Victorian Bar News

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BAR COUNCIL REPORT

Legal Aid

The Bar Council and the Law Institute have prepared a joint submission concerning legal aid. The joint submission was prepared upon the basis that it was likely that the Federal Government would be seeking to play a less active role in the field of legal aid. The submission seeks a rationalization of the various legal aid services while at the same time preserving a proper degree of financing of a rationalized legal aid system, by Federal and State Governments. The submission was presented by the Chairman of the Bar Council and the President of the Law Institute to the new Attorney-General, the Honourable H. Storey Q.C. in mid April. It now appears that the submission and the proposals contained therein will form the foundation of legal aid systems in the States which are to have the substantial control of legal aid matters handed back to them by the Federal Government.

Life Membership of the Victorian Bar

Sir Edmund Herring and Sir Henry Winneke have both been asked to accept Life Membership of the Victorian Bar, and have both accepted the invitation. Other Life Members of the Victorian Bar are Sir Robert Menzies and Sir James Tait.

Supreme Court Delays

An ad hoc committee of the Bar Council has reviewed the Report of the Law Reform Commissioner on delays in Supreme Court actions. The Chairman of the Bar Council has sought an appointment with the Attorney-General for Victoria and the Chief Justice as a matter of urgency to discuss the problem of delays in Supreme Court actions. The recommendations of this Committee are considered at page 6.

Investigation of Congestion in Magistrates' Courts

Mr. J. Murphy, the newly appointed Court Administrator is investigating congestion in Magistrates' Courts. The Bar Council has appointed a Committee to undertake discussions in depth with Mr. Murphy with a view to assisting him in formulating recommendations for the relief of congestion in Magistrates Courts.

Two Months Briefless Reading Period

The Bar Council has given consideration to an amendment to the Reading Rule which requires readers to spend two months in their Masters' Chambers without accepting Briefs. The Bar Council decided to retain the requirement of a two month period of reading without accepting Briefs.

"Plea Bargaining"

The Bar Council received a report from the Crime Practice Committee and gave consideration to the question of so-called "plea bargaining" which received some publicity in the press after comments were made by members of the High Court in the course of the hearing of an application for leave to appeal from the Full Court of the Supreme Court of Victoria. The Council resolved to take no action with respect to the practice. This matter is the subject of an article at page 16.

Workshop for Readers

The Bar Council has decided to extend the present requirement that pupils during their reading period should attend lectures on matters of particular interest to them as Barristers. It is proposed that a series of practical workshops be established to give to young Barristers some training in the practical problems which they might be expected to encounter in professional life.

Applications Review Committee

There has been established an Application Review Committee to co-ordinate all the aspects of applications to sign the Roll of Counsel including the dispensation of reading and clerking rules, the allocation of a clerk and a consideration of certain ethical matters including the payment by the applicant of any outstanding fees to Counsel. This committee has been convened under the Chairmanship of Davies Q.C.

Annual Bar Dinner

The Annual Bar Dinner took place on 8th May, 1976 in the Long Room at the Old Customs House. Mr. Junior Silk, Charles Q.C., proposed the toast to the honoured guests. The dinner was extremely well attended and the speakers were of an exceptionally high standard.

Bar News

The Bar Council has appointed an ad hoc committee comprising Dowling (Chairman) Castan, Ross and Byrne D.D. to consider the future of the Bar News having regard to the expense and effort involved in its production and the continuing need to keep members informed, generally. The committee would welcome members' views.

19th AUSTRALIAN LEGAL CONVENTION

The 19th Australian Legal Convention will take place in Sydney from 3rd to 8th July 1977. Various Papers will be delivered at the Convention and the Chairman of the Planning Committee has written to the Victorian Bar seeking the names of any persons interested to speak or commentate on the Papers which are to be delivered at the Convention. If any person is interested in delivering a Paper or commentating on any Paper he is invited to write to Mr. B.J. Wooldrige, Chairman, 19th Australian Legal Convention, 170 Phillip Street, Sydney, 2000.

The proposed Papers are —

Criminal Justice — Right to remain silent, self defence, provocation and duress, white collar crime, and sentencing bail and parole.

Developments (General Law) — Duty to avoid economic loss, Recent developments in constructive trusts, Exclusion clauses and freedom of contract — judicial and legislative reactions, and Comparative constitutional law — common problems, Australia, Canada and U.S.A.

Developments (Business/Finance) — Debenture issue and underwriting, duties of directors, and powers of general meeting — conflicts of interest, trade practises, current tax planning — Sections 25, 26(a), 51 and 260.

For further information contact Miss Brennan, 12th Floor.

WELCOME:

Mr. JUSTICE McGARVIE

Richard Elgin McGarvie, 50, has been appointed to the Supreme Court Bench.

He was born at Colac. He completed his secondary schooling at Camperdown High School. In 1944 aged 18 he enlisted in the R.A.N. Reserve.

His Honour commenced law at the University of Melbourne in 1947. By 1950 he had gained honours in every possible subject. He graduated LL.B. (Hons.), won first place and the Supreme Court prize. He served articles under Mr. Alec Masel of Phillips Fox and Masel. He signed the Bar Roll in 1952 and read with Lush.

He lectured in Contract at the University of Melbourne from 1957 to 1963.

In 1963 after eleven years at the Bar he was appointed Queen's Counsel. He developed a wide general practice in the civil, criminal and industrial jurisdictions.

He was a member of the Victorian Bar Council for ten years 1960-65 and 1970-75. In the latter period he was Vice-Chairman for two years, and Chairman 1973-1975.

His Honour was a member of the Executive of the Law Council of Australia from 1973 and Treasurer from 1974 until his appointment. He was a member of the Australian Bar Association from 1971 to 1975.

He was actively involved in the "Molomby Committee" set up by the Law Counci of Australia to report on Fair Consumer Credit Laws. He was one of the members of that Committee appointed to the Credit Laws Committee. That body had been established by the Standing Committee of State and Commonwealth Attorneys-General to decide the final form of the draft bills implementing the recommendations of the Molomby Committee.

Since 1974 he was a member of the Law Reform Advisory Council for the State of Victoria and since 1973 the Chairman of the National Committee on Discrimination in Employment and Occupation. He was consultant in Contracts to Monash University between 1965 and 1972 and in Industrial Law from 1969. He has represented the Bar on the Faculty of Law at the University of Melbourne since 1965.

He was an active member of a number of committees there including the Curriculum Committee chaired by Sir Richard Eggleston between 1962 and 1964. As such he took part in the first major revision of the curriculum since the war, involving the introduction of the concept that a wide choice of subjects should be permitted in the final year of the LL.B.

He was a joint author of "Cases and Materials on Contract" first published in 1962, sole author of "Common Law Discharge of Contracts upon Breach" (4 Melbourne University Law Review 1963), "Principle and Practice in Commonwealth Industrial Arbitration after Sixty Years" (1 Fed. Law Rev. 1964). He was a joint author of "Implementation of Fair Consumer Credit Laws" presented to the Australian Legal Convention in Melbourne in 1971 and now in 45 A.L.J. 708.

In 1966 he studied the single postgraduate subject of "Economic Structure and Policy". In 1967 he again returned to University part-time to begin and complete a B.Com.

He was a member of the Australian Labour Party for 27 years. In the late 1960's he advocated a more democratic administration of the Victorian branch. His progressive approach was seen to be against his own interests. He incurred the disfavour of the Victorian Executive. For the sake of his principles, he resigned from the party. Later on, after Federal intervention vindicated his stand, he was re-instated without loss of continuity.

He was a prodigious worker. He once drew a set of union rules for the United Firefighter's Union. That Union was ultimately refused registration because it was held not to be an "industry". But Union rules must be precise and cover a multitude of areas. Once registered they are very difficult to change. They must be scrupulously observed. The Firefighters Union rules are still used as a precedent by Unions.

Much of what has been said may create the inaccurate impression that His Honour was a man of extraordinary industry, and nothing more.

Nothing could be further from the truth. He worked long and hard to cement the bond between the Bar and the Law Institute, between the Bar and the Clerks. He was Chairman of the Bar when the Young Barristers Committee was formed and became its first Chairman.

In his eleven years as a junior he had three readers, Fricke, Abraham and Kimm. He was always accessible to any member of the Bar.

He was editor of the Bar News for two years.

In the unavoidable absence of the Chairman, the Vice-Chairman, Marks Q.C., welcomed His

Honour on behalf of the Bar with the following words:—

"The Bar is pleased to the point of pride in Your Honour's appointment. It is not only because you are an outstanding lawyer, but your interest in the law is linked with an intense interest in the needs of modern society. It is a source of wonderment that a man who speaks so softly as Your Honour can cause so much noise. You have been a champion of human rights in a way that is unprecendented at our Bar . . .

"Your Honour now brings to this Bench additional attributes. You are a hard worker. You are a man of hope, with faith in progress. You reject extremes but may be said to be extremely devoted to moderation and fairness . .

"We congratulate you on your appointment and those who have now given recognition to those outstanding qualities long since understood by your friends and colleagues at the Bar.

"We wish you much satisfaction in the performance of the challenging tasks which lie ahead."

WELCOME:

Mr. JUSTICE JOSKE

Thomas Roderick Joske, 43, received his commission as a Judge of the Family Court of Australia from the Governor-General on the 11th June 1976.

After receiving his secondary education at Wesley College (where he also won the Victorian Junior lifesaving championship) he graduated from the University of Melbourne in 1955.

His Honour served his Articles with Messrs. Russell Kennedy & Cook, and after one year of practice as a Solicitor signed the Roll of Counsel in April of 1957. He was fortunate to be able to read in the Chambers of Keith Aickin. In turn his readers were Langslow, Kay and Freadman.

Rod Joske represents the third generation of a family which has attained high achievement in the legal profession in Australia. His grandfather was a Solicitor practising in Melbourne and Mr. Justice Percy Joske after an illustrious career at the Bar and in Parliament was elevated to the Federal Bench in 1960. Mr. Justice Percy Joske's name became synonymous with the law relating to marriage and divorce in Australia as his text book on the subject was for many years the most learned and distinguished work in that field. It was accordingly not surprising that Rod Joske's services were highly sought after in cases involving family law.

As pointed out by our Chairman during his address of welcome to His Honour, Rod Joske built up so successful a matrimonial practice that he often found himself unwittingly advising respondents on the appropriate tactical manoeuvres to be adopted to overcome the tactical manoeuvres he advised petitioners to take.

Notwithstanding his early establishment at the Victorian Bar in the practice of family law, His Honour also had a wide practice in civil jury work with occasional forays into equity, taxation and causes. As recently as 1975 His Honour appeared in a lengthy criminal trial before the Supreme Court of Victoria.

His Honour served with distinction as a representative of the Victorian Bar on the Legal Aid Committee and on the joint committee with the Law Institute on family law. He was for many years a member of the Juries Sub-Committee of the Victorian Bar and following the appointment of Mr. Justice Fogarty he was appointed Chairman of the Bar Matrimonial Causes Sub-Committee.

Apart from His Honour's optimistic views of the fortune of the Melbourne Football Club,

His Honour also takes an active interest in golf, skiing, yachting and swimming. After some early difficulties he has been able to regain his trim athletic figure with many arduous hours spent in the Oasis gymnasium.

After the move to Owen Dixon Chambers His Honour shared a suite of Chambers with John Barnard Q.C. and they were amongst the first to install a refrigerator in their Chambers with a view to providing refreshments for weary clients and overworked Solicitors. It did not take long however for the other tenants in the near vicinity of Room 913 to learn of the facilities available and more often than not one found other members of Counsel conveniently seeking advice from either Rod Joske or John Barnard late on Friday afternoons.

Section 22 (2) of the Family Law Act states that a person shall not be appointed as a Judge of the Family Court unless by reason of training, experience and personality he is a suitable person to deal with matters of family law. It is the universal opinion of all those who have been fortunate enough to know Rod Joske that he possesses each of the necessary attributes outlined in the Family Law Act and his presence on the Bench can only enhance the prestige of the Court that is, carrying out a most important task in attempting to preserve the family unit as the basis of our society whilst assisting parties to broken marriages to reshape their lives with dignity.

The Bar, those members of Counsel fortunate enough to have read with His Honour and particularly all of his friends on the 9th floor will miss his presence in Chambers. However, the warm, cordial and mutually co-operative relationship that has developed between the Bar and the Family Court will no doubt be strengthened by His Honour's presence on that Court.

DELAYS IN SUPREME COURT ACTIONS

An ad hoc committee of the Victorian Bar has recently produced a report to the Bar Council and the Law Institute upon delays in Supreme Court actions.

This problem has received the attention of a great number of committees of recent years and has generated many reports and recommendations including the statement on the Congestion in Civil Lists (Vic. Bar 1967) Report of Delays Committee (Law Institute 1971), Report of the Joint Standing Committee of the Bar and Law Institute on Practice and Procedure in the Supreme Court (1974) and the Working Paper of the Law Reform Commissioner (1975) summarised in Bar News September 1975.

The opinion of the Committee was that while reforms in practice and procedure would be helpful in reducing delays, the principal factor contributing to the present delays is the insufficient number of judges to cope speedily with the work which has been prepared for trial. This shortage of judges has had the obvious effect of delaying the trial of actions set down for hearing but less obvious is the consequence that the shortage of judges has itself inhibited the reorganisation of court lists and listing procedures. A second consequence has been that the inefficiency which has existed in court procedures has engendered inefficiency in the profession itself. A spectacular example of this latter consequence is the inefficiency caused by delays in the Practice Court. In New South Wales more numerous Chamber Judges have enabled interlocutory and urgent applications to be disposed of expeditiously and in an orderly fashion.

Where practitioners have the expectation that an action set down for hearing will be left in a state of suspension in the lists for many months,

it is not surprising that a sense of urgency is lost and that practitioners tend to direct their attention to cases which are soon coming on for hearing.

The Committee observed that the proposals of the Law Reform Commissioner would have the effect of increasing the number of cases set down for trial and thereby aggravating the backlog in the court lists.

The Supreme Court has recently lost a substantial part of its matrimonial jurisdiction but it must expect soon to have that loss more than compensated for by the proposed Federal legislation to refer much of the original jurisdiction of the High Court to the State Courts. Moreover the existing jurisdiction of the Supreme Court, both appellate and original, has substantially increased in recent years.

The present statutory number of Supreme Court Judges is twenty-one. The Committee recommends that this number be increased to thirty-one and that the new vacancies be speedily filled. The appointment of six more judges and the provision of accommodation for them should be treated by the Government as a matter of urgency and the remaining four should be appointed in due course.

VISIT BY CANADIAN LAWYERS

In April of this year some 45 members of the Advocates' Society of Ontario, in most cases with their wives, visited Sydney and Melbourne. This was the 5th Spring Convention of the Society and followed visits in previous years to the Bench and Bar of Jamaica (1968), Ireland (1970), England (1972) and Scotland (1974).

In September 1975 an advance party came to Australia and visited the Victorian Bar to enquire whether the Society would be made welcome if it wished to visit us. This was made clear, and preliminary arrangements were then made. Douglas Carruthers Q.C. from Ontario was the organiser of the visit and liased with our Chairman, who, in turn, presided over a small Victorian Committee (which included McInerney J. and Judge Ogden as representatives of the Bench).

The Advocates' Society has a total membership of approximately 750 out of a legal profession in the province of Ontario numbering some 10,000. Similarly to Victoria, provincial legislation provides for an amalgamated profession, but unlike Victoria, the legal profession in Ontario subscribes to that system. The members of the Society might be loosely regarded as "the trial lawyers" within their own firms.

The purpose of the Society's Spring Convention is clear. The members wish to have the opportunity of visiting lawyers in other jurisdictions with a common heritage as far as law is concerned, and with common interests to see that the law and its administration in their respective countries should not stagnate but rather should develop along the lines of successful adaptations and innovations in the other common law countries. It would be not overly cynical to suggest that the members of the Society also get the opportunity to see something of another country, and its people whilst, at the same time, obtaining group travel concessions and some relief from the collector at the end of the money year.

The Canadians arrived in Sydney on Sunday 25th April, and had meetings and social contacts with members of the N.S.W. Bar. On Wednesday afternoon the 28th April, they arrived in Melbourne. The party of 45 included Chief Justice George Gale of the Court of Appeal for Ontario, Chief Justice William Estey of the High Court of Justice for Ontario, Mr. Justice William Parker of the High Court, John Aylesworth Q.C. — a retired Judge of the Court of Appeal — and no less than 25 silks amongst the remainder. The ages of the

visitors varied from the late 70s to the early 20s, so there was a good sprinkling of interest, backgrounds and outlooks.

In the late afternoon of their arrival, the Canadians were entertained by the Governor of Victoria, His Excellency Sir Henry Winneke, and Lady Winneke at a reception at Government House. Also in attendance at this reception were the members of our Supreme Court and County Court Benches, other distinguished Victorian lawyers and a large number of the members of our Bar, together with wives. Altogether there were over 300 people present and the Canadians were impressed both by the hospitality of the Governor and the grandeur of the Reception Hall.

Following the Reception, the Canadians were entertained in the private homes of over 20 members of our Bench and Bar. These functions were all successful, it appears, and gave a tremendous opportunity for the lawyers and their wives to make friendships and exchange ideas.

On the Thursday and Friday mornings of the same week, joint discussions were conducted in the Supreme Court Library. Thursday morning was devoted to a general discussion on the processes of law under the heading of "Courts and Procedures". Sir John Young introduced the discussion and this was followed by a tour of the Courts and then further discussions in the Library. On the Friday morning discussions were held on the topics "Legal Aid" and "No Fault Liability". We were represented in leading these discussions by, respectively, Jenkinson J. and Ken Marks Q.C. Both mornings were regarded as valuable exercises in the exchange of information and ideas, although it was a pity that more members of the Victorian Bar did not attend. The Bar is grateful to the Chief Justice in making the Library available for these discussions and to Mr. Alcorn, the Librarian, for his assistance.

After the discussions on both the Thursday and Friday, the Bar entertained the Canadians to drinks in the Chairman's Room and then to lunch in the Common Room. These lunches provided further opportunities for members of the Society and the Bar to meet, and those dining at the Bar on those days exceedingly enjoyed the company and good fellowship.

On the Friday evening the Society hosted a magnificent dinner at the Great Hall of the National Gallery of Victoria to which they invited some 130 Australian guests. Guests included the Governor and Lady Winneke, Sir John Young and Lady Young, and the Commonwealth and State Attorneys-General. Also present was the High Commissioner for Canada, the Canadian Consul-General, the Canadian Judges touring with the Society and a number of our Supreme Court and County Court Judges. Music was played during the evening by the Band of the 3rd Military District and, altogether it was a grand occasion.

During the evening Douglas Carruthers, on behalf of the Advocates' Society, proposed a toast to the Bench and Bar of Victoria. Leo Lazarus Q.C. responded and proposed a toast to the Society. At the conclusion of his response he presented to Barry Pepper Q.C., the President of the Society, a silver tray inscribed as a gift to the Society from "the Bench and Bar of Victoria, April 1976". Two signed and inscribed copies of Sir Arthur Dean's book "A Multitude of Counsellors" were also presented. A witty and humorous speech was then made in response by Chief Justice Estey, which was obviously appreciated by those present.

The Canadians left for home on the Saturday following the dinner, having made good friends here and expressing a welcome to those amongst us who wished to return their visit. This might be a matter to be taken up by the Victorian Bar, but this will depend on some expression of interest from its members. Those

so inclined might care to demonstrate that interest by a written note to the Assistant Honorary Secretary of the Bar Council.

REX WILD

RUSSELL v. RUSSELL, yet again

On the 11th day of May 1976, the High Court handed down its decision in the cases of Russell v. Russell and Farrelly v. Farrelly. As a direct result of these decisions the ambit of the Family Law Act has been limited in the broad areas of custody and property settlements.

Custody

It is clear from the majority decision that the Commonwealth has power to legislate in relation to matters of custody even though that issue is not linked to an application for a divorce. This power was justified pursuant to the marriage power found in S.51 Placitum (xxi) of the Constitution. However, an important limitation was placed upon this power insofar as the majority of the High Court decided that it applied only in respect to natural children of both parties or "joint" adopted children of the parties.

In his second speech to the Family Law Amendment Bill 1976 the Attorney-General, the Honourable R.J. Ellicott said the following:—

"While the decision was substantially favourable to the Act — it was welcomed by the Government — the limited extent to which the Court held it to be beyond power does give rise to problems. I refer to the decision that, in the case of custody of children, the Act was valid only to the extent that it applied to proceedings between the parties to the marriage for the custody of natural or adoptive children of both of them. This means that disputes between one party to a marriage and say a grandparent of the marriage would fall outside the jurisdiction of the Act and these would therefore have to be resolved according to the relevant State Law. Likewise disputes between a husband and a wife over a stepchild would be outside the Act."

It is thus clear, that the view taken by the Attorney-General means that there is now a sizeable gap in what was contemplated in the original legislation:—

(a) No custody order under the Act can be made in respect of a child of either party notwithstanding that that child was ordinarily a member of the parties' household.

(b) No person is now entitled to intervene to claim custody of any child under the jurisdiction of the Family Law Act.

The High Court when considering the matters raised in the cases of Russell v. Russell and Farrelly v. Farrelly concentrated its attention upon the marriage power contained in s.51 Placitum (xxi) of the Constitution. Little, if any, consideration if given to the powers contained in Placitum (xxii) of the Constitution which reads as follows:—

> "(xxii) Divorce and Matrimonial Causes; and in relation thereto, parental rights, and custody and guardianship of infants".

It is our view, that provided an application for custody is linked to a matrimonial cause i.e. an application for a divorce, then the Commonwealth is empowered to legislate in relation to children deemed to be children of the marriage and also in respect of persons wishing to intervene. However as referred to earlier, this is not the view presently being taken by the Attorney-General.

Accordingly, it may be helpful to consider what steps Applicants will have to take in respect of children who are deemed to be children

of the marriage and also in respect of persons wishing to intervene.

In the Victorian Maintenance Act 1965, the expression "child of the family" is defined to include any child of either party who has been accepted as one of the family by the other party — and "mother", "father" and "parent", in relation to a child of the family, shall be construed accordingly. Section 4 of the (Victorian) Maintenance Act gives a Magistrates' Court power to order maintenance in respect of a child of the family as previously defined; and Section 7 of the Maintenance Act gives a Magistrates' Court power to make an order for custody in respect of such child. However, it is important to note that Section 17 of the Maintenance Act does not confer a right on third parties for example grandparents to intervene. Further, an order for custody under that Section is limited until the child attains the age of 16 years whereas the Family Law Act gives jurisdiction to the Court to make orders for custody in respect of children up to the age of 18 years. Perhaps a Magistrates' Court is not necessarily the most appropriate tribunal to determine matters of custody where the issues are of considerable complexity.

If the wide view of the decision in Russell v. Russell is accepted, it would appear that the only proceedings available to a third party who desires to claim custody of the child either of the marriage or a child of the family as defined in the Maintenance Act, are wardship proceedings pursuant to Section 177 of the Supreme Court Act 1958. This procedure however, is not without its problems, some of which were examined by Gowans J. in the decision of Zwillinger v. Schulof 1963 V.R. 407. In that case, the Applicant was the stepmother of the infant and was also the testamentary guardian of the child. It was argued on behalf of the Respondent who was the child's grandfather, that the Applicant did not possess any standing to file the application to have the child declared a Ward of the Court. Gowans J. dismissed this argument and stated at page 411:

> "I think the learned Judge was entitled to regard the applicant as possessing the status of a testamentary guardian of the child. But in any event the proposition that the applicant for an Order that an infant be made a Ward of the Court, or for the issue of an Order nisi for Habeas Corpus, needs to show any particular status or any particular quality of interest in the custody or welfare of the infant, once it appears that he is not a mere stranger, is not a proposition that I am prepared to accept: see re the case of a sister of an orphan child: Re Daley 1860 2 F.F. 258. Moreover, that the competency of the applicant is in such a case a condition precedent to jurisdiction is another proposition that I would not be readily prepared to accept. But in any event by reason of her relationship to the infant and her status as her testamentary guardian, which the learned judge was entitled to act upon, I think the applicant was competent to make the applications in respect of wardship and Habeas Corpus."

Accordingly, it remains unclear as to precisely what locus standi a person requires to enable him or her to successfully institute proceedings under Section 177 of the Supreme Court Act. Clearly, it must be someone who is more than a mere stranger to the child but it need not be someone who is related to the child by blood. However, we believe that a step-father, step-mother or grandparent would have a sufficient connection with the child to permit the institution of proceedings.

Despite these problems, wardship proceedings are comparatively simple to undertake and have the decided advantage that a child automatically becomes a ward of the court upon

the making of the application and remains so for 21 days (Order 54 (b) Supreme Court Rules). The period of wardship can of course be extended by order of the Court.

Another possible procedure that could be adopted is that provided by Section 141 of the Victorian Marriage Act:

"141 (1) Upon hearing the application by the next friend of any infant —

(a) alleging cruelty all-treatment or gross abuse of parental authority towards such infant by the father mother or guardian thereof; or

(b) alleging that the father mother or guardian of an infant has been guilty of adultery habitual intemperance or other misconduct where the court is satisfied that the adultery habitual intemperance or other misconduct disentitles him or her to continue to have the custody or control of the infant —

the Court may order —

(i) that such an infant shall be freed from the custody and control of such father mother or guardian (as the case may be) :

(ii) that the custody or control of such an infant shall be given to some suitable person to act as the guardian either of the person or estate or of both the person and the estate of such infant:

(iii) that the father mother or guardian shall pay to the guardian appointed under this section such weekly sum for the maintenance and education of such infant as the Court having regard to means of the father or mother or the property in the guardian's hand legally available for such purpose may think fit.

(2) Such order for payment may at any time be varied by the Court on the application of a next friend of such infant or of the father mother or guardian of such infant or of the guardian appointed under this section.

(3) On application to the Court by Summons to show cause why such an order for payment should not be enforced, such order shall as the Court may direct be enforceable against such father mother or guardian by process of attachment or by process of execution whether legal or equitable in respect of such property as the Court specifies".

This is a section which has been little used in recent times. It is our view that for a person to become a next friend within the meaning of Section 141, an application should be made to a judge in chambers. This is based upon the procedure which is adopted where it is sought to change a "next friend" in the course of ordinary litigation involving an infant. It is apparent that the section is cast in somewhat terms and is somewhat restrictive in its language. However, one possible advantage may be that the degree of connection that would be required to become a "next friend" pursuant to section 141 may be more tenuous than that required in order to confer standing to the applicant in wardship proceedings under section 177.

Section 63 of the Family Law Act provides that a Decree Nisi shall not become absolute

unless the Court makes a declaration in respect of not only natural children of the marriage or jointly adoptive children of the marriage but also children who are "deemed" to be children of the marriage pursuant to section 5 (1). It has been stated that the Court may be able to side step the effect of the decision of Russell v. Russell by requiring a party to give an undertaking to pay maintenance in respect of a child deemed to be a child of the marriage on the basis that unless he does so the Court will not make a declaration pursuant to section 63 and therefore any decree nisi cannot become absolute.

This attempt to elicit a promise to make maintenance payments may not be a legitimate exercise of the Court's power pursuant to the Family Law Act. Section 63 should in our view be construed to cover only children in respect of whom the Commonwealth has power to legislate.

Settlement of Property

As a result of the decision in Russell v. Russell it is clear that the Commonwealth does not have power to legislate in respect of matters pertaining to property settlements or the declaration of proprietary interests unless that type of relief is sought in conjunction with a divorce. Thus, section 161 of the Marriage Act 1958 (as amended) is once again viable unless and until proceedings for a divorce are instituted. It is interesting to examine the history of section 161 of the Marriage Act in relation firstly to the old Matrimonial Causes Act and secondly to the Family Law Act. As a result of such decisions as Sanders v. Sanders (1967) 116 C.L.R. 366, Horne v. Horne 3 F.L.R. 381 and in particular Denniston v. Denniston 1970 V.R. 555, it was decided that the Commonwealth Matrimonial Causes Act covered the field in relation to matters of property. Accordingly, the effects of instituting proceedings for a Decree of Dissolution of Marriage under the Matrimonial Causes Act had the effect of divesting the Supreme Court of Victoria of jurisdiction in any property matter commenced under section 161 of the Marriage Act.

The manner in which the Family Law Act however purported to treat pending section 161 proceedings was different. Before the decision of Russell v. Russell, the effect of section 9 (4) of the Family Law Act read in conjunction with the definition of "Matrimonial Cause" contained in section 4 (1) of the Act had the effect of permitting pending proceedings under section 161 to continue but the law to be applied was the law as stated in the Family Law Act. In other words, section 161 proceedings became a mere shell but constituted a vehicle by which property issues could be determined by a Court of competent jurisdiction pursuant to the provisions of the Family Law Act.

This can no longer be the case as a result of the High Court decisions. Accordingly, section 161 proceedings may be continued and indeed issued in the State Courts applying the law which has been developed in respect of that section.

However, once proceedings are instituted under the Family Law Act for a Dissolution of Marriage pursuant to the Family Law Act the situation again arises that the effect of instituting those proceedings is automatically to deprive the State Courts of any further jurisdiction. The Family Law Act once again covers the field.

Injunctions

The injunctive power in the Family Law Act is found in section 114 (1) thereof and reads as follows:—

> "In proceedings of the kind referred to in paragraph (e) of the definition of "matrimonial cause" (i.e. proceedings for an order for injunction in circumstances arising out of a marital relationship) in subsection 4 (1) the Court may make such order or grant

such injunction as it thinks proper with respect to the matter to which the proceedings relate, including an injunction for the personal protection of a party to the marriage or of a child of the marriage or for the protection of the marital relationship or in personal protection of a party to the marriage or of a child of the marriage or for the protection of the marital relationship or in relation to the property of a party to the marriage or relating to the use or occupancy of the matrimonial home."

The question now is whether or not it is necessary to read section 114 down in the light of the decision of the High Court in Russell v. Russell.

In Horne v. Horne 3 F.L.R. 381 Wallace J. in delivering the judgment of the Full Court said:—

> "When the section adds that the injunction may be granted in any case in which it appears to the Court to be just and convenient to do so, it is to me beyond the field of debate that this power is limited to aiding, enforcing or protecting the proper and due exercise of the Matrimonial Causes jurisdiction or the provisions of the Act."

These words were obiter but nevertheless are strong and entitled to great respect. In that case of course, the learned judge was considering the power to grant injunctions contained in section 124 of the old Matrimonial Causes Act. Accordingly, the question has to be considered after Russell v. Russell. Has the Court jurisdiction in matters pertaining to the property of spouses when these matters do not come into consideration pursuant to a divorce case whether or not it is still constitutional for an injunction to be made? For example to restrain a husband from entering the former matrimonial home or selling the former matrimonial home, prior to the institution or divorce proceedings. This problem is even more sharply illustrated if one considers the injunctive power contained in s.114 of the Family Law Act in relation to proceedings brought pursuant to s.161 of the Victorian Marriage Act.

S.161 (2) empowers the Court to grant "an injunction restraining a person from making any threatened or apprehended conveyance assignment sale or other disposition of any property in question in the proceedings until the proceedings are heard and determined."

It is clear that where no divorce proceedings are on foot, s.161 of the Victorian Marriage Act is viable. Accordingly, can the Commonwealth constitutionally legislate to empower the Family Court to grant injunctions (which are in effect ancillary to property matters) where it does not have the power to legislate in respect of such property matters themselves?

On the other hand, it could be argued that the true nature of these injunctions is not really in respect of property matters at all but rather they are to regulate the conduct of one spouse to the other. As Hale J. remarked in Green v. Green 4 F.L.R. at page 301:

> "The power to make such an Order in a proper case is a vital necessity for the due administration of the divorce jurisdiction: without it one spouse might be left in a position to bring intolerable pressure to bear on the other, and thereby interfere with the due administration of justice".

Consequently as a result of the High Court decision in Russell v. Russell and Farrelly v. Farrelly there are still grey areas which will need judicial clarification.

LYNNE OPAS
and Anor.

FAMILY COURT PRACTICE NOTE

The following advice has recently been given to practitioners before the Family Law Court:—

Some confusion has arisen recently owing to a request by an interstate Judge that counsel remain seated when addressing the Bench. The normal practice is that counsel should always stand when addressing the Bench unless invited to remain seated.

★★★

Lists of defended cases are made available to each clerk. Counsel wishing to check when a defended application is listed for hearing should at first instance make his enquiry of his clerk.

LETTER FROM LAWASIA

A letter has been received from the Secretary-General of Lawasia and his predecessor referring to certain allegations in the media that it is or was a C.I.A. backed organisation. This allegation, it seems, is based upon the fact that in the past Lawasia has been the beneficiary of funds from the Asia Foundation, which, it has been suggested, is a channel for C.I.A. funds.

In their letter the Secretaries-General reject this imputation and make it clear that any funds accepted from the Asia Foundations were accepted without any knowledge of any association between the Foundation and the C.I.A. and without any condition which fettered the discretion of Lawasia to use the funds for such purpose as it saw fit.

The letter concludes:

"We are able to state categorically that Lawasia has never had any dealing, financial or otherwise, whether direct or indirect, with the C.I.A. Its policy and activities have been determined by its Council, and have not been influenced by the C.I.A. or any other outside body. Financial assistance from the Asia Foundation has been given unconditionally and without any attempt of any kind to influence policy. For the last nine of the ten years of Lawasia's existence, the assistance has been accepted on the basis of positive assurances that the Foundation is not receiving any funds directly or indirectly from the C.I.A."

MOUTHPIECE

"Well" said the Whitewig with a good deal of melancholy, "Another day gone. Nothing done. Nothing to do."

I had slipped in to see them and regretted it. The gloom could easily be infectious.

" 'As idle as a painted ship upon a painted ocean' " quoted someone just to break the silence.

Coleridge was well and good. I saw them rather as the Twa Dogs of Burns:

> "They're no' sae wretched's one would think
> Tho' constantly on poverty's brink
> They're sae accustom'd wi' the sight,
> The view o't gies them little fright."

There was a thump and a crash. My reverie was disturbed by the bursting entrance of lumpish lad, a recent admission.

"I've cracked it at last!" His eyes were shining and he couldn't wait for anyone to articulate the wondering of who or what he had cracked.
"A fraud summons at San Remo" he blurted out. "It's marked at twenty seven. I should break even."

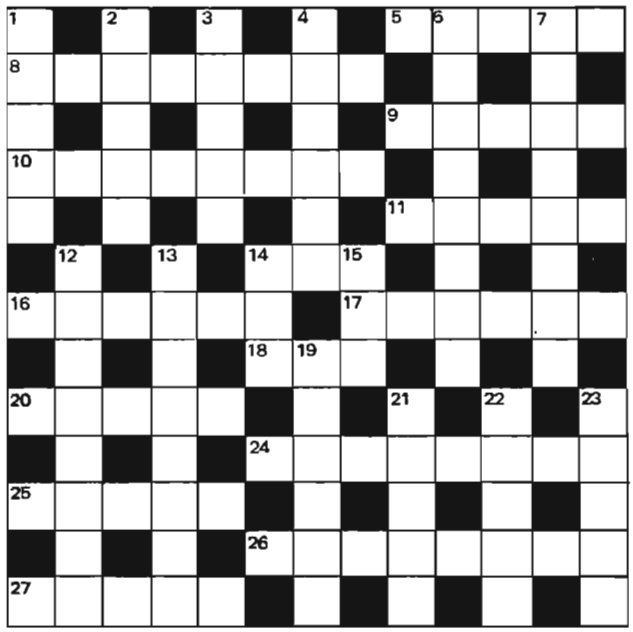
What does the future hold for these poor blighters, I mused. If only they could get some steady work.

"If only we could get some steady work" said the big boy.
"One lucky devil has" said Whitewig.
"Who's that? What does he do?" The questions were frantic.

"It's the steadiest job on earth" said Whitewig. "I know the bloke who builds the plastic models of the new buildings for the Bar Council.

BYRNE & ROSS D.D.

CAPTAIN'S CRYPTIC



ACROSS

5. Once a clever type of larceny (5)
8. Relator of court cases (8)
9. Fly with lover to Gretna Green (5)
10. Enjoyable biannual periods interrupted by legal year (8)
11. Flash (5)
14. Step to a resort (5)
16. Traditional profession apart from law & military (6)
17. Invest with a new form (6)
18. Anon (3)
20. Unperformed (5)
24. Something you put in (8)
25. Boundary (5)
26. Advances the prosecution (8)
27. Perhaps provocateur of another's business (5)

DOWN

1. Ascertain the truth, so they say (5)
2. A remarkable time for important events (5)
3. Box (5)
4. Indemnify (6)
6. Discharged (8)
7. Qualification for a party (8)
12. Giving gratitude (8)
13. Use or possession (8)
14. Fling (3)
15. Legislation in Canberra (3)
19. Put up with (6)
21. Shrink back (5)
22. Bath for the pony express (5)
23. Dull and full of matter (5)

PLEA BARGAINING

BRUCE v. R.

On May 21, the High Court heard the application of Phillip Bruce for special leave to appeal. Aickin Q.C. and Hampel appeared for the applicant. The Solicitor-General, Dawson Q.C. and D.R. Meagher appeared for the Crown.

On September 30 last year Bruce pleaded guilty to 10 counts of forgery and 10 counts of uttering. The plea was made after Bruce's counsel and the prosecutor consulted Judge Byrne in his chambers. It was said that Judge Byrne had indicated that a non-custodial sentence would be imposed. In the result Bruce was fined and placed on a bond.

On October 14 last year Bruce together with two co-accused was presented for trial on a charge of conspiracy to cheat and defraud. It was said that Bruce's counsel and the Crown Prosecutor saw Judge Just in his chambers. The Judge wanted to hear the Crown's opening before giving an indication. The following day Judge Just was said to have indicated in his chambers that in the event of the accused pleading guilty, a non-custodial sentence would be imposed. The accused changed their pleas. In the result each accused was placed on a bond.

The former Attorney General Mr. Wilcox appealed to the Court of Criminal Appeal. In December last, the appeals were upheld and Bruce was sentenced to an effective term of three years' imprisonment. It was from this that Bruce sought leave to appeal to the High Court.

The Issues

The expression "plea bargaining" which seems to have been adopted in the recent controversy and by the Court of Criminal Appeal in England is, in our view inapt and misleading. It has produced such headlines in the press as "Shopping around for Justice", "Justice and the two sides to the bargain" and "Bargains on pleas". A clear distinction must be drawn between a practice where an accused person or his representatives may indicate to the Crown Law authorities that he intends to plead guilty to a particular offence and will do so, but that he is not guilty of another offence and will plead not guilty to it. In those circumstances it has always been the practice for the Crown to consider its position in relation to the offence to which the accused intends to plead not guilty and decide whether or not it will proceed with that charge. For a number of valid reasons the Crown may decide that it will accept the plea of guilty from the accused as indicated and will not proceed to attempt to prove the charge to which he is pleading not guilty. Section 391 of the Crimes Act, in its proviso, seems to contemplate that very practice and procedure. In this circumstance "plea bargaining" may be a more appropriate designation in that the accused may offer his plea of guilty to one charge on the basis that the other charge will not be proceeded with. This practice however has little to do with the present controversy which involves obtaining an indication from the Judge in Chambers prior to pleas being taken, of the Judge's preliminary view as to whether a custodial or non-custodial sentence appears to be appropriate for an offence, whether that issue arises on a plea or upon conviction. It seems that the present controversy has merged the two practices into one concept and the use of the term "plea bargaining" has become confused.

When asked to form a preliminary view on sentence and indicate such view to Counsel for the Defence and to the Prosecutor, the Judge already has before him evidence on oath in the form of depositions which form the basis of the Crown case. In that respect the Judge has material which is most adverse to the accused, subject perhaps to any favourable

material in the depositions which may have been elicited during the commital proceedings.

Many members of the Bar may well take the view that the practice of obtaining a preliminary indication from the Judge in his Chambers as to what view he takes of the offence and in particular, as to whether he thinks it is appropriate for a non-custodial sentence, is highly desirable and in the best interests of the administration of justice and those brought before the Courts.

It is essential that the public have complete confidence in the quality and integrity of the Judiciary and the profession. Any communication by the Judge in Chambers must of course be in the presence of Defence Counsel and the Prosecutor and possibly their respective instructors.

But what must be emphasised strongly is the need for a full and clear explanation to the accused of the right of the Crown to appeal against sentence, and the power of the Court of Criminal Appeal to increase any sentence, even one in respect of which the trial Judge was prepared to indicate prior to pleas being taken that it would be of a non-custodial character. Prior to Bruce's case, of course, the failure to give such advice was well understandable. Since that case such advice would appear to be essential.

But perhaps any indication by the Judge should be sought in open Court where the public and the accused can hear what is being said. In this way the accused still has the benefit of any view the Judge may desire to express and there can be no suggestion that any impropriety "behind closed doors" has occurred.

It may be felt that the existence of the practice proves an embarrassment to Counsel in that it forces Counsel to step out of the roll of an advocate into the roll of a supplicant in Judge's Chambers. In any circumstances it is still essential that Counsel explain to his client the effect of the Crown's right of appeal. It may also be argued that the justification for the practice based on a time saving argument is misconceived, and the Bar should not be a party to it. Instead, more Judges and Courts should be available rather than that short cuts be taken which may be contrary to the basic principle of the appearance of justice. Nothing which cannot be done in open Court should be done in Judge's Chambers.

As a matter of strict theory this argument is unanswerable but it may tend to to overlook some of the more practical considerations which have supported the existence of this practice in England, the United States, New South Wales and in Victoria for many years. The practice has also received the approval of the Court of Criminal Appeal in England in Turner's Case (1970) C.A.R. 352, Plimmer's Case (1975) 61 C.A.R. 264 and in an unreported decision of R. v. Cain referred to in "The Times" Report of the 20th February 1976. The English Courts have emphasised the need of freedom of access between Counsel and the Judge to enable communication and discussion which will enable Counsel properly to advise his client.

One can take the view that a plea of guilty is merely a solemn confession encompassing all elements of the crime charged. Then if an indication is given by the Judge prior to the plea being taken that a non-custodial sentence may be appropriate, the accused may act on that and may be in the position of having a promise of favour held out to him which may be calculated to persuade him to plead guilty when otherwise he may not have done so. This result would not be obviated by having that indication given in open Court. The only way that this result may be prevented is if the accused is told that despite the view that this Judge has formed, the Crown may appeal and have the sentence increased.

The Editors.

SOME JUDICIAL STATISTICS

AUSTRALIA

HIGH COURT

– No maximum number of Justices.
– No age for retirement.
– Average age at 1/7/76 – 62 years.
– Average age on appointment – 51 years.

	Age at 1/7/76	Date of Birth	Year of Appointment	Year of Retirement
McTiernan J.	84	16/ 2/1892	1930	–
Barwick C.J.	73	22/ 6/1903	1964	–
Gibbs J.	59	7/ 2/1917	1970	–
Jacobs J.	57	5/10/1918	1974	–
Murphy J.	53	31/ 8/1922	1975	–
Stephen J.	53	15/ 6/1923	1972	–
Mason J.	51	21/ 4/1925	1972	–

SUPREME COURT A.C.T.

– No maximum number of Judges.
– Retiring age – 70.
– Average age at 1/7/76 – 57 years.
– Average age on appointment – 51 years.

Connor J.	58	12/12/1917	1972	1987
Blackburn J.	57	26/ 7/1918	1971	1988
Fox J.	55	30/ 9/1920	1967	1990

INDUSTRIAL COURT

– No Maximum number of Judges.
– No age for retirement.
– Average age at 1/7/76 – 63 years.
– Average age on appointment – 54 years.

P.E. Joske J.	80	5/10/1895	1960	–
Spicer J.	77	5/ 3/1899	1956	–
Smithers J.	73	3/ 2/1903	1965	–
Dunphy J.	69	18/ 6/1907	1949	–
Nimmo J.	67	15/ 1/1909	1969	–

INDUSTRIAL COURT (Cont.)

	Age at 1/7/76	Date of Birth	Year of Appointment	Year of Retirement
Sweeney J.	61	27/ 4/1915	1963	—
Franki J.	61	23/ 6/1915	1972	—
St. John J.	59	15/ 8/1916	1975	—
P. Evatt J.	53	2/ 7/1922	1974	—
Northrop J.	50	10/ 8/1925	1976	—
Brennan J.	48	22/ 5/1928	1976	—
Woodward J.	47	6/ 8/1928	1972	—

CONCILIATION AND ARBITRATION COMMISSION

— No maximum number of Presidential members.
— Age of retirement — 65 years.
— Average age at 1/7/76 — 50 years.
— Average age on appointment — 46 years.

Sharp J.	62	23/ 4/1914	1974	1979
Moore C.J.	60	5/11/1915	1959	1980
Coldham J.	57	18/ 2/1919	1971	1984
Williams J.	54	25/ 7/1921	1969	1986
Ludeke J.	54	15/ 8/1921	1972	1986
Robinson J.	50	21/ 1/1926	1970	1991
Staples J.	47	2/ 6/1929	1975	1994
Kirby J.	37	17/ 3/1939	1975	2004
Gaudron J.	33	5/ 1/1943	1974	2008

FAMILY COURT

— No maximum number of Judges.
— No age for retirement.
— Average age of Judges (Melbourne) as at 1/7/1976 — 49 years.
— Average age on appointment — 49 years.

Principal registry (Sydney)				
E. Evatt C.J.	42	11/11/1933	1975	—
Melbourne registry				
Lusink J.	54	27/ 5/1922	1976	—
Emery J.	52	9/ 7/1923	1976	—
Asche J.	50	28/11/1925	1975	—
T.R. Joske J.	43	22/ 8/1932	1976	—
Fogarty J.	43	9/ 8/1932	1976	—

VICTORIA

SUPREME COURT JUDGES

– Maximum number of Judges – 21.
– Age for retirement – 72 years.
– Average age on appointment – 53 years.
– Average age at 1/7/76 – 61 years.

	Age at 1/7/76	Date of Birth	Year of Appointment	Year of Retirement
Gowans J.	71	9/ 9/1904	1961	1976
Barber J. (1957*)	70	26/ 7/1905	1964	1977
Dunn J. (1955*)	70	25/ 9/1905	1973	1977
Nelson J. (1954*)	70	5/ 5/1906	1969	1978
Gillard J.	70	2/ 6/1906	1962	1978
McInerney J.	65	11/ 2/1911	1965	1983
Anderson J.	63	4/ 9/1912	1969	1984
Lush J.	63	5/10/1912	1966	1984
Menhennitt J.	63	30/10/1912	1966	1984
Starke J.	62	1/12/1913	1964	1985
Murray J.	59	2/ 5/1917	1974	1989
Kaye J.	57	8/ 2/1919	1972	1991
Young C.J.	56	17/12/1919	1974	1991
Harris J.	55	22/ 1/1921	1973	1993
Newton J.	54	11/ 7/1921	1967	1993
Murphy J.	53	5/ 5/1923	1973	1995
Crockett J.	52	16/ 4/1924	1969	1996
Griffith J.	51	23/ 4/1925	1975	1997
McGarvie J.	50	21/ 5/1926	1976	1998
Fullagar J.	50	14/ 7/1926	1975	1998
Jenkinson J.	49	14/11/1927	1975	1999

* Year of appointment as County Court Judge.

MASTERS OF THE SUPREME COURT

– No maximum number of Masters.
– No age for retirement.
– Average age on appointment – 48 years.
– Average age at 1/7/76 – 60 years.

Master				
Collie	71	8/ 7/1904	1961	–
Jacobs	64	3/ 9/1911	1960	–
Bergere	61	9/ 2/1915	1963	–
Brett	59	16/ 9/1916	1967	–
Bruce	42	7/ 3/1934	1974	–

COUNTY COURT

– No maximum number of Judges.
– Age of retirement – 72 years.
– Average age at 1/7/76 – 56 years.
– Average age on appointment – 49 years.

Judge	Age at 1/7/76	Date of Birth	Year of Appointment	Year of Retirement
Frederico	71	15/ 7/1904	1962	1976
Adams	70	26/ 7/1905	1962	1977
Rapke	66	2/ 9/1909	1958	1981
Wright	63	5/ 8/1912	1971	1984
Corson	60	24/ 8/1915	1963	1987
Mornane	59	12/ 7/1916	1975	1988
Ogden	59	27/12/1916	1972	1988
Vickery	58	28/ 7/1917	1962	1989
Hewitt	58	4/11/1917	1964	1989
Leckie	58	30/12/1917	1965	1989
Gorman	58	4/ 1/1918	1971	1990
Forrest	58	28/ 1/1918	1964	1990
Franich	58	14/ 6/1918	1966	1990
Harris	57	13/11/1918	1964	1990
Somerville	56	27/12/1919	1968	1991
Stabey	55	5/ 9/1920	1972	1992
Hogg	55	3/ 5/1921	1975	1993
Martin	54	11/10/1921	1968	1993
Ravech	54	6/ 6/1922	1975	1994
Shillito	53	25/12/1922	1967	1994
Gray	53	6/ 3/1923	1968	1995
Just	51	4/ 8/1924	1965	1996
Howse (acting)	51	24/ 4/1925	1976	1997
McNab	51	2/ 6/1925	1972	1997
Byrne	50	22/10/1925	1972	1997
Whelan (Chief Judge)	50	30/11/1925	1975	1997
Southwell	49	1/11/1926	1969	1998
O'Shea	49	4/ 4/1927	1969	1999
Spence	48	3/ 8/1927	1973	1999

SALARIES OF JUDICIAL OFFICEHOLDERS

AUSTRALIA

		Salary	Allowance
High Court			
Chief Justice		45,000	3,000
Justice		41,000	2,500
Family Court			
Chief Judge		35,000	1,750
Senior Judge		29,250	1,250
Judge		25,000	1,200
Supreme Court A.C.T.			
Judge		35,000	1,750-2,250
Industrial Court			
Chief Judge		36,000	2,250
Judge		35,000	1,750
Bankruptcy Court			
Judge		35,000	1,750
Conciliation & Arbitration Commission			
President		36,000	2,250
Deputy President		35,000	1,750

VICTORIA

Supreme Court			
Chief Justice	*48,370	(42,400)	2,500
Puisne Judge	*43,920	(38,500)	2,500
Master		30,460	—
County Court			
Chief Judge	*43,350	(38,000)	2,500
Judge	*36,960	(32,400)	2,000
Magistrates' Court			
Chief Magistrate		31,305	300
Deputy Chief Magistrate		29,608	—
Magistrate (after five years)		27,010	—
(under five years)		25,059	—
Solicitor General		40,500	—
Crown Prosecutor		26,810	—
Industrial Appeals Court President		5,000	—
Town and Country Planning Appeal Tribunal Chairman		28,680	—
Crimes Compensation Tribunal Chairman		21,600	—
Motor Accidents Board Appeals Tribunal Chairman		6,000	—
Land Valuation Board of Review Chairman		21,450	—
Environment Protection Appeal Board Chairman		21,600	750

* indicates salary not yet in force.

"IT'S GETTING CROWDED AT THE BAR"

("The Australian"
Wednesday 14th April, 1976 p.7)

On the 31st December 1965, the Annual Report for 1965-6 tells us, the number of counsel in actual practice in Victoria (not including prosecutors) was 282. In ten years this number had grown to 470 and in a further six months – on the 30th June 1976 – the number stood at 555. This growth has been due to no unexpected longevity among senior members, but to a very great number of persons signing the roll.

The number of new members is set out in the following figures:–

		New Members	Net Increase
	1965	39	13
	1966	16	11
August	1966-7	24	11
August	1967-8	36	20
August	1968-9	30	25
August	1969-70	37	16
August	1970-1	51	)
August	1971-2	52	) 69
August	1972-3	39	32
August	1973-4	44	16
August	1974-5	73	53
August	1975-30/6/76	96	88

The effect of this phenomenon has been twofold: first it has led to an increase in the total number of those in practice: secondly it has shifted the balance of numbers in favour of the junior members. The table at the bottom of the page gives an indication of this as it effects those on the active list employing a clerk.

The Problem:

The increase in numbers has imposed a strain upon the equilibrium of the Bar and its institutions in at least four significant areas, some of which have received a good deal of discussion –

(a) Clerking System

At first blush there is no reason why an increasing number of counsel should create any difficulty for the clerks whom they employ, provided that the number on each list does not increase to such an extent that the clerk is unable to provide adequate service to them and to the solicitors with whom he deals. This is, of course, a substantial proviso and opinions have differed as to an optimum number, or indeed the maximum number,

	31st Dec. 1967		February 1971		28th Feb. 1974		30th June 1976	
Silks	37	(12.5%)	46	(11.8%)	44	(9.7%)	50	(9%)
15 years or more	33	(11.2%)	47	(12%)	48	(10.5%)	55	(9.9%)
10-14 years	40	13.6%)	38	(9.7%)	74	(16.3%)	79	(14.2%)
5-9 years	74	(25%)	100	(25.7%)	104	(22.95%)	116	(20.9%)
4 years	19	(6.5%)	25	(6.4%)	28	(6%)	41	(7.3%)
3 years	21	(7%)	41	(10.5%)	37	(8%)	20	(3.6%)
2 years	28	(9.5%)	27	(6.9%)	44	(9.7%)	32	(5.7%)
1 year	17	(5.7%)	39	(10%)	36	(7.9%)	71	(12.7%)
Less than 1 year	25	(8.5%)	26	(6.6%)	38	(8.3%)	91	(16.3%)
	294		389		453		555	

which can be so served. Obviously this number will vary depending upon the capacity of each clerk and of his administration.

In 1972 the Bar Council received a report from the Jenkinson Committee recommending small lists of 45 Counsel. This report is summarised in the June 1975 edition of The Victorian Bar News. After considering these recommendations the Bar Council adopted a policy of seeking to bring all lists to a number of 75, and at the same time it encouraged the establishment of a Clerking Committee for each list. There were a number of reasons for so limiting each list among which was the desire to preserve a diversity of clerking groups and to encourage the establishment of new lists. As a result of this decision the Muir List was created in early 1973. This policy has been criticised by some who contend that the imposition of an arbitrary limit on all lists takes no account of the differing compositions of the list and of the differing capacities of the clerks.

The experience of the growth of the Bar in the years up to 1972 gave the Bar Council some confidence that from time to time it would be necessary to establish a new list and it was doubtless expected that Counsel of some standing would transfer to the new list so as to provide a nucleus of a balanced list. History has demonstrated each of these assumptions to be false. First the net increase has been such that it was necessary to create two new lists in January 1976 and, if the limit of 75 is to be maintained, the present rate of growth will require a new clerk annually. Second the experience of the last few years has shown that counsel are reluctant to change lists for reasons of loyalty, conservatism, fear of the financial consequences or otherwise.

The result has been the exacerbation of the imbalance between the lists. The great numbers of new and most junior members have been directed to the new lists with the effect of imposing an immediate financial burden upon them and upon the new clerks. Furthermore, by restricting the number of those who may join the established lists it imposed a possible long term financial burden upon the other lists as they become increasingly top heavy.

The present distribution of seniority among the clerks is as follows.

CLERK	F	H	D	S	M	C	W	B
Silk	15	8	10	8	2	2	1	4
15 or more	21	13	9	7	2	3	—	—
10-14 years	18	23	13	12	9	2	1	1
5-9 years	27	26	23	29	5	—	4	2
4 years	5	2	8	18	3	1	3	1
3 years	1	—	—	1	13	3	2	—
2 years	1	3	1	2	17	5	3	—
1 year	8	3	7	4	8	16	22	3
Less than 1 year	6	6	5	6	8	6	12	42
	102	84	76	87	67	38	48	53

Consider the probable position in ten years' time.

(b) Accommodation

In 1961 Owen Dixon Chambers provided a home for the Bar. In 1965 it was found necessary to add four storeys.

The policy of the Bar endorsed by the General Meeting held on 13th August 1975 was that the Bar should be housed in one building.

The implementation of this policy was difficult enough in years when the net increase was less than 20. Members will recall the situation when the first and twelfth floors were held by tenants and it was nevertheless necessary to establish Tait Chambers. With an increase that varies from 16 in 1973-4 to 53 in 1974-5 and to some 100 in 1975-6 planning is impossible.

The Bar is now spread between the traditional chambers in Equity Chambers and Owen Dixon Chambers to Tait Chambers, Hooker House, Hume House and Four Courts Chambers.

With the recent decision to abandon the Northrock proposal for the Bar to engage in the erection of its own building in Lonsdale Street it may be that the policy for the Bar accepting responsibility for accommodation will have to be reconsidered.

(c) The Financial Burden

With a philanthropy that is perhaps unique in commercial life the Bar has traditionally been of the view that no financial obstacle should be placed in the way of any qualified person seeking to establish himself in practice.

Thus the pupil is given free accommodation for the period of his reading. He is permitted to engage a clerk whose existing contacts and administration, established over a period at the expense of those already on his list, should ensure him access to work. Subscriptions and other charges such as phone bills and the cost of the Bar Dinner are weighted so as to impose a minimal burden for him in his early years. Furthermore if he is by reason of his lack of seniority unable to obtain chambers in the Bar's own building, his rental is subsidised from the general funds. Finally the clerk to whom he will most likely be assigned is subsidised by contributions of all counsel.

There are, of course, very good reasons for all of this. Nevertheless the burden falls upon the senior members. Perhaps this burden is not great and is, by and large, accepted without complaint, but the fact is that as the number of recipients increases relative to the donors so the burden increases. With the present number of those under five years' standing now at 46.4% of the whole and increasing the whole question of subsidies is being called into question, especially if these subsidies are found to be an inducement to those who might otherwise hesitate to join the Bar.

(d) Structural Difficulties

Up to September 1968 there were two categories of counsel represented on the Bar Council, those of not less than seven years' standing and those of not more than 10 years' standing. Thereafter special provision was made for junior members by the restructuring of representation and the creation of a category of two representatives of those of not more than six years' standing.

Because of the nature of the work performed by the Bar Council it has been thought that a preponderance of silks and very senior members is appropriate. Moreover the Bar has in the past been fortunate that those silks and very senior representatives have been sensitive to the needs of the junior bar. Nevertheless, with

the physical separation of those representatives who keep chambers in Owen Dixon Chambers from the very junior bar who are generally housed elsewhere, the contact which has been a feature of life in the past has diminished and the need for representation of those counsel has become more important. To cater for this group the representation of those under six years' call was increased in 1972 to three out of an elected Council of 18. In early 1973 a Young Barristers' Committee under the Chairmanship of a senior member of the Bar Council was established. In 1973 those under six years' call numbered 170 or 39.7% of the 428 counsel in active practice. On 30th June 1976 this category numbered 307 or 52.2% of the 588 counsel on the active roll and employing a clerk.

It may be that the imbalance is now such as to warrant a further category of representation on the Bar Council – those under two years' call.

(e) The Newcomers' Problem

The fifth area of difficulty and one upon which there is much talk and little certain knowledge is the complaint of the newcomers that because of the reduction of work in Magistrates' Courts and their own increase in numbers there is not enough work about for them to make a living.

This problem if it exists, is not likely to be the concern of the Bar as a whole. First because it is difficult to document. One hears discussion in terms of generalities but there is no information as to the volume of work available or as to the income of the Barrister in his first years. Perhaps the more compelling reason, however is that the Bar has been nutured on stories of the indigent early years of successful counsel and eminent judges and, despite its benevolence towards newcomers, it is dedicated to the spirit of free enterprise and independent endeavour.

It is, perhaps, a legitimate cause for complaint to hear a new arrival say that he was compelled by direction of the Bar to join a list which has less floating work than the then list to which his fortunate contemporary was assigned. Why, he says, should I suffer from a choice which was imposed on me?

SOLUTIONS:

It will be apparent from the foregoing that, while these difficulties have all been highlighted by the recent dramatic increase in newcomers to the Bar, they arise principally because of facts and policies which we have inherited. It is a fact that there is a multiplicity of clerks and an inadequate but well situated building. Both of these facts are unlikely to change. Any clerking and accommodation policy must take account of these facts. Hence it is necessary that each list must be made viable and as far as possible equal in strength. What is abundantly clear is that there is a problem caused or accentuated by the increasing numbers at the Bar.

Logically the solutions fall into three categories:

(a) do nothing and the problem will go away.
(b) stem the inflow.
(c) change the Bar to cope with the inflow.

Each of these solutions may take different forms and it may be convenient to consider each in turn.

(a) The Ostrich Solution

One is inclined to ridicule as typical of a conservative profession the suggestion that the problem will resolve itself. But the present indication is that the dramatic increase in numbers signing the Bar Roll is falling off.

There is no reason to believe that the number of departures from the list of active Counsel by reason of judicial appointment or death is likely to change dramatically in the foreseeable future. It is, however, possible that a number of those who are unable to survive financially will leave. This prediction, however, is not to date borne out by an examination of the list of those who have had their names removed in the last year.

But the present signs are that the surge of 1975-76 may have abated somewhat. An examination of the Bar Roll reveals that about one third to one half of newcomers sign in February March and April each year (except 1973-4). It is too early now to say what this figure will be for 1977 or how it will compare with the 54 who signed in those months this year. But the figures for May and June and the applications for July August September and October of this year are consistent with an annual figure of about 40 which has been typical of the early years of this decade.

If this trend continues, with the assistance perhaps of the Bar Councils' minatory circular to applicants to sign the roll, then the attitude of the ostriches may be justified.

(b) The Protectionist Solution

This solution takes many forms all of which are directed towards the reduction of the numbers permitted to sign the Bar Roll. The views which come under this category vary from those who would close the Roll for some period to those who would permit a stipulated number only to sign each year. The problem of selecting those to fill this quota is to be overcome by examination and admission by merit according to some adherents, by lot according to others. The writer has not yet heard any serious exponents of this view suggest that the places be auctioned like some Stock Exchange seat.

A more moderate position would be to remove the subsidies which are bestowed at present on newcomers so that they must pay their way in a real sense. The difficulty about this view is that it runs counter to the long established tradition of benevolence towards the very junior barrister which is such a feature of the Bar. Nevertheless this is a view which is heard with increasing frequency especially from more senior counsel.

(c) The Acceptance Solution

The protagonists of this view are those who are loth to abandon the avuncular policies of the past towards newcomers but who recognise that there exist problems. For these to abandon the open door policy is unthinkable. It is necessary to accommodate all newcomers. If this view prevails and the inflow continues unabated the Bar will be a very different place in five or ten years.

It may be that the problem of inequality of opportunity between the different clerking lists could be overcome by a requirement that all those who sign the Bar Roll should be placed on a "Nursery List", a list of counsel of, say, less than two years' call. In this way the newcomer would have equal access to the junior floating work and he would transfer to an established list after he had the chance to establish his reputation. The difficulty about this view is that it may well postpone the present inequality between lists rather than resolve them. For if one of the established lists is worse than another, for whatever reason, is it not still a hardship to be assigned to the one rather than the other?

If it is likely that the inflow is maintained and the Bar is to adapt itself to cater for them, the changes will be a good deal more radical.

The existing accommodation policy will have to be abandoned. It may be that there will be a number of small groups spread in different buildings grouped by a community of interest or speciality rather than that of seniority as at present. In this event it is probable that these groups will have considerable autonomy and may ultimately practise as partnerships in a way not now permitted despite the recommendations of the Aickin report.

The present clerking policy will require radical revision. It is possible that those who last year advocated one centralised clerk will carry the day as the existing clerks are unable to cope with the increased lists and the Bar will not assume the burden of subsidising new lists. On the other hand it is possible that the physical fragmentation of the Bar will lead to the disparate groups making their own arrangements for the performance of the duties now performed by the clerks. There have already been pressures in this direction, to date resisted.

The present structure of the Bar will change under these pressures. It may be that the Bar Council will act more as a co-ordinating body between the more autonomous sets of chambers than its present role. And Owen Dixon Chambers will then become the home of the Victorian Bar in a very different way from the present.

Whatever the future holds for the next ten or so Bar Councils, it is certain that they will preside over some very radical changes, for the attitudes and organs of a Bar of 400 members will stretch to a Bar of double that size only after very considerable growing pains.

BYRNE D.

NOTE: Needless to say the foregoing does not in any way represent the official view of the Victorian Bar or of the Bar Council, but is a personal amalgam of views communicated formally and less formally. To all of these contributors, be they conscious or unconscious, I am indebted.

SPORTING NEWS

It is noticeable that George Hampel has become increasingly popular with fellow barristers over the past four weeks. There is no truth in the rumour that his recent acquisition of a flat at Mount Buller is in any way connected with his sudden popularity.

***

Two members of counsel have risen to great heights in the past few months. Barry Moor-

foot recently became a qualified glider pilot and Chris Canavan has ambitions along the same lines. One of Barry's solo flights in the Benalla area took him over 150 miles in about 3½ hours.

***

I have it on good authority that John Jordan will be named as full-forward for the Victorian Amateur Football side in view of his goal scoring sprees in recent weeks. John played for Collingwood Reserves a few seasons back.

***

Opas Q.C. has a two year old filly which is well named. It is by Court Sentence and has been named Governor's Pleasure.

***

Good to see that Killara Lad, which is part owned by Alistair Nicholson, brought up a hat-trick of wins recently on country tracks. A win over 2400 metres in town would not surprise.

***

Sica Flower, a two year old in which John Winneke and David Mattei have an interest, is showing promise. It goes like a cut cat and with racing should be able to score up to 1200 metres.

***

In a surprise result the Bar and Bench defeated the Law Institute in the annual golf match held at Royal Melbourne Golf Club on the 28th May. The extent of the victory, eleven matches to two with two (2) matches drawn, would support the theory that the members of the Bar have had more time than the opposition for practice in recent months. Hansen and Wright had a narrow but clear cut win for the best ball bogey event. Brian McCarthy, President of the Law Institute, presented the Sir Edmund Herring Trophy to Sir John Minogue, formerly the Chief Justice of New Guinea, who participated in the event.

***

Mirontina, a filly in which Ron Meldrum has an interest, scored at the good odds of ten to one at Flemington on the 26th May 1976. The horse is bred to stay and another win the near future would not confound the experts.

***

A little bird has whispered news of Frank Vincent and Bill Morgan-Payler being involved in some bush-walking recently. It is hoped that some details of their observations will be available when the next edition of the Victorian Bar News goes to print.

"CANTALA"

ACCOLADE for EDITORS

It is proving fairly easy to plot the careers of former editors of the Bar News. Each has attained High Office. It seems that the seniority of the position relates directly to the time spent as editor. Look at the following list.

Editor	Term as Editor	Appointment
Kaye, J.	Founder and Chairman, 1 year	Supreme Court Judge
McGarvie, J.	2 years	Supreme Court Judge
Storey, Q.C.	1 year	Attorney-General for Victoria
Heerey	2 editions	Hawthown City Councillor.

Byrne and Ross D.D. have been co-editors for the last two years. They were previously on the editorial committee for three years. They are believed to be watching McTiernan, J., and each other.

MOVEMENT AT THE BAR

Members who have signed the Roll (since April 1976)

A.G. Southall
D.E. Curtain
L.J. Priestly (N.S.W. Q.C.)

Members whose names have been removed at their own request

R.J. Galbally
B.V. Rolfe

Member who has died

K.P. Hurst (Miss)

SOLUTION TO CAPTAIN'S CRYPTIC NO. 16

Editors: David Byrne, David Ross
Editorial Committee: Ron Castan, John Coldrey, Max Cashmore, Lynne Opas, Andrew Kirkham, Geoff Horgan
Cartoonist: Crossley
Printed by: Active Offset Pty. Ltd.

Does Your Honour think the increasing number of young judges is improving the quality of the old ones?