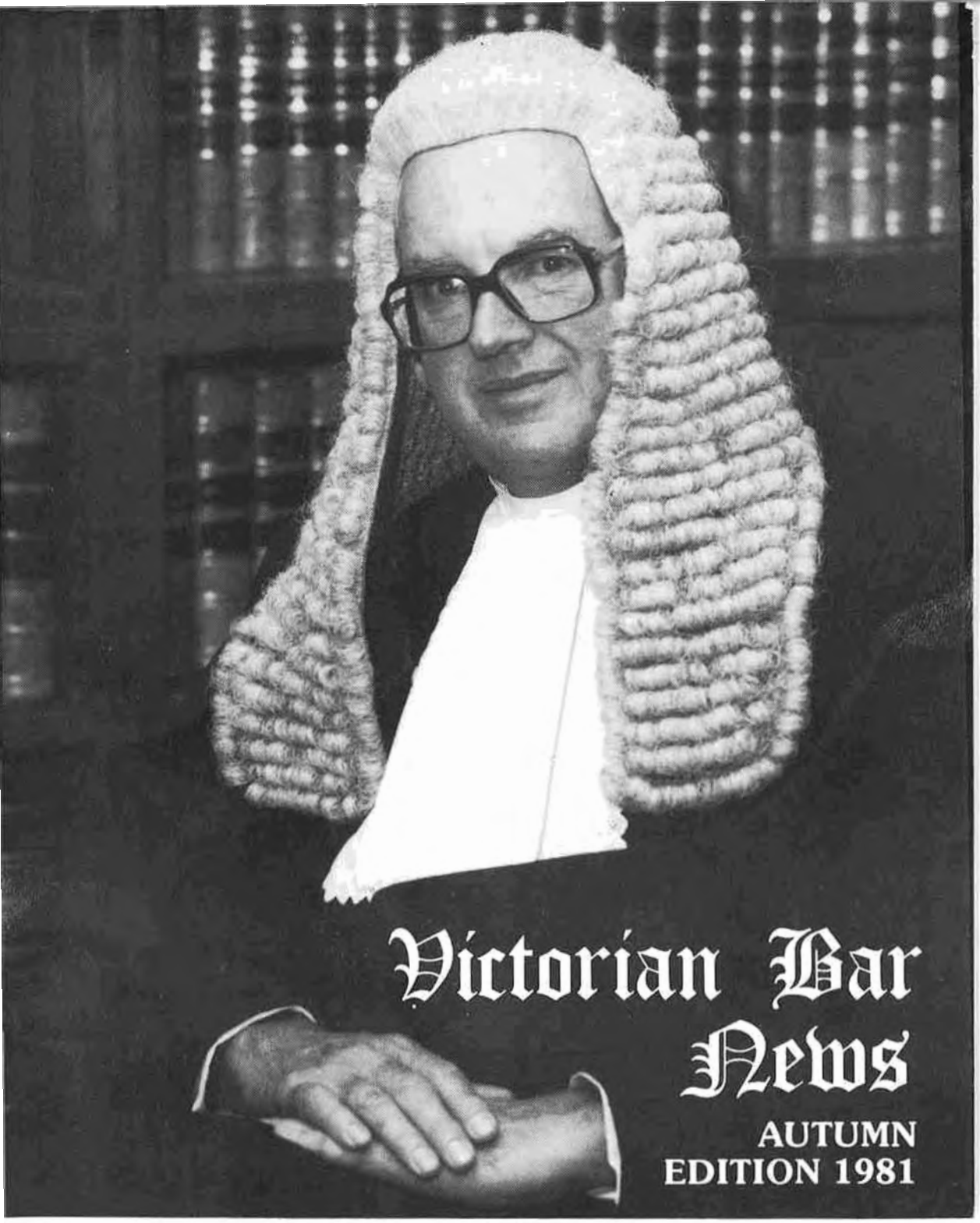

Victorian Bar News

AUTUMN
EDITION 1981

COVER:

His Honour Sir Harry Gibbs, Chief Justice of the High Court of Australia.

Photo by courtesy of The Marshall, High Court of Australia

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BAR COUNCIL REPORT

Influenced by the practice of the New South Wales Bar Association, the Bar Council resolved on the 4th of December 1980 that future Annual Reports of the Victorian Bar will include a record of the attendances at meetings of each member of the Bar Council.

MINUTES

On 12th March it was resolved that a copy of the Minutes of Meetings of the Bar Council edited by the Chairman be made available for inspection by Counsel upon request at the office of the Executive Officer, Miss Brennan.

FEES

(a) The Bar Council is presently considering whether the new scale of County Court fees in the civil jurisdiction (operational from 1st November 1980) should apply to cases heard at the Workers' Compensation Board.

(b) An extensive submission from the Criminal Bar Association concerning fees in the criminal jurisdiction has been submitted to the Legal Aid Commission and the Law Department. Agreement has been reached on a wide range of points.

(c) Miss Elizabeth Alexander, a partner in Messrs. Price Waterhouse & Co., Chartered Accountants, has agreed to act as umpire for the purpose of fixing criminal fees in Legal Aid Commission matters if the Legal Aid Commission, the Law Department and the Bar Council fail to reach agreement. It is proposed that after the Legal Aid Commission commences there will be an annual review of fees each February to take effect in May.

(d) Following the representations by the Bar Council the Insurance Commissioner has agreed to a 25% increase in minimum loadings on Supreme Court briefs at country circuit towns.

INTAKE OF READERS

On the recommendation of the Application Review Committee it was resolved that the date for the intake of readers be moved from the 1st of October to the 1st of September. Those who commence to read on that date will be eligible to take briefs in December rather than January when their masters are unlikely to be in chambers. It follows that those who attend the Leo Cussen Institute in lieu of articles will not be eligible to sign the Bar Roll until March the following year.

SOCIAL

On the 28th November 1980 the Chairman entertained to lunch the Chief Commissioner of Police, Mr. S. I. Miller, the Director of the Legal Aid Commission, Mr. J. Gardner, and the Premier's Adviser on Woman's Affairs, Mrs Y. Klempfner.

A dinner given by the Bar Council in honour of the Country Suburban Law Associations was held in the common room on the 27th of February 1981.

The Annual Bar Dinner for 1981 will be held at the Dallas Brooks Hall on the 30th May 1981.

ANNUAL ELECTIONS

A motion to the effect that in the future elections for the Bar Council, the Returning Officer be directed not to place asterisks or other identification beside the names of candidates who are retiring members, was defeated on 26th February 1981.

DEGREES OF CULPABILITY IN HOMICIDE

The Criminal Bar Association has been asked to consider this question and to advise the Bar Council as to whether any change in the law on this matter is desirable

PARKING IN THE BASEMENT

The following solution has been adopted to the problem caused by illegal parking in the basement of Owen Dixon Chambers. The Directors of Barristers Chambers Limited will be asked to insert in the tenancy agreement of each tenant the following clause –

"The tenant shall pay to Barristers' Chambers Ltd. the sum of $100 or such smaller sum as may be determined by the Board of Directors for each occasion upon which he causes, permits or suffers a motor vehicle to be parked or left standing in a parking space provided by Barristers' Chambers Ltd. for any other tenant or person, unless he satisfies the Board that it was parked or left standing with the express verbal (sic) or written permission of the barrister or other person for whom the place was provided or in case of an emergency."

GENERAL MEETINGS OF THE BAR

On Monday 2nd March a General Meeting attended by some 100 members was held in the Common Room.

Subscriptions

Amendments to Counsel Rules were passed to to the effect that annual subscriptions should be payable each year by counsel on the roll on 1st September. These subscriptions are payable before 1st December. In the case of Counsel who sign the roll later than on 1st September, the amount of subscription payable for the balance of the year to 31st August next might be fixed by the Bar Council.

Counsel whose subscription is more than two months in arrear are not eligible to vote at a General Meeting or to elect the Bar Council or to stand for election to the Bar Council.

The Essoign Club

The meeting passed a resolution supporting the establishment of the Club and recommending to all members that they support the Club and, subject to individual objections, that they join the Club.

The Club was formed and incorporated and has obtained a liquor license subject to compliance with certain requirements of the Liquor Control Commission. The licensed premises are the greater part of the Dining Room area in the Common Room.

Professional Indemnity Insurance

A motion empowering the Bar Council to make rules requiring counsel to insure or to join in a scheme of insurance against professional negligence was defeated.

● ● ●

On Monday 16th March 1981 a large meeting of more than 200 members gathered to consider a motion concerning the raising of money from the Bar to pay off A.B.C. site.

Ballot

By way of preliminary, the Meeting passed a resolution amending Counsel Rules with respect to General Meetings. The resolution empowered the reference of a motion before a General Meeting to a ballot.

The Debenture Motion

The Bar Council recommended to the meeting that it authorise and direct the Bar Council in order to discharge the indebtedness of Barristers' Chambers Ltd. to the Commonwealth Trading Bank consequent upon the purchase of the A.B.C. site, to require all barristers in private practice to take up a Debenture for $2000 to be issued by the Company.

The motion was the subject of passionate debate both for and against, which occupied the full time allotted by the Chairman. At 6.30 p.m. the motion was put and carried by a narrow majority of 113 to 110. The merits and demerits of the resolution are discussed elsewhere in this edition. (p.16)

WELCOME: JUDGE NIXON

On the 3rd March, 1980, the appointment of John King Nixon as a Judge of the County Court was announced.

His Honour was born on 18th July 1935 and received his education at Geelong Grammar School before obtaining his law degree at Melbourne University. Articled at Blake & Riggall before being admitted to practice on 2nd March 1959, he signed the Bar Roll on the 3rd April, 1959.

He read in the Chambers of B.L. Murray and J Mornane who were later to accept positions on the bench.

At the Bar his practice was much concerned with general Common Law work and especially in his earlier days, he developed a considerable practice in matrimonial causes. Judge Nixon was highly respected and developed a reputation as an efficient and hard worker. His record in personal injury litigation was outstanding and it was undoubtedly that reputation and record which lead to His Honour's appointment as Counsel assisting the Board of Enquiry into the Victorian Bushfires in 1977. That appointment was fulfilled with customary skill, diligence and efficiency.

His Honour's involvement in, and love of, "the sport of kings" is well known to members of the Bar. Whilst mention was made at the welcome of a certain lack of success as a racehorse owner, there can be no doubting His Honour's capabilities in the racing field. For many years, he was called upon to represent suspended jockies and trainers before the racing authorities. Some say that it was the information which he learned on those occasions which lead him to be known as "Trifecta Jack".

Judge Nixon had four readers, O'Day, McTaggart, Bristol and D. Martin to whom he was always accessible.

An account of His Honour's life would not be complete if it did not make mention of his devotion to his family. The judge spends as much time as he can with his family and is often seen on the beach at Anglesea, where a game of cricket with his children is a regular occurrence.

All who have come into contact with His Honour during his years at the Bar can testify as to his great courtesy, patience and diligence.

Those qualities will stand him in good stead on the bench. The Bar congratulates him and wishes him a long and satisfying career on the bench.

Photo by Burnside

DE MINIMUS CURAT LSS

The Law Students Society of Melbourne University is currently researching a history of itself. A separate piece is also being written on the publications of the L.S.S. including the long standing and much respected "De Minimus". Unfortunately no copies of "De Min" have been kept and so the L.S.S. is scouring the countryside for any copies of the journal which former law students have kept. The L.S.S. is also interested in gathering together any newspaper cuttings, photos, minutes, trophies (including the Harry Curtis trophy which is missing), programmes, menus, etc. with a view to starting an archive of L.S.S. material and to assist the writers of the official history. Anyone with such material is asked to contact Ray Sheedy, 341 6190 or write or send material to him C/- L.S.S., Law School, Melbourne Uni, Parkville 3052.

FROM "THE BRETHREN"
BY BOB WOODWARD AND SCOTT ARMSTRONG

[The U.S. Supreme Court does not publish reasons for judgement when the court is equally divided. The judgement appealed from is simply confirmed.]

"Renquhist watched with some amusement as the Court tackled an important anti-trust case (U.S. vs. Chas Pfizer & Co.). Powell, White and Marshall recused themselves, leaving only six justices to decide the matter. The initial conference vote was 4 - 2 against the company, with Renquhist and the Chief in the majority. The justice who was assigned the majority would have to plough through briefs, exhibits and trial transcripts that filled six feet of shelf space. Brennan had made up his mind before conference that none of them should have to waste so much time. With a twinkle in his eye, he announced that on further reflection he was persuaded by the Chief's logic. He would switch and vote for the company, making it a 3 - 3 tie. Since the tie would still affirm the lower court decision for the government, his switch would have no effect on the actual outcome of this case, and no-one would have to write an opinion."

Two Recent Appointments

Joan Dwyer has been appointed Chairman of the Equal Opportunities Board.

Barry Hepworth is now Deputy President of the Repatriation Review Tribunal.

The Bar congratulates them both and wishes them well in their new work.

Opening of the Legal Year

The Legal Year was opened on 2nd February with the traditional services at St. Paul's, St. Patrick's and the St. Kilda Road Synagogue.

Those responsible for organising them reported good attendances by members of the Bench and the Bar

"Well I think **my** boys looked prettier"

BARRISTERS' DISCIPLINARY TRIBUNAL

The following is the text of the report of the Lay Observer to the Tribunal, Brigadier Purcell, for the year ended 30th June 1980. The Report has been laid before Parliament pursuant to s.14Q(10) Legal Profession Practice Act 1958.

"Introduction

As required by Section 14Q of the Legal Profession Practice Act 1958, I submit herewith the report by the Lay Observer to the Barristers' Disciplinary Tribunal on the performance of his functions for the year ended 30th June 1980.

As there is virtually no similarity between the systems by which complaints are handled by the Bar Council in comparison with the method by which they are handled by the Law Institute of Victoria I believe it is desirable in order that readers can better comprehend the two systems that I should set out in some detail how each of the systems work in the report covering the particular professional body. I might mention that because of the eseentially different nature of the legal work done by barristers and because they almost invariably have a solicitor interposed between them and their client; the number of complaints received by the Bar Council about the conduct of barristers is considerably less than the number received by the Law Institute about the conduct of solicitors. Similarly to the solicitors the complaints originate from a wide body of people including judges, government departments, solicitors and directly from clients.

The Bar Council Complaint System

As mentioned above, the total number of letters received by the Bar Council which could be regarded as complaints are relatively few in number, totalling less than 30 per annum. When a letter of complaint alleging misconduct by a barrister is received by the Bar Council, it is immediately referred to the Bar Ethics Committee. This is one of several standing committees within the Bar Council structure, and has seven members including 3 Queens Councillors. Unless it is perfectly clear that there is absolutely no substance in the complaint in which case it is immediately referred to the Ethics Committee for consideration, the Secretary to the Bar Ethics Committee refers the letter of complaint to the barrister against whom the allegations have been made in order that he might comment upon the allegations which have been made against him. These comments having been received, the original letter of complaint together with the barrister's comments there-on, are referred for consideration by a meeting of the Bar Ethics Committee.

The Committee may

(i) decide to seek further information from either party.

(ii) decide that on the evidence available the barrister is clearly not guilty of a disciplinary offence and that no further action should be taken other than to inform the original complainant accordingly;

(iii) be of the opinion that the barrister may have committed a disciplinary offence in which case it may resolve
  (a) to take no further action in the matter.
  (b) to deal with the matter summarily; or
  (c) to lay a charge before the Bar Tribunal against the barrister.

Immediately after my appointment as Lay Observer, the Bar Council extended me an invitation to attend, as an observer, meetings of the Ethics Committee. Except when I was otherwise committed, I availed myself of this opportunity and attended most meetings of the Committee held during the period under review. Even when I was unable to attend, I was still provided with copies of all papers provided to members of the committee and was thus completely informed on all complaints received by the Bar Ethics Committee.

During the 12 months period ending 30 June 1980, 29 letters of complaint were received by the Bar Council. Of these 11 were referred for a summary hearing by the Bar Ethics Committee. 18 were not upheld and the complainants were informed accordingly.

No complaints received by the Bar Council nor matters considered of its own motion resulted in a charge being laid against a barrister for hearing by the Bar Tribunal.

Summary Hearings by the Bar Ethics Committee

As mentioned above when the Bar Ethics Committee after preliminary investigation of a complaint is of the opinion that a barrister may have committed a disciplinary offence, it may determine to deal with the alleged offence summarily. For this purpose separate formal meetings are held, due notice having been given to interested parties of the purpose of the meeting. Prior to the meeting all members of the Ethics Committee are given copies of relevant documents. At the meeting itself which is conducted with a minimum of formality, the parties involved are permitted to amplify or substantiate information previously given to the committee and are subjected to cross examination there-on. Having allowed both parties what I would regard as a fair amount of freedom in telling their stories of the events under consideration, the members of committee reach their decision as to whether the barrister concerned has been guilty of a disciplinary offence and the nature of the punishment which should be awarded to those barristers found guilty of committing a disciplinary offence. During the period under review, the Ethics Cmmittee found that in six of the complaints lodged with the Bar Council the barrister concerned was guilty of misconduct and awarded punishments ranging from a reprimand to a fine of $500.

By invitation of the Committee I attended most to the meetings of the Ethics Committee held as summary hearings. All such meetings were held in the late evenings.

Performance of Functions of Lay Observer

The Act provides that any person may complain in writing to the Lay Observer as to the manner in which the Victorian Bar Council, the Committee or the Bar Tribunal deal with complaints against barristers. In the period under review I have received no such complaints. Insofar as the handling of complaints by the Bar Council, the Committee and the Tribunal is concerned, the lay observer's functions have therefore been limited to attending as many meetings of the Ethics Committee as possible so that I was in a position to comment upon any letters I may receive about the way in which the original complaint was handled. The fact that I did not receive any letters regarding complaints about barristers this year is perhaps fortuitous. Clearly I will never receive a great number, as there are only a relatively small number of complaints originally received and it is to be expected that the action taken by the Ethics Committee will be acceptable to the majority of complainants.

The Expectations of Complainants

What many complainants fail to realize and find most difficult to comprehend is that the legal provisions contained in the Act 9202 amending the Legal Profession Practice Act 1958 are designed to give statutory powers to the Bar Council with respect to the discipline of barristers. Almost invariably they lodge their complaint in the belief that the Bar Council has the power and authority to vary a court decision. They are disappointed to learn that even when their complaint is upheld the powers of the Bar Council are limited to disciplining the barrister. I am not suggesting that anything can be done about it by the Parliament, but I do feel sorry for the members of our society, particularly those of limited means, who in all good faith write to the Bar Council, not really with the intention of having the barrister subject to some form of discipline but hoping that the "wrong" which they have suffered can be rectified by the Bar Council without the need for further legal action."

JOHN D. PURCELL

COMPUTERISED LEGAL INFORMATION RETRIEVAL SYSTEMS

The Bar's Views

In November 1980 a questionnaire was circulated to each member of the Bar. The questionnaire was drawn up by the Computer Committee at the exhortation of the Computerised Legal Information Committee (Vic.): the results were extremely useful in enabling that Committee to form its views, which now are set out in a Report submitted to the Victorian Attorney-General.

It must be appreciated that statistics can prove anything, particularly statistics gained from a survey on a subject about which most people questioned know very little. However the response to the enquiry was so good, and the results so clearly expressed, that the Computer Committee considers the Bar should have an opportunity to consider the information provided.

Some 258 replies were received: this represents roughly one-third of the practising profession. The responses were distributed evenly across the various age groups, with 31.3% of those signing the Bar Roll less than two years ago replying and 20% of those of more than 25 years call doing likewise. The greatest response (34%) came from those of between 15 and 20 years' call.

The two clearest messages from the information supplied by those responding to the questionnaire were an unabashed ignorance of computers and of the imminent revolution in data retrieval which is soon to overtake us all, and an overwhelming desire to know more about the subject. In response to the question "I do/do not understand what is meant by the term 'Computerised Legal Retrieval System' " two-fifths were prepared to admit that they did not understand the term. Given this avowed state of ignorance it was satisfying to be told by only 6% of those replying that they did not want to know more on the subject: more than 94% were interested in expanding their knowledge.

Library use and the degree of satisfaction which members felt for library facilities presented a more complex picture. Whereas 63% of those replying felt that the Supreme Court Library was Most Satisfactory or Excellent, only 18% felt the same way as regards their personal library. Yet only 10% used the Supreme Court Library once a day or more, while 88% claimed to refer to their personal library with this degree of frequency.

The answers to the hypothetical questions regarding the source of information which members of the Bar would most appreciate if such were available in full text on a screen and in printed form, if required, in their individual Chambers (i.e. as presently offered in U.S.A. and increasingly in U.K.) presented no surprises. The general opinion was that material should be prepared in the following order of priority:

Victorian	1st
Commonwealth	2nd
United Kingdom	3rd
New South Wales	4th
Other Australian States	5th

The type of material desired from such sources was expressed as follows:

Case Law	1st
Statutes	2nd
Text Books	3rd
Statutory Instruments	5th 4th
Precedents	5th

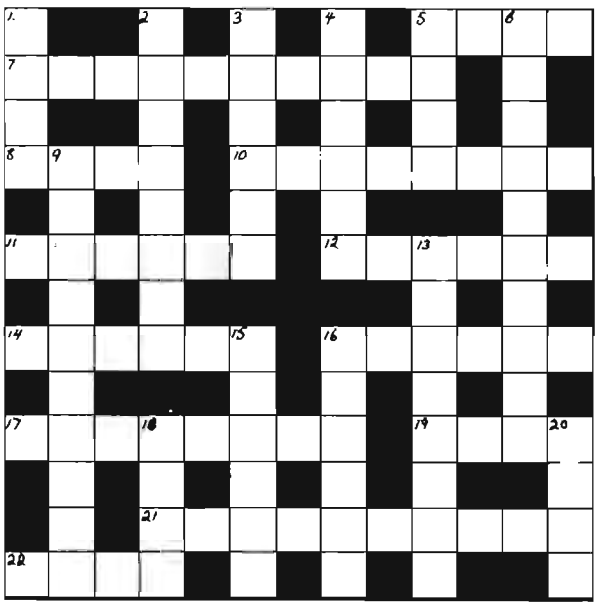
The final question dealt with the money. Each respondent was prepared to pay to obtain access to such a system. Of course some people had reservations, and others were not prepared to pay anything until they saw the operation of the equipment and knew the data which it had available. Nevertheless taking into account these caveats and being mindful of the general level of ignorance admitted by those replying, the answers were most interesting.

20% of those replying were not prepared to pay anything for a computerised retrieval system. However this percentage varied widely between the age groups: 57% of those over 25 years since signing the Bar Roll fell into this category, though only 11% of those of 15-20 years call were similarly inclined. Overall, 76% were prepared to pay up to $1,000 p.a. for such a facility; of these people some 20% were prepared to pay between $3,000 p.a. and $15,000 p.a. If the answers provided are typical of the views of the Bar as a whole, it would appear that we are, as a group, prepared to allocate $¾ million per annum to such a system.

There is no doubt that information retrieval systems for the legal profession are being developed which will be in operation in Melbourne in the course of the next few years. It is comforting to know that the Melbourne Bar will be keen to investigate any proposal and will not ignore the developments in the futile hope that they will disappear. The Bar Computer Committee thanks those colleagues who spared the time to complete the survey. Anyone who wishes to peruse the complete results is welcome to contact me at any time.

LEVIN
Chairman,
Victorian Bar Computer
Committee.

CAPTAINS CRYPTIC NO. 35



(Solution page 39)

Across:
5. Cleopatra's needles (4)
7. Inclined to kill father (10)
8. Conduct metrical examination (4)
10. As an act of latin grace (2,6)
11. Sets forth in legal form (6)
12. At rest (6)
14. Poke a play on words in India (6)
16. Vigour (6)
17. Low walls (8)
19. Combines to make Indian (4)
21. New High Chiefs (5,5)
22. De bene and essential nature (4).

Down
1. Latin work (4)
2. New High puisne (7,1)
3. Seeing the kids (6)
4. Proverbs (6)
5. First part of old latin university (4)
6. Had a wig on (10)
9. Reckons (10)
13. Alcoholic appetiser (8)
16. Attempts literary compositions (6)
18. Every change becomes a dull pain (4)
20. Dispossess (4).

YOUNG BARRISTERS' COMMITTEE

The call of counsel practising in Victoria ranges from 62 years (in one instance) to less than one month (in 23 instances). Personalities, practices, interests and needs vary almost as widely as length of call. No organ can fully mirror such diversity. But some clear profiles can be seen. One is that of the 750 counsel now practising, 420 are of, or under, 6 years' call.

The Young Barristers' Committee was established by resolution of the Victorian Bar Council on the 3rd August 1972, consequent upon Young Q.C. tabling a Report of a Committee on the structure of the Bar Council. That Committee noted the existence of an "ever increasing body of very junior counsel". In its Report it expressed the reasons for the formation of a Young Barristers' Committee as being "chiefly to improving communication between the Bar Council and the junior Bar and to increase the involvement of the junior Bar in the affairs of the Bar and the Bar Council".

Since 1972 the form and function of the Young Barristers' Committee have evolved. Its present form is that of 10 members, all being counsel of 6 years' call or less, elected for a term of two years, half of them to retire each year, together with a young barrister from the Bar Council and a Silk as Chairman. Its present function, additional to those set out above, is to represent directly the interests and needs of young barristers and to act on their behalf. It is no longer a referral agency.

Unfortunately, and for a variety of reasons, by the end of the 1970's the Young Barristers' Committee had fallen into a degree of desuetude. A number of meetings had failed for want of a quorum and at the March 1980 elections for half of the Committee, only two nominations were received.

Accordingly, I obtained the Bar Council's authority to co-opt members to fill the vacuum arising not only from the failure of the election but also if sitting members resigned. After discussions, three of the five sitting members stood aside in favour of younger counsel. In the event, seven counsel were co-opted to the Committee of ten. The co-options were directed specifically to obtaining on the Committee, members of groups hitherto unrepresented – women, members in outer chambers, counsel on certain lists and counsel from the new reader's course.

Thereafter each member was asked to go into the field to ascertain the needs and interests of young barristers. At a lengthy Sunday meeting held in May the results of those inquiries were tabled and discussed. The Chairman of the Bar Council, Berkeley Q.C. attended that meeting, listened to all submissions and spoke with characteristic vigour. His presence was a distinct encouragement and he has taken a continuing interest in the work of the Committee.

A number of working groups were then formed on the basis of the perceived interests and needs of young barristers. A brief summary of that work appears below.

Committee meetings have been held at least monthly throughout the year, and they have all been well attended and lively. They are not held in my chambers, but rotate amongst the various buildings now occupied by young barristers.

Present members of the Committee are:

Name	Clerk	Chambers	Signed Roll	
Peter McGuiness	M	ODC	1976	retiring 1981
David Curtain	B	FC	1976	retiring 1981
Bill Stuart	B	Tait	1978	retiring 1981
Nick Robinson	H	Tait	1978	retiring 1981
Gerard Maguire	F	Equity	1980	retiring 1981

Margaret Rizkalla	W	Tait	1976	retires 1982
Alan McDonald	S	LC	1978	retires 1982
Sally Brown	W	FC	1978	retires 1982
Beverley Vaughan	M	ODC	1980	retires 1982
Kiki Politis	W	FC	1980	retires 1982

John Bannister is the Bar Council representative on the Committee, and Philip Kennon, as Bar's representative on the Law Council Young Lawyers' Committee, attends meetings as an observer.

At present the Young Barristers' Committee has five sub-committees: they are Accommodation, Courts, Fees & Clerking, Practice Advisory and Reading & Social.

The sub-committees meet regularly depending on their individual projects and workloads.

The Accommodation sub-committee has recently conducted a survey to ascertain the accommodation needs of junior counsel. Among other things, this survey has shown that there is a strong preference for suite style accommodation, and interest in sharing of facilities. When complete the results will be made available to those concerned with the provision of future accommodation.

The sub-committee on Fees & Clerking has produced a preliminary report on Computerisation of Barrister's Accounts. This report has been distributed to the Bar Council and all the List Committees. Once all the necessary statistical information is gathered this sub-committee will prepare a final report. It has also been investigating the possibility of fees for Magistrates' Courts appearances being paid within one month.

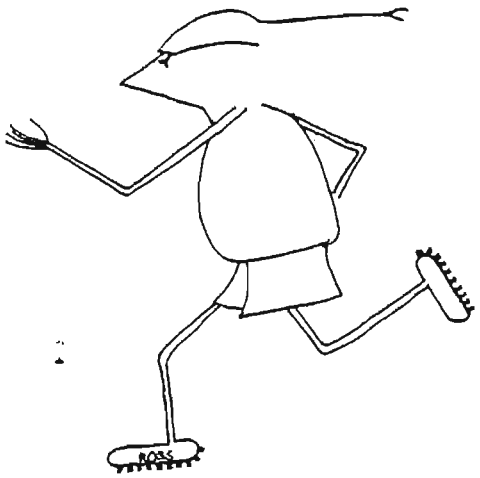
The courts sub-committee is at present involved in a continuing review of the new civil procedures in the Magistrates' Courts and investigating complaints about the lack of facilities at some of those Courts.

The Practice Advisory sub-committee is available to assist junior counsel with everyday problems (other than ethics) that they may encounter in their practice.

The Reading & Social sub-committee is concerned with the new Readers' Course and arranging an evening for junior counsel to meet in an informal atmosphere.

A number of other areas and projects have been investigated.

CUMMINS CHAIRMAN



On the 18th of December, 1980 a number of select competitors participated in the "Owen Dixon Gift" sponsored by the Eleventh Floor Professional Athletics Association. Contestants ran, and in some cases crawled, around the arduous Tan Track of the Botanical Gardens and the gift was awarded to the competitor who completed the 2.36 mile course in a time nearest to a previously nominated time. Winner Stanley managed to complete the course in the time of 15 minutes and 55 seconds, a mere 5 seconds less than his nominated time of 16 minutes. The prize for the fastest competitor was won by Boaden who recorded precisely the same time as Stanley, but was awarded the prize by the judges since Stanley already won something. The "Sir John Kerr Prize" for the participant furtherest from the mark was won by Liz Syme, Archibald's Secretary, who was permitted to leave her typewriter for 22 minutes and 6 seconds; more than 10 minutes better than her modest estimate of 33 minutes. Francis and Kennon claimed that they were only using the run as a warm up for a serious competitive effort in 1981. Some refreshments were provided after the contest and the prizes were bestowed by Fagan who made a witty speech concerning the historical significance of the occasion.

GOLVAN

THE CRIMES (TAXATION OFFENCES) ACT 1980

The Crimes (Taxation Offences) Act was enacted hastily late last year. Employing "political licence" the Treasurer, Mr. Howard, when introducing the Bill said

> "The measures in this Bill will make it an offence to be a party to, or to aid and abet, arrangements to make a company or trustee incapable of paying its tax debts . . Mr. Speaker, let us all be quite clear that this is a measure directed against calculated and fraudulent evasion of tax"

The Act in fact does far more than render illegal "calculated and fraudulent evasion of tax". As one might imagine, "calculated and fraudulent evasion of tax" was illegal long before the Crimes (Taxation Offences) Act 1980.

What are the principal provisions of the Act. It concerns sales tax and income tax. The principal provision (sections 5, 6 and 7) refer to sales tax and "future sales tax". Section 13 then provides, in effect, that a reference to sales tax or "future sales tax" in certain earlier sections shall be taken to be a reference to income tax or "future income tax".

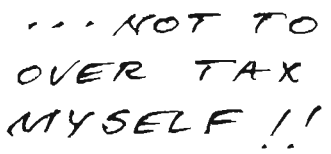
Section 5(1) provides that where a person enters into an arrangement or transaction for the purpose, or for purposes which include the purpose, of reducing, either generally or for a limited period, the capacity of a company or trustee to pay sales tax payable by the company or trustee or of securing, either generally or for a limited period, that a company or trustee will be unable, or will be likely to be unable, to pay sales tax payable by the company or trustee that person is guilty of an offence. Section 5(2) deals similarly with "future sales tax". "Future sales tax" means broadly, sales tax that may "reasonably be expected to become payable . Section 6 provides that a person who "directly or indirectly aids, abets, counsels or procures" another person to enter into an arrangement or transaction or "who is, in any way, by act or omission, directly or indirectly concerned in or party to, the entry by another person" into an arrangement or transaction knowing or believing that the arrangement or transaction is being entered into for a purpose referred to in section 5 is guilty of an offence.Section 7 provides that if a person enters into an arrangement or transaction or aids or abets, etc. or is concerned in or party to an arrangement or transaction knowing or believing it is or likely to reduce anothers capacity or to secure that another is or will be less likely to be able to pay sales tax or future sales tax that person is guilty of an offence.

The penalty provided for an offence is imprisonment for a period not exceeding 5 years or a fine not exceeding $50,000 or both. Under section 10 the Crown does not have to prove the ingredients of an offence in the normal way; a certificate that tax is due and payable is conclusive evidence of the matter stated in the certificate.

Whatever else may be said of the Act, it is plain that it goes beyond being a measure directed against calculated and fraudulent evasion of tax. Calculated and fraudulent evasion of tax was already a crime: see for example, Section 231(1) of the Income Tax Assessment Act, section 86(1) of the Crimes Act (Cth.) and section 124 of the Companies Act. By any standard, proof of an element of a serious crime by production of a certificate which is "conclusive evidence" is oppressive.

What does the Act mean for members of the Bar? One hopes that the vague and sweeping terms of the Act will not be construed to make it an offence to merely advise a client of his rights. Probably, the Act is designed to strike terror into the hearts of professional men and entrepreneurs who devise, arrange and promote tax minimization schemes. One might expect that counsel would not be invloved in the "promotion" of tax minimization schemes and so the Crown will not seek to apply the provisions of the Act against counsel. But, that said, the scope of the Act is broad and its meaning uncertain and the Act does not contain a provision excluding barristers from its operation.

Myers



DEBENTURE OR DISASTER –

The ABC's of accommodation for the Bar

On Monday the 16th March a general meeting of the Bar was convened to determine inter alia whether the Bar Council should be authorized to require all counsel of 12 months standing to take up a B.C. Ltd issued interest bearing debentures for $2,000. The funds so raised would be used to acquire clear the title to the A.B.C. site, to discharge existing indebtedness to the Commonwealth Trading Bank, which had provided the initial funds for the purchase by periodic Bill discounting.

When the Bar originally approved the purchase of the A.B.C. site in November 1979, it was stressed that this approval bore no relation to whether and how the A.B.C. site should be developed. Accordingly, those in favour of the resolution were at pains to emphasize that a levy of $2,000 did not necessarily mean that a similar method would be employed to finance development, if and when development is undertaken.

Unfortunately the arguments marshalled in favour of the proposal depended on the express assumption that the Bar does intend to provide large scale accommodation by developing the A.B.C. site. The justification for obtaining a clear title was stated to be

(a) to demonstrate the Bar's capacity and willingness to contribute towards the creation of large scale accommodation, and

(b) by obtaining clear title, it would be easier to attract finance for that development.
attract finance.

Thus the narrower question of whether to purchase the A.B.C. site by issuing debentures actually depending on the allegedly irrelevant issue of whether the site was to be developed at all.

Even if one accepts the necessity of having clear title before development is undertaken; there is no **immediate need** for issuing debentures to purchase the land outright prior to a determination of the manner of development of the site and the method of financing any such proposed development. Those who opposed the Special Accommodation Committee's recommendation were not necessarily opposed to the eventual development of the site, or its purchase, or, for that matter, its development or purchase by issuing debentures. Faris and Shatin both called for a deferral of the resolution on the grounds that there could be no proper decision made regarding the proposal until sufficient information dealing with alternative methods of finance and chamber accommodation allocation had been disseminated. It was suggested that such questions as, for example, whether chambers in the new building will be leased or held by strata title, should be investigated and discussed prior to obtaining clear title to the site via the debenture method of finance. If the decision was delayed for, say, 6 months, the cost to each individual barrister would be a tax-deductible $170, whereas an immediate debenture issue would involve a far greater non-deductible capital outlay before there was a demonstrated need for such expenditure.

Those who supported the resolution suggested that the time had come for the Bar to show its committment to provide large-scale accommodation for its members. Since the land would have to be paid for eventually in order to fund large construction costs, and since decisions in relation to particular aspects of development were going to be made relatively soon, the A.B.C. site had to be paid for immediately. Given the practicalities of dealing with real estate developers such arguments possess merit. If the Bar refuses to commit itself to the acquisition of a clear title developers would, it was argued, be less likely to take the Bar seriously in its endeavour to provide accommodation on the proposed site.

It was apparent from both the content and tone of some of the speeches that feelings had been quite considerably stirred. Perhaps this was due in part to a suspicion that some barristers will not receive any immediate tangible benefit for their sacrifice. The reason for this fear appears to be a valid one for many junior members of the Bar. If the A.B.C. development will accommodate, say, 450 barristers in the mid 1980's when the projected population of the Bar is approximately 1000, it is obvious that only a minority of counsel will enjoy the initial benefits. Such fears are compounded by the knowledge that allocation of leased chambers in the A.B.C. building might be based on seniority. That fear did not exist in 1959-1960 when a Bar of less than 200 contributed

$2,500 per capita for the future accommodation of a much greater number. The general meeting was accordingly assured that it would be a Bar policy to ensure a mix of junior and senior counsel in the A.B.C. building, and that the question of methods of chamber allocation remained open. One hopes that proposed differentials in leasing payments will not preclude any barrister from having an equal opportunity of gaining accommodation there.

Some of the arguments in favour of the proposal simply failed to deal with the substance of the suggestions for deferral pending the provision of further information. Waldron argued that unless the debenture was now approved, the Bar would have forfeited its last opportunity for the development of facilities for accommodation. Castan observer that the site had to be paid for, and that therefore the proposal should be approved. O'Callaghan suggested that he and his committee had spent a considerable amount of time investigating the problem, and that unless the proposal was passed, it was all a terrible waste of time. This writer was struck by the hostility directed against those who spoke in favour of deferral. It is surely no argument, when considering whether to raise $1.45 million, to allege that counsel are estopped from asking the Special Accommodation Committee for an investigation of alternatives by reason of the fact that no-one has approached the committee to date with such suggestions. Nor is it an argument to suggest that, as no speaker in favour of deferral had mentioned any specific alternative, the resolution should be approved.

An awareness of the difficulties that will probably be encountered in relation to a lack of first-class accommodation for all is in part responsible for the suggestion that counsel should be able to realise a capital appreciation based on the proprietary value of their chambers. Whether this is based on strata titling or a shares purchase, such an approach has the disadvantage of emulating the New South Wales experience, and would dramatically increase the cost of entry to the Bar. At the very least, the proposal has the merit of not requiring one section of the Bar to subsidize vast benefits conferred on another. Now that we are all to contribute $2,000 for debentures, the practical viability of strata titling or similar arrangements remains to be seen.

After 90 minutes of frequently heated debate, the reult of the vote was 113 to 110 in favour of the resolution. Obviously there was a fundamental division of opinion concerning the appropriateness of a debenture payment in the absence of any alternative proposals. Even more important, it was apparent that most of the "juniors" (i.e. barristers of less than, say, 4-5 years standing) voted against the resolution, whereas most of the senior bar present were in favour. Given that a proportionately higher number of juniors than seniors were absent, it appears to follow that the concerns of the juniors in fact present are not shared by the majority of their contemporaries. The more likely explanation is that the efforts to mobilize the junior bar were simply inadequate to the enormity of the task.

If the Bar is committed to being its own landlord, and if it is also committed to preventing barristers from directly benefiting from any increase in the capital value of "their" chambers, it is logical to predict that the development of the A.B.C. site will be approved. Such development will in all likelihood be funded by debentures. The effect of debenture funding will probably be to slow down if not stop the growth rate of the Bar. Much the same consequence would be expected if all or most barristers were required to purchase their chambers, or provide key money. On the other hand, the enormous cost of the development might well persuade the Bar that it cannot afford to retain its commitment to landlord status without allowing some form of ownership of individual sets of chambers. Such a compromise may well result in the development being partly financed by debentures and partly by capital appreciating shares or strata title purchases. In either event it is likely that there will be ample accommodation in either the A.B.C. building or a refurbished Owen Dixon Chambers for all barristers who can afford the high costs involved. So long as the Bar is determined to be seen as a landlord rather than a tenant, inexpensive accommodation will cease to exist, and the effect on the junior Bar will be drastic.

This writer's final comment concerns a puzzling feature of the presentation of the Faris-Dessau motion. It was obvious from Faris's speech that his motion was not contingent on prior approval by the Bar of the debenture issue. Rather, the motion was directed towards a deferral of the special accommodation committee proposal, and sought further investigation before consideration of that proposal by the Bar. One wonders whether the error in the circular dated 10th March, 1981, was partially responsible for the ultimate approval of the committee resolution by the General Meeting.

BRENNER

COUNSEL AT RISK

A person who suffers any loss or sustains any injury in circumstances which he believes were caused by or due to the action of another party expects the law to afford him appropriate legal redress.

This is a natural phenomenon and solicitors and barristers are normally only involved as professional advisers in obtaining appropriate redress

However should the legal adviser entrusted with the enforcement of a person's rights in any way jeopardise his client's claim for redress then the legal adviser, whether he be barrister or solicitor, may find himself personally liable to the client for any loss suffered as a result of any professional neglect.

I am not concerned to embark on a treatise of the law or the authorities dealing with the subject of professional accountability on which members of the Bar are no doubt informed.

My concern as Director of Law Claims is to persuade solicitors that generally speaking the majority if not all "professional accidents" need not happen and can be avoided.

The solicitor, who is in direct contact with the public in a great number of varying situations, is in the front line as it were and thus more vulnerable than Counsel who is so often behind the scenes and, as well, currently enjoys certain qualifications on his liability not available to a solicitor. Generally speaking, in the end it is the combination of the individual resources possessed by the two branches of the profession which is responsible for the service which is ultimately obtained by the client. The quality of that service will determine whether or not a claim for professional negligence is likely to arise.

Just as the solicitor can falter through lack of diary entries, delay and neglect and wrong advice which cannot be excused by a plea of error of judgement in the context of both litigation work and non-litigation matters, so is Counsel at risk, particularly when his instructing solicitor may well be "lost" and "clearly out of his depth".

If for example the solicitor falters at the most common obstacle, the Statute of Limitations, depending on the circumstances, Counsel may also become involved.

WHY RISK INVOLVEMENT when by merely bringing to the attention of your instructing solicitor the essential requirements in any particular circumstances which come before you it can be avoided?

Why not adopt a standard procedure in relation to Statutory provisions by always drawing them to the attention of the solicitor even if you are aware of the expertise of a particular solicitor or firm? There are also some particularly dangerous short periods where both solicitor and Counsel can come to grief. Notice of Appeal prepared and delivered within time pending further instructions or legal aid is preferable to applying to the Court out of time and relying on any discretion that may be vested in a Court. I can assure Counsel that all solicitors would gratefully accept any reminders from Counsel and particularly where the work is being handled by less experienced staff

Often instructions or lack of instructions received by Counsel reveal a solicitor's total ignorance or lack of expertise on a particular subject matter and Counsel has before him a scenario which may lead to inevitable disaster unless he is prepared to intervene and assist.

Why risk being involved in proceedings by an aggrieved client when a short note whether returning completed papers or where you require further instructions, such problems can be averted. Counsel is also aware when returning pleadings, advice and briefs after a conference with a client that there are matters requiring prompt attention and guidance for a solicitor from Counsel at that stage is essential. A timely reminder will protect both the solicitor and Counsel, and particularly Counsel, should the solicitor despite the warning fail to follow up the advice given.

From my point of view I confess that my prime function is to help and protect the solicitors in the profession, and Counsel may question why I should concern myself with the Bar. Clearly the relationship between solicitor and Counsel being a close working relationship any preventative measures taken by Counsel must be for their mutual benefit and protection.

I conclude by posing some questions:-

- What practice do you follow in recording briefs received in your Chambers?

- How do you classify your work in terms of when it is to receive your attention?
- How often do you audit your inactive briefs or instructions? You may be sitting on a "time" bomb.
- Do you defer work on a brief simply because you and your solicitor are awaiting confirmation of the grant of legal aid to the client? "Time waits for no man" and certainly least of all the Legal Aid Committee.
- Do you check the final engrossment of pleadings, opinions, memoranda and other material with your brief instructions? Are the persons named as parties the proper parties?
- Are you cautious with non-Victorian jurisdictions? Statutes of Limitations and times for Notices for claims, appointment of Nominal Defendants, etc. vary from State to State.
- Do you sign up clients on settlement terms or authority to settle?
- Do you obtain written instructions to reject an offer and proceed to trial?
- Do you insist on an interpreter if you have any doubts as to the client's ability to understand the English language?
- Do you accept briefs in jurisdictions in which you have no expertise?
- Do you as Counsel decide to wait for so-called magical "stabilisation of injuries" in personal injury claims before deciding on the jurisdiction? Be positive, make a judgement on jurisdiction on the material presently before you. The rules of Court enable you to move either up or down at a later date as required. Otherwise, the delay arising can later prove fatal if problems arise as to the correct identification of parties and attempts at service of process and other associated problems.

The above questions are not exhaustive of the problems and the answers are obvious certainly, but in practice do you heed the warnings implied?

Perhaps one last question: Do you hold adequate professional indemnity insurance cover?

GRAHAM FULLER
Director,
Law Claims

GIFTS TO BAR LIBRARY

In December 1980 the Bar Council acknowledged the generous gift by Gifford Q.C. to the Library of –

The Australian Local Government Dictionary
Local Government Law and Practice (3rd ed.)
Legal Profession Practice in Victoria
Council Meetings Law and Procedure in South Australia
West Australian Council Meetings Handbook (3rd ed.)
Western Australian Local Government Handbook (2nd ed.)

The books are all part of the remarkably prolific output of the donor. In his letter to the Bar Council enclosing the gift, Gifford had this to say:

"I hope that we will see a tradition that every member or the Bar who writes a book provides the Bar with a copy so that, over the years, the Bar will have a permanent record of what is part of its history.

It is not unlikely that members of the Bar who have written books in the past still have a copy that they could donate to the Bar to help retrieve some of our past history. Many of those authors are now judges, so that there is a very real importance to abtaining copies of their works in the interests of the history and tradition of the Bar. I have retained one copy of each of the previous editions of my books and, if others are prepared to donate a copy of their books, I will do the same with mine.

Some members of the Bar may also have old editions in their shelves which, although of no value to them now, would be of value from the viewpoint of preserving our history as a Bar. In this I include not only textbooks, the books of general legal interest such as those written by Master Jacobs' father, such as his books on famous Australian trials."

LAWYERS BOOKSHELF

"Police in Victoria 1836-1980" – compiled by the Victorian Police Management Services Bureau (Victorian Government Printer - $4)

Introduced by Mr. Lindsay Thompson, Minister for Police and Emergency Services, this book is said to be "informative and interesting". In the Foreword, the Chief Commissioner of Police Mr. Sinclair Imrie ("Mick") Miller declares it to be an "official short history of the Victoria Police Force", the like of which "has not been undertaken previously". One looked forward, therefore, to a short but incisive and critical review of the history of the Victoria Police Force. One was likely, however, to be disappointed; for this book although short is neither incisive nor critical.

In the main well illustrated, the book commences well. It tells of the first three police in Victoria, who were dismissed for being "repeatedly drunk", "repeatedly absent from duty" and for "taking a bribe from a prisoner".Instead of an investigation of the environmental and social factors of the day (1836) that may have caused such conduct, the book contents itself with the glib assertion that such conduct is "a far cry from the efficient and well-trained force that we know today". The book recounts that "as the police received 2/6d. for every drunkard arrested, it was said that oftentimes they would strike persons over the head with their batons, and then say the persons concerned were drunk and lock them up", and then notes that the Chief Constable under whose command such behaviour took place served on "for several years and resigned un-impeached".

Chapter 2 reveals for the first time the unstated Police attitude that the opinion of a policeman is clearer and more true to reality than that of a judge and jury. We learn that the Eureka Stockade, in all its transitory glory, was an "armed insurrection", a "revolt", and a "rebellion". After such events, of course "a number of miners were charged with high treason", but sadly "were acquitted at subsequent court proceedings". No mention is made of their innocence, presumed at all times and confirmed by the jury, but only of their "acquittal" after their "rebellion".

In the catalogue of Chief Commissioners from 1853 to 1980, we learn that promotion by merit with which Brigadier-General Blamey (Commissioner from 1/9/1925 to 6/2/1937) experimented was to the "chagrin of some members". We also learn that Blamey's resignation, brought on by a Royal Commission into (inter alia) his suppression of truth concerning a shooting involving a policeman, was really because "his only crime was a desire to preserve the reputation of his Force".

The book is not devoid of humour, and in Chapter 3 we learn of the restrictive and no doubt oftentimes inconvenient Police Regulations of 1856, which stated that "No member of the foot police is to be mounted, nor is any mounted constable to be dismounted, without authority from the Chief Commissioner". In the days before telephone this regulation must have made life very difficult for policemen beyond 1 day's ride of Melbourne.

At page 35, above the caption "Mounted police apprehending a streaker at Flemington Racecourse, Victoria, Melbourne Cup Day 1975", reproduced opposite, we see the enthusiasm with which some police officers perform their duty.

In Chapter 4, we learn that English civil libertarians opposed as spies the establishment of a detective force in their country, and that it was not until 1842 that a "token group of detectives was appointed". We are told with surprising candour that "in contrast . . . the Victoria Police readily embarked upon an active detective system", and that there was at one time "in the case of several detective officers, a most suspicious suddenness in getting rich". Notwithstanding that, the glib assertions spring quickly to the fore, and we are conforted that most criticism of Victorian detectives over the years has been "false and unsubstantiated".

The chapters on Women Police and the Wireless Patrol are interesting in respect of their subject matter. In Chapter 7, "The Police Strike",we learn that the Victorian Police Association was formed in 1917, and then made "unified demands on behalf of its members" for their "legitimate and reasonable" grievances. Despite this, the book implies that the strike in 1923 is a "sad indictment of successive government" and asserts that the Association was not a "proposer organiser or supporter" of it.

The work concludes with chapters on Traffic Police, Fingerprints and Forensic Science, Police Communications and Modern Police Operations, which are of some interest. Perhaps the tone of this book is best summed up, however, for all its Public Relations-type prose and confident pro-police assertions, by the five lines to which it reduces the Beach Report:

> "All was not plain sailing for the Force under Mr. Jackson and on 18 March 1975 Barry Watson Beach Q.C. was directed by Order in Council to inquire into allegations against certain members of the Force. Though this enquiry brought forth some criticism of the Force, public esteem was still high and on 31st May 1976, a public ceremony was held at the Melbourne Town Hall during which the Lord Mayor of Melbourne presented Chief Commissioner Jackson with a scroll of commendation. The scroll was in appreciation of 123 years of service to the City of Melbourne by the Victoria Police."

Those who enjoy reading advertising brochures will enjoy this book. Those who want to read an incisive and critical history of the Victoria Police Force will not.

Photo Courtesy of The Age

LAWYERS BOOKSHELF

Victorian Criminal Procedure 3rd ed. 1981 by Richard G. Fox Monash Law Book Co-operative Limited, Faculty of Law Monash University, Clayton 3168. $5.70 plus $1.30 postage and packing.

Richard Fox is a noted researcher of the criminal law. He has just written a third edition of his Criminal Procedure.

The format and style of the earlier editions is retained. It is essentially a set of notes. Its advantage and disadvantage arises from its brevity — 123 foolscap pages. But it is ,as one would expect from Mr. Fox, well referenced. With only a few exceptions the relevant statutes and cases are included.

He has made the hard decision of referring to 1980 Bills. Their subsequent enactment and proclamation is a reward deserved by someone who chances his arm in this way.

There are three cases omissions which a reader should note:

p. 18 R. v. Marshall (Unreported C.C.A. Dec. 18 1980 noted in this issue p. 30) on the propriety of a trial judge indicating a likely sentence.

p. 81. Wong Kam Ming (1979) 2 W.L.R. 81 on cross-examination of an accused on the voir dire.

p.83. R. v. Perceval & Gordon (Unreported C.C.A. December 19, 1978) on a judge vetting an unsworn statement, and what he can tell the jury about it.

The author has not included an index of cases and statutes. That would have made the work even more helpful.

There are no up to date texts on criminal law and procedure in Victoria. This work gives a brief, informative and hard working overview of the procedure. Even if there were other texts about, it would be valuable enough. Because there are no other works it is invaluable.

In a review of an earlier edition (Bar News Spring 1979 p. 37) we highly recommended the work. We would go further with this edition and say that it is a booklet which all counsel practising in the criminal jurisdiction should have.

SOME FORTHCOMING CONFERENCES

Australian Mining and Petroleum Law Association

Will hold its 1981 conference at the Hilton Hotel Melbourne from 4th June to 6th June.

Enquiries to: Mrs. A.M. Derham
The Broken Hill Proprietary Company Ltd.,
Box 86A G.P.O. Melbourne.

IBA Conference on Middle Eastern Law

This conference is held in Hamburg, Germany from 1st to 4th July.

Topics include Corporation Law, Joint Ventures Contracts and Commercial Law.

IBA Forum London

This conference will examine the convenience and effectiveness of London as a forum for the resolution of international disputes. It will be held in London from 23rd to 26th September.

IBA Business Law Conference

This biennial meeting of the Business Law section of the IBA is to be held in Budapest from 28th September to 2nd October.
Enquiries for IBA Conferences to:
International Bar Asssociation
Byron House
7/9 St. James's Street,
LONDON SW1A IEE U.K.

MISLEADING CASE NOTE No. 13

John Proprietary Limited v. Smith

The Full Court said: This is an appeal from a decision of Furphy J., dismissing an application for an interlocutory injunction. The plaintiff, John Proprietary Limited, was born John Phillip Smith; but due to a typing error at the Registry Office was entered in the records of the State of Victoria as John Proprietary Smith, shortly after his birth. In due course he grew up, was married, fell in love and obtained a divorce from the defendant, his first wife. She also, in due course, obtained from the local Magistrates' Court a handsome award of maintenance against him. It was that award which he sought by various devices and schemes to nullify, and which led him penultimately before Furphy J.

Musing, as we understand it, upon the middle name which some slapdash clerk had thrust upon him, the plaintiff thought to put that twist of fate to some good use. Changing, with the approval of the woman for whose benefit he sought to have his first wife's maintenance order set aside, his surname from Smith to Limited posed no problems. The plaintiff executed a deed poll, paid the appropriate stamp duty, and lodged that deed with the Registrar. His application for the incorporation of a company of the same name as himself, namely John Pty. Ltd., was granted by the Commissioner of Corporate Affairs promptly upon payment of the appropriate fees. Selling all of his assets, including himself, to the newly formed company pursuant to the laws of Baphutosland (which independent nation in southern Africa permits such transactions), the plaintiff thus became a wholly owned subsidiary of his new company. The shares in that company were then completely acquired by a Swiss trading company of which the plaintiff was a director. The plaintiff held certain preference shares in the Swiss company, but at no time did he have control over that company. Control over the Swiss company remained with a number of Bahaman, Liechtensteiner and Liberian companies, each of which held small parcels of ordinary shares in the plaintiff.

The plaintiff commenced this action, for a declaration that he could not be compelled to pay maintenance to his wife, in the belief that he had finally removed his assets from the clutches of his ex-wife and of the Family Court. His application for an interlocutory injunction to prevent her taking default proceedings came on before Furphy J. Sadly for the plaintiff, Furphy J. declared the whole arrangement to be a "sham" and "not authorized by the United Nations Select Committee on Commercial Transactions", and dismissed his application. It is from that decision that the plaintiff appeals to this Court.

At first glance, it might seem to a lay observer that the plaintiff's arrangement is a sham. Changing his name, incorporating a company with the same name, acquiring himself as an asset, and then allowing control of that company (and thus of himself) to be acquired by a consortium of foreign companies (each of which he may have an interest in), seems an extraordinary type of arrangement. It is not for this court, however, to pass judgement upon the methods lawfully by which men of business order their affairs. None of the steps in the making of this arrangement were illegal according to the laws of the places where such steps were carried out. We note that the State of Victoria, although it sought leave to intervene here to support the jurisdiction of the Family Court to enforce its orders, made no such moral judgements when it accepted the various duties and fees which the plaintiff paid it to carry out those steps of his arrangement which he took in that State.

The question is whether the plaintiff can of his own power give money by way of maintenance to the defendant. In our view he does not have that power, which resides with that consortium of foreign companies which owns him, and he cannot therefore lawfully be required to give money to his ex-wife.

Accordingly, the appeal will be allowed. Subject to the usual undertaking as to damages, we will grant the relief sought.

GUNST

HIGH COURT CHANGES

The first "ceremonials" to be held in the new High Court building in Canberra took place on 11th and 12th February, 1981, with special sittings to mark the retirement of the former Chief Justice Sir Garfield Barwick, and the swearing in of Sir Harry Gibbs as Chief Justice and Mr. Justice Brennan as a Justice of the High Court.

Wilson J. Murphy J. Stephen J.

SIR HARRY GIBBS spent his boyhood in Ipswich in Queensland, the same town from which the first Chief Justice of the Court, Sir Samuel Griffith, had come. In due course his practice at the Queensland Bar developed to a stage where the complaint made about his appointment to the Supreme Court of Queensland in 1961 was that His Honour's talents were needed more at the Bar than at the Bench.

Six years later His Honour was appointed to the Federal Court of Bankruptcy and served on that Court between 1967 and 1970. In those years a generation of the junior and often fairly untutored members of the Victorian Bar who appeared in that jurisdiction at that time came to know His Honour as a kindly and learned mentor, regularly seen in Melbourne.

Sir Harry Gibbs has now become Chief Justice of Australia after serving nearly 11 years as a Justice of that Court. He has earned the great respect of all those who either practise in or follow the course of decisions of the High Court.

As Berkeley Q.C. pointed out in his welcoming address on behalf of the Australian Bar Association, Sir Harry has now secured for himself, as a result of amendments to the Constitution, a term of years in substitution for a life sentence.

MR. JUSTICE BRENNAN was educated in Rockhampton and Toowoomba in Queensland and, during his years at the Queensland University, was active in student affairs. In 1949 he became the President of the National Union of Australian University Students. After graduating His Honour worked for some time on the staff of Canberra University and as an Associate to Mr. Justice Townley of the Supreme Court of Queensland before he commenced practice at the Bar in 1951. His Honour took Silk in 1965, was the Vice President and President of the Queensland Bar Association and President of the Australian Bar Association in 1975 and 1976. While in practice at the Bar, and in his role as a representative of the Queensland Bar on the Law Council of Australia, Mr. Justice Brennan was a consistent supporter of the rights of the under-privileged in such areas as legal aid and civil liberties. He achieved a victory for Fijiian landholders for whom he appeared in that jurisdiction, and made submissions on behalf of the Northern Lands Council to the Royal Commission on Aboriginal Land Rights conducted by Mr. Justice Woodward. In 1975 His Honour was appointed as a part time member of the Australian Law Reform Commission and in 1976, was appointed a Judge of the Australian Industrial Court and became the first President of the Administrative Appeals Tribunal. In the latter capacity His Honour established the operations of the tribunal, and began administering the new Act. He later became President of the newly formed Administrative Review Council. His Honour's work in the field of administrative appeals was instrumental in the setting up of the machinery which enabled the new jurisdiction to operate. In the first report of the Administrative Review Council in 1977 His Honour wrote of the jurisdiction –

> "It concerns the balance between the interests of the citizen and the Government - a balance which is critical to free society."

Photo By courtesy of the Marshall, High Court of Australia

Gibbs C.J. Mason J. Aickin J. Brennan J.

Since 1979 Mr. Justice Brennan has sat as a Judge of the Federal Court of Australia and of the Supreme Court of the Australian Capital Territory and has earned the deep respect of those Counsel at the Victorian Bar who have had the privilege of appearing before him.

On 10th March, 1981 it was announced that His Honour had been knighted.

The appointment of Sir Gerard Brennan to the High Court adds a fresh and welcome voice to a new High Court, whose judgements will be awaited with interest.

HIGH COURT OF AUSTRALIA

PENNANT HILLS RESTAURANT PTY. LTD. v. BARRELL INSURANCES PTY.LTD

FEBRUARY 10,1981

An employee of Pennant Hills Restaurants Pty. Ltd. was rendered paraplegic in compensible circumstances. The employer found itself uninsured in consequence of the negligence of Barrell Insurances Pty. Ltd. The relevant Statute provided that the periodic payments were subject to biennial variations so as to accord with changes in a particular Commonwealth statistical index. The employer's liability to the statutory fund was likewise subject to periodic variations during the lifetime of the employee.

The employer, Pennant Hills Restaurant Pty. Ltd. sued the Defendent for damages being that sum which would put it in the same position as if it did not have to meet the said periodic payments, and it was the assessment of these damages which came for consideration before the Full High Court. The Court was dramatically divided in a judgment likely to be of enormous consequence in personal injury cases.

Barwick C.J. said that although this was not a case for the assessment for compensation for personal injuries such as dealt with in **O'Brien v. McKean** (118) CLR 540, he agreed with Mason J. as to the effect of that case, and of the House of Lords' decision in **Lim Poh Choo v. Caamden and Islington Area Health Authority** (1980) AC 174. But he still held to the view that he expressed in O'Brien's case that future changes in the value of money ought not to be reflected in the assessment of damages for tortious breaches. The fact that, in the present case, future payments of compensation had to be indexed, meant that these payments would probably increase. But the Plaintiff must establish this rate of interest by evidence and not by speculation. Likewise, because of difficulties of proof, he would not attempt to reflect in the assessment of damages income tax which might be attracted by the investment of the capital sum involved.

On the question of the rate of discount to be applied to determine the value of present damages for future loss, the Chief Justice rejected the idea of using current interest rates. He also rejected the idea of endeavouring to work out a "real" rate of interest. Instead, he favoured the acceptance of an artificial rate of discount which left the successful Plaintiff room to offset the declining value of money. He fixed this at 5%.

Gibbs J. also agreed with the conclusions reached by Mason J. but made some comments of his own. The Courts, he said, should adhere to the rule established in O'Brien's case that in the assessment of damages for personal injuries no allowance should be made for inflation. It was unreasonable to expect an economist to be able to provide reliable evidence about the nature and extent of the changes of purchasing power and money projected over several decades. "Solid proof on the basis of probability" is impossible to obtain on such an issue and the only practical course is that suggested by Lord Diplock in **Mallet v. McMonagle** (1970) AC 166 at 176, that is ". . . to leave out of account the risk of further inflation, on the one hand, and the high interest rates which reflect the fear of it and capital appreciation of property and equities which are the consequence of it, on the other hand." His Honour said that there was a difference between the present case and a personal injury

case. In the latter, compensation cannot attempt to ensure that the Plaintiff will be placed for the rest of his life in the same position as if he had not sustained the injuries. In an exceptional case such as the present, the wrong suffered was purely economic It required the estimation of future wage rates, even if these did result from inflation, but there was no reliable evidence upon which a Court could act in determining what those future rates would be. This made the assessment of damages extremely difficult, and required the Court to proceed on the basis that the current rate would continue in the future, but it should take into account the indexing provisions by adopting **an exceptionally low discount rate.**

On the question of income tax, His Honour said that it could not be assumed how the Plaintiff would invest the sum. The current case differed from that of a claim for damages by a Plaintiff whose earning capacity has been lost or diminished There was no material in this case which would assist the Court in taking into account the tax that would be notionally payable on the income produced by the notionally invested fund. Accordingly, it was appropriate to adopt the expedient of fixing a discoutn rate which would take into effect, not only the indexing provisions, but also the notional tax on a notional income. His Honour adopted as this discount rate, 2%.

In a long judgment, Stephen J. analysed the background andhistory of the case and the special difficulties caused by the indexing provisions of the Statute. His Honour cited Lord Scarman in the Lim Poh Choo case to the effect that "the principle of law is that compensation should as nearly as possible put the party who has suffered in the same position as he would have been if he had not sustained the wrong" (1970) AC 187. To assume that current award rates would remain unchanged for the next 34 years is to disregard that principle. They demanded that if there were a likelihood of future changes in the purchasing power of money, the assessment of damages should reflect those changes in the sum presently awarded. His Honour added that this would also be the case where damages were to be assessed for personal injuries involving future outgoings or the loss of future earnings

His Honour then analysed the different views as reflected in the English Courts and those recently expressed in the United States and also in Canada, where it has been determined that account should be taken of the effects of future inflation in assessing damages. He then discussed the various approaches which in his view were permissible, that these were:

(a) the attempt to determine the "real" rate of interest;
(b) the "predictive" approach where evidence was led in an endeavour to predict future changes in the purchasing power of money over a long period of time;
(c) the undiscounted approach which, although contrary to the long established practice of assessing damages, had about it an element of simplicity and predictability.

His Honour ultimately opted for the undiscounted approach, and because of the exceptional nature of the case, made now allowance for income tax on the notional income for the invested damages.

Mason J. (with whom Wilson J. agreed) was of the view that a discount rate of 2% was appropriate. His Honour had difficulty in indentifying the precise principle upon which O'Brien's case was decided. But he regarded O'Brien's case as deciding that inflation should not be taken into account in assessing damages for personal injury, whether in respect of lost earning capacity or for future expenditure.

> "Whether the decision prevents the application in such cases of law discount rate equal to the interest rate appropriate to a stable currency in lieu of the high rates of interest which prevail in an era of inflation in another question which I leave for later consideration".

His Honour also said –

> "that the O'Brien principle was based n some respects on factors which have beenm falsified by our experience since 1968. First, the case for saying that there will be significant decline in the purchasing power of money over a given period in the future is very much stronger now that it was then . . . Secondly, the fact that we now live in an era of rapid inflation is in itself a reason for departing from the so called principle that the law disregards changes in the purchasing power of money. If it ever was a principle, it was very much the product of an age in which currency had a stable value in terms of purchasing power."

His Honour discussed **Mallet v. McMonagle** (supra), **Taylor v. O'Connor** (1971) AC 115, **Cookson v. Knowles** (1979) AC 556 and **Lim Poh Choo's case** (supra). He did not regard these cases as excluding the selection of an appropriate multiplier by reference to a "real" or low interest rate reflecting the rate payable in times of stable currency. Lord Scarman in **Lim Poh Choo's case** said (at page 58) "while there is wisdon in Lord Reid's comments (**Taylor v. O'Connor** at page 130) that it would be unrealistic to refuse to take inflation into account at all, the better course in the majority of cases is to disregard it." Mason J. was of the view that these remarks were directed against the specific inclusion of an allowance for inflation **in other than exceptional cases.**

His Honour held that it was speculation to endeavour to predict economic trends over the next 30 to 40 years. He favoured the calculation of damages without attempting any such projection, by applying a low discount rate, if that were appropriate to the case. He rejected the approach of the Supreme Court of Canada, and the approach of the Court of Appeal in New South Wales in **Beneke v. Franklin** (1975) 1 NSWLR 571 at 593 and 608 where it was said one should have regard to current movements in the purchasing power of money and some speculation should be made about future inflation. This was admitting through another door, the speculative assumptions which he deplored. He was then left with a question whether the selection of a discount rate should be based on rates of interest appropriate to a stable economy or on the "real" rate of interest as established by evidence of past experience. On the latter the Court had not had the benefit of evidence or expert opinion.

> "In this unsatisfactory situation, I would adopt a discount rate of 2% as a fair approach to the problem **raised by this case** – one which does more justice to the Plaintiff than the adoption of a 4% or 5% rate appropriate to a stable economy reflecting a moderate level of inflation. **In expressing this view I am not to be taken as saying that it should necessarily apply to all personal injury cases. I am conscious of the special nature of this case and the imperfect materials which have been made available to us.** Accordingly, subject to an examination of the question of taxation, I would apply a discount rate of 2%." (emphasis added)

For Murphy J , the ignoring of the effects of future inflation, in an award of damages for personal injury, imposed a gross injustice upon a Plaintiff, for "ridiculously low sums have been awarded for very substantial economic losses". Whilst not agreeing with any of the other judgements, His Honour, like Stephen J., would adopt a no discount approach on the grounds of simplicity and the absence of wild fluctuations in times of sudden inflation or deflation.

Aikin J. agreed with the reasons for judgment prepared and presented by Stephen J.

What therefore did the Pennant Hills case decide? One might re-echo the same concerns expressed about O'Brien's case and say "What indeed?" It is submitted that it decided –

(1) that the case itself was exceptional by virtue of the indexing provisions provisions of the Statute. These called for the application of the low discount rate of 2%.
(2) the principles stated in O'Brien's case are still applicable in claims for damages for personal injury, and future inflation is to be ignored both in claims for future services and for destruction of earning capacity.
(3) in such cases, the Court will be left with the question of deciding whether the appropriate discount rate should be based on rates of interest appropriate to a stable economy or on the real rate of interest as established by evidence of past experience. It would seem that 2% is too low and perhaps 3%, 4% or even 5% would be more appropriate to a stable economy reflecting a moderate level of inflation – per Mason J. at page 43.
(4) the incidence of taxation attracted by the income of the fund is to be taken into account.

BALFE

SROKA v. GORBAL and SCOTT

Full Court of the Supreme Court of South Australia (4 Sept. 1980)

Law Society Judgement Scheme p. 364.

Practice – Interrogatories – action for damages arising out of motor collision – In answering Plaintiff's interrogatories defendant says he is unable to answer without revisiting scene – whether oppresive or unreasonable for defendant to be required to answer.

The Plaintiff's writ alleged that he sustained injury and damage in a motor collision: and that the collision was caused by the negligence of the first defendent. The Plaintiff interrogated. The first defendent answered various of the interrogatories by saying "I am unable to say without returning to the scene which I am not required to do."

A summons to compel further and better answers was taken out. The Master referred the matter to the Full Court.

Held: the defendant was required to answer the interrogatories unless he showed oppression or unreasonableness.

Matheson, J (delivering the leading judgement)
His Honour set out the facts, then reviewed the authorities on the requirement to answer interrogatories, on oppression and on unreasonableness, and in particular

Langdon v. Viola 13 S.A.S.R 296

Parker v. Wells (1881) 18 Ch. D 477

American Flange v. Rheem (No.2) 1965 N.S.W. R 193

Looker v Murphy (1889) 15 V.L.R 348

His Honour continued (at p.369)

"I do not regard any of the authorities as fatal to the relevant interrogatories in the case at bar. The defendant now lives at Maslins Beach, whereas at the time of the issue of the writ he lived at Royal Park. The accident was at Seaton No doubt answering these interrogatories will involve some time and labour, but this does not necessarily make them oppresive. I agree with Deputy Master Teesdale-Smith that a defendant would not be justified in saying that he is not required to revisit the scene of the accident if, in fact, the accident happened outside his front door. On the other hand, however, he may be justified in maintaining his stand if he was required to journey to say, Port Lincoln."

"In most, but perhaps not all cases, any hardship could be met on payment of travelling expenses, loss of earnings or other appropriate disbursements. Where in the particular circumstances such expenses or losses will reasonably be incurred, the person interrogated should set out in an affidavit his circumstances, including the reasons why, if it be the case, he thinks that to answer the interrogatory would be oppressive or unreasonable. When the summons of the person interrogating comes on for further hearing, it would be for the Master to rule on what is reasonable in the circumstances and whether the points made by the person interrogated can be met by the imposition of terms. Such terms should then be ordered as a condition for an order requiring the interrogatories to be answered."

"Such a situation is not unlike that expressly provided for in the Supreme Court Rules in relation to medical examinations or the attendance of witnesses. If it is unreasonable to expect the person interrogated to return to the scene of the accident because of the distance to be travelled, or there are are other relevant personal circumstances that cannot be met by terms, the Court would ordinarily disallow the interrogatory."

"In all the circumstances, the answer I propose is that the defendant should be required to answer each of the interrogatories referred to there in unless he files a further affidavit within fourteen days setting out the grounds of the alleged oppression or unreasonableness. I would expect that the application would then come on for further hearing before the Deputy Master who would then decide what, if any, terms could meet the objection and make his ruling in the light of the reasons of this Court."

SUPREME COURT OF VICTORIA

R. v. MARSHALL

FULL COURT

YOUNG, C.J.,

Mc INERNEY AND Mc GARVIE, J.J.

DECEMBER 18, 1980

In the last edition of Bar News (Summer 1980, p.18) we referred to Marshall's case. Argument had been invited by the Court on the propriety and desirability of a judge indicating what a sentence might be on a plea of guilty.

Judgment was handed down after we went to press.

Marshall had been presented in the County Court on one count of rape. The offence arose out of the "Heidelberg Rapes". The applicant was currently undergoing sentence after protracted committal proceedings and thirteen previous Court appearances relating to his participation in the rapes

The Bargain

Before a jury was struck, his Counsel, in open court, sought the Trial Judge's assistance on a possible plea to rape with mitigating circumstances pursuant to s.44(4) Crimes Act 1958. The following dialogue took place:–

Counsel:	. . . .the whole basis of the application to Your Honour for guidance is that my client would be anxious to know what sort of period he would be looking at. . .
His Honour:	Well, I would say that it would be no more than an extra 18 months or 2 years
Counsel:	Would that be the maximum or the minimum?
His Honour:	No, the additional time he would be confined in gaol. . . I cannot say anymore than that, because I haven't heard the plea. I do not know what the full force is or what can be said on his behalf, but if it were a Plea to rape with mitigating circumstances, I would say perhaps he would be looking forward to a further 18 months of imprisonment – something like that.

The Sentence

Following a short adjournment, the applicant was arraigned on a charge of rape with mitigating circumstances, which was accepted by the Crown. Subsequently a plea in mitigation was made on behalf of the applicant. After hearing the plea, His Honour said:–

"His Honour:	Well, supposing I were to sentence him to 4 year imprisonment, fix a minimum of 2 years and 9 months, and make 12 months of the sentence concurrent with the sentence that he is at present undergoing – that would leave him with, not taking the minimum, one year, 9 months, with remissions for good behaviour which, I assume, will normally be taken into account. He would spend a little over a year longer and would be released sometime in March or April of 1982.
Counsel:	Yes, Your Honour. I would have only really been arguing about months, and ----------"

The applicant was then sentenced to a term of 4 years imprisonment with a minimum term of 2 years and 9 months being fixed. His Honour directed that 12 months of that sentence be served concurrently with the sentence presently undergoing. The total effective minimum increase in the time to be served by the applicant was 1 year 9 months.

Grounds of Appeal

The applicant sought leave to appeal on the grounds that the sentence imposed on some of the other Heidelberg rapists and that the Judge had placed undue weight on the length of time the applicant would be likely to be confined after deducting remissions.

Although no reliance was placed on what had occured prior to arraignment, Counsel for the applicant indicated that the applicant had understood the Judge to be referring to the principal, or head, sentence, rather than the effective term to be served.

The Court of Criminal Appeal of its own motion raised the question whether there was any objection to what had been done and the application was adjourned to be fully argued

Judgment

The Court of Criminal Appeal in a joint judgment limited itself to a consideration of the aspect of judicial participation in sentence negotiation, and canvassed a range of principles fundamental to the administration of justice

These principles fall into the following broad categories:–

(a) the visibility of the judicial process:
(b) the impartial administration of the Criminal Law:
(c) the effect of any indication so given by a Judge.

(A) The visibility of the judicial process:-

(i) Discussions between Judge and Counsel in private

The Court had this to say

> "We do not know that such discussions are common in Victoria but we are clearly of the opinion that any such discussions should not take place. Anything which suggests an arrangement in private between a Judge and Counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely, the accused, it is embarrassing to the Crown and puts the Judge in a false position which can only serve to weaken public confidence in the administration of justice" (15).

> "But there is a positive fundamental principle to which, in our opinion, the process runs counter. That is the principle that the judgement of the court is delivered only after the Court has heard at a hearing at which members of the public are present, or entitled to be present all that both parties before it wish to place before it. To allow this principle to yield to an expedient for clearing the lists, is to clear the lists at too great a price " (20).

(ii) **Discussions in Public:-**

> "The procedure adopted in the present case would, if it became common, rapidly lead to a belief and perhaps more than a belief that an accused pleading guilty will receive a lesser sentence than one who defends himself by pleading not guilty. We have already pointed out that this is a fundamental error. (R. v. Grey (1977) V.R. 225; R. v. Richmond (1920) V.L.R. 9). Further, if the procedure became hardened into a practice, and the Judge in a given case indicated that on a plea of guilty that he might impose, say, a term of 4 years' imprisonment, it seems likely that sooner or later public negotiations for a lesser sentence would occur. Not only might such negotiations be thought to be inconsistent with the integrity of the Court; they would be thoroughly unseemly in the administration of justice If an accused thought that the sentence indicated by the Judge as likely

was unacceptable, the arraignment would have to be postponed, or the trial would have to proceed in an incorrect atmosphere. The integrity of the Court is of the greatest importance to public confidence in the administration of justice In the end, the successful administration of justice, depends to a considerable extent upon public confidence in it, and it is thus vital that the confidence be maintained

"There is the further danger, as occured in the present case, of a misunderstanding by the accused as to what is being indicated. The applicant, we were told, thought that the Trial Judge was indicating the maximum sentence His Honour might impose, and although there is no justification in the transcript for the accused forming such a belief, it is an embarrassment in the administration of justice that such a misunderstanding should have arisen. It is not an embarrassment of significance in the present case, but it could be in another case, there would be little that this Court could do to resolve the question. That is to say, there is no means by which this Court could conveniently discover whether an applicant before it was genuinely the victim of misunderstanding." (18)

"If it's a bargain you want, go to the Market Court."

(B) The impartial administration of the Criminal Law.

"In the present case, of course, nothing took place in private. There was nothing involved which could be described as a bargain, except in a colloquial sense. Moreover, everything was done in public and this removed certain of the objections applicable to an indication of the likely sentence given by a Judge in private. Nothing would be more likely to undermine public confidence in the administration of justice than the knowledge that it was possible to "negotiate" with the Court in private as to the sentence to be imposed. It will be worse still if the public came to believe that a lesser sentence would be imposed merely because a plea of guilty was entered rather than upon conviction after a plea of not guilty. (See R. v. Grey (Supra)). Further, in considering what sentence to pass, a Judge is not entitled to impose a heavier sentence that he otherwise would because of the

accused's sworn evidence was not being accepted by the jury (R. v. Richmond (Supra)). If negotiations in private became common, it would, to borrow a phrase used by Barwick, C.J. in the course of the argument in Bruce's case (Unreported Full Court of the High Court Judgement 19 December 1975), be "clearing the lists at too great a price" But the objections to negotiations concerning the likely sentence are not confined to negotiations which take place in private They include objections that are also available in the present case

If a Judge is asked to give an indication of the sentence which is likely to be imposed following a plea of guilty, he is likely to feel inhibited from subsequently passing a more severe sentence. If he succumbed to the inhibition, he would fail to pass the appropriate sentence. If he did pass a sentence more severe that he had previously indicated, the accused would undoubtely, and in most cases with justification, harbour a feeling of injustice. He would, in the colloquial sense, have got more than he bargained for Moreover, notwithstanding that the course taken could not preclude an appeal by the Attorney-General, an accused person who received from this Court after an appeal a sentence greated or more severe than that previously indicated, as Bruce did, would also be justified in feeling that he had been unjustly treated."

(C) The effect of indications given:-

"We now turn to explain why we do not find it necessary to discuss the English cases in detail, and why in particular we do not propose to consider the rules laid down in R. v. Turner (1970) 2 Q.B. 321. The reason is simply that there is a very important difference in the procedure for administration of the criminal law in England and Victoria. In Victoria the Crown has a right of appeal against a sentence imposed if the Attorney-General considers that a different sentence should have been passed and is satisfied that an appeal should be brought in the public interest; Crimes Act s. 567A. No such right exists in England Thus, if a judge were asked before arraignment to give an indication of a sentence likely to be imposed, the Crown might by its silence give the impression of being content with the indication and yet appeal as soon as the indicated sentence was imposed. In our opinion, such a protest would tend to weaken public confidence in the administration of justice. The prosecutor, before sentencing judges in accordance with the long tradition of the Law invariably refrains from expressing an opinion as to the sentence to be passed. The Solicitor-General explained that it is not possible from a practical point of view, even if it were desirable, to depart from the long-standing practice and authorise the Crown Prosecutor in any given case to inform the court what sentence the Crown thought appropriate. The view of the individual prosecutor would be irrelevant and no machinery exists for the submission of, as it were, an **ex officio** view Nor would it be desirable. The prosecutor should certainly assist the court by reference to relevant statutes, but we would, with the greatest respect, doubt whether the prosecutor's duty extends to assisting the court to avoid appealable error if that means to urge the court not to impose a sentence less than a specified sentence. (See R. v. Tait (1979) 24 A.L.R. 473 at 477). We should have thought that the prosecutor's duty would be discharged by ensuring that the court was apprised of the range of sentences available, and we should wish to reserve for future consideration, if it should ever arise on an appeal by the Attorney-General, the extent to which the Crown might be limited by the principles discussed in the judgment to which we have just referred". (Page 21).

Further Observations

During the course of their judgment, the Court made further observations. The first was to the effect that it was the task of the accused's legal advisers to advise him as to the likely sentence and that such a responsibility could not be transferred to the court, and nor was it legitimate to attempt to do so.

The Court disclaimed any desire that their judgment should be understood as meaning that it was to be regarded as improper for counsel to have access to the judge during a trial for a purpose other than that of discussing the likely sentence - choosing to leave it to the discretion of both judge and members of the Bar as to the circumstances and the manner in which such consultations should take place.

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The Court of Criminal Appeal also declined to lay down any universal prohibition against a Trial Judge giving an indication as to an appropriate sentence; "it is, for instance, often convenient in the course of a Plea, for a Trial Judge, with a view to shortening the proceedings, to stop counsel pursuing a particular line upon the ground that it is unnecessary to do so". (23).

Peripheral Matters

It may be convenient to mention some of the peripheral matters raised by the Full Court in the course of their judgment.

The Court in its judgement declined to consider the propriety or otherwise of the bargaining processes between accused and the Crown. Some measure of consideration of this point has previously been given by the Full Court in R. v. Grey (1977) VR 225. 232, particularly at page 232:-

(a) "On the other hand, there may be pleas of guilty which are not designed to serve the public interest - or may do so only marginally or incidentally. That is to say, the accused's self-interest is completely predominant in the decision reached by him. One such case will be when the accused is quite unrepentant and confesses his guilt simply because the case against him is overwhelming, and, in a practical sense, unanswerable. Another may be a case of "plea bargaining" between the accused or his advisers and the Crown, as, for instance, where the Crown accepts an offer by the accused to plead guilty to a lesser offence. The entry of the "guilty" plea is merely a manifestation of an exchange of an advantage for a disadvantage by both the accused and the Crown. In such a case it will ordinarily be much more difficult to persuade the court that the plea has that degree of spontaneity or sincerity expected to be the product of true repentance. But, of course, a plea bargain and remorse are not mutually exclusive. A remorseful accused ought not to be prevented from seeking the benefit of the new arrangement that he can advantageously make with the Crown, nor penalised on that account if he does".

(b) In addition to the distinction drawn by the Full Court, between the Victorian and the English situations, as is evidenced by the presence of s. 567A in our Crimes Act, there is a further difference apparent which makes the English plea bargaining "cases; exemplified by R. v. Turner (supra) and R. v. Atkinson (1978) 1 W.L.R. 425; of marginal utility in Victoria. It is the fact that in England the trial judge plays a far greater role in determining the counts to be laid in any indictment to be preferred against an accused person; see Archbold 40th edition para. 99A. This congruence of executive and judicial functions may perhaps serve to explain the nature and the extent of the pressures reported to have been applied by trial judges in such cases as R. v. Inns (1974) 60 Cr. App. R. 231; R. v. Grice (1978) 66 Cr. App. R. 167; R. v. Bird (1978) 67 Cr. App. R. 203; R. v. Atkinson (1978) 1 W.L.R. 425; R. v. Lewellyn (1978) 67 Cr. App. R. 149 and R. v. Winterflood (1979) 68 Cr. App. R. 291.

(c) It is interesting to note that the Federal Court of Australia in R. v. Tait (1979) 24 A.L.R. 473 distinguished the English authorities on the basis that there was no statutory warrant for a judge to hear evidence in camera. In the absence of that warrant there was no authority for a judge to hear material affecting his sentence in Chambers. That Court (at p. 491):"a judge who has no discretion to close his court for reasons of the kind mentioned in Turner's case ought not, in reliance upon the same reasons, countenance a procedure involving his receipt of a communication in private, calculated to effect the sentence he is to impose. That position follows from important considerations of public policy. If a private communication is permitted to effect the sentence so that it appears to be discordant with the facts publicly related to the court, the sentence will not be seen to be appropriate, the deterrent affect of punishment will be impaired, and public confidence in the process of sentencing will be diminished".

Crown Function on Sentencing

The point reserved by the Full Court for future consideration (mentioned in R. v. Tait (Supra)) related to the enumerated duties of the Crown to assist the court to avoid appealable error. The Federal Court said at p. 477 "If

the proposition that the Crown is not concerned with sentence was ever construed as absolving the Crown from this duty (that is to assist the court in the task of passing sentence), it cannot be so construed when a Crown right of appeal against sentence is conferred. The Crown is under a duty to assist the court to avoid appealable error. The performance of that duty to the Court ensures that the defendant knows the nature and extent of the case against him, and thus has a fair opportunity of meeting it. The failure by the Crown to discharge that duty may not only contribute to appealable error affecting the sentence, but may tend to deprive the defendant of a fair opportunity of meeting the case which might ultimately be made on appeal. It would be unjust to a defendant, whose freedom is in jeopardy for the second time, to consider on appeal a case made against him on a new basis - a basis which he might have successfully challenged had the case against him been fully presented before the sentencing court.

> "Although the existence of error is the common ground which entitles the appellate court to intervene in appeals by the Crown and by a defendent, there would be few cases where the appellate court would interyene on an appeal against sentence to correct an alleged error by increasing the sentence if the Crown had not done what was reasonably required to assist the sentencing judge to avoid the error, or, if the defendant were unduly prejudiced, in meeting for the first time on appeal the true case against him".

The Order

The Court held that the course taken by the Trial Judge was one which, although undesirable, involved in the instant case no disadvantage to the applicant and no miscarriage of justice. Accordingly, the application for leave to appeal was dismissed.

Registrar of Criminal Appeals

A Registrar of Criminal Appeals is to be appointed. It is a new position.

The Supreme Court (Criminal Appeals) Act 1980. No 9454 which amends the Supreme Court Act 1958 says:-

2 After section 180 (5) of the Principal Act there shall be inserted the following sub-sections:

"(5A) In addition to the Masters referred to in sub-section (1) a Registrar of Criminal Appeals shall be appointed and may be removed by the Governor in Council.

(5B) The Registrar of Criminal Appeals shall —

(a) have the qualifications of a Master under the Division:
(b) be entitled to the remuneration for the time being fixed under sub-section (4) (a);
(c) have and may exercise all the powers and functions of a Master; and
(d) for all purposes be and be deemed to be a Master appointed under and subject to the provisions of this Division ".

The qualifications of a Master are by s. 180 (3) that he is a barrister and solicitor of not less than five years' standing.

At present, the remuneration of a Master is $45,628 with an allowance of $1.000.

The amending Act goes on to say:-

4. After section 188 (2) of the Principal Act there shall be inserted the following sub-section:

"(3) The Registrar of Criminal Appeals shall subject to the general direction and control of the Chief Justice be responsible for —

(a) the preliminary examination of all applications made to the Full Court pursuant to the provisions of Part VI. of the Crimes Act 1958 and the Rules made thereunder;
(b) taking such action as he is authorized or required by the Chief Justice or the Rules to take for ensuring the efficient and expeditious despatch of all such applications to the Full Court; and
(c) performing such other duties and functions as are imposed or conferred on him by the Chief Justice or the Rules ".

The position is expected to be advertised.

LETTERS TO THE EDITOR

Dear Sirs,

The Summer 1980 issue of the **Bar News** contained the alarming information that serious consideration is apparently being given to increasing substantially (by more than 50 per cent) the size of the Victorian Reports.

In recent years, members of the Bar have been bombarded with an ever-increasing stream of reports, journals, loose-leaf services, bulletins, new editions, supplements, etc. etc. which cram our bookshelves and deplete our bank accounts.

It may well be that in Victoria some reportable decisions remain unreported. If that situation is to be remedied, I would suggest that the proper course is to look more closely at some of the cases which are reported, rather than to increase the size of the reports, let alone by an astonishing 50 per cent. Victoria, with a population of less than four million produces one volume of law reports per year, while England and Wales with a population of forty-nine million manage to get by with basically an annual three volume series of general law reports for the superior courts with Scottish and Northern Irish House of Lords cases thrown in.

The Victorian Reports seem to be crammed with cases involving unmeritorious points in breathalyser prosecutions and cases where well established priciples of law are applied to factual situations which have no enduring importance for anyone beyond the immediate parties. Page after page of the reports is taken up with copious citation of authorities which are available in standard text books or digests.

I would respectfully suggest that if there is to be any review of the system of law reporting in Victoria – which I agree is long overdue – the starting point is surely not some arbitrary increase of the number of pages, but rather a re-think of the basic purpose that the Victorian Reports are supposed to serve. From such a review, there might be agreement reached as to the criteria which should govern the selection of cases for the Victorian Reports and an express formulation of such criteria.

I conclude by saying that no criticism whatsoever is intended of the present editor who clearly labours under an anachronistic system. However, if he is to be given a greater say in the selection of cases for reporting, I suggest he might be provided with a copy of the famous World War II poster which asks the stern question, "Is the journey really necessary?".

Yours sincerely,

PETER HEEREY

Dear Sirs,

I refer to the article entitled "Police seek access to jury room" appearing at p. 24 of your Summer Edition, 1980.

In the 3rd. paragraph of that article the following sentence appears: "As to the former, Mr. Miller observed that 40 to 50% of those pleading not guilty before a jury were acquitted." The article then goes on to present information which, it is said, shows that the statement attributed to Mr. Miller is necessarily inaccurate. If one adds however, the totals under the headings "convicted", "trial aborted" and "acquitted" the result achieved is 337. Expressed as a percentage of this total the 133 acquittals amount of 45.69732%. It goes without saying that this result is "40 to 50% of those pleading not guilty before a jury".

It may be of interest to the author of the article to know that Western Australia juries acquit approximately 50% of those persons who take their trial before the District Court. As I understand it that percentage has been the same for the past four or five years.

Yours Faithfully,

HUGH McLERNON
Bar Chambers, Perth, WA

(In our view, the article did not intend to demonstrate the inaccuracy of the Chief Commissioner's statement. It was suggested that, by omitting the figure for those pleading guilty, the impression of an unreasonably high acquittal rate by juries was a false one. In fact the figure for those convicted following plea or verdict was 81% of those dealt with. The acquittal rate was only 13.78%. [Eds.)

Mouthpiece

The Time: **Monday 23rd March 10.30 a.m.**

The Place: **The Common Room**

"Did you see 'the Age' this morning? Here let me show you the front page."

Whitewig picked up the paper lying over the easy chair, paying no heed to the somnolent form under it.

"Have a look at this report of last weeks meeting. They only took seven days to report it."

"Maybe the paper has been taken over by Butterworths", ventured Flossie.

"'A struggle between the rich and the poor', they write a positively Marxist account of the vote."

"'The motion was opposed by the young barristers who see it as a threat to their financial survival.' These must be the poor - all except 110 of the young barristers could not even afford the tram fare to attend the meeting."

"I feel sorry for the destitutes who opposed it," muttered Whitewig, "I hear tell that they included a silk. Things must be bad."

The Waistcoat had now roused himself. But he did not turn his wrath upon those who had disturbed him. He made a contribution.

"You chaps can tell me about the 1979 Bar Council enquiry into earnings. Is it true that those whipper-snappers in the Magistrates' Courts are earning $10,000 net in their first year $16,000 in their second$24,000 in their third?"

They all hung their heads sheepishly.

"The Bar Council tells us nothing," the old man moaned.

"That's what I like about 'the Age' you can learn more about the Bar than we ever find out, and it saves going to those boring meetings."

BYRNE & ROSS D.D.

Autumn 1981

SPORTING NEWS

All Barristers present breathed a sigh of relief when the staff of the Commonwealth and State Banks from William Street narrowly defeated the "Clerks" at a cricket match conducted at Albert Park on the 15th February 1981. The "Clerks", with Muir scoring 18, declared for 110 and we understand that the temperature in Farenheit almost matched the score. For one agonising moment it appeared that the Banks may not overhaul this meagre tally, but the introduction to the bowling crease of a six year old (bowling underarm) secured victory for the financiers.

• • •

It is becoming quite fashionable for Counsel on one floor of Chambers to challenge fellow barristers to a cricket match. In the third annual match between the tenth floor (Four Courts) Gentlemen's XI and the combined eighth floor Rest of the World XI played at Elsternwick Park on 7th December 1980, the Gentlemen's XI regained the C.J. McPherson Trophy; going 2-1 in the cumulative yearly total. Reynolds was universally acclaimed as "man of the match."

• • •

Whilst on the topic, some time ago some barristers, including Lee, Philbrick, T. Casey, Hore-Lacy, Cashmore, Bob Johnson and other regulars at the "Golden Age", challenged the staff of the "Age", particularly the sporting press, to a cricket match. Our enthusiasm diminished when it was learnt that their proposed opening bowler was one Patrick Smith, a fiery opening bowler for a District side. The decision to settle out of court, whilst not regarded as being a courageous one, was generally conceded as being prudent.

• • •

Some time ago, Hicks sold his interest in a trotter named "Estoppel" – well named because it held itself out as having outstanding ability and unfortunately caused many punters to act to their detriment. He tells me that it was a "knee knocker" and would not always give of its best due to intermittent pain. As there is no restriction on the use of the drug B.T.Z. in the United States, the horse was bought by American interests. The latest edition of the Trotting Register showed that it had won $96,000 in prize money since leaving our shores.

• • •

A searing hot northerly was blowing when the Law Institute humbled our players in the annual Tennis Match at Kooyong held shortly before Christmas. The hot and dusty "en tout cas" courts, whilst providing ideal conditions for players such as Collis and Thomson, Q.C., was too much for the rest of our team including Rattray and Mr. Justice Hase.

• • •

The saga of Jack Forrest and his "racehorses" continues. "Salt Mine" is still in Siberia. After another unsuccessful run by "Hue and Cry" Forrest was heard to remark that it "needed more ground" – someone unkindley remarked "Yes, preferably over it." Forrest trains another chaff bandit called "Station Street". When it recently ran second last at Wycheproof (starting at 6 to 4 favourite) it is alleged that the irate course commentator referred to it as "Stationary Street".

• • •

Victorian Bar News

It is not without significance that a game calling for greater skill than cricket or tennis was won by the Bar and Bench against the Law Institute. I refer to the annual Golf Match between the two sides held at Royal Melbourne Golf Club on the 27th of February, 1981. Mr. Justice Walsh expressed our gratitude at retaining the Sir Edmund Herring Trophy and some research is being done into the law relating to "long user" in the light of the fact that the Trophy has graced the 13th Floor at Owen Dixon Chambers for a number of years. Redlich, a single figure golfer of great skill, won "the nearest the hole competition" and Les Ross and Cashmore again won the pewter pots for "the individual pairs competition"

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Balfe's interest in hockey goes back many years and he is still an active player on both outdoor and indoor hockey fields. He has coached the Melbourne University Hockey Team and has coached Women's Hockey Teams. He travelled to Perth in April 1979 for the Esanda World Tournament and represented Victoria in the Australian Veterans Tournament held in Perth in August 1980 and is hopeful of playing for Victoria later this year. He visited Karachi in January 1980 and 1981 for the second and third Champions Trophy Tournament and maintains that part of the expenses should have been allowed by the Deputy Commissioner in the light of the fact that he imports hockey sticks from Pakistan for sale. We regret to advise that the Deputy Commissioner disallowed his claim.

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In 1965 Morrish came second in the high jump at the Victorian Titles. He had set himself a goal of 2 metres during a recent comeback and achieved this height (6 feet 6¾ inches) when competing in the 1981 Victorian Championships. This was good enough for second place to David Hoyle. We understand that he is a short priced favourite to win a gold medal at the 1984 Gerilympics.

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Autumn 1981

SOLUTION TO
CAPTAIN'S CRYPTIC No. 35

EVIDENCE — REQUEST FOR COMMENT

The Victorian Bar Council has received a request from the Australian Law Reform Commission to assist it in work on the Evidence Reference This Reference requires the Commission to review the laws of evidence applying in the Federal and Territory Courts with a view to producing a comprehensive law of evidence to be applied in those courts. The review involves an examination of the laws of each State and a consideration of the merits of the different legislative provisions to be found in each State.

In some instances, the Victorian legislation is unique and often is the result of recent reforms. Comment from members of the Bar about their experience of such legislation would be of the greatest assistance to the Commission. The more significant provisions are the following:–

- **Compellability of Spouses, Parents and Children.** The Victorian provisions (Evidence Act 1958 s. 24 and Crimes Act 1958 s. 399 and s. 400) are unique in Australia and the result of recent reforms.

- **Cross-examination of Rape Victims about Prior Sexual History.** The provisions contained in the Evidence Act 1958 s. 37A, are the result of recent reforms. Similar but not identical provisions have been enacted in other States.

- **Computer Produced Documents and Business Records.** The Victorian provisions (Evidence Act 1958 s. 54-58J) have not been adopted in all States and Territories. There is very little literature available on the operation of the legislation and there are few reported decisions. The legislation relates to statements in documents; statements in records, books of account, and computer produced documents. The provisions are the results of the attempts that have been made over the last 40 years to modify the hearsay rule by statute.

- **Notice of Alibi.**Sections 399A and B of the Crimes Act 1958 set out the notice of alibi procedure which is a relatively recent reform. Not all States have enacted this legislation. A further point to note is that Victoria is the only State to have the provision (s. 399B) whereby the prosecution or police may be guilty of contempt of court if they communicate with the alibi witness unless in the presence and with the consent of the accused or, if represented, his lawyer.

- **Microfilm.** Sections 53-53T Evidence Act 1958 set out conditions for the admissibility of reproductions including microfilm. They are the result of reforms in the 1960's and somewhat similar legislation is to be found in other States They are extremely detailed provisions.

- **Privilege – Communications during Marriage.** Under s. 27 Evidence Act 1958, a communication to a spouse is privileged except in criminal or bail proceedings. This exception does not apply in South Australia, New South Wales and Western Australia. In Queensland and the A.C.T., the privilege applies to criminal proceedings and not to civil proceedings – the reverse of the Victorian provisions. In making a choice between the various approaches it is relevant to ask whether the absence of the privilege in criminal bail proceedings and its availability in civil proceedings have created any problems and to identify those problems.

- **Confessional/Medical Privileges.** Sections 28(2) and (3) Evidence Act 1958 confer these privileges. They are to be found also in Tasmania and the Northern Territory but nowhere else in Australia.

Specifically the Australian Law Reform Commission seeks comment from members on:

- the extent to which use is being made of these provisions — especially those relating to computer produced documents, business records, and microfilm;

- what problems, if any, have emerged in the use of the above provisions;

- what criticisms do members of the Bar have of these provisions.

Members are urged to assist the Australian Law Reform Commission in this enquiry. Any comment should be sent to the Australian Law Reform Commission, to the Commissioner in charge of Reference, Mr T.H. Smith, G.P.O. Box 3708, Sydney 2001.

AMENDMENTS TO CRIMINAL LAW LEGISLATION

1. The Crimes (Sexual Offences) Act 1980 (No. 9509) received assent on 23/12/80 (Government Gazette 23/12/80). page 4377) and came into operation on 1/3/81 (Government Gazette 4/2/81. page 339). The Act makes very substantial changes to the law relating sexual conduct and in particular

   (a) decriminalises homosexual acts between consenting adults

   (b) decriminalises consensual vaginal. anal or oral penetration of a child of either sex over the age of 10 if the child is not more than 2 years younger that the partner

   (c) decriminalises consensual vaginal. anal or oral penetration of a minor between 16 - 18 if the partner is not more than 5 years older or if the minor has previously willingly taken part in any act of sexual penetration (oral. anal or vaginal) with a person other than the accused.

   (d) extends rape to include the introduction of a penis into the anus or mouth of a person of either sex or the insertion of an object (other than part of the body) "into the vagina or anus of another person (whether male or female)"

   (e) abolishes the presumption of consent in the case of a separated spouse

   (f) abolishes any requirement of a warning as to corroboration in rape or other sexual offences but requires corroboration for procuration. offences with intellectually handicapped person or administration of drugs for sexual purposes

   (g) creates new offences of rape etc. with aggravating circumstances, which includes a prior conviction for a sexual offence

   (h) introduces a defence of reasonable belief as to age in respect of charges relating to minors

   (i) replaces the concept of carnal knowledge with the concept of an act of sexual penetration (as in the extended form of rape)

   (j) as to incest. extends the crime by replacing carnal knowledge with any act of sexual penetration and equates mothers with fathers and brothers with sisters (rendering illegal an act of sexual penetration between family members of the same sex)

   (k) extends the law relating to procuration by equating male and female victims and substituting an act of sexual penetration for carnal knowledge but limits it by imposing a requirement of threats of fraud

   (l) extends the law relating to prostitution and soliciting by equating the conduct of males and females

2. The Motor Car (Miscellaneous Provisions) Act 1980 (No. 9477) which relates to the cancellation of licences. the use of breath analysing instruments and other purposes was assented to on 23/12/80 and is to come into operation on the respective days fixed by Proclamation (Government Gazette 23/12/80. Page 4375). Sections 1. 2. 3. 5. 6. 7. 8. and 9 of the amending Act came into operation on 21/1/81 (Government Gazette 21/1/81. Page 197).

3. The regulations under the Poisons Act relating to drugs of addiction and restricted substances have been amended by Statutory Rule No. 3 of 1981.

4. The Coroners Amendment Act 1980 (No. 9493) was assented to on the 23/12/80 and came into operation on tha tday (Government Gazette 23/12/80, Page 4376). The Act amends the law relating to the recording of depositions before a coroner and the admission of such depositions on a trial. Its operation is retrospective.

5. The Community Welfare Services (Extradition) Act 1980 (No.9498) received assent on the 23/12/80 and came into operation on that day. (Government Gazette 23/12/80, Page 4376). It makes provision for the extradition of persons released on parole.

HASSETT

VERBATIM

On the application for a jury action to proceed in the absence of the Defendant.

Starke J.:"I do have a recollection (that in a trial in which I appeared for the Plaintiff) the Defendant just did not turn up. I don't want to speak in terrorem but I remember very well – the Plaintiff failed – and immediately the verdict was given about 7 counsel appeared for the Defendant asking for costs".

Novakovic v. Gorki
8.10.80

• • •

Lovitt cross examining police officer and alleging a "verbal" against Tuddenham –

Lovitt: How can you possibly conduct an interview by talking and typing at the same time, or by listening and typing at the same time? How many fingers do you use to type?
. . . Three
You would not regard yourself as a professional typist or skilled typist?
. . . I reckon I'm pretty good three-finger-typist; been doing it for a fair while.
One hand?
. . . No, two hands.
And what do you do with the other two fingers?
. . . They stay connected to my (hand).
Do you keep them crossed, or what?
. . . (No answer)

R. v. Tuddenham
3.12.1980

• • •

For a modern version of the Highwayman's Case **Everet v. Williams** (1725) 9 LQR 197 see **Ashton v. Turner** (1980) 3 W.L.R. 736.

• • •

"It was further submitted by Mr. Adams that the Plaintiff was precluded from obtaining equitable relief because, seeking equity, he did not come with clean hands since he had cleaned septic tanks without the consent of the council and despite the fact that he had been warned not to do so."

Marks v. Swan Hill Shire Council
(1974) V.R. 896 at 901

• • •

In the course of cross-examination, an accused police officer was referring to the relationship between police and prostitutes in St. Kilda –

Accused: . . . because prostitutes work areas they have their own areas . . . if other girls come within the areas it could start a bit of conflict. We (the police) generally kind of keep the peace between them.

Willee: You could cure that by arresting all of them?

Accused: That's right . . . if you had the time, but time is of the essence you can't really arrest everybody . . . the point is there is (sic) more prostitutes than police so you can't lock them all up.

Willee: Eventually you must win, mustn't you?

J.H. Phillips Q.C.: The King of the Babylonians tried in 2000 B.C.

Willee: Well, he died before he finished the job."

R. v. Duggan & Langskaill
February 1981

• • •

In the course of a plea on behalf of an armed robber with priors going back to 1944 –

Crafti: Your Honour, when my client is released he proposes to live with his daughter-in-law at Bairnsdale.

Judge Kelly: If she's still alive.

R. v. Paul
18.12.80

• • •

Counsel cross examining female witness as to the substance of post-accident conversations, and why she is accurate, and how she remembers what was said.

Greenberger: You weren't taking notes of the conversation were you?

Witness: No but I have watched enough of Perry Mason to know conversations are important.

Sandringham Magistrates Court
18.2.1981

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Young man applying for reduction of bail –

Ellis S.M. I see this applicant wants to get married. Perhaps I should do him a favour and refuse the application. When are you getting married?

Applicant: As soon as possible . .

Ellis S.M. Who am I to stand in the way of romance? Application granted.

Melbourne Magistrates Court
12.3.1981

● ● ●

Defendant contesting exceed .05 charge:

Prosecutor: How do you know you only had eight drinks?

Defendant: Because I was counting my drinks, I always do.

Prosecutor: Were you drinking with friends?

Defendant: Yes, two or three.

Prosecutor: You were in a school were you?

Defendant (looking puzzled): No we were drinking in a hall . . "

Ringwood Magistrates Court
16.3.1981

● ● ●

A fly started to buzz around his face as Willee addressed the jury.

Willee: You might think the Crown don't have too many friends in this case . . .

Judge O'Shea: At least you've got one Mr. Willee!

Willee: That's the friend of all prosecutors . . "

R. v. Duggan & Langskaill
February 1981

● ● ●

On proceedings at Brighton Council.

As the chamber clock crept closer to midnight, Cr David Garnet-Thomas would rise, like Dracula from the grave, and launch into a ponderous diatribe on the twin blessings of policy and principle.

I listened in utter disbelief one night when, at about 11.30 p.m., he solemnly moved that a comma be deleted from a motion.

"This will make it much more fitting," he announced with great aplomb and blithe disregard for the principles of English grammar.

Sandringham & Brighton Advertiser
28.1.1981

● ● ●

On the hearing of a careless driving charge.

G. Thomas (examining the Defendant in chief):

"Were you concussed as a result of the collision?"

Answer: "Yes."

Followed by an objection from the Prosecuting

Sergeant: "This witness is not an expert and cannot give that evidence."

J.P. to Thomas:

You could get that in by re-phrasing the question.'

Thomas, who thinks for a moment:

"Did the doctor tell you you had concussion?"

Answer:

"Yes."

No objection, satisfied smiles all around.

Prahran Magistrates Court
19.2.1981

● ● ●

In a commentary upon **R. v. Davies** where the Prosecutor in the Victorian Court of Criminal Appeal addressed to the Court an argument upon the sufficiency of the sentence appealed against

"Unlike the position in England the Crown is regularly represented in Victoria but its representative typically plays the role of a highly paid ornamental dummy adding nothing to the proceedings beyond contributing to the pageantry of the Court."

(1981) 5 Crim L.J. 65

● ● ●

LEGGE'S LAW LEXICON

"D"

Danegeld. A terrible punishment inflicted upon Scandinavian adulterers.

Days of Grace. The period of 1 year after call within which junior counsel may appear in County Court Chambers ignorant alike of the rules of Court, the necessity to certify and the name of the Judge's Associate.

Dead freight. The fee for preparing a case for trial which on the day is fixed last in the County Court List of Causes.

Death. An event of legal importance although it may be difficult to say when it takes place in the case of a judge sitting in an ultimate Court of Appeal.

Death duties. Illegal and immoral exactions upon the heirs of the rich (1909) A.C. 475.

Debenture. A floating charge issued by a company shortly before it sinks.

Decollation. A partition action.

Decree Nisi. The locus poenitentiae originally allowed to give a man time to choose between his wife and his mistress.

Deed. See "Foul".

De facto. The name of the relationship bought to an end by a declaration of insolvency.

Defamation. An action to make possible the payment of death duties by the executors of politician.

Default Summons. A petition for the restitution of conjugal rights.

Defeasible. The status of a coroner's decision on a point of law.

Defeneration. (not what you think).

Defilement. An ancient writ by which a bureaucrat guilty of punctuality might be deprived of his office.

De novo. The argument in reply that silks can get away with

Departure. A pleading available when counsel's imagination exceeds his instructions.

Depeculation. Tax avoidance.

Derogation. Answering an interrogatory while at the same time objecting to do so.

Desertion. The act of a husband who says to his wife – is there anything we ought to discuss before the football season starts.

Dictum. A Judgement of the Supreme Court of Nova Scotia.

Diminished responsibility. Bringing in a leader for the Appeal.

Victorian Bar News

Direction. A statement of law to a criminal jury designed to assist the Legal Aid Commission properly to disburse the money allotted to it for briefing counsel in the Full Court.

Discovery. A form of concealment practised by solicitors.

Distinguished. The adjective with which a less distinguished judge ignores a more distinguished judge.

Diversity. A form of amusement which can be taken only in the High Court.

Doli Capax. The theory that was yesterday merely an innocent amusement has today become an indictable misdemeanour.

Ducking stool. The punishment reserved for counsel seeking an adjournment in the County Court.

Dukes tecum. A subpoena to appear before the Chief Justice.

Duplicity. The cunning with which prosecutors multiply charges.

Duress. The assistance given by a judge in the compromise of a building dispute.

Dyke Reed. Dyke Reed?

THE CRICKET MATCH

It was the hottest of days on the 22nd December, 1980 when Wraith led the gallant few onto the hallowed turf of the Albert Ground to defend the Sir Henry Winneke Trophy which the Bar had so nobly wrested from the Law Institute the previous year. Despite an early breakthrough when Solicitors' Captain Fraser was bowled by Harper for seven, the Solicitors in a well disciplined effort with all but one reaching double figures, amassed a total in their forty overs of 7 for 207. The ordeal of a morning's fielding in century heat obviously told upon the Bar's batsmen. Couzens batted elegantly for about half an hour for seven runs and only Gillard, McTaggart and Connor reached double figures.

When Gillard was 20, he was the subject of a sensational run-out. When moving for a second run the ball was thrown from the outfield to find Gillard a good two feet within his crease, as the instant replay later showed.

Nevertheless, the umpire at the bowler's end, who resembled a frightened pachyderm in full flight, jellied his way at a fast trot in the direction of St. Kilda Road to take up a position to adjudicate the on-coming throw. As the ball whistled in, the umpire was still running towards St. Kilda Road facing away from the wicket area with his finger raised in the air.

Connor provided the highlight of the Bar innings with what in cricketing parlance is described as "a little gem of an innings" when he cut loose to score 44 runs in approximately 25 minutes with a barrage of shots to all corners of the ground, executed in a cavalier spirit that some of his team mates might have been well advised to adopt.

In the 29th over of their innings, the Bar capitulated to be all-out for 109. Despite the disparity of scores, the match this year captured the imagination of the popular press which seemed more concerned with the vision created by new team manager and official scorer Wilson, "resplendent in white, with panama hat, silk scarf, dark glasses, and clutching a gin and tonic as a defence against the heat. Mr Wilson admitted he looked more like a South American dictator than the official scorer. But, not even his eloquent pleas could bail the barristers out of trouble"
The Sun, December 23, 1980. Page 13

It would seem that if the Bar is to regain the much coveted Trophy, then a revision of tactics will be necessary, although the purists would have cringed when Wraith was overheard to say more recently that if the game had been played after the happening of a certain international incident at the M.C.G. that "our bowlers would have underarmed us to a second successive victory".

Autumn 1981

MOVEMENT AT THE BAR

Members who have signed the Roll since Summer 1980 Edition

BREAR, L.H	(re-signed)	Clerk W
McINNES, S.E. (Miss)	Parliamentary Counsel	
James Gregory JUDD		P. Buchanan/Howells
Bruce Gregory LEE		Bongiorno/Howells
Hugh Anderson BURCHILL		Wheeler/Howells
Michael John SHARPLEY		Stanley/Howells
James Jackson ISLES		Hore-Lacy/Howells
Edward Gerald deZILWA		Kennan/Howells
Susan Coralie KENNY		Heerey/Howells
Edgar John Stephen SZABO		Duggan/Howells
Vladislav Micheal GREGUREK		Murley/Howells
Thomas Patrick KEELY		Meldrum/Howells
Lynda Mary WEST		Magennis/Howells
Felicity Pia FOSTER		Merkel/Howells
Robert David JONAS		J.V. Kaufman/Howells
Susan Adele BLASHKI		Opas/Howells
James Thomas FINN		F.C. James/Foley
Peter Henry MOLONY		Willshire/Howells
Stephen WARTSKI		Davey/Howells
Brian Joseph McCULLAGH		J.R. Moore/Howells
John Philip DUGDALE		Crossley/Howells
Cathryn Faye McMILLAN		Griffith/Howells
Judith Mary LORD		P.M. Guest/Howells
Laurence Alexander HARRIS		Zahara/Howells
Gemma Cecilia VARLEY		Parliamentary Counsel
Peter Micheal Edward WISCHUSEN		Blackburn/Howells

Members who had their names removed from the Roll of Counsel at their own request.

R. FREADMAN
A.E. SCOTT
A.J GINNANE (Non-Practising List)

Members who have had their names transferred from the Practising List to the Masters and other Official Appointments list.

R.L. GILBERT
J.R. DWYER (Mrs.)
B.G. HEPWORTH

Member who has had his name transferred from the Masters and other Official Appointments List to the Practising List as a retired Barrister

M. STRATHMORE

Number in active practice: – 721

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