utility of the 'Jazz' chapter cannot be overlooked. It is reported to provide an essential literary refuge for both the Bench and the Bar during sieges of long-winded advocacy in court.

David Ross is a man of law and a man of letters. His book is usefully set out under headings in alphabetical order. In this respect, Ross well surpasses Auden's *A Certain World*, which is an enduring disappointment because it happens to end merely with 'W' for 'Writing'. Not to be outdone, *Ross on Crime* ends its principal text with 'Z' for 'Zoneff Direction'. In this respect, the work is a rarity and its value as a collectors' item inestimable.

Indeed, it does not stop at 'Z'. Appendices 'A' to 'F' are of great value to practitioners, covering topics such as: Words and Phrases; Latin; Preparation Checklists and Authorised Report references. The section on Legal Writing is especially important. The first principle advanced, and faithfully applied by Ross in his work, is:

> …aim…to be easily understood. Even complex ideas can be expressed simply without being superficial or simplistic. W Somerset Maugham said: 'If you could write lucidly, simply, euphoniously and yet with liveliness you would write perfectly…A good style should show no effort.'

No review is complete without at least an attempt to be critical. In order to preserve a semblance of objectivity, two observations are offered – even if the result is praising by feint criticism. The first is that while practitioners and students of the law would certainly benefit from reading *Ross on Crime*, its interest for a general audience is less evident. Second, as Ross candidly confesses (as if the owner of *Beer Street* noted fatigue in the saddle cloth after it won the Caulfield Cup[20]) 'the softcover wears thin after a while in constant use'. In order to overcome this apparent shortcoming, Ross helpfully counsels the application of a plastic covering.

By way of conclusion, David Ross would have to be one of the best legal authors presently writing in English. With its encyclopedic length and the range of its

'…the practical utility of the "Jazz" chapter cannot be overlooked.'

ideas, *Ross on Crime* is not to be read at one sitting. It is to be dipped into over weeks and months and years. If a question mark is occasionally raised for the dipper, far more often the text is a source of delight in finding the answer; and, best of all, it is delight inspired by the wisdom of a lifetime of learning, seamlessly graced with welcome and abundant good humour.

NOTE: For those who like a statistic for every occasion, the following *meat pie statistics* are provided:

> 'Meat pie statistics' is a phrase coined by Heerey J in the course of ex tempore observations made in *Henderson & Ors v Amadio Pty Ltd & Ors* [1995] 1029 FCA (23 November 1995), where His Honour likened the statistics compiled to illustrate the legendary dimensions of that case to the number of meat pies consumed at an AFL grand final.

NOTES

1 *Ross on Crime,* 2007, Third Edition, David Ross QC, Lawbook Co.
2 See: *International Herald Tribune*, 21 March 2007, article by Michiko Kakutani.
3 Wystan Hugh Auden (21 February 1907 –29 September 1973) who signed his works WH Auden, was an Anglo-American poet, regarded by many as one of the greatest writers of the 20th century.
4 *A Certain World: A Commonplace Book*, by WH Auden, published in 1970, The Viking Press N.Y.
5 JC Beaglehole ed., *The Journals of Captain James Cook on his Voyage of Discovery* (3 vols, in 4, Cambridge, 1955–69)
6 Cited in *Ross on Crime*, 2007, Third Edition (2007) p. 749 [12.700] Mme Roland (Marie-Jeanne Philipon) 1754–1793, French revolutionary, reported in A de Lamartine *Histoire des Girondins* (1847) Bk 51, ch 8.
7 *Williams v The Queen* (1986) 161 CLR 278 at p. 292.
8 *R v Sussex JJ; Ex parte McCarthy* [1924] 1 KB 256 at p. 259.
9 *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at p. 154.
10 A Bierce, *The Devil's Dictionary*. Volume VIII The Collected Works of Ambrose Bierce, Neale Publishing Co, New York, 1911 (first published 1906 as *The Cynic's Word Book*).
11 Ibid at p. 587 (This observation is made with the knowledge and blessing of his Honour, and, like the siting of the reference to Judge Smallwood in *Ross on Crime* under the chapter heading 'Ignorance', means to convey no disrespect, and no offence is taken.)
12 *Balance NT* November 2002 p. 26.
13 *R v Alipek and Saltmarsh* [2004] VSC 58, paragraph [8].
14 Ibid at p. 657 paragraph [10.135].
15 *R v Pavlovski* [1998] VICSC 70 (7 May 1998) (CA).
16 Ibid at p. 193 paragraph [3.510].
17 *Gibby v East Grinstead Gas and Water Co*, [1944] 1 All ER 358 at p. 363.
18 Ibid, commencing at p. 655.
19 *Scott v Numurkah Corporation* (1954) 91 CLR 300 at pp. 316–317.
20 James D Merralls AM QC was a part owner of *Beer Street* in 1970 when it won the Caulfield Cup in Melbourne, ahead of *Arctic Circle*. Any suggestion that Merralls actually noted fatigue in *Beer Street*'s saddle cloth on this celebrated occasion is pure fantasy.

Lawyers in Australia

By Lamb and Littrich
Federation Press, 2007

Lawyers in Australia, as the title suggests is a book about lawyers, their role in society, the legal profession and its ethical and structural frameworks. The book is divided into two parts. Part 1 examines the sociological context of the legal profession. Here the authors consider issues such as how lawyers influence society through their work, their role in law reform and social justice.

After a brief look at the historical background, the book considers the 'culture' of the legal profession, and asks if the gradual changes in social, gender and ethnic profiles of Australian lawyers have made, or will make, any difference. The discussion of the effect of women in the traditionally male dominated profession is interesting. The authors cite the psychologist Carol Gilligan, whose hypothesis that 'there is a male model of moral reasoning based on an abstracted "universalistic" application of principles or rules – epitomized in legal education – which compares to a female "ethics of care" based on a contextual form of reasoning that focuses on people as well as the substance of the problem', smacks of Essentialism in my humble opinion. Yet, on the other hand, it is difficult to ignore Justice Michael Kirby's lamentation that in his experience after ten years on the High Court: 'few female advocates have had speaking parts'.

The authors also examine the 'corporatisation' of the legal profession, the role of the judiciary, access to justice (or to the courts), and 'justice' itself, noting perceptively as has been said that 'all legal cases deal with the acquisition, protection or dispossession of one or more of three things – power, money and respect'.

In Part 2 the book turns to the 'ethical context in which the legal profession operates.' The authors refer to this as the 'duty matrix' or the 'professional responsibility' framework encompassing duties to the court, the client, the profession, third parties, and to the community, and chapters are devoted to each topic.' In these chapters the legislative regulation of the 'Australian' legal profession is also examined. And this is where the book has a few problems. Although the authors refer to the Model Provisions (the prototype for adoption as uniform State laws), the reference point is principally that of the New South Wales *Legal Profession Act 2004*. This results in some confusion. For example, the authors write: 'Those presiding over courts of summary jurisdiction are usually called magistrates, and referred to in court as "Your Worship."' A footnote states that in NSW, magistrates are now addressed as 'Your Honour'. Of course, magistrates in Victoria have been addressed as 'Your Honour' since 6 September 2004.

The book also highlights a curious paradox. In Chapter 1 it is said lawyers are commonly perceived as 'elitist, aloof, greedy and devious'. Further on, however, in the chapter on the judiciary it is pointed out that 'public perception of the levels of professionals' ethics and honesty consistently place Supreme Court judges and High Court judges among the top ten professions most trusted in our society'. Weren't judges lawyers once?

Although the book is designed primarily for undergraduate law students who must study Professional Conduct – or Legal Ethics as it is sometimes called – alongside their core subjects, it would also be a useful text for graduates undertaking practical legal training courses. Instructors in both areas would find it extremely helpful given that at the end of each chapter there is a series of questions for seminar discussion and further research by students.

JENNIFER DIGBY

Limitation of Actions – The Laws of Australia, Second Edition

By Peter Handford
Lawbook Co, 2007

This book is also published as Subtitle 5.10 of The Laws of Australia encyclopaedia. As a result, all references in the book commence with the numbering 5.10.

The book claims to be the only current and comprehensive study of limitation periods across all Australian jurisdictions.

The book contains eight chapters: 1. Introduction, 2. Limitation Acts, 3. General Principles, 4. Contract, also Tort and Related provisions, 5. Property, 6. Other Provisions, 7. Extension or Postponement of Limitation Periods and 8. Procedural Matters.

The book also contains a very useful and very comprehensive reference table of all limitation periods for different classes of claim applicable in Australia. As a result the actual text commences on page 53, with the introduction.

The author states:

> Limitation of actions may appear on the surface to be the blackest of black-letter law, an endless succession of cases and statutory provisions, but in fact the rules cloak many policy issues of great complexity and the utmost social importance. By way of example, the law of limitation sets limits to the compensation rights of those who suffer latent but insidious diseases such as asbestosis, mesothelioma and the like; victims of child abuse, the full consequences of which only emerge many years later; home owners whose houses have been badly built and begun to fall down; and people who suffer loss due to professional negligence. It can be argued on behalf of all of these classes of potential plaintiffs that the time allowed them by the law for initiating an action should be long enough to provide them with an adequate remedy. However, the law must also give appropriate weight to the interests of potential defendants, by setting limits to the length of time for which they remain at risk of being sued and attempting to ensure that actions are brought promptly.
> (Preface p. v).

The book is set out with statements of general principle at the start of a topic in bold, followed by a more detailed analysis of the topic. For example, in the chapter in property, under the heading 'land' and the sub-heading 'general' the statement of general principle is:

> Actions to recover land may not be brought more than 12 years (in New South Wales, Queensland, Tasmania and Western Australia) or 15 years (in South Australia and Victoria) from the date on which the right of action first accrued to the plaintiff, or to some person through whom the plaintiff claims.

The detailed analysis then provides four paragraphs of detail, with numerous references cited for each statement of principle.

The work seeks to provide an integrated study of the statute and case law on limitation of actions in the Australian States and Territories, arranged logically and identifying developments common to all or some jurisdictions whenever possible (Preface p. v).

The work is comprehensive, and is a useful reference or starting point to identify the limitation period for any potential claim, as it includes relevant case and statute law.

WILLIAM STARK

Disputes and Dilemmas in Health Law

Edited by Ian Freckelton and Kerry Petersen
Federation Press, 2006
Pages i– xxxv including Tables of Cases and Tables of Statutes and Contributors, 1–652; bibliography 653–682; index 683–698

This is a new edition of a work previously published under the title *Controversies in Health Law*. Whether the controversies have simply transmogrified into disputes and dilemmas – and whether this is a distinction without a difference – is a moot point. What is unassailably the case is that this text has now expanded into 30 substantial chapters from 36 eminent contributors drawn from the ranks of lawyers, health professionals, academics and policy-makers. It endeavours, indeed succeeds, in conveying something of the panoramic scope of a field – health law – which encompasses many and varied aspects of the practice and discipline of law, including tort, contract, equity, commercial and tax, administrative law, family law, child protection, IP and crime.

The book aims to inform, provoke and stimulate reflection on a wide range of current issues and concerns in the area of health law. Where the individual contributions in the collection are particularly useful is this: in their dissertations, the authors survey not only the state of play in the areas of discussion, but also respond to the editors' insistence that authors engage with questions of future trends and where the topic is heading, whether that be dilemmas in the provision of clinical treatment or the ethical consequences of scientific capacity and the challenges that poses to public debate and policy. That leads to the question of how the 30 chapters are organized, and the answer to that is nine key areas, being: ethical frameworks and dilemmas; human rights and therapeutic jurisprudence; public health; reproductive technologies; research and vulnerability; the sequelae of the end of life; litigation and liability; regulation; and information, privacy and confidentiality.

There is huge scope in this work for practitioners to find something of relevance and assistance to them, be it on subjects such as issues raised by new technologies, changes to legislation, changes in community expectations, the new regulatory processes for medicine and other health professions, changes to the area of civil liability for medical negligence, and the fierce debate over the role of coroners. Topics range from cloning and stem cell research, gene patenting, organ donating and transplanting, and mad cow disease, to competency concerns for young persons and older persons, international trade agreements and the practice of medicine and genetic privacy, discrimination and insurance. These name only a few areas covered.

It is a very readable collection. It is thoroughly erudite. Its scholarship and learning is evident throughout. It is extraordinarily well footnoted and referenced. The bibliography alone runs for 30 closely set pages, and provides a wealth of further reading on the topics covered. It comes highly recommended by this reviewer.

JUDY BENSON

Benjamins Jewellers

COURT DRESS

Cultured pearl
8.5mm – 9mm
necklace and gold clasp.
RRP $3,950.

Longines ladies and gents watches
RRP $1,395 each.

1.24ct diamond
pavé set bangle
RRP $3,400.

Pink sapphire
and diamond
set ladies
dress ring.
RRP $3,500.

Blister pearl stud earrings. RRP $800.

Merchants in fine jewellery,
watches and distinctive gifts since 1880.

368 LITTLE COLLINS STREET MELBOURNE 3000 TELEPHONE +613 9670 9416 FACSIMILE +613 9670 3936