SPRING EDITION 1984

Victorian Bar News

The Front and Back Cover:
The Contract is signed. The Building is to be erected. Like some reluctant bride again cajoled to the altar, the Bar has finally committed itself (see pages 15 and 24). And Spring is here.

VICTORIAN BAR NEWS

SPRING 1984

CONTENTS **PAGE**

BAR COUNCIL REPORT

COMMITTEES

Young Barristers Committee

The following have been elected to the Young Barristers Committee —

H.A. Burchill
T.V. Hurley
J.J. Isles
P.D. Trevorah
R. Deborah Wiener

(b) **Ethics Committee**

Castan Q.C. has been appointed to the Ethics Committee following the resignation of McPhee Q.C. from that body

(c) **Library Committee**

The Library Committee has been enlarged and the following additional members have been appointed.

McMillan, Panna and M.J. Richards.

(d) **First Aid Committee**

E. M-T. Murphy has been appointed Chairman of the First Aid Committee

LEGAL AID COMMISSION

Kirkham Q.C. has been appointed as the Bar's nominee on the Legal Aid Commission.

ETHICS

(a) **Photographs for publication**

The rulings concerning photographs for publication (which appear at P.86 of Gowan's **The Victorian Bar**) were amended by adding a sub-rule (d) That sub-rule is in the following terms —

"(d) Subject to the limits provided by sub-rules (b)(i) and (ii) and (c), a barrister may permit a posed photograph of himself to be published in association with the publication of a learned article or address by him"

That ruling was made following a request made by the Editor of the **Law Institute Journal** for photographs of contributors who were members of the Bar. The Law Institute has been advised by the Chairman of the Bar Council that —

(i) the Bar rulings have been amended so as to permit a posed head and shoulders photograph of a barrister (against a plain featureless background) to be published in association with a learned article by that barrister in a publication such as the **Law Institute Journal**;

(ii) the above amendment does not however permit a photograph to be published of a contributor of case notes or book reviews or the like

and remains subject to the general rules against touting and obtaining undue personal publicity;

(iii) the Bar rulings do not prohibit the use of photographs of barristers engaged in public activities

(b) **Business cards and with compliments slips**
The Bar Council has resolved that Counsel may use business cards of normal size and style bearing name, qualifications, business address and telephone number and "barrister" or "Q.C.". The card may not be distributed generally but may be supplied to a witness, client or solicitor where necessary. Counsel may also for normal purposes use a "with compliments" slip bearing the above information. A business card or "with compliments" slip should not be used in any circumstances which could constitute or could appear to constitute touting.

RE-ARRANGEMENT OF LISTS ON THE BAR ROLL

(a) The Bar Council resolved that the present division of the Roll of Counsel into lists be rescinded and that it be divided into Divisions as follows —

Division A
Comprised of each Counsel on the Roll who is practising as a barrister and holds himself out as ready to practice as a barrister, and is not otherwise employed in a full-time occupation. Such Division to be divided into parts as follows:
Part I: Victorian Practising Counsel
Part II: Interstate and Overseas Practising Counsel

Division B
Comprised of Counsel on the Roll who have accepted judicial or other public office and divided into parts as follows:
Part I: Governors
Part II: Judges
Part III: Ministers of the Crown
Part IV: Solicitors-General and Directors of Public Prosecutions
Part V: Masters, Magistrates and full-time members of statutory tribunals
Part VI: Crown Counsel, Parliamentary Counsel and Prosecutors for the Queen
Part VII: Other official appointments e.g. Registrar of Titles, Commissioner for Corporate Affairs, Public Trustee and the like

Division C
Comprised of those Counsel on the Roll who have retired from public office and have not resumed practice as Counsel and those Counsel of not less than 10 years' standing unless otherwise determined by the Bar Council who for reasons other than acceptance of public office have retired from practice as Counsel and are not engaged in any occupation or activity such as would be inconsistent with remaining on the Roll of Counsel. Such Division to be divided into parts as follows:
Part I: Retired Judges
Part II: Retired holders of public office other than judicial office
Part III: Retired Counsel.

(b) The Bar Council has also resolved that it shall in its sole discretion determine the division in which the name of any Counsel on the Roll shall be placed and it may so determine at any time and either on the application of any Counsel on the Roll or of its own motion.

Notice of a motion to this effect together with an explanatory memorandum will be circulated to the Bar before the Annual General Meeting.

ANNUAL GENERAL MEETING

The annual general meeting of the Victorian Bar will be held on Monday the 24th of September 1984 on the 2nd floor of Fourt Courts Chambers, 180 William Street, Melbourne.

SOCIAL

On the 20th of September the Bar Council will hold a dinner in honour of the High Court Justices who will be sitting in Melbourne on that day.

NEIGHBOURHOOD DISPUTES PROJECT

Following a request from the "dispute resolution project", a project of the Legal Aid Commission of Victoria and the Victorian Law Foundation, the Bar Council is preparing a submission concerning that project.

FEES

Enquiries have been made concerning whether, after a case in which he is briefed is "not reached", and he is asked to return that brief, it is proper for Counsel to mark any and what fee. It was resolved by the Bar Council that if Counsel's instructions are withdrawn not for good reason he should mark a full brief fee together with any conferences, views etc.

YOUNG BARRISTERS' COMMITTEE

During recent months the Young Barristers' Committee, which meets fortnightly, has considered a number of issues of concern to the Junior Bar. Much activity has centred around the suitability of the clerking system, the jurisdiction of the Magistrates' Court, accommodation within Owen Dixon Chambers and the sub-leasing of chambers within Owen Dixon Chambers.

At the General Meetings of the Bar earlier this year the Young Barristers' Committee put forward to the Bar Council proposals on the controversial issue of clerks. Amoung the proposals of the Committee which won acceptance at a General Meeting was the distribution of a questionnaire. The Committee considered that this provided an opportunity for a critical assessment of the present system and consideration of alternatives for the future.

The Committee was pleased to receive an invitation from the Attorney-General to provide constructive suggestions on possible improvements to the Magistrates' Court and rules. This included the scale of costs applicable in the Magistrates' Courts increased jurisdiction.

The Committee submitted that it was inappropriate to increase the scale of fees in the new $3,000 to $10,000 scale, by merely 10% of the present $1,000 to $3,000 scale. It recommended the alteration of the existing scale to incorporate scales B and C of the December, 1981 County Court Scale of Fees. Adoption of this scale would prevent a windfall reduction in costs at the expense of the legal profession for cases heard in the Magistrates' Court instead of the County Court. By way of example it would provide a brief fee of $390.00 on the suggested top scale in the Magistrates' Court ($5,000 to $10,000).

It has been a policy of consecutive Young Barristers' Committees that expansion of chambers in Owen Dixon Chambers, by barristers removing dividing walls to provide larger, fewer rooms, be prohibited. This has become the policy of the Bar Council. Nevertheless, the Committee seeks to ensure that the policy is upheld.

In an attempt to ensure fairness in the sub-letting of chambers in Owen Dixon Chambers the Committee has requested the Bar Council to prohibit the sub-letting of chambers unless the sub-letting is done in accordance with the principles of seniority or is for less than 6 months. The Committee is still waiting for Bar Council consideration of this matter.

On 24th September, 1984 at Silvers Discotheque, Toorak Road, South Yarra, the Committee is holding a Centenary Dinner Dance for members of the Bar and friends. It looks forward to a successful evening.

BAR COUNCIL ELECTIONS

The following have offered themselves as candidates for election to the Bar Council 1984-1985

Counsel of not less than 12 years standing

	Room
N.R. McPhee Q.C.	1006
J.E. Barnard Q.C.	1207
P.A. Liddell Q.C.	215
S.P. Charles Q.C.	AC2018
R.P. Dalton Q.C.	138
D. Graham Q.C.	AC2020
P.D. Cummins Q.C.	FC0104
M.J.L. Dowling Q.C.	1014
E.W. Gillard Q.C.	1212
B.R. Dove Q.C.	829
A. Chernov Q.C.	1205
D.R. Meagher Q.C.	AC1901
R.K.J. Meldrum Q.C.	914
P. Mandie Q.C.	111
C.E. Macleod	407
J.A. Coldrey	312
R. Richter	AC2705

Counsel of not less than 6 nor more than 15 years' standing

W.B. Zichy-Woinarski	221
D.L. Harper	220
B.A. Murphy	LC1210
R.L. van de Wiel	LC1208
G.G. Hicks	LC1211
S.K. Wilson	EC0406
Rachelle Lewitan	1106
M.B. Kellam	AC1919

Counsel of not more than 6 years' standing

Elizabeth Curtain	FC0606
A.J. McDonald	1126
K.M. Liversidge	107
G.J. Digby	FC0105
A.A. Nolan	FC0705
J.E. Middleton	AC27stB
B.S.T. Vaughan	AC1715
P.G. Priest	137
C.J. Ryan	FC0307
J.A. Magee	FC1014
P.A. Chadwick	AC1717
R.J.H. Maidment	AC1712

FAMILY LAW BAR ASSOCIATION

Two informal meetings of members of the Victorian Bar practicing in Family Law were held in July. The first was to discuss basically the new scale of fees and was attended by about 50 members of Counsel. Arising out of that meeting was a suggestion that a group analogous to the Criminal Bar Association be formed.

The enthusiasm obviously waned during the month of July for the second meeting was attended only by about 20 people.

A steering committee (Opas, Kay, Watt, Nikakis and Molyneux) has been formed. For those members of Counsel who are interested in the area but who would not or could come to the last meeting, any input into the proposed association would be more than welcomed by the steering committee.

Finally, a reminder of the First Commonwealth Conference which will be held in Hobart on the 16th and 17th November, under the joint auspices of the Law Council of Australia Family Law Committee and the Family Law Council of Australia. The keynote address will be delivered by Professor David Hambly, Commonwealth Law Reform Commissioner who is approaching the halfway mark in his almost impossible task of reviewing the law relating to matrimonal property in Australia

Other speakers will include the Chief Judge, Justices Asche, Fogarty and Treyvaud. Some time will be made available on both evenings for those who wish to either gamble or gambol.

All further enquiries should be made to Jan Williams care of the Law Council of Australia at Canberra Phone (062) 47 3788.

PERSONAL INJURIES BAR ASSOCIATION

Over the last year those at the Bar practising in common law personal injuries cases have been faced with a number of matters which have caused them grave concern.

Late last year a group of counsel practising in the Supreme Court personal injuries jurisdiction met to discuss the problems of listing in the Supreme Court and the then suggested increase in the County Court jurisdiction.

Things have moved fairly quickly from that time. Not only has the County Court jurisdiction been increased, and new listing methods introduced, but also we now have a completely new procedure known as the Pre-Trial Conference. Many consider this latter procedure will substantially affect practice in the personal injuries field.

To top all this, the authorities saw fit to list no personal injury cases at all in the County Court for the month of July, and only one Judge was available for those cases in the Supreme Court for two weeks in July.

Things became worse in the Supreme Court, as no personal injuries list at all was provided in that Court for the whole of August!

In the country areas, circuits have been, and are continuing to be cut, altered and amalgamated.

Taking a lead from last year's meeting of Barristers involved in the Supreme Court personal injuries field, a group from the County Court met at Seabrook Chambers in June 1984. This meeting discussed the creation of a formal association, such as the very successful Criminal Bar Association, to represent the whole Bar involved in personal injuries cases.

To this end a meeting was publicised and held at Seabrook Chambers on 14 August 1984. This meeting adopted the formal constitution of what is now known as the Victorian Personal Injuries Bar Association.

The office bearers are as follows:—
President: H. Ball
Secretary: J. Williams
Treasurer: C. Macleod

The Committee is constituted of three members of Counsel representing the Supreme Court, J. Howden, M. Shannon and J. Meagher and three representing the County Court, J. Ruskin, M. Ruddle and N. Fowler.

All enquiries (and it is hoped there will be many) regarding the above Association may be made to J Williams. Members are urged to join in great numbers.

WELCOME: JUDGE FAGAN

Warm wishes on behalf of the Legal Profession in Victoria were extended to Warren Christopher Fagan on the occasion of his appointment to the Bench of the County Court at a well-attended welcome held on 16th August 1984.

Judge Fagan was born on 5th February 1937. He was educated at The Good Shepherd Convent, Abbotsford and at The Marist Brothers College, East Brunswick, and completed his matriculation in 1952 at the remarkable age of 15

However, His Honour did not take a path leading directly to the practice of the law. Instead, he went to work in a barber's shop. In what may be seen as an early demonstration of the success which later marked his legal career, His Honour in 1956 received the award as the outstanding apprentice in hairdressing. The award was conferred by Sir Charles Lowe in his capacity as Lieutenant Governor So far as is known, that occasion was Judge Fagan's first contact with the law.

Photo courtesy Law Institute

His decision to lay down his scissors and comb was prompted by a chance suggestion from a customer that the young Fagan should consider a career in the law Acting on this suggestion, he made his way to a library and there found a biography on the life of Marshall Hall. He never looked back

After graduating in law from Melbourne University in 1960, he served articles at the firm of Pavey Wilson Cohen & Carter, and was admitted to practise on 1st March, 1962. He signed the Bar Roll on 21st June, 1962, and read with Crockett, then at the height of his career as a junior. He took silk in 1978.

His Honour's practice at the Bar reflects an extraordinary versatility. His early years saw him appearing frequently in Health Act prosecutions. A brief to appear before the Board of Inquiry into Scientology conducted by Anderson QC on behalf of an interested organisation opposed to the practices of scientology gave the young barrister an early opportunity to display his talents. For several years his practice was in criminal law, but it broadened ultimately to include personal injuries, commercial law, insurance and extensively in Town Planning and Local Government law. Indeed, Warren Fagan has appeared in virtually every jurisdiction Always an intensely industrious person, his thorough preparation for every case and carefully drawn paperwork were well known But amidst all the pressures of a successful practice, he always gave generously of his time to the many who sought his assistance

Judge Fagan had five readers: Peter Fox, Robert Mackay, (now practising in Tasmania), Clive Sharkey, Ralph Greenberger and Michael Stiffe. He was a conscientious master who always took his duties seriously. He has the gratitude of all his readers for the very valuable lessons he taught them.

Nor was he stinting of his time for the Bar as a whole. He served on no less than ten committees:

- County Court Practice Committee, 1968-1973
- County Court Fees & Costs Committee, 1970
- Lands Tribunal Committee, 1970
- Joint Standing Committee with the Law Institute on County Court Practice & Procedure, 1973-1978
- Chief Justices Law Reform Committee, 1975-1980
- Town Planning and Local Government Committee, 1980-1981
- Law Reform Committee — Town Planning Panel, 1981-1984
- Attorney-General's Committee for Improving Delays in Criminal Trials in the County Court, 1981-1984
- Bar Council and Australian Institute of Judicial Administration Committee on Delays in Criminal Trials

Additionally, he was Chairman of the County Court Listing Committee of the Criminal Bar Association. A lengthy report known as the "Fagan Report" dealing with delays in the criminal law, was submitted to the Bar Council by a committee chaired by His Honour, and that report has been implemented by the State Government

The new judge is no stranger to the judicial task — prior to his appointment he has held the following offices:

- Acting Chairman, Town Planning Appeals Tribunal, 1975-1976
- Local Government Act Arbitrator (Victoria), 1977-1978
- Acting Chairman, Liquor Control Commission, 1980

Throughout his career, Judge Fagan has maintained an active interest in fields outside the law. His sporting activities included playing football, squash and tennis, and for many years he has been an enthusiastic skier and sailor. It is doubtful that there exists a more loyal supporter of the Collingwood Football Club. He has travelled widely

With six children, His Honour is a good family man. These and his wife and parents were proud witnesses at the ceremony marking his appointment As was there noted, Mrs Fagan and their eldest daughter are completing law degrees They should provide an additional source of legal learning if required

The breadth of his experience within and outside the law make Warren Fagan an eminently suitable additon to the County Court Bench. The Bar wishes him well

A VICTORIAN PERSPECTIVE ON ABORIGINALS AND LEGAL AID

Hore-Lacy recently delivered a paper on this topic to the Bar Council at its request. We thought it should appear here. (Eds).

(i) The contribution of the Bar to Legal Aid Work

By the early '70s, after almost 200 years of European occupation, it finally became recognised that Aborigi-nals of this country were deprived to such an extent that more vigorous efforts should be made in an attempt to redress, to some extent, the imbalance Land rights and Aboriginal Legal Aid, along with improved services in other areas, were thus born.

Victoria

In Victoria the inaugural meeting to establish the Victorian Aboriginal Legal Service (VALS) was held at the University of Melbourne on the 15th of June 1972 A constitution was adopted for the establishment of a new non-profit unincorporated association to be gov-erned by a Council of fifteen members at least one-third of whom would be Aborigines and which would include representatives of the Bar Council, Law Institute and Legal Aid Committee.

The establishment of the Council was the result of initiatives of members of the Aboriginal community in Melbourne together with academics and lawyers from outside. It was by this stage widely recognised that Aborigines were disproportionately represented to a remarkable extent in the prison population of Victoria and their access to legal services including satisfactory representation before the courts was appallingly in-adequate The Bar Council considered that maximum encouragement and support should be given to the initiatives of the Aboriginal people.

The President of the Council, Professor P.L. Waller, chaired the first Council meeting on the 26th of July 1972 and the Council was subsequently able to hire its first staff member, an administrative secretary, in Jan-uary 1973 Among those who had been elected to the Council were Mr. Ron Castan (Hon. Treasurer), Mr. G. Evans (Hon. Treasurer) and Ron Merkel. Mr. N. O'Bryan Q.C. was the nominated representative from the Bar Council.

VALS was able to hire its own full-time solicitor in July 1973 and has now grown in size to the point that it has a full-time staff of over 20, including six full-time lawyers and four field officers. From its base in Brunswick Street, Fitzroy, VALS attempts to deal with the legal and para-legal problems of its clients who reside not only in Melbourne, but throughout Victoria. Now estab-lished as a co-operative, its legal staff handles the majority of criminal cases. Controlled by all Aboriginal directors the workload on VALS staff continues to grow each year.

The Northern Territory

In 1973, in the Northern Territory of Australia, two Aboriginal Legal Aid organisations commenced oper-ation The Central Australian Aboriginal Legal Aid Service (CAALAS) and the North Australian Aboriginal Legal Aid Service (NAALAS). The Services are oper-ated by Aboriginal administrations which are elected by Aborigines living in the Centre and Top End respect-ively. These administrations employ staff including solicitors. A third organisation, the Pitjantjatjara Council (inc), subsequently evolved and is located in Alice Springs. The Pitjantjatjara Council embraces a legal service which looks after the particular interests of the Pitjantjatjara people who live within the States of Western Australia and South Australia as well as within the Northern Territory.

The organisations provide a comprehensive legal serv-ice to all Aboriginals free of charge The comprehensive nature of the service provided, however, can be some-what illusory as the limited resources available are overwhelmed by the requirements of the criminal justice system. Generally speaking matters which can-not be handled adequately by the employed staff are briefed out.

Recognition of the vital connection of land to all aspects of Aboriginal culture was given some expression with the passage of the Commonwealth Land Rights Act for the Northern Territory and in the creation of the Northern Land Council (NLC) and the Central Land Council (CLC) in early 1977. The formation of both councils arose from the recommendations of the Woodward Commission in 1973 and whilst forerunner bodies existed prior to 1977 the legislation establishing both bodies as legal entities was not promulgated until 26th January 1977. Like their sister legal aid organisations the Land Councils operated out of Darwin and Alice Springs. The Land Councils comprise representatives of the Aboriginal traditional owners of land and are involved with land claims, mining negotiations and indeed any matter relating to "their land". Employed by the Land Councils are advisors such as anthropologists and lawyers.

Mention is made of these organisations because, since their inception, Melbourne barristers have played a unique and vital role in their development and operation.

The Northern Territory basically has a two Court system, a Magistrates Court (Court of Summary Jurisdiction) and a Supreme Court. As in all States in Australia the more serious cases go to the Supreme Court for trial before a Judge and jury or for sentence before a Judge sitting alone. The Court of Appeal from a single Supreme Court Judge is the Full Court of the Federal Court of Australia (comprising three Judges) and from there to the High Court of Australia.

The homicide rate in the Northern Territory is more than six times the national average and more than three times the next highest State (Western Australia). The vast majority of the victims and perpetrators are Aborigines. Aboriginal involvement in most other areas of "crime" is proportionally as high. It is claimed that a recent survey showed that Aboriginals at Groote Eylandt (in the Gulf of Carpentaria) were proportionally the most imprisoned people in the world.

Pioneer Days

Pre 1973, apart from serious offences which were allocated to local private practitioners, the cells connected with the Northern Territory Courts were crowded with Aborigines who were taken before the Court, unrepresented, almost invariably pleading guilty to a charge little understood, to be hastily dispatched "according to law".

It is little wonder that after three months the first and only solicitor employed by CAALAS at that time, on a Supreme Court arraignment day, faced with the daunting and almost impossible task of handling the multitude of cases before the Court, was found after a short search hastily packing his bags preparatory to catching the first plane out of Alice Springs.

It was then that the Victorian connection with Aboriginal Legal Aid in the Northern Territory commenced. Peter Faris, of the Victorian Bar, in response to an urgent call from the Service, proceeded to Alice Springs where he was largely responsible for establishing the service as a viable legal organisation and assisted the Aboriginal population of Central Australia in the formulation of a representative Council to run the service. He was sole solicitor for approximately three months. After six months he returned to Melbourne where he commenced employment with the Victorian Aboriginal Legal Service. Faris was replaced by another Melbourne barrister, Geoff Eames, who became senior solicitor of CAALAS in 1974. He was employeed in that role for a period of approximately two years before becoming the first solicitor for the Central Land Council in 1976. In that position he represented Central Australian Aboriginals in a number of land claims. He was then employed as senior solicitor with NAALAS for approximately 12 months before joining the Northern Territory Bar where he represented the Northern Land Council in two significant land claims. Until recently he has been employed as the Director of the South Australian Legal Aid Commission.

Ross Howie, a Melbourne solicitor and a member of the Victorian Bar since 1982, took over the reins from Geoff Eames in November '75. He stayed in that position until 1979 when he commenced employment as senior solicitor for the Central Land Council. He occupied that role until coming to the Bar in 1982. Other members of the Bar to work as permanent CAALAS solicitors are Jon Tippit and John Corker. Tippit first commenced working for CAALAS in 1980 in mid-March. He returned to the Bar in mid-May until he made his way back to Central Australia in February 1982. He is currently senior lawyer.

Apart from people working as employee solicitors it has been necessary on occasions to fill gaps in the Service by calling on locums to help out for shorter periods particularly in relation to work in the local courts. The Bar has been a ready supplier when needed. Amongst those to work in the Centre in this capacity are Vincent Q.C., Don McIvor, Hore-Lacy, Cosgriff, Hartnett, Faris, Duffy, Punshon, Brustman, Van de Weil, Monti, Hill and Byard.

Regular Melbourne contact with NAALAS commenced in early 1978 when Hore-Lacy commenced as an employee solicitor. Hore-Lacy was joined by Morgan-Payler after approximately six months and both remained until mid 1979 David Parsons, another Melbourne solicitor, then joined NAALAS. He has previously worked at CAALAS from 1974 until 1976 as initially junior solicitor and subsequently senior solicitor. Eames commenced shortly thereafter as previously mentioned. Greg Borchers was employed from 1978 until 1983. Bother Borchers and Parsons are now members of the Victorian Bar

Colin McDonald left the Bar in early 1982 and has since that time until recently, when he left, been a driving force at NAALAS

The Supreme Court

The workload in the Services in the Northern Territory is such that CAALAS and NAALAS have not had the resources, and, in most cases, the expertise, to handle Supreme Court trials. Vincent Q.C. commenced performing this function in Alice Springs and Darwin as early as 1974. Since that time he has been the major advisor and leading Counsel in the more serious criminal cases. Coldrey began assisting in 1977. In later years the workload has spread and those who have worked in this capacity are Morgan-Payler, Barnett, Hill (now M.L.C. for Warrandyte), Van de Weil, Don McIvor, Hore-Lacy, Hartnett, Dee, Duggan, Kimm (now Judge) and Kirkham Q.C. It is estimated that more than 80% of Northern Territory criminal trials of Aboriginals have been conducted by Melbourne barristers. These have included such notable trials as the Hukitta and Ti-Tree trials

Miscellaneous

Apart from trial and appellate work important and significant cases such as difficult and involved committals and claims and charges of assault by policemen on Aborigines have been presented by Melbourne Counsel. The Pitjinjatjara Council has recently resorted to the same Melbourne barristers in their general policy of opposing liquor outlets in the Northern Territory Liquor Commission. One of these, Brian Keon-Cohen, is presently acting as Counsel assisting Paul Seaman Q.C. in the land rights enquiry in Western Australia

There are dozens of other Melbourne barristers who have acted in advisory and appellate capacities Aboriginal land claims have been dominated by people such as Laurie Q.C., Coldrey, Howie, Parsons and in recent times Sher Q.C. To not mention other names is not to ignore willing and meaningful contributions from others such as Castan Q.C. whose long term commitment and support has been of great importance.

While it is acknowledged that in most cases barristers have received some payment for their services it is fair to mention a number of matters.

First, for the major part of the period following the inception of Aboriginal Legal Aid in the Northern Territory, most barristers worked for substantially reduced fees and suffered significant disruption of their ordinary practices. In those days the Services were constantly struggling for funds. Apart from isolated cases at different times the local profession has not had the experience or competence to handle serious criminal cases. With the odd exception there was no member of the profession in the Northern Territory who had the experience of more than a handful of criminal trials. Despite that, the Services usually found it cheaper to brief from Melbourne than locally. In the early days in order to minimize expenses for the Services barristers more often than not were accommodated in private houses using sleeping bags and mattresses on the floor depending on available space and upon who was able to assist From Melbourne the same barristers provided a free advisory service which has been important to organisations which are isolated both legally and psychologically and which are under constant attack from the traditional conservative areas.

Lest a picture of deprivation be too starkly painted it should be pointed out that barristers who have worked in the Territory have no complaint. In most cases they find the work richly rewarding in ways which make financial consideration appear insignificant. It should also be added that in recent times (since about March 1983) more realistic fees have been marked and paid

Before leaving the Northern Territory it is perhaps worth mentioning two further matters. The first is that the more senior of the Melbourne barristers are being increasingly briefed by A.L.A.O. (Australian Legal Aid Office) in Darwin and Alice Springs. The second is that, unless it should be suspected that a Melbourne barrister has prepared these observations, it should be noted that the significant contribution from other arms of the profession both from Victoria and elsewhere is recognised.

Land Councils

It is not surprising, in view of the history of the Legal Aid Service, that Melbourne barristers have worked in and for both Land Councils

Apart from the involvement of Eames and Howie, John Coldrey, after 15 years at the Bar, was appointed Director of Legal Services with CLC in 1982 where he remained until he returned to the Bar in 1984. Tim Morris worked in a similar position for six months in

1978-79. Michael Dodson completed his articles under Faris at the Victorian Aboriginal Legal Service where he remained from early 1977 until late '81. At that time he joined the Victorian Bar. After almost three years in practice he left and is now working for the Northern Land Council in Darwin, his birth place. Dodson is the first and only Aboriginal ever to practice at the Bar in Victoria.

Victorian Aboriginal Legal Service

It would be surprising if a Bar which has the connection with the Northern Territory which the Victorian Bar has ignored the Service in its own State.

VALS' first solicitor was Philip Molan, a former Melbourne solicitor in private practice In June 1974 Faris joined from the Bar. Soon after he took on Hartnett's articles. Vincent Q.C. had a stint for four months. Chris Loorham, who has recently joined the Bar, was employed from early '76 to mid-79 after which time he went to CAALAS. Michael Dodson started in May 1978 and in June of that year Len Brear, now back at the Bar, commenced. Morgan-Payler, who had returned to the Bar from Darwin, joined in May '79 and remained until October 1981 when he returned to the Bar

Of the 17 solicitors who commenced and departed between January '73 and September '82 nine were either members of the Bar or became subsequent members

Two Way Traffic

The traffic between the Bar and the various legal aid organisations has not been all one way. Solicitors who have devoted the early parts of their careers to the various Services are now increasingly enriching the Bar with their presence. No doubt this trend will ensure a continuing concern and involvement by the Bar in general. The names include Hartnett (Vic), Loorham (Vic and CAALAS), Dodson (Vic), Kate Norman (Vic), Gray (Vic), Trood (Vic), Richard Brear (Vic), Howie (CAALAS and CLC), Parsons (CAALAS and NAALAS) and Borchers (NAALAS).

While it is true to say that none of the interchange between members of the Bar and the various Aboriginal organisation has been the result of direct Victorian Bar Council initiatives, it is also true to say that the Bar has actively assisted and encouraged in two important ways First it changed its rules to allow members to work in the various Aboriginal organisations and secondly, it granted temporary leave of absence without consequential loss of seniority or chambers, to barristers desirous of working for them.

(ii) The value to solicitors and clients of an independent Bar for Legal Aid Work

Peculiar difficulties suffered by Aborigines are recognised by the three Northern Territory Supreme Court Judges in the case of **R. v. Anunga** (1976) 11 A.L.R. 412 This recognition led to the formulation of interrogation guidelines for police in dealing with Aboriginals, commonly known as the Anunga Rules, which attempt to redress the disadvantage suffered by many Aboriginals in the interrogation situation. Much case-law concerning the application of these principles has evolved.

Concepts of Aboriginal life and expression of language involved are often completely different to what traditional lawyers are used to. Anthropological, psychological and education background is usually different.

Consequently, from the instruction stage to the sentencing stage, an expertise in understanding and conducting a defence is required which is not contained in any of the law libraries of this land, and which cannot be acquired by any amount of experience in traditional courts.

Advocates working regularly with Aboriginals obviously acquire ar. amount of expertise which increases with time and experience

The average term of an Aboriginal Legal Aid solicitor is probably no more than 2 years. Rarely do the Services attract solicitors sufficiently experienced to handle serious Supreme Court cases. The Bar provides this experience and permanency. With the increasing number of Legal Aid solicitors coming to the Bar the continuance of this state of affairs is assured.

As previously mentioned the Bar is a ready advisory service for the often beleagued legal aid solicitors. On important issues, such as opposition to the Northern Territory Criminal Code, weighty assistance has been given. For example, Vincent Q.C. and other members of the Bar spoke at civil liberty and community meetings in opposition to the Code. Articles were published. Three members of the Bar (including Mark Weinberg) for no fee apart from a nominal conference fee, conducted a 4 day "Criminal Code Seminar" in Alice Springs in January of this year. Seventeen Aboriginal Legal Aid and A.L.A.O. solicitors from Darwin and Alice Springs attended. Late last year David Ross voluntarily spent weeks preparing a comprehensive index to the Code which will prove invaluable to legal aid practitioners for years to come.

CONCLUSION

The difficulties still suffered by Aboriginals in the criminal justice system cannot be over-estimated. Despite the efforts made by concerned people significant problems remain. These include the inability of many Aborigines to do themselves justice in the witness box and inadequate interpreters. The fact that police interviews are rarely if ever recorded often leads to a situation where disputed police evidence cannot be effectively challenged. By comparison to most Europeans many Aborigines have little understanding of the criminal justice system. The Aboriginal's advocate thus has an added responsibility in advising and conducting a trial. For these reasons it is imperative that people who have little understanding of the system obtain the best available representation The briefing of experienced Counsel in serious cases (including experience in appearing for Aboriginals) goes some way towards evening the scales. The Victorian Bar has traditionally played, and hopefully will continue to play, this role.

In view of the fact that a proposal is being mooted to have Aboriginal legal aid organisations serviced exclusively by "in house" employee solicitors a number of observations are irresistible. Historically, the various organisations were initiated principally by members of the private profession and not Government. Without support from the private profession they could not and would not survive in any effective way Employee lawyers from the private profession brought to the organisations a philosophy of independence and the knowledge that they could rely on the Bar for support even if that support was against the interests of Government and bureaucracy and even if against personal interest or advancement

What of the alternative? Are CAALAS, NAALAS or VALS going to attract an employee solicitor who has appeared in more than 170 murder trials, or a solicitor who regularly practices in the High Court in cases involving complex constitutional issues? Are they going to employ experts in licensing law and the best commercial lawyers?

If the services the Bar is currently providing are to be replaced, and the quality of legal facilities is to be maintained, that is what the organisations will have to do. The available expertise ranges from the negotiation of most sophisticated commercial agreements to the development, preparation and presentation of cases based upon anthropological and other specialist evidence through to most difficult criminal matters which often involve intense racial and social hostility which can be demoralising to the inexperienced and daunting to lawyers who must live in that environment

An independent Bar has been and should be impervious to these pressures.

It is not an idle boast to say that the Victorian Bar has provided for Aborigines in the Northern Territory a far higher level of expertise, commitment and experience than would have been the case otherwise and is still engaged in that process Apart from members who have been working in the Territory a great many others have offered their professional help. Many of the offers have not been taken up because there has developed a faculty to provide very experienced barristers in all jurisdictions even to Magistrates Court level

Nor is it an idle boast to claim that any reduction in the wide range of assistance being currently provided by the Bar will result in a lessening of the effectiveness of the service as a whole and any system whereby legal functions are performed solely by resident solicitors will lead to the development of tired and stagnant organisations providing the minimum.

FAREWELL: ANDERSON J.

On 4th September, Anderson J. became Sir Kevin Anderson Q.C. He is a former Chairman of the Bar Council and author of a number of text books. He served as a Judge of the Supreme Court from 1969 The Bar wishes him a happy and fulfilling retirement and looks forward to seeing him in the Essoign Club.

THE NEW BUILDING — A POSITIVE STEP

Lawyers are reported to be conservative. Barristers more than most. Nothing we delight in more than a fond rehearsal of past triumphs. In our centenary year this delight has verged upon self indulgence. And for those who will attend the Centenary Dinner with spouse and companion, this indulgence will approach licence.

In this year the most tangible indication of the confidence which the Bar has in itself and its future has been its committment to the new building on the ABC site. In 1975 the Accommodation Committee of the Bar Council predicted a Bar of 800 members in 1984. It is now nearly 1000. Despite the forebodings of many, it is still seen as an attractive calling for over 70 young lawyers per annum. There is every prospect that it will continue to be so.

In 1961 when there were some 200 in active practice, Owen Dixon Chambers was completed. In 1968 when the number had grown to 280, four more floors were added.

On 13th August 1975 a General Meeting of the Bar adopted a recommendation that the Bar be housed in one building. Since that date successive Bar Councils have sought to implement this policy in various ways.

1975: The favoured proposal was to erect a building at 544 Lonsdale Street in conjunction with North Rock Development at a cost of $23.5m

1977: Attention turned to 500 Bourke Street. The Bar was to take a long lease from the National Bank

1978: The Bar rejected a proposal to purchase the Goldsborough Mort Building.

1979: A General Meeting ratified the purchase of the ABC site.

1981: Bar Council resolved:

> "If a new building is erected on the ABC site it will be the policy of the Bar Council that in the allocation of rooms in the Building there be, as far as practicable, the same distribution amongst barristers on each floor as there is at the Bar generally."

1982: Barristers Chambers Ltd takes a lease over part of 200 Queen Street and establishes Aickin Chambers

1983: A group of some 20 barristers purchase and refurbish Seabrook Chambers.

Meanwhile, the ABC Subcommittee chaired by O'Callaghan QC had been seeking proposals for the development of the ABC site. Earlier this year the Bar Council resolved to recommend to Barristers' Chambers Ltd, that it accept the proposal of Leighton Contractors and merchant bankers, Schroder-Darling to erect a twenty storey building. The proposal is outlined in **Bar News** Autumn Edition 1984. The Contracts were signed on Friday 7th September

The contracts provide for Leighton to design and construct a building to a standard equivalent to that of 200 Queen Street. It will be completed in stages so that the Bar will take possession progressively in 1986

The facade of the new building graces the cover of this edition. The floor layout has been determined following an analysis of the responses to the recent questionnaire. From time to time the Bar will be consulted as to other features of the project, so that the end result as far as possible meets the special requirements of the majority of barristers

The new building, as yet unnamed will soon be seen growing behind the County Court building, a visible monument to the vision and enterprise of the Bar. Like Owen Dixon Chambers, which was commenced before any but a few among us were in practice, the new building will provide for the Bar of the future a secure investment and a home for years to come.

The Bar has and will have much cause to be grateful for the efforts of the members of the ABC Sub-committee over the past few years: O'Callaghan QC, Liddell QC, Chernov QC, Webster, Gunst and Isles.

ENERGY LAW CONFERENCE

Lawasia is conducting a conference at the Hilton Hotel, Singapore between 5th November and 9th November 1984. The topic is Energy Law and Policy in Asia and the Western Pacific. Enquiries: Lawasia, 170 Phillip Street, Sydney

FAMILY LAW CONFERENCE

The title of the Law Council of Australia conference is "Family Law in 84"

It is to be held at the Hotel Le Surf Casino, Hobart from 12th October to 20th October 1984.

Enquiries: Travelforum Pty Ltd., 66 Albert Road, South Melbourne.

Mouthpiece

Place: Essoign Club coffee lounge
(In other words the unlicensed part)
Conversants: Middle Range Barrister 1
Middle Range Barrister 2
Background Milieu: The buzz of self-discussion, the earnest clink of chess pieces and the sound of the brave and hardy devouring a Michael Christian-type veal parmigiana.

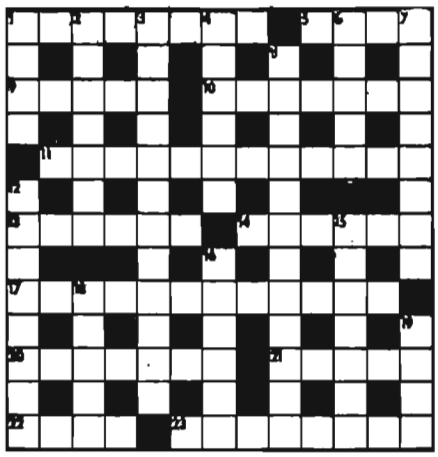
M.R.B.1: Been busy lately?
M.R.B.2: What? Oh yes, of course, of course
M.R.B.1: No, I mean honestly
M.R.B.2: Oh, can't complain, can't complain.
M.R.B.1: No, I mean honestly.
M.R.B.2: Oh, well, anyway, my clerk says it's been quiet for everyone. Quietest two months in years. What about yourself?
M.R.B.1: What, oh, can't complain, can't complain Of course I haven't spoken to my clerk in months — matter of fact I'm not even sure of his name.
M.R.B.2: No, I mean honestly
M.R.B.1: Well you can't expect much at this time of the year can you? I mean what with the July vacation, the August school holidays, the County not taking civil in July, the Supreme not taking personal injuries in August. . .
M.R.B.1: No, no, true, true, and of course the sollies like to get away, I mean January and February, they're usually down at the beach, and lots take off for the May school holidays, as well, you know, I mean they've got their beach houses as well as the old ski lodges for Winter, lucky beggars. Still wouldn't be a solly for all the money in China — I mean who wants security? (Long ruminating pause interspersed by the slurp of sugarless black coffee as both are "trying" to diet.)

M.R.B.2: No, no, couldn't stand the grind of being a solly, I mean what with partnerships, trust companies, the firm car (long pause). Christmas is, of course, very quiet. I like to wind down in December, never much work then — I mean the courts are all too busy concentrating on their Christmas parties aren't they?

M.R.B.1: Yes, you know over the last few years I've found Easter has taken a big chunk out of the year, it seems to be turning into a two week long-weekend every April
M.R.B.2: You're damned right, and even the long weekends are turning into four day breaks, I mean Show Day simply ruins the whole of September
M.R.B.1: Come to think of it things go very quiet about Labour day in March, and then there's the wretched Queen's birthday in June
M.R.B.2: Yes, yes. . .and don't forget November. My God all the racing fraternity goes A.W.O.L. for the Cup carnival. Have you been able to get doctors along to juries during that month? I mean absolutely everything is adjourned until the New Year, most of the Judges don't want to be bothered with law in November. .no not in November. . .
M.R.B.1: Oh well there's always October. I'm looking forward to October I've heard a whisper that I'm in line for a Supreme Court Circuit up the bush
M.R.B.2: Oh. . .haven't you heard? The Supreme Court has temporarily cancelled all circuits — something to do with listings and the government — you know — the usual.
M.R.B.1: Oh, wondered why I hadn't heard from that chap for a while Still can't complain, can't complain Got to dash, have to bash out a set of interrogatories by this afternoon.
M.R.B.2: Ha, ha, bet you've had that brief lying on your desk for two years under the piles of all the others — eh?
M.R.B.1: Er, ah (runs hand across balding sweaty pate, adjusts stained club tie) no. . .two days actually. . .

ELLIOTT, P.D.

CAPTAIN'S CRYPTIC No. 49



ACROSS:

1. Assign as in a case to a court (8)
5. Labels become a male deer (4)
9. This justice is a brickie (5)
10. Latin in full (2, 5)
11. Legal associations in boats (12)
13. Delicious vegetarian tit bit (6)
14. Acid from ants (6)
17. 1541 Kings Court (5, 2, 5)
20. Confirm E.g. an infant's compromise (7)
21. Bring on oneself a penalty (5)
22. Withered from old age (4)
23. Of equality before the law (8)

DOWN

1. Stomach matcher (4)
2. Sailors out of Goa (7)
3. Compression (12)
4. Clans (6)
6. Without you, virtue becomes a Roman Fountain (5)
7. No. 6265 (5, 3)
8. Adherent of bishops rule (12)
12. Magistrates' Court Summonses (8)
15. Small quantity (7)
16. First elements of contracts (6)
18. Top of shoe gives a lift (5)
19. -a-brac (4)

(Solution page 40)

ATTORNEY-GENERAL'S COLUMN

Current Developments in the Criminal Law
I have taken a particular interest in the reform of the criminal law in terms of reform of the substantive law and procedural reform. Many of the developments, particularly in legislative terms, have been greatly assisted by input from the Crown Prosecutors and from the Criminal Bar Association.

Interim Report on Delays in the Courts — Legal and Constitutional Committee of the Victorian Parliament
The Legal and Constitutional Committee of the Victorian Parliament has an extensive reference relating to delays in all jurisdictions. The Preliminary Report on Delays in the Courts (March 1984) is a very substantial document which runs to almost 400 pages and is required reading for anyone interested in the administration of the criminal law in Victoria or the issue of delays generally.

Witnesses to give evidence to the Committee included Judges of the Supreme and County Courts, the Director of Public Prosecutions, Police Officers, Prosecutors for the Queen, a representative of the Legal Aid Commission, Professor Ian Scott and members of the Victorian Bar.

The report canvasses areas of delay from the time of the laying of the charge until the time of trial of the accused. The Committee makes some 15 recommendations in its Preliminary Report. These recommendations include recommendations for a review of support staff in the Victorian Police Force, a recommendation relating to the Forensic Science Laboratory, a recommendation that the Criminal Listing Directorate be placed on a statutory base, and that the Flanagan Committee should continue to monitor the preparation of criminal trials.

The Committee makes some particularly important recommendations which deserve consideration and discussion:—

(1) *That there is a need to overcome the general lack of communication between bodies involved in the criminal justice process and to this end a Committee should be established under the aegis of the Attorney-General comprising representatives of the Criminal Bar Association, the Director of Public Prosecutions, Prosecutors for the Crown, Criminal Listing Directorate, Victoria Police and the community, to ensure that as far as possible good lines of communication are established and maintained and a pattern of co-operation is developed between the parties and agencies in relation to matters concerning the good administration of criminal justice.*

(2) *That a formal mechanism should be established whereby all courts can inform Parliament and the public about their workload, staffing and administration including statistics on cases awaiting trial, adjournments and the like. Annual reports from each jurisdiction should be tabled in the Parliament for public information.*

(3) *The current monthly schedule followed by the County Court and the Supreme Court for criminal trials should be replaced by a two-monthly schedule so that trials can be heard despite the fact that they might extend beyond the end of the month.*

(4) *That an information booklet should be produced by the Law Department to alert jurors to their rights and responsibilities and to give them any other information necessary to fulfil their duties.*

I would welcome responses from members of the Bar on the above recommendations as it would appear that they have considerable merit. The Government will be making a formal response in Parliament in September to these recommendations.

The evidence given to the Legal and Constitutional Committee, particularly by the Director of Public Prosecutions, led to the enactment of the **Crimes Procedure Act 1983** (operative 7/2/84). This Act was concerned to expedite the hearing of criminal trials in a number of ways. Firstly, it empowers a Judge to deal with issues relating to evidence in the course of a trial prior to the empanelling of the jury but after the arraignment of the accused. Secondly, it empowers the Attorney-General to specify statutory time limits requiring the prosecution to file a presentment within a certain time after the committal and requiring the trial to be commence within a certain specified time after the filing of the presentment. The time limit in each case can be extended but only by order of the court. I anticipate that I shall prescribe time limits in September. The Act also provides that a Judge alone is to determine issues relating to the previous convictions of a person who has been convicted by a jury in a criminal trial.

Pre-trial Conferences in Criminal Trials

The Director of Public Prosecutions has also made suggestions that the County Court and Supreme Court adopt practice rules relating to pre-trial conferences in certain criminal trials. This would enable the court to clarify the issues in complicated criminal matters at an early stage. I am hopeful that we will see pre-trial conference rules in operation before the end of the year.

A Central Criminal Court

A further development in the organization of criminal trials which needs consideration is the establishment of a central criminal court. Ultimately, it may be desirable to hold all the Supreme and County Court trials in one secure building. A building such as the County Court building, for instance, could easily be converted to a central criminal court. However, such a development is not possible until more court space becomes available, possibly through the development of a joint Federal Court/State Supreme Court building in Melbourne.

None the less, there are possible advantages in having a central criminal list covering criminal trials in both the Supreme Court and the County Court and under the overall direction and administration of a Supreme Court Judge. This development allied with the courts sitting in two or three month terms rather than in monthly cycles could lead to very substantial improvements in efficiency. It will also have the advantages of increasing flexibility between the two courts so that trials could be moved within the list from one Judge to another when the list before a particular Judge collapsed unexpectedly.

Reform of the Substantive Criminal Law

The Crimes (General Amendment) Act, the Crimes Conspiracy and Incitement Act and the Crimes (Criminal Investigations) Act have now all come into operation.

The Crimes (General Amendment) Act (operative 1/7/84) contains a number of miscellaneous amendments many of which were suggested by the Criminal Bar Association. These amendments include amendment to Section 418 allowing counsel for the defence to open to the jury the evidence of any witness called on behalf of the defence including the evidence of the accused and including the unsworn statement of the accused. It facilitates the proof of prior convictions by way of prima facie proof of convictions by certificates by the Prothonotary of the Supreme Court or the Registrar of the County Court. It allows the Coroner to grant bail in murder cases and it provides for the Director of Public Prosecutions to appeal against bail orders in lieu of the Attorney-General's appeal against bail orders. The Act also allows for detention at a youth training centre to be imposed in summary cases as well as indictable cases. It also introduces the concept of non-conviction bonds in the County Court and Supreme Court

The Crimes (Criminal Investigations) Act introduces amendments to Section 460 of the Crimes Act to clarify the time during which police officers may hold a person in custody prior to bringing the person before a Justice or Magistrate. The time period is six hours which may be extended by order of a Magistrate but only with the consent of the accused person.

The Crimes (Conspiracy and Incitement) Act (operative 1/7/84) gives effect to the report of the Criminal Law Working Group on Conspiracy and Incitement. The Act codifies and places on a statutory basis for the first time the law relating to the offences of conspiracy and incitement. The common law offence of conspiracy is abolished. The Act defines a conspiracy as an agreement to do an unlawful act. In general terms, the penalties for conspiracy and incitement are brought into line with the penalties for the relevant substantive offences.

Sentencing Reform

The Government proposes to legislate in the Spring session to provide that courts must take into account the means of an offender when imposing a fine, to make legislative provision for payment of fines by instalments consistently with the procedures available in the Judgment Debt Recovery Act, to provide for

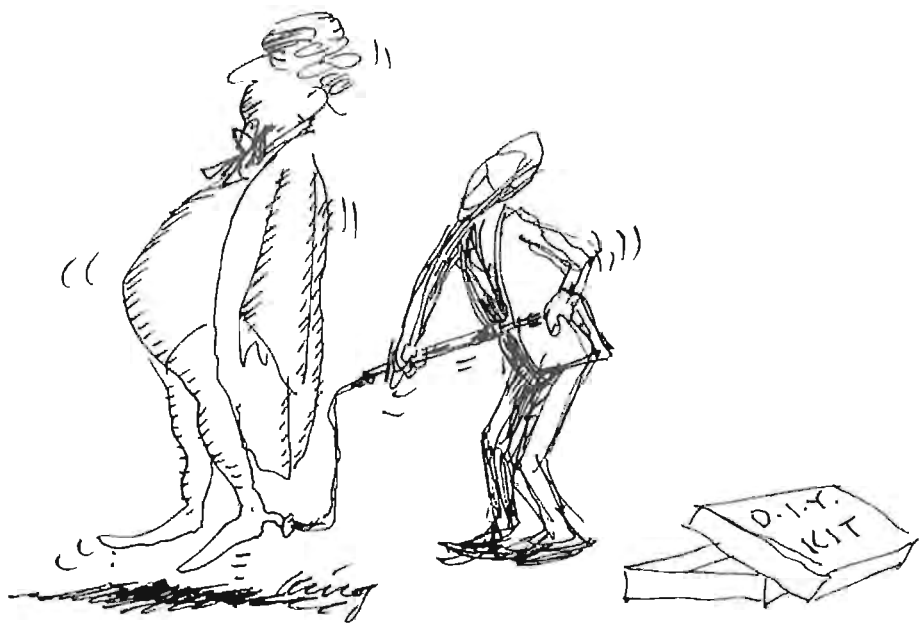
courts to make an order for community service or an attendance centre order where there is default in payment of a fine. The legislation will also provide that a person can only be sent to jail for non-payment of a fine after there has been a further hearing by a court which establishes that the person has had the means and the ability to pay the fine but has wilfully not paid it. The legislation will also prescribe in statutory terms that imprisonment is a punishment of last resort and it will require all courts to give written reasons when imposing a custodial sentence.

The Jury System

The jury system is receiving much public scrutiny at the moment. I have made it clear that I am a firm supporter of the jury system. I am opposed to its erosion in criminal cases either in the form of the introduction of optional juries or in the form of the introduction of majority verdicts. It must be remembered that the overall conviction rate in the County and Supreme Courts in recent years, including pleas of guilty, is approximately 86%. The disagreement rate is approximately 3% which is only marginally higher than South Australia where they have majority verdicts.

It is enormously important to remember that rights and freedoms which have been built up and established for centuries can be easily lost forever due to an over-reaction to some topical pressure. I have no intention of shifting my position in relation to the use of juries but I do think that a juror's life can be made easier by the introduction of some explanatory leaflets to be given to jurors when they first attend for jury service as to the nature of the legal system and the nature of their role. The facilities for jurors, particularly in the Supreme Court, must also be improved. The Law Department is presently spending some $70,000 on the refurbishment of the jury rooms in the Supreme Court which will include repainting, carpeting and relighting.

KENNON



COURTS MANAGEMENT CHANGE PROGRAM

On almost any criterion the administration of Victoria's Court system is in need of radical overhaul. Whilst the law itself has developed and adapted to reflect changing community needs and standards, the court system generally and courts administration in particular have been allowed to atrophy virtually throughout the whole of this century.

Some of the more important symptoms of this atrophy are as follows. First, so far as the court system itself is concerned perhaps the most obvious and important symptom is the enormous growth in civil jurisdiction not in the courts but in court substitute tribunals, such as the Small Claims Tribunal and the Residential Tenancies Tribunal. Second, courtroom facilities are generally totally inadequate both in terms of content and location. The high proportion of courthouses throughout Victoria classified by the Historic Buildings Council is both a testament to our 19th century forbears and their vision of the importance of the law; it is also a testament to a perceived diminished importance of the law in the 20th century. Third, the administrative and office systems used in the Courts are virtually innocent of any post World War II technological innovation other than the ball-point pen; the result is that enormous amounts of manpower — the term is used advisedly as few women are employed — are required to keep the system functioning. There are no word processors, no mechanised accounting systems, no cash registers for handling money and, of course, there are no computers.

There is a widely accepted view within the legal profession that the debilitation of the courts is the result of a lack of Government funding and that this situation arises because "there are no votes in courts". Whilst there may be an element of truth in this view it is equally important to recognize, particularly in the context of economic decrement, that the resources currently allocated for courts administration are very poorly deployed and that the system of administration is neither effective nor efficient in economic terms. Nor does it provide much job satisfaction for those working in the system.

The Courts Management Change Program devised at the direction of the Attorney-General commenced in April with a comprehensive restructuring of the Law Department's Courts Administration Division. Since then a series of projects designed to improve administrative efficiency and effectiveness have been embarked upon. Each project is directed by a Steering Committee working to specific terms of reference and on which are represented a broad range of interested parties. (The high powered nature of these committees is evidenced by the fact that the Chief Justice is chairing two of them). In turn the Steering Committees are supported by task forces of staff drawn from both inside and outside the Law Department. The more significant of the projects are outlined below.

Organisational Options for Courts Management in Victoria

The objective of this project is to analyse the economics of different types of court structures with a view to determining whether Victoria should continue to have a structure of courts which is essentially municipality based or move progressively towards some other structure, for example, regional complexes. The project is also addressing the issue, if it is found that regional complexes are more economically viable, of how the needs of the community, particularly in country areas, for court services may be met effectively. As a sub-set of this project an experiment is being undertaken on case management systems within magistrates' courts with a view to improving productivity.

Administrative Systems and Management Information Data

The objective of this project is to develop a comprehensive program for the introduction of computers in court administration designed to reduce operating costs, improve service levels and to provide better information needed to manage the courts effectively. For the purposes of this project the court system is being treated as an integrated unit rather than treating each of the courts within the system as an independent entity. The reason for this approach is that the economies of scale which can be achieved through computerisation can only be maximised (and justified) if the court system which in Victoria is comparatively a

very small system, is treated as a whole. The first step in this program has already been taken with the delivery to the Department at the end of June of a computer on which the Writs and Warrants function will be undertaken; the system is expected to be fully operational by 1 January 1985. Other opportunities under consideration include the computerisation of the courts registry functions and the centralised processing of debt recovery and alternative proceedings functions.

Steps have also been taken as part of this project to plan to ensure that interfacing can occur where appropriate between the computers of the various government agencies involved in the justice system. The longer term objective is to have a computer network that can be accessed by the legal profession (and others) to obviate the time consuming and therefore costly searching which is now inherent in the system. (e.g. searching of Corporate Affairs files, land titles, court files and registers etc.).

Human Resource Development

This project is concerned essentially with personnel issues with the major emphasis being placed upon the urgent need for staff development. Excluding the Judiciary, there are approximately 800 people involved in the court system in a variety of capacities. Because of the Courts Change Management Program the nature of the majority of jobs within courts and the career paths which may be pursued by staff will change dramatically from those which have traditionally existed. For example, the introduction of computerisation will materially alter the nature of clerical tasks and reduce mundane and clerical repetitive work. Not only will staff in future be required to operate computer based systems but there is an urgent need to enrich jobs in other ways so that morale is raised and career prospects made more inviting. In addition there is a need to improve supervisory and management skills within the system. As part of this project a major survey is being conducted of staff attitudes towards their jobs and about personnel practices pursued within the Law Department.

Communication and Consultation

The objective of this project is to increase the effectiveness of communication and consultation on matters relating to courts management between the Judiciary and the Magistracy on the one hand and the Courts Administration Division of the Law Department on the other. An initial study has already commenced in the Supreme Court (where virtually all Judges have been interviewed) to determine what matters should be the subject of consultation between the Courts Administration Division and the Court with a view to establishing appropriate communication and consultative mechanisms to ensure the improved efficiency and effectiveness of the Court. Later phases of this project will cover the County and Magistrates' Courts and also focus on the development of appropriate consultative mechanisms with the profession and the wider community in general.

The lack of consultation facilitated by appropriate consultative mechanisms has, in the past, led to unnecessary friction and frustrations between the courts and the Department, has inhibited the quality of decision making and has resulted in totally inadequate planning. At best problems have been "band-aided", at worst problems have not been addressed at all

Courthouse Maintenance and Development

The objective of this study is to prepare a ten-year maintenance and development program for all courthouses in Victoria. At present no long term plan exists and, as a result, the millions of dollars spent annually on maintenance and new construction is not always spent in the areas of greatest need. Part of the activity in the project includes a forecast of population trends within Victoria and the consequent need for extending existing courthouse facilities and the construction of new facilities.

Victorian Government Reporting Service

Currently the Law Department has within it a Court Reporting Branch and Shorthand Writers Office which provides transcripts to government bodies other than the Courts. The amalgamation of these separate activities to form a Victorian Government Reporting Service (similar to the Commonwealth Service) is being examined as is the introduction of more modern technology including computer assisted transcription. A combination of new technology and more effective management should enable a significant improvement in the level of service provided to the courts and other government agencies without increasing costs.

Other Projects

A number of other projects are being pursued in addition to those major projects outlined above. For example, a Committee chaired by the Senior Master of the Supreme Court is looking at the management of court's trust funds with a view to the development of proposals designed to ensure more effective management of those funds. A study has been completed of the licensing activity of magistrates' courts and there are a number of opportunities to improve the effectiveness and economy with which this function is executed. The administration of the Poor Box in Magistrates Courts is currently the subject of an investigation by a Working Party comprising representatives of the Courts, the Department of Community Welfare Services and the Victorian Council of Social Services. In excess of $1

million per annum is distributed from the Poor Box and it represents the single largest discretionary welfare fund in Victoria; as such it is essential that it be administered so that the maximum benefit to the community is obtained.

The Courts Management Change Program is, of course, only one of the elements in the Government's comprehensive program to address the problems of the courts, particularly delays. The profession will be well aware of the work of the Civil Justice Committee, of the appointment of additional judges to the Supreme and County Courts, of the changes in jurisdiction in the Supreme, County and Magistrates Courts and of the provision of additional County Court courtrooms, to name just a few of the other initiatives.

Members of the legal profession will appreciate that improved performance of the court system can flow not only from additional resources and better administrative systems, but also from changes to the processes by which the courts and the profession work.

Returning to the law after more than a quarter of a century as an academic, management consultant and company director, the most striking impression is the isolation of the legal profession from the community at large. To be fair the impression of isolation and lack of relevance was underscored by the fact that prior to joining the Law Department as Deputy Secretary for Courts I spent almost twelve months as Acting Director of the Ministry of Consumer Affairs carrying out a major reorganisation of that Ministry and its court substitute tribunal system. The growth in the volume of civil cases heard in court substitute tribunals has been rapid and the point was reached in 1983 where the number of cases heard in tribunals, such as the Small Claims Tribunal, exceeded the number of civil cases heard in magistrates' courts. Where there is concurrent jurisdiction the community is clearly voting against the courts and, given mounting community pressure, continued growth in civil jurisdiction outside the formal court system is assured unless the courts are able to be adaptive to community demands for change.

Legal processes which differentiate the tribunals from courts include the informality of hearings, the non-applicability of rules of evidence, non-adversarial procedures, restricted legal or other representation, plain English and multi-language process and, above all, the mediation of disputes before they proceed to formal adjudication. Most important from the individual litigant's point of view is that the costs of pursuing an action in the tribunals is very low compared with those associated with court actions even at the lowest level of the court system and rarely are awards for costs made in the tribunals.

In my view the choice facing the courts in relation to minor civil disputes seems clear. Non-adaptive strategies can continue to be pursued in which case the court system will continue to recede in relevance and value to the community, or it can experiment with adaptation. Whilst I am aware my suggestion may not enjoy widespread support in the legal profession, I consider a useful starting point for experimentation may be to invest the magistrates' courts with a tribunal type jurisdiction in respect of motor vehicle damage cases to, say, $3000 (this figure being the current limit of the Small Claims Tribunal jurisdiction). It is a matter of speculation as to the impact, if any, such an innovation might have on the profession. If the experience of the Ministry of Consumer Affairs tribunals is any guide then the vast bulk of the matters brought to court in its exercise of a tribunal type jurisdiction would be those which people would not otherwise pursue because of the costs of court action relative to the amount in dispute. Tribunal processes require conciliation, a process not dissimilar to the pre-trial conferences now being successfully experimented with in the County Court. Dispute conciliation is a role which more experienced Clerks of Courts could fulfil and one which would provide enhanced job satisfaction

There are other aspects of legal processes which may also warrant investigation with a view to determining their efficacy in the context of the modern community.

Shortly after the Government announced my appointment to the assignment of managing the change program in Courts Administration, a very eminent member of the profession whom I have known since my law school days phoned me up to offer his commiserations. He expressed the view that he thought the system was not amenable to change and suggested that I would incur at least the passive resistance if not the active opposition of the profession in trying to create change. I am pleased to say that his predictions have proved to be unfounded and that I have found almost universal preparedness amongst members of the profession to recognize the need for change and to participate actively in the process of formulating and implementing it. Clearly the profession has appreciated that it is far preferable to be an active participant in planning the direction of change than to have change thrust upon a system from outside.

JOHN KING

(Mr. John King is the Deputy Secretary for the Courts).

CONSUMMATUM ERIT

On Friday, 7th September about thirty people gathered on the 12th Floor in the Bar Council Chamber. It was already the appointed hour, 4.30 p.m., but proceedings had not started. Maybe S.E.K. Hulme was held up. Was he still in Court? Maybe his plane had been delayed, hijacked even?

Like wedding guests the assemblage naturally fell into interest groups. Bar people talking among themselves Likewise Leighton representatives, Schroder-Darling people, the McLachlan people. Each of them doubtless thinking of the months of negotiation which led up to the ceremony. Chairman Stephen Charles moved among the guests, smiling, putting them at ease The photographer fiddled with his gear, pretending to take light readings. The documents and the Common Seal of Barristers' Chambers Ltd. lay on the table, ignored by all

At four-forty a whiff of Sobranie and the Chairman of the Board was among us Hulme is not so much seen in the Common Room these days His hair is thinning somewhat and his complexion indicates excessive dosages of midnight oil. He greets a few old friends and adversaries and sits at the table flanked by Peter O'Callaghan and the Victorian Manager for Leightons Together they and the Schroder-Darling man set about their tasks. The contract documents were voluminous and had all to be signed and sealed and sealed and signed. Hovering over them like Masters of Ceremonies at a Pontifical High Mass were the solicitors for the parties, turning the pages, pointing to the relevant parts, doubtless checking that no formality was overlooked. Surprisingly soon the task was done. O'Callaghan smiled Perhaps the photographer caught him. They all stood up while Ed Fieldhouse grabbed at least one copy and hustled it away for safekeeping.

As if all of a sudden it was now licit, the guests began to intermingle. It was not exactly a case of bluff builder's horny hand in the manicured mit of the Sydney merchant banker. That happens only in British television series. But all present could sense the occasion. Barristers had committed themselves and the Bar to a major project. We who will cheerfully advise a client to spend millions were now putting our name to a venture which will ultimately involve millions of our own. We gratefully accepted a drink.

Stephen Charles said a few words He noted the long history of the Bar's efforts to enlarge their own accommodation, the indefatigable efforts of Peter O'Callaghan over so many of those years and the contributions of so many in putting the contract together O'Callaghan spoke. We were relieved to hear that Vice-Chairman and B.C.L. Director, McPhee, had phoned supporting the contract, albeit from North Queensland and with reversed charges. He marked the vision of Peter Liddell and his enthusiasm for the project.

The guests continued to circulate and then to slip away For better or for worse the Bar and Leighton Contractors and Schroder-Darling are bound together for the next two years or so The construction programme is so tight that there is not even time for a honeymoon Indeed, dare I say it, the work began even before the nuptial ceremony The guests departed wishing the couple (triple?) a happy future. But someone must have wondered who was the bride?

BYRNE, D.

LETTERS TO THE EDITORS

Dear Sirs,

NAME OF NEW BUILDING

It is suggested that consideration should be given to naming the new building "Barristers' Chambers".

The name is clearly identifiable with barristers and the community would soon become aware that barristers have their own building in Lonsdale Street. At the present time the community at large would not be aware of Aickin Chambers, Latham Chambers etc However, they may be aware of A.C.I. House and National Bank House.

Building naming rights are very important e.g., Wales House, Collins House, B.H.P. House, Myer House, S.S.B. Centre. I can see no reason why barristers should not project **their** building to the public

You will be aware that all members of the Bar have (or continue to) contributed to the purchase of the site and "Barristers' Chambers" would acknowledge these efforts as joint rather than naming the building after an individual.

It is also the 25th anniversary of Barristers' Chambers Limited and the Directors (both past and present) have assisted in the development of this project.

If it is decided to name the building after an individual then I would suggest Tait Chambers. You may be aware that the existing Tait Chambers may be demolished in the future and as such it would be a continuing tribute to the memory of Sir James who was on the Practising List for almost sixty-four years.

E. FIELDHOUSE

Dear Sirs,

In the Winter Edition of the **Bar News** 1984, the Chairman, Law Reform Committee stated in a Law Reform Report that:—

> *"If any member who wishes to assist with references to any particular area of the law, he is requested to forward his name to the Secretary. . . with details of his area of speciality."*

In this comment it is clear that the Chairman of the Law Reform Committee was persisting in his opposition to the **Interpretation of Legislation Act 1984** and proposals contained in a report that preceded that Act to draft statutes in "gender free" language. In his report Gillard Q.C. was continuing the current practice of where the male includes the female (see, **Acts Interpretation Act** 1958, section 17).

The Law Reform Committee, has benefited greatly from views on all aspects of Law Reform readily given by female members of the bar. It is my concern that female members of the bar are not deterred from assisting the Law Reform Committee by the references to the masculine gender in the report published in the last issue of the **Bar News.**

I have always thought that the **Acts Interpretation Act** section 17 was incorrect. In nature does not the female include the male?

Notwithstanding the comments of Gillard Q.C., I would be pleased to hear from any female members of the bar who wish to assist the Law Reform Committee.

JOHN HOCKLEY
Secretary, Law Reform Committee

Dear Sirs,

APPRECIATION

Those members of the Bar who are Freemasons combine with judges, barristers and magistrates to hold a dinner annually at the Masonic Centre of Victoria.

Arising from the 1984 Dinner, a cheque for $1,000 was presented to the Royal Freemasons' Homes of Victoria as a contribution towards the provision of care for the elderly in our community.

Currently the Royal Freemasons' Homes of Victoria provides care, comfort and security for over 630 elderly people throughout Victoria in independent living units, hostel and nursing home accommodation. As a charitable organisation, the Homes is dependent on donations to achieve its objectives.

Accordingly, we should be most grateful if this letter could be published as an expression of appreciation and thanks for the magnificent donation made to assist in our work.

Yours sincerely

I.G. McPHERSON
Administrator
Royal Freemasons' Homes of Victoria

I PUT A TRIAL

ON COMPUTER

(and vice versa)

"You've got to understand" said Langslow to the man in the computer shop, "that you're dealing with a couple of blokes with fingers like clubs"

We had been briefed to appear for an accused man facing drug conspiracy charges. The committal had lasted many days. Twenty three witnesses had been called before the magistrate. The Crown had given us notice of their intention to call an additional eighty witnesses.

When I first came into the matter the brief was delivered in boxes. Part of the crown allegation was that the accused had made money out of his activities. That explained the box full of papers dealing with financial matters. Some of the witnesses had already given evidence before a Royal Commission. We expected that we might get access to some of that material. The reading was going to take weeks. The issues were complex. The prospect was daunting. The mere volume of the paper was intimidating.

That's how we found our way into the comuputer shop. "There must be a way of putting this on a computer" I had insisted. So the two of us with fingers like clubs were talking to the computer gentleman. We told him that we wanted to put a court case on computer. "Ah yes", he said "we've just done a programme for a man in a greengrocer's shop who wants to know what to order".

"Perhaps that's not quite it", we said.

"We've just done a programme for a woman who runs a book store so she can tell at any given moment what stock she has. Unfortunately she doesn't know how to use it".

We walked out an hour or so later. I had by then hired an Osborne personal computer with what were said to be floppy disks, a printer, an extra V.D.U. which is computer talk for a T.V. set, and assorted boxes of paper, file covers, cables and some other odds and ends. "Don't worry" said the man, "there's a book of instructions that we'll send along with it".

Conversations with well meaning friends had caused me to believe that I wanted a computer with what they call a Data Base II Programme. The man in the shop agreed. "That is just what you need" he said confidently

So it was that at the end of the day I surveyed the brief I did not understand while sitting behind a machine I could not use. I looked up the book of instructions. If I put in certain floppy discs I would then be able to start the Data Base Training Course I was told. I put the discs in and pressed the buttons. Lights flashed, wheels whirred and printing came on the screen.

Slowly and painfully it took one through a simple course which seemed to be aimed at how to develop a mailing system of names. Of course you never know when you will want a list of people whose letter boxes you want to have filled with junk. I can think of a few people right now. I wonder if the computer can arrange to have wet newspapers blowing across their gardens as well.

Victorian Bar News

I kept at that machine day and night. I punched information into it and sometimes got it back. I used it at Chambers. I took it home and used it there. I took it up to Macedon to Langslow's weekender that he calls his Farm.

What I wanted from the machine was an indexing system. I wanted to be able to call up what different people said about different things, when events were said to have taken place, who referred to what exhibits, what counts pieces of evidence related to, and above all where in the transcript all this was to be found.

Slowly the sort of system I wanted emerged. Just as slowly emerged a routine for extracting the information we wanted indexed.

Can you imagine a page of transcript with these headings, WITNESS PERSON ISSUE PAGE DATE EXHIBIT COUNT. At the end of each day we would get to work on that days transcript. Let's suppose that a witness was talking about another person doing something with some exhibit, or as was more usual meeting another witness to do some heroin deal. If it appeared on the transcript at page 1297 and occurred on 16.8.78, that might be entered as: SCOTT WILSON HDEAL 1297 780816 - 2.

So each event, each incident, found itself in a line of information.

After a time we found that the actual keying of the information into the computer was taking our fingers like clubs a very long time indeed. It was then that great good fortune brought us a young lady with the skill to do it for us, and a machine of her own at home. We would write out the index and she would key it in. She charged us by the hour, and very moderately at that.

We finished up with a pretty good index. Overall there is no doubt that it was a time saver. I tested the time element one night in this way. I indexed the transcript using a card system. Time: 2½ hours. Indexing for the computer. Time: 1¼ hours.

The big advantage of the computer index is its capacity to retrieve information. For instance, once we needed to find out everything that had been said on the subject of dealings in hashish oil. The computer turned up the pages in the transcript where it had been referred to in seconds. What's more, it could do combinations. You could ask the computer the question, Did Scott and Wilson meet in Sydney in 1977? If the information had previously been keyed in it would again give you the reference in seconds.

Warning: Rubbish in, rubbish out. What you put into the machine must be correct, it must be something you will want, and it must be capable of retrieval. Otherwise you've wasted your time.

The German Dog Principle. I began to see the computer as having the qualities of a highly intelligent dog which understood only German commands. If you spoke fluent German, then no problems. If you didn't then you must learn enough German to induce it to obey you. A slight mispronunciation would have as its only result a blank look. If you tried to force the issue it would bark back "boot error", "unknown command", "B dogs error on A" or similar strange things.

Let me warn you. Life with a highly intelligent dog which understands only German is not always plain sailing.

The Pie Bag Syndrome

Lest you think that to use a computer is simply to press a button whereupon all the answers come out, let me recount to you the following. One lunchtime Langslow and I were in my chambers. It had been a difficult morning and promised to be a more difficult afternoon with a witness who had given us little joy. Lunch had been a pie from a bag, coffee from a styrofoam cup, and the air was thick with cigar smoke. (Later on we found that the computer was allergic to cigar smoke. That explained some of its obstinacy; and when we did find that out we smoked all the more just to spite it). We asked the computer lots of questions about what others had said this witness had been up to. It provided us with good information on the screen. Time was short. The essence had to be noted quickly. A pie bag was the nearest paper to hand so the jottings were done on it. We trooped off to court.

Not too long afterwards, it began to emerge that what we had noted over lunch was becoming vital. Then came what must have seemed an incongruous spectacle. Thousands of dollars of sophisticated equipment had been put to use, and here was counsel cross-examining holding a pie bag in his hand. At that moment the pie bag was the world.

Conclusion

Computers are flighty little jobs. But when put to good use they can save you countless hours. If all goes well it means you only have to read the transcript once. Those who have been in long trials without a computer will probably admit to reading the whole transcript at least half a dozen times.

I should add that the accused was convicted. I blame the computer for that, of course. If there is a successful appeal that will be to the credit of his counsel.

DAVID ROSS

Casenote:

THREE STEPS BACKWARD OR MERELY A RE-STATEMENT OF BASIC PRINCIPLES?
Mallett v Mallett

In **Read v Read** (1984) FLC 91 - 527, Nygh J said, "Much of the water that has flowed under the bridge of the Full Court since 1976 has now flowed irretrievably into the desert as it would seem."

For those who do not know, or do not care to know, section 79 of the Family Law Act is the section that enables the Court to re-distribute the assets of the parties upon the breakdown of the marriage in accordance with that which the Court determines is just and equitable in the circumstances. The section goes on to provide that the Court must take into account certain matters which include direct or indirect financial contributions made towards the acquisition, conservation and improvement of the property and contributions made in the capacity of homemaker or parent. In a line of decisions commencing almost as soon as the Act commenced in 1976, the Full Court of the Family Court developed the concept that after a long marriage where each party had put in to the marriage that which was expected of them either as breadwinner or homemaker and parent, it was convenient to determine what the assets accumulated were and apply the concept of "equity is equality". The Court then looked to see if there were any factors which would indicate why the parties should not share equally in those assets.

In its practical application the so called "principle of equality" meant that in fairly straight forward cases where the assets consisted of the matrimonial home, some savings and perhaps some superannuation that had already fallen in, both the husband and the wife could expect to walk away from the court with about half of the assets. In the more complicated cases where the assets consisted of business assets or unusually large savings then the court tended to perhaps abandon that approach and place more emphasis on the direct financial contribution of the husband (usually) rather than the non-financial contribution of the wife.

In other cases, it was the needs of the wife and children (quite appropriately) which became the dominant factor leading to the wife receiving a larger share of the available capital assets.

Mr. and Mrs. Mallett were married for 29 years. They raised three children. Mr. Mallett was a successful businessman. The parties jointly owned the home worth $240,000. They each had shares in the family business with approximate value of $27,000. In addition, the husband had investments worth $261,000.

Bell J of the Family Court of Australia at Brisbane allowed the wife to retain her half share of the home, her shares and suggested that the husband should provide the wife with 20% of the value of the other accumulated assets. The Full Court of the Family Court took the view that the wife should have 50% of everything. The husband appealed to the High Court.

All five Judges of the High Court (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ) concluded that there was no rule, principle or guideline in the Family Law Act which enabled the Court to say that, as a starting point, equity of division of assets after long marriages was an appropriate position for the Court to adopt.

The Chief Justice expressed the view that the Family Court was given a very wide discretion under Section 79 but said that there were very few fetters on that discretion.

> *It is necessary for the Court, in each case, after having regard to the matters which the Act requires it to consider, to do what is just and equitable in all circumstances of the particular cases. In some cases, the Family Court, rightly starting with the proposition that the contribution made by the wife as home-maker and parent should be recognized "not in a token way but in a substantial way" has gone to conclude that at least in ordinary circumstances such a contribution ought to be equally equated to the efforts of the husband who is thus free to pursue his direct outside employment . However, the Parliament has not provided, expressly or by implication, that the contribution of one party as homemaker or parent and the financial contribution made by the other party are deemed to be equal . . . or that equality of division should be the normal or proper starting point for the exercise of the Court's discretion.*

Mason J said,

> . . . *It has been held, again correctly in my view, that the Act intends that the wife's contribution as homemaker should be recognized in a substantial and not merely in a token way. However, the Judges of the Family Court have gone a step further by saying that the contribution of the wife as homemaker is to be equated to the contribution of the husband as income earner . . . no doubt, a conclusion in favour of equality of contribution will be more readily reached where the property in issue is the matrimonial home or superannuation benefits or pension entitlements in the marriages of longstanding. It will be otherwise when the property in issue consists of assets acquired by one party's ability and energy has enabled the establishment of conduct of an extensive business enterprise to which the other party has made no financial contribution and where the other party's role does not extend beyond that of homemaker and parent . . .*

Wilson J said,

> . . *It cannot be said of every case where the parties reside together that equal value must be attributed to the contribution of each. That will be appropriate only to the extent that the respective contributions of the parties are each made to an equivalent degree What the Act requires is that in considering an order that is just and equitable a Court shall "take into account" any contribution made by a party in the capacity of homemaker or parent. It is a wide discretion which requires the Court to assess the value of that contribution in terms of what is just and equitable in all the circumstances of the particular case. There can be no fixed rule of general application . .*

The only support for the approach the Family Court Judges appears to have come from the judgment of Dean J:

> *That general Counsel of experience, derived from decisions in previous cases involving questions of fact, is that, in cases involving a long marriage where the parties have adopted the attitude that their marriage constituted a practical union of both lives and property, the notion of equality is likely to offer an acceptable and useful starting point at least as a regard to those assets, such as the matrimonial home, ancillary possessions and savings and investments for retirement, which are fairly to be seen as truly representing the fruits of the totality of efforts of wage earning, homemaking and mutual support . . . so read, they (the decisions of the Full Court) appear to me to reflect no more than sound common sense founded on unrivalled experience and will involve no more than the articulation of a step in the path to conclusion in the exercise of a discretion which essentially relates to factual matters . . .*

Dawson J said of the concept of equality as a convenient starting point:

> *No doubt such an approach is appropriate in those cases where the financial contribution of the husband does not extend beyond the provision of a family home and the acquisition of savings to provide support for both parties to the marriage in retirement. It may well be appropriate in other cases where the husband's contribution extends beyond the matrimonial home and any savings from earnings to the acquisition of property for commercial purposes . . . but it does not follow in every case where the husband earns the family income and the wife carries out her responsibilities in the home that the contribution of each to property acquired during cohabitation should be regarded as equal. If, for example, the husband is engaged in conducting a business, the nature of the business, the skills which the husband applies in it, the way in which he applies those skills and the manner in which the business has been built up, are all factors which may indicate that it is inappropriate to assume equality of contribution . . .*

There is something for everybody in the judgments in Mallett's case. Recognition is given to the important role of the wife as homemaker or parent. Recognition is given to the important role of the husband as breadwinner Recognition is given to the concept that in many, if not most, cases an equal division of assets could well be appropriate. Recognition is given to the fact that in cases involving peculiar business acumen, one cannot equate the role of homemaker or parent with that of the breadwinner. Recognition is given to the broad general discretion given to the judge at first instance. Perhaps the worst thing to come out of **Mallett's case** is the likely fetter that it will place on the Full Court's capacity to oversee the occasional unsatisfactory exercises of that discretion by the judge at first instance.

The author has long been of the view that if all of the judges of the Full Court think the trial judges come to the wrong answer, then the provisions of Section 94 of the Family Law Act (Powers of the Court of Appeal) are sufficient to enable that Court to substitute its own conclusions. Unfortunately, that view does not appear to be shared by the justices of the High Court.

J. V. KAY

STRATEGIES AND TECHNIQUES FOR SUCCESSFUL NEGOTIATIONS

By Mark K. Schoenfield

There have been many scientific studies over the years concerning negotiation, conducted mainly by people in the fields of management and social psychology. While the results of these studies vary, the findings contain a consistent core that seems applicable to lawyers.

Through the exchange of information, each negotiator decides whether a mutually acceptable common ground exists for resolving a matter or whether further negotiation would be futile. The negotiator's tactics, strategies and goals are numerous and complex.

Personality of the negotiator

Lawyers may be pleased or displeased to learn that there is no direct correlation between specific personality traits and successful negotiation. Successful negotiation means optimal settlements that are close to the opposing negotiator's limits.

There is one exception to the fact that different personality types can be successful negotiators: the attorney whose behaviour is influenced by a strong desire to avoid conflict, either in the negotiation or at trial. Attorneys who are extremely conflict averse will not push for optimal settlement terms. In addition, by acting weakly in negotiations, they unintentially encourage the other lawyers to seek tougher terms

In addition to basic personality traits and situational pressures, attorneys are influenced by a need to avoid embarrassment — that is, they need to save face. For people in general, and probably more so for professionals, avoiding loss of face is an important determinant of actions. This principle has important consequences. The opposition should be allowed to yield gracefully.

The successful strategy

In general, the most successful strategy (the one that maximizes gain) is to take a realistically high initial position and make only a few small concessions. That position avoids the difficulties that arise from an unrealistically high one, which may not be taken seriously by the other negotiator and may be ignored. If the other lawyer treats the unrealistically high position as a serious one, it may be concluded that the negotiator (1) does not know what he is doing; (2) does not understand the true nature of the matter; (3) thinks that he is a fool who does not know a ridiculous offer when he hears one; or (4) is so unreasonable that further negotiation would be useless.

None of those conclusions is to the negotiator's advantage

In contrast, a realistically high initial position establishes a bargaining range that allows maximum gain Unlike a low initial position, it prevents unnecessarily conceding items before the negotiation actually begins. It establishes a degree of control early in the process by setting the bargaining range

For this reason, attorneys should disregard the old lawyering myth: "Never make the first offer." A realistically high position can be effective. Of course, if the attorney is uncertain for some reason and does not know what will be realistically high, it is advantageous not to make the first offer. Then counsel can use the other party's first offer as additional information for assessing his position in the negotiations.

A few small concessions will not cause the negotiator to drop very far from the realistically high initial position. "Concession" means actually giving up something of value. While making a few small concessions, the negotiator also can yield large but meaningless items to build momentum or goodwill.

A more detailed perspective is provided by the five general strategies listed below: hard, concede first, moderate, fairness and games.

Hard strategy

No concessions are made unless the other party is refusing to do so. Even then, only small concessions are made. This strategy is quite close to the one discussed above and is generally most successful. It is based on the theory that success comes from establishing realistically high expectations and being extremely reluctant to lower them. The few concessions allow the negotiator to acquire information to reassess aspirations.

The hard, initial position often leads to a higher final offer by the other party, who has not been able to learn what the bottom line really is, especially if there is substantial time pressure to achieve settlement. It also helps to set the range before a power deadlock leads to one side invoking the "split the difference" norm in order to achieve settlement. Starting and remaining high will lead to a more advantageous result if the negotiators decide to "split the difference."

It also prevents the necessity of withdrawing concessions apparently or actually made. There is a norm or custom against revoking concessions. Breach of the custom by revoking a concession, is at best, awkward and, at worst, can cause a breakdown in negotiations.

Concede first
The negotiator makes a unilateral initiative, giving concessions with the expectation of reciprocity later in the negotiation. The secret is to make those unilateral concessions without surrendering real leverage. It is in essence a method of establishing a pattern of matching the advantageous concessions.

There are two psychological theories underlying this strategy. First, distrust causes the other party to refuse to make concessions because of a fear of being taken advantage of in the process. A unilateral initiative can lower the level of distrust. The second theory is that people co-operate best with those who are willing to make favourable promises, but who also can make effective threats. For that reason, a unilateral concession does not surrender real power or leverage.

Moderate strategy
The negotiator combines the hard and concede first strategies. Moderate strategy is based on the critical danger of those strategies. The hard strategy can lead to being too hard or to the other party's fearing exploitation, causing an unnecessary deadlock when the parties' real positions overlap sufficiently to allow for settlement. The concede first strategy may cause the appearance of softness, inadvertently encouraging the other party to become greedy and attempt to exploit a perceived weakness.

The moderate or concede first theories are most useful when settlement is a high priority. One example is a situation in which a deadlock causes both sides to have no profits or even experience mutual losses.

Fairness strategy
In a surprising number of cases, what the parties and their attorneys really want is to achieve "something" that is fair and just. This goal may be due to some remaining vestiges of idealism or a way of minimizing stress (by settlement rather than further struggle such as a trial), while reaching a respectable goal (justice) that prevents embarrassment (saves face). The items on the agenda are important for their subjective symbolic value.

The fairness strategy requires articulating a proposal as a fair solution based on equity principles (psychological equity). It is the most co-operative form of negotiation. The negotiators' task is to work together to solve a problem and satisfy all clients, rather than to engage in a win-lose competition.

The theoretical basis is that a fairness strategy reduces the other negotiator's need for defensiveness by removing the perceived threat to the client's basic interests and goals. The fairness strategy tends to establish trust that leads to settlement if any common ground for agreement exists. This strategy is especially useful if (1) establishing or preserving a long-term relationship is important; or (2) a joint, good-faith effort by both parties is important to maximize the gain; or (3) non-repudiation is a significant concern, so that one does not want the other party to feel "taken advantage of" and to attempt to avoid obligations.

The parties agree on a principle for resolving the dispute. The principle is then used to formulate settlement terms. For example, the principle in a personal injury case may be the average verdict in similar cases.

Games strategy
The negotiator indicates interests and concessions that are not real concerns. The objective is to confuse the other party about goals, aspirations, strategies and tactics.

The games strategy is especially helpful in two situations. First it can be used before or as a change from other strategies, in order to upset the other negotiator's equilibrium. Second, it allows one to engage in what appears to be the process of negotiation, when the actual purpose is to obtain information from the other side about factual, legal or strategic theories. The latter is the use of negotiation as a means of informal discovery, rather than an attempt to resolve a matter.

These strategies may be used individually or in combination. In order to negotiate with combinations of strategies, either sequential bargaining or differential roles need to be used.

Sequential bargaining

Sequential bargaining means switching from one strategy to another. The switch may occur during negotiation of one item or when moving from one item to a new item. It can be psychologically difficult to alter one's strategy during a negotiating session. For that reason, planning is especially important in using sequential bargaining.

Differential roles require more than one negotiator on a side. Each negotiator appears to use a different strategy. One negotiator is friendly with a moderate or fairness strategy. That negotiator is teamed with a second perons, who represents the same client but adopts a hard strategy. There are countless variations. One major difficulty is subtly co-ordinating the multiple efforts, so that the team members do not end up at cross purposes.

In addition to choosing a personal style or approach and a single strategy or a combination of strategies, the negotiator must choose tactics to implement the strategy.

Goals rigid, means flexible

Tactical considerations in the negotiating process generally revolve around two basic principles: (1) choosing methods to implement one's strategy, and (2) recognizing the other negotiator's tactics in order to respond effectively. The negotiator must remember, however, that tactics are merely a means to an end. It is easy to become so involved in attempting to make one's tactics "work" that one loses sight of the ultimate goals of the negotiation.

The crucial rule is "be goals rigid and means flexible." Since tactics, and often strategies as well, are merely means and not ends, a negotiator must be prepared to be flexible with tactics.

Before analysing methods of assessing the other parties' tactics and strategies, some of the basic tactical approaches will be outlined. These are: problem solving, exchanging information, trial and error, bargaining, debate, bluffs and power.

Problem-solving tactic

Even without using the fairness strategy, a negotiator can use the tactic of presenting a position as an attempt to solve a mutual problem rather than as an effort to gain a competitive advantage. The theoretical premise is that conflicts are more likely to be resolved by clarifying disagreements and tasks to formulate a joint solution, rather than attempting to change the other party's position directly. Once all negotiators really understand the situation, progress can occur. The negotiators become a "team" striving for a mutually agreeable solution.

In using this tactic, it is essential to allow the other party to agree for a different reason. The process can break down easily if the negotiator seeks not only agreement on the ultimate issues but also agreement on the reasons for agreeing. All too often, negotiations deadlock because one party demands that the other party admit the correctness of some position, argument or factual reasoning.

Problem-solving tactics can be invoked to break a deadlock. Typically the deadlock is caused by all of the negotiators being too firm with high aspirations or engaging in "imitative behaviour," which means that each negotiator imitates the apparent moves of the other, so that progress is impossible.

To break these deadlocks, the problem-solving tactic usually requires some disclosures of real preferences. By exchanging information concerning each client's real preferences, the attorneys can determine whether agreement is possible without violating each client's perceived vital interests.

Exchanging information
This tactic is most often utilized as part of problem solving, but it can be used to persuade the other party in regard to issues of fact, law or fairness. The negotiator either unilaterally discloses information or seeks agreement that there will be certain mutual disclosures.

Although expanded discovery procedures have obviated the need for informal exchange of information in many cases, this tactic should be used if the other negotiator is likely to make a favourable change of position once the information is voluntarily disclosed. For example, a personal injury plaintiff's attorney, who has investigated the liability and damage issues elaborately prior to filing and believes that the case is very strong, may turn over all of that information before the defense files a discovery request in order to expedite a settlement.

Trial and error
The negotiator makes an offer. If it is not met with acceptance, the refusal becomes information on which to base the next move. Gradually, the attorney learns what will be acceptable and can reach agreement if he chooses to do so. This response-based method uses erroneous calculations of what will be acceptable as data to develop insights into the optimal settlement point.

Trial and error is preferable to exchanging information if communications are difficult or tactically unwise. There are three methods for implementing the tactic of trial and error.

1. Systematic concession. The negotiator maintains high aspirations while varying the proposal with alternative choices. None of these alternatives, in fact, represents any greater concession than the previous one, but it allows the other party to make a more flexible choice.

2. Trade-offs. A negotiator concedes low priority items while remaining firm on high priority items.

3. Feedback requests. The attorney requests or demands feedback on offers. In this way the negotiator encourages a more co-operative atmosphere and obtains information.

Bargaining
The negotiator explicitly conditions an offer on receiving a specific concession. It can be similar to the systematic concession and trade-off methods for implementing trial and error tactics.

Debate
Rhetoric can be used for two purposes. One, the attorney's statements are intended to persuade the other side that the client is right or will prevail unless he agrees to settle, or both. The communication is competitive, in that it indicates that one side should prevail.

Two, the statements are used to solve problems by resolving misunderstandings arising from different perceptions of reality. For example, assume in a rape case that neither the prosecutors nor the court-appointed psychiatrists are aware of a rare psychotic condition called episodic dyscontrol. Defense counsel may discuss and debate this little-known medical condition in order to educate and alleviate any misunderstanding about the nature and legitimacy of the proposed insanity defense, thereby gaining leverage in the plea bargaining negotiation.

Bluffing
This is a risky tactic. If lawyers are caught bluffing, they lose credibility in that case. If they acquire a reputation for bluffing, they lose credibility generally. Bluffing does not necessarily require any lies, which, of course, are unethical. At best, this tactic requires a certain degree of ambiguity.

Power
The use of power as a coercive force can work, or it may lead to a breakdown in negotiations or retaliation. The other party may retaliate to save face or in anger even if it means greater losses in purely objective terms. The possibility of a breakdown in negotiation or retaliation is reduced if the exercise of power is presented as a morally justified defensive action.

Power can be exercised most effectively if the parties are so unequal that one is virtually helpless to counter the action. In this type of situation, there is no true negotiation. One side has sufficient power to make unilateral moves that, while articulated as offers or demands, are really decisions totally independent of the other party.

Counselling clients comes first
Effective negotiation initially requires counselling clients to obtain sufficient authority for realistically high aspirations. Proper planning then increases the negotiator's control of the process. During the negotiation itself, skillful communication and systematic concessions should maximize the outcome. Throughout the process, awareness of the choices being made by the attorney and by the other negotiator reduces uncertainty and increases effectiveness.

LAWYERS BOOKSHELF

GUILTY SECRETS: FREE SPEECH IN AUSTRALIA

by Rober Pullan: Methuen Australia; 232 pages; Paperback; 1984; $14.95.

"Congress hall make no law. . .abridging freedom of speech or of the press" This part of the first amendment to the U.S. Constitution gives clear expression to the view that speech should be unfettered by legal constraints. The U.S. Supreme Court's interpretation of the amendment has varied over the years from strict to liberal, but it has consistently refused to determine, as has been advocated from time to time, that it bans all legal constraints on speech whatsoever. Rather, it has taken the view that although speech is free, nonetheless it remains subject and responsible to a variety of laws both civil and criminal which affect it. These include incitement, sedition, blasphemy, obscenity, licencing and picketing laws, offensive and insulting language, defamation and so forth. Civil and criminal defamation in particular has been a contentious field and in this area the U.S. position today largely reflects the famous 1964 decision of the U.S. Supreme Court in **New York Times** v **Sullivan.** Paul Newman fans will be aware that the test adopted for defamation is one contingent on the presence of malice, defined as a knowledge of the falsity of a statement or reckless disregard as to whether it was true or not. Falsity as such is therefore not decisive. Lacking a similar constitutional provision the Australian position is presently diverse. In general terms Victoria, South Australia, Western Australia and the Northern Territory provide a defence of truth. In N.S.W., Queensland, Tasmania and the A.C.T., truth alone is not a defence. The presently proposed Uniform Defamation Bill would represent a move away from the existing Victorian position and require that publication be also for the public benefit. Other provisions, which have been the subject of much debate, include a power to order the publication of corrections in a prescribed format and the introduction of a limited power to sue for defamation of the dead, this last being unique in the Common Law world.

Those opposed to the existence of any defamation law argue that it is based on a misconception. It exists, it is said, to protect the reputation of a person being damaged by another. It equates the protection of reputation with the protection afforded property by other areas of tort and criminal law. This is a confusing and distorted view of property since one's reputation lies purely in the minds of other people and therefore cannot be regarded or dealt with as property in any meaningful manner.

Robert Pullan's book is a call for a constitutional amendment providing for the right of protection of free speech to and for the repeal of all laws of obscenity, sedition and defamation. The author is a journalist of 18 years standing who has worked both in Australia and the United States. His first book, Bob Hawke: A Portrait, was published in 1980. The present work included a brief Forward by Donald Horne, a bibliography and a somewhat restricted index. The text is clear and well presented and the number of typographical errors is not such as to annoy any but the fastidious reader.

Yet even to one basically in sympathy with the author's views, it is thought that the book has a number of faults. The uncommitted reader might expect to be exposed to a well presented summary of the arguments advanced by the proponents of defamation and to a coherent rebuttal of these. Although the author does make references throughout the book to various such arguments, there is no systematic defence put forward such as might have formed the basis for at least one of the book's 11 Chapters.

The author writes warmly of the works of Thomas Paine, the American patriot. On page 45 in reference to Paine's famous work he writes "A tone of outrage suffused Common Sense". The same could be perhaps said about **Guilty Secrets.** The author's style at times is somewhat confusing and leads to uncertainty of meaning. For example on page 118:
"When the High Court freed Egon Kisch a rebel whom we will meet later, the Sydney Sun said that the decision was a horror to everybody except the Little Brothers of the Soviet and kindred intelligentsia, and convicted the editor and proprietor of criminal contempt" Again on page 100 there is a reference to Governor Brisbane rejecting a Bill. The preceding paragraphs provide no explanation as to what Bill. On page 133 there are two references to "the men in grey" with no real explanation as to whom exactly the author is referring.

Again there are a number of assertions and simplistic statements. For example "When a reporter sues, the judges' mistrust of free speech makes them prejudiced against them" (page 125), and "Most conversations in Australia are unlawful" (page 16).

Victorian Bar News

Again it is said defamation is the weapon of the rich and socially powerful. Free speech is one of the few available to the poor and socially weak. The constraints which defamation law impose lie therefore relatively far more heavily upon them. Moreover the poor and socially weaker members of society are less likely to be able to indulge in the trouble and expense of defamation litigation, either to defend a suit or to sue. They are thus likely to be more readily defamed with impunity and, at the same time, more fearful themselves of the consequences of speaking freely. (Of course this can lead to the paradox that the person most likely to speak without fear of the consequences is one who has little or nothing to lose such as a bankrupt)

To describe the distinction between libel and slander in a book largely devoted to the topic as "Slander is spoken, libel is written, defamation" (page 16) seems hardly good enough even for a book intended for laymen. Perhaps the author wishes to avoid being legalistic. The numerous references to Judges and lawyers throught the book give the impression overall that he is not particularly impressed by them. A former editor of the Bulletin for example is described as being "seduced" into the law (page 143).

At various stages the author makes reference to various political arguments which he links with his main argument in a far from convincing manner. On page 205 for example he asserts that "Government under the Crown is also incompatible with free speech because the Crown creates the illusion that the people are not the final authority". On page 188 he links free speech to the idea of equal time as though the absence of constraint on speech is somehow equivalent to the requirement that a platform for speech should be freely provided.

Despite however what is perceived as its faults the book is worth buying and reading. The history of free speech (or its absence as the author would contend) in Australia does make for entertaining and sobering reading. The author has gathered together many stories and anecdotes. And the many modern examples of recent cases do highlight just how much defamation is a largely unknown jurisdiction. By its very nature such proceedings and, particularly their results, are unlikely to be widely published. To lawyers then, and particularly, to those who are not well versed in the jurisdiction, the reading of what has been published and with what results can make for particularly interesting and professionally informative reading.

SHARP

• • •

JUDGES THROUGH THE YEARS

by Eric Edgar Hewitt
Hyland House, Melbourne, 159 pp. Index.

Judge Hewitt has produced a book which is in scope at once modest and ambitious. It is ambitious in that it covers the field of all County Court Judges since the very beginning of the Court until the date of writing. (There have been two appointments to the County Court Bench since the book went to press and they are, of course, Judges Hassett and Fagan.) It is modest, however, in that the individual entries are limited by and large to a recital of basic facts — schooling, University days and accomplishments, legal career and membership of other organisations, with at times a brief characterizing remark.

This spare quality is especially noticeable as the book moves closer to the present time. As the author remarks in his introduction "I have faced the daunting task of writing about my fellow Judges and recently retired Judges, because I believe it should be as up-to-date as possible. In dealing with them, I omit many anecdotes, which I leave to others to write about. But the Judges of the present are just as able and varied and colourful as Judges of the past". It is to be hoped that an embargo on anecdotes of present and immediate past of the County Court Bench is to be of shorter duration than that appropriate to State Papers. Indeed it is pleasing to read that there is such variety and colour in the present and recent past, since as the book stands the present Bench seems a little demure in contrast to the earlier state.

Who now emulates Judge Pohlman, with "his kindly disposition, which was sometimes, even on the bench, evinced by tears. . in queer contrast to the severity of the sentences he was wont to impose"? The Judges of the past seemed to adopt a freer demeanour in Court some, we are told, winking at Counsel discomposed, no doubt, by sudden access of both hope and doubt. Judge Forbes "paced the bench with his hands thrust in his trousers pockets" thus expressing his feelings with more gusto than the present encumbents whose opportunities for expressive gesture are limited to, perhaps, a meaningful sideways swivel of the chair of judgment or a precipitate departure.

Judge Cope, who arranged the free defence of the Eureka insurgents, once reserved a decision — until his death. Another Judge as a boy knew the first Napoleon; a third, Judge Macoboy, is still celebrated, or more properly alluded to, in the ballad of Jack Doolan —

> "He held the Beechworth coach up, and robbed Judge Macoboy
> Who trembled and gave up his gold to the Wild Colonial Boy."

Unusual Christian names seem to run in the County Court. One Judge chipped an insolvent who complained of having to "hypothecate his chronometer." The Judge's love of plain English may have been influenced by his parents' choice of Wriotheley Baptiste as his given names.

Judges' hobbies seem by and large to be blameless and of no concern to the paying public although it might be noted that Judge Leech "developed late in life a taste for theology and became a lecturer on mystic subjects". Spiritualism may well have assisted those litigants still agonising over the estate of Judge Molesworth in 1957. He died in 1907. The golfing, gardening and other recreations rarely intrude into the legal side of the Judges' lives. One exception perhaps is the pleading attributed to Judge Mornane whilst he was at the Bar in relation to injuries suffered on the golf links —

> "2. At all times material the Defendant was the proprietor or occupier of certain riparian land at Heidelberg in the State of Victoria.
> 3. The said land was dedicated, laid out and maintained as a course or links for the promotion of a game of skill or chance or of mixed skill and chance known as Golf.
> . . .
> 6. The terrain between the said tee and green was anfractuous, tortile or otherwise undulate."

Religious or political controversy is properly eschewed by the Bench but Judge Hewitt recalls the outburst of the celebrated Rationalist, Judge Foster, who could not contain his outrage at the usual recital by a child qualifying himself to take the oath and snapped out "There is no hell, sonny".

The book contains many samples of judicial humour — a form of humour often, sad to say, greeted with hilarity no less synthetic than the canned variety. Perhaps the most memorable sample — and a terrible reminder to witnesses who would rise above their station, came in the note on Judge Hamilton, in describing that Judge examining an insolvent: "Come, madam" he concluded "you must have some property of some kind".
"Well I'll tell you" she snapped, "my face is my fortune".
"No assets, Summons dismissed".

The book contains notes on 107 Judges, the earliest Judge Pohlman, having been appointed in 1852, the latest, Judge Rowlands, in 1983. Read attentively, the notes are as an interesting source of raw sociological data as to the background of the County Court Bench and may settle a number of arguments on such questions, as well as providing a foundation for a critical or analytical study.

M. CRENNAN

CRIMINAL LAW ADVOCACY

Papers delivered to a Seminar of the Legal Services Commission of South Australia in May 1983. Obtainable from the Commission 82 - 98 Wakefield Street Adelaide South Australia 5000. **$6.50, 75 pages**

The most popular books on advocacy at the moment are the Rumpole series. Rumpole is a character with a lot of appeal to us all. He has qualities which we like. Courage is the first of them. He prides himself on being the gadfly of difficult judges. Despite his lovable literary pomp, he can get through to the simplest of clients, and touch the heart of the jury. We like our families to like Rumpole too. It makes them think our job is important. And it does take the heat off our families' demands of us because Rumpole has a very patchy practice and doesn't make much out of it.

Like so many others, I bought the Rumpole books. I commiserated with his losses. I was buoyed by his victories. I was enthralled by Mortimer's skill of writing. But, sad to say, the gloss was removed by the court scenes. Mortimer had Rumpole making fundamental errors in asking questions, in giving evidence from the bar table, in addressing the bench. It may be Mortimer's literary licence, but perhaps it was deeper. I read his autobiography recently "Clinging to the Wreckage". Before he took silk Mortimer had done only one criminal trial. After taking silk he did a murder, and he does not say what the result was.

Since Harris' "Hints on Advocacy" and Hastings "Cases in Court", there has been Wellman, well known and well thumbed, Du Cann's "The Art of the Advocate", Munkman's "The Technique of Advocacy", and others. The next to be added to the list is **Criminal Law Advocacy.**

This is a collection the transcripts of an Advocacy Seminar in South Australia last year. There were four papers delivered. Vincent QC spoke on Preparation of a Criminal Trial; Michael Abbott spoke on Cross-Examination; Barker QC spoke on opening and closing addresses; and a psychologist, Graham Andrewartha spoke on Psychological Communication in the Court Room. Each paper was commented on, and questions were asked of the speakers. The transcript was edited by Eames of our bar who is now Director of the Legal Services Commission of South Australia.

Most of us are fascinated by stories of advocacy. For many it is not just a job, but our interest as well. We go along with what Chaim Potok has Asher Lev thinking. "If you want to know how to do a thing you must first have a complete desire to do that thing. Then go to kindred spirits — others who have wanted to do that thing — and study their ways and means, learn from their successes and failures and add your quota. Thus you may acquire from the experience of the race."

It is probably as hard to talk about advocacy as it is to describe how to ride a bike, or how to ride it well. Those who are advocates, advocate. Generally they do not write about it because there is no simple way of putting down all the twists of thought, all the fine judgements that go into one court case, into one cross-examination, even into one question.

This booklet adds to our store of knowledge and to the lore of our craft. It contains the thoughts of able people on the nuts and bolts of trials.

It is worth getting. But read Rumpole too.

DAVID ROSS

VERBATIM

Kayser for one of the co-accused rises to make an application for separate trials.
His Honour: (Completely deadpan) "I hope, Mr Kayser, that this application does not take too long. I want to go to Vienna.
Kayser: (Somewhat stunned) "But, but, Your Honour its only May, the Vienna conference is in August. . ."
His Honour: (Even more deadpan) "I'm quite aware of that Mr Kayser, but you're not known for being short are you?"
Kayser: (Completely stunned) "Of course Your Honour must be referring to my stature and not my forensic skills."
His Honour: "Of course Mr Kayser, of course."
(The Judge just managed to catch the last plane to Vienna).

R v Steane
Cor. Judge McNab and Jury
May 1984

• • •

The accused having been asked whether he would give sworn evidence:
"Then I have to decide whether to give Mr Ray the opportunity — he keeps reminding me of a hungry dog sitting outside the front of a butcher's shop looking at a side of beef."

R v Brazel
Cor. Judge Murdoch & Jury
6 August 1984

• • •

From a record of interview:
Q9: What happened then.
A: I brother felt sore, hurt and he cry out. Then I open another door and got out of the car and came up to them and ask 'what's the matter' and they just kept swearing and I don't know what they say. I try to stop them from swearing but they keep going.
Q10: How did you try to stop them from swearing.
A: I say 'No Fucken More'.

• • •

In the course of an opposed application for renewal of a 'disco' permit before the Liquor Control Commission:
Licensing Inspector: "I expect that the 'disco' will in the future be run much better, and these disgraceful incidents will not recur, because the Licensee's wife, Mrs X, is now running it. No offence intended, but she's a bit like the English lady who's Prime Minister, 'The Iron Maiden'."
Hedigan QC: I daresay he means Mrs Thatcher, the so-called 'Iron Butterfly'."
His Honour: I hope so, the Maiden was a Mediaeval instrument of torture."
Hedigan QC: "Perhaps he's not mistaken at all."

Cor. Judge Kimm
April 1984

• • •

In the course of a Building Case:
Porter: "And did you arrange for any particular contractor to build the fence?"
Greek witness: "Mr Papadopoulos came to us and told us, 'I have a friend whose name is Spiro' — and we told him we didn't want a Greek; we wanted to get someone who was able to do it properly."

• • •

The Defendant had pleaded guilty to a shop lifting charge. The defence case was that the Defendant had forgotten to pay for the goods because she was distracted by her two ill-behaved young daughters.
On oath, the store detective was strongly asserting that if the Defendant had any children with her, they certainly did not, at any time, constitute a disturbance. Half way through her evidence His Worship interrupted, and in rather strong terms, directed that the two ill-behaved girls at the back of the court be removed.
Counsel for the Defendant rose to comment that these were indeed the children of the Defendant.
Case dismissed.

Police v Parnham
Cor. Stott S.M.
Ferntree Gully
30 May 1984

• • •

Judge Mullaly was sitting in appeals. One appeal concerned the wrongful use of a video poker machine. The police explained that by inserting a coin, the player would then be dealt a hand of cards shown to him on a screen. The police produced the machine. When His Honour asked for a demonstration a policeman duly found 20¢ and inserted it. The coin rolled in, and the first card flashed on the screen. What card was it? Why the Ace of course.

Cor. Judge Mullaly
August 30, 1984

• • •

Things were warming up in Second Division at Ringwood:
Police Prosecutor to witness: "How many times did you throw stirt and dones at the defendant?"

Cor. Bolster SM
16 July 1984

• • •

Graffito in a Supreme Court convenience could be an entry in a Bar Motto Competition. "The law is like marijuana. The harder you suck the higher you get."

• • •

Dennis Smith was cross-examining a 34 year old transexual who was alleged to have procured underage girls to work as prostitutes in a brothel run by the accused. Smith suggested that the witness had been offended when the accused would not let her work at the massage parlour.
Witness: "It didn't hurt me, nothing hurts me any more, after what I have been through."
Smith: "...She said you are too old and ugly and she wanted girls not men."
Witness: "I may be old. I don't know about ugly. You aren't an oil painting yourself."

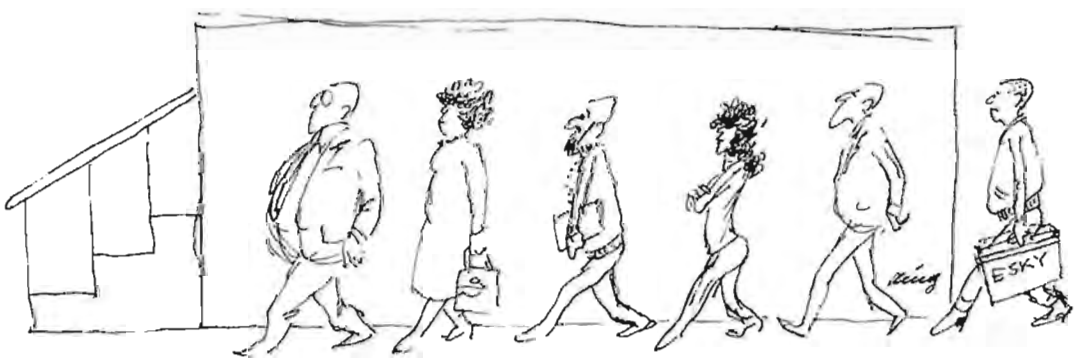
R v Mentes
Cor. Judge Fricke & Jury
18 July 1984

• • •

An interpreter was being cross-examined by Wraith about his memory of events surrounding his translation:
A: Yes, I also have some recollection of the events because although I am a professional interpreter and I do interpret Arabic and Italian, I do minor things such as shoplifting and other things as well.

R. v. Maramou
Cor. Nathan J & jury
July 25, 1984

• • •



SPORTING NEWS

Stratton Langslow fulfilled a 12 year dream when he won the senopod section of the Murray River canoe marathon. He pushed his single canadian 400 km. last Christmas to come close to record time. On the cold winter mornings keen-eyed observers on Albert Park lake could see him loom out of the mist on his training paddles. This year he wants to win again and break records. He has set aside October for high altitude training in Nepal.

• • •

Dame Fortune has again smiled on Monahan, and twice. He was at Warrnambool during the May Cup carnival and was lucky enough to score "Sun For Fun" in the sweep conducted at the Warrnambool Club. The win of approximately $7,000 was shared with John "Sangster" Lee who was on circuit. Others to partake in the booty included Lee's instructing Solicitor together with a local Solicitor, Peter McLoughlin. Monahan purchased a yearling colt at the Victorian Sales so the money will be put to good use. But his trip to Los Angeles for the Games cost him nothing. That was the result of a win in a raffle. The prize included air fares,accommodation and spending money.

• • •

Sometimes going on circuit can be a bit of a bore and many prefer to frequent the Courts around Melbourne. How would you like a brief to go to Copenhagen! Golombek is opposed to Keenan in an action for personal injuries suffered by an infant Plaintiff who was injured in Victoria whilst on a trip from Copenhagen. Evidence is to be taken on commission later this year and so their attendance is required. We are not sure what the circuit fee is but it should be reasonably tolerable. We have not been able to find out if their respective wives are going. Keenan, incidentally, has already been to Istanbul where evidence was taken in a case last year

• • •

Heaton is probably sufficiently qualified to set himself up as a travel consultant. In recent years his trips overseas have included Europe, Turkey, the Greek Islands, South America and cruising on yachts in the fiords of Norway. The latter is well recommended. His yachting exploits have included sailing across the Pacific and Atlantic oceans. He recommends the Maldives and claims the tropical island is ideal for diving enthusiasts. Those thinking of going to Sri Lanka are advised to read the paragraphs on "RIOT" referred to in Archbold.

• • •

We all know that Pannam Q.C. is the author of the text book "The Horse and the Law" and no one can doubt his qualifications and experience in this area. We are told that he was recently riding his hack past the front door of the country pub at Mount Macedon when he narrowly avoided a well primed patron as this gentleman rolled out. The aggrieved man called out "What do you think you are doing — riding a Melbourne Cup winner?" In actual fact Pannam was riding Hyperno who won the Cup in 1979. He is now Pannam's hack having been recently retired when he failed to stand a preparation late last year. His new owner claims that Hyperno is an intelligent horse and an excellent hack for his rides around the local area. Incidentally, we would all love to see Pannam and Phil Dunn when they take part in a 14 day riding trek to the Sierra Nevadas in Spain — a 13,000 feet mountain range. Believe it or not, Dunn is now a competent rider although a strong horse is required lest the R.S.P.C.A. be called in. His style is somewhat unusual and he is compared with a retired Colonel in the "Light Horse".

• • •

SOLUTION TO CAPTAIN'S CRYPTIC No. 49

MOVEMENT AT THE BAR

MEMBERS WHO HAVE SIGNED THE ROLL SINCE THE WINTER EDITION

Brian Francis MURRAY (N.S.W. Q.C.)
John LLOYD-JONES (N.S.W. Q.C.)
Vince BRUCE (N.S.W. Q.C.)

MEMBERS WHOSE NAMES HAVE BEEN REMOVED FROM THE ROLL AT THEIR OWN REQUEST

Bruce ROSS
Ian H. GIBSON
N.B. GOOD
M.P. GREEN
P. INDOVINO

MEMBER WHO HAS TRANSFERRED TO THE MASTERS & OTHER OFFICIAL APPOINTMENTS LIST

J.C. MILLER

TOTAL IN ACTIVE PRACTICE: 914

VICTORIAN BAR NEWS
ISSN-0150-3285

Published by
The Victorian Bar Council,
Owen Dixon Chambers,
205 William Street,
Melbourne 3000

Editors
David Byrne Q.C., David Ross

Layout and Cover
David Henshall

Editorial Committee
Max Cashmore, Paul D. Elliott,
Charles Gunst, John McArdle

Cartoons
Lou King

Phototypeset and Printed by
SOS Instant Printing

Spring 1984

UNREPORTED DECISIONS OF THE COURT OF CRIMINAL APPEAL

SEPTEMBER 1984

Enquiries regarding these cases may be made of David Ross ODC 406 (ph. 7462)

APPEAL

Appeal against conviction after plea of guilty — The applicant must show that in all the circumstances a miscarriage of justice has occurred: the burden of proof is on the applicant.

R. v Pickup
16 April 84.

DPP's reference — basis of same — application of Crimes Act S.460 (prior to amendment by Act No. 10076).

DPP's reference No. 1
10 May 84.

DRUGS

Trafficking — Poisons Act S.32(2)(b) — accused in possession of more heroin than prescribed in schedule. Evidence that the heroin was thrown from a moving car. Such evidence not sufficient to constitute trafficking under the Poisons Act.

Observations on the effect of S.73(2) Drugs Poisons and Controlled Substances Act 1981.

R. v Tenni
18 June 84.

EVIDENCE

Corroboration — R. v Kehagias (see Rape)
Unsworn Statement — R. v Beljajev (see Handling)
Identification — R. v Kehagias (see Rape)

FIREARMS

Machine gun — definition — adequacy of Judge's charge — Firearms Act S.3(1).

R. v Wagnegg & Flannery
27 April 84.

HANDLING

Doctrine of recent possession — use to be made by jury of what is said to police, contents of unsworn statement. Those principles are —

(a) Any untrue statement or false denial made before or after a caution is given can be used to show a consciousness of guilt and can be used as to the credit of the applicant if he subsequently gives an innocent explanation at his trial or before trial.

(b) Any failure to give an innocent explanation when the situation reasonably calls for it before the caution can be used as to the credit of any subsequent innocent explanation which he makes at his trial or before trial.

(c) No failure to give an innocent explanation after caution can be used as to the applicant's credit or otherwise, and the jury must be so directed.

(d) In my opinion, the concept of selectivity does nothing more than confuse the issue in this case. I think it is clear (**Woon v R.** 109 C.L.R. 529) that selective answers made before or after caution can be used to show a consciousness of guilt and can be used no doubt as to the credit of a subsequent innocent explanation if the answers can be clearly and reasonably construed as showing a consciousness of guilt.
Here, whilst it is clear that the applicant did answer some questions and so to this extent was selective but it does seem that the questions he answered were questions which either were known to the police or could obviously be ascertained by them. It is not suggested that any of the answers were untrue, and accordingly, in my opinion, could not have been used by the jury either to show a consciousness of guilt or to undermine the credit of the innocent explanation which he subsequently made in his unsworn statement from the dock.

(e) The failure to give an immediate innocent explanation is not a matter exclusive to cases of recent possession, but subject to the right to silence, applies to all cases where an innocent explanation may be reasonably expected.
In my opinion, the right to silence is a fundamental principle of the criminal law and is not to be overridden by any other so-called doctrine or other principle.

R. v Beljajev
14 May 84.

PETITION OF MERCY

New trial ordered on ground that defence counsel erred in not calling evidence which would have assisted the defence, thereby causing a miscarriage of justice.

re Knowles
25 May 84.

PROSECUTION PRACTICE

Prosecution called eye witnesses but did not question them. Such a course is not to be encouraged and may produce unfairness. (Appeal against conviction dismissed).

R v. Foley
15 May 84.

RAPE

S.62(3) Crimes Act — corroboration — "once the trial judge chose to give a jury a warning as to corroboration in a case involving. . .sexual assault he was obliged to state what corroboration is. . .and what evidence is capable of amounting to corroboration". S.62(3) does change the law on corroboration, it merely dispenses with the requirement to give such a direction in a specific class of case leaving the judge a discretion to give the warning in an appropriate case.
— mutual corroboration — Hester 1973 A.C. 296 is limited to case involving young children and should not apply to two women complainants.
— statements of prosecutrix admitted — observations on what use may be made of the statements, and of the desirability of their tender — judge's charge confused as to the contents and this (inter alia) rendering verdict unsafe and unsatisfactory.
— identification — showing photos to witness — no I.D. parade — dock I.D. — flight of accused did not fill gap in crown case.

R. v Kehagias, Leone & Durkic
27 June 84.

SENTENCE

Mentally disturbed offender requiring assessment after some sentence. Attempting to strangle a child on a train. Sentence of nine with five. No interference with sentence on appeal although the members would not have passed that sentence.

R. v Payne
4 April 84.

Judge not to take into account a view formed of the accused on a previous occasion.

R. v Slater (Goldberg)
6 April 84.

Community Welfare Services Act S.123 — judge has power to order concurrency with sentences being served for Commonwealth offences.

R. v Slater (Goldberg)
6 April 84.

Attendance centre — examination of legislation — date of commencement of attendance at Attendance Centre.

R. v Bridges
23 July 84.

Armed robbery — heroin addict — original sentence five with three — on appeal sentence varied to seven with five and applicant to be released on entering bond conditional on treatment at Gresswell and Odyssey.

R. v Halewyn
8 March 84.

Parity — another accused in a different case at same country sittings given lighter sentence on same charge where circumstances more grave. Not a ground of appeal.

R. v Thor
11 May 84.

Parity — armed robbery — by beating while armed and taking $10. Co-accused fined in Children's Court. Applicant's sentence reduced from 18 months Y.T.C. to 9 months Y.T.C.

R. v Kraja
7 March 84.

Parity — armed robbery — accused on one count less than co-accused receiving same head sentence — varied on appeal.

R. v Thompson & Listas
6 April 84.

Armed robbery — carefully prepared train payroll robbery of $288,000. Sentence of fifteen with twelve varied to twelve with ten.

> "A determination whether the judge has exceeded the discretion available to him and that the sentence is therefore excessive does not admit of sustained and detailed debate. Assuming the relevant sentencing factors to be understood and each of those factors to have been evaluated in the light of the circumstances of the particular application, the answer is largely intuitive and, as such, a matter of impression.
> "I think that the sentence of fifteen years imposed on this applicant for one offence of armed robbery is excessive. If, because the circumstances of the offence imperiously demand it, or because it is thought the time is ripe to accept what is said to be the legislative invitation to pass harsher sentences for armed robbery, then there will be a case in which for the first time the offender will be sentenced for a single such offence to fifteen years' imprisonment. This, however, is not the case." per Crockett, J.

R. v Zakaria
18 April 84.

SENTENCE (cont.)

Statistics — C.C.A. calls for and obtains State and Commonwealth statistics to determine whether sentence within the acceptable range — trafficking in and selling cannabis (Application dismissed).

R. v Zouras
23 July 84.

Manslaughter of two victims after charge of murder.

> "The verdict does not indicate whether the jury regard one victim as having offered more provocation than the other. In our view once full effect is given to the jury's verdict there is no basis for treating one killing as more blameworthy than the other, even if the provocation were treated as having been wholly offered by one victim only." (per curiam).

Sentence varied to similar sentences on each count.

R. v Campbell
8 June 84.

THEFT

Property — Crimes Act ss.71, 72, 73(9) — agent who retains money payable to his principal steals — agent wrongly bills principal for extra insurance premiums. Appropriation occurs when he pays the principal's cheques into his account.

R. v Baruday
27 July 84.