VICTORIAN BAR NEWS

No.150 Summer 2011

150!

Another Milestone

ISSN 0159 3285

DYNAMIC IN ITS MOST BEAUTIFUL FORM.

The all new BMW 5 Series is a harmonious balance of design, innovation, performance and tradition. Its perfect proportions provide class leading functionality with the efficient and dynamic drive that is synonymous with a BMW.

The all new BMW 5 Series is further enhanced with the member benefits of the BMW Corporate Programme. As a member of the Victorian Bar, you will receive complimentary scheduled servicing for 4 years/60,000km, corporate pricing*, reduced dealer delivery fee and a reduced rate on a BMW Driver Training course with the purchase of your new BMW. In addition, your spouse can also enjoy all these benefits when they purchase a new BMW. The BMW Corporate Programme is an exclusive way to lower your cost of ownership and enjoy special benefits, making it the smartest way to get behind the wheel of the Ultimate Driving Machine.

Find out more information by visiting bmw.com.au/corporate or contact your preferred BMW Dealer today.

THE ALL NEW BMW 5 SERIES. BMW CORPORATE PROGRAMME.

BMW EfficientDynamics
Less consumption. More driving pleasure.

The above benefits apply to the purchase of a new BMW from September 2010 and only to the vehicle purchased. Terms and conditions apply and can be viewed at bmw.com.au/corporate. *Selected models only.

BMW11798_VB

VICTORIAN
BAR NEWS

No. 150 Summer 2011

Victorian Bar Review

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

This publication of *Victorian Bar News* may be cited as (2011) 150 Vic B.N.
This edition of *Victorian Bar Review* may be cited as (2011) 1 VBR.
Opinons expressed are not necessarily those of the Bar Council or the Bar or of any person other than the author.

Advertising
All enquiries including requests for advertising rates to be sent to:
Miriam Sved
The Victorian Bar Inc.
205 William Street, Melbourne 3000
Tel: (03) 9225 7943
Email: miriam.sved@vicbar.com.au

Design and Production
Avalanche Creative Solutions Pty Ltd; www.avalanchecreative.com.au

Contributions
All contributions to *Victorian Bar News* should be in word format and are to be emailed to admin.assistant@vicbar.com.au. VBN Boilerplate submissions should not exceed 400 words. All articles submitted for consideration for publication in *Victorian Bar Review* should be in word format and conform with the style guide prescribed by the Australian Guide for Legal Citation (http://mulr.law.unimelb.edu.au/files/aglcdl.pdf).

Cover Photo
The Editors of *Victorian Bar News* 1971-2011, L to R:
The Hon Peter Heerey QC, Paul J Hayes, Gerry Nash QC, Paul Elliott QC, The Hon David Byrne QC (Absent: The Hon Haddon Storey QC, Georgina Schoff SC, Judy Benson, David Henshall; Deceased: The Hon Sir Richard McGarvie AC KStJ QC, Robert Johnston, David Ross QC).

Forty Years and Nearly 150 Editions

Editorial

Welcome to the not quite 150th edition of the *Victorian Bar News*... Milestones in numerous fields of endeavour are regularly observed and often celebrated. They give pause for reflection and allow the observer to contemplate the future while reminiscing the past.

As *Victorian Bar News* was about to publish what was thought to be the much anticipated 150th edition, the enjoyable task of carefully looking back on editions past in the course of preparing an article detailing the history of *Victorian Bar News*, revealed an inconvenient and amusing truth resulting in what can only be described as a Pythonesque outcome. It was deadline day. Virtually all of the copy for the 150th edition had been submitted, the layout was almost complete, advertising had been booked and paid for, the printers were on stand-by and the special 150th edition celebratory cake and champagne were about to be devoured by some of the former Editors of *Victorian Bar News*, when suddenly it was brought to our attention that this edition, the 150th, was not the 150th, but was in fact the 149th!

Ross Nankivell's outstanding research undertaken for this milestone edition of *Victorian Bar News* disclosed that back in Spring 1986, an error was made in the numbering of edition number 57 of *Victorian Bar News*, which was mistakenly numbered edition number 58. This error was then carried forward, undiscovered until now, for almost twenty-five years and ninety-one editions.

The lead article appearing in this edition which details the history of *Victorian Bar News* and its remarkable evolution (which was meticulously researched and compiled by Ross Nankivell of the Victorian Bar Office), illustrates that the production of *Victorian Bar News* over time has often been pleasingly hallmarked by trial and error and amusing incidents. This edition, the 150th numbered edition, is one such humorous quirk or error, which in the interests of tradition and convenience will be let through to the keeper as we proceed to celebrate this milestone edition, notwithstanding.

The rogue edition,
VBN No. 58, Spring 1986.

This edition of *Victorian Bar News* is also significant for another reason, as it contains the first edition of the *Victorian Bar Review*. The *Victorian Bar Review* is intended to operate as a distinct legal journal within *Victorian Bar News*, in which contributions addressing current issues of legal principle or jurisprudence will be published. We are delighted that Baron Walker of Gestingthorpe and Jonathan Beach QC are featured in this first edition of *Victorian Bar Review*.

Victorian Bar News plays an important role at the Victorian Bar. It informs members of the work undertaken by the Victorian Bar Council and also the professional and social activities of their colleagues. It is a platform for the Bar's public voice and is a means through which the Victorian Bar and its members can be promoted within and beyond Victoria. It also fosters collegiality amongst members of the Bar which is becoming increasingly important as the Victorian Bar becomes more fractured geographically by chambers and by speciality.

The voluntary task of producing *Victorian Bar News* is an enormous one. Many who have been involved in the production of *Victorian Bar News* agree that the job can be often frustrating and time-consuming, sometimes it can be irritatingly political, but it is always fun and extremely satisfying once each edition lands in members' pidgeon holes.

As the current Editor of *Victorian Bar News*, I sincerely thank everyone who has been involved in or contributed to the production of *Victorian Bar News* over the past forty years.

After forty years and nearly 150 editions, I am sure the readers of *Victorian Bar News* will all unanimously agree that it is a milestone worth celebrating.

Paul J Hayes

Letter to the Editor

Dear Editor,

I am not a great fan of the revamped journal however I recognise that different editors have different approaches to the task neverthless I raise a voice of protest at the latest (Autumn) edition and its appalling choice of font. Whether the downsizing was a nod to style or an attempt to cut down on the total number of pages in an edition its effect is significant eye strain compared to previous editions.

I would very much appreciate a speedy reversion to a point size and font style more conducive to the relaxed read that the News in its current form is supposed to provide.

Sincerely,
Sam Tatarka

The font point size has been increased in this edition of *Victorian Bar News*.

- Editor

Change and Continuity

Chairman's Cupboard

I congratulate the editor of Victorian Bar News, Paul Hayes, on this milestone edition of the journal. Thanks must also go to the distinguished past editors of the publication. Both the current editor and past editors have devoted an enormous amount of time to the preparation of the journal for publication and we, the members of the Bar, owe them a great debt.

Change of State Government

One of the significant events of recent months has been the change of State Government and with that, the swearing in of a new Attorney-General, the Honourable Robert Clark MP. I was grateful for the opportunity to meet with the new Attorney-General late last year, and discuss some of the Government's policies in relation to the justice system, which include the introduction of a Courts Executive Service, the establishment of a Judicial Commission to deal with complaints against judges and tribunal members (but keeping the Judicial College of Victoria as a separate educational body), and re-introducing the practice of utilising retired judges as reserve judges (but not having acting judges). We look forward to contributing to the development and implementation of the Government's policies in these and other areas.

National Profession Reforms

The Bar Council has been active in considering the proposed national profession reforms, which are the subject of a separate article in this edition.

ABA Advanced Advocacy Course

The ABA Advanced Advocacy course took place in Melbourne during January. From all reports, the course was extremely successful. It included about 38 participants from around Australia and New Zealand, and 21 'coaches'. The coaches included Silks from the United Kingdom, South Africa and New Zealand as well as Judges from NSW and Western Australia. There were also three highly regarded performance coaches teaching at the course including one from the USA. Victoria's new Attorney-General very kindly attended the final dinner as the key note speaker and presented the certificates to the participants.

The ABA organisers (led by Phil Greenwood SC, from the New South Wales Bar) praised the hospitality of the Victorian Bar, and the facilities of the Essoign Club and the Federal Court of Australia, which were made available for the course.

The Supreme Court kindly agreed to let us use the Supreme Court Library for a cocktail function. I would like to thank Will Alstergren, William Lye and the staff of the Bar Office for their invaluable work, which enabled the course to be so successful. The ABA has decided to hold the course in Melbourne again next year, and I would strongly encourage members of the Bar to consider attending.

Bar Council projects

Two projects which have been in train for some time, and should come to fruition over the next few months, are the review of the clerking system and the review of the Silks selection process. In relation to clerking, the working group is soon to publish to members a discussion paper setting out its proposed recommendations and provisional views, and seek submissions. In relation to the Silks selection process, a small working group comprising Melanie Sloss SC (as Senior Vice-Chairman), Michael Colbran QC (as Immediate Past Chairman) and me has been considering these issues, with the assistance of Keith Mason AC QC (former President of the New South Wales Court of Appeal) and Dr Rufus Black (Master of Ormond College). We have received a number of submissions and have met with a number of members of the Bar and judges.

One of the significant projects for the coming year will be the introduction of exams for the Readers' Course and changing the structure and content of the Readers' Course. These follow a review of the Readers' Course carried out last year. The exam will cover evidence, procedure and ethics and a mark of 75% or more will be required to enter the Readers' Course. Another significant project over the coming year will be the further implementation of the Bar's marketing plan. The Bar Office aims to work with the clerks and the Bar Associations to improve the quality and consistency of marketing efforts on behalf of barristers.

Thank you

I would like to acknowledge the dedicated service of Michael Colbran QC as Chairman of the Bar Council last year, and to thank the other members of the Bar Council who retired at the last election, Sara Hinchey, Anthony Strahan, Simon Pitt and Richard Stanley. I also thank the retiring Honorary Secretary, Stewart Maiden, for the considerable assistance he provided to the Bar Council. An important part of the work of the Bar is carried out by the Committees. I thank the retiring Chairs and members of the Committees for their hard work and contribution to the Bar.

Mark Moshinsky SC

Victorian Bar News: A Remarkable Evolution

1971 - 2011

The first edition of *Victorian Bar News* was published at Easter 1971 – the only issue, at least to date, titled by reference to the church-based terms of the English legal year: Michaelmas, Hilary, Easter and Trinity.

The first edition, No. 1.

It was the Victorian Bar Council newsletter to members of the Bar. The number of members on the practising list had significantly increased that year to 453 barristers. From an average of about thirty two each year for the previous four years (including interstate counsel signing the Victorian Roll), fifty-one people had signed the Roll that year – all Victorian counsel.

The Annual Report that year described the purpose of the quarterly newsletter "to enable members to be better informed of [Bar Council] activities".

"'What's the Bar Council doing about it?' has long been the cry of members of the Bar." This was the first sentence of the first edition of *Victorian Bar News*, Easter 1971. "This question has often been provoked by a desire to know about ethics rulings, investigations, representations to various authorities, procedural problems and sundry matters affecting counsel which have been or ought to have been the subject of the Council's attention. By means of this quarterly publication the Bar Council hope to keep the Bar informed of these matters. This will be done by providing a brief account of the rulings made and other matters of interest." The two Co-Editors of the newsletter were the late Honourable Sir Richard McGarvie AC KSt J QC (former Chairman of the Victorian Bar Council, Justice of the Supreme Court of Victoria and Governor of Victoria) and the Honourable Peter Heerey QC (retired in February 2009 after more than eighteen years as a Justice of the Federal Court of Australia and now returned to the Bar), both of whom were members of the Bar Council at the time.

Each of the first four editions was in a variety of different type-scripts, mostly 'Indigo Serif', and was roneoed. Projected as a 'quarterly', the first two editions were published in Easter and in July, 1971, each consisting of four small pages. The third edition was not until May 1972, nearly a year later and was a twenty page catch-up edition before reverting back to five pages in September 1972.

The fifth edition, first quarter March 1973, was the first printed edition – still small pages, but printed pages, most in double columns and twenty printed pages in total. The fifth edition also added a crossword puzzle. The crossword as it was named in the seventh edition, was entitled 'Captain's Cryptic' and became a regular feature lasting for more than sixteen years, from the fifth edition, March 1973 to edition number 68, Autumn 1989. Until the retirement of the Honourable David Byrne QC (former Justice of the Supreme Court of Victoria having recently retired after a distinguished nineteen year judicial career) and the late David Ross QC from Co-Editorship, preparation of the 'Captain's Cryptic' was an ongoing labour of love by David Ross.

The sixth edition saw the first cartoon to be published in *Victorian Bar News*, a full-page illustration by 'Croc' better known as now-retired County Court Judge Graeme Crossley QC. A barrister is speaking sternly to his client – the client attired as Superman: "Sure, you look great – but it'll ruin your alibi!". The most prolific *Victorian Bar News* cartoonist over the years was 'Croc'. Crossley was also on the Bar Centenary Committee and created the line of dancing barristers cartoon for those celebrations which is now the logo of the Essoign Club.

The Essoign Club logo, Croc's most famous illustration

Common Law? Still relevant cartoon from Edition No. 19, March 1977

The next cartoons did not resurface until the ninth edition, more than a year later, after which they were a regular feature. Cartoons and sketches continued to edition number 66 and ran for fourteen years, from September 1974 to Spring 1988, and survived in Ron Clarke's sketches of the 'Bar News Personalities' of the Quarter in editions numbered sixty-seven

to eighty from Summer 1988 to Autumn 1992 and have reappeared in edition numbers 149 and the current 150th edition. Others who contributed cartoons and sketches include: Ron Clarke, David Drake, Andrew Evans (Paul Elliott QC's brother-in-law, a Tax Inspector in England), the late Lewis King, the late Carl Price, and the late David Ross.

Before going commercial with magazine production, David Henshall (who had joined Byrne and Ross as Co-Editor for a number of editions in 1977 and 1980-81) continued to do covers, lay-out and design. In the era of commercial production which emerged in the mid-eighties, magazine design and layout has been capably overseen by Ron Hampton and more recently, Peter Colpman and Ern Mei Lee.

McGarvie and Heerey co-edited *Victorian Bar News* through its first seven editions from Easter 1971 to September 1973. They took it from four small roneoed pages to twenty printed pages.

While McGarvie was Chairman of the Bar Council in 1973-74 and 1974-75, the two 1974 editions were co-edited by the Honourable Haddon Storey QC (former Victorian Attorney General) and the late Robert Johnston.

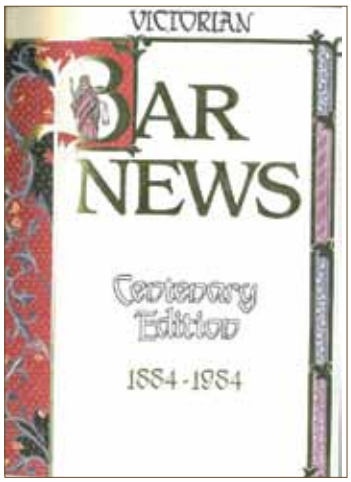
The tenth edition, March 1975, was produced by the formidable team of Byrne and Ross as Co-Editors. They were the first independent Editors who were not members of the Bar Council.

Byrne and Ross, then in their early thirties, were on the small Editorial Committee for the July and September 1973 sixth and seventh editions under Co-Editors McGarvie and Heerey and also for the June and September 1974 editions under Co-Editors Storey and Johnston. Storey was ten years their senior, a silk, a conservative member of the Legislative Council and a member of the Bar Council. Byrne and Ross did the work on the 1974 editions under Storey's supervision. Storey remained on the Editorial Committee for their first year as Co-Editors for the March, May, June and September 1975, tenth to thirteenth editions.

The late David Ross QC

David Ross was a creative and anarchic genius who regularly served it up to Storey, "Hullo Storey, here's a piece that'll stand your hair on end!" Bald from an early age, Storey knew, but couldn't be entirely sure, he was being teased.

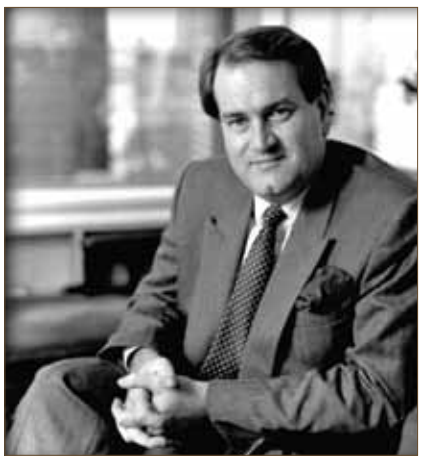
At least for those first two years, David Byrne had an ally in Haddon Storey in keeping his friend David Ross's erratic genius in control. For a remarkable eleven years from the start of 1975 until the end of 1985 (including the 1984 Centenary year), David Byrne and David Ross, 'Byrne & Ross, DD' as they styled themselves were Co-Editors.



Edition No. 50, Byrne & Ross, DD's Centenary Edition, 1984

They did everything. With scissors and Clag (that iconically Australian glue), they laid out the magazine at Byrne's house. His hospitality included good-quality port which, early in the process may have sustained and inspired, but as the evening wore on, presumably did so with possibly less efficacy. The only expense to the Bar was the cost of actual printing. With quiet and noble generosity, Byrne and Ross did, and paid for everything else.

Victorian Bar News was, in those days before the current prevailing environment of political-correctness chilled the air, 'robust' in observation, debate and humour. The judicial welcome to His Honour Judge Cairns Villeneuve-Smith records the "chill of terror" felt by former Supreme Court Justice, the Honourable John Coldrey QC (the author of an article written while he was at the Bar) and Byrne (as Co-Editor) when Villeneuve-Smith (then at the Bar) advised them that a Judge considered himself defamed as a result of an article published in a previous edition of *Victorian Bar News*, but he (Villeneuve-Smith) would attempt pacification. After weeks of sweating it out beneath the sword of Damocles, Coldrey and Byrne realised it was a practical joke when Villeneuve-Smith told them "His Honour has agreed to accept $500 in used notes to be handed to me as intermediary." It was over lunch at The Latin, that Coldrey handed over Monopoly money as Villeneuve-Smith laughed, "It took you a while to twig to it, John."



A dashing young Elliott

Paul Elliott QC joined the Editorial Committee in 1984. He became Editor in 1986. Heerey returned to be Co-Editor with Elliott in the second half of 1986, and remained as Co-Editor with Elliott until the end of 1990 when in December of that year, Heerey was appointed to the Federal Court bench. First with McGarvie, and then with Elliott, Heerey was Co-Editor for a total of some seven and a half years.

Elliott was sole Editor more than once, and served as Editor or Co-Editor until his retirement after production and publication of the Summer 2008/2009 edition number 146. The official statistics record that Elliott served on *Victorian Bar News* for a staggering twenty-three years, nearly a quarter-century, if one takes into account his two years on the Editorial Committee before becoming Editor in 1986.

Victorian Bar News' first female Editor, Judy Benson

Gerard Nash QC joined the Editorial Committee in the Spring of 1986 and became Co-Editor with Elliott in Winter 1991. Judy Benson joined the Editorial Committee in Winter 2002, and became Co-Editor with Nash and Elliott in Spring 2002.

At the 2009 Bar Dinner, the Bar recognised the extraordinary efforts and achievements of the three then recently retired Editors of *Victorian Bar News*, Paul Elliott QC, Gerard Nash QC, and Judy Benson.

Georgina Schoff SC

In September 2009, the Bar held a reception in the Essoign Club to launch the new *Victorian Bar News* under the Co-Editorship of Georgina Schoff SC and Paul Hayes. Schoff then already had been a member of the Editorial Committee for some six and a half years (twenty-seven editions) before being appointed Co-Editor in 2009. Schoff and Hayes produced the editions numbered 147, 148 and 149 – Spring 2009 and Summer and Autumn 2010. Schoff resigned as Co-Editor in 2010 and Hayes now remains as sole Editor and has overseen publication of this edition (No 150, Summer 2011).

Edition No. 147, Spring 2009

At Justice Heerey's (as he then was) welcome to the Federal Court of Australia in 1990, the then President of the Law Institute of Victoria in his address to the court stated that *Victorian Bar News* was the first such magazine produced by any of the Independent Bars of Britain, Ireland, Australia and New Zealand. From four small roneoed pages of type-script as the newsletter of the Bar Council in Easter 1971 to the current bumper 150th edition, *Victorian Bar News* has grown to become a high-quality, full-colour, independent, professional magazine of about sixty and more quarto-size pages.

The first overtly humorous, or more accurately, sardonic piece was published in the seventh edition of *Victorian Bar News* by Byrne and Ross and entitled 'Mouthpiece'. Humorously written and tongue-in-cheek, it hypothesized about barristers volunteering to serve as acting honorary magistrates! At the time it was seriously provocative. 'Mouthpiece' became a regular feature for twenty years from September 1973 to Summer 1993, appearing in editions numbered seven to eighty-seven, continuing after Byrne and Ross's 1986 retirement.

'Verbatim' (direct quotation and republication of dialogue in court) began in the twenty-sixth edition and included this gem from His Honour Judge Cullity QC: "Would you gentlemen be kind enough to arrange for consent orders simply to be noted on the file. I'm not going to sit here all day writing out this muck." 'Verbatim' ran regularly for thirty years from the twenty-sixth edition to edition number 146 (Summer 1978 to Summer 2008-09), and has made a welcome reappearance in edition number 148 and the current edition.

The first glossy cover of *Victorian Bar News*, an engraving from the 'Illustrated London News' of the 1st September 1877 – an artist's impression of the planned Victorian Supreme Court Building for which the construction contract had been signed in April of that year, appeared on the cover of edition number 28 in Winter 1979. Photographs first appeared in the twenty-eighth edition in Winter 1979 and the first colour cover appeared on the thirty-sixth edition, Winter 1981.

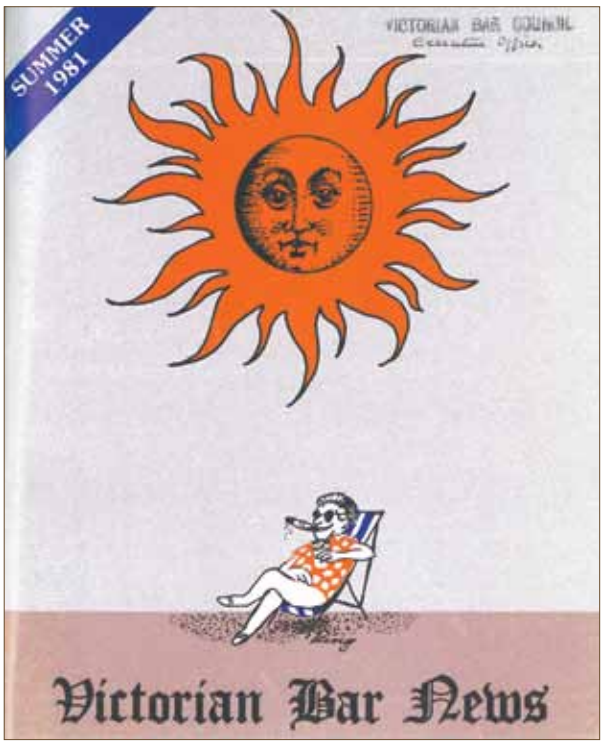
Edition No. 28, Winter 1979

Under the editorial stewardship of Byrne and Ross, the *Victorian Bar News* photographer was none other than Julian Burnside AO QC who pictorially chronicled life at the Victorian Bar in the late seventies and eighties.
A number of professional photographers have also contributed over the years, most notably David Johns, who has done so splendidly for forty-nine editions over about fourteen years and who remains the 'go to' photographer for *Victorian Bar News*.

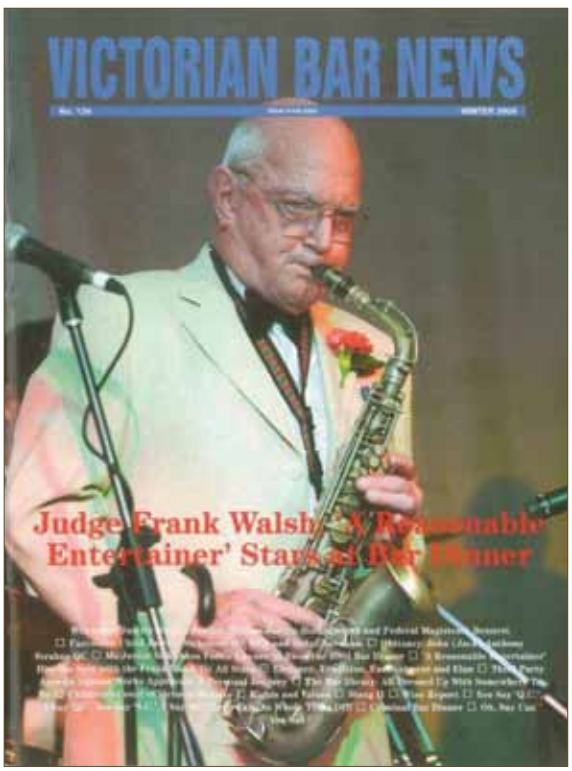
David Wilken first appeared as Editorial Consultant in edition number 66, Spring 1988. He proposed a new format, full-colour print, more colour photography and the introduction of advertising to offset the additional costs. Edition number 69, Winter 1989, introduced the first commercial advertising to *Victorian Bar News* which was comprised of three small textual member 'classifieds' and a commercial advertisement: For sale - The Australian Digest (2nd Edition) and All England Law Reports from the library of Dr T W Smith QC – replies to Judge Smith, County Court; To Let - Roger Kemelfield's Mt Buller Ski Flat; For Hire - a Mildura House-Boat (no name)); and a nearly half-page advertisement introducing 'Rosemary's Filing Service'.

David Wilken developed and grew the advertising that enabled the shift first to the present larger quarto size in edition number 96, Autumn 1996 and then to a full-colour-throughout magazine in edition number 116, Autumn 2001.

There was the occasional full-colour advertisement earlier, but the first full-colour internal photograph was on page 25 of edition number 102, Spring 1997. Dyson Hore-Lacy SC, the Honourable Frank Vincent AO QC (former Supreme Court of Victoria, Court of Appeal Justice) and Sir Richard McGarvie (then recently retired from role of Governor of Victoria) were photographed in colour in the Supreme Court Library with the 'silver cigarette case', which is a token which has been passed on from one member of the Bar to another for more than 100 years "[i]n recognition of your readiness to uphold the highest traditions of an advocate and to appear without fee for those unable otherwise to afford your services", after it was passed from to Hore-Lacy by Vincent, who in turn had previously received it from McGarvie. By way of postscript to that story, some two years ago, Hore-Lacy passed the silver cigarette case on to Julian Burnside. Hore-Lacy says there are many worthy recipients as more barristers are involved in human rights issues now than at any time in the Bar's history. Pro bono work is performed across all areas of practice at the bar and in many cases is unknown and unheralded. However, Burnside's courageous defence of refugees, in particular the 'Tampa' refugees, a cause which at the time was unpopular with a conservative electorate, made him a worthy recipient. The then recently retired Vincent also attended the presentation.



A marvellous early colour cover, Edition No. 38, Summer 1981



A fine example of David Johns' photographic work, former County Court Judge, Frank Walsh AM QC entertaining colleagues on Sax at the 2004 Bar Dinner

Passing on an admirable tradition, The Hon Frank Vincent AO QC, Julian Burnside AO QC and Dyson Hore-Lacy SC with the silver cigarette case

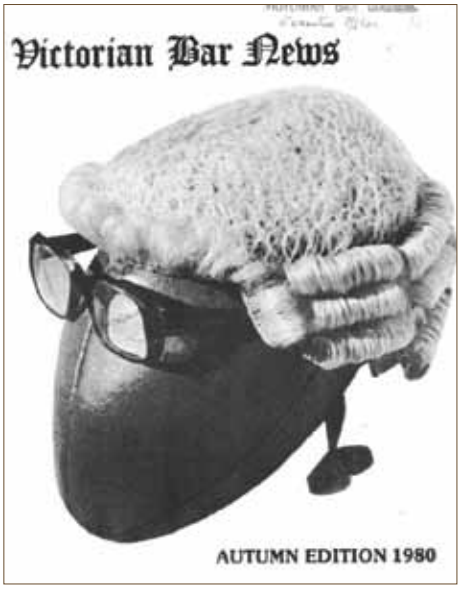
It was in edition number 116, Autumn 2001, that the internal pages of *Victorian Bar News* burst into colour with every photograph in full colour, with the exception of a vintage black-and white photograph of the Honourable Paul Guest QC (a former Justice of the Family Court of Australia) representing Australia while rowing in the 1968 Mexico Olympics.

Serious ill health, hospitalization and surgery in 2007 forced David Wilken to consider retirement from *Victorian Bar News*, on which he had worked for nearly twenty years. He died peacefully at home in November 2007.

The 'Attorney-General's Column' featuring the late Honourable Jim Kennan SC (former Victorian Attorney General and member of the Victorian Bar) was first published in the forty-eighth edition, Winter 1984. The tradition of the 'Attorney General's Column' which continued without interruption for twenty-four years and nearly one hundred editions ended in edition number 146, Summer 2008-09, with the final column written by the former Attorney General and Minister for Industrial Relations and Racing, the Honourable Robert Hulls MP.

The fifth to seventh editions of *Victorian Bar News* began with a piece, the length and character of which varied widely, signed 'The Editors'. However, the character of *Victorian Bar News* was then still very much that of a Bar Council newsletter. As noted earlier, the Co-Editors, McGarvie and Heerey were both members of Bar Council and indeed at the time, McGarvie was Vice-Chairman. It was in edition number 58, Spring 1986, that the first 'Editors Backsheet' appeared – an editorial by Heerey and Elliott. The 'Editors Backsheet' ran for twenty-two years through to edition number 146, Summer 2008/09. It is now entitled simply 'Editorial'.

Sport has always been a staple of *Victorian Bar News*, which has faithfully recorded and reported upon the Bar's sporting life. Football, cricket, tennis, golf, hockey, sailing, volleyball and netball, and more recently soccer, skiing and real tennis have all featured regularly and have consistently entertained and inspired, irrespective of outcomes. While sporting glory especially in recent times has proven to be somewhat of an elusive commodity, the Bar makes up for the lack of silverware in the Essoign trophy cabinet with an abundance of enthusiastic participation.

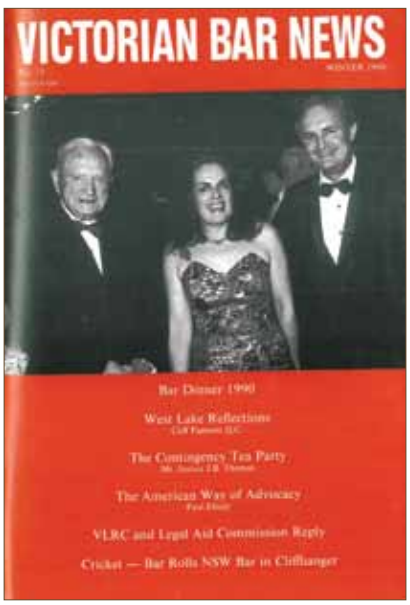


A sporting look, Edition No. 31, Autumn 1980

The independence of the *Victorian Bar News* Editors cannot be taken for granted and has always been closely guarded by the Editors from early on. Shortly after one Bar Council election, the then newly-elected Bar Chairman met with the Editors of *Victorian Bar News*, Heerey and Elliott and invited them to resign, informing them that they did not have the confidence of the new Bar Council and were too left-wing. Predictably, and happily, they declined to do so.

The first Chairman's column was written by McGarvie in the eighth edition, June 1974, entitled 'The Bar in Public Affairs'. It was another thirteen years before the Chairman's column appeared, written by the late Charles Francis AM RFD QC in edition number 63, Summer 1987 following his appointment as Chairman in the aftermath of the tumultuous Bar Council election that year. It was titled 'Chairman's Message'.

In edition number 73, Winter 1990, the Honourable Justice Harper (a former Chairman of the Bar and now a Justice of Appeal of the Supreme Court of Victoria) changed the title to 'Chairman's Cupboard'.

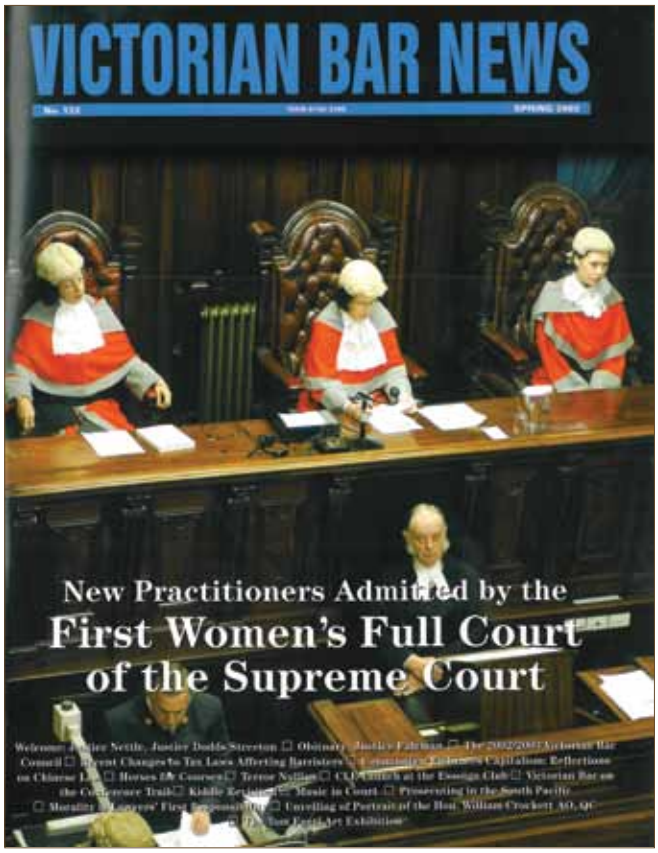


Edition No. 73, Winter 1990, in which the first Chairman's Cupboard was published, also featuring the Hon Tom Smith QC, Susan Crennan QC and the Hon Justice Smith (as they then were) on the cover

According to Harper JA, "'The Chairman's Message' seemed to me to smack of tablets of stone, or Ron Barassi at three-quarter time, or Michael Adams QC presiding over a meeting of the Essoign Club. I told the Editors as much. They looked at me with a kind of fuzzy amusement. I attempted to give my reasons for not wanting to preach under a pretentious heading. As an aid to their understanding of my point of view, I opened the Chairman's cupboard and offered them a drink. At last their eyes and minds had something upon which to focus. And I had a heading under which to write."

The Chairman's column continued as the 'Chairman's Cupboard' for more than eighteen years – editions numbered 73 to 145 – through sixteen Chairmen. John Digby QC re-named it 'Chairman's Outlook' for editions number 146 and 147 and under Michael Colbran QC the column was headed 'Chairman's Brief' for editions numbered 148 and 149. In the present 150th edition, the tradition of 'Chairman's Cupboard' has been reinstated with Mark Moshinsky SC penning his first column as Bar Council Chairman.

Victorian Bar News has become a wonderful textual and pictorial record of life at the Victorian Bar. Every member of the Bar who has contributed to *Victorian Bar News* in the nearly 40 years since the first edition in Easter 1971 has done so as a volunteer. A past Bar Chairman suggested that with three Editors to share the load, each one of them put in something in the order of a full week on each of the four annual quarterly editions - a massive contribution to the Bar of time and energy.



Edition No. 122, Spring 2002. Victorian Bar News has always covered important events of historical significance to the State's barristers and judiciary

So many others have made substantial contributions over many years and include people like Graeme Thompson on Welcomes, Farewells and new Silks, and on the Editorial Committee, then the Board of *Victorian Bar News* for some twenty-two years (eighty-nine editions); Peter Lithgow and the Honourable Justice Pagone (while practising at the Bar prior to his appointment to the Supreme Court of Victoria) on book reviews; Richard Brear gathering statistics, Mal Park and Carolyn Sparke.

Max Cashmore and Coldrey each served on the Editorial Committee for about twelve years (some fifty or more editions). Graham Devries, Bill Gillies and John Kauffman QC each served on the committee for about ten years (some forty editions). Charles Gunst QC and Paul Duggan each served some six to seven years (some twenty-six to thirty editions), while His Honour Judge Howard QC (before his appointment to the County Court of Victoria), John McArdle QC, Nicola Gobbo, Victoria Lambropoulos and Peter Clarke all served some four years (some fifteen to seventeen editions). The Honourable Justice Curtain (Justice of the Supreme Court) was a member of the Editorial Committee until her original judicial appointment and together with Tina Giannoukos, Peter Nugent and Olyvia Nikou QC they each served about two years (some six to eight editions). The Honourable Justice Bongiorno AO QC (Justice of Appeal of the Supreme Court of Victoria), David Bennett QC and Burnside each served on the Editorial Board for some four, seven and twelve years respectively (seventeen, twenty-seven and fifty editions respectively).

As with all Bar Committees made up of volunteer barristers needing to maintain a practice, and to meet the always urgent and often unexpected demands of independent practice, not every *Victorian Bar News* Editorial Board or Committee member was always able to contribute as much as they and the Editors would have wished. And there is no doubt that the Editors always shouldered the main and massive burden of producing such a quality magazine.

However, everyone involved – the Editors; those from time to time on the Editorial Board or Committee; and, perhaps most significantly of all, each individual barrister who wrote a piece for *Victorian Bar News*, whether one-off, occasionally or regularly – everyone together has, for forty years now, contributed to and produced a splendid magazine of which the whole of the Victorian Bar can be proud.

VBN

Does Judicial Independence Matter?

The Honourable Justice Marilyn Warren AC, Chief Justice of Victoria

The Victoria Law Foundation Law Week Oration, delivered by the Hon Justice Warren AC, Chief Justice of Victoria on Thursday 27 May 2010

Any discourse on the topic judicial independence possibly invokes the apprehension that everything that needs to be said has already been said and that everyone knows that it matters, and hence, it is unnecessary, even repetitive, to talk about judicial independence any more.

So to begin with a sub-question: Is there a need to talk about judicial independence?

Talking about judicial independence is akin to talking about the rule of law. Everyone knows we have it.

As Sir Gerard Brennan observed, the subject of judicial independence is one that belongs primarily in the public domain.[1] For the purposes of this evening's discourse, I will try to address the topic so that it may be better understood by the community. Necessarily, my observations will not be addressed to the Judiciary or academia.

Lord Bingham, when delivering a lecture at Cambridge University[2] chose as his subject '*The Rule of Law*' because it was an expression used constantly and yet, so his Lordship said, there was no certainty 'that all those who used the expression knew what they meant……or meant the same thing'.[3]

Judicial independence is a concept referred to regularly in the context of political announcements, discussions about court decisions, and the relationship between the government of the day and the Judiciary. It is an important concept that lies at the heart of our democratic system of government. Because of that, it tends to be taken for granted. Everyone assumes in Australia that judges are not corrupt, determine cases on their merits, and impartially and fearlessly, in accordance with the law. Yet, I suspect there are different understandings applied by different individuals and sectors to the concept of judicial independence. Hence, akin to Lord Bingham's conundrum as to the meaning of the concept, '*the rule of law*', we need to understand what is the meaning of the concept of judicial independence. If that meaning can be identified, then a discourse can follow as to whether there is a need to talk about the subject leading, perhaps, to an answer to the primary question postulated: does judicial independence matter?

I will commence by discussing the traditional approach to judicial independence and draw upon its connection with the rule of law. I will then discuss the role of judicial independence in the protection and enforcement of human rights. In that context, I will discuss occasions when judicial independence matters, mostly when the citizen versus the state.

I will then explore the separation of powers and reflect upon the differences in Australia in the recognition of and respect for judicial independence. I will consider some examples in the Commonwealth context, the state sector and, in that context, reflect upon styles of government.

This will lead me to consideration of the modern approaches to government and the phenomenon of judicial independence in practice. I will tease out the topic by reflecting on the facilitation of the Judiciary by the Executive and also, the modern judicial managerial approach to courts' business.

I will then move to a different topic, reactions to sentencing and its relationship with judicial independence. I will touch upon the general philosophical concept of 'justice as fairness'. After reflecting on sentencing, I will turn to the role of the media in the recognition of judicial independence.

I will then move to consider what judicial independence means to whom: the Judiciary, the Executive, the Legislature, the community and the media. I will then turn to my conclusion in answering the primary question, does judicial independence matter?

A Traditional Approach To Judicial Independence – The Connection With The Rule Of Law

As Sir Gerard Brennan observed,[4] a free society exists only so long as it is governed by the rule of law. Sir Gerard also observed that judicial independence exists to serve and protect 'the governed' or, in simpler words, the community. It is a concept described as a bastion,[5] even a fortress.[6] There are evocative descriptions of courts protecting the liberty of the citizen. Judicial independence is a concept that arises in modern times in so many ways – provision of court resources, judicial salaries, the appointment of acting judges and the like.

As long ago as Montesquieu's *The Spirit of Laws*[7] it was said there was no 'liberty' if the Legislature and Executive powers were not separate from the power of judging. Otherwise, Montesquieu said 'the judge might behave with all the violence of an oppressor'.[8]

This is very interesting but we are still not drilling down into what it is that constitutes judicial independence. It seems that the concept comes down to a core principle of the decider of the case being free from influence. This means, free from influence from the government of the day, the parties before the court, the media, other judges' opinions and, even, the predispositions and predilections of the individual judge or judges deciding the case before the court. The aspiration must be for a judge each time he or she hears a case to be like a clean sheet of paper. So, judges when they are sworn into office take an oath or make an affirmation *to do right by all persons, without fear or favour, affection or ill-will*. What these words

mean in the judicial oath is that judges will never be frightened or intimidated by what needs to be done; they will not favour one party because for example they know the person or someone connected with the person; they will not like or dislike one party more than the other. Judges will decide cases on the basis of legal principle.

But what is it that judges do? They exercise judicial power. What is that power? The power of judges lies in their judgment. It is the power which every state must have to decide 'controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property'.[9]

So, unlike totalitarian states, democratic states have a forum where disputes between citizens, or, disputes between the government itself and the citizen can be decided impartially. What is more, the citizens are subject to the burden of the power of the courts, that is, the courts can compel the citizen to do something; but the citizen also has the benefit of the power in that they may trigger the exercise of judicial power in their own interest.[10] But it is not only about a forum to make decisions. It is about the decision being made impartially and fearlessly.

Yet, it does not stop there. In order to demonstrate or show that the decision of the case was reached fearlessly and impartially the judge needs to provide reasons, that is, explain why it is that one party wins and the other loses. In other words, the reasoning behind judicial decision making is inextricably interwoven with judicial independence. It is the reasons for the decision that show what was written and drawn on the blank sheet of paper to reach the result at the end.

But there is more. As former Chief Justice Gleeson observed, judges do not set their own agenda.[11] They are only able to decide the cases that come before them, within the parameters and confines of that case. They cannot make up facts or invoke evidence such as expert evidence, which is not before them. Judges have to decide the cases before them, impartially and fearlessly, applying the rule of law.

Credit for the expression 'the rule of law' is usually given to Professor Dicey. Although there are traces of the concept as far back as Aristotle.[12]

Dicey applied three meanings to this concept, the rule of law. First, no one can be punished or suffer any loss for breaking the law except by order of the courts of the land. Lord Bingham observed that this thinking was clear: if anyone is to be penalized for breaking the law, the breach must be proved before a court of the land, not a tribunal picked by the government.[13] Secondly, Dicey said, in as many words: no one is above the law and everyone is subject to the same law applied in the same courts. Thirdly, Dicey said that the rule of law was a special attribute of English institutions, referring probably to the common law. I will put this third aspect to one side.

Dicey has informed the traditional view of judicial independence, especially that of the Judiciary itself.

Judicial Independence And The Protection Of Human Rights

Dicey did not contemplate the need to refer to a Bill of Rights, albeit, the existence of *Magna Carta*. But, doubtless, as commentators have observed Dicey may be taken to have expected human rights laws to form part of the law.

The *Universal Declaration of Human Rights* links the protection of human rights with the rule of law. In doing so it rejects what is known as the 'thin' definition of the rule of law, which posits that a legal system may be savage and undemocratic, but still be a system of law.[14] Nevertheless, as Lord Bingham observed 'there is no universal consensus on the rights and freedoms which are fundamental, even among civilised nations.'[15]

To talk about rights is, inevitably, to talk about law. Rights presuppose a framework of demands which constrain and direct the manner in which force may be exercised. The only way in which demands on the exercise of force can be expressed in civic society is through law. Without the law to give them tangible expression, rights become nothing more than aspirations. Law is, as Spinoza said, the mathematics of liberty in the history of mankind.[16]

Without the law to give them tangible expression, rights become nothing more than aspirations.

As judicial independence is integral to the rule of law, which is a necessary presupposition for the protection of individual rights, it follows that judicial independence is integral to the assertion of human rights. Without an independent Judiciary, it is impossible to imagine citizens having tangible human rights capable of being asserted against the state. As former Chief Justice Gleeson observed, 'the independence of judicial officers is a right of the citizens over whom they exercise control'.[17]

Judicial independence in that sense, is itself a human right, insofar as it is the human right which presupposes the unfettered enjoyment of all others. It is for this reason that Article 10 of the *Universal Declaration of Human Rights* and Article 14 of the *International Covenant on Civil and Political Rights* both require an independent and impartial tribunal to determine the rights and obligations of individuals in a civil suit, and in any criminal charge laid against an individual.[18] It is also for this reason that the *Draft Principles on the Independence of the Judiciary*, known as *The Siracusa Principles*, which provided the foundation for the Montreal *Universal Declaration on the Independence of Justice* in 1983 describe judicial independence as an 'essential safeguard' of human rights.[19]

It is sometimes characteristic of states that are bound by the rule of the law to regard the human rights of individuals as inconvenient. They attempt to remove individuals from the jurisdiction of the courts and the independent adjudication of

the Judiciary. The United States decision to incarcerate what it termed 'unlawful combatants' in a military base built on land leased from the Cuban government outside the purported jurisdiction of the United States Supreme Court was decried as a breakdown of the rule of law and human rights. This Executive decision was an implicit recognition of the ability of the courts and the law to constrain the behaviour of the Executive towards an individual.

Similarly, much was made of the interrogation techniques used on suspected terrorists, particularly, techniques such as water-boarding which were characterised as a form of torture. In the debate, the question was never 'Is torture lawful?' It was accepted by all parties that it was not. The debate was always 'Does water-boarding constitute torture?' Again, this is symptomatic of the power of the rule of law.

Whilst, our legal system has always recognised individual rights, it is only recently, in the Australian Capital Territory and Victoria, that these rights have been given statutory expression. In this, Australia represents an anomaly amongst common law countries.

In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* comprehensively sets out the human rights which individuals residing in Victoria can expect as citizens. A great deal of public commentary has warned of a cabal of judges mad with new-found power using charters of rights to wreak irretrievable damage on civic governance.

The experience of the Judiciary in Victoria in applying the *Charter* has not borne out these predictions. Fortunately, we live in a democracy that does not routinely violate the human rights of its citizens. As such, the *Charter*, as applied by the independent Judiciary of Victoria, has operated as an important adjunct to the human rights of citizens in this state, rather than instigating any program of radical change. The twin bastions of individual rights, parliamentary democracy and the rule of law administered by an independent Judiciary, have ensured the *Charter* has been smoothly integrated into Victorian society, institutions and jurisprudence.

The Victorian and ACT experience with human rights cases demonstrates the critical importance of judicial independence in construing, enforcing and protecting human rights. So far, the cases have been concerned with drug trafficking,[20] access to public housing,[21] the procedural rights of a vexatious litigant,[22] coercive questioning powers,[23] criminal trial procedure,[24] treatment of mental illness,[25] extended imprisonment[26] and professional practice.[27]

The range of facts and circumstances that have come before the courts reveal two things. First, the variety of human rights sought to be protected against the state. Secondly, the significance of the need for impartiality, inscrutable impartiality where the state seeks to deny the citizen his or her rights.

Separation Of Powers: Australian Differences In The Recognition Of Judicial Independence

The separation of powers is critical to judicial independence. In Australia there are differences in the recognition and application of the doctrine of separation of powers between the federal sector and the state sector. In the federal sector, there is sharper recognition and demarcation of the separation of powers between the Executive and the Judiciary. There are reasons for this. Principally, they may be found in the *Australian Constitution* and the provisions in Chapter III enshrining the separation of the power, role and function of the federal Judiciary.

Of course, as Professor Lane has observed[28] other than the High Court, federal courts are discretionary statutory creatures. Whilst the Commonwealth Parliament has the power to abolish and create statutory courts, and indeed this has occurred in the industrial jurisdictions, the fact remains it has not happened to the significant federal courts, the Federal Court and the Family Court. The Federal Court is strongly recognised for its connection with the High Court of Australia. Its Chapter III protection is always raised when the Executive and the Legislature contemplate reforms that potentially impact on judicial independence such as judicial remuneration and the determination of judicial complaints.

> The separation of powers is critical to judicial independence.

The recognition and demarcation of the separation of powers between the Executive and the Judiciary in the federal sector is reflected in the administrative structure established to facilitate and deliver judicial independence.

By contrast, as Professor Saunders has highlighted,[29] Victoria does not, constitutionally speaking, recognise separation of powers vis-a-vis the Supreme Court. The judicial independence of federal judges is analogous to the judicial independence of state judges and vice versa. Professor Lane has observed that the same arrangements apply to both: Executive control of judicial appointments; removal from judicial office; suspension from judicial office; the meaning of 'misbehaviour' or 'incapacity'; the pre eminent role of parliament in removal proceedings; judicial review of these proceedings; an assured judicial remuneration; and the abolition of a court.[30]

However, there are strong constitutional differences between the federal and state sectors. The judicial independence of federal judges is guaranteed by section 72 of the Constitution supported by section 128 which requires a double majority in a referendum to alter a position in the Constitution. By contrast, the judicial independence of state judges does not have analogous support. So, for example, the Constitution Act of Victoria may be amended, albeit with a joint sitting of the Parliament, under the ordinary 'peace, order and good government' law making power.[31] As to removing judges, in the Constitution the removal power is limited to specific

grounds whereas, with the exception of New South Wales, no removal provision in any state is restricted to prescribed grounds. However, the independence of courts, both federal and state, is an integral part of these courts' function in protecting and implementing the rule of law.

Whilst the judicial independence of federal courts has the vivid constitutional foundation of the *Australian Constitution*, there must be a foundation for state courts in other constitutional sources. Professor Lane expressed the view that the common law forms the 'matrix of State constitutions'.[32] He argued that just as the *Australian Constitution* is framed in accordance with underlying assumptions including the rule of law,[33] the rule of law applies equally to state constitutions because of the role of *Magna Carta* in all Australian constitutions.

Yet, even on a philosophical as distinct from constitutional level, separation of powers in the state sector must exist, otherwise, for practical purposes the role of the Judiciary would be blurred with the other arms of government, particularly, the Executive.

All that said, an important development occurred with respect to the role of state Supreme Courts recently.

Earlier this year, in *Kirk's* case, the High Court affirmed that state Supreme Courts have a significant role to play in the guardianship and supervision of their own jurisdiction - the very foundation of judicial independence and the rule of law.

In the context of privative clauses, the High Court held that as Chapter III of the *Constitution* requires there to be a Supreme Court of every state; a state cannot alter the constitution or character of its Supreme Court so that it ceases to meet the constitutional description. Thus, the supervisory jurisdiction to determine and enforce the limits on Executive and judicial power by persons and bodies other than the Supreme Court is a defining characteristic of Supreme Courts under Chapter III.

The High Court has made a profound statement about the imperative of judicial independence. Whilst the High Court does not use the words 'judicial independence', its reasoning is entirely concerned by it. The Court took the view that to allow a state to alter the character of its Supreme Court so that it no longer met its constitutional description, would create 'islands of power immune from supervision and restraint,' and undermine the single common law of Australia. To deprive the Supreme Courts of that supervisory jurisdiction would mean that they were no longer independent in the relevant sense. Furthermore, as the High Court exercises ultimate supervisory jurisdiction over all other courts in Australia, to remove the ability of state Supreme Courts to exercise supervisory jurisdiction is to remove the High Court's jurisdiction, contrary to the entrenched independence of the Judiciary in Chapter III.

Yet, contrary to the constitutional and philosophical recognition of the critical role of state Supreme Courts in *Kirk*, there are some state government structures that do not properly recognise the role of the Supreme Courts and the independence of the Judiciary. Leaving aside South Australia,[34] in most Australian states a strong, powerful and influential Executive provides the facilities, resources and develops the policies that affect the function of judicial power. To demonstrate, it is instructive to understand the framework of the Victorian Executive model and where the Supreme Court fits in.

Modern Government Practice And Judicial Independence

It seems that in the early 1990s the Executive resolved in Victoria to restructure the public sector to create what are sometimes described as 'mega departments'. Essentially, the restructure involved a rationalisation and reduction of the numbers of government departments and permanent heads of those departments. Further, the restructure involved the appointment of secretaries to the departments, that is the permanent heads, who are directly employed by, and accountable to, the Premier. The secretaries of the departments develop the public sector policies of the government of the day in accordance with the directions of the Premier and, of course, the relevant minister. These mega departments have large budgets; one of the largest is the budget of the Victorian Department of Justice.[35] The Department provides technology, human resources services, building accommodation, IT services and indeed everything it takes to enable the components of the Executive to deliver the services

required of that department. Some states, for example New South Wales, and until the late 1980s, Victoria, have a discrete Attorney's-General Department (preceded in Victoria by a Law Department). Those departments are concerned with looking after the courts and facilitating their function.

In Victoria, with the implementation of the 'mega department' structure, the courts, particularly the Supreme Court, were relegated to a lower order within the Executive dependent upon service delivery and provision of resources by the mega department of the Department of Justice. Consequently, duplication of administrative work and subtle infiltration of the exercise of judicial power have occurred in a number of ways.

Thus, the Supreme Court, notwithstanding the doctrine of the separation of powers, has engaged with a government provided IT system that is shared with a major litigator in the Supreme Court, the state, and is subject to the allocation of resources by the secretary of a department who is, individually, a frequent litigator in sensitive and difficult matters where the liberty of the citizen is at stake.

These matters were explored by my former colleague, the Hon. Tim Smith in a paper where he spoke about the 'Behemoth' of the modern state government.[36] It is a thorough and accurate assessment.

A most difficult aspect of the state government structure for courts is the way in which policy priorities are developed. Let me refer again to the Victorian experience. Under the Secretary of the Department of Justice lie a number of Executive Directors with specific portfolios. A group made up of the Secretary and the Executive Directors will meet periodically to discuss the priorities of the Department of Justice for the coming year. Quite properly, the courts are not involved in this process. However, the group ultimately determines the policy and budget priorities and thereby the application of Department of Justice resources for the coming year. If the courts are to succeed in obtaining funding it is politically sensible to craft the court case for resources to fit within the policy priorities of the Department of Justice. Given the functions embraced in the Justice Department – police, emergency services and corrections for instance – the awkwardness involved in such a structure for courts is immediately understood with regard to the Supreme Court.

Under these arrangements there is a thin façade constituting the separation of powers.

By contrast, in the federal sector the federal courts receive separate funding and are responsible for their own budgets. Of course, they are accountable to the Commonwealth Parliament. Further, the administrative head of the federal courts, the chief executive officer, is also the chief or senior registrar of the court, appointed by the Executive Council and accountable to the Commonwealth Parliament. In addition, the remuneration of the chief executive officers is determined by the Commonwealth Remuneration Tribunal. Hence, we see a much stronger and sharper demarcation of the separation of powers between the Executive and the Judiciary at the federal level.

Additionally, the time taken up by state courts in dealing with a government department, involves double dealing and participation of the Judiciary in administrative responsibility. This has to be done to ensure that the court is appropriately separated and protected from the exigencies of the public sector when it comes to the application of the rule of law and the independence of the Judiciary. It is also a very awkward structure which, given its complexities and the tight control of resources in accordance with government policy, both sides, the Executive and the Judiciary, manage as well as they can. Nevertheless, it is a questionable arrangement. Perceptions are important. It is undesirable to assert formal separation of the Judiciary from the Executive yet, in practice, apply a pragmatic or expedient approach. Real Judicial independence is significant for the citizen within the structure of government.

We may ask, why should the citizen in the federal sector have a higher level of confidence in the true independence of the Judiciary than would be the case in the state sector?

A most difficult aspect of the state government structure for courts is the way in which policy priorities are developed.

On one view, the state sector approach is more cost efficient in the delivery of a greater volume of judicial work than the federal sector there being a higher number of filings in the state sector. If we take a fair comparator, a civil proceeding such as a corporations matter in the Victorian Supreme Court, the Federal Court and the New South Wales Supreme Court the whole of cost to government in the state sector is a little under $3,000 per case, whereas in the federal sector, the whole of government cost is a little over $11,000 per case. Doubtless, this difference is focussed upon by state treasuries.

Of course, the comparison takes no account of the true cost of the delivery of justice in a state sector system where there is necessarily duplication of process and active involvement of the Judiciary in the administrative aspects of the Supreme Court, thereby taking judges away from their direct decision making work as judges.

The second phenomenon of modern government practice and judicial independence is the modern pressure placed on courts and, therefore, judges to hear and dispose of more cases more quickly. Around Australia in both state and federal courts, there is growing specialization of the Judiciary, increased judge management of cases and, to some extent, judicial involvement in alternative dispute resolution. We know that in the higher courts about ninety-six per cent of all cases settle before trial. It is the remaining three to four per cent, hard rump of cases that are the challenge for the modern court. They are hard fought cases where the parties usually want to take a trial through to its very conclusion and, in due course, pursue most avenues of appeal. There is not a superior court in the country that does not engage in judicial management of cases. This will only increase with the High Court decision

in *Aon*.[37] Law reform agencies and governments, state and federal are anxious to implement civil procedure reforms. Arrangements including over- arching obligations, pre-action protocols, liberal powers of case management invested in courts, narrowed discovery and expanded ADR are intended by governments to reduce the cost to the state of dispute resolution.

This has two consequences. First of all, the resolution of disputes between citizens is more frequently played out in a private rather than the public forum. Secondly, increased pressure is placed upon the Judiciary to play a managerial, as distinct from a judicial, role. One of the dangers of this approach is that judges will be tempted to conduct proceedings, such as case management conferences or early neutral evaluation hearings, in private. They may be pressured, or at least tempted, to conduct judge led mediations where private caucusing with the parties may occur.

Immediately two phenomena arise: closed justice and the risk of tainting the impartiality of the judicial function. Judicial independence is at risk.

Reactions To Sentencing And Its Relationship With Judicial Independence: The Role Of The Media In The Recognition Of Judicial Independence

In 2007, at a National Judicial College of Australia conference on the topic *Confidence in the Courts*, Professor David Brown delivered a paper exploring the concepts 'popular punitiveness' and the 'public voice'. After observing that there is a running commentary in modern society on judges and their work in sentencing, he said that:

> … [these] forces include the 'rise of the public voice' as part of a more general 'anti elites' political movement; the declining influence of social and legal expertise; the tendency to construct 'community' through fear and the risk of victimisation; and the development of new forms of communication which in their emphasis on images and a shared cultural experience are somewhat at odds with the rationalistic and truth oriented discourses of the law.[38]

Criticism of judicial decisions is not novel nor is it confined to sentencing cases.

Four days after the Communist Party decision of the High Court, Prime Minister Menzies did not make 'legal criticisms' of the decision, but said it caused 'grave concern to some millions' of Australians.[39]

Following intervention by the High Court in the Tait case, the Victorian government resolved to commute the sentence of death imposed on Mr Tait. Premier Bolte issued a two page statement saying that the cabinet had been 'forced' to commute the death sentence and that several recent developments (referring to the High Court) had 'virtually deprived the Government of power to discharge its responsibilities to the public'. The Premier continued by referring to the exploitation of the legal system and the use of the 'legal machine' making it 'quite impossible' for the government to discharge its functions.[40]

After the High Court decision in Mabo, and then the decision in *Wik*, the Deputy Prime Minister of the day stated his intention to ensure judges appointed to the High Court were 'Capital C conservatives'.[41] On *Wik* it was said that the High Court had 'gone beyond tolerable limits'.[42]

These cases demonstrate the level of tension that arises when the Executive has a sense of frustration at the setting aside of a decision which is politically important to the government of the day. However, as then Justice McHugh pointed out, 'the courts cannot be moved by the political consequences of their decisions. They must maintain an a-political stance. In contrast to the exercise of Executive power, judges cannot base their decisions on or be affected by, potential political implications and media pressures. The judges must base their decisions on the law'.[43]

This leads me to the very point about the role of the media. These days there is a deliberate approach by some media to campaign for increased sentences. Recently, the Sentencing Advisory Council of Victoria published work that disclosed an increase in the length of sentences imposed in the higher courts in Victoria in relation to certain serious offences.

Further research is yet to be done, but there is a real prospect of a correlation between the increase in the sentences imposed and pressure brought to bear by sectors of the media to achieve a populist outcome of increased sentences.

Some media complain about sentencing starting from an expectation that justice is fair. Their criticism often confronts judicial independence and attempts to pressure the Judiciary to sentence more harshly. This media starts with a different premise from the Judiciary. The Judiciary sees justice as just, sometimes fair, sometimes harsh. More than ever, judges are under pressure to be 'fearless'.

When we ask the question: does judicial independence matter? – we need to immediately identify for which purpose or goal are we making the enquiry.

This immediately focuses our attention on identifying what it is about the job of judges that means they must be free to act independently.

The fundamental job of the judge is to apply the law, and to do so justly and from an independent and objective position, without being influenced by self-interest or the vested interests of others. If this is correct, then we need to note that the key task of the judge is to apply the law in a particular way, not to produce a particular result.

While the result of a particular legal case, for example, a conviction and sentence will in the end be viewed differently by different individuals or groups, as either just or unjust, the judge will have done his or her job if the case has been run and managed in accordance with the law. So returning to the question posed: where does judicial independence fit into the overall objective of the justice system to ensure just legal outcomes for the citizens?

Returning to the issue that is constantly raised by the media – the inappropriateness and 'softness' of sentences handed down by the courts. Often there is a complaint that a particular sentence is simply not just. Why is it not just? Because say, a certain number of years imprisonment is simply not fair given the nature of the crime in question. So the appeal is to our sense of fairness.

So how do these notions of justice, fairness and judicial independence operate in relation to the act of a judge determining a sentence?

The connection between fairness and justice has a long history in modern political and moral philosophy. One of its champions, John Rawls, has detailed this connection in his most influential theory, *Justice as Fairness*.[44]

I do not intend to engage in the continuing philosophical debate his 1958 essay has inspired, other than to take note of a key element of his theory which remains a vital component in any analysis of fairness or justice; this is the crucial notion of impartiality.

The philosopher, Professor Amartya Sen, describes fairness, the notion of impartiality and Rawls' theory, in the following way:

> So what *is* fairness? This fundamental idea can be given shape in various ways, but central to it must be a demand to avoid bias in our evaluations, taking note of the interests and concerns of others as well, and in particular the need to avoid being influenced by our respective vested interests, or by our personal priorities or eccentricities or prejudices. It can broadly be seen as a demand for impartiality.[45]

While the principles of justice which Rawls specifies may be but one of many sets of principles which could be argued to be at the centre of the notion of justice, the notion of impartiality is at the core of the role of judges in their task of administering justice.

What Judicial Independence Means To Whom

For the Judiciary, judicial independence involves a strict constitutional interpretation. Judges decide cases fairly, fearlessly and impartially. Judges also believe, very strongly, that they should be supported by the Executive in the implementation of their role and the delivery of judicial independence. Indeed, judges believe that there is an obligation upon the strongest arm of government, the Executive, to properly resource the weakest arm of government, the Judiciary.

The Executive arm of government sees the Judiciary as the enforcement agency of the state. So, for example, when the citizen is to be prosecuted for breaching the laws of the state, it is the courts that supervise the process and determine the breach and the punishment. The Executive also sees the courts as the vehicle for creating certainty in the state by quelling disputes between citizens through dispute resolution. That said, the Executive may see the courts as an obstruction to government business and a frustrating agency for political goals and power. But that is not how the Judiciary views it nor would it be proper of the Judiciary to think that way.

The Legislature, on the other hand, in strict constitutional terms views the Judiciary as the interpreter of the laws as made by the parliament.

For the community, or those described by Sir Gerard Brennan as 'the governed',[46] the Judiciary is seen as the enforcement agency of the public will and also the protector of the citizen.

The media see the Judiciary as the provider of the news that is presented and marketed to the community in a way that is enticing, interesting, topical and consistent with the modern way of accessing instantaneous information. There are significant sectors of the media that appreciate and understand the role of the courts in protecting the citizen against the state and facilitating the resolution of disputes between citizens.

For the media there will always be a tension with the courts, but simultaneously a symbiotic or cooperative relationship. The courts need the media to explain to the community

the work they do. The media needs the courts to provide significant parts of the news.

Similar to the Executive, the media will be frustrated by the courts which exercise their independent judicial function to protect the human right of an individual over and above protecting another right, freedom of speech. The tension between freedom of speech and the human right of a fair trial of an accused citizen is all part of the pressure and difficulty faced by the modern Judiciary.

Conclusion

I turn then to the primary question: Does judicial independence matter?

The conclusion is obvious. As a matter of constitutional and legal principle it matters because judicial independence lies at the heart of our democracy. When the Judiciary frustrates the Executive it is a healthy phenomenon of our democracy. For the Legislature, if the laws made are interpreted or constrained in a way not anticipated by it, again, it is a healthy phenomenon of our democracy. For the community, or the governed, the Judiciary is not about populism. That is for the Executive, with the ministers of the government of the day, and the Legislature, through the electoral processes. Thus, whilst the community may on occasion be dissatisfied with a sentence imposed on an individual or with the outcome of a civil case they are able to take comfort and certainty from the fact that, if a time ever comes when they need to be protected from the state, or when they have a dispute with another citizen, they will be heard equally before the law by an impartial and fearless decision maker.

Ultimately, it is what the community thinks about judicial independence that matters.

To draw again from Lord Bingham, to the community I would say this: when the knock comes on the door late at night, when you are arrested and placed in custody, when your insurer unfairly refuses to pay for your damaged home or vehicle, when a sales person tells lies and misleads you on the quality of the product being bought, when a state or local government fails to do what it is bound to do by law at your loss and cost, it is the independent Judiciary to whom you may turn.

Whilst our Judiciary is not threatened by guns, sacking and imprisonment, the community should be alert to the subtle ways judicial independence may be eroded. It is the Judiciary that is always vigilant and protective of the citizen and the state within which the citizen lives. Judicial Independence matters.

[Postscript: In this speech, the Chief Justice discussed the decision in *Kirk v Industrial Relations Commissions of New South Wales* (2010) 239 CLR 531. Since the speech was given, the High Court has affirmed the importance of judicial independence in two more important decisions. In *State of South Australia v Totani* [2010] HCA 39, the Court struck down as unconstitutional parts of the *Serious and Organised Crime (Control) Act 2008* (SA) describing it as 'repugnant to the institutional integrity of the courts' ([226] per Hayne J). In *Plaintiff M61/2010E v Commonwealth of Australia* (2010) [2010] HCA 14, the Court held that processing asylum seekers offshore did not insulate the Australian Government from the requirements of the *Migration Act 1958* (Cth) and the requirement that it accord asylum seekers procedural fairness.]

Does judicial independence matter? The conclusion is obvious. As a matter of constitutional and legal principle it matters because judicial independence lies at the heart of our democracy.

Victorian Bar News gratefully acknowledges the Chief Justice's kind permission to republish her address above which was delivered as the Victoria Law Foundation 2010 Law Week Oration on Thursday 27 May 2010 at the University of Melbourne.

End Notes:

1 Brennan, The Hon Sir G, *Judicial Independence*, address to the Australian Judicial Conference, 2 November 1996, p.1.
2 The Sixth Sir David Williams Lecture at the University of Cambridge 2006.
3 Bingham, the Rt. Hon. Lord TT, *The Rule of Law*, (London 2010) p.vii.
4 ibid.
5 Stephen, The Right Hon Sir N, *Judicial Independence – A Fragile Bastion*, (1982) 13 MULR 334.
6 Sheller, The Hon CSC, *Aspects of Judicial Independence*, speech delivered to the Compensation Court Conference, 30 March 2001.
7 Montesquieu, Baron de *The Spirit of Laws*, G&A Ewing and G Faulkner, Dublin 1751 (Rep Legal Classics Library, Birmingham, Alabama, USA, 1984).
8 ibid.
9 *Huddart Parker and Co. Pty. Ltd. v Moorhead* (1909) 8 CLR 330, 357; also, cited by Gleeson, The Hon., ibid.
10 Gleeson, The Hon M, ibid.
11 Gleeson, The Hon. M., *The Right to an Independent Judiciary*, speech delivered to the 14th Commonwealth Law Conference, London, September 2005.
12 ibid.
13 ibid at pp. 304.
14 See J. Raz, *The Authority of Law: Essays on Law and Morality* (1st ed, 1979) 221.
15 ibid p.68
16 The origin of this phrase, whilst universally attributed to Spinoza, is impossible to trace. It is sometimes rendered as 'the mathematics of freedom'.
17 Murray Gleeson, *Embracing Independence* (Local Courts of New South Wales Annual Conference, Sydney, 2 July 2008) at 3.
18 For the importance of these articles to interpreting the *Australian Constitution*, see Forge v ASIC (2006) 229 ALR 223, 283-5 (Kiry J).
19 *Draft Principles on the Independence of the Judiciary* (1981) art 29. See also, Art 1.
20 *R v Momcilovic* [2010] VSCA 50.
21 *Metro West v Sudi* [2009] VCAT 2025.
22 *Attorney-General (Vic) v Kay* [2009] VSC 337.
23 *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 381.
24 *R v Fearnside* (2009) 193 A Crim R 128.
25 *Kracke v Mental Health Review Board* [2009] VCAT 646.
26 *RJE v The Secretary to the Department of Justice* [2008] VSCA 265.
27 *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346.
28 Lane, P H *Constitutional Aspects of Judicial Independence – Fragile Bastion: Judicial Independence in the 90s and beyond*, Judicial Commission of New South Wales Monograph http://www.judcom.nsw.gov.au/publications/education-monographs-/monograph1/fb
29 *The Herald and Weekly Times & Anor v Popovic* (2003) 9 VR 1; [2003] VSCA 161.
30 ibid p.8.
31 See *Clayton v Heffron* (1960) 105 CLR 214, 250-251.
32 ibid at p.16, citing, Dixon, The Hon. Sir O., '*The Common Law as an Ultimate Constitutional Foundation*' (1957) 31 ALJ 240; (1935) 51 LQR 590.
33 ibid citing Australian Communist Party v Commonwealth (1951) 83 CLR 1, 139.
34 In South Australia there is a separate courts authority.
35 Budget figures for the Department of Justice (2009-10) may be founded at *Budget Paper 3: Service Delivery: Department of Justice* (http://www.budget.vic.gov.au/CA25755B0004CE3B/WebObj/BP3Ch3DOJ/$File/BP3Ch3DOJ.pdf) 143.
36 The Hon. Tim Smith, 'Court Governance and the Executive Model' (Speech delivered at The Judicial Conference of Australia, Canberra, 2006).
37 *Aon Risk Services Australia Ltd v Australian National University* (2009) 235 CLR 175
38 Brown, D. *Popular punitiveness, the rise of the 'public voice' and other challenges to judicial legitimacy,* paper delivered at the National Judicial College of Australia conference Confidence in the Courts, 9-11 February 2007.
39 Kelly, T., Seeing Red – the Communist Party Dissolution Act and Referendum 1951: Lessons for Constitutional Reform, Evatt Foundation (Sydney, 1992) p.158.
40 Burns, C., The Tait Case (Australia 1962), pp. 140-142.
41 The Newcritic, Issue 9, December 2008. p.4. fn 19 at http://www.ias.uwa.edu.au/new-critic.
42 As recounted in McHugh, The Hon. M., *Tensions between the Executive and the Judiciary*, speech to the Australian Bar Association Conference, 10 July 2002.
43 ibid.
44 *Justice as Fairness*, Rawls, J., Philosophical Review Vol LXVII (1958).
45 Sen, A., *The Idea of Justice*, p.54 (2009) published by the Belknap Press of Harvard University Press, Cambridge, Mass, USA.
46 ibid.

VBN

The National Profession Reforms *An Overview*

Mark Moshinsky SC

In December 2010, the taskforce established by the Standing Committee of Attorneys-General (SCAG) published a revised draft of the proposed national profession legislation. The draft legislation is due to be considered by the Council of Australian Governments (COAG) in February 2011. As at the time of writing, it is not clear whether the proposed national profession reforms will go ahead. Nevertheless, it may be of interest for members to have a brief overview of the current draft of the legislation for a national profession.

The proposed structure involves one State (the 'host jurisdiction') passing the 'Legal Profession National Law' as a law of that State, with the other States and the Territories then passing legislation adopting the national law as a law of the State or Territory, as the case may be.

There would be established a National Legal Services Board (the Board), an Admissions Committee of the Board, and a National Legal Services Commissioner (the Commissioner). The Board would have responsibility for making rules regarding legal practice, including practice rules, among other things. The Admissions Committee would be responsible for giving compliance certificates, which would be necessary to gain admission to practice (with the State Supreme Courts remaining the admitting bodies). The Commissioner would act as the CEO of the Board and would have certain other functions, but many of the functions given to the Commissioner under the draft legislation (e.g. as regards complaints) must be delegated to a State or Territory local representative (see further below).

The Bar has been supportive of the concept of a national profession, seeing it in the interests of the public as consumers of legal services, and of barristers. Past reforms have enabled barristers to practise interstate without the need for admission in other jurisdictions. These reforms would take matters one step further by providing a single set of legislation and rules for practice across Australia. However, the Bar did have concerns with the earlier version of the draft legislation and does have some concerns with the current draft, some of which are mentioned below. On the whole, however, the current draft addresses most of the earlier concerns.

The Board, the Admissions Committee and the Commissioner

One of the contentious issues has been the composition of the Board. Under an earlier draft, the role of the profession was quite limited. The December 2010 draft represents a considerable improvement, but there is still one aspect which is unsatisfactory. Under the December 2010 draft, the Board would comprise seven members. Of these, two would be appointed by the host Attorney-General (i.e. the Attorney-General of the host jurisdiction) on the recommendation of the Law Council of Australia (LCA), one on the recommendation of the Australian Bar Association (ABA), and three on the recommendation of a standing committee of State and Territory Attorneys-General (the Standing Committee). The Chair would be appointed by the host Attorney-General on the recommendation of the Standing Committee, having consulted the LCA, the ABA and the Council of Chief Justices, with each of the LCA, the ABA and the Council of Chief Justices effectively having a right of veto over the appointment. These provisions largely pick up a model put forward by the LCA, save in relation to the Chair. The LCA had proposed that the Chair be appointed on the recommendation of the Council of Chief Justices. The Bar's position is that the Chair should be appointed on the recommendation of the Council of Chief Justices, as proposed by the LCA.

The Admissions Committee is to consist of the following persons, appointed by the Board: 3 current or former Supreme Court Judges; three persons nominated by the LCA; one person nominated by the ABA; one person who represents a State or Territory Justice Department; and one person who is the Dean of a Law School.

The Commissioner is to be appointed by the host Attorney-General on the recommendation of the Standing Committee and with the concurrence of the Board.

Delegation to State bodies

While the national law would establish common legislation and rules for the regulation of the legal profession across Australia, a significant part of the day-to-day regulation of lawyers would still occur at the State level. The draft legislation provides for each State to nominate a local representative(s) of the Board and a local representative(s) of the Commissioner. It is not clear at this stage who the Victorian local representatives would be, but it seems possible that the office of the Legal

Services Commissioner of Victoria (whether or not with the same title) would fulfil those roles. It is not anticipated that the Legal Services Board of Victoria would continue to exist, as its functions would be largely carried out by the National Legal Services Board.

For each of the Board and the Commissioner, the draft legislation specifies certain functions which must be delegated to the State local representative, certain functions which can be delegated, and certain functions which cannot be delegated. From a practical point of view, many of the functions will be delegated to the State local representative and not carried out by the national entity. For example, the function of issuing practising certificates must be delegated by the Board to a local representative. In relation to the Commissioner, the functions which must be delegated include the investigation of complaints and the commencement of disciplinary proceedings. Where functions are delegated to a local representative, they can be further delegated to a professional association such as the Bar.

The provisions would enable the current practice to continue, whereby the Bar is involved in the issue and renewal of practising certificates (which sometimes raises "fit and proper person" issues) and (through the Ethics Committee) in the investigation of complaints. This is important, because the nature of practice as a barrister is such that senior barristers are well placed to consider these issues and do so with a high degree of rigour. The Bar's involvement in these aspects of regulation keeps the Bar apprised of issues as they are developing, which can inform the Bar's policies and CPD program.

The provisions would enable the current practice to continue, whereby the Bar is involved in the issue and renewal of practising certificates (which sometimes raises "fit and proper person" issues) and (through the Ethics Committee) in the investigation of complaints.

Other provisions of interest

It is not possible in the space of this article to cover all of the provisions of the draft legislation, even in a shorthand way. There are numerous differences from the provisions of the Legal Profession Act 2004 (Vic), some of which are more significant than others. In the balance of this article, I merely highlight a few provisions which may be of interest.

The draft legislation contains provisions about the use of certain titles, including "barrister", "Queen's Counsel" and "Senior Counsel" and prescribes who may use those titles.

The draft legislation makes a distinction between fused jurisdictions and non-fused jurisdictions, and a barrister moving from a fused to a non-fused jurisdiction is required to give notice to the local representatives of the Board.

Unlike the current Victorian practising certificate (which does not on its face differentiate between barristers and solicitors), under the draft legislation a practising certificate for a barrister will be subject to a condition that the holder is authorised to engage in legal practice 'as or in the manner of a barrister only'.

The draft legislation deals with the reading program to become a barrister. It provides that the holder of a barrister's practising certificate must undertake and complete an approved reading program and read for a specified period with a barrister (of an approved class or description). The supervising barrister will have to certify, at the end of the reading period, that the barrister is fit to practise as or in the manner of a barrister without restriction.

In relation to legal costs, the draft legislation provides that a law practice must charge costs that are no more than is fair and reasonable in all the circumstances. A costs agreement is prima facie evidence that the legal costs disclosed in the agreement are fair and reasonable. These provisions do not apply to commercial or government clients.

The provisions dealing with professional indemnity insurance essentially leave this matter to be determined at the State level. On their face, these provisions appear to enable the current arrangements with the LPLC for primary layer insurance for barristers to continue.

The draft legislation provides for the Commissioner (through the local representative) to carry out compliance audits of law practices, including of a barrister's practice.

The provisions relating to complaints draw a distinction between 'consumer matters' and 'disciplinary matters'. Disciplinary matters are complaints which would, if the conduct were established, amount to unsatisfactory professional conduct or professional misconduct. Consumer matters include costs disputes and other matters which the Commissioner (through his or her delegate) determines should be resolved as a consumer matter. The description 'consumer matters' would appear to cover matters where there are issues regarding the quality of the service provided, but not amounting to unsatisfactory professional conduct. The Commissioner (through his delegate) has the power to make determinations in relation to consumer matters and disciplinary matters. There is a right of appeal to a designated tribunal (which would presumably be VCAT in Victoria), but not for a compensation order for less than $10,000.

If the national profession project goes ahead, the details of the provisions may well change further. The above description merely provides a high level summary of the draft legislation as it currently stands. VBN

Under Review

Governmental Integrity and Anti-Corruption in Victoria

Peter A Clarke

In June last year Elizabeth Proust, Special Commissioner, and Peter Allen, the Public Sector Standards Commissioner, presented the long awaited Review of Victoria's Integrity and anti corruption system.

The 96 page report proposes the creation of three distinct integrity bodies; a Judicial Commission dealing with oversight of judicial conduct, a Parliamentary Integrity Commissioner who will inquire into the conduct of members of parliament and their staff and a Victorian Integrity and Anti Corruption Commission. The Commission is the focus of the Review.

The Commission will comprise three members; the Director of Police Integrity, the Chief Municipal Inspector and the Public Sector Integrity Commissioner. Each Commissioner will be appointed for a renewable 5 year term. The rationale behind such specialist positions is to give the Commission specialist expertise to investigate police, local government and the public sector. The Review argues this structure will prevent the Commission from becoming a single issue agency.

The powers given to each Commission member will be similar to those given to interstate watchdog commissions including witness summons, compelling witnesses to answer questions, overriding privileges and the power to enter public premises and conduct searches.

The review recommends that the Director for Police Integrity continue in place and retain the existing extensive powers relating to telephone interceptions and other surveillance devices and to authorise controlled operations. The review recommends the Director extend his jurisdiction to investigate all police employees, not just sworn officers. In "exceptional circumstances" the Public Sector Integrity Commissioner or the Chief Municipal Inspector may use the more coercive (and controversial) powers of the Director, Police Integrity by the Commission referring an investigation to the Director of Police Integrity, establishing a joint investigation with the Director or applying to the courts for warrants to use such powers.

The Review contemplates the Commission being able to investigate whistleblower complaints about members of parliament or other matters referred by the Parliamentary Integrity Commissioner.

The Review recommends that the scope of the Ombudsman's powers be reduced with some of the existing powers being given to the Commission and the Ombudsman being overseen by the Parliament for the first time. It also contemplates an oversight structure of a independent investigations Inspector and a dedicated parliamentary committee of the Victorian Parliament. In addition the Review recommends establishing an Integrity Co Ordination Board which will comprise members of the Commission, the Auditor General, the Ombudsman, the Parliamentary Integrity Commissioner and the Public Sector Standards Commissioner. The Board is designed to strengthen co operation across the integrity system.

The early meetings of the Board are likely to be lively affairs if the Ombudsman's position vis a vis the Commission remain unaltered. The Ombudsman's report to Parliament in August 2010 stated that the proposed the Commission structure was too complex, lacked flexibility and would run into "legislative barriers" as to jurisdiction. He said that the Commission would be required to "..meet definitional thresholds of criminal or dismissal offences before investigations can commence" which "..would establish artificial boundaries between conduct that is corrupt or not." The Ombudsman suggested that the better response to dealing with official corruption is to bolster the power of existing agencies and ensure they were free to investigate Ministers and other members of Parliament and their staff as well as local councillors.

In an unusual move Elizabeth Proust hit back through the press at Brouwer's report to Parliament including a very unveiled criticism of the lack of representation of those being investigated by the Ombudsman stating " I had expected that people who had been charged with nothing and been accused of nothing would be asked questions and if they wanted to they would have lawyers but they told us consistently they were not allowed to." Brawling between senior public servants is rare but highlights the long ongoing controversy that has attended the issue of anti corruption investigations in Victoria. It has been a vexed political and legal issue for a decade.

While the focus of the Review related to the establishment of the Commission it made recommendations on other related issues. The Review recommended the modernisation of whistleblower protection legislation, clearer standards of conduct for local government officials, a codified rights to procedural fairness for those conducting investigations.

Until November 2010 there was a strong likelihood that the Commission would be established in the proposed form later that year or early in 2011. The Brumby Labor Government had accepted the Review and was committed to its establishment. Then the election came and to most media commentators (though not the electors) surprise there was a change of government.

The incoming Coalition government has committed itself to establishing an anti corruption body by 1 July 2011. It did not commit to the structure recommended by the Review. While the then opposition's policy was to abolish the Office of Police Integrity and establish an anti corruption body which would have the power to investigate cabinet ministers and staff, police, judges, local councillors and other public officials the new government so far has not introduced legislation setting out its preferred structure. That said it was interesting to read that the Minister for Crime Prevention, Andrew McIntosh, recently promised to make sure all the probity issues surrounding the Kew Cottages development would be investigated when the new Anti Corruption Commission was established.

The future reform of Victoria's Integrity and Anti-Corruption system is awaited with interest. VBN

Raising the Bar *Updating the Bar Readers' Course*

Elizabeth Bennett

The Victorian Bar has long been justifiably proud of its readers' course, and of the tradition of mentor / reader (formerly master / pupil) relationships.

In the spirit of maintaining the most well-regarded readers' course in the country, the Bar recently undertook a review of the course. The review was comprehensive and considered a number of amendments that could be made to enhance and modernize the process of coming to the Bar. The Readers Course Committee has been asked to advise on and implement various changes to the reading process.

A number of changes will be introduced to the content and structure of the readers' course. One of the key changes will be the introduction of an entrance exam for the Readers Course from September 2011. The concept of an entrance exam as a pre-cursor to being able to practice as a Barrister is not new in Australia. New South Wales has now for many years examined would-be Barristers in the fields of Ethics, Evidence and Practice & Procedure in order to entrench and uphold professional standards and also maintain public confidence in the independent Bar.

The purpose of the exam is to ensure that those undertaking the revised course have the necessary knowledge to get the most out of it. We understand that the exam is likely to cover Evidence, Practice and Procedure and Ethics so as to ensure that all Readers who are about to commence the Readers' Course have a sound understanding of those areas. A mark of 75% or higher in each of the three exam papers will be required to obtain entry to the course. The first exam will be offered in June 2011 for the September 2011 course.

In a further change, no deposit will now be required to accompany an application to come to the bar. Rather, the full course fee will be required if a candidate passes the entrance examination upon being offered and accepting a place in the readers course. The course may be shorter, but will be equally as intense as the current model, although we understand that the course curriculum is still being developed. It is intended that the new application and exam process will replace the waiting list for readers. Some have applied to come to the bar two or three years before being offered a place, something that is clearly undesirable.

Under the new system once a place is allocated, it will not be possible to defer that place, save in exceptional circumstances, and even then only to the following course.

The changes to the readers' course are not the only alterations to the Bar that have recently been considered. As part of its ongoing analysis, the Bar has been evaluating mentoring and its efficacy in promoting a strong and connected bar.

The mentoring relationship at the Victorian Bar is a touchstone of training to become a barrister. It can be a process that

requires some patience, as mentor and pupil share a room and facilities. It is a process that can be both a strain and a joy.

Lifelong friendships have been formed from the mentor / pupil relationship. However, there have been anecdotal accounts of some unfortunate relationships. For example, reports of readers not attending chambers during their reading period, and an absence of facilities for the use of the reader (such as a desk) are sadly not at all unusual. In some cases, it also appears that there have been instances of poor communication between mentor and reader which have lead to regrettable misunderstandings and overall poor training.

In addition, new national legal profession reform requirements mean that in the future, a mentor will need to certify that their pupil is fit to practice as a barrister.

Concerned to incorporate this change in a way that maximizes the benefits of the mentor system as well as the readers' course, the Victorian Bar has been investigating the health of the system in order to identify methods by which it could be improved.

Last year, the Bar commissioned a survey that involved interviews of junior barristers and their mentors from a selected intake period. The Bar is in the process of considering the outcome of that review, so that it can better consider how to improve the mentor / pupil relationship, and how to better prepare both mentors and pupils for the ups and downs of the reading period.

The outcome of the review and its resultant recommendations are awaited with interest. One thing is for certain though – between the changes to the readers' course and the ongoing monitoring of the mentoring process, the Victorian Bar will be at the forefront in Australia in the professional and effective development of the junior bar. VBN

The New Costs Court

Samantha Marks SC

The new Supreme Court Costs Court Team: The Hon Associate Justice Wood; Judicial Registrar Gourlay; Costs Registrar Deviny; and Costs Registrar Cenidi

The Victorian Costs Court was launched by the former Attorney General The Honourable Robert Hulls on 26 May 2010 with the wish that 'at some distant point, it is rendered obsolete'. However, given that what is said to result in that effect would be a 'legal process that is so clear, so straightforward, that parties are able to agree on costs without further dispute, without further adjudication, without further expense', it seems unlikely to be obsolete in the foreseeable future.

The Costs Court is the first such specialist court in Australia. It has been introduced on the basis that is a 'new and vastly better alternative to the fragmentation and uncertainty of old – a one-stop, centralized court for the resolution of costs disputes arising from litigation or between clients and practitioners'. It is expected to reduce the burden on lower courts, free up judges and other court officials to deal with the principal disputes between parties rather than spending so much time on the minutiae of costs disputes, and improve the efficiency of costs rulings. Whilst VCAT members, magistrates and County Court judges and registrars can still consider the appropriate costs scales and fix costs summarily, any matters they chose not to fix in this fashion will now be referred to the Costs Court.

The Court unites the taxation and costs reviews functions previously performed by the Supreme Court's Taxing Master, Registrars of Court and VCAT. It is constituted by Associate Justice Wood as the Costs Judge, the recently appointed Judicial Registrar Meg Gourlay, and Costs Registrars Dominic Conidi and Mick Deviny (who were previously taxing officers in the County Court). Reviews from the decisions of the Registrars go to the Judicial Registrar.

As of 1 March 2011, all costs proceedings arising from orders of the Supreme Court, County Court, Magistrates' Court and VCAT, as well as proceedings pursuant to the Legal Profession Act 2004 and the Legal Practice Act 1996 will be called over before the Judicial Registrar or the Cost Registrars where the conduct of the matter will be allocated to the Cost Judge, Judicial Registrar or to the Cost Registrars.

Supreme Court *Practice Note No. 7* of 2010 deals with the premises and arrangements for the Costs Court. The Rules of Court, in particular Order 63 of *the Supreme Court (General Civil Procedure Rules)* 2005 have been amended from 31 December 2009 to facilitate taxation of costs in the Costs Court. Notable changes include a rule enabling assessment of costs in appropriate matters without appearance (but where a party can object to the assessment if required (New part 8 of Order 63) and mediation of appropriate costs matters by Costs Registrars (Rule 50.07.2).

The Costs Court is located in the Supreme Court at 436 Lonsdale Street, Melbourne. From March 2011, the associate to the Costs judge will be Mr Luke Bush, contactable on 9603-9324. The Acting Associate to the Judicial Registrar is Mrs Pamela Walton, contactable on 9603-9319. VBN

State of the Profession: Still waiting for the surge

Fiona McLeod SC

Australian Women Lawyers Conference
7 August 2010, Brisbane

Introduction

I want to focus on two key issues today. Each needs to be addressed urgently.

First, the number of women working at senior levels in the profession.

Second, the issue of pay disparity.

It is beyond doubt that the proportion of women in private practice drops off quickly after the first few years. We go from equal or greater numbers graduating, and drop below 20 percent of all partners and less than 10% of all silks. The fall off appears to gather momentum sharply at about 7 years post graduating, and it never bounces back.

The pay disparity starts at a very junior level and is glaring at senior levels. I believe it is the single most important factor influencing the decision to return to work after a career break – for caring responsibilities for example. If there is no certainty of income it is not a credible option.

Why does it matter? I'm doing okay!

In any discussion of the role of women in the legal profession, it is worth considering some of the reasons why equality of participation is so important.

I start with the basic proposition that any division of a work force which favours one group over another on any basis - gender, race, ethnic origin or lifestyle preference for example, must be inherently weaker than one with a diversity of skills and depth of talent. No group within the community can exclusively claim to possess all of the skills needed for the successful administration of law and justice. A profession that nurtures the breadth and depth of the talent pool, on the other hand, benefits from the diverse contribution of its members.

If the legal profession is to serve the community legitimately and with credibility, its leaders must include women in significant numbers. An organisation that fails to include women in its leadership team conversely lacks credibility in its dealings with clients, in particular government clients and others who are themselves committed to equality of opportunity and non discriminatory practices. A profession that prides itself on a commitment to the defence and support of basic human rights, of fairness and justice for all must surely extend the same support to its own members.

The full participation of women in the legal profession makes economically good sense. It ensures a 'return' on the investment in human capital and the expense of legal training and education. Higher retention rates result in savings of many hundreds of thousands of dollars invested in the professional development of lawyers. Retention of staff also means personal relationships within workplaces and with clients are fostered over the long term. As staff gain experience, their ability to work independently relieves senior lawyers of supervisory duties. If the community is deprived of the contribution of significant numbers of these lawyers the investment in training and experience is effectively wasted and the resource not fully utilised.[1] It is therefore uneconomic to lose the skills and capacity of more than 50 per cent of the graduate population. This bleed of intellectual capital and loss of income is not sustainable and can be a make or break situation in many firms. It is not just about the position of women, but the viability of any business which seeks to make a profit and invest in future profitability.[2].[3]

The strength of the legal profession in particular impacts upon women's ability to perform an important role in the administration of justice and to contribute more broadly to leadership in the community. It is from the independent bars for the most part that our judicial officers, our crown prosecutors and solicitors general are drawn. Senior lawyers are frequently found voluntarily contributing to governance of the profession or community organisations. If women lawyers leave the profession in numbers and do not return, this must inevitably impact upon the strength and depth of the legal profession and ultimately on the quality of the courts and community organisations.[4]

Finally, it is sometimes said that the financial security of women in society and their equal treatment as citizens is a crucial indicator of standing and well being of women in society and thus of the health of society as a whole. For Australia to demonstrate its commitment to the just and equitable treatment of its citizens on a global stage, it must treat issues of systemic discrimination with serious attention.

Composition of the Profession – Yesterday and Today

"The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother"
Bradwell v Illinois, US Supreme Court 1873[5]

Not content with 'noble and benign' pursuits, women in Australia have been involved in the legal profession for more than a hundred years. Over the century the composition of the profession has certainly improved, but the proportion of women has peaked well below equal numbers and after bursts of improvement appears to have stalled below 30%.

We certainly got off to a slow start.

In 1900 Edith Haynes, was permitted to commence her study in Western Australia but was refused permission to undertake her law exams on the ground *'The time and money would be*

expended and quite wasted'.[6] She unsuccessfully challenged the decision and never completed her studies.

In 1898 Ada Evans enrolled at Sydney law school, much to the chagrin of the Dean when he discovered the fact upon return from vacation and continued to study despite his attempt to convince her she '*did not have the physique' for law and should do medicine instead*.'[7] She graduated in 1902, but was refused permission to practise as a barrister until 1921.[8] When finally allowed to practice after a significant battle with conservative forces, she was offered briefs but refused them in an act of great self-depreciation reflecting no doubt the humiliation of her struggle, on the ground "*by then she considered herself incapable of handling them, not wishing women's standing in the profession to be undermined by a show of incompetence*'.[9]

Flos Greig was the first woman to commence a law degree and to be admitted to practice in Australia in 1905. Her admission was made possible by the introduction of enabling legislation in 1903 by the Victorian parliament. The Act was the subject of fierce debate at the time.[10] Ironically it was argued that if the Bill were to be passed, a woman '*might become Crown Prosecutor, Chief Justice or Acting Governor*', a situation that has come to pass in Victoria within 100 years of the enabling legislation. Flos Greig was a champion of women's suffrage, writing in 1909 in the Commonwealth Law Review, on the issue of whether women were capable of performing legal work: '*Personally I have never heard one rational reason against it, though I have listened to heaps of twaddle*.'[11]

The Victorian Bar leads all other State and Territory bars with a proportion of around 23% women barristers.

In 1923, nearly 20 years after the admission of Flos Greig, Joan Rosanove was the first woman admitted to the Victorian Bar. She was treated shabbily, unable to secure a room in the principal set of barristers' chambers, ostracised by her male colleagues and struggled to find work. She was the first woman to appear in the High Court but left humiliated to work as a solicitor building a hugely successful matrimonial practice before returning to the bar in 1949. Still unable to secure chambers she conducted her affairs in the Supreme Court library before finally moving into chambers under the pretence of 'reading', as might a new barrister, in the room of a senior barrister when he was away. Ten years after her first application, in 1964 she was appointed QC. Her success was tinged with the regret, later saying '*I've had to accept the fact that being a female in this day and age, I'll never be made a judge*.'[12]

The first Australian woman to be appointed silk was Roma Mitchell in 1962. She was then the first woman to be appointed QC and a Supreme Court judge. She was the founding Chair of the Australian Human Rights Commission and chancellor of the University of Adelaide. She became Acting Chief Justice for a time and later Governor of the State. Upon her appointment to the Supreme Court, the Chief Justice insisted she be addressed as '*Mr Justice Mitchell*' and did so until convinced of the absurdity of the title.

In 1984 the Commonwealth *Sex Discrimination Act* was introduced. In 1987 Mary Gaudron was the first woman appointed to the role of Solicitor General of a State, in New South Wales and at age 43 was the first woman appointed to the highest Court of Australia, the High Court. When she went to the bar and applied for chambers she was rejected on the basis '*it was nothing personal – it was just that she was a woman*'. In 1997 Mary Gaudron spoke of her response to a colleagues patronising remark by saying '*The trouble with women of my generation is that we thought if we knocked the doors down, success would be inevitable. The trouble with men of your generation is that so many still think that if they hold the doors open we will be forever grateful*.'[13]

The last decade has seen the appointment of Justice Marilyn Warren as Chief Justice of the Supreme Court of Victoria and Justice Diana Bryant as Chief Federal Magistrate and then Chief Justice of the Family Court. Justice Margaret McMurdo has been appointed President of the Court of Appeal in Queensland and numerous female justices have been appointed to the trial and appeal divisions in Supreme and Federal Courts. Significant numbers of women Crown prosecutors and Solicitor General Pamela Tate SC have been appointed.

In 2008 Quentin Bryce, former lawyer and Governor of Queensland, become Australia's first woman Governor General. In 2009, three women judges out of seven are members of the High Court creeping ever closer to a composition representative of our numbers in the community.

Women lawyers are law professors and Deans of eminent law schools. They appear in numbers in corporate counsel positions and in a sprinkle of ASX100 Boards, in government departments and include Department Secretaries and Assistant secretaries, Ministers and now, a Prime Minister.

More than a century has passed since Flos Grieg's admission to practice and two decades have passed since Mary's appointment to the High Court, so where is the surge of numbers flooding the senior ranks of the profession in the footsteps of these pioneers? Surely after twenty-thirty years as the majority of new lawyers we should expect to find these graduates and those who preceded them on the cusp of senior appointments. Sadly it is not the case.

In the practising profession, women constitute about 38% overall of legal practitioners, with the bars not exceeding 20% of women for the most part. The Victorian Bar leads all other State and Territory bars with a proportion of around 23% women barristers. Although these figures fluctuate they have never improved markedly. The proportion of women at the Bar in the ACT is less than 6%.

New South Wales and Victoria are the only states to have conducted research into the reasons for women lawyer's limited participation in the profession. New South Wales

is the only state to publish annual figures concerning the composition of the profession. Sadly there is only limited and anecdotal information on partnership take up rates for women in other states. The absence of research and monitoring in other States and Territories is itself suggestive of a significant level of complacency.

Women leave the profession in droves in their middle years. A recent report in Victoria found that practitioners aged 40 and under comprise 47% or nearly half of the practising lawyers in Victoria, and 66% of all women practising in the law in Victoria. The percentage of those lawyers that are women is 56% - a proportion that dwindles to 25% for the over 40s women in the law. So at around age 40 the number of women practising halves; at the 50 year mark that number halves again to about 340 practising women lawyers, compared to more than 1400 male lawyers aged between 50 and 60 years of age.[14]

The Law Society of New South Wales found in 2006 that out of twenty-four of Australia's leading law firms, women make up on average just 18.1% or 429 of 2,364 partners.[15]

Female partners, particularly equity partners, in private law firms are the exception rather than the rule.

In NSW there 5% of QCs and SCs and 19% of all practicing junior barristers are women. In Victoria silks hover around 7-8%, compared with 1997, when women comprised 6% of QCs.

Perhaps part of the reason we are not here in numbers is that the experiences of our first women lawyers are not relics of history, but persist, reflected in the subtle cultural expectations and power structures that reinforce that success belongs to men, where women are the interlopers and must continuously prove their worth to be deserving of success. These expectations can get to us and wear us down. Steps to improve the culture, policy and composition of those power structures are very important and we must continue to reform them.

Perhaps another reason is that women simply elect, en masse, not to sacrifice home life for work, not to strive for the seemingly endless capacity to generate income through direct personal endeavour and a certain machismo in dealings with others.

But knowing the women lawyers I know and their drive and ambition, and being able to count the low number of women I know are currently on maternity leave from our bar, I suspect these factors are less important. Women are no different from men in this respect and tend to adapt to the same processes of unhealthy diet and appetite regimes, abandoning or neglecting personal relationships and rest and recreation in pursuit of the work identity. Women also bear the lion's share of responsibility for domestic chores and child raising.[16]

The real vice is money, or the lack of it.

A Stunning Disparity - Pay Inequity Kicks in Early

It remains the fact that women lawyers continue to earn less than men in practice, that the disparity emerges at a very junior level and continues to senior levels, and that women are more likely to be engaged in part time and casual work, all of which contributes significantly to a gap in earnings, retirement savings and promotional opportunities.[17]

In private sector law firms the pay inequities are sizeable and can be as high as 50 % less, after factoring in the prevalence of salaried partners as opposed to equity partners. When profit share is tied to equity, the gap becomes a chasm.[18]

And it starts early. In New South Wales, when the incomes of solicitors with less than one year's experience were compared in 2002, men on average earned $8,200 more than their female counterparts. By 2007 little had changed, the estimated mean income of male solicitors admitted between one and five years was calculated to be $70,300 while that of female practitioners was $63,500.[19]

Fees paid to barristers demonstrate a stunning disparity.

A number of reports and surveys over the last decade by the Victorian Bar and Australian Women Lawyers, most recently the Law Council and AWL confirm what judges have been saying for at least the same period of time, that women appear less frequently in shorter trials and not in particular male dominated jurisdictions before Australian courts and tribunals. They're not briefed in large by provide firms.[20]

We know the earnings of women barristers are, in many instances, low. This may reflect part-time work. It is relevant to ask – is that by choice or is that part time work, or low paid work is the only work on offer? And if it is the case that women are working part time because of the needs of dependents, how on earth can they afford to continue?

Fairness and Equity –Targets and Incentives

We inherently believe in fairness, that the best person for the job should have it. This is why the merit argument is so seductive. And why is continues to defeat us.

Let us consider what is implied in the concept of fairness when measured against the opportunities presented to two lawyers, one male and one female graduating with equal academic standing.

First, the male will begin his career with a ready-made social network of old boys, clubs and sporting connections which he will be invited to continuously to foster throughout his career.

Second, he will be paid more for no apparent reason from the first or second year of practice for the whole of his career.

Third, the female will take a career break for say a total of 2 years, where her salary will cease or stall.

Fourth, while the female is on her career break, the male will be offered opportunities to travel, study, build close relationships with clients and colleagues as well as developing the networks.

Fifth, encouraged by his peers, the male will ask for more money.

Sixth, also for no apparent reason but subconsciously to do with him being the right sort, the male will be perceived as promotion worthy.

You can no doubt think of a number of other variables that play or have played into the mix tipping the balance even further – personal characteristics seen as desirable, the type of work typically offered to those unable to work 20 hour days over a long period, career breaks turning into opportunities to sideline.

Add in some racial, religious or background diversity and our young woman ends up way down the pecking order when it comes to comparing her prospects for promotion against our young man.

And when the time comes for the new partner or the new silk to be appointed – the merit of the male is obvious and the woman must prove she is outstanding to measure up. Or if she is appointed it is seen as tokenism, designed to address a gender imbalance where her shortcomings are poured over setting her up for criticism from the beginning.

So what do we do? Each time bold measures are suggested that are seen as genuinely addressing the opportunity to participate fully in the profession, they are derided as unfair (because the beneficiaries are not meritorious), unnecessary (because time is all that is needed) and wasted effort (because the really good women make it, so anyone can).

I would like to offer the following provocations each of you.

We need to set goals.

I suggest at least 50% of our profession should be women, at all levels from graduation to retirement at age 60+.

I suggest 30% of our equity partners and 30% of our QCs and SCs should be women. Translate that figure to each local association and each firm and we will see real progress.

And the real cruncher, money – women need a mechanism to compare their pay with their male counterparts and supports for equal remuneration. They need to lift the shroud of secrecy to permit access to information about pay and fees. They need support and encouragement to ask for equal pay. And they it to be offered to them by responsible employers who are more interested in long term loyalty than the short term gain of savings made by underpaying a portion of the workforce.

At the bars, the governments must continue to lead but the private firms must lift their game. They should each set targets of at least 30% of briefs and 30% of fees to go to women. They should aim for breadth and depth of briefing, so the loss of one senior woman does not wipe out the entire briefing list. They should target areas of weakness, where traditionally briefing of women has been poor like intellectual property, construction work, arbitration and commercial work and nurture a pool of senior and junior women.

These things require active intervention and strategic thinking, they cannot be left to chance and to old habits. So here is my five point plan.

Stay in touch - Identify and track women barristers on maternity leave with the aim of maintaining communication and supports.

Incentives and support - Develop a package of financial incentives and supports to encourage return to work after maternity leave, for example, rent free periods and subscription relief.

Re-entry program - Develop a formal program to reintroduce women to life at the Bar after maternity leave. This might include access to occasional care; redeveloping your practice; brushing up the CV; introduction through social functions to the Bar Council; specialists CPD programs focusing on improving confidence and increasing specialist knowledge.

Nurture leadership - Develop a package of encouragements for women between 7 and 12 years seniority which may include senior mentoring, introduction to leadership and governance roles.

Celebrate Success- Recognise advances formally – create an incentive for going beyond amorphous good feelings and human resources vibes. Create an annual Bar award for the private law firms showing the most improvement in adherence to model briefing policies.

At the bars, the governments must continue to lead but the private firms must lift their game. They should each set targets of at least 30% of briefs and 30% of fees to go to women.

And let us keep our sense of perspective. Remember the privilege it is to be alive at this time in this country to be able to articulate and protest against unfairness without persecution. And remember that individually you can also take action. You may not be the first law graduate or the first high court judge, but the position of first woman president and first woman UN secretary general is still open.

And here are some things I have found help along the way.

Do not condone inequity when it is apparent, or it is revealed to you by others. While it is easier to ingratiate yourself into the prevailing culture by pretending inequity does not exist, you will not be served by this in the long run.

Take whatever step you can to personally nurture the career of other women – by offering them positions of responsibility, by briefing them, by including them in your team, by mentoring them and offering them opportunities to work with you, by taking your own steps to ensure their pay and conditions are on a par with male colleagues.

Encourage women with carer responsibilities to adopt flexible work practices that suit you both. This may involve a degree of trial and error and the bold use of technology.

Be the role model for others.

Speak highly of other women and advance their cause.

End Notes:

1 Warren, the Hon Justice M. (2006) *Speech on the Occasion of the Tenth Anniversary of the* Victorian Women Lawyers 24 August, 2006.

2 A private research and training company based in Sydney, FMRC Pty Ltd makes its living benchmarking best practice and ensuring the bottom line remains healthy for firms of all sizes. FMRC, based on its statistical analysis across Australia of the private legal sector, puts a cost on the loss of staff referred to above.

3 Oakes, Neil, FMRC Newsletter 'In Focus' *10 easy strategies to build profits*, www.fmrc.com.au

4 Kirton, C. (2006). *Has the system failed women?* Judicial Appointments Forum, Australian Bar Association. Sydney: Sheraton on the Park Hotel, 27 October 2006.

5 83 U.S. 130 (1873).

6 *In re* Edith Haynes (1904) VI WAR 209, 211 Supreme Court of Western Australia.

7 Bek McPaul, *A Woman Pioneer* (1948) 22 (1) Australian Law Journal 1,2; see discussion by Tate SC P, *Extending The Boundary of Right – Flos Greig, Joan Rosanove and Mary Gaudron, Three Australian Women Lawyers,* 10th Ethel Benjamin Commemorative Address Dunedin, New Zealand 22 September, 2006.

8 Tate above.

9 McPaul above at 2.

10 By the passage of the *Women's Disability Removal Act No. 1837 of 1903, 6 April, 2003* entitled "an act to remove some anomalies in the law relating to women" and enabling women to be admitted to practice as legal practitioners.

11 Greig, F. Commonwealth Law Review March 1909, quoted by Mossman Prof M. J., *Reflections on the History of Women in Law* 27th Allen Hope Southey Memorial lecture, Melbourne 19 March 2009.

12 Archival footage of Joan Rosanove, Sunday Program Channel 9, 1965.

13 Gaudron, the Hon QC, M., *Launch of Australian Women Lawyers*, Melbourne 19 September 2006.

14 A. Patterson: *Bendable or Expendable: Practices and attitudes towards work flexibility in Victoria's biggest legal employers* Melbourne Law Institute of Victoria 2006.

15 Mahlab Recruitment *Private Practice Australia and International Survey 2006*; NSW Bar Statistical Profile 2008, http://www.nswbar.asn.au/docs/about/barstats/2008/s5.pdf.

16 Australian Bureau of Statistics, *How Australians Use Their Time*, 2006, Cat no. 4153.0, (2008); Gillian Whitehouse et al, *The Parental Leave in Australia Survey:* November 2006 Report (2006); Australian Women Lawyers *Submission to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave Issues Paper* 2 June, 2008.

17 Law Council Submission titled E*nquiry into pay equity and Associated Issues relating to increasing female participation in the workforce*, April, 2009; see the National Wage and Equal Pay Case 1972 (1972) 147 CAR 172.

18 Law Council Submission above.

19 Ibid p 5.

20 Law Council of Australia website http://www.lawcouncil.asn.au/

VBN

Bar Health And Wellbeing Week

Lindy Barrett

17 - 21 May 2010

For years now, there has been constant speculation about the overall health of members of the Bar. Are we truly like John Mortimer QC's Rumpole of the Bailey? For those of you not in the know (where have you been?) Rumpole is an overweight fellow, quiet partial to a diet of fried foods and over boiled vegetables. He also loves to smoke a cigar, and has a penchant for cheap red wine. Aside from his favourite sport of cross-examination, the extent of his "exercise" otherwise appears to be the daily stroll to Pommeroy's bar.

But surely the typical barrister of the Victorian Bar has evolved beyond this severely out-of-date character? Long-gone are the days of smoke-filled chambers and excessive boozing, right? We've all seen those government campaigns about exercising (thanks Norm!), had the benefits of the food pyramid drilled into us from an early-ish age, and no-one could possibly miss those warnings that are on every packet of smokes these days (even the fake lolly ones)? So of course we must all be super-fit, super-abstinent people who regularly imbibe our recommended daily intake of approved food groups? Right? Right???

Well, in order to determine such a vitally important question, the Health and Wellbeing Committee arranged for free health checks and assessments to be carried out in the foyer of Owen Dixon West during 17 to 21st May 2010. Some 308 people participated, with interesting results.

So are we really just a bunch of Rumpoles? Or have we moved on? The results are below:

Blood Pressure

1% of us had very high systolic blood pressure (which is the pressure in you arteries as the heart squeezes out blood)and whopping 35% recorded a high rating. Another 1% had very high diastolic blood pressure (which is the pressure as your heart relaxes before the next beat) and 20% had high ratings.
Rumpole rating: 7/10

Cholesterol

43% of participants recorded at risk readings of total cholesterol! Thankfully, 56% of us were within normal ranges (i.e. total cholesterol of 5.5 or less).
Rumpole rating: 6/10

Diabetes

29% had a high random blood glucose level (6.5 or more), and 72% were at a medium to high risk of suffering from diabetes.
Rumpole rating: 8/10

Cardiovascular disease risk ratings (heart, stroke and blood vessel diseases)

Tests showed that 76% of us were assessed as a low risk of cardiovascular disease. Yay! And, only 23% recorded a moderate or high cardiovascular disease risk score.
Rumpole rating 4/10

Waist measurement (indicator of risk of diabetes and heart disease)

Despite being a reasonably common accessory around town (along with the oh-so desirable muffin top), pot bellies are in fact not good for you. 30% of us had high risk waist measurements and 26% had medium risk measurements.
Rumpole rating 8/10

Smoking

Hoorah! 91% of us are non-smokers! Those scary warnings must have worked. Way to go Federal Government (or perhaps the slow-down really is a result of those increased taxes)!
Rumpole rating 2/10

Diet - fruit and vegetable consumption

47% of us don't eat enough fruit, and a staggering 89% don't eat enough veggies.
Rumpole rating 10/10

Physical activity

Only 28% of us get enough physical activity... which means that 72% of us don't.
Rumpole rating 9/10

Overall Rumpole rating - 47/80 (or 58%). Well, apparently, we have come some way, but over 50% of us are still mini-Rumpoles in the making! Oh dear!

Cool Courage and Collegial Conviviality

Bronia Tulloch

Above: Bronia Tulloch on the charge

Friday 23 and Saturday 24 July 2010

Bronia Tulloch, Robert Dyer and Jeremy Geale represented the Victorian Bar in The Age Race held at Falls Creek on Friday 23 and Saturday 24 July 2010. The Age Race is a team event and each team member must complete two GS runs which were held on the Friday and two slalom runs which were raced on the Saturday. The 'Vic Bar Racers' placed 14th out of the 34 'corporate' teams which successfully completed all 12 runs across the two days. A further 15 teams which entered the competition were disqualified, a fate narrowly missed by the Vic Bar Racers when international alpine aficionado Robert Dyer caught an edge on his first slalom run. In an inspiring and commendable show of team spirit Robert picked himself up, climbed back up to the missed gate and still managed to ski all his remaining gates and heroically complete his run.

Conditions were clear and sunny on both days, but icy. This made it hard for the racers to get and hold an edge around the gates however it reduced the extent of ruts in the snow for those racers who drew lower numbers in the start list. At the start of the course the pitch allowed racers to gain some speed around the first few gates, but then it flattened out making it a challenge to hold onto speed around the gates in the middle of the course, suiting the gliders more than the carvers.

The Vic Bar Racers were also able to hold their own at the après activities held on Friday and Saturday nights and while medals were not awarded for this aspect of the event, the Bar was certainly in contention for a podium finish.

Anyone who is interested in representing the Victorian Bar at The Age Race on Thursday 28 to Sunday 31 July 2011 should contact Bronia Tulloch as soon as possible on broniatulloch@vicbar.com.au. Previous ski racing or après ski experience is not required and the event is suitable for all skiers and snowboarders who feel comfortable on a blue run or above.

VBN

Triglia's Supreme Court

The Essoign's Permanent Collection

Above: The Salvatore Triglia acquisition

Like the journey of an epic work of art, the Essoign Club throughout its much loved history has very much been a work in progress as it has sought to evolve through the ages. There are those at our Bar who can recall when the Essoign was a club on the 13th floor of Owen Dixon East, replete with leather couches, indoor cigarette smoke and a steaming bain marie which patiently displayed many a deep-fried culinary delight.

While it has undergone physical transformation and a location change, the Essoign remains a club that belongs to its membership. Over time, while some things have happily changed, many things reassuredly for many remain the same. This process is very much reflected in the Essoign's consistent approach to its art collection.

In the first part of last year, the Essoign exhibited the work of Salvatore Trigila at the Essoign. Triglia is a Melbourne-based artist and teacher who in recent years has specialized in sketching Melbourne's built environment. Triglia speaks of his recent works with passion, observing:

> "What has interested me is the physicality of these buildings; their drama, their austerity and their beauty."

Certainly, many would agree that there are few buildings in Melbourne more grand or beautiful than its Supreme Court, the subject of Triglia's recent work. A sample of Triglia's work hung in the Essoign for a number of weeks and was the subject of critical attention and acclaim from Essoign members and guests alike.

At the end of the exhibition period, the Essoign committee commissioned a drawing of the William Street view of the Supreme Court to be part of the Essoign's revered permanent collection. The artist says that he intends his works to:

> "Convey something caressed, something lyrical, a passing glance – can we feel the noise, the encroachment of the 21st century?"

Triglia's work was unveiled by the Honourable Justice David Beach in the Essoign on 26 May 2010, where it was immediately the subject of considerable comment. Plainly, the Essoign cogniscenti must know a thing or two about great contemporary art, as was evident if one were privileged to participate in the enlightened discourse which enthusiastically appraised and critiqued this drawing of immense significance at it's unveiling. The work is a view of the Supreme Court, as

The view of the Supreme Court from the Essoign

it appears from the Essoign. The juxtaposition of the actual Supreme Court, viewed from the Essoign with an artistic rendering of the same view serves to remind us of the different perspectives available to us through art. For some, the Supreme Court always looks considerably more attractive when viewed from the Essoign with a glass in hand. Perhaps one day Triglia might be commissioned to complete a painting of the Essoign from the perspective of the Supreme Court? The view would be an interesting one indeed.

Salvatore Triglia's dramatic interpretation of the Supreme Court of Victoria in muted tones of black and white and beige seems to be very much at home amidst the ongoing expansion of the Essoign's permanent art collection which continues to reflect the tastes and interests of its members. VBN

Reclink Frank Galbally Cup 2010

Ben Ihle

To say that the Barristers were triumphant in the 2010 Reclink Galbally Cup would be to speak both a lie and the truth. This year's event provided something of a crossroad for the annual game, and for the two teams; the first made up of barristers (with some assistance from the clerks' offices) and the other, an evergreen contingent of solicitors. It was the first time that the game had been played at the same venue in successive years and, as such, promised some permanence to the fixture. More importantly though, it provided for the inevitable break to the deadlock: Since 2005 the Barristers had won two games (albeit not always in an emphatic performance), as had the Solicitors (with one year the match not going ahead). One of the teams was going to walk away with significant bragging rights.

The build up to the game was irresistible. Galbally cup stalwarts John Dever and Matt Fisher proffered several emotive emails. Each sought to stir motivation and employed language evocative of Hawthorn coach John Kennedy's famous 1975 grand final address ("Do something! Don't think. Don't hope. Do! At least you can come off and say, I did this …"). The talk among those who would be lacing up on that fateful May Saturday was ripe. We had lost the last two games against the Solicitors, it was time to bring the Galbally Cup back to the bar!

Wayne 'Moose' Henwood at the helm.

Although the emails and talk were stirring, they did little to motivate many to the first, last and only training session in the week preceding the game. Although only a handful showed up to the session - what rabble bunch they were - the hope in each burned brightly on the discovery that for the first time the bar would be coached, not by a ring in, but by one of their own: Swans legend, Wayne "the Moose" Henwood. The Cup would be reclaimed by the Bar, and for the first time with a truly "Bar" team.

Game day arrived.

Hopes were high, as was adrenalin: each almost as high as the mean age of the barrister's team. The only thing overpowering the expectation was the strong smell of dencorub in the change rooms. Talk was tough, at times a little too tough considering the number of young children brought in to see "Daddy" achieve one more moment of sporting greatness before the boots went on the hook on the garage wall for good.

As soon as the team ran out things started to slide. Following a light warm-up the Bar went one man down, when I strained a muscle during a kick-to-kick drill (clearly not enough dencorub!). Further last minute reshuffling had to be done by Coach Henwood due to the conspicuous absence of ex-VFL big man, Tim Bourke.

The siren sounded and the ball was bounced. Justin Brereton, thrown into the middle, threw his big frame less at the ball and more at the 6'6", 24 year old solicitor playing opposite. Despite being outsized and more than a few seasons past his best, Brereton got his fist to the ball. The ball popped up like a wet bar of soap and landed deftly in the hands of a solicitor already running full steam towards his side's goal. Within seconds the ball had sailed through for the Solicitors' first score. Eleven seconds in and the Barristers were already playing catchup to a younger, faster and fitter side.

The tempo for the first quarter did not shift beat. The Solicitors routinely worked the ball out of the middle and into their forward line with the pattern only temporarily broken when a barrister unwittingly took possession only to be seized upon by a pack of solicitors. Each instance was reminiscent of a 'Big Cat' documentary on the Discovery Channel. The only things that kept the Barristers believing for the first 25 minutes were Dermott Dann's hard running, Michael Croucher's fierce body work when tackling 22 year-old articled clerks trying to skip around him, and Marko Cvjeticanin's Schwarzenegger-esque physique and presence in the half-back line.

When the siren sounded for quarter time the Barrister's limped towards Coach Henwood looking for inspiration. They were sore, exhausted and yet to score. It was going to be a long afternoon.

Out of nowhere, as if to script from a Hollywood movie, Tim Bourke ran (although this is probably a fairly liberal use of the verb) from the change rooms to join the pack. He had made it. This was what was going to save the Barristers from humiliation and maybe even deliver victory. Looking around the huddle it was clear the inspiration had arrived and despite his eloquence, it was not from anything the Coach had said: "*Don't try and finesse it. We're not that finesseful.*"

Although he would never admit it, several present have reported that Robert Heath's Kareem Abdul-Jabar glasses began to fog over, so moved was he with what was going to be the shift in the team's fate.

"We're not that finesseful"

The coach seized on the lift in spirit. He put Bourke straight into the ruck and surrounded him with several young, gazelle-like, running players supplied courtesy of John Dever's office. The players resumed the field and it was clear that the solicitors' coach had sensed the shift in attitude. He sent three of their best to triple-team Sebastian Reid in the Barristers' forward line (probably in the expectation that the ball would be coming down to him more often than it did in the first quarter). We had them worried.

The siren sounded and the ball was bounced. It sailed high in the air and the anticipation was thick. The rucks lumbered towards each other and readied themselves to launch. The solicitors' ruckman took off and sailed towards the ball. Bourke stumbled, tripped and did all he could to keep from falling over. Within seconds the solicitors kicked another goal.

Brereton's impressive athleticism at the opening bounce

Despite expectation, the second quarter unfolded much like the first. Bourke fell over every time he got near the ball. Dugald McWilliams was consistently under siege as he, with the assistance of others, valiantly tried to stem the surging tide. Holding the backline together, McWilliams appeared to be under mortar heavy attack. The ball, along with several, leaping twenty-something solicitors routinely flew through the air towards him. More often than not, such lead

Half-time conference

to another goal for the solicitors.At half-time the Barristers adjourned to the privacy of the change rooms so as to avoid the disappointed eyes of the onlookers. The only comfort acquired was that of the ever-adoring offspring looking up to their fathers who were sweat ridden, in some instances blood-stained, and uniformly completely spent. The adoration was moving. The Barrister's performance was not. One goal umpire, a long time beneficiary of Reclink's charity works came in and gave the Barristers an almighty spray. He was animated and passionate. The Barristers were not.

The second half continued in much the same vain as the first half. However, it was punctuated with a few highlights. The Barristers broke through for a few goals, partly due to Tony Burns inspiring post-surgery gut running. Hero-come-lately, Chris Winneke, decided the obliteration was too much to merely stand by and bare witness. Casting aside injury, he found some boots and the courage to take the field. The effect of his decision was immediate, even if it was not long-lasting.

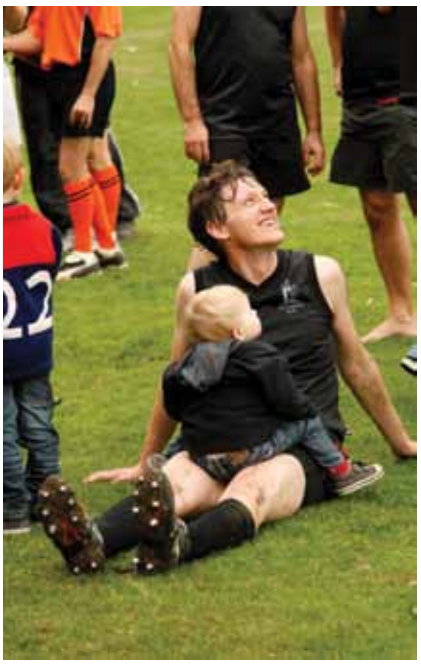
Sebastian Reid helps the Coach look for inspiration.

The Coach reached towards the bottom of his bag of tricks and, looking around, had a flash of brilliance. He spotted John Dever on the sidelines, tracksuited and limbered up. Henwood called on his clerk to join the fray with his two sons, Phil and Michael, and many of the male members of his office. Dever, like the rest of us, prefers to be on a winning side. He remained on the sidelines despite the SOS call.

As the game went on the Barristers got slower, the margin got bigger and the injuries mounted. Only the siren offered mercy. The Barristers limped from the field with bodies and egos smashed. The deadlock was broken and the bragging rights lost. The Barristers' performance was a spectacular failure.

Big bodies slumped to the grass as several old sets of lungs burned for air. It looked like many on the Barristers' side would never walk again, at least not without a limp. The Solicitors celebrated as the P.A. system belted out their team song: "We are known as the instructors. We're the ones who do the work…" When time had past enough for the Barristers to reclaim their breath talk quickly turned to "next year", and the need for some training in the lead up.

Looking at the two, post-game, huddles one could only be struck by the number of kids on the ground. The solicitors, with an apparent average age of twenty-two, looked as fresh as when the game began. They chatted amongst teammates as if they were at the start of the game. Not one looked liked he had even raised a sweat.



Dugald McWilliam with a future Bar prospect to be recruited under the father/son rule

In the other huddle, several children ran and hugged their fathers. The next physical battle had begun for many on the Barristers' side as they wrestled with their adoring fans. Overcoming many painful bumps and bruises the hero-fathers were kissed and hugged and walked from the ground with children hanging off them, some with one from each limb. One member of counsel, although battered and barely upright, was seen kicking the footy with his two kids within minutes of the game ending.

As alluded to in the opening of this report, notwithstanding the scoreboard, the game can be seen as a triumph for the Barristers. Several combatants for the 'Wigs and Gowns' had renewed legend-like status in their children's eyes and the spirit of collegiality between the Barristers was strong from start to finish. New names were put to familiar faces and battle-forged bonds were renewed. Although the Barristers were been beaten by a much younger, fitter and competent football side, at least the team lost as a team in what can only be described as an 'honest' sporting performance. What is more, the event raised, as it always does, a significant amount for Reclink: a worthy cause worth lacing up for again next year when the Barristers will again apply the dencorub, bring their one-eyed fans in droves and attempt to re-live past sporting glories…whether those glories be real or imagined. Either way, it won't matter to the adoring fans. VBN

Sometimes, even when you lose, you still win

The 2010 Bar Dinner

David Turner

Left: Chairman of Victorian Bar 2011, Mark Moshinsky SC
Top: Fiona McLeod SC
Bottom: Former Chairman of the Victorian Bar (2010), Michael Colbran QC

This year, the Bar Dinner was held in spring on the evening of Friday the 3rd of September 2010, once more beneath the magnificent Leonard French ceiling in the Great Hall of the National Gallery of Victoria and again was a splendid evening and a universally acclaimed success.

The 2010 Chairman of the Bar, Michael Colbran QC, presided over the evening by welcoming the 48 honoured guests who had been appointed to judicial office in the previous twelve months as well as those members who had received national honours. An impressive 360 people attended, of whom the most senior was Peter O'Callaghan QC with 50 years seniority and the most junior being the members of the March 2010 Readers Course.

The Honourable Chief Justice Robert French AC of the High Court of Australia attended as keynote speaker. The Chief Justice entertained with a speech entitled "Singers of songs and dreamers of plays" and spoke of the importance of pro bono work in the profession, public life and the law. His Honour also reflected on some interesting cases in his career.

The Honourable Justice David Beach of the Supreme Court of Victoria responded with an insightful and highly amusing explanation of appointments in general and the secret meaning of the initials on the doormats placed outside each Judge's room in chambers.

As the Bar Dinner was held on a Friday night in September, one of the honoured guests found himself in somewhat of a dilemma, with an AFL footy final being played that night involving the club for which he once played. The Honourable Justice Mordy Bromberg of the Federal Court of Australia, a former St Kilda Football Club player was somewhat torn between the great pleasure of attending the Bar Dinner and celebrating his appointment and the need to watch his beloved Saints play in the qualifying final against Geelong. Luckily for the Bar, His Honour was able to attend the dinner and be kept up to date with the score by colleagues at an adjacent table. For the record the Saints ended up upsetting the fancied Cats by four points in a thriller at the MCG.

The Bar Band again reconvened for its annual gig. Led by the musical magic of Paul Connor on guitar, Alistair McNab on sax and Miranda Ball on vocals, the band swooned the crowd till midnight.

It was another great night for the Victorian Bar. Special thanks again go to Bar Council Treasurer Will Alstergren and Denise Bennett of the Bar Office for their excellent organisation.

The 2011 Bar Dinner is to be held at the Melbourne Museum on Saturday 28 May. The speakers will include The Honourable Justice Geoffrey Nettle and Rachel Doyle SC. VBN

Below: The Bar Band: Alastair McNab on saxophone; Paul Connor on jazz guitar

1. The Hon Justice Hollingworth; The Hon Chief Justice French AC; Her Honour Judge Kings

2. Jack Keenan QC; Gunilla Hedberg; His Honour Judge Duckett QC OBE

3. Hugo de Kock; Kate Bowshell; Ray Smith; David Kim

4. Eliza Holt; Sam Rosewarne; Moya O'Brien; Jim McKenna; Ruth Shann

Singers of Songs and Dreamers of Plays

The Honourable Justice Robert French AC, Chief Justice of Australia

In the long-standing literary tradition of denigration of the legal profession, the American poet Carl Sandburg wrote:

> The work of a bricklayer goes to the blue
> The knack of a mason outlasts a moon
> The hands of a plasterer hold a room together,
> The land of a farmer wishes him back again.
> Singers of songs and dreamers of plays
> Build a house no wind blows over.
> The lawyers – tell me why a hearse horse snickers
> Hauling a lawyer's bones.

Sandburg's dismissal of lawyers from the ranks of singers of songs and dreamers of plays stands against the centuries long record of lawyers who have written poems, novels, plays, songs and music and who have been and are players, singers and actors. Lawyers occupy places of prominence in the Australian cultural landscape in literature, poetry, the dramatic arts and music. To name names locally would imply odious comparisons by possible omission – but my good friend, your member Peter Heerey, Master of the Rhyming Arts, cannot escape mention.

Literary allusion has found its place in many judgments with various purposes: to lift the tedium of the prose; to illustrate some point of meaning or to demonstrate normative truths.[1] Alexander Pope once wrote of 'so vast a throng the stage can ne'er contain'. Justice Neasey of the Supreme Court of Tasmania used Pope's phrase to support his conclusion that a dead blowfly resting on an indentation on the surface of an iced cake could be said to be 'contained' in the cake within the meaning of s 63(1)(ba) of the *Public Health Act 1962* (Tas).[2] That section provided that an article of food is adulterated when it contains a foreign substance. A universal truth underlying a legal principle was invoked by Justice Burbury of the same Court when he quoted Shakespeare's *King John* to explain why dying declarations are admissible:

> What in the world should make me now deceive,
> Since I must lose the use of all deceit?
> Why should I, then, be false, since it is true
> That I must die here, and live hence by truth?[3]

The Chief Justices of the High Court have from time to time indulged in poetic and literary allusion. Sir Samuel Griffith in the *Sawmillers*[4] case in 1909 misquoted in Latin the Roman poet Juvenal and was picked up seventy-five years later by Justice Zelling in the Supreme Court of South Australia who not only referred to Griffith's error but also pointed out its lack of application. Chief Justice Owen Dixon cited Othello on provocation by adultery.[5] And in the unpromising setting of a moneylending case, Chief Justice Barwick let his literary hair down and spoke of arrangements which sprang out of friendship and which 'at least as to friendship had a Shakespearian denouement'.[6]

Above: The Hon Chief Justice French AC
Below: His Honour Chief Judge Rozenes QC; Michael Colbran QC; The Hon Justice Bromberg; The Hon Chief Justice Warren AC; The Hon Justice Katzman; Mr Michael Healey; Former LIV President, Mr Steven Stevens

All the Chief Justices, however, could take lessons in judicial literary adventurism from Chief Justice John Roberts of the United States Supreme Court, who recently visited this city. In a judgment he wrote in 2008 concerning whether a police officer lacked probable cause to arrest a cocaine dealer, he adopted the style of Raymond Chandler:

> North Philly, May 4 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighbourhood? Tough as a three-dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He'd made fifteen, twenty drug busts in the neighbourhood.
>
> Devlin spotted him: a lone man on the corner. Another approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office.[7]

It is not necessary for a lawyer to be a writer, composer or poet, or a judge with literary pretensions to be a singer of songs and dreamer of plays. Karl Llewellyn, in his famous Bramble Bush Lectures of the late 1920s and early 1930s, eloquently and elegantly took issue with Sandburg's relegation of the legal profession from the ranks of productive humanity. He pointed to the way in which creative advocacy informs good judging and said:

The job of choosing wisely between the inventions of counsel is a difficult one. The job of consistent wise choice is tremendous. Yet it is not of itself the major work. That has been done, consistently, continuously, by the bar ... And when I say invention, I mean invention. To produce out of raw facts a theory of a case is prophecy. To produce it persuasively, and to get it over, is prophecy fulfilled. *Singers of songs and dreamers of plays* – though they be lawyers – *build a house no wind blows over*.[8]

The songs and plays of counsel are shaped by the exigencies of the particular cases in which they appear. They resonate in the public sphere. Every legal proceeding, however small, however apparently routine, is a public acting out of the proposition that ours is a society governed by the rule of law and aspiring to justice according to law. Every contending argument in every case is a statement about where the justice of the case, according to law, is to be found. Every judicial decision made independently, impartially and with care declares the answer, as best the judge can give it, to the question: what does the doing of justice according to law require of me in this case?

In the company of this Association, embedded in the history of the law in Australia, in the formation of the Australian Federation itself and in the public affairs of both the State and the Commonwealth, I affirm the role of counsel as 'singer of songs and dreamer of plays', a role which, as the membership of your Association has amply demonstrated over the last century or so, spills out of the courts and into the wider arena of public life.

This lofty theme is not designed to mythologise the life of the advocate. The untidy realities of legal practice and our own limitations have led us all to sing songs that prove discordant and to dream plays that turn into nightmares. And sometimes it is the sad truth that opposing counsel's song is clearer, purer and better pitched to its audience than ours.

So it was in the Fremantle Court of Petty Sessions in 1973 when I appeared for the first time, representing the son of a friend of my mother's. My client base was rather limited. My client had hit a tree while driving home late on a foggy evening in Peppermint Grove. He was charged, rather leniently I think, with careless driving. Hoping to create some sense of legal nuance around what were rather intractable facts, I found a lot of interesting law on the topic of careless driving. The magistrate was treated to much of that law, including English and Canadian cases. To paraphrase Sandburg, however, my song was a house that blew over before the prosecuting inspector's pungent observation:

> What with the fog and the grog, your Worship,
> I don't think he knew where he was going.

The prosecutor's submission was a practical statement of the dangers of infringing the precautionary principle, expressed concisely in a judgment in the House of Lords or Court of Appeal or perhaps the Queens Bench Division, which I have been unable to recover, but which was in the following terms:

> When you do not know where you
> are going, you must not go.

Sometimes, creative attention getting is the best that an advocate can hope for. Returning in memory to that gladiatorial arena of my professional novitiate, the Court of Petty Sessions in the 1970s, I was representing a man charged with driving with a blood alcohol concentration in excess of 0.08 per cent. He was embarking on his evidence-in-chief. It was 3 o'clock in the afternoon. The magistrate's eyes were closed and his relaxed posture strongly suggestive of a state of altered awareness. A court clerk faithfully recorded my client's evidence with a noisy manual typewriter. I endeavoured to rouse his Worship from his slumbers. I coughed. I dropped books. All to no avail. I spoke to the prosecuting sergeant, a man of long and bitter experience in that jurisdiction. I said to him: 'I think the magistrate is asleep'. 'What else is new', he replied. At this point necessity became the mother of invention. I shouted at the magistrate: 'Your Worship' – he sat up suddenly attentively alert. 'It is possible', I said, 'that you have not heard all of my client's testimony above the sound of the typewriter.' Without hesitation he responded, 'I have great faith in the transcript, Mr French.' I suppose I could count it as a victory in a small interlocutory battle, on the way to losing the war, that I woke him up.

Sometimes one is tempted to take the bench down a peg or two especially when it resorts to literary, classical or biblical allusions in the course of argument. This is a temptation to

be resisted. Generally, it is not good advocacy. In a committal hearing which I prosecuted in Perth in the wake of the Costigan Royal Commission in the 1980s, the magistrate made a sweeping ruling which appeared to exclude much, if not all, of the rather slender evidence which I was seeking to put before him. When I asked him to reconsider the breadth of his ruling, he replied: '*Quod scripsi scripsi*' – what I have written, I have written. For one of Catholic upbringing who had studied Latin, this statement had a familiar ring to it. However, only after the court rose did I remember that it was Pontius Pilate who said it. How sweet it would have been to point out to his Worship the infamous author of his dismissive words, and how ultimately fruitless, as a piece of advocacy.

We all have little war stories, good and bad, to tell. If not told to excess, or at excessive length, they are part of the collegial delights of life at the Bar. But the cleverness or elegance or literary merit of the things we say, or do not say, in court is ephemeral. It is the substance of what we say and its contribution to the great public role of our courts as the third branch of government that matters. That contribution is enhanced when the profession is prepared to provide its skills in advancing the public interest without any corresponding private benefit.

About nine years ago, the Full Court of the Federal Court decided a case called *Ruddock v Vadarlis*[9], which concerned the executive interdiction of a Norwegian vessel, the Tampa, which had, at the request of the Australia Government, picked up some 400 asylum seekers from their sinking ship. The losing parties in the appeal, Mr Eric Vadarlis and the Victorian Council for Civil Liberties, had sought habeas corpus and ancillary orders requiring the Commonwealth to bring ashore those on the ship. They were assisted by Amnesty International and the Human Rights and Equal Opportunity Commission intervening. The applicants for relief were, for the most part, represented by members of the Victorian Bar acting without fee. In delivering the majority judgment adverse to the asylum seekers, I reflected upon the role of the barristers and solicitors who represented their interests. I do not mind repeating now, what I wrote then:

> The counsel and solicitors acting in the interests of the rescuees in this case have evidently done so pro bono. They have acted according to the highest ideals of the law. They have sought to give voices to those who are perforce voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions. In so doing, even if ultimately unsuccessful in the litigation they have served the rule of law and so the whole community.[10]

The majority judgment was variously denounced by legal and other commentators, with such epithets as 'all at sea' applied by my late colleague Justice Brad Selway, and the ultimate condemnation of it as 'a piece of judicial activism' by David Marr. They did not denounce the tribute to counsel. That was reserved for the late PP McGuinness, the editor of Quadrant, who called it 'pure guff'.[11]

Above: His Honour Judge Ginnane SC; The Hon Justice Giudice AO

The voluntary role of counsel in that case and cases like it, reflect the interpenetration of law and public life and the opportunities which it provides for the advocate to take up in various ways and at various levels the mantle of the 'lawyer statesman'. Those possibilities are apparent to anyone familiar with the history of the Victorian Bar and of your Association and the contribution which its members have made to the law and to public life over the last 170 years or so.

Travelling back to the mid-nineteenth century in Victoria, names like Barry and Stawell and Higginbotham are part of the history of the development of selfgovernment and responsible government in the colony. Later, came the nation builders such as Deakin, Isaacs and Higgins, and then leaders in the great task of developing and consolidating the institutional infrastructure of our representative democracy, Owen Dixon and Robert Menzies.

Because of their distance from us in history, it is difficult sometimes to visualise the humanity of such figures which can, in some measure, put their contribution to the greater good within the grasp of our contemplation.

It is hard to visualise Robert Menzies as a precocious 28 year old counsel arguing the *Engineers*' case[12] in the High Court, being told from the bench, as legend would have it, that he was talking nonsense and responding that he was compelled to speak nonsense by the prior decisions of the Court. Being given leave to attack those prior decisions he seized the moment and the rest is history.

We do not have a transcript of argument in the *Engineers*' case at the High Court, but we have Menzies' counsel's notebook. An examination of it shows a neat, precise record interspersed with the occasional doodle and apparently irreverent observation. Chief Justice Adrian Knox attracted the comment 'X + Y = 1'. It is not clear what Menzies meant by it, but it seems unlikely to have been complimentary.

At the young age of 33, he stood for the Legislative Council for Victoria. His campaign brochure would probably not pass

muster today. It was silent on policy, but adequately recorded his achievements. I had a conversation with him in Perth in 1969 about the beginnings of his parliamentary career. He said with that humour which had not dimmed with the passing years:

> I stood for the Victorian Upper House and I lost two to one. The incumbent died and I stood again and won two to one. After thirteen months in the Victorian Upper House I decided that one might as well be dead, so I resigned.

Menzies' notebook is one among many documentary traces, at the High Court, of the great personalities of the past. There is one artefact however, which is an item of mystery tantalising in its possible provenance. On any view it has a Victorian connection. It is a bottle of pure Norwegian Cod Liver Oil, found by former Federal Court Chief Justice Michael Black in 1992 in a cupboard in the chambers of the Chief Justice of the High Court in the old High Court building in Little Bourke Street. He was kind enough to present it to me not long after my appointment as Chief Justice. An examination of the bottle and some inquiries have shown that it was sold by a chemist, AE Sharpe, who carried on business in the 1920s and thereafter in Darlinghurst, opposite the old High Court building in Sydney. The label on the bottle, which promises many benefits, has handwritten on it the weight of the contents – 8 fluid ounces. The handwriting and the cork in the bottle indicate that it may have been made up by the chemist. A mark on the base of the bottle indicates that it was manufactured by a company called Australian Glass Manufacturers which produced glass products with that mark in the 1920s and 1930s and again in 1960. The features of the bottle generally are suggestive of the earlier period. There are, however, at least two hypotheses open. One is that the bottle belonged to Sir John Latham. The other is that it belonged to Sir Owen Dixon. Whoever it belonged to, they didn't have very much of it. Any member of the Victorian Bar who can solve the puzzle of the ownership of the bottle will be provided with a complimentary autographed copy of the Constitution.

Top: Diana Olsson; Paul Elliott QC.
Above: Erin Ramsay, David Morgan; Kathleen Foley

Having reached our Cod Liver Oil moment, it is now time for you to enjoy your main course. So I will not detain you beyond the mandatory peroration.

The Victorian Bar and its members, famous and not so famous, have given much to the law and to Australia since its formation. They continue to do so. The Bar has what seems to me to be a healthy culture of contribution to the public good. Long may that culture continue and grow. So long as it does you can be, in the most important way, what Sandburg thought lawyers could not be – singers of song and dreamers of plays and builders of a house no wind blows over.

End Notes

1 M Meehan, 'The Good, The Bad and the Ugly: Judicial Literary and Australian Cultural Cringe', (1989-1990) 12 *Adelaide Law Review* 431 from which the examples cited in footnotes 2 to 6 inclusive are taken.
2 *Doyle v Maypole Bakery Pty Ltd* [1981] Tas R 376 at 378.
3 *R v Savage* [1970] Tas SR 137 at 145.
4 F*ederated Saw Mill, Timber Yard, and General Woodworkers Employees' Association of Australia v James Moore & Sons Pty Ltd* (1909) 8 CLR 465 at 494.
5 *Parker v R* (1962-63) 111 CLR 610 at 628-629.
6 *Hungier v Grace* (1972) 127 CLR 210 at 216.
7 *Pennsylvania v Nathan Dunlap* 129 S Ct 448.
8 KN Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* (New York, 1930) at 153.
9 (2001) 110 FCR 491.
10 (2001) 110 FCR 491 at 548-549 [216].
11 PP McGuinness, 'Pesky litigators in a muddle of rights and wrongs', *The Sydney Morning Herald*, 27 September 2001, News and Features Section at 14.
12 *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129

High Court Judgments and the Submissions of Vexatious Litigants: A Comparative Analysis

The Honourable Justice Beach

What you have seen this evening, is yet another example of the imbalance of resources between the Commonwealth and the State. The Chief Justice's speech (constructed with all the resources of the Commonwealth behind it) even had its own IT support and audio visual department. On the other hand, I am confined to some notes, written on a few scraps of recycled paper – paper, which our finance department tells me not to waste, because, apparently, it does not grow on trees.

I was snoozing quietly the other day in a Council of Judges meeting when I was woken by Whelan J. He was reporting about page seventeen of the Court's communication policy:

- for those of you who have never been to a Council of Judges meeting, it's a kind of more polite version of a Bar Council meeting – without the prospect of being voted off at the end of the year.

I wasn't aware we had a written communications policy, much less one that ran to seventeen (or more) pages.

In order to look alert, I turned up the relevant page to see that the policy suggests that a judge contemplating giving a speech should consider where the speech is being given and the identity of the other speakers on the platform.

I haven't sought approval to give this speech. I thought I'd chance my arm that speaking on the same platform as Chief Justice French would probably be OK.

I have been asked to speak for fifteen minutes.

I have a licence to say anything – and so I will!!

In recent weeks, much has been written about classifying judges.

It has been asserted that judges can be classified as follows:

- First, a nice person with a good personality who is bright (apparently a good judge);
- Secondly, a nice person who is not too bright (apparently not much of a problem for the system because he or she cannot do too much damage);
- Thirdly, a nasty person who is not too bright (again, apparently not too much of a problem for the system because he or she can be corrected on appeal);
- Fourthly, a nasty person who is bright (this type is said to be a problem for the system);

  …. and then we come to the lefties, libertarians and Legal Aid lawyers – I am still trying to work out where I fit in that system.

It's all too easy to suggest classifications. The harder step is to then actually classify individual judges. I do not intend to shirk this task. Tonight I am going to classify some judges for you. I am sure those I classify won't mind. Unfortunately I don't have sufficient time to classify everyone.

However, before I do that, tonight, for the first time, the Bar dinner is being held on the same night as an AFL final. I can't resist saying "to all you Collingwood supporters out there – we are now in September!"

Let's talk about the footy for a while. What I like about AFL finals Records is the section they have in them that looks back to this day ten, twenty and thirty years ago. I thought we might do a bit of that.

Ten years ago tonight, the main speaker was Jonathan Beach QC. His task was to toast a number of honoured guests.

Beach, as I will refer to him, described the then newly appointed Chief Federal Magistrate as "a person of flexible thought processes". Her Honour had the privilege of doing the reply speech that year. From her reply speech, it is not entirely clear that her Honour took Beach's statement as the compliment I am sure it was intended to be.

Another of the honoured guests was Bongiorno QC. Is there any year in the last ten that Bongiorno QC, Bongiorno J, Bongiorno JA, Commendatore Bongiorno and Bongiorno AO has not been an honoured guest?

In any event, Beach described his Honour the Commendatore AO JA as "some sort of train spotter". This was clearly not meant as a compliment.

The high point of Beach's speech was, of course, his reference to Gavin Griffith who had received an Austrian award translated as "the Grand Decoration of Honour in Gold with Star for Service to the Republic of Austria". Beach's summary of this was, to use his words, "suggestive of some monumental cock up".

Having been less than entirely effusive about those honoured guests, Beach then turned his attention to the then newly minted Attorney General Rob Hulls. Strangely, in what could only be described as sycophantic (even for him), in referring to the Attorney General, Beach used this expression "the font of

all knowledge when it comes to legal matters".

Twenty years ago the speaker was a young Susan Crennan QC (as her Honour then was).

Nothing unkind was said – unless the expression "man about town" used in respect of Justice McHugh has content with which I am unfamiliar.

Of note, Crennan J referred to the then recent appointment of Justice Tim Smith in glowing terms before putting a proposition which is as good today as it was then and which I heartily endorse. Her Honour said:

> "The Bar is always relieved when the son of a well respected and well loved member of the Bar follows in his father's footsteps. It declares 'all's right with the world'."

On this day thirty years ago, I am sure there was a Bar dinner. However, neither the fact of the dinner nor the speeches given were recorded in the Bar News.

I am certain very fine speeches were delivered – it's just that the editors of the Bar News at the time thought that its pages were better devoted to an article by Burnside headed "Venereal delights".

Further reference to the AFL would be a step too far. Otherwise I might be standing here saying (in as much of a monotone as is possible):

> Round one:
>
> - WorkCover Authority versus Adelaide
> - One vote, WorkCover Authority, J Ruskin
> - Two votes, WorkCover Authority, F McLeod
> - Three votes, Adelaide, R Doyle.

Speaking of Rachel Doyle, there was at one point a suggestion that she would do an introduction by videolink from Paris. My source in the Bar Council, who I will simply refer to as Mr Throat (he likes to be referred to as "Deep" by his friends), told me that this was scotched by the Bar Council. However, I have Doyle's draft as at 26 July.

The draft contains some questions Doyle had for Chief Justice French. They appear to be modelled upon another cross-examination performed in the not too distant past. I don't know whether Doyle expected answers, but I think the questions should be put:

> Her first question:
>
> "Chief Justice French, on the night of Saturday 7 February 2009 … you left the Integrated Centre for Judicial Excellence (also known as the High Court) at about 6.00 p.m. Where did you have dinner and what did you order?"

Doyle's script goes on, dealing with the risk that the Chief Justice might attempt to duck and weave and claim to have been domiciled in Perth at the time. In which event she proposed the following:

> "I put it to you Mr French (or Chief Justice, as you call yourself) that you came here this evening with the sole and malevolent purpose of manufacturing a tissue of lies".

I will leave to the Chief Justice to decide how best to deal with Doyle when she next appears before him.

Before I come to classifying individual judges, I should say something about assessing judges. This is a practice that has gone on for a long time. More specifically, the reading, analysis and assessment of individual judgments is something barristers have been doing for a long time.

For example, Ross Gillies regularly reads, analyses and assesses judgments. In fact, he scores them out of ten.

Most frequently he scores my judgments in the range four and a half to five and a half out of ten. However, recently I heard he scored one of Kevin Bell's judgments nine and a half out of ten.

Always interested in seeking ways to improve customer satisfaction, I approached Gillies and asked how Bell J had come to score nine and a half while I only ever score four and a half to five and a half.

Gillies' answer was immediate. He said:

> "Because this judgment is a masterpiece of learning with fabulous attention to detail. It is thorough -
>
> - it refers to the Magna Carta;
>
> - it refers to the Petition of Rights;
>
> - it refers to the Bill of Rights
>
> - it refers to the Habeas Corpus Act of 1640;
>
> - it refers to the Habeas Corpus Act of 1679;
>
> - it refers to the Habeas Corpus Act of 1816;
>
> - it even refers to Mabo."

I said to Gillies:

> "OK, so why did it only get nine and a half?"

His response was:

> "Well, the judgment refers to Blackstone, Charles the First, William and Mary, Edward the First, George the Third, Henry the Second and King John, but as thorough as it is, there is no reference to Robin Hood … or Sherwood Forest".

So much for a common law silk's assessments of judgments.

I turn now to classifying individual judges. However, before I do so, I need to talk about one further important matter – doormats.

Outside the door of each Judge's chambers on the first floor of the Trial Division building of the Supreme Court are, what can only be described as, very large doormats.

They serve a useful purpose – they act as a sort of sandbag levy whenever it rains and water flows along the corridor.

I first saw the door mats some thirty odd years ago when I visited Dad in chambers. My father had been on the Bench for about twelve months. I was surprised to see this enormous door mat outside the door of his chambers.

The doormat had the letters "GR" emblazoned on it. He proudly told me that this was a reference to George the Sixth and that his doormat was much better than those that had "ER" on them. Additionally, he was somewhat in awe of some of the older Judges who he said had even older doormats with "VR" on them. There was even reference to a fabled "WR". He hoped as his seniority increased he might obtain a "VR" doormat – but he thought that there were no more "WR" doormats.

My father was aware of the doormats' purpose as a flood levy for rainy days. However, he never discovered their true purpose – a purpose that has existed for over 100 years. They exist so that those in the know can tell at a glance how a particular Judge is currently rated:

- ER: extremely reliable;
- GR: generally reliable;
- VR: very reliable;
- and the fabled WR (perhaps soon to be re-introduced in the light of the recent outstanding appointments to the Court): wholly reliable.

By this measure, one can walk down the eastern corridor of the Trial Division building and see (and I am sure they won't mind me telling you) that Justice Emmerton is regarded as extremely reliable; Justice Osborn's mat has gone missing (but when last seen had him classified as generally reliable); Justice Harper is extremely reliable; Justice Hargrave is generally reliable (although his Associates are classified as extremely reliable) and Justice Hollingworth is generally reliable.

Justice Cavanough was until recently regarded as extremely reliable but in a shuffle of chambers his mat now has what looks like a chef's hat on it – others assert is a crown – my enquiries have not yet revealed the meaning of the chef's hat symbol – but lest there be any doubt, John Middleton, a Judge having a hat does not indicate that his or her chambers are open for lunch.

I want to turn now to the honoured guests. If you count them on your program you will see there are 48 of them – although those of you with an eye for detail will see that in fact there are only 47. Consistently with past appearances, Bongiorno is recorded twice. One assumes this is meant to convey that he is doubly honoured.

Last week I received a call from Jack Keenan who wanted to tell me stories about honoured guest number 44, Tony Graham QC.

Jack had some very amusing anecdotes about a couple of sets of interrogatories that had been drawn by Graham in the distant past. However, it would be unfair to repeat these anecdotes:

Above: The Hon Sally Brown AM; The Hon Justice Bongiorno AO, Commendatore nell' Ordine al Merito (Republic of Italy); The Hon Justice Beach

(a) first, they take approximately six and a half minutes – and if I was to give equal time to all forty-seven honoured guests, this speech would take another five hours and five minutes – not counting bathroom breaks;

(b) secondly, the stories were defamatory of Graham – and I don't know him well enough. He might hit me – or worse, send me a letter of demand which I would have to deal with;

(c) thirdly, notwithstanding Rex Patkin's fascination for interrogatories, most of us regard the topic as less than entirely stimulating.

Let me finish then by simply saying something about the doubly honoured guest.

Bongiorno's exploits are too many to recall. Whilst Gillies always asserted you should never be overcooked as a barrister; and knowing only 80% of your brief was the ideal way to ensure that your adrenalin levels were appropriately primed – Bongiorno (as a barrister) actually lived by this rule.

One example will suffice. Bongiorno was leading Wheelahan some years ago before another honoured guest, Mandie J. The case concerned the construction of a lease of the Glenroy RSL. Bonge and Wheelahan acted for the RSL.

Even though the issue was the construction of the lease, on the first day of trial Bonge persuaded Mandie J that he ought to have a view of the premises. This application was not easily made – but was nevertheless acceded to.

The court adjourned and reconvened at the Glenroy RSL. Bongiorno was nowhere in sight. Mandie J enquired where senior counsel for the RSL was – having regard to the submitted importance of the view.

As those of you who know Bonge will have already guessed, Bonge was, of course, back in chambers reading the brief.

Bonge's late preparation paid off in spades. On day two of the trial, Mandie J asked Bongiorno why his client would not concede a point that was ripe for concession. Bongiorno's meticulous preparation enabled him to deliver the following compelling argument:

> "Your Honour, the diggers have never waved the white flag. They don't propose to do so now."

The topic of tonight's speech was to be "High Court judgments and the submissions of vexatious litigants: a comparative analysis". However, I detected a certain reluctance in the Chairman to a speech on this topic when he (as the commercial lawyers would say) "failed, refused and neglected" to put this title on the program.

So I changed my mind – and I will leave that topic for another day – other than to say that (as so often happens) when you study one topic you often discover something else.

I leave this with you, have you noticed how the High Court has begun to channel Professor Julius Sumner Miller? For those of you who are interested, you can see my current favourite paragraph, paragraph [122] of AON v ANU (and I quote): "Was it so"? – of course, the answer is in the judgment, but that must wait for another day.

Thank you and good night.

VBN

Top: Jonathan Beach QC; Dr Josh Wilson SC; Charles Gudsell QC
Above: Deborah Mandie; The Hon Justice Mandie; The Hon Justice Buchanan

Women Lawyers Achievement Awards

Joye Elleray

Kim Knights (Victorian Bar) and Sarah Mansfield (Victorian Bar) at the Victorian Women Lawyers Achievement Awards

The Hon Justice Davies (Supreme Court of Victoria); The Hon Justice Maxwell (President, Supreme Court of Victoria, Court of Appeal) and Elizabeth Jackson (Reporter, '4 Corners', Australian Broadcasting Commission).

'Rising Star Award' winner, human rights lawyer Simone Cusack; Award winner, Solicitor General for the State of Victoria Pamela Tate SC (as she then was, now the Hon Justice Tate of the Court of Appeal of the Supreme Court of Victoria); 'Women's Lawyers Achievement Award' winner Jane Dixon SC (Victorian Bar); The Hon Justice Maxwell; 'Community Justice Award' winner, Fatoum Souki (Western Suburbs Legal Service); Astrid Haban-Beer (VWL Convenor); WBA Convenor Joye Elleray (Victorian Bar).

The Victorian Bar once more asserted its prominence when on 26 May 2010, Jane Dixon SC and Pamela Tate SC each won a prestigious Women Lawyers Achievement Award.

The Awards are now into their fourth year and were held at the Chapter House to St. Paul's Cathedral in Flinders Lane, Melbourne and were co-hosted by the Victorian Women Lawyers and the Women Barristers Association (Victoria).

The Women Lawyers Achievement Awards has become an extremely popular event amongst members of the legal profession in Victoria and tickets for the gala dinner and awards ceremony were sold out well in advance of the night with many patrons scrambling to be placed on a waiting list. Nominations for the Awards were called for from legal practitioners in early 2010 and a quality field of candidates was rapidly assembled.

Dixon's achievements include but are not limited to having commenced employment in 1984 at Galbally & O'Brien, being the firm's first female practitioner where she was articled to Frank Galbally CBE AO. After being admitted to practise in 1985, Jane went on to read with the late Lillian Lieder QC and Dyson Hore-Lacy QC, before eventually signing the Bar Roll on 24 November 1988. She has been an active member of the Bar Council and assisted in the establishment of a Committee to encourage indigenous people to see the Bar as a possible career path. She remains an active member of the Indigenous Lawyers Committee and is a trustee of the Indigenous Lawyers Fund. Dixon was appointed Senior Counsel in 2006 and has appeared in many lengthy cases including but not limited to, delving into rooming house fires and deaths. Her involvement in the establishment of Bushfire Legal Help and coordinating the Vic Bar's pro bono assistance to individuals wanting to participate in the 2009 Bushfire Royal Commission is testament to Dixon's selflessness and public spirit.

Tate JA's considerable achievements both in academia and in practice are well known and well documented (and indeed are noted elsewhere in this edition of *Victorian Bar News*). However it was her extra-curricular efforts in field of human rights and the advancement of women in the Australian legal profession and her exemplary service to the State of Victoria in her role as Solicitor General which attracted the attention of the 2010 Award judges. In the arena of human rights, Justice Tate worked tirelessly as Special Counsel to the Human Rights Consultative Committee (which led to the enactment in Victoria of the *Charter of Human Rights and Responsibilities Act* 2006) and appeared for the Attorney General in many important human rights cases. She is a former Convenor of the Women Barristers Association (1999) and also played a significant role in the implementation of the Victorian Bar's Equality of Opportunity for Women Report in 1998 and thereafter. Justice Tate's instincts for service, hard work and justice will undoubtedly serve her well in her role as a Justice of Appeal.

Winners of other awards in 2010 were Fatoum Souki (Western Suburbs Legal Service), winner of the 'Community Justice Award' and human rights lawyer Simone Cusack, winner of the 'Rising Star Award'. VBN

Judge Nixon Farewell Dinner

Common Law Bar Association

The Hon Justice Jack Forrest

Speech delivered by The Honourable Justice Jack Forrest on the occasion of the Farewell Dinner for His Honour Judge Nixon, staged by the Common Law Bar Association at the Essoign Club on 17 June 2010

It was decided that I should make some prefatory remarks and Terry deliver the after dinner speech for four reasons:

(1) He is taller than me – that's true.

(2) He is funnier than me – and that's true.

(3) He is able to add lib – in case His Honour failed to appear. Terry did so recently when his co-host Barry Hall surprisingly failed to appear so that's true.

(4) Most importantly he does, he says, the best "John Nixon" impersonations at the Bar – and even more so, he says than anyone at the bench – we'll find out soon.

The extended Forrest family has a long relationship with His Honour. His Honour's first master, Mr B L Murray, later Justice Murray was so taken aback by His Honour's approach to litigation that he took silk within 4 weeks of His Honour's commencing reading. That left my second cousin and godfather Jack Mornane, later his Honour Judge Mornane, in charge of His Honour at Selbourne Chambers.

In days gone by, Jack Mornane was always spoken of as a robust and vigorous jury advocate. He would now be the first cab off the rank in the Court of Appeal's zealous examination of civil jury addresses. In any event it was at his feet that His Honour learnt the skills he homed to perfection as the leading junior common law barrister – not just at the Victorian Bar – but undoubtedly and more importantly the leading common law barrister on Dever's list.

His Honour was welcomed to the County Court bench on the 5th day of March 1981. Just to put that in context: Malcolm Frazer was PM, Des Whelan was the Chief Judge, Melbourne (His Honour's team) had last won a flag 16 years earlier, and Footscray – perhaps His Honour's real team (as it was then known) 26 years earlier. If His Honour had a Dever crystal ball he would have known that Just a Dash was likely to win that year's Melbourne Cup.

I have had the opportunity to read His Honour's welcome speech – closely, indeed akin to the Court of Appeal's scrutiny of a trial judge's ruling or sentence. But, again resorting to the Court of Appeal approach (which we all aspire to replicate), I was able to discern a couple of common threads –

- His Honour, particularly through the efforts of His Honour's clerk, Percy Dever, amassed a vast fortune and was clearly both the richest and busiest common law counsel in Australia.

- Secondly, His Honour's capacity to dilute that vast sum by investing in racehorses which had the ability to compete only with the ambulance.

As for His Honour's formidable knowledge and mastery of legal principles – not a mention.

His Honour's forensic skills – not a mention.

His Honour's capacity to relate to the common man – not a mention –

All were missing.

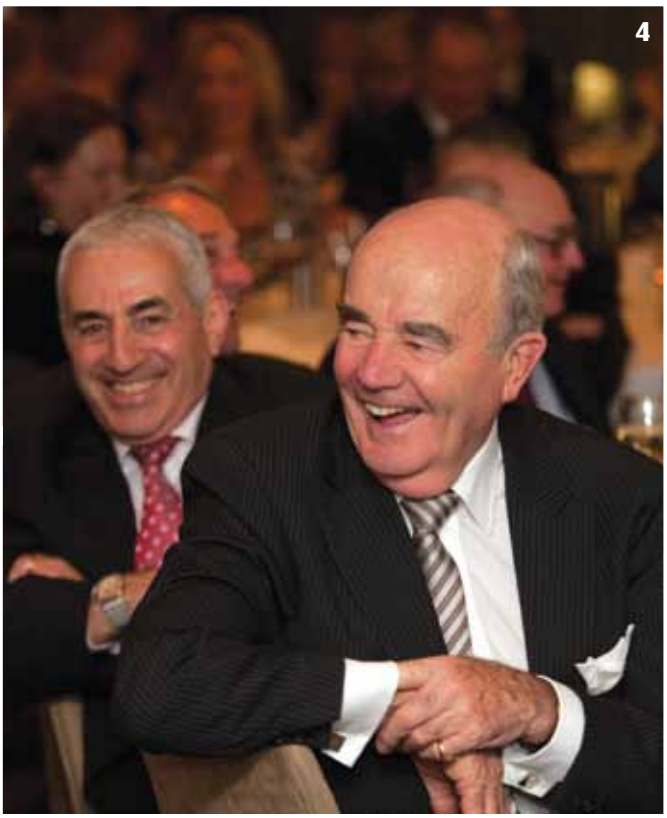
Also at that welcome a quite lengthy but wonderful poem set to the Man from Ironback, authorised by Woodsy Lloyd QC, was read by Mr Tony Smith, on behalf of the Law Institute Victoria. In fact that was another singular feature of the welcome – that rendition took up virtually all of the Law Institute's contribution to His Honour's achievements.

So it was with that ringing endorsement of the bar and solicitors of this State that His Honour took up his judicial role.

At his welcome His Honour also promised "if he was spared" to still be here in 2007; notwithstanding, doubts expressed from time to time, His Honour has done the County Court proud.

His Honour also mentioned the services performed by his secretary Ms Fran Merrington. 25-1 against was laid on Fran seeing it out to1997 as His Honour's Associate, let alone 2007, let alone 2010. She has also done the Court proud.

His Honour tired eventually of the common law and for a significant part of his career was the senior criminal judge in practice if not in seniority in the County Court.



1. Jack Batten, James Mighell SC, Richard Stanley QC, Jack Keenan QC
2. Mrs Libby Nixon and His Honour Judge Nixon
3. Guests enjoying the evening's entertainment
4. His Honour Judge Wodak QC, The Hon Allan McDonald AO QC
5. Gerry Lewis SC, Ross Middleton SC and His Honour Judge O'Neill SC

Before I finish there are two characteristics of His Honour that I briefly wish to mention.

Lateral thinking: His Honour demonstrated this in his early days, but the essence of this account requires the drawing of inferences. Such as two jurors arriving in Sydney at the appointed hour, or, I think His Honour's favourite, the king hit footballer standing beside Lee Adamsen.

His Honour had heard a personal injury trial and one particular member of counsel had been continually rude and disrespectful – and two greater vices: incompetent and unpunctual. Now His Honour could have taken direct action in the Judge Mullaly – I mean "ace" not "rebound ace" style. But he did not. He could have referred the barrister's conduct to the Ethics committee – but he did not. Consider these facts:

- His Honour was enraged by counsel's behaviour.
- The barrister concerned was on Dever's List.
- Shortly thereafter for a period of precisely twenty-eight days the barrister failed to open a ribbon. Nor did Pat Utting put through a call.

Just like the juror travelling on Qantas or Jetstar – draw your own inference. If you draw the inference I am prepared to, it was a marvellous example of a court applying an alternative remedy.

The other characteristic is bravery beyond the call of duty.

About four years ago the County Court reintroduced trial by ordeal – which had been absent from the common law for about 500 years.

The Chief Judge was directly responsible for this extraordinary development. It was not a trial by ordeal of the citizens – far worse it was devised for the judges sitting in the criminal division of the court.

They were to spend one month hearing serious injury applications – and to add to their misery the labyrinth-like inner workings of the Accident Compensation Act would be explained by Tobin, Jens, Gillies, Stanley et al.

Judge Hart was more than adept at avoiding this extraordinary punishment – he prolonged a case to consider many difficult issues and then stated a case to the Court of Appeal – declaring he could not be confident in determining any serious injury application until the Court ruled – and then departed never to be seen in the civil jurisdiction again.

John Nixon was made of stronger stuff. True it was that the last time he opened the Accident Compensation Act it was known as the Workers Compensation Act and was twenty per cent its current size. But His Honour, unlike others, was no shirker and bravely took on the marvellous intricacies of s. 134AB – with beautiful drafting. Sadly His Honour delivered the "coup de grace" to the plaintiff on the question of loss of earning capacity.

Now His Honour, as well all know, has a proud record of surviving scrutiny by the Court of Appeal.

I have to tell you that His Honour's bravery in taking on this daunting task was not appreciated as it should have been by the Court of Appeal. Usually that Court differentially and unanimously heaped praises on His Honour's jury directions, rulings on law and sentences in criminal trials but now they were strangely receptive to the appellant's/plaintiff's case.

Above. The Hon Justice Terry Forrest

They no doubt were surprised to see His Honour as another potential victim in a civil appeal of the labyrinth-like provisions of s. 134AB(38) (e) – (g)". I will say no more about the result other than His Honour soon left the serious injury jurisdiction never to be seen again – muttering "it was all the fault of those overpaid common law barristers".

Those qualities that were not explicitly referred to at His Honour's welcome can now be said emphatically to have been displayed by His Honour over his 30 years on the Bench.

I had the great pleasure and good fortune to appear before His Honour both in common law and Racing Appeals Tribunal hearings on many occasions. Indeed on one occasion I appeared with Beach J indirectly for His Honour before Balmford J where the allegation was that His Honour's membership of the VRC meant that he was ostensibly biased against the trainer who had innocently kept a set of electric spurs in his wardrobe. I am pleased to report that His Honour won – but at times we didn't travel at all that well in the running.

His Honour was, as well all knew, courteous, incisive, fair and able to apply legal principle to the facts without fear or favour. He could, of course, pick a rogue at 1000 m but above all he understands he frailties of humankind and that many have traversed a hard road before ending up at the end of His Honour's steely gaze.

His Honour of course could not have stayed the course without the support of two exceptional women. His wife Libby and his associate Fran, to whom we all owe a debt of gratitude.

As a colleague of mine who will remain nameless but used to be a could-have-been-champion, said this morning: "At your retirement everyone speaks glowingly about what a marvellous judge you were whether you were hopeless or brilliant. The problem with Jack Nixon is that he is a great judge and its not bullshit".

The members of the common law bar past and present wish John and Libby a happy and well-earned retirement. VBN

2010 Readers

Victorian Bar Readers' Course

March 2010 Readers
Back Row: Mark Halse, Ariadne Galanlopoulos, Alexandra Squarci, Martin Guthrie, Jennifer Howe, Barnaby Chessell, Simon Martin, Dinash Daniel, Grant Hayward, Melanie Baker, Thomas Mah, Timothy Greenway, Daniel Epstein, Melanie Szydzik, Cathy Dowsett, Natalie Burnett, Karina Atchia.
Centre Row: Barbara Toohey, Wendy Pollock, Angela O'Brien, Jessica Fallar, Deborah Foy, Therese McCarthy, Kyle McDonald, Vanessa Plain, Warren Smith, Martin Kozlowski, Nahrain Warda, Angeline Centrone, Deanna Caruso, Andrew Felkel, David Sanders, Rohan Barton, Christene Hamilton, Jessica Sun.
Seated Row: Kate Burke, Rupert Watters, Benny Browne, Leon Malantugun, Kevin Naethan, Steven Paisi, Nathaniel Asimba, Cynthia Lynch, Kerry Paull.
Front Row: Edward Gisonda, Andrew Bell, Adam Coote, Con Lichnakis, David Goodwin, Andrew Purcell, Keith Wolahan, Simon Kenny.

September 2010 Readers
Back Row: Wendy Pollock, Tamieka Spencer Bruce, Conor O'Sullivan, Jeffrey Stanley, Jonathan Hirst, Raelene Sharp, Jane Sharp, Adrian Kennedy, Liam Brown, Daniel Bongiorno, Jonathon Sprott, Jessica Swanwick, Rebecca Dunlop, Marian Clarkin, Emma Mealy, Robin Robinson, Amanda Pearson, Miriam Orwin, Melissa Marcus.
Centre Row: Louise Martin, Stephen Linden, Glenn Worth, John Dickie, Panayiota Karnis, Michelle Mykytowycz, Rodney McNeil, Karen Argiropoulos, Matthew Albert, Katharine Gladman, Adam Rollnik, Toby Mullen, Diana Price, Catherine Boston, Teresa Porritt, Simone Bailey, Felicity Bentley, Emma Peppler, Vincent Peters, Maree Norton, Daniella Mattiuzzo.
Seated Row: Marita Evans, Adrian Muller, Rodgers Tovosia, Ronald Talasasa, Campbell Horsfall, Rosie Jordan, Ruth Champion.
Front Row: Neil Howard, Raymond Alexander, Justin Podmore, Justin Willee, Julien Lowy, Stephen Devlin, Alexandra Burt, Kathryn Bundrock, Francis Scully, Paul Jeffery.

J.B. Box Trophy

Julian Snow

Each year a team representing the Bar & Bench play the Solicitors of Victoria at real tennis at the Royal Melbourne Tennis Club for the JB Box Trophy, presented by (the now retired Supreme Court Justice), the Honourable Murray Kellam QC. Box is an entirely appropriate name to be celebrated annually in this fashion; his legal accomplishments include being No.1 on the Bar Roll of Victorian Barristers, a three time chairman of the Bar Council and latterly a County Court judge, while at tennis he was the first President of the Royal Melbourne Tennis Club and a record equalling sixteen time winner of the club's primary championship, the Gold Racquet.

The Bar & Bench record in this event can only be described as pitiful; we have won only twice since the event was inaugurated in the mid 1990's. Despite improved preparation this year, I regret to inform readers that the 2010 renewal was also narrowly lost – by 5 matches to 4.

Our valiant team (in ascending order of tennis handicap) was: James Guest (retired counsel), Judge Howard Mason, John Lewisohn, Mark Derham QC, Stewart McNab, Paul Hayes, and Dr Gavan Griffith QC.

It would be churlish of me to point out (but I do anyway) that the 'Solicitors of Victoria' team consisted of only one qualified player, the remainder being an assortment of interstate practitioners, non-practising lawyers and blatant ring-ins. The judge and barristers were sufficiently gracious to allow this ethical lapse to pass almost entirely unremarked. VBN

1. The feared Griffith backhand
2. Hayes & McNab desperately defending the hazard end
3. Solicitors serving it up to the Bar
4. A proctor's cracking good shot


2


3


1


4

Maxwell (Max) Perry

Maxwell Gordon Perry completed his law degree at the University of Melbourne in 1975. He had the good fortune of reading with the late Fred James and is a highly respected member of the Victorian Bar. Practising in crime, he is equally at home at either end of the bar table, where his almost encyclopaedic knowledge of the law and trivia is regularly and 'amusingly' divulged. He serves his clients, opponents and the bench with candour, honour and distinction.

It may truly be said, that Max is not one to mince his words. One need only call Perry's mobile phone and hear his message on his answering service, should he not pick up: "I have either died or been arrested. If you leave your name and a number and detailed greeting, I will in all probability not get back to you, but neither of us will care. Perry."

Max has always shown an interest in encouraging junior members of counsel. Much of his time is spent teaching aspiring lawyers as a lecturer and tutor at the Leo Cussen Institute and more recently as a teaching Fellow at the University of Melbourne. He has also represented and assisted countless applicants for practicing certificates in their successful passage past the raised eyebrows of the Board of Examiners. Max is an interesting and interested member of our Bar. Put a shilling in his hand.

Silence All Stand

Federal Magistrates Court of Australia

Federal Magistrate Dominica Whelan

Bar Roll No 1673

Her Honour was born and raised in New South Wales, but has lived in Melbourne for more than 30 years.

Upon completion of her law degree at the University of New South Wales (where she was one of only three women in her class, the others being New South Wales Magistrate Pat O'Shane and Federal Sex Discrimination Commissioner, Sue Walpole), Her Honour was Associate to the Honourable Elizabeth Evatt, then Chief Judge of the Family Court of Australia.

In her academic career, Whelan FM tutored Family Law and Constitutional Law at Monash University under the mentorship of renowned industrial law expert Professor Ron McCallum, who was later to become Dean of Sydney Law School.

Professionally, Her Honour was a regular volunteer at the Fitzroy Legal Service and developed a busy and impressive practice at the bar in industrial law. Historically there had been no women industrial advocates at the time Her Honour commenced practice in this area. Together with Jan Marsh (later to become Commissioner of the Australian Industrial Relations Commission (now Fair Work Australia)) and Jenny Acton (later to become Commissioner Acton and now a Senior Deputy President of Fair Work Australia), Her Honour became a widely-respected leader amongst women practising at the industrial law bar, tackling challenging and important cases.

Her Honour's commitment to industrial law and worthy social causes is beyond doubt as is evidenced by her membership of Justice Marshall's Collingwood Football Club legal coterie, the Industrial Magpies, which also sponsors an indigenous Australian Rules team, the Yuendamu Magpies.

Her Honour brings to the office of Federal Magistrate many years of experience as a talented and dedicated lawyer, especially in the field of industrial law.

Supreme Court of Victoria, Court of Appeal

The Honourable Justice Pamela Tate

Bar Roll No 2675

Her Honour was educated at St Philomena's College in Dunedin, New Zealand where she was head prefect and dux of the school.

Her first university academic discipline was Philosophy, where Her Honour graduated Bachelor of Arts (in Philosophy) with a First Class Honours degree from the University of Otago in 1979 – topping the year in the Philosophy School. This was followed by attendance at Oxford on a British Council Commonwealth Scholarship graduating with a Bachelor of Philosophy (a graduate, Master's-level degree) in 1981.

Following her time at Oxford, Her Honour travelled to Australia where she graduated with a First Class Honours Law Degree from Monash University.

After serving articles with Michael Salter at Phillips Fox, she was admitted to practice in March 1989 before serving as a High Court Associate to the Honourable Sir Daryl Dawson AC for two years. Upon being called to the Victorian Bar Her Honour read with John Middleton (now Justice Middleton of the Federal Court) and, after he took silk, completed her reading period with Geoffrey Nettle (now Nettle JA), whom she now joins on the Court of Appeal.

Her Honour established a strong superior court practice with an emphasis on constitutional and administrative Law, intellectual property, industrial law, taxation and trade practices.

Soon after taking silk in December 2002, Her Honour was appointed Solicitor-General for the State of Victoria in July 2003. Her Honour served as Solicitor-General for the State of Victoria with distinction for more than seven years, appearing regularly before the High Court, where Her Honour's written and oral advocacy were, as always, meticulous and of the highest quality.

As Solicitor-General, Her Honour had an instrumental role as the legal adviser to the Consultative Committee that considered and made recommendations to the Victorian Government which led to the introduction of the Victorian Charter of Human Rights and Responsibilities. The enactment of the Charter by the Parliament of Victoria in 2006 is one of the most significant legal developments in this jurisdiction in recent years. The Charter recognises and protects, as part of Victorian law, a series of human rights based on the International Covenant for Civil and Political Rights. Victoria and the ACT are the only jurisdictions in Australia to have so legislated.

Her Honour has served on the Special Committee of Solicitors-General constituted by the Commonwealth Solicitor-General and the Solicitors-General of each of the States. By her peers, Tate JA is held in the highest regard for her contributions to the deliberations and work of that Special Committee and by the Australian legal and political community for the way in which she has carried out her role as Solicitor-General and it is this universal respect which underscores why the State of Victoria is so fortunate for Her Honour to now be serving on its highest state court.

Supreme Court of Victoria

The Honourable Justice Michael Sifris

Bar Roll No 2375

Born and raised in South Africa, His Honour attended Northview High School in Johannesburg and Damelin College for matriculation, studying law at the University of Witwatersrand.

Witwatersrand was, from its origins in 1896 as the South African School of Mines, an open university with a policy of non-discrimination on racial or any other grounds. Nelson Mandela was a law student at Witwatersrand. And most of the defence lawyers in the Rivonia Trial of Mandela and others were Witwatersrand law graduates.

His Honour graduated in 1977 and was awarded the Law Society Prize as the top student of the year, with wife Adiva second in the class.

After emigrating to Australia in 1986 and re-qualifying, His Honour was admitted to practise in Victoria in March 1987 and came to the Bar reading with Charles Gunst (later QC) before signing the Bar Roll in May 1989.

His Honour has practised law for more than 32 years since being admitted to practise as an Attorney of the Supreme Court of South Africa in April 1978. In more than 21 years at the Victorian Bar, His Honour established a very strong practice in banking and securities law and corporate insolvency.

Combining part-time study with full-time practice at the Bar, in 1992, His Honour graduated with a Master of Laws from the University of Melbourne.

His Honour could not be any more conscientious or careful than as a junior and senior-junior, never seeing himself as less than fully responsible, even when with a leader.

Taking silk in November 2002, His Honour's practice as Senior Counsel flourished.

His Honour has been involved on one side or another in most major corporate insolvencies over the last many years, to name just a few, Pyramid, Ansett and Opes Prime.

His Honour brought a practical approach to the conduct of litigation, with an instinctive sense of the justice of the case.

Justice Sifris has also contributed significantly to the Bar, serving on the Bar's Human Rights Committee for four years; on the Continuing Legal Education Committee for four years; and on the Litigation Procedure Review Committee for Commercial Law.

In practice, His Honour was always committed to sound advice and persuasive advocacy - and to solving client's problems efficiently.

He has been an outstanding barrister and acknowledged leader in his field, along the way making significant contributions to the Bar and his fellow barristers.

Supreme Court of Victoria

The Honourable Justice Peter Almond

Bar Roll No 1715

His Honour was educated at the Yarra Valley Grammar School at Ringwood and at the University of Melbourne – graduating in Arts and Law in 1978, and then completing a Master's degree in Law in 1985.

Soon after being admitted in April 1980, His Honour came to the Bar reading with Jeffrey Loewenstein and signing the Bar Roll in May 1982. His Honour took silk November 1999.

In 30 years of practise, His Honour developed a diverse general litigation practice, with trial work initially in the Magistrates' and County Courts but with interlocutory work, and some trial work in this Court and the Federal Court.

As he became more senior – and much more so after taking silk – His Honour undertook large and complex cases, often representing major corporations and regulators, such as ASIC, APRA, NEMMCO and the Australian Stock Exchange.

Silks to whom he was a junior praise His Honour's meticulous preparation – in particular, scrutinising discovery and uncovering material for cross-examination. He was never less than fully prepared, and never reluctant to take a witness.

His Honour's practice remained grounded in commercial law and he was briefed as the leader in a share of the foreign exchange cases in which he had so excelled as a junior.

His Honour contributed significantly to the Bar. He was a Director and Member of the List A Committee for some six years – four of those, serving as List Chairman. He was a Deputy Member of the Supreme Court Board of Examiners. He also presented papers in the Bar's Continuing Professional Development Seminars; at the Leo Cussen Institute; and at the RMIT University.

At University, His Honour was known as "Fonz" – the Henry Winkler character from the American series "Happy Days" – because he wore the same old leather motorcycle jacket every day. His sport was hockey, in which he developed a fierce reputation.

Justice Almond has had a distinguished career as a barrister – demonstrating the many qualities that make for a good judge – in particular, picking the vital issue and making a call on what is worth fighting. Many of His Honour's cases have not proceeded to trial for that reason – or if they have, in only limited compass.

Supreme Court of Victoria

The Honourable Justice John Dixon

Bar Roll No 1673

The Hon Justice Dixon was educated in Brisbane at the Anglican Church Grammar School (Churchie) and the University of Queensland graduating with a Bachelor of Commerce in 1974 and Bachelor of Laws (with honours) in 1977, and later the University of Melbourne, graduating Master of Laws in 1980.

His Honour came to Victoria and was admitted here in June 1978. He read with the late Michael Shatin (later QC) and signed the Bar Roll in November 1981.

And what a Readers Course it was! The course included, not only His Honour, but Justice Whelan of this Court; Justice Marshall of the Federal Court; Judges Cohen, Hogan and Michael Bourke of the County Court; Professor Mick Dodson, the first Indigenous member of the Victorian Bar and 2009 Australian of the Year; and Judge Kevin O'Connor, President of the New South Wales Administrative Decisions Tribunal.

His Honour has practised law for more than 33 years since his admission to practise as a solicitor in Queensland in March 1977, and has practised as barrister for the best part of 30 years, taking silk in 2007.

Justice Dixon began doing almost exclusively criminal defence work. It was only at the end of the 1980s that this began to seriously evolve into a strong commercial practice, where he developed a particular specialty in investment law and litigation and the conduct of large, complex proceedings, achieving outstanding results in complex cases.

His Honour is a foundation member and a Fellow of the Australian Institute for Commercial Arbitration; and was Vice President of that Institute.

In addition to an outstanding practice, His Honour was somewhat of a pioneer in the development of legal practice at the Bar having played a significant role in the establishment of Chancery Chambers in 1997 and was one of the early members of List A Barristers.

His Honour has served for many years as the Treasurer of the Commercial Bar Association and Chair of its Corporations & Securities Law section as well as service on the Bar's Pro Bono Committee while undertaking extensive pro bono work himself.

Justice Dixon's musical talents are well known to many who listened to him play fiddle in a pick-up traditional Celtic band alongside Judge Kevin O'Connor, the mandolin with the Doutta Galla Mountain String Band and the penny whistle in other ensembles, enthusiastically playing Appalachian tunes like "Angeline", "the Baker" and "Over the Waterfall" and "planxties" (Irish dance tunes) by the Irish harper, O'Carolan, especially one called "Sí bheag Sí mhor"– translating as "the faeries on the small hill and the big hill".

Supreme Court of Victoria

The Honourable Justice Cameron Macaulay

Bar Roll No 1842

His Honour was educated at the Greythorn Primary and High Schools; at Camberwell Grammar School for the last four years of High School; and at Monash University.

Excelling in many things at Camberwell Grammar School, His Honour was dux of the school in 1974 and played in the first XI and the first XVIII in the last two years. Illustrative of his breadth he sang in the school choir and was in the school play all four years, playing the lead in final year– John, the Witch Boy in Dark of the Moon – a dark, mythical and magical tale of a Witch Boy who becomes human seeking happiness with a beautiful girl - all set in the Great Smoky Mountains of North Carolina.

His Honour, studied Arts/Law at Monash, graduating Bachelor of Arts in 1978 and Bachelor of Laws in 1981, later earning a post-graduate diploma in Commercial Law.

After serving articles at A G Moore & Associates and remaining with that firm as a solicitor for about 18 months, His Honour came to the Bar reading with D M O'Callaghan and signing the Bar Roll in November 1983.

His Honour's practice was built on a solid foundation in both criminal and civil matters. By the late 1980s, it was entirely civil and since the early 1990s it has been of a general commercial character. Significant areas of practice were professional negligence, chiefly representing solicitors and auditors and general insurance. Over the years His Honour's practice widened to include superannuation, trusts, and trade practices. As a barrister, Macaulay J was regarded as a determined and formidable opponent and a hard man to get anything out of, particularly in his specialty of professional negligence.

As Senior Counsel, His Honour has appeared in many notable and often reported cases including: in one of the Tattersalls cases, for the Trustees seeking commission; in the Catch the Fire Ministries anti-discrimination and religious vilification case; and in Bowen Investments v Tabcorp Holdings.

Before coming onto the Bar Council in September 2008, he served for several years' on two very substantial Bar Committees – 5 years on the Professional Indemnity Insurance Committee and 5 years on the Ethics Committee.

His Honour has been an outstanding barrister with similarly outstanding service to the Bar where his contributions have been substantial, highly valued and appreciated. The Bar's sense of loss is compensated by the joy that the community at large will be the beneficiary of His Honour's appointment to the Supreme Court.

County Court of Victoria

His Honour Judge Dean SC

Bar Roll No 1783

His Honour Judge Dean was educated at Geelong Grammar School; the Peninsula School; and graduated with a Bachelor of Arts and Bachelor of Laws from the University of Melbourne in 1981 (which included an exchange year at the University of Nottingham Law School).

After serving articles with Mr Ed Delany of G E Delany & Co. Solicitors, within a year of admission in May 1982, His Honour came to the Bar reading with the late John Barnett and signing the Bar Roll in May 1983

His Honour took silk in 2001 in the same year that he graduated as a Master of Laws from Monash University.

In his 28 years of practise His Honour has appeared, not only for the defence, but also as the senior prosecutor in prominent matters such as:

- the long-running Salt nightclub murder trial;
- the Tamil Tigers terrorism trial; and
- the ACCC Federal Court prosecution of the late Richard Pratt.

In addition to these major criminal cases, His Honour has also forged a considerable reputation as senior counsel appearing in significant Administrative Law matters, such as the successful Supreme Court challenge by Greg Domaszewicz to the jurisdiction of the State Coroner; and in commercial matters, recently representing the Chief Financial Officer in the Bill Express Limited liquidation proceedings. Bill Express Limited fell into liquidation owing more than $250 million.

His Honour has also had a significant practice in Inquiries and Inquests, including, for example, appearances in the Longford Royal Commission, the Linton Inquest and, most recently, the Bushfires Royal Commission.

His Honour has done much to contribute to the greater good of the community at large, beginning, when still at law school, as a volunteer at the Fitzroy Legal Service and serving there for more than 10 years, from 1980 to 1990.

His Honour also has been a member of the International Commission of Jurists since 1998; and he served on the Committee of Liberty Victoria from 2000 to 2002. He has taught in the Bar Readers Course for some 15 years since 1996 and also in the Bar's CPD program. His Honour served on the Committee of the Criminal Law Bar Association for more than 10 years, from 1985 to 1995 and for some years on the Bar Litigation Procedures Committee for Criminal cases, the Bar Equality Before the Law Committee, the Bar Legal Assistance Committee and more recently as Chairman of the List B (Green's List) Committee.

Going Up

The Honourable Justice Hartley Hansen

was elevated to the Court of Appeal of the Supreme Court of Victoria from the trial division of the court and was appointed as a Justice of Appeal on 19 July 2010.

Gonged!

The Honourable Justice Geoffrey Giudice AO,

who was appointed an Officer of the Order of Australia for distinguished service to the judiciary and to industrial relations, particularly through the development and implementation of policies and through the Australian Industrial Relations Commission.

His Honour Chief Judge Michael Rozenes AO,

who was appointed an Officer of the Order of Australia for distinguished service to the judiciary, particularly as Chief Judge of the County Court of Victoria and the Commonwealth Director of Public Prosecutions, and through contributions to law reform and legal education.

The Honourable Justice Linda Dessau AM,

who was appointed a Member of the Order of Australia for service to the judiciary, particularly through contributions in the area of family law policy and practice, and to the community.

The Honourable William Hodgman AM QC MP,

who was appointed a Member of the Order of Australia for service to politics through the Parliaments of Australia and Tasmania, and to the community through a range of ex-service, charitable, sporting and multicultural organisations.

The Honourable Alan McDonald AO,

who was appointed an Officer of the Order of Australia for distinguished service to the law and to the judiciary, particularly the implementation of mediation initiatives and administrative reforms, and as a mentor, to medical research ethics, and to a range of sporting organisations.

The Honourable Peter Howard Costello AC,

who was appointed a Companion of the Order of Australia for eminent service to the Parliament of Australia, particularly through the development of landmark economic policy reforms in the areas of taxation, foreign investment, superannuation and corporate regulation, and through representative roles with global financial organisations.

Adjourned Sine Die

Federal Court of Australia

The Honourable Alan Goldberg AO

Bar Roll No 774

His Honour has served the legal profession as barrister and Judge, for nearly 45 years.

Exemplifying his belief in his statement "the strength of the Bar is our system of reading and learning by example" after being one of Daryl Dawson's (later Sir Daryl Dawson AC KBE CB QC of the High Court of Australia) eleven readers, he himself was mentor to a further eleven readers.

In his early days, His Honour was excited by the camaraderie of the Bar and drew benefit from mixing with and learning in his reading period from the abundance of talented people like Jim Gobbo (later Sir James Gobbo AC CVO KStJ QC, Justice of the Supreme Court and Governor of Victoria), Ted Woodward (later Sir Edward Woodward AC OBE QC, Justice of the Federal Court of Australia and Chancellor of the University of Melbourne), Norman O'Bryan (later Justice of the Supreme Court), Haddon Storey (later Victorian Attorney-General), and Frank Costigan (later QC).

His Honour generously and unstintingly carried on this tradition to many members of counsel who came to his open door.

His Honour's commitment to legal education as the Bar representative and also in his personal capacity was considerable and included serving on:

the Victorian Council for Legal Education (1970-82), taking particular responsibility for the Articled Clerks Course at RMIT and included serving on the Committee that supervised that course and for 10 years teaching Introduction to Legal Method in the Course;

- the Monash University Law Faculty Board (1976-82);
- the Victorian Supreme Court Board of Examiners (1991-92) including a period as its Chairman;
- the Australian Legal Education Council (1978-88) which supervised legal education in all Australian States and Territories; and .
- the Trade Practices Committee of the Law Council of Australia.

His Honour was also a tower of strength in assembling the Bar's responses to the many Government and Law Reform Agency investigations and reviews of the independent Bar as well as being the foundation President of the Commercial Bar Association (1994-96).

One of His Honour's endearing virtues was that of an innovator, delighting in being the first with the latest, whether it was as the first Victorian barrister with a fax machine, a 'man-bag', or a mobile phone.

At his Welcome, he spoke of the mixed feelings that all men and women appointed to the Bench must surely experience, that of delight at the appointment, sadness at leaving the enjoyment of professional life and humility in the face of the responsibilities they are taking on. He then explained these away saying "But I should discount any reference to humility because I am reminded of what Golda Meier said to Moishe Dayan . . . "Do not be so humble; you are not that good".

The capacity crowd at his Welcome knew this and 13 years later it was said on behalf of the profession and the Bar, "His Honour is and always was that good!"

Supreme Court of Victoria

The Honourable Justice David Byrne

Bar Roll No 775

The Honourable Justice David Byrne, signed the Bar Roll in September 1965, reading under J A Gobbo (later Sir James Gobbo QC), following his education at Xavier College, University of Melbourne and Université Paris I (Sorbonne).

In 1970, the first Australian edition of Cross on Evidence was published. James Gobbo (not yet QC) was Editor with His Honour as Associate Editor, becoming editor for subsequent editions in 1979, 1986 and 1991. He was joined by a young Professor of Law at the University of Sydney, J D Heydon, who after joining the Sydney Bar was appointed successively to the New South Wales Supreme Court and the High Court.

His Honour had five readers; Ian Turley, now Program Co-ordinator of the Law program at Monash College, Margaret Rizkalla, now a Judge of the County Court and Richard Spicer, John Karkar (now QC) and Marc Bevan-John, all members of the Bar.

Taking silk in November 1982, His Honour became "the Bar's most prominent specialist in building and construction law". Uncharacteristically he also took on a number of murder trials and his experience of high-profile and complex criminal trials carried through to his time as a Judge.

With Peter O'Callaghan QC, His Honour played a pivotal role in the construction of Owen Dixon Chambers West. David Harper QC (then Bar Chairman) recalls of the Committee responsible for the construction the huge task required of them, in that for 4 years the Committee met each Wednesday

at 7:45 am and as often as required at other times, with His Honour attending over 200 meetings. He described His Honour's work, skill and mastery of the detail as prodigious.

Similar dedication was shown as a member of the Editorial Board of *Victorian Bar News* from 1971 to 1986, and for a remarkable 11 years from the start of 1975, including the 1984 Centenary year, His Honour and the late David Ross QC were Co-Editors. The only expense to the Bar was the cost of actual printing, the editors did and paid for everything else.

His Honour has also served on the Bar Council and the Supreme Court Board of Examiners and many other Bar committees and has taught in just about every Bar Readers Course. He also served the State of Victoria as a Justice of the Supreme Court for 19 years, of which he was Principal Judge of the Commercial and Equity Division for 8 years, before retiring in 2010. His Honour was an outstanding barrister and a highly regarded and innovative Judge. His contribution to the Court was extraordinary as it was to the Bar.

An avid walker, His Honour has adopted a meditative and reflective style of walking as evidenced by his description of his walk to Adelaide from Melbourne that was to follow his retirement from the bench: "I see [the long walk] as a sort of gateway into my new life".

County Court of Victoria

His Honour Judge John Nixon

Bar Roll No 595

His Honour Judge Nixon was educated at Geelong Grammar School and at Trinity College at the University of Melbourne. His Honour also spent some of his professional formative years in London reading with Mr Peter Webbs of the English Bar in the Chambers of the now Lord Scarman and developed, as Hartog Berkeley QC said at his welcome, "an incurable case of Anglophilia".

His Honour was admitted to practice in March 1959 and signed the Roll of Counsel that same month, reading with Tony Murray who was later to become Solicitor-General for Victoria and a Justice of the Supreme Court, until he took silk and thereafter devoted the balance of his pupillage with John Mornane, later His Honour Judge Mornane QC.

His Honour soon established a formidable general common law practice, particularly in personal injuries, in which he became the leading senior junior also developing a considerable practice in what were then known as Matrimonial Causes, and now, Family Law. His negotiating skills and jury advocacy became the stuff of legend. His Honour acted in many racing enquiries over many years and was Counsel Assisting the 1977 Board of Enquiry on the bush fires and grass fires in Victoria. He had a very large circuit practice in Wangaratta.

His Honour had four readers; William O'Day (now retired from the Magistrates' Court), Bruce McTaggart, the late David Bristol and David Martin.

His Honour has been an outstanding Judge, even split between the civil and criminal jurisdictions and later becoming the Court's senior Judge in Crime.

His Honour is held in high esteem and great affection by the Bar. His deep admiration for the late Judge Jim Forrest, role model and mentor showed in the eulogy he delivered at his funeral. His sons, Justices Jack and Terry Forrest in turn spoke at a special retirement dinner convened by the Common Law Bar Association, where the stories and the laughter bore witness to a much loved Judge.

As counsel for 22 years and as a Judge for 29 years, His Honour demonstrated a formidable knowledge and mastery of law and legal principles and an extraordinary capacity to relate to human-kind with a principled compassion for the frailties of the human condition.

No one left the Nixon court perplexed by an incomprehensible outcome, no one left the Nixon court in any doubt about what His Honour thought of the case and in some instances of the way it had been presented. But most importantly, whatever the jurisdiction, no one left a Nixon court without feeling that they had been before a consummate judge on the top of his form.

His Honour demanded of Counsel the very same high standards that he himself observed for which we are all indebted.

County Court of Victoria

His Honour Judge Anthony Duckett QC AM OBE

Bar Roll No 710

Few have begun at the Victorian Bar with a better credentialed mentoring lineage than His Honour Judge Anthony Duckett. Signing the Roll in November 1963, His Honour read with the late Ivor Greenwood (later Senator and Commonwealth Attorney-General) who had read with George Pape (later Sir George, Judge of the Supreme Court) who had read in the chambers of R G Menzies (later Prime Minister Sir Robert Menzies) who had read in the chambers of one Owen Dixon.

Just 2 ½ years after starting at the Victorian Bar in 1966, His Honour went to Hong Kong "one of the success stories of the post-war world" but also a place of crime and violence where he spent most of his next 23 years.

Almost immediately on arriving in Hong Kong, as a Crown Counsel 'Prosecutor', His Honour began prosecuting, mostly without a 'lead' counsel, the most serious, complex and contested criminal jury trials in the Hong Kong High Court, including murder and major drug cases, bank frauds and membership of triads, also appearing in Full Court appeals and later becoming Senior Crown Counsel and Acting DPP.

Not uncommonly, His Honour prosecuted cases that became front-page, banner-headline news such as the eye catching case of the murder of an Australian scientist, Dr Ronald Coombe. At just over 7 years from signing the Roll, His Honour fought the case, 'without lead' against silk at every level, at trial; on appeal to the Full Court; on further appeal to the Privy Council; and on the remand back to the Hong Kong Court of Appeal. His Honour was one of only four Hong Kong counsel granted silk that year in (May) 1984, and in July was called to the English Bar as a member of the Honourable Society of the Middle Temple.

His Honour appeared as Senior Counsel for the Crown in 7 appeals to the Judicial Committee of the Privy Council, 'three of great importance'.

As a Judge in the County Court, His Honour has adjudicated over some of the most challenging of cases, illustrated by the 2001 trial described as "one of Victoria's largest drug-trafficking busts in recent years". Claims circulating at the time included that one of the accused was a triad gang boss and that he and his co-accused had laundered sums exceeding one billion dollars. The trial ran for 3 months. The jury returned convictions, and sentences were substantial, including two for 16 and 21 years.

His Honour leaves the County Court, after 48 years of distinguished service to the Law, including more than 15 years as a Judge.

His Honour's adventurous spirit was in evidence when he spoke of his wife's fortitude and spirit when arriving on the Eastern Russian coast in winter for one of three Trans-Siberian railway crossings, accompanied by 3 children all under the age of 5.

A return to the University of Melbourne to pursue a Bachelor of Arts degree, majoring in Political Science and History now beckons for His Honour who seems to be determined to remain busy in retirement.

Obituaries

Samuel Edward Keith (SEK) Hulme AM QC

Bar Roll No 499

Samuel Edward Keith (S.E.K.) Hulme AM QC was born 13 July 1929 in Melbourne and died 27 November 2008, aged 79.

The second son of Samuel Edgeley Hulme and Alethea Henrietta Hulme (nee Wright), he acquired the nickname "SEK" during selection discussions for a school football match.

SEK was educated at Lloyd Street Central School in East Malvern and Wesley College Preparatory School in Prahran, before spending a year in the Royal Australian Naval College in 1943. In 1944, he resumed his studies at Wesley College, finishing school in 1947.

From 1948-51, he studied law at the University of Melbourne (Queen's College), graduating with a Bachelor of Laws (Honours). He was in the Melbourne University Regiment from 1948-1952, before becoming a Commissioned Officer (Citizens Military Forces) in the CMF Air Liaison Section in 1952-53.

On the recommendation of his then-Dean, Zelman Cowen (later Australian Governor-General), SEK applied for a Rhodes scholarship, which he won. He attended Oxford University (Magdalen College) between 1953-55, graduating with a Bachelor of Civil Law (First Class Honours). In 1956, he was a temporary lecturer in law at Magdelen before returning to Melbourne to commence practice at the Victorian Bar. He also lectured and tutored in law for a while at Melbourne University.

Specialising in equity, revenue and commercial matters, SEK read with Keith Aickin (as he then was), before moving to chambers of his own in Eagle Star Chambers. He also became something of a specialist in inquiries, and eventually took silk in 1968.

During his years as a junior, SEK had four readers: Gavan Griffith, Ron Castan, Bruce Coles and Peter Galbally. He was chairman of Barristers' Chambers Ltd between 1979-87.

Among his numerous directorships and institutional activities, SEK was a member of the Barristers' Disciplinary Tribunal (Victoria) between 1980-97, and inaugural chairman of the Melbourne University Law School Foundation (1985-92). SEK was also a member of the Human Ethics Committees at the Royal Children's Hospital (Melbourne) and the Royal Australasian College of Surgeons and was a councillor and vice president of the Old Colonists' Association of Victoria.

Married to Natalia Matushenko since 1970, SEK and Natalia had a daughter and a step-daughter. SEK's interests included wine production (he was the founder of The Arthur's Creek Estate), writing, history and sport. He was the co-author (with Geoffrey Blainey and James Morrissey) of Wesley College: the First Hundred Years, plus numerous papers and articles on constitutional and revenue law. SEK was made a Member of the Order of Australia (AM) in 1992. He retired from the Bar on 30 June 2008.

A fuller description of SEK Hulme's life can be found in the Bar's Oral Histories

The Honourable Sir Edward Woodward AC OBE QC

Bar Roll No. 473

The Hon Sir Edward Woodward, AC, OBE, QC was born 1928 in Ballarat and died 21 April 2010, aged 81.

His father was Eric Woodward (later Lieutenant General Sir

Eric Woodward, the longest-serving Governor of New South Wales).

Sir Edward was educated at Melbourne Grammar School and the University of Melbourne, graduating Master of Laws in 1950. He was admitted to practice on 1 June 1951. He signed the Roll of Counsel on 7 December 1951 and read with Clifford Menhennitt.

He was Associate to Chief Justice Sir Edmund Herring. He took silk in 1965 and served on the Bar Council from 1969 until his appointment to the Northern Territory Supreme Court in 1972.

He was leading counsel for the Yirrkala people in the first major Aboriginal land rights case in 1968-1971, and was Aboriginal Land Rights Royal Commissioner 1973-74. He sat on many Boards of Inquiry and 17 Royal Commissions.

Sir Edward served as a Judge of the Supreme Court of the Northern Territory (1972-79) and of the Federal Court (1977-90). He was Director-General of Security, heading ASIO (1976-81). He was a member of the Council of the University of Melbourne for 20 years and served as Chancellor from 1990 to 2001.

He was made an Officer in the Order of the British Empire in 1969, a Knight Bachelor in 1982 and a Companion in the Order of Australia in 2001. His memoir, One Brief Interval, was published in 2005.

Ian Hudson Munro

Bar Roll No. 1604

Ian Hudson Munro was born 31 January 1942 and died 14 April 2010, aged 68.

Ian Munro began in the law in 1960 as a Law Clerk with Newell, Marsh & Lewis and completed the Articled Clerk's course at the University of Melbourne.

He was admitted to practice on 1 August 1967 and remained with the firm as an employee solicitor. In 1969, he joined the firm Walter & Griffin – later Walter & Munro. He was a partner – and then consultant – in that firm for ten years before coming to the Bar.

He signed the Roll of Counsel on 9 October 1980 and read with David Mattei. He built up a general common law and personal injuries compensation practice, appearing in all jurisdictions from the Magistrates' Court to the Full Court, and in the Federal Court and Administrative Appeals Tribunal.

Ian had a particular interest in Environmental Law and was a member of the Environment Institute of Australia and of the Federal and State Environmental Law Associations.

He retired from practice in June 2007 and remained a member of the Bar on the List of Retired Counsel.

Peter John Galbally QC

Bar Roll No. 748

Peter John Galbally was born 25 November 1940 and died 9 May 2010, aged 69.

Peter was an Arts and Law graduate of the University of Melbourne, and was a Tutor at Newman College. He served articles at Corr & Corr and was admitted to practice on 1 March 1965. He came straight to the Bar, read with SEK Hulme and signed the Roll on 22 April 1965. He had three readers: John Noonan (now QC), Frank Saccardo (S.C. and now a County Court Judge) and Joe Sala. He took silk in November 1989.

Peter practised law for 40 years. He was at the Bar for 5 ½ years; then practised as a solicitor for 5 years with Galbally & O'Bryan, becoming a partner in that firm. Peter returned to the Bar in February 1976. Right up until his retirement at the end of August 2005, Gal remained a courageous and universally admired common law jury and appellate advocate, (practising mainly in medical negligence and defamation) and a celebrated Sale circuiteer. He did the hard cases, regularly taking on the well resourced might of the medical profession and never refused or side-stepped a case by reason of its difficulty or potential lack of success. He was a loyal and trusted colleague and friend to many who persistently and consistently acted in the interests of others.

Galbally was one of the architects of LawAid – the Bar and Law Institute scheme of legal aid in civil cases – and for 10 years a Trustee of the scheme (for some years its Chairman). Peter served on the Executive of the Common Law Bar Association for 12 years and was Chairman of the Dever List for 8 years.

Hilarious tales of Gal's generosity and ingenuity on the Sale circuit are numerous as they are legendary. Just ask the Judge who was locked out of his motel room while well refreshed after a rather late circuit dinner and who was 'helped' by Gal through the breakfast hatch to gain access to his room, or the neurotic Basil Fawlty like manager of the Sale motel (which prohibited animals on the premises), who failed to find the 'indisputable evidence' when 'Kirra', Gal's much loved labrador retriever accidentally accompanied him on circuit and stayed with him for the entire week, hiding under the bed and in other motel rooms while happily feasting on Chinese meals.

Peter is survived by his wife Sue, and a large tribe of children and grandchildren and is deeply missed by all who were privileged to share his universe.

John Anthony (Tony) Magee

Bar Roll No. 1599

John Anthony (Tony) Magee was born 17 October 1945 and died 11 May 2010, aged 64

Tony migrated to Australia at the age of 17. He worked on the gas fields and in mining camps in the Centre and all over Australia. He was the manager of a large Melbourne commercial painting firm when he went to Monash. Enrolled for full-time study and summer semesters, he worked full-time throughout and graduated in minimum time.

Tony did the Leo Cussen Practical Training Course and was admitted to practice on 1 October 1980, aged nearly 35. He came straight to the Bar, signing the Roll on 9 October, and read with Neil Williams.

Tony practised for 22 years, up to his retirement at the end of 2002. He practised in administrative, intellectual property and commercial law and in large building and complex engineering cases in Victoria and interstate.

He had two readers, Stella Moraitis (now a full-time Member of VCAT) and Gim Teh (then a Law Lecturer at Monash; later also a full-time Member of VCAT).

He was Chairman of the Melbourne Bar Pty Ltd for 3 ½ years, including into his retirement from practice, and served on a number of Bar Committees, including the Applications Review Committee.

Anthony Endrey QC

Bar Roll No. 653

Dr Anthony Endrey QC was born 24 November 1922 in Hungary and died 26 May 2010 in Hungary, aged 87.

Anthony Endrey graduated Doctor of Law with Honours from the University of Budapest. He was a research assistant at Friedricks-Wilhelm University in Berlin.

He served in the Royal Hungarian Army in World War II, fighting against the Russians, and was taken prisoner of war. Upon his release in 1945, he resumed legal studies and was admitted to practice in Hungary in 1947. He practised in his home town of Hodmezovasarhely.

He migrated to Australia in 1949 and then studied law at the University of Tasmania, graduating LL B in 1956 with a first class honours degree.

He headed the common law department of Gillot Moir & Ahearn until, in 1962, he came to the Bar, reading with Peter Murphy (later, Mr Justice Peter Murphy). He had one Reader, Barry Macaulay. He took silk in 1975.

Tony was appointed a Master of the Supreme Court in July 1976 and resigned in 1977. In 1979, he retired to his farm at Marden near Leongatha, where he raised Aberdeen Angus Cattle. He returned to practice at the Victorian Bar in 1981. At the end of 1982 he returned to Hungary and resumed practice there.

Tony was a leading member of the Hungarian community in Australia, serving as President of the Federal Council of Hungarian Associations of Australia and New Zealand, the Hungarian Cultural Council and the Council of the Hungarian Institute in Melbourne. He was a prolific writer on matters Hungarian and historical and has 13 books in the National Library of Australia catalogue.

Kevin Sol Pose

Bar Roll No. 1223

Kevin Sol Pose was born 16 September 1946 in and died 20 June 2010, aged 63.

Kevin went to school at Elwood High School. He won the Supreme Court Prize at Monash in 1969. He served articles at Grant & Co and was admitted to practice on 1 April 1971. He went to Oxford, graduating Bachelor of Civil Law in 1973. He signed the Bar Roll on 12 February 1976 and read with the late Neil Forsyth.

Kevin was a Lecturer in Law at Monash University for some 3 years. He practised at the Bar, appearing in a wide range of tax cases, while concurrently teaching at the University of Melbourne for 10 years as a Senior Lecturer in Law. He was, up to his death, a Professorial Fellow of the University of Melbourne. He was a great mentor.

Kevin left the Bar in November 1987 to become the Senior Tax Partner at Arthur Robinson & Hedderwicks, later Allens Arthur Robinson. He was with the firm for some 19 years, returning to the Bar in March 2007.

Kevin made significant contributions to tax reform and interpretation on many professional and governmental committees. He was an external member of the Public Rulings Panel of the Australian Taxation Office, and a member of the National Tax Liaison Group Transfer Pricing Subcommittee.

He was, for many years, a section editor of the Australian Tax Review.

Michael John Croyle

Bar Roll No. 1021

Michael John Croyle was born 13 February 1945 and died 26 June 2010, aged 65.

Michael Croyle was born in Melbourne and grew up in Brighton. He was educated at Xavier College and at the University of Melbourne where he was President of the Law Students Society. He graduated LLB in 1967. He served articles at Abbott, Stillman and Wilson and was admitted to practice on 1 March 1968.

He practised as a solicitor until he came to the Bar where he read with John Hanlon (later Judge John Hanlon of the County Court). He signed the Bar Roll on 31 August 1972. He went on to earn a LLM degree in 1978. He established a wide-ranging practice with an emphasis in personal injuries, workers' compensation and insurance work. He had three readers: Joseph Ferwerda, Deborah Coombs and Rebecca Leshinsky.

He was appointed a Judge of the Accident Compensation Tribunal in 1988. Upon the disbanding of the tribunal in 1992, he returned to practice at the Bar.

He retired from practice on 30 June 2004.

In 2001, he was appointed a part-time referee at Insurance Enquiries and Complaints Limited, a predecessor to the Financial Ombudsman Service. He later became an Ombudsman and Panel Chair of the Financial Industry Complaints Service in 2004, and then of FOS.

At FICS and FOS, he served as a life insurance Panel Chair and as mentor to many case managers who prepared disputes and briefed the Panel members for hearings. At the Service he embodied the collegiate, open- door atmosphere enjoyed at the Bar and he was pastoral in dealing with his colleagues. His friendship is missed by the Ombudsman and by the Panel Chairs. As decision maker, he brought acuity, restraint and a heightened awareness for the just outcome. He left a legacy of high-quality decisions and guidance.

A keen golfer, Michael was a long time member at Yarra Yarra Golf Club, where he served as committee member and President. At his Tura Beach property on NSW's Sapphire Coast he combined decision-writing with golf.

He loved his wife, Jackie and daughters, Elizabeth, Lucy, Georgina and Phoebe. He enjoyed becoming a grandfather. Sadly, he developed cancer. With Jackie's support he battled the illness with courage and realism.

In the weeks leading to his passing, he was still yearning for literature, learning, music and travel. With no more pause than his treatment and care made necessary, he continued reading, and even assisting FOS until his eyesight failed. He was steely in intellect and resolve and remained during years of illness, mindful and present. He loved life and his world responded accordingly.

The Honourable Steven Strauss QC

Bar Roll No. 433

The Honourable Steven Strauss QC was born 3 September 1921and died 24 July 2010, aged 88.

Born in Germany, he was 12 when Hitler came to power. His local schooling became difficult and his mother sent him to a Jewish boarding school in another part of Germany. With the help of a former teacher, Steven went on a children's transport to England in July 1939 – only a few months before the outbreak of war. He was 17.

Interned in 1940 as an enemy alien, he was deported to Australia on the British military transport ship, Dunera.

Interned here in camps at Hay, Orange and then Tatura, he completed his Leaving Certificate in Tatura. A scholarship student at the University of Melbourne, he began part-time studies during his 4 years service in the Australian army. He graduated LLB in 1948, LLM in 1949.

He served articles with John Elder at Madden, Butler, Elder & Graham and was admitted to practice in September 1949. He signed the Bar Roll in February 1950 and read with Douglas Little (later appointed to the Supreme Court and knighted). He had one Reader, Graeme Uren. He took silk in 1965 and had a broad practice in practically every jurisdiction.

In July 1976, he was appointed to the Family Court of Australia; in 1983 a temporary Judge of Appeal; and in 1985 a permanent Judge of Appeal. At his Farewell from the Court in November 1993, his contribution to Family Law was described as profound. The Court's tribute notice noted his great humanity and wisdom; and described him as one of its intellectual leaders, and a true gentleman.

The Honourable James (Jim) Harley Kennan SC

Bar Roll No. 973

The Honourable James Harley Kennan SC was born 25 February 1946 in and died 4 August 2010, aged 64.

He graduated LLB (Hons) and later LLM by major thesis – both from the University of Melbourne. He was admitted to practice in April 1969 and signed the Bar Roll in September 1971. He practised at the Bar until 1982, when he entered the Victorian Parliament. He took silk in 1987.

He was a former Deputy Premier and Attorney-General for Victoria. He was a Minister in the Victorian Government between 1983 and 1992, and held a number of portfolios including Attorney General, Minister of Corrections, Planning and Environment, Aboriginal Affairs, Transport, Major Projects and the Arts. He was Deputy Premier between 1990 and 1992, to Joan Kirner and was Leader of the Opposition at the time of his retirement from Parliament in 1993.

The Herald Sun reports Ms Kirner saying of him, that "he was an outstanding parliamentarian and a fierce advocate for human rights, equal opportunity and environmental reform".

Jim was also the Chair of the Australian Government's bilateral foreign relations council, The Australia India Council, between 1995 and 1999. He was the Co-ordinator of the Global Foundation's Asia Pacific Round Table held at Georgetown University, Washington D.C. in 2000.

Jim re-signed the Bar Roll in June 2000 and was in active practice up to his death.

Like other great common law advocates, Jim was never afraid to take on hard cases be it at trial or on appeal, especially against well-heeled and bullying corporations and governments. The little guy always had a champion in his corner when Jim was retained to appear. But more than that, as a barrister Jim was a great all-rounder who could play at either end of the ground and was equally comfortable amongst the whisperers in the commercial and equity division as he was before a jury in common law, or in the appellate divisions arguing a challenging constitutional or administrative law point. Around chambers Jim was a much loved and affable colleague who always had time for and was available to help his fellow counsel, particularly younger barristers, who frequently drew upon his wisdom, sound judgment and broad experience.

Beyond the practice of law, Jim was for 9 years Chair of the statutory body, the Victorian Institute of Forensic Mental Health, known as Forensicare, from which he retired only months before his death. In its tribute the organisation said of Jim that he was a committed human rights advocate and worked tirelessly to protect the rights of people with a mental illness and their carers and ensure that people with a mental illness in the criminal justice system had access to quality care and treatment.

Jim Kennan's lifelong commitment to the law and justice did himself and the Victorian Bar a great honour. He is deeply missed by many. May he rest in peace.

His Honour Judge John Frederick Barnard Howse

Bar Roll No. 522

Judge John Frederick Bernard Howse was born 24 April 1925 and died 16 September 2010, aged 85.

He was educated at Xavier College (Burke Hall), Kew; St Patrick's College, East Melbourne; and at the University of Melbourne. From 1943 to 1945, he served in the RAAF as a meteorologist. After the war, he studied law, graduating LLB in December 1948.

He served articles with Harry Gilham at Oswald Burt & Co and was admitted to practice in March 1950. He remained with that firm practising as a solicitor for four years, and was admitted to partnership in 1952. He signed the Roll of Counsel in October 1954, reading with Murray McInerney (later Sir Murray McInerney and a Judge of the Supreme Court).

He practised mainly in the Common Law jurisdictions of the Supreme and County Courts, but was frequently briefed by the Crown Solicitor to prosecute crime. In February 1963, he accepted appointment as a Prosecutor for the Queen.

In 1976, he was appointed a Judge of the County Court, on which Court he served with distinction for more than 14 years up to his retirement in April 1990. His Honour was then the first County Court Judge to accept appointment as a Reserve Judge, available on call as needed. He served a further 10 years as a Reserve Judge, fully retiring in April 2000 after a total of 37 years service to the State as a Crown Prosecutor, Judge and Reserve Judge.

Kathryn Rose Rees

Bar Roll No. 2643

Kathryn Rose Rees was born 2 April 1943 and died 27 September 2010, aged 67.

Kathryn had worked as a librarian and a school teacher before studying Arts/Law at Monash. She was Co-Editor of the Monash University Law Review and graduated Bachelor of Arts in 1986 and Bachelor of Laws (with Honours) in 1989.

She served articles with Michael Robinson of the firm Arthur Robinson & Hedderwicks and was admitted to practice on 5 March 1990.

She served as Associate to the Honourable Justice Toohey of the High Court of Australia; then read with A L Cavanough (now Justice Cavanough of the Supreme Court of Victoria) and signed the Roll of Counsel on 30 May 1991.

Kathryn was a member of the Society of Trust & Estate Practitioners and a nationally accredited mediator.

She was a Law Reporter for the Victorian Reports for 13 years from the 1992 to 2004); and the Assistant Editor (Civil) for the last 4 years from 2007 to the present. She co-authored Limitation of Actions Handbook Victoria (Butterworths 1997).

She had served on the Bar Human Rights Committee and on the Committee of the Women Barristers Association and had been Assistant Secretary of the WBA.

His Honour Judge Stanley George Hogg QC

Bar Roll No. 456

Judge Stanley George Hogg QC was born 3 November 1921 and died 24 November 2010, aged 89.

After school at Wesley College, intending to be an economist, he began work with the Bank of New South Wales, studying commerce and accounting part-time at the University of Melbourne. From 1941 to 1946, he served briefly in the Army, and then transferred to the Royal Australian Navy – seeing

active service in the Pacific and Papua New Guinea. After the war, he completed his Commerce degree and began studying law. He graduated in Law with Honours, and was awarded the LLM degree in 1950.

He served articles with Wallace Ball at Henderson & Ball and was admitted to practice in August 1950. He remained with that firm as a solicitor for six months. He signed the Bar Roll at the end of January 1951 and read with George Lush (later Sir George Lush and a Judge of the Supreme Court).

He developed a wide general practice, including criminal trials and personal injuries cases – later specialising in commercial law, taxation and estate planning. He took silk in 1970.

In 1975, he was appointed a Judge of the County Court, on which Court he served with distinction for 17 ½ years up to his retirement in May 1993 – sitting in all jurisdictions and on the Workers Compensation Board.

Judge Hogg was Independent Lecturer in Accounts at the Melbourne University Law School for some 17 years, and lectured in Commercial Law in the Commerce Faculty. He was, for many years, Secretary of the Bar Superannuation Fund and a Trustee of the Supreme Court Librarian's Superannuation Fund. He served on, and chaired, the Legal Aid Committee of Victoria. For some 14 years, he served on the Board of Management of the Freemasons Hospital, for 2 years as Chairman. He was a keen and active Rotarian – active on its various committees and in its charitable work.

John Wilfred Senior

John Wilfred Senior was born on 3 November 1935 and died on 7 July 2010, aged 75.

Several years ago, Sam Newman was walking along William Street. He was appearing in the filming of a Streettalk segment of 'The Footy Show', starring himself. Sam stopped outside a newsstand near the corner of Lonsdale and William Streets. He walked up to John Senior and said, "Good morning, madam." John thought for a moment and responded. "I'm not a madam." John paused then looked at Sam, fury in his eyes. "And do you want me to prove it?"

Thankfully, that part of the footage was not broadcast. It showed, however, that the otherwise gentle John Senior could be feisty, even angry, especially if anyone tried to back him into a corner.

And there were plenty who did try. Ron Senior claims that he and his brother had different senses of humour. I have always thought that they would have made a great comedy duo. John as the straight man – the Bud Abbott; Ron, the clown – the Lou Costello. John saw the world largely in black and white. That enabled people to stir him up.

Wilfred John Senior was born in Hobart on 3 November 1935, the second child of Daphne and Richard Senior. At the end of the Second World War, the family moved to Melbourne. As well as John's parents, the family included his older brother Herbie, and his sisters Margaret and Beverley. Ron was born in 1948, after the family had moved to Melbourne.

In 1986, John saw an advertisement for a newspaper seller. After working in a couple of different locations, John moved into the Courts precinct in the late 1980's. He stood at a fold-up stand outside the steps of the former entrance to Owen Dixon Chambers East. Ron joined him in 1994.

There then began a long period of friendships with many barristers and other people in the area. Getting the paper from John and Ron was an experience; it was something to look forward to in the morning. These men didn't sell papers for the money: the commissions they earned were next-to-nothing. They did it because they enjoyed it.

In October 2008, Ron issued a press release. It announced the appointment of a Royal Commission to inquire into John's treatment of Ron as a co-worker on the newsstand. A Royal Commissioner was appointed. John engaged Senior and Junior Counsel to appear on his behalf. They threatened the Royal Commission with an injunction on the ground of apprehended bias, which was entirely correct.

John Senior was a fanatical Western Bulldogs supporter. From time to time, he wore a Western Bulldogs scarf at the newsstand. He was also a lover of films. His passion was the old musicals, Carousel and Paint Your Wagon, and the operetta Desert Song. It showed a gentler side of John's personality.

On Ron's birthday last year, John was diagnosed with bowel cancer. He made a courageous decision not to have treatment. It is a credit to Ron that he gave up work to look after his brother until the end, which came on 7 July 2010.

Ron has since returned to the news stand, however without John, it isn't quite the same. May he rest in peace.

This is an edited text of the eulogy delivered by David Gilbertson on 14 July 2010 at the funeral of John Senior, newspaper man.

VBN

Senior Counsel for 2010

Supreme Court of Victoria

Front row L to R: Michael Fleming SC; Andrew Moulds SC; Peter Chadwick SC; Justin Bourke SC; Albert Monichino SC; Ted Woodward SC; Warren Friend SC.

Second row L to R: Samantha Marks SC; Daryl Williams SC; Richard Niall SC; Georgina Schoff SC; Philip Solomon SC; Wendy Harris SC; David Batt SC.

On 25 November 2010, the Chief Justice of Victoria, the Honourable Justice Warren AC, appointed the following Barristers as Senior Counsel in and for the State of Victoria, in order of seniority:

Michael Feery FLEMING SC

Date of Admission: 1 November 1976
Signed Bar Roll: 20 May 1982
Read with: The Hon Peter Heerey QC
Readers: None
Areas of Practice: Administrative/Public Law; Accident Compensation; Insurance, particularly Indemnity & Contribution; Common Law; General Commercial Law

Andrew James McGregor MOULDS SC

Date of Admission: 1 May 1978
Signed Bar Roll: 15 February 1979
Read with: The late James Howden, former County Court Judge
Readers: Deborah Foy, Laura Colla
Areas of Practice: All aspects of Common Law, Personal Injuries and Workers' Compensation

Peter Anthony CHADWICK SC

Date of Admission: 1 April 1981
Signed Bar Roll: 18 June 1981
Read with: John Keenan QC
Readers: Selena McCrickard, Michael Kats, Josephine Swiney, Angeline Centrone, Ruth Champion, Vera Hardiman, Geoffrey Clancy
Areas of Practice: Criminal Law

Mark Joseph ROCHFORD SC

Date of Admission: 1 March 1983
Signed Bar Roll: 26 May 1988
Read with: The late Gordon Taylor
Readers: Timothy Marsh, Francesca Holmes, Christopher Carr, Erin Ramsay, Kristie Churchill, Raelene Sharp
Areas of Practice: Crown Prosecutor

Justin Lawrence BOURKE SC

Date of Admission: 2 November 1983
Signed Bar Roll: 30 November 1989
Read with: The late Ian Sutherland QC
Readers: Edward Johnson, Paul O'Grady, Garry Hindson, Marc Felman, Mark McKenney, Robyn Sweet, Cathy Dowsett
Areas of Practice: Industrial, Employment and Discrimination Law

Albert Alfred MONICHINO SC

Date of Admission: 2 April 1984
Signed Bar Roll: 28 May 1987
Read with: The Hon Frank Callaway QC
Readers: Dino Currao, James Doherty, St John Hibble
Areas of Practice: General Commercial Litigation; Commercial Arbitrations (both domestic and international)

Edward Winslow (Ted) WOODWARD SC

Date of Admission: 2 April 1984
Signed Bar Roll: 20 November 1997
Read with: Paul Cosgrave SC
Readers: Oren Bigos, Paul Liondas, Eloise Dias, Adrian Muller
Areas of Practice: General Commercial, in particular: Corporate Insolvency & Reconstruction, Corporations Act proceedings, Commercial Contracts and Banking & Finance

Warren Lloyd FRIEND SC

Date of Admission: 6 May 1985
Signed Bar Roll: 25 May 1989
Read with: The Hon Justice Peter Vickery
Readers: Jeremy Smith, Neil Campbell
Areas of Practice: Industrial and Employment Law; Administrative Law

Samantha Lee MARKS SC

Date of Admission: 7 April 1988
Signed Bar Roll: 25 May 1989
Read with: Leslie Glick SC, George Golvan QC
Readers: Sharon Burchell, Lydia Kinda, Travis Mitchell, Nandi Segbedzi, Jordon Ross, Dr Angela O'Brien
Areas of Practice: Banking & Finance; Contracts; Corporations Law; Insolvency; Trade Practices; Securities; Anti-Discrimination; Probate; Testators' Family Maintenance; Employment Law; Mediation

Daryl John WILLIAMS SC

Date of Admission: 5 June 1989
Signed Bar Roll: 30 May 1991
Read with: Henry Jolson QC
Readers: Simon Woolley
Areas of Practice: General Commercial Law with emphasis on Corporations, Insolvency, Banker & Customer, Professional Negligence and Tenancy Disputes

Richard Michael NIALL SC

Date of Admission: 4 April 1991
Signed Bar Roll: 25 May 1995
Read with: The Hon Justice Kevin Bell
Readers: Fiona Ryan, Rolf Sorensen, Ruth Hamnet, Graeme Hill, Emily Porter, Sam Ure, Bill Swannie, Louise Martin, Matthew Groves, Therese McCarthy
Areas of Practice: Administrative Law (Judicial Review, Migration, Revenue and FOI), Industrial Law, Professional Disciplinary Bodies and Employment

Georgina Lucy SCHOFF SC

Date of Admission: 29 April 1991
Signed Bar Roll: 25 May 1995
Read with: William Houghton QC
Readers: Renee Sion, Lindy Barrett
Areas of Practice: General practice specializing in Media and Intellectual Property Law

Philip Howard SOLOMON SC

Date of Admission: 7 April 1993
Signed Bar Roll: 22 May 1997
Read with: The Hon Justice Christopher Maxwell, President of the Court of Appeal, Supreme Court of Victoria
Readers: Douglas Gration, Kathleen Foley, Perry Hertzfeld, Maree Norton, Andrew Bell
Areas of Practice: Administrative Law; Commercial & Corporations Law; Equity & Trusts; Taxation; Insurance; Contracts; Accident Compensation Law

Wendy Anne HARRIS SC

Date of Admission: 7 April 1993
Signed Bar Roll: 22 May 1997
Read with: Jack Hammond QC
Readers: Andrew Cameron, (together with David Batt SC), Rebecca Nelson (was Davern), Rodrigo Pintos-Lopez
Areas of Practice: Constitutional Law; Commercial Law; Banking & Finance; Insurance

David James BATT SC

Date of Admission: 11 April 1994
Signed Bar Roll: 28 May 1998
Read with: Melanie Sloss SC
Readers: Andrew Cameron (together with Wendy Harris SC), Gabi Crafti, Sandro Goubran, Charles Parkinson, Kathryn Hamill, Tamieka Spencer Bruce
Areas of Practice: Commercial Law, Taxation, Constitutional and Administrative Law, Land Valuation and Compensation

Red Bag, Blue Bag *Return of the Two-Thirds Rule?*

Life at the Bar - A Senior and Junior Perspective

Red Bag

As a well known Red Bag, I am delighted to be asked to advise in relation to the question whether the two thirds rule ought be reinstated. As will be obvious from what appears below, this question admits of one answer only. That answer presents as an autochthonous solution to a heterogeneous problem, namely that of maintaining appropriate relativity as between the fees marked by the inner Bar and those marked by the junior Bar.

On this matter I am confident that the senior Bar, though many, speak as one. We have no interest whatsoever in what our junior colleagues mark per se: so long as they neither embarrass us by marking too little in circumstances where it is clear that they have performed all the work, nor overreach themselves by marking too high a fee in instances where it is clear that this singular honour ought be retained by senior counsel.

This is a skill which can only be learned by practising over many years the art of discreetly inquiring of one's leader prior to rendering a bill whether they anticipate making any "adjustments" to their fees. This delicate way of broaching the subject will give one's leader licence to ruminate, in barristerial code, on the question whether this is a matter in which the client ought be shown mercy, or rather one where counsel ought feel at liberty to gild the lily.

This is one of the most important conversations a leader and a junior can have, and it must be conducted in oblique terms without ever directly addressing the issue in terms of dollars. Terminology with which junior counsel may need to acquaint themselves for this purpose will include variations on the theme "a little less than usual", "the usual", "quite a bit", and "quite steep" - as these are the coded increments in which senior counsel are accustomed to speak.

If there is a need on the part of senior counsel to indicate that the fee slip in question promises to deliver the mother lode, then the phrase "the client may be a little surprised" or "I think they'll baulk at this" might be employed, thus serving to alert junior counsel to the fact that they have licence to mark the highest fee they have ever billed, and then multiply that by the number they first thought of before having their clerk send out the fee slip.

If, in the alternative, silk intends to add this matter to their pantheon of "charitable works", they may utter a phrase such as, "I feel a little sorry for our bloke", or "she's a widow you know". This will alert junior counsel to the need to display restraint and modesty when marking this one.

It will be clear then from the above, that the central question for resolution is not so much one of the implementation of a strict rule or the clumsy application of fractions. Rather, what must be maintained at all times is the relative superiority of senior counsel both as to skill and income, but without the achievement of this relativity ever seeming to have resulted from the application of crude formulae devised in accordance with a rule.

And I so advise.

Blue Bag

I had just been admitted as a Legal Practitioner when I decided to go to the bar. I remember the exact moment I made the decision (i.e. when I was "called") well. I had just thrown a few documents in a folder with some pink ribbon and some Wikipedia-based research hoping that counsel would figure out the problem.

Satisfied with my day's work, I hit "refresh" on theage.com for the 27th time that hour and saw the latest news about a long running trial (the C7 saga). They were reporting on the cost of senior counsel's involvement: Jonathan Sumption QC was getting $20,000 / day!

I was about to undertake another billable task (networking on facebook), when a memory stirred… the two-thirds rule… I remembered something about it in legal ethics class, or was it legal history class? Anyway, I knew there was a rule and I decided I could do quite nicely with a cash injection of $13,333.33 for a day's work.

I posted a status update on facebook: "2/3rds rule… wat u no bout it?" ("Two thirds rule – does anyone have any pertinent information in relation that that topic?").

Preoccupied with the idea of an easier ride, I armed myself with my iPad and walked to the local Collins St free-trade café, where I got myself a shade-grown, fair-trade, organic, -Ethiopian coffee mocha-latte with caramel flavoring. I awaited the answers to pour onto my iPad.

My mind was racing. Two third's the fee?! For what?! Being the junior?! I could be the junior! I don't think I would even have to do any talking in court. How hard could it be! Solicitors and the Silk do all the work anyway (see above). I got my name on the bar readers' course ASAP and began sucking up to silks in earnest.

My hard-work paid off with my very first brief. There were a few weeks of very busy preparation. I loved to think what my senior counsel was billing. Unfortunately, the matter settled, so we never saw the inside of a Courtroom. There were some awkward moments for me with my leader:

Me: So, what fee will you be marking?

Silk: You impertinent little…

Things got stranger when I rendered my first fee slip:

Instructor: "What the $*&$#@! hell do you call this?!"

Me: <innocently> My fee slip.

Instructor: It just says "two thirds senior counsel's fee"!!! Is it 1967?

Me: <bewildered> 1967? No… I wasn't even born then… (In retrospect, I am not sure this helped…)

Instructor: Well, alright, if you insist…

A few weeks later, I got a call from my clerk, asking why I had been paid a total of $825.80 after my big case (which he had scratched and clawed to get me). I said it must be a mistake… I would check…

The moral of the story, my friends?

Let us not seek the return of the two-thirds rule. It is based on a single, unpredictable factor: the amount of work done by your leader. And that is something that cannot be controlled by any junior. VBN

Gallimaufry

The Honourable John Coldrey QC

Since I have never been a Chief Justice; never will be a Chief Justice; and have retired from the bench; I can say anything I like about this rare species. In fact I have always got on very well with Chief Justices – a skill I attribute to a keenly developed capacity for obsequiousness. And while on that subject (obsequiousness) could I again congratulate Chief Justice French on his well deserved appointment - just in case he didn't receive my letters.

Perhaps understandably there are very few published anecdotes about Chief Justices. One has to go back at least to the 17th century when Lord Chief Justice Holt (1687 – 1694) wrote a paper in which he advocated that judges should, upon appointment, take an oath of celibacy. He opined that the absence of celibacy amongst judges affected their ability as judicial officers.

Using this basis of analysis, there are probably a number of trial judges whom appellate courts could identify as having voracious sexual appetites. Incidentally, at the time Chief Justice Holt advanced this novel proposition, he was a bachelor aged 76.

In 1802, Lord Ellenborough was appointed Chief Justice. Apparently he was a small rotund gentleman who required two cushions on his chair to raise him to the height necessary to view the court personnel. Indeed, I couldn't help feeling an affinity with him. That was until I read the remark of one of his fellow judges: "Ellenborough can still strut while he sits".

On one occasion a nervous young barrister commenced his plea before Lord Ellenborough by stammering the words:

> "My Lord, my unfortunate client ..."

After he had repeated this phrase three times, His Lordship remarked:

> "Get on with it! Up to this point the court is entirely with you."

My dazzling research has also extended to Australian Chief Justices – again with slim pickings.

Sir John Latham had some difficulty with traffic laws. He was stopped by a young Irish constable while driving down St Kilda Road, Melbourne. He was asked:

> "What would be your name?"
>
> Sir John said "John Latham".

The constable said, "You wouldn't be after being that same John Latham who was a barrister, would you now?"

Sir John said: "Yes. I am that same man."

"And you wouldn't be after being that same John Latham who was the Commonwealth Attorney-General?"

Sir John, whose hopes had begun to rise, said "Yes, I am he".

The constable said: "Well, you won't be able to plead ignorance of the law, now will you?"

When Sir Anthony Mason was sitting with his New Zealand colleague, Sir Robin Cooke on the Supreme Court of Fiji, the latter was appointed to the House of Lords. Thereafter his signature on the court documents transmogrified from Robin Cooke to "Cooke of Thorndon". Sir Anthony subsequently consulted Sir Gerard Brennan as to whether he should change his signature to "Mason of Mosman". After pondering the matter, Sir Gerard replied: "No, people will think you're a used car dealer".

When I joined the Bar Sir Henry Winneke was the Chief Justice of Victoria. He had such a charming manner with appellants (particularly unrepresented appellants) that they left the Court believing that his dismissal of their appeal was an act of great kindness.

Jack Winneke recounts an occasion when Sir Henry was on Circuit with Lady Winneke and they were having drinks with counsel. Late in the evening counsel approached Sir Henry's wife and inquired:

"Can I get you another Winneke, Lady Drambuie?" Unphased, she responded: "No thank you, one Winneke an evening is quite enough."

Sir John Young was the Chief Justice when I was appointed to the Bench. He had been a member of the Scots Guards during World War II and was rumoured to have a tiger tattooed on his right buttock. If so, I was never privileged to see it. Sir John was an erudite lawyer and a kindly man.

He was not much concerned with small talk or trivia. One of his tasks was to swear in new Magistrates. He swore in a friend of mine who had worked with a firm of solicitors named Ford and Co. When my friend informed Sir John of this fact in response to a question about his previous employment, Sir John paused before inquiring: "Would that be at their Geelong or Broadmeadows plant?"

In fairness, I should record that when I told this story at a gathering at which Sir John was present, he denied its occurrence. I responded by telling him that if that was so, he now knew what it was like to be "verballed".

On another occasion the environmentally conscious wife of a court colleague demanded: "What's your position on saving whales?" A somewhat bemused Sir John replied that

Verbatim

VBN Court Reporter

he thought this was a particularly lovely part of Britain.

His successor, John H Phillips, had a pleasant light tenor voice and, on at least one occasion, was introduced to gatherings as "The Singing Chief Justice". This was not necessarily a prestigious or preferred title, but it was certainly one notch better than "The Singing Detective".

John Phillips had a wonderfully dry sense of humour. One of his anecdotes concerned a Chief Justice who had invited a newly appointed judge into his chambers and, in endeavouring to put him at ease, offered him a scotch whisky. Outraged the judge expostulated, "I'd as soon commit adultery as touch alcohol!" to which the Chief Justice responded "wouldn't we all".

Another story concerned a survey sent to a Chief Justice by the equivalent of the Victorian Judicial College. One question read: "List the number of judges in your court broken down by sex." He answered: "None, alcohol is the big problem".

The current Chief Justice, Marilyn Warren, has been a colleague and friend of mind for many years. I recall meeting her in the Court corridor minutes after her present appointment had been announced. She greeted me with the words: "How would you like to kiss a Chief Justice?"

'Very much indeed!", I replied.

(I can assure you that in my relationships with Chief Justices generally, this was a unique event). However, I must say that it provoked no discernible improvement in my Court roster. This demonstrated either the Chief Justice's integrity and impartiality, or my ineptitude (or both)!

So, what do we expect from a Chief Justice?

On reading the literature and watching a DVD where Canadian judges venture their views, it seems clear that, metaphorically speaking, what is required is the capacity to traverse a tightrope, on a unicycle, while juggling flaming torches and singing light opera. It is also an advantage to have the ability to compete in triathlons and to change water into wine.

On the other side of the coin is the comment by a Canadian Chief Justice about judges. Individual judges, he observes, are loveable, intelligent, wise, compassionate, and sympathetic; but in a group they become absolutely insane and exhibit bizarre behaviour. If you think that is exaggerated, you have never attended a Council of Judges meeting!

VBN

County Court of Victoria,
29 September 2010

Coram: Her Honour Judge Bourke

Mr Monti: Well, just while Mr Middleton is tendering, Your Honour we will just see whether there's anything else we have forgotten.

Her Honour: All right, thanks, Mr Monti

Mr Monti: The only other thing that we would like to tender would be Mr Middleton, Your Honour.

Her Honour: Yes, thank you.

Mr Monti: We would like to tender him.

Her Honour: I told Mr Bolger that I run a very sensible serious court, Mr Monti. So - - -

Mr Monti: Well, Mr Bolger has known me well enough to know that's not possible, Your Honour.

Her Honour: Thank you, Mr Monti.

Mr Middleton SC: Could Mr Bolger mark me, Your Honour?

Mr. Monti: Mark him like you'd mark a calf.

VBN

Restaurant Review

Schweinhaxe

+39

The Venue: +39
Address: 362 Little Bourke Street, City
Telephone: 03 9642 0440
Hours: Mon-Sat 7am-10.00pm. Sunday, closed
Offerings: Pizzeria and degustation bar

I summoned my former readers at late notice. One took up the offer of a free lunch. The other two were busy. God bless former readers. They have the ability to appear interested in even the most boring tale related by their former mentor.

I wanted to go somewhere that had options. It was a Monday, not the day to be celebrating the end of the week. We went to a place named +39 in Little Bourke St, just down from Hardware Lane. +39 is a reference to the international telephone code for Italy. Despite the quirky name it has been reviewed in such publications such as Delicious and Vogue.

It was one of those mad late-winter days. Lots of rain, wind and sunshine, all at once. +39 was packed when we arrived. People were trying to escape from the cold and the fact that it was a Monday.

There is a large counter that displays savoury things like Ciabatta ($8-$12.50), Piadina ($9-$10) and Panini ($5.50-$6.50) with assorted fillings and also many sweets, dolce, minicakes and biscuits. It is an impressive display: simple, fresh and tasty. The kitchen is open and dominated by a large Moretti Forni pizza oven. The rest of the place is basic: exposed pipes; concrete floor; painted white brick walls and wooden tables and chairs. What makes the place hum (apart from the modern chill out music) is the vibrant wait staff; the pulse from the open kitchen and the buzz of the content clientele. This is all overseen by the owner, Remo Nicolini. He looks the goods. Go and you will know what I mean. He is fully in control of the kitchen and wait staff and loves his customers, always greeting them with a friendly Ciao.

Our wooden table was set with: a red pepper mill; Sicilian salt; chilli pieces in oil; water glasses and good quality cutlery in a steel basket. The menu came on two pieces of well-worn paper.

As it was a Monday of a long week ahead, I opted for a Sicilian Mandarine juice ($4.50). The mixed sweetness and tartness of the juice was very refreshing. My reader wanted a Sicilian Blood Red orange juice ($4.50) but this had run out. He instead had Aranciata Rossa ($3.50) (a carbonated Blood Orange soda drink).

+39 has a short but very good list of beers and wine. This includes Italian beers such as Menabrae ($10) and Ichnusa ($9) and a whole range of different Italian wines of various grape varieties. I promised myself to come back and do these justice sometime.

I ordered Tagliatelle Gamberi ($19). This was no ordinary pasta with prawns. It came with ½ dozen very fresh and firm prawns that were perfectly cooked. The tomato sauce was rich with fresh chilli and rocket. The thickness of the tagliatelle was perfect for capturing the sauce. I moved my tie to avoid the flicks of sauce but came undone.

My reader ordered a Salsicca Pizza ($18). This had six large slices. It was a big meal but he was up to the task. I knocked one off to give him a hand. The base was thin, tasty, and well topped. It came with tomato, mozzarella, Italian sausage, porcini mushroom and Parmesan. It was very moist. The sausage was skinless, home made and in crumbling chunks. My reader really wanted a salami style sliced sausage but still described the pizza as "tasty". There are many other pizzas on offer including an Aragosta Pizza ($33) with, as the name suggests if you are Italian, lobster together with black caviar, burrata and cherry tomatoes ($33) and a Gratinata Pizza ($13) with mozzarella, roasted eggplant, cherry tomato, bread crumbs and olive oil. Not surprising that +39 recently was awarded Pizzeria of the Year by Cheap Eats.

We ordered coffee and also shared a Calzoncino Di Nutella ($6). That's right, a Nutella Pizza. It came warm and topped with lashings of Nutella and chopped strawberries. Decadent. The coffee tasted particularly good when blended with the remnants of the Nutella that was, by this time, all over my lips and chin.

I have also been to +39 just for coffee. This is the place where I was introduced to a Piccolo Latte, a short version of the Latte, being a 1:1 ratio of steamed milk and espresso. A great coffee that is strong and not too milky. The perfect mid-morning coffee. +39 is an authentic Italian pizzeria and bar.

It comes with attitude, but of the right variety.

Guten Appetite! VBN

Dear Themis

VBN's Guide to Good Form

On the right point...

Dear Themis

I have a difficult case coming up. I have some very good arguments and some very bad arguments. Unsurprisingly, my instructing solicitors are keen that I run on the bad arguments. But I am concerned that running these bad arguments will distract the Court from the good arguments. What should I do?
- Signed Besieged

Dear Besieged,

The answer is simple: you must follow instructions. This will keep the instructing solicitor on side, the surest way of getting further work. Forget what the Ethics Committee or that wretched new *Civil Procedure Act* says: the duty to oneself is always the paramount duty.

As to presenting the arguments, you might wish to adopt the tactics of a very eminent counsel in the Court of Appeal in a similar situation. He started off his submission by acknowledging that he had three arguments, one very good, one average and one very bad. The presiding judge then asked "In which order will you deal with these arguments Mr X?" The barrister brazenly replied "That is a matter for your Honours".

- Themis

On one's occupation...

Dear Themis

I am a very senior Queens Counsel. I sometimes get embarrassed on social occasions when asked "And what do you do". When I reply that I am one of Her Majesty's Counsel for the State of Victoria, people seem to shy away, feeling intimidated. Can you give me any response which might make have a different effect?

- Signed One of Her Majesty's Counsel for the State of Victoria

Dear One of Her Majesty's Counsel for the State of Victoria,

I doubt all people just feel intimated when you say that you are "One of Her Majesty's Counsel for the State of Victoria". I can think of a variety of other effects such a statement might have. But I digress.

The question *"And what do you do"* is of course a dreadful question: it should never be asked in polite society. It was often asked of a man who was independently wealthy and did not have an occupation. He found the question irritating and impolite. Whenever he was asked "And what do you do", he simply replied "All that I can" or, "My very best."

Given the tone of your letter, I am sure this is a response that you would feel confident to give.

- Themis

On wishing to impress...

Dear Themis

I'm a baby barrister and have been briefed in my first case to prosecute on a possession charge. Apparently drugs were found in the punter's backpack during a random search at The Big Day Out concert. He's denying they're his, of course. Can you direct me to some really good law on possession; I'm very nervous about my first appearance and I do so want to impress the Court.

- Signed Possessed

Dear Possessed,

Generally speaking, the concept of possession is disarmingly simple. To possess something one needs to know that one has it. However, for said punter there is the inconvenient hurdle of section 5 of the *Drugs, Poisons and Controlled Substances Act* 1981 to overcome which requires said punter to prove that the illegal contraband is not his.

When I did such matters in my early days at the Bar we were all abreast of His Honour, Chief Justice Bray's possession principle elucidated in *R v Boyce* (1976) 15 SASR 40:

> "…as long as he had hold of the case he had the exclusive control of it until he was interrupted by the police. He could have thrown it in the air, jumped on it, cut it up with a knife, taken a gun out of his pocket and shot a hole through it, or produced an incendiary apparatus and set alight to it. He was in my view completely in physical de facto custody and control of the thing for a definite, if short, period of time and the fact that a speedy end to that control had been predetermined by the police is immaterial."

Of course you could always pursue an alternative course and that is, seek an adjournment of the case until the High Court has handed down its judgment in *Momcilovic*. But be warned, Melbourne's favourite fish-wrapper, the 'Herald Sun', has already taken a lively interest in the outcome of *Momcilovic* and might also closely examine the case of said punter and your forthcoming appearance. Just make sure that your name is properly inscribed on the bluey (in large block letters), so that it appears correctly in print the following day, when your marvellous and heroic advocacy is faithfully reported to Melbourne's magpie literati.

- Themis VBN

Habitat *Thoroughly Carpeted*

In and Around Chambers

Carpet/'kapət/ *n*. **1**. a heavy fabric, for covering floors. **2.** a covering of such a fabric. **3.** any covering like a carpet: *they walked on the grassy carpet*. – v.t. **4.** to cover or furnish with, or as with, a carpet. **5.** *Colloquial* to reprimand. – *phr*. **6. on the carpet,** *Colloquial* before an authority for a reprimand. [ME, from L: card (wool)]. (*Macquarie Concise Dictionary*, Third Edition, Sydney, 1998).

For many Barristers (and some Judges) the word 'carpet' carries with it the potential to reopen old psychological wounds, possibly incurred in the Court of Appeal, or perhaps in the High Court on a special leave day after being on the receiving end of a thorough judicial carpeting.

But for the numerous tenants of Owen Dixon Chambers West, the mere mention of the word 'carpet' is often greeted with collective groans, bemused shaking of heads sideways and muffled expressions of frustration.

In the cool new millennium of interior design minimalism and hard flooring, wall to wall carpet nowadays captures one's attention in the same way as vertical blinds, laminex benchtops, pine bedroom furniture and Pro Hart paintings. Tired and creepy, but not quite yet, perhaps never to be, retro-chic.

Late last year, Barristers Chambers Limited ('BCL') decided to replace the carpet in the foyers of Owen Dixon Chambers and Owen Dixon Chambers West with, that's right, carpet.

The new carpet laid in the ground floor foyers of both Owen Dixon East and West, which Habitat understands was 'specially commissioned', commands one's attention with its hues of electric blue into which is woven an intricate pattern of circles and spots in tones of cream and beige. When it was first installed there was amusing gossip about of people reeling from a slight vertigo effect when looking down through the corridor from West to East. Others have remarked that stylistically, the new floor covering would be more suited to a Tabaret poker machine barn, or maybe in a local mayor's office somewhere behind the iron curtain circa 1982, such as Nizhny Novgorod, or Sverdlovsk.

Elsewhere on the tenanted floors of West, much of the old salmon pink coloured carpet remains, which in places is beginning to resemble the 'Pazyryk Carpet' (the world's oldest surviving carpet which dates from around 500-400BC), in terms of wear and tear. Thankfully though BCL has begun to replace much of the old carpet with a much more serviceable and aesthetically pleasing steel grey and pin-point beige spot pile.

Although not overly pleasing to the eye, the Essoign Club's rationale d'carpet in the dining room, that being noise reduction, is a sound one when considering that the dining room plays host to a horde of loquacious barristers on a daily basis.

1. The Essoign Carpet - Witness to many a dark secret.
2. Vertigo in blue? The new 'specially commissioned' carpet in the foyers of Owen Dixon Chambers (East and West).
3. Burger with the lot - Three different styles of carpet on ODCW13.
4. Playing it safe with a lovely beige in ODCW.
5. Aesthetically pleasing and serviceable - The new carpet on ODCW9.

However, so far as the public areas of Owen Dixon West are concerned, the question begs. Why carpet? One is hard pressed to think of any smart modern CBD building which welcomes visitors upon entry with a carpeted foyer. Habitat respectfully suggests that carpeting be left for the appellate courts and that BCL considers installing contemporary serviceable hard flooring which would be popularly received by many and admired by many more.

VBN

A Bit About Words *Rarities*

Julian Burnside

I recently read a book by Ammon Shea called "Reading the OED"[1]. Although the title suggests a "how-to" guide to the dictionary, the book is much more remarkable. The author must be a rare - more likely a unique - person: he spent a year reading the entire text of the second edition of the OED: all 21,730 pages of it.

His account of the task (a modest 223 pages) is a blend of diary and philavery. Each letter of the alphabet gets a single chapter. The first half of each chapter is a chatty discussion about the project, or about dictionaries, or about language generally, followed by a small list of words which engaged the author's attention in that letter of the alphabet.

By this means, the reader is treated to a small selection of rare and obscure words: a shortcut to some of the entertaining curiosities of the English language. And a good selection it is – briefer than Foyle's Philavery; more selective than "Mrs Byrne's Dictionary of Unusual, Obscure and Preposterous Words", and without the pretension of Bowles' "The Superior Person's Little Book of Words".

> "A bayard is a person who proceeds with all the self-confidence that ignorance induces. "

But the detail that caught my attention (beyond the mad scale of the enterprise) was the observation that the OED2 includes a quotation which contains a word which is not otherwise to be found in the dictionary itself. This is a very rare occurrence indeed - I know of only one other instance of it. The quotation is from the 17th century, so the word has been around for long enough to be noticed by someone, surely. In its entry for *micturient*, the OED contains an illustrative quotation from Gayton (1654): "Which … gave Sancho to perceive his condition very micturient, and cacaturient." If readers looks elsewhere in the dictionary for *cacaturient*, they will be disappointed. It is nowhere to be found. The nearest entry is *cacatory*. *Cacaturient* is not found in Johnson, Webster or Bailey. I have not found *cacaturient* in any of the specialist dictionaries of obscure words, low language or slang, and it is not to be found in the thousand online dictionaries searched by OneLook (www.onelook.com). (This gets more interesting, so stay with it).

An electronic search through the OED2 shows that the quotation from Gayton is the only place in the entire dictionary where *cacaturient* is used. But it is a real word and a useful one which describes a familiar thing. It was used in 1917 by Stuart Pratt Sherman in "On Contemporary Literature" at p.274, and in 1952 by Clarence Decker in "The Victorian Conscience" at p.155. If this seems surprisingly prolific, given its absence from any known dictionary, it has to be conceded that Sherman and Decker were both quoting from the same letter by George Meredith: "O what a nocturient, cacaturient crew has issued from the lens of the Sun of the mind on the lower facts of life!" But surely if the word is good enough for George Meredith and Gayton, it should be good enough for the OED.

It must be that the editors of the OED must have overlooked Meredith's letters, since *nocturient* does not appear on the OED at all, either as headword or in a definition or quotation.

The oddity of a word which is recognised by the OED but is not defined in it got me thinking about other linguistic rarities. One is *shibboleth*. It is a Hebrew word with two quite diverse meanings: either "ear of corn" or "stream in flood". It was introduced into English in Wyclif's Bible with the meaning "A word or sound which a person is unable to pronounce correctly; a word used as a test for detecting foreigners, or persons from another district, by their pronunciation." This comes from the fact that it was used by Jephthah the Gileadite

as a test-word by which to distinguish the fleeing Ephraimites (who could not pronounce the *sh*) from his own men. The Ephraimites pronounced it *sibboleth* (see Judges xii. 46).

Shibboleth is a word which is often misused, although in its proper English meaning it is useful It is sometimes used now as meaning a *myth* or *misapprehension*. In "Thereby Hangs a Tale" at p.256 Funk goes so far as to say it means any catch-cry or slogan used by a political party. Except on the Humpty Dumpty principle, this is wrong. But whatever meaning is attributed to it in English, *shibboleth* is a rarity for the fact that it was knowingly introduced into English with a meaning utterly unconnected to either of its meanings in Hebrew.

Another word which, arguably, has the same characteristic is the rarely used *disghibelline*: "To distinguish, as a Guelph from a Ghibelline". The Guelphs and the Ghibellines were the two great parties in mediæval Italian politics. It was important to distinguish them. In 1672 Marvell wrote "In their conversation they thought fit to take some more license the better to disghibelline themselves from the Puritans." From this, the verb took on the more general meaning of distinguishing between two factions or groups, and thus it parallels *shibboleth* but is unlikely to displace it. Since Marvell was an English writer, and the Guelphs are represented in modern times by the ducal house of Brunswick and the present dynasty of Great Britain, it might be supposed that Marvell was a sympathiser with the Guelphs. If Wyclif had not introduced *shibboleth*, someone might have coined *disephraimite*.

And you know what all barristers do after a big case? We go out and spend the fees we have just put in the fee book, before the money comes in. When you do that, you have just fornaled your income.

Shibboleth can be readily distinguished from words which are introduced to be used metphorically, such as *tricoteuse*. A *tricoteuse* is "A woman who knits; applied specially to women who, during the French Revolution, sat and knitted at meetings of the Convention or at guillotinings". The best-known *tricoteuse* in English literature is Madame Desfarges, in Dickens' "A Tale of Two Cities".

Other rarities in English may be found among the irregular plurals, by those willing to search. Although there are many oddities among plurals, can there be any home-grown plurals as rare as *mouse-mice* and *louse-lice*? No other *–ouse* word in the English language changes to *–ice* in the plural.

But there is one other irregular *–ice* plural, and that is *dice*, the plural of *die*. This is a unique formation, but has practically faded from sight since *dice* is now used almost exclusively as both singular and plural. Although many people remember that the singular is *die*, very few people nowadays say *one die, two dice*. To do so will attract an accusation of pretension. But we retain a vestigial memory of the original form, in the saying "the die is cast".

Other rarities to be found in Shea's book are words which are absurdly obscure for ideas which are ridiculously common. For example, you know the big stretch you do on waking up in the morning, or when tired? The stretch the cat does on the hearth rug? It is more than just a stretch: it's a whole-of-body thing. There is a word for it: *pandiculation*.

And what about that obvious feature of every person's face: the vertical groove from the nose to the upper lip. It is part of the natural topology of shaving, or applying lipstick. It is the *philtrum*, but sadly it does not appear as a headword in the OED or in Johnson. However you will find it in Nathaniel Bailey's English Dictionary (1742) and in the 2nd edition of the Random House Dictionary of the English Language. But all is not lost. A draft entry in the OED dated March 2003 includes *philtrum* in a quotation supporting the entry for *dysmorphic*, but it has not yet been dignified as a headword. This makes it a twin to *cacaturient*.

Shea's book highlights various rare words, but three struck me as particularly useful. A *bayard* is a person who proceeds with all the self-confidence that ignorance induces. The thing it describes is so common that it is a surprise to see that we don't have a familiar word for it. However useful it might be, *bayard* is never heard, even though there is a book which uses the word in its title: "A Bayard from Bengal", by Frederick Anstey (D Appleton and Co., 1902). It opens unpromisingly: "Would no-one arise, inflamed by the pure enthusiasm of his *cacoethes scribendi*, and write a romance which shall secure the plerophory of British, American, Anglo-Indian, Colonial and Continental readers by dint of its imaginary power and slavish fidelity to nature?" Not a book likely to propel a word from obscurity. Incidentally, *plerophory* is another obscure word. It means "full of assurance or certainty", so is aptly used in a book about a bayard. *Plerophory* is an awkward word and hard to say; *bayard* is useful. We should bring it back.

And then there are the two words mentioned earlier: *micturient* and *cacaturient*. They both mean you really have to go. Number one and number two. Delicacy forbids any further detail, but if you check the OED for the first, you will surely understand the second.

End Notes

[1] I am indebted to Justice Peter Gray for telling me about "Reading the OED"

VBN

Book Review

The Honourable Peter Heerey QC

Richard A Posner, - How Judges Think

Harvard University Press 2010, 400 pp $31.95

The term prolific hardly does justice to Richard Posner, a judge of the United States Court of Appeals for the Seventh Circuit for 25 years and a senior lecturer at the University of Chicago Law School. Americans are very keen on rankings. Law Schools are ranked, amongst other things, on the output of publications. It has been said that if Richard Posner were a Law School, he would be ranked about seventh in the nation.

In his most recent work, *How Judges Think*, there is no list of prior publications. On the back cover it is merely said that he "is the author of many books". This prudent space-saving is understandable when one reads in a profile in *The New Yorker* of December 2001 that as at that date he had written 31 books, more than 300 articles and nearly 1900 judicial opinions. The interviewer notes:

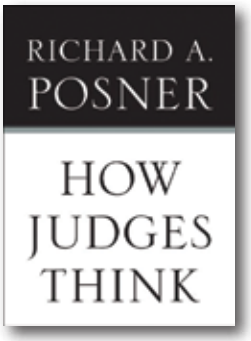
> He has written books about AIDS, law and literature, and the Clinton impeachment trial, and articles about pornography, Hegel, and medieval Iceland. This year alone, while working full time as a judge and teaching at the University of Chicago Law School, he published *Breaking the Deadlock*, a book about the Bush-Gore election; a second, updated edition of his 1976 book, *Antitrust Law*; and two collections of essays. He also wrote *Public Intellectuals*, a 400 page diatribe against the species, and *Law, Pragmatism and Democracy* in which, among other things, he derides democracy's anti-elitist pretensions and the animal rights movement.

In the present work Posner looks at judging as an internalized mental process, to be assessed in terms of the psychology of cognition and emotion, and, somewhat unexpectedly, labour economics. He is scornful of what he calls "legalists", otherwise known as formalists, who see themselves as judges who

> decide cases by applying preexisting rules, or, in some versions of legalism, by employing allegedly distinctive modes of legal reasoning, such as "legal reasoning by analogy". They do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside conventional legal texts – mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions) – for guidance in deciding new cases. For legalists, the law is an autonomous domain of knowledge and technique.

As a teacher at the same University which gave birth to the market economics of Milton Friedman, Posner looks at most human activities in terms of supply and demand and trade-offs of costs and benefits by participants in a market. Here is how it works for judges, or more specifically those in the US Federal judiciary.

A labour market consists on the buying side of a set of employers who want to hire workers for a particular type of job, and on the selling side of a set of workers who prefer that type of job to others open to them. On the buying side there is the President, with the approval of the Senate, who has the (potentially conflicting) goal of appointing (i) "good" judges who will apply the law impartially and efficiently, thereby fostering economic confidence and political stability and (ii) judges who will tilt in favour of the political goals of the Administration in cases where there is a measure of discretion. But, as Posner notes, once appointed the judge is well insulated from carrot and stick.



The appointment is for life; promotion, either from district judge to Court of Appeals or from the latter to the Supreme Court, is statistically a fairly remote prospect anyway. (Notable examples of the lack of predictability of judges include the Republican-appointed Earl Warren. And Lyndon Johnson reputedly said that every time he made an appointment he made ten enemies and one ingrate.)

On the selling side, the prospective judge will want a salary. United States judicial salaries are surprisingly low: $165,000 and $175,000 respectively for district and Court of Appeals judges (State judges usually get less), although a federal judge can retire at 65 after 15 years service on full salary. But as Posner points out, money is not the principal motivator, since usually appointees could receive more in private practice or even in teaching. Non-pecuniary compensations include "not having clients to kowtow to" and, conversely, receiving the deference (at least superficially) of practitioners and also "those judges having a taste for leisure can indulge their taste more easily than they could as practicing lawyers". On the latter point, as an example of the vast American literature on the judicial life cited in the work, the reader is referred to the intriguingly titled article "Publish or Paris? Evidence of How Judges Allocate Their Time" (2004) 6 *American Law and Economics Review* 1. More importantly, there is the satisfaction of having a reputation as a good judge validated in the judicial and broader legal community.

Posner says that judges are "occasional legislators". His footnote to this assertion is worth quoting, and not just for the satisfaction of Australian readers or more particularly, Sydney University alumni:

> Not a new idea, but it still grates. "The principle of the Swiss Civil Code that where the law is silent or unclear the judge must decide the case as if he were a legislator, still sounds strange to us, even after a century of demonstration, from Bentham through Holmes to Professor Pound and Cardozo and Lord Wright, that this is what in fact happens daily in our courts." Julius Stone, *The Province and Function of Law* (1950).

The amount of legislating that a judge does depends on his "zone of reasonableness", defined as "the area within which he has a discretion to decide a case either way without disgracing himself". The zone will depend, amongst other things, on the subject matter – wider in constitutional cases, less so in commercial cases – and the rank in the judicial hierarchy – the higher the wider.

Since judges (at least federal judges in the US and judges in Australia and most other common law countries) do not have to worry about "election, re-election, fund-raising, interest groups and the like" Posner suggests that the "springs of their behavior are mysterious". It is here that we are introduced to some thoughtful and original insights, especially the role of intuition. Just as a businessman or a military commander has to make quick judgments without

a conscious weighing and comparison of pros and cons of a possible course of action, an experienced judge will have a "capability for reaching down into a subconscious repository of knowledge acquired from one's education and particularly one's experiences". The more experienced the judge, the more confidence he is apt to repose in his intuitive reactions and his "repository of buried knowledge" and the less likely he is to be attracted to a systematic decision-making methodology.

However, the discourse of law, and especially that part consisting of judges' reasons for judgment, is conformist and unadventurist, however original the underlying thought. The internal decision-making process may be, usually is, intuitive, messy, involving hunches and blind alleys along the way. But the result must be expressed in a traditional way (albeit not as formally as in European judicial systems), in a form not too disconcerting to readers of judgments. Posner observes that Supreme Court Justice William O. Douglas, the Court's "only avowed legal realist … flouted perfectly sensible norms of judging (and) helped to give realism a bad name". A substantial footnote lists some scathing comments from non-conservative commentators: Douglas's judgments "appear to be hastily written; and they are easy to ignore", the carelessness of his opinions was rooted in his "indifference to the texture of legal analysis, which arises from an exclusively political conception of the judicial role". The Australian reader is immediately reminded of Justice Lionel Murphy.

For advocates, especially appellate advocates, Posner advises that rather than "beating the judges over the head with cases" the advocate should recognize the essentially legislative character of much appellate jurisdiction and "emphasize instead the practical stakes in their cases and how the stakes would be affected by the court's deciding those cases one way or the other". The key to effective appellate advocacy is "the advocate's imagining himself an appellate judge", "identifying the purpose behind the relevant legal principle and then show(ing) how that purpose would be furthered by a decision in favour of the advocate's position".

Posner is nothing if not combative. In the New Yorker piece he is quoted as saying:

> I have exactly the same personality as my cat. I am cold, furtive, callous, snobbish, selfish, and playful, but with a streak of cruelty.

In the present work he is caustic on present Chief Justice John Roberts, who at his confirmation hearing said that a judge, even if he is a judge of the Supreme Court, is merely a (baseball) umpire calling balls and strikes. Posner analyses that in jurisprudential terms which, however, for full appreciation require an underlying knowledge of baseball which the present reviewer does not possess. Nevertheless the take home message is brutal:

> The tension between what he said at his confirmation hearing and what he is doing as a Justice is a blow to Roberts's reputation for candour and a further debasement of the already debased currency of the testimony of nominees at judicial confirmation hearings.

Elsewhere Posner tells us that the Ninth Circuit Court of Appeals is "the worst performing federal court of appeals". How much more delicate are Australian judges in commenting on the merits of competing courts!

Most of the work will strike the Australian reader as full of thoughtful insights into the way judges actually work in a common law system. Posner's views, notwithstanding their seriousness, are expressed in a most engaging and readable style.

One slightly discordant note should, however, be mentioned. A whole chapter, entitled "Judicial Cosmopolitanism" is devoted to the controversial (in the US) practice of citing decisions of foreign courts. "Judicial Cosmopolitanism" is clearly being used as a pejorative term; Posner is not intending to convey some notion of a charming judicial Maurice Chevalier. For example, he refers to the Supreme Court:

> insisting on injecting itself into highly emotional controversies, such as those over abortion, homosexuality, the regulation of campaign financing and the electoral process generally, and capital punishment, and doing so provocatively, with aggressive rhetoric, intemperate dissents, and, lately, promiscuous citation of foreign decisions.

It seems the perceived vice is not just citing foreign decisions as a source of an idea or an argument, but treating those decisions "as having persuasive force just by virtue of being the decisions of recognized legal tribunals, never mind how compelling the tribunal's reasoning is".

Many detailed grounds are advanced for the objection. Too many decisions will be cited, there will be a citing "arms race"; it is one more form of "judicial fig-leafing", covering up the judge's own voices lest they make justice seem too personal; foreign decisions emerge from a complex social, political, historical, and institutional background of which most American judges are ignorant. But the "decisive objection" is that the practice is undemocratic because judges from other countries "are outside the US democratic orbit". The judges of foreign countries, however democratic, have no "democratic legitimacy" in the US.

In truth this over-excited reaction to a practice that in other common law countries seems totally unexceptionable, may be simply a manifestation of American exceptionalism, the concept that the United States is somehow unique among nations, and morally superior to all others. Indeed the link is explicitly made by Professor Steven G. Calabresi in his substantial article "'A Shining City on a Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law (2006) 86 *Boston University Law Review* 1335.

Calabresi sees many Americans believing, as he clearly does himself, that "Americans are a special people, in a special land, with a special mission … (t)he Constitution is the focal point of American exceptionalism: it is our holiest of holies, the ark of the covenant of the New Israel". He says that American exceptionalism "is not racist whereas the nationalist exceptionalism of Ancient Greece, Rome, the British Empire and Nazi Germany were all explicitly racist" and later that "America is a good country that is committed to good values in a way that Ancient Greece, Rome the British Empire, and Nazi Germany were not". Without wishing to descend to the tiresome America-bashing of some in the Australian commentariat, the point can surely be made that the lofty ideals enshrined in the US Constitution and Bill of Rights did not stand in the way of 80 years of slavery and a further century of law-backed racial segregation and discrimination. VBN

VICTORIAN BAR REVIEW

No 1 2011

THE ENGLISH LAW OF PRIVACY - AN EVOLVING HUMAN RIGHT

Baron Walker of Gestingthorpe
Justice of the Supreme Court of the United Kingdom

The cases of *Wainwright v Home Office*[1] and *Campbell v MGN Ltd*[2] are reported in close proximity in the same volume of the English Law Reports. The contrast between the two cases could hardly be greater. *Wainwright* was a claim against the state by two citizens with no social or financial advantages. Mrs Mary Wainwright and her son Alan were humiliatingly strip-searched when visiting her other son in prison. They eventually obtained public funding to bring a claim just before the expiration of the limitation period. They had suffered their humiliation in 1997, before the coming into force of the Human Rights Act 1998, and their claim was ultimately rejected by the House of Lords in October 2003.

Naomi Campbell, by contrast, was a celebrity super-model who issued a writ against the Daily Mirror newspaper on the very same day that it published an articled headlined "Naomi: I am a drug addict". That was in 2001, after the coming into force of the Human Rights Act. Her appeal to the House of Lords succeeded (though by the narrowest of margins) in 2004. She succeeded even though the newspaper publisher was not a public authority, and it might have been thought irrelevant whether the Human Rights Act was in force or not.

I have started with these two contrasting cases because their juxtaposition in the reports is a striking illustration of just how rapidly the English law of privacy has developed under the influence of the Human Rights Act 1998. One possible conclusion is that the tort of invasion of privacy was born in English law between October 2003 and May 2004 (though its conception might perhaps be claimed by the Court of Appeal in *Douglas v Hello*[3] in December 2000, or the differently constituted Court of Appeal in *A v B Plc*[4] in March 2002).

The Human Rights Act transposed into domestic law the United Kingdom's long-standing international obligations under the European Convention on Human Rights. Article 8 of the Convention declares (subject to qualifications that I will come back to) that:

"Everyone has the right to respect for his private and family life, his home and his correspondence".

Under the Act[5] it is unlawful for a public authority[6] to act in a way incompatible with a Convention right, unless statute compels it to do otherwise. The victim of a breach of this duty has a remedy (which may include damages) against the public authority . The expression 'public authority' is defined as including the court. Under s 3 of the Act all courts must so far as possible interpret legislation in a way that is compatible with Convention rights. There is a question whether the court is also obliged, under its negative duty not to act incompatibly with Convention rights, to develop or even remould the common law so as to remedy any perceived defects in its protection for human rights.

This issue is often described as whether the Act had not only vertical effect (between the citizen and the state) but also horizontal effect (between one citizen and another – though that other might be a newspaper publisher). *Wainwright* gave no comfort to the horizontalists, but *Campbell* has given a very different message.

Lord Hoffmann was the only Law Lord who delivered a full opinion in both cases. His opinion in *Wainwright* recognised personal privacy as an underlying value but firmly rejected what he called the previously unknown tort of invasion of privacy. He described it as "an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle". He also regarded the coming into force of the Human Rights Act as weakening the argument for a general tort to fill gaps in the existing law.[7]

In Campbell, by contrast, without casting any doubt on the general conclusion in Wainwright, Lord Hoffmann attached great importance to the Human Rights Act, and saw its restriction to public authorities as anomalous:[8]

> "What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person ...
>
> The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information ... Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control information about one's private life and the right to the esteem and respect of other people. These changes have implications for the future development of the law. They must influence the approach of the courts to the kind of information which is entitled to protection, the extent and form of publication which attracts a remedy and the circumstances in which publication can be justified".

[1] [2004] 2 AC 406
[2] [2004] 2 AC 457
[3] [2001] QB 967, paras 128-130 (Sedley LJ), discussed by Lord Hoffmann in *Wainwright* at paras 28-32
[4] [2003] QB 195, paras 4-6
[5] s 6 (this summary skates over some complexities in s.6(2))
[6] s 7
[7] Footnote 1, paras 33-34
[8] Footnote 2, paras 50-52

Lord Hoffmann's reference to trade secrets is a reminder that this area of the law is a development of the law of confidence which equity fashioned in order to protect confidential information entrusted by one person to another. There was an important step forward thirty years ago in the *Spycatcher* case[9], a saga which led (among other things) to the British Cabinet Secretary being cross-examined in the Supreme Court of New South Wales. In the English part of that complex litigation the House of Lords extended the reach of the law of confidence to include not merely the original recipient, but anyone who had notice that the information in question was confidential. Subsequent case-law has extended the notion of what is confidential so as to include what is simply private. Article 8 of the European Convention, and decisions of the Court of Human Rights at Strasbourg, have had a strong influence on these developments[10].

Before looking at some of the English and European cases I want to draw your attention to two general points about them. The first concerns the court's approach to analysing the question. The second concerns the process by which the court answers the question.

I have quoted paragraph (1) of Article 8 and I must now add the important qualifications in paragraph (2):

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The rights and freedoms of others include freedom of expression, which is protected by Article 10. The textbook approach to Article 8 and other qualified Convention rights is to ask two questions. Is the right interfered with? If so, is the interference justified? If the answer to the first question is yes and to the second no, there is a breach of the right[11].

In practice, it is sometimes difficult, and it may not always seem worth the bother, to separate out the two questions. For instance in Campbell Lady Hale considered the case of a photograph of a celebrity doing nothing in particular in a public place[12]:

> "She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it."

In the last sentence Lady Hale is of course referring to interference with the Article 10 right of freedom of expression. As regards Article 8, is that non-interference or justification? I am not sure. Does it matter? I'm not sure about that either. In principle courts should go through the discipline of analysing an issue correctly. But the more arguable or peripheral the degree of interference, the less will be required by way of justification in order to avoid a breach. So sometimes the two questions do tend to get elided.

The second general point is the way in which the court (which means, apart from wholly exceptional cases, a judge sitting without a civil jury) is to perform the balancing exercise. Judges (unelected judges, as the media are happy to remind us) have had the task of human rights adjudication put on them by Parliament. We must adjudicate, and we must give reasons. Where the issue concerns social and cultural values (rather than, for instance, fair trial) judges can bring to the task no specialised qualifications: only an open mind, a respect for both privacy and free speech, and a willingness to listen to both sides. At present, as the law develops, the favoured approach is for the judge to enquire carefully into the facts, and to make a decision based on evaluation of the particular facts.

This approach was set out by Lord Steyn in *Re S*[13] in four propositions:

> "First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

The second and third of these steps are sometimes referred to as parallel analysis –

analysis, that is, by reference to the two competing interests of privacy and free speech.

Re S was a case in which the trial judge was asked in the interests of a five year old boy to ban normal reporting of the trial of his mother for the murder of his nine year old brother. The judge declined to do so. This awful situation was going to be known to the boy's neighbours and schoolfellows in any event, and he would need special care and support regardless of any media ban. Against that there is a strong public interest in the openness of the criminal justice system. The Court of Appeal and House of Lords upheld the trial judge's decision.

English courts[14] have followed Strasbourg[15] in holding that an individual's Article 8 right to respect for his or her privacy is engaged whenever the circumstances are such as to give rise to a reasonable expectation of privacy. That is a wider and

[9] *Attorney General v Guardian Newspapers Limited* [1990] 1 AC 109
[10] There is a helpful summary in *McKennitt v Ash* [2008] QB 73, paras 8-10 (Buxton LJ)
[11] Footnote 2, paras 20-21; footnote 10, para 11
[12] Footnote 2, para 154
[13] *Re S (A Child)(Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17; see also *Re W* [2006] 1 FLR 1, para 53
[14] Footnote 2, para 21
[15] *Halford v UK* (1997) 24 EHRR 523

less demanding test than the formula (proposed by Gleeson CJ in *Lenah Game Meats*[16] and adopted by the Court of Appeal of New Zealand in *Hosking v Runting*[17]) of disclosure of what would be highly offensive to a reasonable person of ordinary sensibilities. The English test is indeed so wide that it may be thought to rephrase the question rather than to answer it.

So at present the English approach is highly fact-sensitive, but as the volume of case-law increases patterns of facts and practice are starting to emerge. Some of the questions to which the courts have begun to give answers are the following. What difference does it make if the claimant is a celebrity; or the minor child of a celebrity; or a celebrity role-model who has been behaving in a way that is not expected of a role-model? What difference does it make if the information is conveyed to the public not only in written or spoken words but also in photographs or videos? Does it make a difference if information is obtained by deception, or if photographs are taken covertly or in circumstances that amount to harassment? What about photographs taken in the street, or some other public place?

There is no doubt that in privacy law those who are expected to have the thickest skins are politicians (who are likely, in most democracies, to hold elected office, though in the UK we have not yet completed the reform of our upper house). In democracies those who put themselves forward for public office must expect, and accept, that they are exposed to public scrutiny and criticism, and that the criticism will often be intemperate and unfair. The leading cases include the two *Lange* cases in Australia and New Zealand, [18] *Sullivan* in the United States[19], *Lingens* at Strasbourg[20], and *Reynolds* in the UK.[21] In the important recent case of *Von Hannover v Germany*[22] (concerned with the unremitting pursuit by paparazzi of Princess Caroline of Monaco) the Strasbourg court underlined the point:

> "A fundamental distinction needs to be drawn between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "imparting information and ideas on matters of public interest" it does not do so in the latter case."

The Strasbourg Court[23] has even upheld publication of information about the health of the former French president, M. Mitterand, on the ground that public concern about the health of the head of state outweighed the serious breach of professional confidence.

The same sort of approach has been taken towards chief executives of multinationals who wield great economic power. The Strasbourg Court[24] upheld the right of a French magazine, Le Canard Enchainé, to publish the tax return of the chief executive of Renault (at a time when it was making many of its workers redundant) and the English court[25] has recently upheld the right of the Daily Mail to publish allegations that the former chief executive of BP had misused corporate resources to enable his live-in partner to be set up in business.

Then there is a wider and vaguer class of persons who (in Lord Woolf's words)[26] "hold a position where higher standards of conduct can be rightly expected by the public". Buxton LJ[27] commented drily on this formula –

> "that is no doubt the preserve of headmasters and clergymen, who according to taste may be joined by politicians, senior civil servants, surgeons and journalists."

No doubt there is a good reason why the Lord Justice did not add judges and lawyers to those of whom higher standards of conduct can be expected. This is where the element of hypocrisy comes in – the unattractive spectacle of claiming, or pretending, to be better than you really are. One of the justifications relied on by the Daily Mirror in the Campbell case was that Naomi Campbell had not merely denied taking drugs, but had gone out of her way to emphasise that in this respect she was better than other models.[28] Indeed the three-two split in the House of Lords was in large part a difference of opinion as to whether the newspaper's justified publication of the fact of Ms Campbell's addiction had been flawed by over-intrusive journalistic embroidery, especially the large photograph of her leaving a meeting of Narcotics Anonymous, and whether the Court of Appeal had been right to depart from the trial judge's evaluation of that issue.

Ms Campbell is a world-famous celebrity, and it is celebrities with whom the media have a particularly close and symbiotic relationship: film stars, pop stars, models, footballers, and transient beings who (for fifteen minutes at least) are "famous for being famous". Lord Hoffmann's view[29] was that being a celebrity

> "...would not in itself justify publication. A person may attract or even seek publicity about some aspects of his or her life without creating any public interest in the publication of personal information about other matters."

The double meaning of "public interest" is an important point which has often been made, for instance by Lady Hale in *Jameel*[30]

> "There must be a real public interest in communicating and receiving the information.

[16] *ABC v Lenah Game Meats* (2001) 208 CLR 199
[17] [2005] 1 NZLR 1
[18] *Lange v ABC* (1997) 189 CLR 520; *Lange v Atkinson* [2000] 3 NZLR 385
[19] *New York Times v Sullivan* (1964) 376 US 254
[20] *Lingens v Austria* (1986) 8 EHRR 103
[21] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127
[22] (2004) 40 EHRR 1, para 63
[23] *Plon (Societe) v France* 18 May 2004
[24] *Fressoz & Poire v France* (2001) 31 EHRR 28
[25] *Lord Brown of Madingley v Associated Newspapers Ltd* [2008] QB 103
[26] *A v B plc* [2003] QB 195, para 11
[27] Footnote 8, para 65
[28] Footnote 2, para 24
[29] footnote 2 para 57
[30] *Jameel v Wall Street Journal Europe Sparl* [2007] 1 AC 359 para 147

> This is, as we all know, very different from saying that it is information that interests the public – the most vapid tittle-tattle about the activities of footballers' wives and girl friends interests large sections of the public but no-one could claim any real public interest in our being told all about."

In the same case Lord Bingham put the point very briefly[31], "it has been repeatedly and rightly said that what engages the interest of the public may not be material that engages the public interest".

As the law of privacy develops its origin in the law of confidence will become a historical curiosity, and invasion of personal privacy will be recognised as a separate tort. Indeed I think we have probably reached that point already. Another necessary exercise in taxonomy is to recognise that while article 8 protects the individual both (by the law of defamation) against false publications which damage his reputation and (by the new tort) against true publications which are unjustifiable intrusions into his privacy, the Court's longstanding reluctance to impose prior restraint on free speech (known to English lawyers as the rule in Bonnard v Perryman[32]) ought to be confined to libel; and, arguably, should even with libel yield where necessary to "parallel analysis" to determine what proportionality requires.[33] This topic was fully discussed by the High Court of Australia in the remarkable O'Neill case.[34]

Muck-raking is a long-standing and salutary function of the press. But once the exposure of bad behaviour moves out of the sphere of political and public life it is no longer possible (if it ever was) to justify every or any invasion of privacy by invoking the well-known saying that "there is no confidence in iniquity".[35] The exposure of iniquity may be in the public interest, but the sensational disclosure of aberrant sexual conduct, especially if accompanied by prurient details and photographs, may not deserve the protection of the public interest defence.

In *A v B plc*[36] the Court of Appeal, presided over by Lord Woolf CJ, refused to ban publication of "kiss and tell" stories by two women with whom a married professional footballer had had casual sexual relations. Lord Woolf attached weight to the notion that the footballer was, whether he liked it or not, a role model for the young. When the *Campbell* case was before the Court of Appeal[37] Lord Phillips doubted this:

> "The fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay."

The House of Lords took much the same view.

A similar approach can be seen in the *Mosley*[38] case. Mr Max Mosley was president of the international motor-racing federation. Video film was taken (by a camera concealed in the jacket of woman E, as she was known) of activities at what the claimant called a party and the defendant called a sadomasochistic Nazi orgy. The News of the World published a sensational story illustrated by stills from the video. Woman E, who was to have been the defendant's star witness, failed to attend court to give evidence, and the public interest defence failed on the judge's crucial finding of fact that the activities did not have the theme of a Nazi concentration camp. Mr Mosely was awarded £60,000 damages. The judge's long and dispassionate judgment attracted strong press criticism for "moral relativism" and worse, but it has not been appealed, and it seems likely to have a lasting effect, for better or worse, on this sort of investigative journalism.

However the movement is not uniformly in favour of privacy. Another famous footballer who had been playing away from home obtained an ex parte injunction but then had it discharged, partly because he appeared to be principally concerned in preserving his reputation for commercial reasons, that is so as not to lose lucrative sponsorship contracts.[39]

There is undoubtedly a great deal of anxiety in the media about the chilling effect of recent developments. Against that the decisions of the House of Lords in *Reynolds*[40] and *Jameel*[41] do clearly recognize the importance of the public interest defence, not only in privacy but also in defamation claims, where responsible journalism seeks to expose corruption, hypocrisy or incompetence in public life. But one area in which the media do have real cause for concern and complaint is in the cost of defending claims, and in particular the very high costs that may be awarded against them if their defence fails. Successive British governments have made huge cuts in the civil legal aid budget. The new policy is that most civil claimants should finance their litigation by conditional fee agreements with their lawyers. These agreements provide for success fees that may be included in costs awarded against the defendant.

Coming back to *Campbell*, I have to tell you (with a heavy heart) that at first instance she was awarded modest damages of £3,500; she lost them under a unanimous decision of the Court of Appeal; and had them restored, by a 3-2 majority, in

[31] para 31
[32] [1891] 2 Ch 269
[33] Clayton & Tomlinson, the Law of Human Rights, 2nd ed. (2009) para 15.26, criticising *Greene v Associated Newspapers Ltd* [2005] QB 972
[34] *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57
[35] See for instance *Lion Laboratories Ltd v Evans* [1985] QB 527
[36] Footnote 24
[37] [2003] QB 633 para 41
[38] *Mosley v News Group Newspapers Ltd* [2008] EMLR 20
[39] Terry v Persons Unknown [2006] EWHC 119 (QB)
[40] Footnote 21
[41] Footnote 30

the Lords. That hair's-breadth success in obtaining modest damages resulted in the newspaper having to pay her costs of over £1m, including a percentage success fee, as well as its own costs. The costs award was unsuccessfully challenged by a separate petition[42] asserting that it was so disproportionate as to infringe the newspaper's article 10 right of free expression.

I have made several references to the significance of photographs and I must try to pull those threads together. Courts in England and elsewhere have frequently commented on the power and immediacy of the impact that a photograph can have. In *Campbell* several of the Law Lords referred to the old saying that a picture is worth a thousand words. It is particularly true of photographs of the human face: the photograph is a permanent record, easily disseminated by modern technology, of how a person looked when he or she was injured or distressed, or confronted by some unexpected shock or embarrassment.

This is mainly a problem for celebrities, since nonentities are generally of little interest to the freelance photographers who service the media's needs. But if anyone (whether celebrity or nonentity) is faced with public distress or humiliation he or she is entitled to be protected from wider publicity for the incident. An example of this is the disturbed man who tried to kill himself in a shopping centre, and later had the embarrassment of video film of the incident (recorded by CCTV) being broadcast to a wide audience. [43]

Children have a particularly strong claim to protection from media intrusion. In *Re S*[44], the sad case about the mother accused of murdering her elder son, there was no question of the younger son himself being photographed or made the subject of any publicity; the issue was whether he could be protected from publicity about his mother. More recently in *Murray*[45] the Court of Appeal reversed the striking-out of a claim for invasion of privacy made on behalf of a child suing by his parents, Doctor and Mrs Murray (the latter being much better known as J K Rowling, the author of the *Harry Potter* books). The child (then eighteen months old) had been photographed in the street in Edinburgh while being pushed in a buggy by his parents, and the photograph had been published in the press. The judge had wrongly supposed that the claim was only nominally brought by the child, and was in substance for the protection of his parents' privacy. But the Court of Appeal recognised that the parents' attitude was an important practical consideration:[46]

> "If the parents of a child courted publicity by procuring the publication of photographs of the child in order to promote their own interest, the position would or might be different."

In striking out the claim Patten J[47] had expressed doubts about the unfettered application of the Strasbourg Court's decision in *Von Hannover*:

> "If the law is such as to give every adult or child a legitimate expectation of not being photographed without consent on any occasion on which they are not, so to speak, on public business then it will have created a right for most people to the protection of their image. If a simple walk down the street qualifies for protection then it is difficult to see what would not."

The Court of Appeal took a rather different view but did not wholly disagree[48]:

> "The focus should not be on the taking of a photograph in the street, but on its publication. In the absence of distress or the like caused when the photograph was taken, the mere taking of a photograph in the street may well be entirely unobjectionable. We do not therefore accept . . . that if the claimant succeeds in this action the Courts will have created an image right.
>
> We recognise that there may well be circumstances in which there will be no reasonable expectation of privacy, even after von Hannover v Germany. However, as we see it all will, as ever, depend upon the facts of the particular case."

The judgment of the Strasbourg court in *von Hannover* refers to public figures being harassed by photographers and to photographs of Princess Caroline having been taken secretly. It is not clear whether some notion of *nec vi nec clam* influenced the decision in that case. But since the wrong complained of is the offensive intrusion into private life I see no reason why the court should not take account of the circumstances in which pictures are taken, as well as how they are published. If the circumstances of intrusion involve some other civil wrong, such as deceit or trespass, the victim may have a separate cause of action, even including the economic tort of causing loss by unlawful means, as in the curious and difficult case about the authorized and unauthorized pictures of the wedding in New York of Michael Douglas and Catherine Zeta-Jones.[49]

That is all I have to say about our developing law of privacy as against the media. It will be obvious to you that its development is far from complete. I want to add two footnotes, one about the position in Australia and New Zealand, and the other about governmental intrusion into privacy in the United Kingdom.

[42] *Campbell v MGN Ltd* (No 2) [2005] 1 WLR 3394; compare *Tolstoy v United Kingdom* (1995) 20 EHRR 442.
[43] *Peck v United Kingdom* (2003) 36 EHRR 31.
[44] Footnote 13.
[45] *Murray v Express Newspapers Plc* [2009] Ch 481
[46] Para 38.
[47] [2007] EMLR 22, para 65.
[48] Paras 54-55
[49] *Douglas v Hello! Ltd* reported with *OBG Ltd v Allan* [2008] 1 AC 1

I am here to talk about English law, not the law of Australia or New Zealand, and it would be most unwise to pontificate on those topics. But perhaps I may mention that English courts are familiar with the interesting and important decisions of the High Court of Australia in *ABC v Lenah Game Meats*[50], and Court of Appeal of New Zealand in *Hosking v Runting*[51], both of which I have already mentioned briefly. The first is the case about covert filming in a Tasmanian abattoir where possums were killed and processed. The activities at the abattoir were not trade secrets but the Court recognised that broadcasting the film might damage the claimant company's commercial interests. As Gleeson CJ drily put it:[52]

> "A film of a vertically integrated process of production of pork sausages, or chicken pies, would be unlikely to be used for sales promotion."

The High Court held that an injunction restraining broadcasting should not have been granted, because of the high value to be placed on free speech on matters of public and political concern, including animal welfare. But the judgments (which discuss a number of overseas authorities and refer to the influence of the European Convention) give some encouragement to the development of an Australian law of privacy, though only for natural persons. Gummow and Hayne JJ stated at the end of their joint judgment:[53]

> "Whatever development may take place in that field will be to the benefit of natural, not artificial, persons. It may be that development is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the Restatement, 'free from the prying eyes, ears and publications of others.'"

The Court of Appeal of New South Wales has recently declined to recognise a common law tort of invasion of privacy[54] and the Australian Law Reform Commission has recently put forward proposals for legislation in this area.[55]

The facts in *Hosking v Runting* were very similar to those of the J K Rowling case: celebrity parents had been photographed in the street with their two-year-old twins in a buggy, and the claim was brought (in substance though not in form) to protect the children. The Court of Appeal of New Zealand was unanimous in dismissing their appeal but split 3-2 on the general issue of the existence of a tort of invasion of privacy. The majority held that it did exist, favouring the "highly offensive to a reasonable person" test adopted in *Lenah Game Meats*. The judgments contain a full discussion of English, Australian and American as well as New Zealand authority.

The other footnote, as I come to a close, is concerned with official intrusions into privacy by central government, local government, and other public bodies with statutory powers. They are in many ways an even more worrying development than the risk of proper investigative journalism being chilled. But this is at present more of a political than a legal issue, at any rate as regards decided cases in England.

I began this talk by referring to *Wainwright v Home Office*, the case of the mother and son who were humiliated when visiting a prison. They eventually succeeded in a claim to the Strasbourg Court.[56] They would now have a domestic remedy under the Human Rights Act. But apart from *Wainwright*, and the case about the attempted suicide caught on CCTV installed by a local authority, all the defendants in the English cases that I mentioned have been private-sector media entities. That is quite surprising, as the Human Rights Act is primarily concerned with the duties of public authorities, and public-sector bodies, starting with the intelligence services and the police intrude more and more into our private lives. They do so not in order to publish or broadcast the information which they have gathered, but to store it for possible use for their own purposes.

There is constant surveillance of public places by CCTV cameras, and the police regularly film those who attend demonstrations, even if the demonstrations are peaceful and properly organised. Last year a peaceful demonstrator against the arms trade, with no criminal record, succeeded in the Court of Appeal in a claim for invasion of privacy after he had been photographed by the police.[57] The House of Lords rejected[58], but the Strasbourg Court has upheld[59] a complaint about the police use of stop and search powers (exercisable regardless of reasonable grounds for suspicion) against observers at an arms trade exhibition. The routine interception of telephone calls to and from overseas (where statutory safeguards for confidentiality are less demanding than for internal calls) has been held by the Strasbourg Court to infringe Article 8 rights.[60] So has the retention of DNA samples taken under statutory powers from persons who are later acquitted (or not charged).[61] A full account of those issues would take much more time than we have available. But it seems inevitable that in due course there will be a good deal more case law on this aspect of privacy also.

This article is an edited version of an address by Baron Walker of Gestingthrope to the members of the Anglo Australian Lawyers Society, delivered in Melbourne on 25 August 2010. VBR

[50] (2001) 208 CLR 199.
[51] [2005] 1 NZLR 1
[52] Para 25.
[53] Para 132.
[54] *John Fairfax Pty Ltd v Hitchcock* [2007] NSW CA 364.
[55] For Your Information: Australian Privacy Law and Practice (Report No. 108, May 2008).
[56] *Wainwright v United Kingdom* (2007) 44 EHRR 40.
[57] *R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123
[58] *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307
[59] *Gillian and Quinton v United Kingdom* (2010) 50 EHRR 1105
[60] *Liberty v United Kingdom* (2009) 48 EHRR 1.
[61] *S & Marper v United Kingdom* 4 December 2008.

WHY ARE THE MORAL DEMANDS ON THE PROFESSION DIFFERENT FROM OTHER MORAL DEMANDS?

Jonathan Beach QC
Barrister-at-Law, The Victorian Bar

It is timely to remind ourselves of the moral status of our profession and the role we play within it. Recent profit maximization strategies of some lawyers ignore or undervalue the profession's moral foundations. More generally, recent political debate on the national regulation of the profession proceeds within a framework which is unenlightened by such reflection.

Why do professionals have a higher morality, or at least a different morality, from everyone else? Are the moral demands which are placed on them sourced to some "role morality" which inheres in their role? And if so, are there idiosyncratic features of this role morality in the professional context that distinguish it from other role morality contexts?

Law firms whose primary drivers are their profit margins, and for some their price to earnings ratios, hardly pose these questions for themselves. Contemporary court administrators who extol the virtues of business models for subject matter which defies commodified applications of efficiency, productivity or "innovative" management techniques, pass by any such analysis. Populist politicians who interlard their rhetoric with "modernization" and "service delivery" and who are mesmerised by the latest techno-wizardry, self-selectively choose to dwell in the Rumsfeldian twilight of the "unknown unknown" in terms of what it means to be a professional and the ethical foundation from which independence and self-regulation are necessary derivatives.

This article:

(a) identifies the essence of being a professional;

(b) discusses role morality and its application to the professional role; and

(c) then discusses professional ethics and the separatist thesis to draw conclusions on why the moral demands on professionals are different.

An appreciation of the meta-ethics underpinning the roles of professionals better informs what it is to be a professional and provides a securer understanding of the well described normative ethics of professionals and the need for the associated profession's independence and self-regulation.

The essence of being a professional

Any discussion of the moral obligations of a professional must begin with its definition. But the concept of a professional is nebulous. Yet in order to analyse the moral obligations of professionals and whether those obligations differ from the moral obligations of anyone else, what it means to be a professional must be illuminated, even if imperfectly.

To be a professional is to describe a role. The role is reflective of some function to be performed to achieve a particular end. So it is teleological in nature at least[1]. Sometimes the word "professional" is used adjectivally to distinguish the competent from the less competent or the possession of a specialized skill appropriately remunerated from the unremunerated[2]. But its noun use distinguishes a person by reference to the particular role from, say, other occupational roles or roles created by a given or assumed relationship between people (e.g. familial) or between a person and an institution(s). More generally, a professional is to be distinguished not only from other role holders, but also from those who do not perform a role even if perhaps an illusory concept.

Sometimes a professional has been defined not so much by the essential role but rather by an identification of observable characteristics, the aggregate of which is taken to constitute the person as a professional. So it has been said that a person who possesses the characteristics of esoteric knowledge, relative autonomy, who is motivated by universalistic values and who performs a service in the confines of a fiduciary relationship with the particular client is appropriately described as a professional[3]. If a person possesses all of these traits he is said to be a professional. If he possesses none of these traits but is performing a remunerated service, he is said to perform merely an occupational role. If he possesses some only of these characteristics, he may be described as a "semi-professional"; on that approach, journalists, for example, rise no higher. But if the task is to deduce any unique moral demands placed on professionals, then this traits approach has at least two but related difficulties. First, the traits approach identifies indicia without looking at the essence of what it means to be a professional and then considering whether the indicia or some of them are actually subsidiary to that essence. Deriving a moral obligation from a trait is superficial if the trait is the necessary consequence of the underlying essence. In truth, the moral obligation flows from the foundation. Second, even accepting the traits approach, the traits approach may conceal any relative ranking to be given to some traits over others. Because of these difficulties, not only is the traits approach an inappropriate model to define a professional, but it is also inappropriate to illuminate the moral obligations that may be peculiar to the role. In order to embark on that latter enquiry, the essential essence of the role needs to be identified. In contrast, if one just analyses particular traits, then the very description of the specified traits may either define away the moral enquiry or conceal its foundation. The core role rather than the shell characteristics must be understood.

What is the role of a professional? Generally, a role would normally be defined by:

[1] Alexandra, A. & Anor (1996), "Needs, Moral Self-consciousness and Professional Roles", *Professional Ethics* 5(1): 43-58.

[2] Freidson, E. (1991), "Nourishing Professionalism", in *Ethics, Trust and the Professions: Philosophical and Cultural Aspects* edited by E. Pellegrino & Ors (*Georgetown University Press* pp 193-196).

[3] Evetts, J. (2003), "Explaining the Construction of Professionalism in the Military : History, Concepts and Theories", *Revue Francaise de Sociologie* 44(4): 759, 762-3.

(a) the responsibilities and functions that the holder of the role would normally perform;

(b) the relationship of the role holder to the social institutions that give that person such responsibilities and functions or at least are enabling in that respect[4]; and

(c) the status that inheres in the role by virtue of that relationship.

But such generic aspects may not illuminate the ultimate objective of the role. But it is only the identification of this telos which relevantly explains the application of these generic characteristics to the particular role case, for example, the professional role.

Many ethicists rightly posit that the ultimate objective of the professional is to satisfy a fundamental need. This has been variously described. For example, Oakley[5] defines the fundamental need as "certain goods that play a crucial strategic role in our living a flourishing life for a human being", although he does suggest that the constitutive goals could be merely morally permissible rather than to require that they be key components of human flourishing, so as to accommodate occupations such as architecture, music, teaching and accountancy. But the nebulous concept of "morally permissible" is at one level question begging and on another level without limit for moral relativists, leading to the Gilbertian-like concept of all being professionals and therefore none being professionals. But on any view, health and justice are both the paradigm examples of fundamental needs and "morally permissible". Moreover, such fundamental needs may arise from being a human per se or because of a person's relative position in society. More generally, the relevant "goods" are those that we need rather than merely desire. They must be such that not obtaining them is likely to "harm" us. The professional's role is directed to the satisfaction of a necessary pre-condition to meeting such a fundamental need. Now there is no bright line between fundamental and non-fundamental needs. As Coady[6] points out, the provision of bread or child-care may be to some individuals as significant as the supply of health or justice, but in any event the suppliers of these former goods are not usually associated with correlative dimensions such as esoteric knowledge, absence of conflict of interest, beneficence, autonomy (individually and collectively (e.g. self-regulation)), discretionary judgments, collective organization, ethical codes and the discharge of obligations in the context of fiduciary relationships, each of which correlative dimensions may be derived from the peculiar nature of the "goods" in question.

Generally, the discharge of a fundamental need by the provision of a fundamental "good" is the useful teleological marker of a professional, with the "good" having the unusual properties of not being defined by the client alone, involving the use of discretionary power and creative judgment, and not usually having homogenous properties unlike commodified objects of trade. Inherent in the "good" is a continuous and inter-active relationship with the "buyer" with that relationship normally producing an evolution in the boundaries of the "good", features that are not normally the objects of trade. Moreover, even with broader heterogeneous and non-traded objects of contracts such as building contracts or service contracts relating to inanimate objects, the object of the contract is external to the client, unlike a true professional's services where the client is the very object (with some exceptions) upon which the services are defined, manipulated and performed. Those who treat the law or medicine as a business fail to appreciate the different nature of the "good". Moreover, they fail to appreciate the unique teleological properties of such "goods" as being pre-conditions to satisfying fundamental needs. Consequently, on that platform of ignorance, they are then unappreciative of the necessary derivation of the secondary hallmarks of esoteric knowledge, avoidance of self interest and conflicts of interest, autonomy, collective organization, self regulation, ethical codes, maintenance of client confidentiality and the necessary incidences of fiduciary relationships, the absence of any of which may be antithetical to providing the "good" and satisfying the fundamental need.

There is another aspect to the identification of the telos. One can use "good" in two senses. One can refer to the fundamental need or its necessary pre-condition as a "good". But one can also use the concept more generally in valuative terms, viz, in the broader sense of "for the public good". So the ends of a professional role may be to supply or enable satisfaction of a fundamental need in the individual case, but also individually or cumulatively to satisfy "the public good". But again, as Coady points out, the latter notion may have its difficulties. The mechanic who ensures that the brakes of a school bus are in working order performs services for the public good. Non-lawyers may perceive that lawyers who advise on tax avoidance may harm the social good. But these perceived exceptions either way do not deny the useful generality that the twin elements of satisfying a necessary pre-condition for meeting a fundamental need and acting in "the public good" can be viewed as the relevant objectives of the professional role. Moreover, the two elements are not mutually exclusive. Satisfying fundamental needs for individuals in the aggregate is likely to satisfy the public good; but the converse does not necessarily follow.

If the professional is defined by the two related teleological properties of satisfying the fundamental needs of individuals and collectively satisfying the public good, what does this say about the dimensions of the moral obligations of the professional as compared with everyone else? In order to address that question, first something more needs to be said about role obligations.

[4] Williams, B. (1973), "Goodness and Roles" in his *Morality: An Introduction to Ethics* (*Penguin* pp 62-67).

[5] Oakley, J. & Anor (2001), "A Virtue Ethics Approach to Professional Roles" in *Virtue Ethics and Professional Roles* (*Cambridge University Press* pp 74-75, 79-81).

[6] Coady, M. (2000), "The Nature of the Professions", paper presented at the "*Workshop on Professional Ethics : Chinese and Western Philosophical Perspectives*", *University of Melbourne*, July 2000.

Role obligations

The assumption of a role, according to Alexandra[7], "requires an alteration in behaviour by the role bearer to help realize the ends definitive of the role" and modifies "the judgments of third parties about the propriety or otherwise of the role bearer's behaviour". But the role approach may not provide precise guidance as to what specific role requirements are ethically justifiable[8]. Moreover, the role may not itself be the self contained universe to derive the professional's moral obligations. The professional may be able to change the role or if necessary resign from it[9]. Moreover, there may also be a "space" that enables the individual professional to "incorporate personal values" when making role-defined decisions.

Further, it may be debatable as to what precise part of the role is the source of the moral obligations. It could be:

(a) the telos for which the role exists and is to be performed, my preferred position;

(b) the status that is inherent in the role and the values that are inherent in the status or the third party perception thereof, viz, honesty, fairness, loyalty, trustworthiness, and caring; but if the status is not freestanding from the telos, with the telos generating or explaining the status, then the status ought reduce to the telos and therefore dimension (a);

(c) the secondary constitutive or performative elements of the role, such as autonomy, self-regulation, collective organization, esoteric knowledge, fiduciary relationships, and a code of ethics, that are necessary to satisfy the telos of the role; but again, this takes you back to the telos as the foundation of the moral enquiry.

But whatever the problems involved in using the role as the source of the moral obligations, it is the sensible starting point.

Hardimon[10] points out that a role obligation is a moral requirement which attaches to an institutional role, whose content is fixed by the function of the role, and whose normative force flows from the role. So role holders have moral obligations to carry out the role's tasks if the institution from which the role derives is just and the role holder has voluntarily accepted the role or made use of the opportunities that the institution provides. Hardimon divides obligations into "contractual" and "non-contractual" role obligations; "contractual" role obligations are acquired by signing on for the roles from which they derive; "contractual" is not here used in any legalistic sense. So a professional has "contractual" role obligations. Merely as a consequence of signing on for the role, the professional is morally obliged to carry out the duties and tasks of the role. What is being signed up for is a "package of duties" where the "cluster of rights and duties" are specified by the institution but where the roles are not a species of individually negotiated contracts. Analogously, Freedman[11] divides his universe into acquired and non-acquired moral obligations with a role holder such as a professional having acquired moral obligations in contrast with non-acquired moral obligations which derive from "requirements of morality which are incumbent upon [individuals] regardless of any actions they may have performed to incur this requirement". At a level of generality, professional morality corresponds with a form of acquired morality, and ordinary morality corresponds with non-acquired morality.

Utilizing the concepts of acquired or "contractual" role obligations rightly suggests that the very assumption per se of a role carries with it a "new" or additional moral obligation to discharge the responsibilities and obligations inherent therein that would not otherwise be imposed. But the voluntary assumption of obligations may not be the complete picture. The "contractual role obligation" model leaves out role identification per se. If you identify with a role, your moral self conception may be transformed. You may conceive of yourself as someone for whom the norms of the role function as moral reasons without any further need to justify being bound by a moral obligation as a result of any voluntary assumption or "acquisition". So you may have two moral reasons to act viz: "I signed on for the role of lawyer"; "I am a lawyer".

To summarise:

(a) role holders such as professionals have, by virtue of the assumption of the role per se, "acquired" or "contractual" moral obligations that attach to the role at least to carry out the role's tasks;

(b) the normative force of those obligations flow from the assumed role per se;

(c) by reason of (a) and (b), there may be different moral obligations "imposed" on a professional as compared with:

(i) other acquired role holders who are not professionals, simply because other roles have different teleological boundaries;

(ii) non-acquired role holders;

(iii) non-role holders;

(d) further, role identification may reinforce these different moral obligations, not on the basis of any self-conscious responsibility as a result of signing on for the role but merely because of the ontological reference point of how the professional sees or defines himself or herself.

Thus far the discussion has not required any detailed consideration of the ends of a professional's role to reach the abstract conclusion that if a professional is a role holder, acquired moral obligations inhere in the role such as to oblige

[7] See n. 1.

[8] Flores A. & Anor (1983), "Collective Responsibility and Professional Roles" *Ethics* 93(3): 537-545.

[9] Coady, M. (1996), "The Moral Domain of Professionals" in Codes of *Ethics and the Professions* edited by M. Coady and S. Bloch (*Melbourne University Press* pp 29, 42-44, 48-51).

[10] Hardimon, M. (1994), "Role Obligations", The *Journal of Philosophy* 91(7) pp 333-5, 337-9, 354-362.

[11] Freedman, B. (1978), "A Meta-Ethics for Professional Morality" *Ethics* 89(1): 1, 2, 5-6, 9-10.

the professional to carry out the duties and tasks of the role.

But the source of the moral obligations is the telos itself rather than merely role holding per se. As I have said, the telos of the professional role is the satisfaction of the fundamental needs of individuals. Those who have such needs have a moral right to claim them from those who have undertaken to provide them and can provide them without harm to themselves. So a professional has a moral obligation to provide them. So viewed, the moral obligation derives from the telos. But the telos defines, and is then defined by, the role. If a person does not assume the role so that there is no "contractual" or acquired role obligations, it may be difficult to say that the otherwise qualified person has a moral duty to satisfy the fundamental needs of others. I put to one side the "rescue" scenario; in such a case there may be an argument for non-acquired role obligations to be involuntarily assumed. So although the telos is significant, it is not free-standing. The role holder can use the telos either as the lens through which the holder views the means of performance of the role or as the ultimate objective that performance of the role must discharge. Self awareness of the telos and recognition of its value and action motivated by this end, so producing moral self-consciousness, may then be the essence of the role. But so viewed, the telos then for practical purposes reduces to the role. So role morality theory is still the appropriate model to explain the source of a professional's moral obligations.

Now the telos also has a broader function, for it also explains the very existence of the profession and its institutional elements (constitutive and performative). The moral demands of the individual professional are linked with the collective profession and cognate demands. The institution "creates" the individual roles. Moreover, if the collective is necessary to nurture the individual professional by providing continuing education, collaboration, licensing, discipline and lobbying for purposes directly related to the fundamental need, and the individual professional is a necessary condition for satisfying the fundamental need, then an individual professional may also have a moral obligation not only to attend to fundamental needs (an obligation that inheres in the role itself) but to foster the institution and other members as well. But even then, such an individual duty to foster the collective is derived from the role obligation. In saying all of this, I am not, however, dealing with the collective in some amorphous collegiate-nurturing sense or its political or lobbying activities that are extraneous to the identified telos. The existence of the collective may also produce what some perceive as these collateral advantages, but it could hardly be said that an individual professional has a moral obligation to sustain them.

The discussion of institutional aspects also gives rise to a further issue which is peculiar to legal professionals. Legal professionals are usually officers of a court, which involves a duality of role. For many legal professionals, however, their work (e.g. drawing a trust deed) will not be practically affected by this duality. But for some work, the duality will have practical significance. But where it does, the above analysis is not altered. If the duty to the court is a moral obligation, then it is part of the moral obligations which inhere in the role either because the profession demands that it does so or the professional, who assumes the role, voluntarily assumes the additional obligation. Alternatively, if the duty to the court is not in any free-standing sense a moral obligation, nevertheless the professional's moral obligations would be circumscribed by this and other "over-arching" legal obligations, so rendering the distinction moot in any practical sense. Moreover, any tension between these obligations is obviated by an externally imposed hierarchy.

In summary, an individual professional's moral obligations are sourced to the role. And the role is the distinguishing feature of the source and content of a professional's moral obligations as compared with, say, "ordinary" moral obligations. But how do they relate to "ordinary" moral obligations? And if there is a conflict, how is the conflict resolved?

Professional morality -v- "ordinary" morality

There are at least three theories for explaining the relationship between professional morality and "ordinary" morality, namely:

(a) The single encompassing framework within which ordinary, professional and other group ethics are based, with professional ethics not being distinguished from any other type; perhaps this tends to a form of moral absolutism[12];

(b) The pluralistic approach[13], where there is no unified or single moral authority such that each group in society has its own group ethics if it has the necessary political will and power; a form of moral relativism in which a professional ethic is separate from, but equally ranked with, any other group or non-group[14] ethic;

(c) The separatist model, as described by Gewirth[15], with the essential tenet being that "professionals, by virtue of their expertise and their consequent role, have rights and duties that are unique to themselves and that may hence be not only different from, but even contrary to, the rights and duties that are found in other segments of morality"; this is a more sophisticated relativistic position.

Now it would seem that models (b) and (c) better reflect the sourcing of moral obligations to the role, with the separatist thesis best reflecting the role obligation theory. The separatist thesis (model (c)) not only reflects the fact that the professional holds a role, which may be a source of moral obligations, but also reflects the peculiar teleological significance of the professional's role which may justify additional ethical

[12] Goss, R. (1996), "A Distinct Public Administration Ethics", *Journal of Public Administration Research and Theory* 6(4): 573, 576-7.

[13] See n. 12.

[14] A "non-group" ethic is conceivable if one subscribes to theories of moral subjectivism, moral intuitionism or moral individualism, the ultimate atomistic relativism.

[15] Gewirth, A. (1986), "Professional Ethics: The Separatist Thesis" *Ethics* 96(2): 282-4, 286-295, 299-300.

obligations that other roles may not. Usefully, the separatist thesis also appears to be descriptively true[16] thereby reinforcing the appropriateness of the thesis. Model (b) does not appear to truly reflect the professional's role of satisfying a fundamental need, which is itself a justification for an additional and perhaps even "higher" group ethic over all other groups. Model (b) would weigh each group equally in terms of justifying the derivation of a group ethic for each which is equally weighted. Model (a) does not appear to recognize moral obligations sourced to roles separate from ordinary moral obligations and may be inadequate if not simplistic[17].

In my view, the separatist thesis, albeit an imperfect theory, best reflects both the reality that a professional is a role holder and that the professional is a special form of role holder satisfying a fundamental need, thus giving professional ethics a hierarchical advantage over other group ethics. The justification for the separate moral obligations of the professional is then given by the role with the fundamental telos. Alternatively expressed, such separateness can be said to derive from the fact that the professional's services require unique rights and duties, and can be expressed in terms that without those special moral conditions, it may not be possible to perform the services necessary to satisfy the fundamental need.

Accepting that the separatist thesis is the most appropriate model, are there separate or additional moral obligations imposed on the professional? Assume that:

(a) the profession promulgates or enshrines relevant rules;

(b) such rules are framed to discharge or achieve the telos;

(c) such rules and the specific mode of their operation do not infringe what Gewirth describes as the principle of general consistency viz:

  (i) each person has equal rights to the conditions of:

    A. autonomy; and

    B. well-being;

  (ii) each person ought act generally in accordance with such generic rights of each other person.

If (a) to (c) are satisfied, then such rules can be taken to impose separate moral obligations on the professional to comply with such rules given the professional's voluntary assumption of the role. And if a professional acts in accordance with such rules, he may justifiably infringe the ordinary moral rights of the client or a third party (e.g. an opposing party in litigation) if such infringement is necessarily brought about by such compliance.

Now several things should be noted. First, the fact that a profession is itself morally justified or for "the public good" does not mean that all its rules and all actions of individual professionals thereunder are morally justified. The rules and the specific mode of their operation must be separately justified by the telos and the principle of general consistency. Second, if these are separately justified, then the role holder may assume a moral obligation to comply with and uphold such rules and the institution. That does not tell you much about the content of the rules. But the principle of general consistency together with the telos of a professional would at least suggest (if not require) derivative moral obligations to respect the client's autonomy, promote the wellbeing of the client (not just avoid harm to the client), eschew self-interest or conflict of interest, maintain the trust and confidences of the client and act with "beneficence" or "a certain degree of altruism"[18] ("the derivative moral obligations"). This is in contrast with a business which "has no defining interest encompassing the good of others", has "no public good it aims for", has "profit, not philanthropy, (as) the guiding star", where "benefiting the purchaser is no intrinsic part of the seller's aim"[19], and where its primary principle is non-maleficence rather than beneficence. Thus the separatist thesis recognizes that professionals have moral obligations to comply with the institution's rules and to comply with the derivative moral obligations. The derivative moral obligations are necessary but perhaps not sufficient conditions to discharge the telos. Another way to look at it is to say that the derivative moral obligations indirectly inhere in the telos.

For example, a professional meeting the client's needs usually must act independently of the interests of others such as government. Moreover, it is the client's need for justice that is paramount rather than some disembodied and amorphous free-standing notion of "justice", "administration of justice" or "public interest", which are sometimes used as nebulous slogans. A professional must be free to independently pursue in the interests of the client what is necessary, but within, undoubtedly, legitimate boundaries. Further, the profession itself also has to have that autonomy. The esoteric knowledge which is one of the hallmarks of the professional entails that the profession itself is best placed to self-licence, self-educate and self-discipline. It is other members of the profession with similar knowledge, an appreciation of the peculiar dimensions of the "good" involved, and an understanding of the complex discretionary and innovative characteristics of the task of the professional that justifies such collective autonomy and self-regulation. In addition, other derivative moral obligations, such as the requirement to avoid conflict of interest, need little explanation in terms of their necessary derivation to discharge the telos. More generally, the correlative fiduciary relationship between the professional and the client is also explained by the peculiar nature of the "good" as elaborated on in Section A. To establish trust, confidence and loyalty is essential to understanding the client's need and formulating a solution so that the fundamental need can then be discharged. The absence of requirements such as to act with beneficence, maintain confidences and trust, and avoid conflicts of interest would entail an environment unconducive to discharging the

[16] Overman, S. & Anor (1991), "Professional Ethics: An Empirical Test of the 'Separatist Thesis'", *Journal of Public Administration Research and Theory* 1(2): p 131 at 132.

[17] Gibson, K. (2003), "Contrasting Role Morality and Professional Morality: Implications for Practice", *Journal of Applied Philosophy* 20(1): 17, 22-26.

[18] Pellegrino, E. (1999), "The Commodification of Medical and Health Care: The Moral Consequences of a Paradigm Shift from a Professional to a Market Ethic", *Journal of Medicine and Philosophy* 24(3): 243, 254.

[19] Fullinwider, R. (1996), "Professional Codes and Moral Understanding" in *Codes of Ethics and the Professions* edited by M. Coady and S. Bloch (*Melbourne University Press* pp72, 74-77).

need. Now the label "fiduciary" is imprecise and is sometimes used to justify subjective, if not puritanical, grandiloquence that has little to do with the identified qualitative dimensions. For present purposes, I use it only as a convenient label for the described content. But in summary, all of these derivative moral obligations are derived from the meta-ethics of the separatist thesis which is an apt description for the foundation of professional ethics.

Gewirth[20] explains that the separatist thesis is not without its limitations; but there does seem to be general acceptance of the concept as being an acceptable model. Moreover, the separatist thesis explicitly assumes that there could be conflict between professional morality and ordinary/non-acquired morality which a professional has to confront, but which is avoided by the non-professional and more clearly the non-role holder. As to this conflict:

(a) conflict between professional and ordinary morality is a necessary incidence of the interaction between the two;

(b) the separatist thesis may justify the professional infringing the otherwise moral rights of the client or third party; such conduct may otherwise lack the usual conditions for moral justification.

So unlike ordinary moral obligations, the moral demands on professionals may require not only resolution of conflict between the professional's role morality and ordinary morality, but may also countenance the former overriding the latter. But an alternative way to reconcile conflict may not be to countenance an overriding, but perhaps to accept that, in part, slavish adherence to a professional code may not be necessary and/or to recognise that there is, within professional judgments, independence and action, a significant range of freedom so that potential conflicts may be able to be eliminated.

In summary, the moral demands on professionals are different from the moral demands on anyone else such that:

(a) moral obligations inhere in the professional's role that may not apply to other role holders or non-role holders;

(b) the professional's role and its special telos:

  (i) explains the constitutive elements of the particular profession including its independence and self-regulation; as Carr[21] has said: "although ethical constraints and considerations are certainly regulative of a wide range of occupational services, they are actually constitutive" of the professions;

  (ii) explains the particular rules and conduct requirements;

  (iii) justifies the derivative moral obligations;

  (iv) justifies in most cases a resolution of any conflict between professional moral demands and ordinary moral demands in favour of the former.

Now the moral demands are different, but are they higher moral standards? Perhaps the above prioritization regime suggests that moral demands on professionals are higher. But then perhaps the prioritization regime is an illusory ranking. If the rules of a profession are based upon the principle of general consistency and ordinary moral obligations are similarly based, then the conflict may reduce to a debate not dissimilar to conflicts between competing ordinary moral obligations. Perhaps another way to look at it is to say that there is not a higher standard of moral obligation but rather a moral obligation to commit to the values of the profession which is a different concept. But whatever be the position, there is a significant difference, and that difference ought inform the professional's special status and how professionals ought view themselves and their behaviour.

Conclusion

An appreciation of the different role of a professional and the professional's moral obligations should give cause for reflection by:

(a) politicians who are considering how the profession should be further regulated;

(b) members of the profession who are pursuing profit maximization strategies, including subjecting themselves to the influence of external equity holders and litigation funders;

(c) members of the profession who are interested in understanding the derivation or need for the normative ethical obligations to which their conduct is usually subject.

Without a true appreciation of this meta-ethical foundation, members of class (a) are unlikely to appreciate either what needs to be reformed or the likely effect of any potential reform. As to class (b), for example, the morality of profiting from the sale to external investors of shares in the "monopoly" associated with a professional's special status, which status has been conferred by and for the public and to justify a fundamental need, may be suspect and antithetical to the reason why the special status was required to be conferred in the first place. As to class (c), the illumination of the meta-ethical foundation can only produce greater confidence in the need for, and understanding of, the derivative moral obligations, which most professionals willingly accept without further enquiry or self-interested manipulation. VBR

[20] See n. 15.

[21] Carr, D. (2006), "Professional and Personal Values and Virtues in Education and Teaching", *Oxford Review of Education* 32(2): 171, 172.

BMW M3 GT2, the 17th BMW Art Car, by Jeff Koons 2010.

BMW Melbourne
Southbank
Kings Way

Sales
Finance
Service
Parts

The Ultimate Driving Machine

BREACH OF THE PEACE.

At BMW Melbourne we strive for excellence across all facets of our business. As Melbourne's CBD dealership, we have the full range of BMW products and services conveniently located at our Southbank and Kings Way showrooms. These include BMW New, Demonstrator and Premium Selection vehicles, BMW Motorcycles, BMW Lifestyle boutique, BMW Service, with the latest in diagnostic technology, BMW Bodyshop and a BMW café for your enjoyment.

IT'S TIME TO DRIVE THE ULTIMATE.

BMW Melbourne
118 City Road, Southbank, VIC 3006
209 Kings Way, South Melbourne, VIC 3205
Tel: Simon Reid, Corporate Sales Manager 03 9268 2222
bmwmelbourne.com.au LMCT 8155

LUDLOWS

LEGAL REGALIA & TAILORS

BUY YOUR OWN

Sale Price

$2,000

Bar Wig

Bar Jacket
100% Cool Wool

Bar Gown
100% Cool Wool

Three Jabots

Free alterations for the lifetime of the garments

Available for 2 weeks only

LUDLOWS LEGAL REGALIA & TAILORS

Mezzanine Level, 530 Lonsdale Street, Melbourne, Vic Australia 3000
Tel 03 9670 2000 • Fax 03 9602 2266 • Email info@ludlows.com.au

www.ludlows.com.au