Victorian Bar News

WINTER EDITION
1982

Green glass wine bottle.
Approximately 1650
was found in
GRAY'S INN SQUARE

Small jug of pale buff ware
with green lead glazing.
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The Jug was found in the north eastern corner of GRAY'S INN SQUARE when the site was being excavated in 1952, prior to rebuilding after the war-time devastation.

. . + . .

The Bottle was found in the north western corner of GRAY'S INN SQUARE in 1953 when that site was being excavated. Close inspection will reveal the notches in the rim at the top of the neck, through which string was passed and tied to hold the cork in place.

The Cover:
The Licensing of the Essoign Club gives added point to these items from the Bar's Trophy Cabinet. It seems that the habits of the profession have not changed in 300 years.

The Rt. Hon. Sir Ninian Stephen G.C.M.G., K.St.J., Q.C.

Governor-General Designate and Member of the Victorian Bar

Photo by Burnside

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BAR COUNCIL REPORT

Attendance

Since the last edition of the **Bar News** there have been seven meetings of the Bar Council. Apart from Walsh, Q.C. (appointed to the County Court), and Charles, Q.C. and Nathan Q.C. (recently elected to replace Waldron, Q.C. and Walsh Q.C.) the figures for attendances by members of the Council at those meetings are as follows:

Shaw, Q.C.	7
Hampel, Q.C.	7
Barnard, Q.C.	6
Liddell, Q.C.	6
Phillips, Q.C.	5
Cummins, Q.C.	7
Dowling, Q.C.	4
Nicholson, Q.C.	6
Chernov, Q.C.	6
Hansen	7
McArdle	7
Murphy	4
Adams	7
Bannister	5
Rush	5
Gunst	7

Readers' Practice Course

The second floor of Four Courts Chambers has been leased by Barristers Chambers Ltd., for the purpose of accommodating Readers undertaking the Readers Practice Course.

Essoign Club

The licence has been granted for the Essoign Club, and a number of successful functions have been held on the Club premises. The availability of wine with meals, and of drink during the afternoons, appears to be of growing popularity.

Accommodation

By a poll of the Whole Bar taken in April 1982, the following motions were passed:

Motion 1 – "That the development of the A.B.C. site should proceed by such combination of mortgage finance, debenture finance, strata titling and sale and lease back as the Bar Council shall approve."

In favour of Motion 1 – 251.
Against Motion 1 – 128.

Motion 2 – "That the development of the A.B.C. site may be accompanied by the disposal of Owen Dixon Chambers as an integral part of the development of the A.B.C. site with the capacity to house all of Melbourne's barristers in a single location."

In favour of Motion 2 – 251.
Against Motion 2 – 111.

A lease has been taken of 5 floors of the building at 200 Queen Street, and a scheme for subsidising the rents in that building has been adopted. The effect of the scheme is that the rents in that building are to be on a par with the rents in Latham Chambers. It is hoped that this scheme will enable a mix of barristers to take Chambers in the new building.

Criminal Fees

A new scale of fees payable to Counsel in the criminal jurisdiction, dated 30 April 1982, has been circulated. These fees take effect as from 1 May, 1982.

Use of a Barrister's Name in a Solicitors Firm Name
It has been resolved that a person wishing to sign the Roll of Counsel may not allow his name to continue to be used in a firm of solicitors of which he has been a member.

New Telephone System
The Bar has received a report from a firm of telecommunications consultants, on a proposed new telephone system for the entire Bar. This matter is being considered further, with a view to introducing a modern telephone system for all barristers.

Annual Bar Dinner
The 1982 Bar Dinner was held at the Dallas Brookes Hall on Saturday 5 June, 1982. The honoured guests were Sir Ninian Stephen, Sir John Norris, Q.C., Sir James Gobbo, Chief Judge Waldron, Judge Tolhurst, Judge Walsh, and Berkeley Q.C., Griffith, Q.C. was Mr. Junior Silk.

Expansion of Chambers in Owen Dixon Chambers
It has been resolved that no further expansion of Chambers in Owen Dixon Chambers should take place for the time being.

Other Occupational Sidelines
It has been resolved that employment as a bookmakers clerk is a fitting and proper occupation for a barrister during the course of his reading period.

Mouthpiece

"The trouble with the Government is that they're idiots." The Waistcoat sat back, expansive and comfortable. A peremptory sign brought Pat to his side to replenish his brandy balloon. "They wouldn't know an artificial and sham tax scheme if it was shoved up their noses. If they did, why don't they ban them?"

The logic was inescapable. Whitewig was lost for an answer. So the gentlemen pressed on, "And if they can't recognise a crook scheme, how can we?"
"Or the Accountants", ventured Flossie.
". . . . . or the Solicitors either".
"Or the Ethics Committee, when you're put up for advising on one".

The Waistcoat ignored him.
His mind was on deeper things.

"I know what they're up to. They've given up trying to ban tax schemes. They hope to achieve the result better by shaming the professions into having no part in them. So the lawyers become the guardians of community morality. And that of course is not the proper function of the Bar".
He was becoming apoplectic, and boring.
"It's in the finest tradition of our Bar that we are ready to advise fearlessly the downtrodden, the outcasts of society . . . "

The dapper young man on his left broke in, "It seems that the only way I can keep up my tax practice is by accepting briefs only from the Government. If I do accept a brief from a promoter, I must make sure to tell him his scheme won't work."

BYRNE & ROSS D.D.

ETHICS COMMITTEE REPORT

Since August, 1981, the Ethics Committee held 5 summary hearings of which 3 resulted in a finding that a disciplinary offence or offences had been committed, as follows: –

(i) A complaint was received in circumstances where a member of Counsel was briefed to draw a document initiating certain proceedings. The brief was received in about early April, 1981. Counsel conceded that from June, 1981 he had known that the document was required most urgently and that he had undertaken to his instructor to draw it before the Short Vacation but despite a number of promises to his instructor had not done so and that he had no rational explanation. The Committee found that Counsel was guilty of a disciplinary offence, namely inexcusable delay (from June, 1981) and the giving of unreliable undertakings. The Committee considered that often a delay of six weeks was not inordinate but that, in the particular circumstances of this case, it was. Counsel was fined $200.00.

(ii) A member of Counsel, who had been found guilty of similar disciplinary offences in the past, failed to return an uncompleted brief despite a number of requests to do so by his instructing solicitor. Counsel was fined $350.00 for failing to return the brief and $50.00 for failing to reply to or acknowledge the Secretary's initial letter to him concerning the complaint.

(iii) A member of Counsel had failed to attend to a brief to draw Answers to Interrogatories. Counsel had held the brief for 12 months and had no explanation at all for the failure to complete the brief in the last 5 months of that period from March, 1981 to July, 1981. He also failed to respond to requests for the work to be done over that period of 5 months. The committee decided that Counsel had committed a disciplinary offence in failing to attend to the brief including failing to respond to requests for the work to be done from March, 1981 to July, 1981. Counsel was fined $100.00.

(iv) The Committee investigated a complaint in relation to the alleged failure by some readers to give satisfactory attendance at the Readers' Course which commenced June, 1981. The Committee was not satisfied that there was any disciplinary offence by any reader or that the attendance by any reader was so poor as to amount to a disciplinary offence but in some cases the Committee was not satisfied with the explanations given as to particular attendances by some of the readers. One reader was asked to attend before the Committee and, after answering a number of questions, was advised by the Chairman as to Counsel's responsibilities during the remainder of the reading period.

The Committee holds regular meetings. One of the main items of business is the consideration and investigation of complaints. The Committee rejected a number of complaints from lay clients where no misconduct or breach of ethics was made out but rather the complaint was substantially based upon or appeared to be motivated by a dissatisfaction with the result of proceedings. The Lay Observer, Mr. F. Eyre, has attended meetings and has taken a keen interest in how complaints are dealt with and answered, particularly those from lay clients.

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The Committee and its members regularly deal with requests by Counsel for rulings, permissions and advice on various ethical matters. Recent rulings have included the following: –

PREVIOUS CONVICTIONS

The Committee re-affirmed that it was a clear rule of conduct that Counsel was under no duty in a criminal case to disclose facts known to him regarding his client's previous convictions nor to correct any information (or lack thereof) which might be given to the Court by the prosecution, if the correction would be to the client's detriment; neither was it part of Counsel's duty to advise his client to disclose a previous conviction. The Court should not question a defendant or his Counsel as to previous convictions and if Counsel is so questioned, his reply should be that the question is not one for him to answer. See **Boulton: Conduct and Etiquette at the Bar** (6th ed.) p. 76 and **Halsbury (4th ed.)** Vol. 3 para 1137. Of course, it was equally Counsel's duty not positively to state anything to the Court which might lead to the inference, directly or indirectly, that a client had no prior convictions when this was not the case.

LETTERHEAD

The Committee applied the existing rule in advising a member of Counsel that he could not use a letterhead bearing the words "Barrister-at-law".

ARMY LEGAL AID SCHEME

The Committee investigated the circumstances in which barristers in the Army Reserve participated in the Army's Legal Aid Scheme. The Committee resolved that, in the circumstances of the Scheme being a well established scheme and conducted within the limits which were provided in writing to the Committee, there was no objection to a barrister taking part provided that he did not subsequently accept any brief in relation to a matter with which he had prior connection as part of the Scheme.

The Committee has under consideration (and has had under consideration for some time) the question of whether any and if so what rules should be laid down in relation to the giving of advice, in particular in relation to taxation matters and "tax avoidance". Submissions have been received from the Taxation Committee and some other members of Counsel.

COMMUNICATIONS WITH PRISONERS

"At the request of the Department of Community Welfare Services, the attention of members of the Bar is drawn to Section 135 (1) (f) of the Community Welfare Services Act 1970 which provides that

> 'every person who without the approval of the Director-General takes or receives or in any manner attempts to take or receive from a prisoner any money letter article or thing whatsoever may be apprehended by any member of the Police Force, prison officer or other officer or by any person in whose custody any such prisoner then is without warrant and may by such member, prison officer or other person be detained and kept in such custody until he can be brought before a Magistrates' Court which may hear and determine the offence. Penalty: imprisonment for two years.'

Members of the Bar are asked to ensure that they do not infringe this provision and, in particular, to avoid accepting letters or notes which may be (without warning) profferred to them by a prisoner."

Yours sincerely,

MANDIE

ANNUAL PRANDIAL

The Bar Dinner went off with and without the usual hitches. Members were entertained by speeches from the Chairman, from Griffith Q.C., and from Sir Maurice Byers, Chief Judge Waldron and Berkeley, Q.C. in that order.

Old and new members of the Bar of both sexes were able to meet and reinforce the usual barriers. Pleasantries and overcoats were exchanged.

AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION

The new Australian Institute of Judicial Administration Incorporated has been formed by Australian Judges, practitioners and academic lawyers to introduce modern administration of justice in Australia.

The Institute, a pan-Australian organisation independant of government, has chosen as its first project, a detailed investigation into what actually causes delays and inefficiency in three Australian Supreme Courts. This two years' investigation in the Supreme Courts of New South Wales, Victoria and the Australian Capital Territory has been welcomed and warmly encouraged by Chief Justices, Sir Laurence Street, Sir John Young and Mr. Justice Blackburn. The research team headed by Dr. Ross Cranston of the Law School of the Australian National University will examine and analyse court records and interview a wide cross-section of Judges, practitioners, court officers and professional litigants. For each court a panel of a Judge, a barrister and a solicitor will advise and guide the researchers.

Areas which the Institute has in mind for future projects include trials of white collar crime, efficient methods of listing cases, computers in legal practice and judicial administration, the effect of legal aid on the length of trials, and a co-ordinated judicial system eliminating conflict between Federal and State jurisdictions.

The Institute aims to enable improvements in the administration of justice to be assured on an empiric, systematic basis. A valuable source of information is the experience of those who have long worked with the system. Similar approaches by counterpart Institutes in the United States and the United Kingdom have shown how efficiency can be improved in this way.

In Australia the first need is for reliable information from statistics and objective research to identify the exact nature and dimensions of the problems that must be overcome to reduce delays and maximise efficiency. Based on what the intensive investigation shows to be the barriers causing delays and inefficiency, the Institute plans to undertake further projects to find ways of removing these barriers. Many past alterations to procedures have been based on hunches. There has been practically no systematic monitoring of the changes to see whether they have in fact improved the system.

Because of its close association with Judges and the whole legal profession, the Institute is well placed to influence the implementaion of many of its reforms by changes of court rules without recourse to government. It is a body which can speak to governments with authority upon proposals to reform the justice system.

As a continuing body specialising in judicial administration the Institute will at all times welcome from all sources within the profession, suggestions for improvement. It will act as a storehouse of information, knowledge and ideas in the area, which it will make available to governments, administrators, courts and all others interested. It also plans a reference library and the publication of writings and research findings on judicial administration.

Inaugural Seminar

An inaugural seminar will be be opened by Sir Harry Gibbs, the Chief Justice of Australia. It is to be held at Sydney University on Saturday 14th August 1982. Research papers will be given by Dr. Ross Cranston, Professor Ian Scott, Director of the English Institute of Judicial Administration at Birmingham, and Mr. Justice Mahoney on the methods of the first project and the useful work which the Institute can do.

Forms of registration for the seminar and for membership applications will be sent on request. Please apply now to the Secretary of the Institute, Peter Heerey, Barrister, Latham Chambers, 500 Bourke Street, Melbourne 3000. The seminar registration fee is $15.

The membership subscriptions, of $25 for individuals, are allowable deductions where membership is incidental and relevant to the income producing activities of the member.

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OBITUARY

Sir Keith Aickin 1916 - 1982

The Bar was saddened by the news of the death on June 18 of the Honourable Sir Keith Arthur Aickin, K.B.E., LL.M. He was born on 1 February 1916 in Melbourne. He was educated at Melbourne Church of England Grammar School. Later at the University of Melbourne, he graduated with the degree of LL.M. He was Associate to Dixon J., from 1939 until 1941. From 1942 until 1944 (when Dixon was Australian Ambassador to the United States) he was third secretary of the Australian Legation. He was the legal adviser to the European Regional Office of the United Nations Relief and Rehabilitation Administration from 1944 until 1948. He signed the Victorian Bar Roll in 1949. He read with Adam, and took silk in 1957 on the same day as Lush. His practice both as a junior and as a silk was primarily in commercial, constitutional and patent work, but in his early days as a silk he appeared in the Court of Criminal Appeal. On one occasion he was pressed by a now retired member of that Bench who said "But Mr. Aickin it is plain as a pike staff that your client is guilty". "That" replied Aickin "is not the exercise. It is whether he had a proper trial".

From 1951 until 1956 he was the independent lecturer in company law at the University of Melbourne, and was succeeded in that position in 1957 by Young. In 1966 he was appointed a member of the Council of LaTrobe University. He held directorships in a number of large public companies. He is one of the few Australian Barristers to have appeared before the House of Lords. He was one of the joint authors (together with Gleeson Q.C. and Professor Lane) of the famous opinion "Ex parte Rothery" of 1975 advising that a Governor-General may in appropriate circumstances dismiss Ministers who could not obtain supply. He was appointed to the High Court in 1976.

We are sorry at his passing. Our sympathy is extended to Lady Aickin.

APPOINTMENT

Nathan Q.C., 45, has been appointed Counsel assisting the Attorney-General. It is a new position which involves advising and assisting the Attorney. It is said to carry a salary of $41,000.

The Bar wishes him well.

LORD DENNING TO RETIRE

Lord Denning announced on Friday 28th May, 1982 that he will retire in July. His retirement has come in the midst of severe public controversy.

It all arose in the following way. In 1981 a riot case was heard in Bristol Crown Court. There were twelve accused at the trial, some of whom were West Indians. Lord Denning's most recent book "What Next in the Law", published by Butterworths made scathing reference to the verdict. Lord Denning said that, by using 35 challenges, the ringleaders got five coloured jurors. "The evidence against two of the accused was so strong you would think they would be found guilty. But there was a disagreement". Lord Denning said that the "packed" jury split on racial lines.

British citizens were no longer all qualified to serve on juries, he said. "The English are no longer a homogeneous race. They are white and black, coloured and brown . . . . . some of them come from countries where bribery and graft are accepted . . . . and where stealing is a virtue so long as you are not found out. They no longer share the same code of morals (or) religious beliefs."

Unfortunately, a lot of what Lord Denning said was either factually wrong, or at least misleading. The Crown Case was that only one of the accused was a ringleader. Three of those described by Lord Denning as ringleaders were acquitted by direction of the trial judge at the end of the Crown Case because of insufficient evidence. Of those whose cases went to the jury, one was unanimously acquitted. Four more were acquitted after prolonged deliberation by majorities which must have included at least five white jurors favouring acquittal.

Of the remaining four accused, the jury said they might reach a verdict on one with a further direction, but were deadlocked on the others. Of those three, not two, about whom there was disagreement, one was white.

Two of the black jurors threatened defamation proceedings, demanded an apology, withdrawal of the book and damages. Most, if not all of their demands were met. Lord Denning stated publicly his new view of the value and conscientiousness of black jurors. The book was withdrawn and will be issued in an altered form. A public apology has been promised. He has instructed solicitors. And he has said he will resign.

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Why is it that Lord Denning's retirement should merit such attention from us? First of all he has been judge for nearly 40 years. But more importantly, he has been a maverick of great humanity. He has become a more widely known figure than any of his fellow judges. He is the subject of unashamed hero-worship. There is a Lord Denning Society to pay tribute to his work.

How has all this come about? Alfred Thomas Denning was born 23rd January 1899. He was a very clever boy from humble beginnings. At Oxford he collected 1st class honours in mathematics and jurisprudence and was called to the Bar in 1923. By 1929 he was joint editor of Smith's Leading Cases, and by 1935 of Bullen and Leake's Precedents. He was appointed King's Counsel in 1938 and a judge of the High Court of Justice in 1944. At 45 he was the second youngest appointee for 150 years. Then further elevations came: a Lord Justice of Appeal 1948, Lord of Appeal in Ordinary 1957, and finally Master of the Rolls in 1962.

He regards himself a student of language. He says that ".... words are imperfect instruments to express the mind of man and that the better role of a judge is to be a master of words, and to mould them to fit the purpose in hand".

His style of writing judgments has shown considerable change over the years. The well known **High Trees House Case** (1947) K.B. 130 shows no sign of stylistic novelty. By the 70's however, he demonstrates a distinct and characteristic style. The most striking of these is the short sentence. Most judges even now show an extreme distaste for the full stop. Not so with Denning. Every sentence is short. Not more than a few words. Especially at the start of the judgments.

He developed a penchant for the striking opening to his judgments. "It was bluebell time in Kent", **Hinz v. Berry** (1970) 1 All ER 1074; "In summertime village cricket is the delight of everyone", **Miller v. Jackson** (1977) 3 All ER 338).

He will be remembered for his dissent in **Candler v. Crane Christmas** (1951) 1 All ER 426 and, more recently for his championing of the Mareva Injunction since (1977) 1 W.L.R. 1093. Typical of his approach to novel remedies was his support for the Anton Piller Order (1976) Ch. 55. Likewise his persistent, but unsuccessful, efforts to uphold the right of the deserted wife to remain in occupation of the matrimonial home – a right described by Megarry as "one of the most lusty infants to which English Law has given birth in recent years": 68 L.Q.R. 379.

Perhaps it was his light touch that captivated so many. One appeal concerned a solicitor's clerk who was caught while attempting to put laughing gas in the ventilating system. He was imprisoned for contempt.

Denning exhibited understanding and mercy, and a good deal of wisdom.

> "There is a lesson to be learned from the recent cases on this subject. It is particularly appropriate at the present time. The new Crown Court is in being. The judges of it have not yet acquired the prestige of the red judge when he went on assize. His robes and bearing made everyone alike stand in awe of him. Rarely did he need to exercise his great power of summary punishment. Yet there is just as much need for the Crown Court to maintain its dignity and authority. The judges of it should not hesitate to exercise the authority they inherit from the past. Insults are best treated with disdain – save when they are gross and scandalous. Refusal to answer with admonishment – save where it is vital to know the answer. But disruption of the court or threats to witnessess or to jurors should be visited with immediate arrest. Then a remand in custody and, if it can be arranged, representation by counsel. If it comes to sentence, let it be such as the offence deserves – with the comforting reflection that, if it is in error, there is an appeal to this court. We always hear these appeals within a day or two. The present case is a good instance. The judge acted with a firmness which

became him. As it happened, he went too far. That is no reproach to him. It only shows the wisdom of having an appeal".
Balogh v. Crown Court at St. Albans (1974) 3 All ER 283 at 289-290

There is no doubt that he has ruffled a few feathers. Since his eightieth birthday he has written two best-selling law books, taken part in B.B.C. television and radio programmes and has been reversed eight times in succession in the House of Lords. He lectures and speaks with an impish glee. He is not loath to tell a story against himself, or against any of his judicial brethren.

Professor J.A.G. Griffiths of the University of London reviewed Denning's career in the "Observer" of May 30, 1982. "Lord Denning is unlikely to be remembered as a great judge. A great judge leaves behind him a body of doctrine reflecting a coherent and consistent philosophy, and, although confined by the rules of law he must interpret, nevertheless elaborates a view of justice which is recognisable within a long tradition.

But Lord Denning is in another great tradition: that of the English eccentric. He is .... his own man – and, to many of his countrymen, a judge who seeks justice, however erratically, according to his own lights"

When Patrick McAuslan reviewed Denning's "The Due Process of Law" he concluded, "At the end of the day Lord Denning is a unique judge and English law and public life would be poorer without him .... (he is) . . . unorthodox, larger than life, a great performer, eager to publicise his own considerable contributions to public life and present them in the best possible light .... able to carry on a full working life long after most people have retired, and finally always willing to question the conventional wisdom of his colleagues while at the same time accepting and maintaining the essential rightness of the system ....." (1981) 44 MLR 236

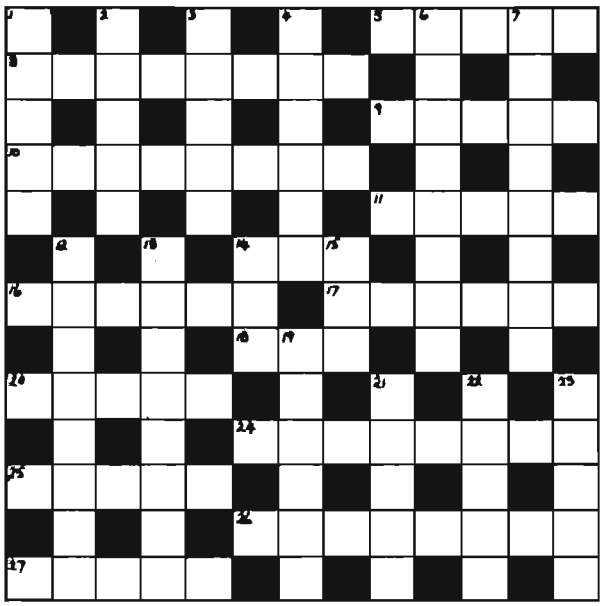
CAPTION COMPETITION

Winner of last edition's competition was J.G. Meagher with the following entry:

McInerney J.: You must be tired Charlie. Would you like a seat?

Francis Q.C.: Yes Murray, I'd like a safe seat, or better still, the one you're about to vacate.

CAPTAIN'S CRYPTIC No. 40



Across:

5. Seats become property
8. That which pertains to the conduct of actions (8)
9. Four footed and divisible into shares (5)
10. Sent a note (8)
11. Essential to existence (5)
14. Request (3)
16. Re a part of the club, I recall (6)
17. Bind by contract or promise eg. of marriage (6)
18. "This little kingdom ... " Henry IV, II, IV, iii
20. Entertained argument or evidence (5)
24. Sounds like babyish counsel exciting quarrels (8)
25. A judgment which puts an end to things (5)
26. One resolved not to marry (8)
27. The condition of the body politic (5)

Down:

1. Presents the case (5)
2. Participant in proceedings
3. Last removed from Mo's unfortunate colleague (5)
4. The right to approach (6)
6. Time during which a court sits (8)
7. Mutual conveyance of property (8)
12. Abandoned ship lives in the Flagstaff Gardens (8)
13. Straying from moral standard (8)
14. Furnish oneself with authorities on a limb (3)
15. H. Marks J is within my knowledge (3)
19. Put an end to the nuisance (6)
21. Empty of brain, draw into a conduit perhaps (5)
22. Leather strip (5)
23. Tearful court announcer (5)

(Solution Page 36)

IS THERE AN ALTERNATIVE

Modern day practice is for all a high pressured battle between clients, telephone, deadlines, staff, partnership organisation and not the least, the annual tax bill. For some the complexities of running a practice and the problems of cash flow, competition from other professions, attracting new clients, sustaining and serving existing clients mean an increasingly infrequent contact with law. They become high powered office managers/ accountants/ PR consultants and the like. Many practitioners are now wondering whether all the effort is worth it. They ask, "Is this a living?", "Is there any alternative?", "There must be a better way to earn a living?" and other variations on the same theme. For others there is the problem of combining a career with active family involvement, or husband's career versus wife's career.

In the past the only alternative for many, if they wished to change their life style, was to turn to teaching, the magistracy, or, for some, to opt out altogether. One of the great problems with practising law is that unlike many other professions such as medicine, engineering or architecture, it is not a "transportable" profession. Traditionally lawyers rarely change firms or move between the bar and solicitor's offices and even more rarely physically move to another jurisdiction.

The purpose of this article is to suggest a very viable alternative offering security, good financial rewards, excellent career prospects and an alternative life style while still enjoying a satisfying professional life. This alternative is employment as Crown Counsel with Government in Hong Kong. This article is aimed at the solicitor with at least 2 years experience, the barrister with at least 3 years experience and the more senior experienced practitioner who wishes to maintain high job satisfaction with good financial rewards but feels that a change in direction or life style is called for. It is aimed at those who feel the need to practice law rather than business management; who wish to be involved in stimulating legal problems, but not to be subjected to the constant pressure inherent in private practice.

Hong Kong is a British Crown Colony, and consequently its legal system is closely modelled on the British Judicial system. An Australian or New Zealand lawyer would quickly feel at home working in Hong Kong. There is a very strong and active private bar to provide stimulating opposition. The ultimate court of appeal for Hong Kong is the Privy Council. The attractions of being involved in a matter on appeal to the Privy Council are obvious.

A government lawyer in Hong Kong generally plays a more important and responsible role in Government than his counterpart in Australia or New Zealand. One of the reasons for this is that Hong Kong has only a limited democracy which means that lawyers are more closely involved in the decision making processes of Government and are called upon to make, or at least assist in making, important and sensitive policy decisions. Then,because Hong Kong is the banking, commercial and shipping centre for the whole of Asia, complex and interesting legal problems regularly arise, involving everything from extradition proceeding, points of international law, boards or inquiry, and commercial crime to the usual range of big-time crime.

Employment in Government in Hong Kong basically means working for one of four departments. By far the largest department is the Attorney General's Chambers headed of course by the Attorney General. These chambers provide the drafting, advisory and court representation service to the many departments of Government. Although the private profession in Hong Kong is strictly divided into barristers and solicitors the Attorney-General's Chambers generally operate on a fused system although, of course, some members spend more time in court than others by personal preference. The Chambers are divided into three sections, drafting, civil and advisory, and prosecutions. There are approximately 122 Crown Counsel currently employed of whom approximately one-third are English, one-third Australians and one-third locally recruited lawyers.

The second largest department is Legal Aid. Work here covers the full range of legal work and while a lot of work is briefed out to private solicitors or the private bar, part of the work, including court appearances, is done directly by the Legal Aid Officers.

A small specialist department deals with Company and Land Registration bankruptcy and liquidations. This is the Registrar-General's Department. All aspects of the work involved in these specialist areas other than criminal aspects are done by officers of that department.

Finally there is the Judiciary. Magistrates are recruited directly from abroad. A system of promotion within the judiciary exists and a number move on to become District Court Judges and High Court Judges. The Magistrate's Court is limited to a criminal jurisdiction. An applicant for a position of Magistrate must be aged over 40 years and have 10 years experience. The salary scale commences at the level of Senior Crown Counsel and has the same benefits.

Employment of expatriate lawyers is on contractual terms initially for 2½ years. The package offered includes a realistic salary. For Crown Counsel the range is $HK8,655 – $HK15,150 per month ($A1.00 – $HK6.4) ($NZ1.00 – $HK4.75), a 25% gratuity on conclusion of contract, free medical and dental services subsidised schooling locally or a boarding school in the officers country of origin, accommodation (a charge of 7½% of salary is made for accommodation which for a family usually consists of 2 or 3 bedroom apartment) and travel to and from the country of origin for the officer and his family. At the end of the contract the officer receives paid leave of 3½ months. Taxation is currently fixed at a maximum of 15%. Salaries have been subject to a pay increase in April 1981.

Promotion for officers in the Attorney General's Chambers is from Crown Counsel to Senior Crown Counsel (salary range HK$15,860 – HK$17,990 per month) to Assistant Principal Crown Counsel (salary HK$19,350) to Deputy Principal Crown Counsel (salary HK$22,500) and onwards up to Attorney-General.

Officers at Senior Crown Counsel level and above (which includes Magistrates) sign a three year contract providing for annual leave of 45 days, rather than a 2½ year contract with leave at the end of the contract. An officer on an Annual Leave contract is provided with air passages each year to fly himself and his family to his country of origin. This allowance can of course be used to travel anywhere else in the world. The other benefits of an Annual Leave contract are the same as those on a 2½ year contract.

What do these figures mean in Australian terms? Take a Senior Crown Counsel position at $15,860 per month + 25% gratuity ($47,580 in 12 months). This equals HK$237,900 per year. Deducting tax at 15% and rent of 7½% leaves HK$184,372.25 which is equivalent to approximately Aus. $28,800. I leave it to you to calculate how much you must earn in Australia to have that sum per annum clear of tax and the cost of a home. When making a comparison one of course should not forget the tax free benefits of medical care and, for Senior Crown Counsel and above, annual airfares to the officer's country of origin or an equivalent allowance to anywhere in the world for the officer and his family. In New Zealand terms the same calculation results in a figure of approximately $NZ38,800.

Recruitment and promotion in the Attorney General's Chambers are firmly based on merit and ability although, of course, seniority and local experience are important additional factors. An experienced lawyer may be recruited at any of the levels indicated above and may be promoted to a higher rank shortly after joining.

Hong Kong, of course, has much to offer outside working hours. The influence of many Asian and European cultures means a plethora of restaurants, cultural exhibitions, film and stage shows. The advantages of live-in home help and babysitting are obvious and mean that the Hong Kong lawyer and his/her spouse are free to enjoy all that Hong Kong has to offer.

So the answer to those who are asking "Is there an alternative?" is, "Yes, there is – as a lawyer with the Hong Kong Government." If you are under the age of 35 and a solicitor with at least 2 years experience or a barrister with at least 3 years experience and the alternative of employment in the Attorney General's Chambers, Legal Aid or Registrar General's Department appeals to you or if you are aged 40 years with 10 years experience and the alternative of employment as a magistrate appeals to you, please contact Michael Winter, c/o Garrick Gray & Co., 43rd Floor, 55 Collins Street, Melbourne., who will be able to arrange for you to be sent an application form and will arrange an interview with a representative of the Attorney-General's Chambers.

PUNISHMENT

AND

PUBLIC OPINION

It is not uncommon for politicians and judges to purport to take into account public attitudes to crime when, either legislatively or judicially, they are in the process of fixing penalities. Inside each politician there is, apparently, a mini-computer that tells him what the public will stand for in the way of crime and what it requires in the way of suppression. As England awaits, with some foreboding, a renewal of last summer's urban riots, politicians there have been painting a picture of a menaced and frightened public demanding the reintroduction of powerful sanctions against crime. Law and order has become a major political issue and Parliament has again been asked to consider the merits of the hangman's noose and flogger's birch. The politicians have been assuming that the public supports the imposition of very long prison sentences for violent crimes and that it favours imprisoning many of those who commit non-violent offences. They choose to ignore the criminologists who have been telling judges and legislatures for some time that extended periods of improsonment are largely ineffectual in deterring crime and, insofar as there is a deterrent effect, its impact is in the early part of the sentence. The Home Office has been suggesting that if, after the initial shock of imprisonment, some prisoners were released on licence, the combined effect of supervision and the threat of re-imprisonment would keep most out of trouble. The British are already faced with a clogged-up prison system and the acceptance of such views would do much to relieve the congestion and reduce the explosive tensions which are building up in the prisons. However the politicians have no confidence that these measures can be introduced without a communal backlash.

A report by the London **Observer** at the end of March this year of a public opinion poll carried out in collaboration with the Prison Reform Trust suggests that these political mini-computers may have been wrongly programmed. The pollsters invited a sample of the public to choose sentences ranging from fines to imprisonment for various types of offence ranging from violent crimes, such as serious assault, rape, mugging, and cruelty to children, to non-violent crimes, such as burglary, vandalism, shoplifting and confidence trickery. The results of this survey indicated that public opinion was far more balanced than demands in Parliament for hanging and flogging would suggest and that, far from being violently retributivist, the public would be prepared to accept non-custodial sentences for most non-violent offenders now in prison and that a large majority of those interviewed (3 out of 4) were of the view that sentences of up to seven years should be the normal maximum punishment even for violent offenders. The poll results are shown on p.19.

The figures reflect only general attitudes towards different classes of crime, but they do indicate that political or judicial intuition of public opinion as a justification for exemplary sentences may be unfound.

Victorian Bar News

What is the significance of all this for Australia? Two decades of downward movement in rates of imprisonment led to an all time low in 1977 but since then there has been an upturn in the rates of imprisonment with the consequential crowding of Australian prison accommodation. This has been accounted for by an upgrading of legislative penalties and by a hardening of attitudes to punishment on the part of the judiciary, apparently in response to a similar toughening in the views of the public. There is in fact little in the way of Australian research into public attitudes towards sentencing of offenders. Various public opinion polls have been conducted since the 1940s, usually in relation to the acceptability of capital punishment for serious offences, and the Australian Law Reform Commission, as part of its sentencing reference, arranged for certain questions to be inserted in a national public opinion poll conducted by the **Age** in 1979. But all of these surveys are handicapped by their lack of depth. In the latter survey, the questionnaire related to many issues other than crime and punishment and while the respondents confirmed the desirability of using non-custodial sentencing options for lesser offences, they were not given the opportunity to indicate the appropriate period of incarceration for graver offences. Of course public opinion may be readily discounted as ill informed, dependent on the biases of the news media and volatile in its passing responses to crime. Moreover it is well understood that attitudes may vary according

VIOLENT CRIMES

SERIOUS ASSAULT	Favoured by: (per cent)
1 – 3 years prison	20
4 – 7 years	29
longer	31

RAPE	
1 – 3 years prison	11
4 – 7 years	20
8 – 12 years	16
over 12 years	20
life	20

MUGGING	
1 – 3 years prison	28
4 – 7 years	21
8 – 12 years	10

CRUELTY TO CHILDREN	
1 – 3 years prison	24
4 – 7 years	17
longer	24

NON-VIOLENT CRIMES

BURGLARY	Favoured by: (per cent)
1 – 3 years prison	25
less than a year	15
large fine	23

VANDALISM	
1 – 3 years prison	17
less than a year	9
suspended sentence	8
large fine	16
probation	11

SMALL-SCALE SHOPLIFTING	
fine	57
probation	17
prison sentence	7
suspended sentence	8

CONFIDENCE TRICKS	
large fine	20
suspended sentence	7
1 – 3 years prison	29
4 – 7 years	13
less than a year	10

Table by courtesy the **Observer**

to sex, age, ethnicity, political affiliation and other factors and thus the concept of "public opinion" in a pluralistic society as diverse as Australia may be without real meaning. The Australian Law Reform Commission, which itself supports reduced use of imprisonment, (see Report No. 15: Sentencing of Federal Offenders, 1980)* made the following observation regarding public opinion:

> Neither judicial officers nor the Commission can ignore community feelings entirely. Proposals for law reform, if they are to be accepted and implemented, must secure the approval of Ministers and Parliament, sensitive and answerable to public opinion. These feelings must therefore be carefully considered, along with other relevant factors, in formulating proposals for change in the imposition of punishment. But as we have stated before, 'responsible law making calls for more than attention to public opinion polls'. (para 61)

While law reformers, politicians and judges need not be slaves to public sentiment, the London Observer report seems to suggest that public opinion, at least in the UK, may be more moderate and more responsive to reform than the intuitive processes of the law makers would allow. Surely then we too should attempt, in a more systematic way, to find out actually what is the state of the public mind before invoking it to justify draconian measures.

Richard G. Fox
Reader-in-Law
Monash University

* See Commonwaelth Crimes Amendment Bill 1981, cl.5 (1) which will, if passed, add a new s. 17A to the Crimes Act 1914 (Cth) imposing restrictions on the imposition of sentences of imprisonment on Commonwealth offenders.

VALETE GOLDIE

Goldsmith Collins, who died on the 27th April, was born in 1902. In the 1920's he acquired fame as Fitzroy's centre-half-back. Solidly built and not unskillful, he was above all, supremely determined. Thereafter "Goldie" (as he was always known) achieved some measure of success in his business, and by 1951 had a valuable house and property at Northcote. This he chose to fence with a series of gates.

For this usual fence no permit had been sought, and, the Northcote Council eventually obtained a conviction against Goldie in the Court of Petty Sessions. An order nisi to review the conviction on the ground that the gates did not in law constitute a fence was subsequently refused by a majority of the Full Court. This misfortune provided the immediate stimulus for a celebrated legal career.

Goldie soon became a familiar figure in the Supreme Court Library, invariably wearing a light grey dustcoat and carrying a sizeable suitcase which bulged with briefs. He associated with Rupert Millane, who many years before had used a miner's licence to fence in part of Queen Street as a parking area. Millane was now well established in practice as undisputed leader of the vexatious litigant's bar. For some years before the two finally fell out, Millane and Collins frequently exchanged notes of useful cases and pleading precedents.

Increasingly, Collins waged was against authority. Fines and costs continued to mount up against him. Undeterred, Goldie punched the Sheriff when he came for costs. This led to further proceedings. On another occasion when the police arrived at his home late at night to obtain Council fines, he instructed his wife to "stop them". Whilst Mrs. Collins, Horatio-like and armed with a broom, held the bridge, Goldie went out the back door and over the fence. On the subsequent assault charge Ted Laurie, who had acted for Goldie on a number of occasions, appeared for Mrs. Collins. In an era before women's liberation, after lunch and a few beers Morris S.M. finally acceded to the earnest plea of counsel that Mrs. Collins had acted under the duress of her husband and the charge was duly dismissed. For the Collins family it was a happy and rare occasion.

Collins in the Premiership Team 1922

Other litigation, however, was not so successful, and further proceedings for contempt were brought against Collins before Hudson J. On this particular occasion, Goldie insisted on his constitutional right to lie prostrate on a seat in the Fourteenth Court throughout the proceedings. Thereafter whenever Goldie brought actions against Councils or Judges, Edward Herbert Hudson was invariably joined as one of the co-defendants.

Goldie's writs, long and closely typed documents, liberally sprinkled with epithets, displayed considerable ingenuity. On occasions, the prayer for relief sought (inter alia) "an order that he be admitted to practice as a barrister and solicitor of the Court". Having regard to the size of his growing practice, Goldie's request was not entirely unreasonable.

He purchased a considerable part of Sir John Latham's Law Library, which Sir John, an enthusiastic Fitzroy supporter, knocked down to Goldie at a very modest price.

It became inevitable that Goldsmith Collins would be declared a vexatious litigant and proceedings to achieve this were ultimately brought in the Fourteenth Court. During the presentation of the Crown Case, in order to steady his nerves Goldie took more than twenty Veganin tablets. Before the order for his "legal castration" was finally pronounced, Goldie was mercifully anaesthetised at the back of the Court, where, at the end of the day he was left by the attendants. He did not waken again until shortly before midnight to find himself in a pitch dark Court. With some difficulty, Goldie finally extricated himself from the locked Supreme Court Buildings, and next day sought leave to issue a writ against the Judges for negligence and false imprisonment, claiming some millions of pounds by way of damages.

From time to time Collins was gaoled, and on one such occasion was brought from custody to appear in bankruptcy proceedings before Clyne J. Having been refused any paper on which to write his argument, Goldie sought to hand up to the judge a long argument written on prison toilet paper. Clyne J. was sympathetic, but would not accept the argument in its then form. He directed Collins be given appropriate paper and the argument transcribed onto it.

Goldie's home was eventually sold to settle his debts. There was a sizeable surplus, which was paid into Court and which Goldie long refused to touch, lest this be construed as constituting an approval of what had been done.

Goldie was a forceful advocate with a not inconsiderable knowledge of case law, especially the law of contempt. On one notable occasion before Herring, C.J. a silk well known for his suave and urbane style, whilst presenting the case against him, momentarily stumbled for an authority. Goldie, without a word, immediately passed across the relevant report open at the appropriate page. But his understanding of principles was often astray, and Rupert Millane's comment that "Goldie was a fine advocate but a poor lawyer" was, perhaps, a reasonably accurate assessment.

Goldie's "practice" gradually dwindled and he lived out his last years in a caravan at Panton Hill, where, tragically at the age of 80, he was accidently burnt to death. The 'fifties, the era of Dixon and Fullager, is often regarded by Victorians as the golden age of the High Court. It was, even more certainly, the golden age of the great vexatious litigants – Millane and Collins.

FRANCIS Q.C.

MISLEADING CASE NOTE NO. 18

Fabian v. Abel

Machinery J. said recently:
This is the return of an order nisi granted last month, calling upon the Defendant to show cause why an information of Quo Warranto should not be filed against him.

The Informant, Mark Fabian, is a man well known in these courts for his tireless championship of unusual causes. He has made application pursuant to Order 53 Rule 1 for this order nisi, alleging that the Defendant is not entitled to hold his office. The Defendant is, of course, Sir Earnest Abel, the leader of the recently elected Labour-Conservative Government and Premier of this State.

The order nisi for an information of quo warranto has replaced the ancient prerogative writ of quo warranto, but the information has all the strength originally placed in the writ, after the Quo Warranto Inquiry of Edward I. It is directed to a claimant to or a usurper of an office, and calls upon him to disclose by what authority he claims or holds that office.

The Defendant has given evidence before me that he is the Premier of this State, his Labour-Conservative Party having won a majority of seats at the recent State election. He said that he was sworn in as a Minister of the Crown by the Governor, Sir Monty Falklands, shortly after the election; and he produced a commission to that effect signed by the Governor. Prima facie these credentials appear unimpeachable – how then does the Informant put his case?

Section 51 (xxix) of the Commonwealth Constitution empowers the Federal Government to make laws with respect to external affairs, even when such laws take effect solely within a State: **R. v. Burgess** (1936) C.L.R. 603. The Commonwealth, as a signatory to the Charter of the United Nations, has, of course, bound itself to give effect to international agreements The Federal Government is thus able, and required,

to make laws giving effect to international agreements to which it is a party, even if those laws conflict with the laws or Constitution of any State. To the extent of any such conflict, Commonwealth law prevails: Section 109 of the Commonwealth Constitution.

The foregoing is clear, but the evidence on which the Informant relies is surprising, and should be set out in full. Some months ago, the ruling Federal Conservative Progressive Party launched an appeal for funds. Amongst other donations and pledges of support, it received the following letter from President Gatling of Argentina:

> "I admire your progressive centralisation of power. Keep up the good work. Herewith $10."

This letter was answered by what might be described as a formal letter, signed or purportedly signed by the Prime Minister Sir Rupert Strangler, in the following terms:

> "Thank you for your support. We will do our best in the new session of Parliament to carry out our legislative program, and to give effect to your comments."

The Informant alleges that this correspondence constitutes an offer, an acceptance, and valuable consideration. It seems to me that this is right, and thus there appears to me to be a binding agreement between the parties to the the agreement. The agreement is clearly international, and is equally clearly designed to reduce or eliminate local or State Governments, to the aggrandizement of the central Government. There is nothing unprecedented in that, of course; monarchs since the Conqueror having engaged in such conduct.

Until recently I would have thought it absurd that the Federal Government could, by entering into a cleverly contrived series of international agreements, extend its legislative power beyond the range given it by the Constitution. Any such opinion however, has been dissipated by the recent High Court decision in **Koowarta v. Bjelke-Petersen** (1982) 39 ALR 417. In this case the majority of the Justices held that an international agreement on racial discrimination empowered the Federal Government to legislate on that subject, a subject on which it could not otherwise make laws. It is not for me to say that there should not be laws preventing discrimination against those not born in Australia, but this decision seems to have an extremely wide scope. However, it is binding on me and I must follow it.

The Federal Government is therefore both able and required to make laws on a topic covered by an international agreement.

It follows that by the agreement referred to it is obliged to legislate to abolish State Governments, and indeed the States themselves. Since abolition of the States would make the Commonwealth Constitution a nullity, it may be that the execution of this agreement with Argentina constitutes a self-executing winding-up order for the Commonwealth of Australia itself. It is, however, unnecessary for me to decide this point.

This Court is a Court of Equity. It is trite law that Equity deems to be done what ought to be done. It follows therefore that the State Government, and indeed the State of Victoria itself, has in the eye of Equity been abolished. The Defendant is Premier of nothing at all. There is therefore no public office for him to usurp.

I will discharge the order with costs.

GUNST.

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CENTENARY OF THE VICTORIAN BAR

A Committee has been formed to suggest to the Bar Council an appropriate programme to celebrate the Centenary of the Victorian Bar in 1984.

It is felt that there should be at least a Centenary Dinner and a Centenary Oration. Other functions and other ways of commemorating the Centenary of the Bar may be appropriate.

The Bar has already bought what is hoped to be a sufficient quantity of a wine of 1971 as the Bar Centenary Wine and some thought will have to be given to design of an appropriate label. The purpose of this circular is to let the Bar know that the Committee exists and to invite (sensible) suggestions from members of the Bar as to what ought to be done to commemorate the Centenary.

Suggestions might be given to members of the Committee — Berkeley Q.C., Hulme Q.C., Nicholson Q.C., Crossley and Judd.

A LAWYER'S BOOKSHELF

Residential Tenancies Handbook – Victoria
by Gim Teh. Butterworths 1982 I-XII, 212 pages $19.50.

One of the most significant pieces of recent legislation passed by the last State Government was the Residential Tenancies Act 1980 the operation of which began on the 9th November 1981. Butterworths have now published a text on the Act authored by Gim Teh, a Senior Lecturer in Law at Monash University with a considerable background in the area.

The first thing to note about the book is that it is not basically a law book. Rather, as the name suggests, it is a handbook aimed more at those likely to be directly affected by the Act. These include tenants, landlords, estate agents, social workers and other, "paralegals". Lawyers will find the book useful if only for the fact that, excluding the text of a seminar held last year by the Leo Cussen Institute and published by them, it is the first comprehensive study available of the Act.

The book has a number of interesting or useful features. These include a large number of draft forms and notices (now made somewhat redundant by the fact that the Tribunal itself has produced and made available a number of draft forms etc.), a Glossary of Terms, and list of Relevant Names and Addresses. The transitory nature of any book of such a type is illustrated by its listing of the name of the former A-G, as the Minister in charge of the legislation.

One thing the book does not include, is a copy of the Act. This would have been useful having regard to the frequent reference in the text to unquoted sections. It would have enabled the reader to know, in the light of any subsequent amendments, at which particular stage of the development of the Act the text was written.

The first chapter of the book is an interesting if somewhat partisan review of the background to the Act and its significance. The author makes no secret of his personal views. Excluding any question as to what might in fact or ultimately be of benefit to tenants these views can be described as "pro-tenant".

Gim Teh is extremely critical of what he regards as the poor drafting of the Act. Lawyers who read the numerous instances referred to in the text, or who study the Act itself, might tend to agree with him on this. As an example, his comment on S. 55 of the Act, which appears as a footnote on page 85 reads as follows:

> "Besides being a monumental sample of legal sludge that section has completely missed the main point for which it was originally conceived".

Lawyers might be concerned however and less likely to agree with what they might discern to be the author's criticism of the profession. His qualifications are listed on the flyleaf as being, inter alia, "of the Inner Temple, Barrister at Law, Advocate (sic) and Solicitor of the Supreme Court of Victoria". He has this to say about lawyers –

"The Law Institute has shown that lawyers stand on the side of landlords, estate agents and other investors in legal reform such as this. While its vested groups may so far have won the day the long term effect of such partisanship is not likely to improve the deteriorating public image of lawyers as a whole". (p.4)

"The creation of the tribunal system may thus be seen as an important break-through in traditional thinking in the landord-tenant area. It is something which would not have been achieved had the law reform process been solely the work of lawyers". (p.5)

And again, when referring to the social worker, paralegal etc.

"There could thus be a real break from their dependence on lawyers to advise on rules zealously kept and secretly reposed in the lawyer's bosom. Second they can now actually replace lawyers in many types of hearing before the tribunal". (p. 10)

The analysis and commentary on the sections of the Act contain many valuable lessons, insights, and ideas. For instance, a footnote to page 28 acknowledges the author's debt to a final year law student for saving him from a significant error. The footnote refers to the jurisdiction of the Magistrates' Court, and impliedly the County Court, to hear residential tenancy matters. Previous commentators on this aspect of the legislation, this critic included, have expressed the view that the two named Courts had a co-extensive jurisdiction with the Tribunal. Careful analysis of the relevant sections shows, however, as the author indicates, that in fact this is not so and that there is a monetary limit on the jurisdiction of each of the two Courts. In particular, a tenancy dispute can only be taken before them if it is a money claim which in each case exceeds $1,500.

Despite its undoubted worth to all concerned, however, it may be that in view of its emphasis, and the undoubted effort expended by the author on tenants' issues, the book may be of more value to tenants than to landlords. Thus those issues which could be regarded perhaps as landlords' issues do not seem to be as adequately covered as those of tenants.

As an example there is the difference in coverage given to the giving of a tenant's Notice to Leave and of a landlord's Eviction Notice. The former (p. 160) under large type contains a paragraph explaining the significance of Section 140 which provides for the allowing of time for postage in determining the date of service by post. Under a heading in much smaller type when dealing with landlords' eviction notices there is no such reference. (p. 196)

The book is undoubtedly worth its purchase price. It may be of interest, however, that Dr. Adrian Bradbrook of the University of Melbourne, likewise an academic with a considerable background in the subject, has written a book on the Act much more in the form of a legal text to be published by the Law Book Company apparently in July 1982. Moreover, in view of the significant changes proposed in the Act by the present Government, it seems there will be scope for several more new books or editions in the near future.

SHARP

CUSTODY CASES –

IS THERE TRULY A RIGHT OF APPEAL?

(sub. nom. – THE JUDGE CAN DO NO WRONG (ALMOST)).

The Relevant Statute

Section 64 of the Family Law Act provides that in proceedings with respect to custody of a child of a marriage the Court shall regard the welfare of the child as the paramount consideration and may make such order as it thinks proper.

Section 94 of the Family Law Act provides for an appeal to a Full Court of the Family Court. Upon such an appeal the Full Court may affirm, reverse or vary the decree the subject of the appeal and may make such decree as, in the opinion of the Court, ought to have been make in the first instance.

The View Of The High Court

On the 14th December, 1979, the High Court handed down its decision in **Gronow (1979)** FLC 90 – 716. The case concerned competing claims by the parents of a four year old girl. The parties separated in February 1977 when the child went to live with her father. Evatt CJ granted the husband sole custody in June 1978 after a contested hearing. The Full Court of the Family Court (Watson SJ and Joske J with Fogarty J dissenting) reversed that decision and granted the mother custody. The High Court upheld the father's appeal and resurrected the Trial Judge's decision.

Stephen J. said: –

> "In this case the fine balance of competing circumstances not only made the decision facing the learned Trial Judge a difficult one. It should also have gone far to satisfy the Full Court that this was not an occasion upon which it was proper for an appellate Court to disturb the outcome of a discretionary judgment, particularly when made after a most careful review at first instance of all relevant circumstances and made with that unique advantage which the primary Judge alone possessed, that of seeing the parties and those associated with them and gaining at first hand some personal impression of that personality. Where very evenly balanced competing claims are in question, and where it is custody that is an issue, this advantage must be of particular significance . . .
>
> The constant emphasis of the cases is that before reversal an appellate Court must be well satisfied that the primary Judge was plainly wrong, his decision being no proper exercise of judicial discretion."

"...AND MAKE SURE HE GETS CUSTODY!"

Murphy J. said :-

> "In a true appeal, the duty of the appellate Court, whether a matter be discretionary or otherwise, is to give the judgment that it thinks is warranted and not to defer to the Court below when it thinks otherwise. In custody cases however, the primary Judge's normal advantage in observing the witnesses, and the appellate Court's normal disadvantage in not so doing, is generally so greatly magnified that an appellate Court will rarely be able to come to a conclusion opposed to that of the primary Judge."

Aickin J. (with whom Mason and Wilson JJ concurred) after citing from **Lovell v. Lovell** (1950) 81 CLR 513 at 533 said:-

> "The advantage which a trial Judge has of seeing and hearing the witness is of particular importance in matters of custody where so much depends on an evaluation of the characters and personalities of the parents, and their attitudes, not only to the child, but also to each other. The attribution of comparitive weight or importance to various factors would generally be influenced by the impression formed from seeing and hearing each parent, and in appropriate cases the child or children involved. Some objective matters such, for example, as relative financial resources and adequacy of accommodation may stand in a different position but in the present case it is not suggested that any error occurred in that respect".

The Post-Gronow Statistics

Appellants	5
Respondents	54

Information supplied by the Principal Registry of the Family Court of Australia at Sydney indicates that since December 1979, 62 appeals have been heard in custody cases. Eight appeals have been upheld of which two relate to questions of interim custody and one related to an ex parte order. At least two of the five successful appeals resulted in re-trials with no change from the first result. Only one successful appeal has in fact been reported **(Grimshaw)** (1981) FLC 91-090).

Caveat Advisor

The restrictive interpretation by the High Court and the follow up statistics clearly indicate that appeals in custody cases are generally doomed to failure. Counsel when advising on the likely prospects of an appeal succeeding should bear those matters in mind as well as the enormous emotional drain placed on the parties of once again bolstering up hopes not to mention the financial expenses of the appeal. It seems clear that the words in Section 94 do not mean what they say. It may also mean that the Judges at first instance are right all of the time (almost).

Kay

THE ESSOIGN CLUB

At the first annual general meeting of the Essoign Club the Chairman, Berkeley, Q.C., reported to members that the Liquor Control Commission had on 26th April, 1982 granted the Club a liquor licence. Since then there has been successful dispensing of liquor on the premises. In recognition of his services to the Club, particularly in relation to the obtaining of the licence, His Honour Judge Frank Walsh was elected the first honorary life member.

The Club is administered by a Committee elected at the annual general meeting consisting of Berkeley Q.C. (Chairman), Shaw, Q.C. (Vice Chairman) Spry, Q.C. (Chairman of the Wine Committee), Chernov, Q.C., Michael Adams and McInerney (Secretary). It has two staff members Michael Christian (Nominee) and Pat Gilbert (Bar Manager). The hours of operation of the Club are as follows:

Monday to Thursday 12.30 p.m. – 2.30 p.m. (members only)
Monday to Thursday 4.30 p.m. – 7.30 p.m.
Friday 12.30 p.m. – 8.30 p.m.
Guests (excluding clients) may be invited to the Club by members each evening between 4.30 p.m. and 7.30 p.m. and on Fridays between 12.30 p.m. and 8.30 p.m.

Guests may also be invited to lunch in the Club on days when the Full Court hears motions for the admission of barristers and solicitors. On these days members are requested to make reservations for their guests with the Nominee or the Bar Manager.

The Committee has resolved for a trial period commencing on 18th June, 1982 to provide an a la carte restaurant service on Friday evenings between 6.30 p.m. and 9.30 p.m. Members will be asked to make reservations for their guests on these occasions. Depending on the response of members a decision will be made as to how often restaurant facilities will be provided.

In addition to the bar service, the Club provides a full take-away liquor service in beer, wine and spirits. Bulk purchases may be collected at the liquor store in the basement of Owen Dixon Chambers by

arrangement with the Bar Manager. The Club presently has available for sale a fairly wide range of quality wines at very reasonable prices.

A further service provided by the Club is regular exhibitions of art for sale. Presently on exhibition are 19th century legal prints including Daumier and Dendy Sadler which will continue till 2nd July. All the prints are available for sale and enquiries should be made to Michael Adams (Clerk S).
This Exhibition was preceded by one of Turkish and Persian rugs in May. Other exhibitions are planned for later on in the year.

In its first six weeks of trading the Club has been a great success in providing a convivial atmosphere in which to finish off the working day. The Committee is anxious to ensure that the Club operates so as best to serve the interests of the Bar, the great majority of whom are members. It will be pleased to hear suggestions from members in that regard.

Victorian Bar News

SPORTING NEWS

Paul Guest's prowess as a rower is well known. One could have envisaged that if he turned his mind to other athletic pursuits, he would make a success of them. In recent times he has become an accomplished runner and has participated in all the "Fun Runs" conducted this year. Although "Puffing Billy" beat puffing Paul this year, Guest has subsequently bettered his best time with a sterling effort in the Halls Gap marathon. He hopes to beat his personal best time of 3 hours 30 minutes when he races in the Sri Chinmoy Marathon in August. His program includes a tilt at the Big M Marathon in October and the Honolulu classic in December. He is so desperate that he participated in the Sports Exacto Team Trot disguised as a representative of some clothing company.

• • •

Hicks has a bad case of "tennisitis". He has been seen to bring his racquet to suburban Courts in the hope that some unsuspecting mortal will challenge him to a game. He has been opposed to Peter Robinson in a long fraud committal and they regularly oppose each other "out of court". He maintains that Robinson's forehand is as vicious as an A Grade players. He can speak with a degree of authority as his team won their section of the Associated Grammar School's Competition last year and have been promoted this year.

• • •

Readers of the sporting pages of the newspapers would have seen some publicity given to Royal tennis when a series of International players arrived to challenge our best boys. We are investigating reports that Heerey has been scurrying around the sacred Courts in recent times and taking a few hints from Searby Q.C who is well qualified to assist those who seek to play the Royal game – Searby, we understand, represented Australia in Royal Tennis some years ago.

In racing news the Bar has had a number of successful owners in the last few months. Bowman, who has more horses than Robert Sangster, has become somewhat blase with his successes and was a visitor to Brisbane on the long weekend to see one of his team race. He and Dove Q.C. have a smart galloper in "Rake's Pride" which has saluted twice in town. Tom Mees and Boyes won several "scale E's" when Diwali won the Australian Steeple at Sandown. Lee and Franich are still counting their winnings from the success of Killarney Glove at Bendigo. "Bickies" Bicknell, Tebbutt, Bowman and Noel Ross had success with Cryptic Clue at Werribee and Rubicon, who has had more lasts than a cobbler, eventually greeted the Judge at Bendigo.

• • •

We have been trying in vain to interview Langslow to hear his side to the story concerning his trip to New Zealand – a trip ostensibly to improve his technique at fly fishing. Dunn and Peter Galbally had intended to travel with Langslow to attend some special course but they were wise enough to know that technique is subsidiary to luck at this caper. Galbally and Dunn cancelled their trip at the last moment and their decision was quite justified having regard to the fact that Langslow landed only three "tiddlers" for the week.

• • •

David Ross looked a candidate for the Intensive Care section of the Eltham Bush Nursing Hospital following his completion of the inaugural Australian Tri Marathon. One has to complete successive marathons in canoeing, bike riding and then running to qualify for an award. We attempted to obtain an interview with him some weeks after the event but he was still puffing and unable to talk lucidly. Calloused hands prevented him from writing an account of his achievement and we can only hope that he can provide us with details in the near future.

"FOUR EYES"

LEGGE'S LAW LEXICON
"I"

I.O.U. A brief from Legal Aid Commission.

Identification Parade. A visual verbal.

Ignorantia Juris Haud Excusat. The presumption that the average layman ought to know more law than the High Court of Australia.

Immemorial Usage. A custom existing since before 1189, e.g. that counsel shall not be paid within the time of a year and a day.

Immorality. The presumption that all sin is sexual.

Immovable. Plaintiff's counsel with 4 briefs on the one day in the one jury list.

Impanel. The lottery by which a person charged with an act of gross indecency can face a jury consisting of 5 maiden ladies, 4 lay preachers, 2 accountants and a retired bank manager.

Impertinence. (1880) 6 Q.B.D. 190, the pleading of creative litigation.

Impediment. A genealogical stutter.

Implied Trust. The act of accepting a promise from opposing counsel that he will finish by 2.15.

Impossibility of Performance. The ability of such an opponent to make good his promise before 4.15 the next day.

In Chief. In the Family Court a party is entitled to have Counsel's version of the facts presented on affidavit. In other jurisdictions this is done by counsel asking his client questions. Junior counsel are not permitted to ask leading questions in chief.

In De Centex Posu Re. A primitive form of discovery at common law.

In Forma Pauperis. Another brief from Legal Aid Commission.

In Pari Delicto. Double trouble.

In Terrorem. The art of a judge able to stop counsel by saying, "I would not think of stopping you".

In Transitu. The closing address of counsel who has accepted 3 briefs for the same day in different courts.

Inducement. A circuit fee.

Industrial Injury. A decision of the Full Bench of the Conciliation and Arbitration Commission.

Inevitable Accident. A frequent result of accepting 3 briefs for the same day in different courts.

Infamous. Inglorious but well known, e.g. a defence of volenti.

Victorian Bar News

Information. A document designed to tell the accused as little as possible about the offence with which he is charged.

Inns of Court. The Metropolitan and The Golden Age, formerly also The Mitre and Menzies.

Innuendo. The real meaning of the expression "with the very greatest respect".

Instructions. The first page of a barrister's brief containing the names of the parties (mis-spelt), a 3 line summary of the relevant facts and a list of the 580 photocopy documents attached in neither alphabetical nor chronological order.

Intercourse. (shall be free); see (1945) 70 C.L.R. 1.

Inter Vivos. The condition of a judge of the Supreme Court before he gets his knighthood.

Intern. Junior counsel appearing in the Practice Court.

Interpretation. The unintelligible explaining the unfathomable.

Interrogatory. The right of counsel by non-leading questions to disclose to the other side the case that he proposes to make at the trial of the action.

Interstate. Goldberg, Q.C.

Interveners. Senior counsel appearing in the Practice Court.

Invention. A defence to a charge of trafficking in a drug of addiction.

Invoice. A barrister with a brief.

Iter. ? ? ?

CONTINUING LEGAL EDUCATION PROGRAMME

The Faculty of Law at the University of Melbourne is offering the following advanced continuing legal education courses commencing in July, 1982:

Advanced Income Tax
Advanced Industrial Law
Company Takeovers Regulation
Current Constitutional Problems
Law of Damages

The courses are based on those offered to candidates for the LL.M. by Coursework and will comprise twelve two-hour seminars to be held between July and October. All seminars will be conducted in the evening at the Law School. Assessment will be available in some subjects and where successfully completed, appropriate certification will be given by the University.

Places available in each course are necessarily limited and will be allocated on similar principles to those applying to the LL.M.

The fee for each course will be $300.

Applications close on 30th June 1982 and enquiries regarding enrolments should be directed to the Administrative Officer, Faculty of Law, University of Melbourne, Parkville, Vic., 3052.
Telephone 341 6165.

VERBATIM

Upon a deception charge, Magistrate reviews long list of prior convictions committed in N.S.W. and Victoria. Defendant sentenced to nine months gaol–

Wallace S. M: "After you get out of gaol I suggest you go back to New South Wales . . . you're from there aren't you?"

Defendant: "When I break the law in New South Wales they say –
'When you get out of gaol go back to Victoria', but the fact is I'm from Adelaide."

Oakleigh Magistrates Court
19 May, 1982

● ● ●

The Royal Plural

Cummins Q.C. (with D. Harper) appearing in the recent murder trial concerning the disappearance of Roger Wilson was making a submission to O'Bryan J. in the absence of the jury. After being sufficiently persuasive to win the point, Cummins concluded with the words:
"That being the case your Honour, we shall resume our seat".

● ● ●

Q: "In November did Tom Gawne try and arrange accommodation for you in the Church of England Home in South Australia because you were suffering a nervous breakdown . . . ?"

A: "I'd like to say 'bloody bullshit'."

His Honour: "The danger of saying that you see, is that you are very likely to run into trouble with me, . . . ?"

A: "I don't want to do that either".

R. v. Gawne,
7 December 1981
Cor. Judge Gorman.

The allegation was rape of an escort agency lady.

Kayser: What was the cost of the massage?

Witness: The massage was $25.00.

Kayser: And what did the customer get for his $25.00?

Witness: A topless massage.

Kayser: Alright, that's for $25.00. You also offered a full service?

Witness: Uh, Uh.

Kayser: A full service didn't mean a grease and oil change and carburettor clean did it?
And later on:

Kayser: Would it be true to say that you did your best to give pleasure to the client with whom you worked?

Witness: That's correct. The object of the game is to get it in, get it over and get out.

R. v. Searle,
21 May 1980,
Cor. Judge Leckie and Jury.

● ● ●

A female witness was sick. To hear her evidence the court was convened at her bedside at Bethesda Hospital.

His Honour: "I repeat that although I am sitting in a hospital ward, this is an open court and any member of the public is entitled to be present. So far as the examination of the witness is concerned, the better course may be, I think, Mr. Prosecutor and Mr. Kaufman, if you approach the bed and examine from whatever position you find most convenient."

R. v. Crusius,
29 March, 1982
Cor. Brooking J. & Jury.

Judge Forrest was in fine fettle on 10th May 1982 in **R. v. Brown and Ors.** These two exchanges were noted during the course of pleas.

Judge: And what exactly is a "theatre-hop?"
M. Perry: It means he did whatever his boss told him to do.
Judge: Sort of like a husband?
Perry: Yes but not nearly as rewarding.
and later
Baczynski: As a result of the police contacting him the night before, he failed his Legal Studies exam the next day.
Judge: So what, there's probably a few people at the Bar who did as well.

It was a long conspiracy committal. Before adjourning, Clothier S. M. would bind over all defendants to the next day.
On one occasion –
Clothier S. M.: "Would all the defendants please stand".
They did. Bell. absently rose with them to the mischievous delight of other counsel at the Bar table.
Clothier S. M.: "Perhaps Mr Bell knows something that we don't".

Police v. Adams & Ors.
27 May 1982.
Fitzroy Magistrates Court.

• • •

• • •

"... A BENCH FOR 3 !!"

MOVEMENT AT THE BAR

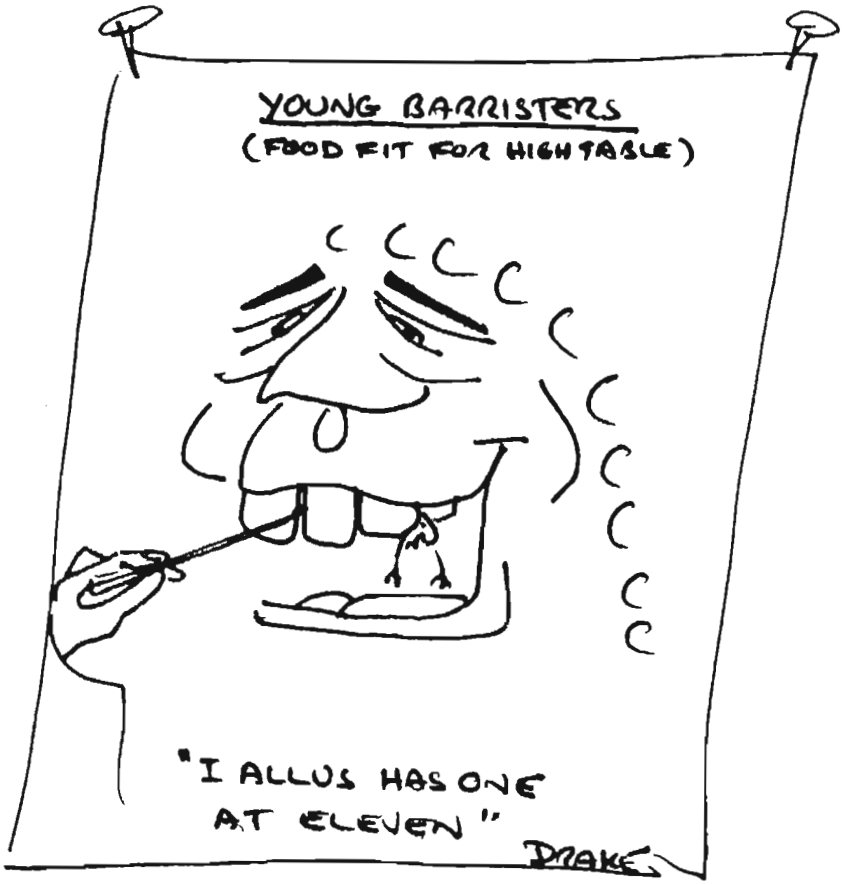
Members who have signed the Roll since the Autumn 1982 Edition:

A. Z. KORNBLUM	(re-signed)	
W. D. FORREST	(re-signed)	
Graham Anthony DEVRIES	Rowlands/Duncan	"W"
Richard Ross Sinclair TRACEY	Uren/Bloomfield	"C"
Kenneth Ross HOWIE	Merkel/Duncan	"W"
Christopher DELANEY	Golombek/Spurr	"S"
Terence Robert SULLIVAN	Kent/Howells	"R"
Christopher Ripley LOORHAM	Faris/Bloomfield	"C"
Terence Michael FORREST	Gillies/Dever	"D"
Michael F. FLEMING	Heerey/Bloomfield	"C"
Robert George SQUIRRELL	Bingeman/Bloomfield	"C"
David Hope DENTON	Zichy-Woinarski/Stone	"B"
Donald Howard FRIEDMAN	Flatman/Duncan	"W"
Marguerite Thérese MILVERTON	Moorhead/Bloomfield	"C"
George John TRACZYK	Milte/Spurr	"S"
Geoffrey John COMBES	Canavan/Hyland	"H"
Evan James SMITH	Morrow/Foley	"F"
Philip Lawrence CAIN	Anderson/Dever	"D"
Elizabeth Ann DAVIS-LUNELLI	N. Moshinsky/Howells	"R"
Michael Damien WILSON	Stanley/Bloomfield	"C"
Russell Lindsay BERGLUND	Henshall/Howells	"R"
Michael Joseph Gennaro WAUGH	Kimm/Hylands	"H"
Brendan Michael GRIFFIN	Meldrum/Bloomfield	"C"
Michael John RIVETTE	Lopes/Bloomfield	"C"
Peter Waddington ALMOND	Loewenstein/Bloomfield	"C"
David Judah HAVIN	J. V. Kaufman/Bloomfield	"C"
Brian Emlyn WALTERS	Stott/Foley	"F"
Andrew Nigel BRISTOW	R. C. Gillard/Bloomfield	"C"
Nicholas Joseph GREEN	C. W. Rosen/Bloomfield	"C"
Paul George KOVACS	Graham/Bloomfield	"C"
Malcolm Walter SPEED	Hayden/Duncan	"W"
Fiona Ann Fogarty YOUNG	Pinner/Bloomfield	"C"
Stephen Edward MARANTELLI	Murley/Bloomfield	"C"
Graham Barry HALL (N.S.W. Q.C.)		

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

P. J. MORAN
N. E. ROBERTS

TOTAL NUMBER IN ACTIVE PRACTICE 778


YOUNG BARRISTERS
(FOOD FIT FOR HIGH TABLE)
"I ALLUS HAS ONE
AT ELEVEN"
DRAKE

BAR NEWS BACK COPIES

Numerous copies of the following editions of **Bar News** are still available from the office of the Bar Council.

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Summer 1979
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Summer 1980
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Summer 1981
Autumn 1982

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SOLUTION TO CAPTAIN'S CRYPTIC No. 40

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AMENDMENTS TO CRIMINAL LEGISLATION NOTIFIED IN GOVERNMENT GAZETTE

This list shows notifications subsequent to those listed in the Summer 1981 Bar News.

Statutes

Motor Car (Miscellaneous Provisions) Act 1980 (No. 9477)
S. 4 to operate 21/10/81 (G.G. 21/10/81, p. 4340).

Motor Car (Further Amendments) Act 1981
To operate 21/12/81 (G.G. 16/12/81, p.4148)

Firearms (Shooters Licences) Act 1981
S.2(2) operates 1/10/81 (G.G. 9/9/81, p.2939);
Remainder of Act operates 1/1/82
(G.G. 16/12/81, p.4148)

Alcoholics and Drug Dependent Persons (Amendment) Act 1981
S.1 and 4 operate from date of assent 15/12/81
S.3 and 5 not proclaimed as at 3/6/82
S.2 to operate on operation of Drug Poisons and Controlled Substances Act 1981 (not proclaimed as at 3/6/81).

Motor Car (Amendment) Act 1981
S.1, 2, 4, 5, 6, 7, 8 and 10 operate 20/12/81
(G.G. 16/12/81, p.4147)
S.9 to operate 3/3/82 (G.G. 3/3/82, p.604)

Community Welfare Services Act 1978
S.22, 23, 34 and 57 operate 6/1/82
(G.G. 6/1/82, p.6)

Coroners (Amendment) Act 1981
To operate 24/3/82 (G.G. 24/3/82, p.809)

Juries (Amendment) Act 1981
Whole Act (except Section 5) operates 2/2/82
(G.G. 27/1/82, p.264);
S.5 operates 3/5/82 (G.G. 27/1/82, p. 264)

Order in Council

Breath Analysing Instrument approved (G.G. No. 47, 11/5/82)

Regulations

Juries (Fees and Rates of Compensation for Jurors) Regs. 1982 S.R. 23/1982

Appeal Costs Fund (Amendment) Regulations 1982 S.R. 113/1982

Evidence (Crown Witnesses Allowances) Regulations 1982 S.R. 1/1982

Community Welfare Services (Prisoners Earnings) Regs. 1981 S.R. 518/1981

Motor Car (Speed Measuring Devices) Regulations 1981 S.R. 520/1981

Road Traffic Regulations - Amended by S.R. 498/81, 522/81, 5/82, 56/82, 133/82.

HASSETT

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