Victorian Bar News

SUMMER 1984

Cover:

The sanctuary door knocker, Durham Cathedral (U.K.), is a tangible symbol of the ancient power of the Ecclesiastical Law. Once he had grasped the handle a refugee from the King's Law was safe (for so long presumably as he could stand the Monastic Life and the Penance). Or think of it as just a sunny shape and colour at a time when, in theory at least, it is summer.

VICTORIAN BAR NEWS

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BAR COUNCIL REPORT

Bar Council Membership
The following were elected as the members of the New Bar Council from October 1984 to September, 1985.

N. R. McPhee Q.C.
J. E. Barnard Q.C.
P. A. Liddell Q.C.
S. P. Charles Q.C.
D. Graham Q.C.
P. D. Cummins Q.C.
M. J. L. Dowling Q.C.
E. W. Gillard Q.C.
A. C. Chernov Q.C.
R. K. J. Meldrum Q.C.
J. A. Coldrey Q.C.
D. L. Harper
B. A. Murphy
Rachelle Lewitan
M. B. Kellam
Elizabeth Curtain
K. Liversidge
J. Middleton

The Chairman is S. P. Charles Q.C.

N. R. McPhee Q.C., and A. Chernov Q.C., were elected as Vice Chairmen.

Since the elections, J. A. Coldrey Q.C. has been appointed the Director of Public Prosecutions for the State of Victoria and has resigned from the Bar Council.

An election is to be held to fill a casual vacancy on the Council.

Pre-trial conferences
It has been resolved by the Bar Council that the following procedure be in accordance with established practice when dealing with solicitors at pre-trial conferences in the County Court.

"Counsel may deal directly with an opposing solicitor at a pre-trial conference when the opposing solicitor has not briefed Counsel. Counsel should not deal directly with an opposing solicitor in negotiations prior to the pre-trial conference except in circumstances of necessity".

Legal Aid
The Legal Aid Commission is presently considering employing a number of in-house counsel to appear in court for legally aided persons. The Bar Council is holding discussion with the Commission on this subject.

Visit of the Chinese Minister of Justice
A number of members of the Bar Council and several other members of the Bar entertained His Excellency, the Chinese Minister of Justice, and his entourage at a luncheon held at the Essoign Club on Friday 9th November, 1984. The Bar was presented with Chinese legal texts and a large ginseng root. His Excellency informed Charles that among the many properties of the root, it could be used as an aphrodisiac. Charles, in return presented His Excellency with a copy of "A Multitude of Counsellors" by Dean and "The Victorian Bar" by Gowans.

Accommodation
A general meeting of the Bar was held on 19th November, 1984. The motion put to the meeting was "That Rule 34 of Counsel Rules, which provides that a Barrister shall not without the permission of the Bar Council practice from chambers other than those provided by Barristers' Chambers Limited, be rescinded and be no longer a Counsel Rule".

The motion was defeated by a vote of 88 in favour and 168 against.

Centenary Dinner
The Bar Centenary Dinner was held at the function centre at the Moonee River Race Club on the 5th November 1984. Considered a great success, the dinner was addressed by His Honour the Chief Justice of the High Court of Australia, Sir Harry Gibbs. Other speeches were given by Sir Guy Green, the Chief Justice of Tasmania, Charles Q.C. and Hayne Q.C. A good and memorable night was had by all.

MANOEUVRES WITHIN THE LAW COUNCIL

Over the past few years, dissatisfaction has been growing amongst constituent members of the Law Council over its performance and structure. Suggestions for change have been made from time to time. These include the admitting of individual lawyers to membership of the Law Council, or altering voting power of constituent member bodies so as to reflect the numbers making up each such body. Such moves would, it is said, reflect the financial contributions of the existing constituent bodies, since these are made by capitation fee. The consequence would be to give larger bodies such as the Law Institute of Victoria a greater number of votes at Council meetings than smaller bodies, like Western Australia or the Bars. These moves have to date met with little success since they have been generally opposed by smaller individual organisations, including the various State Bars.

Further, from time to time some members of the Law Council and its Executive have argued that there should be a rise in capitation fees if the Law Council is to be an effective representative of the legal profession at Federal level. In fact, capitation fees have been increased over the last two years and it is felt by some that more increases may be necessary.

The whole matter has now been brought to a head by the recent announcement by the Law Society of N.S.W. of its intention to withdraw from the Law Council on this issue. This, in turn, has provoked motions from the Law Institute of Victoria and the A.C.T. Law Society aimed at changing the constitution so as to accommodate individual membership and increase voting rights of the larger bodies. The proposals can be summarised as follows:

(a) Law Institute of Victoria has proposed the following changes.

  (i) Each constituent body be entitled to one vote for each 1,000 members (i.e. Vic., N.S.W., Queensland, A.C.T. Bars - 1 each; L.S.N.S.W. - 7; L.I.V. - 5; L.S.QLD. - 2; Law Societies of Tasmania, W.A., S.A. and N.T. - 1 each).

  (ii) Each member of each constituent body (i.e., every barrister and solicitor in Australia) be granted individual membership of the Law Council, their capitation fees deemed to have been satisfied by the payment of capitation fees by the relevant constituent bodies.

  (iii) Individual members form a House of Members.

  (iv) Votes on the Law Council be divided between:

    (x) House of Members - 50%;

    (y) Constituent bodies - 50%.

  (v) Increase the income of the Law Council (but no particular method of achieving this has yet been put forward).

(b) The Law Society of the A.C.T. has put forward the following proposed amendment.

  (i) There be individual membership (without voting rights).

  (ii) Individual members contribute directly to funds of the Law Council (in addition to capitation fees payable by the constituent bodies).

  (iii) Individual members would be entitled to attend, speak, but not vote at Law Council meetings.

As a result of the announcements by these N.S.W., Victorian and A.C.T. constituent bodies, a general meeting of the Law Council has been called for 8th December, 1984 to consider the proposed withdrawal of N.S.W. and the two motions referred to. The Law Society of Queensland has asked the Law Institute of Victoria and the Law Society of A.C.T. to particularise (for the purpose of distributing such particulars to members prior to the meeting) their specific concerns about the Law Council and it seems that to date, only A.C.T. has agreed to do so. At this stage, however, no such response has been received from either Association.

The meeting will obviously be important not only for the Law Council as such, but for constituent bodies, particularly the small ones such as South Australia and the Bars. A change in accordance with the proposal of either the Law Institute of Victoria or the A.C.T. Law Society will have the practical consequence of diminishing considerably the influenceof the numerically small organisations on the Law Council. The Bar Council has not yet formulated the attitude its representative will be requested to adopt at the meeting of 8th December, although it is the fact that the Queensland and New South Wales Bars will oppose the proposed constitutional amendments. It is likely that this Bar will adopt a like attitude.

CHERNOV

WELCOME: PHILLIPS, J.

It is with great pleasure that the Bar welcomes the appointment to the Supreme Court of John Harber Phillips.

His Honour signed the Bar Roll on February 24, 1959. He read with the esteemed Vic Belson. From an early stage he spent his professional career in criminal courts.

One of his less renowned cases is said to have occurred at South Melbourne Petty Sessions. He was acting for a man charged with assault. The court business was heavy and Phillips adjourned himself outside for a quiet smoke. Inside his client was convicted and fined. Upon learning of this travesty Phillips reminded the court of his attendance and demanded a rehearing. The application was granted, the case reheard. The justices doubled the penalty.

We often used to wonder how Phillips performed in court, for out of court he was quiet and reserved. Not at all for him the supposedly traditional mould of the criminal barrister, the hail-fellow-well-met Falstaff. That was until we took time off to watch him, with Hampel, defend Murphy and Stillman. They were two policemen charged over the death of a man from injuries said to have been received from the accused in a police station. Phillips was not much different in court than out. He was still quiet, still polite, but deadly.

Poachers into gamekeepers applies just as much to the law as to other aspects of life. Once the police realised that Phillips had a remarkable striking rate, they retained him to act for them. So whenever a policeman was charged with an offence, you could expect John Phillips to be acting for the accused. That's how he came to be in **R. v. Murphy & Stillman.** And that is how he came to be acting for the police in the inquiry before Beach Q.C. Phillips acted for the police after the inquiry and after they were charged, and not one was convicted.

It is not possible to act for those charged with crimes and remain unscathed oneself. Of course he paid the price. In 1982 he acted for Peter Gibb who with others was charged with murder. Gibb denied the act. The two co-accused asserted that Gibb was ther murderer and had forced them to participate. They led evidence of precisely why they had grounds to fear him. Phillips defence was thus doomed fromt he start, and the conviction of Gibb inevitable. Phillips fought it to the end. The later successful appeal, [1983] 2 V.R. 155, would have been only little consolation.

As one of the outstanding criminal lawyers in the country he was briefed in **R. v. Chamberlain & Anor.** for both accused. Of that case enough has been said to make a detailed reference here unnecessary. None of those who have cause to question the verdict did so because of the representation. All assert that it was first class.

Phillips had broken ground by taking silk in 1975. He was the first who practised exclusively in crime to do so.

A dry wit, a gentle smile, an affection for an old Rolls and for Scots heritage are part of the man. So was a loved pipe which he successfully battled against, much to the annoyance of those of us with a similar liking.

He became this State's first D.P.P. in 1983 (See **Bar News** Winter 1983 p.18) and adorned the office. Now he is on the Supreme Court. He leaves behind a career of service on 11 Bar Committees and chairmanship of the Criminal Bar Association. His readers Hender, R. Galbally and P. Power will especially miss him.

He takes to the bench a keen mind and a thoughtful disposition, and a deep knowledge of the criminal law.

We wish him well.

ATTORNEY-GENERAL'S COLUMN

During the Spring sessional period of the 49th Victorian Parliament, which ended on 2 November 1984, the Attorney-General, the Hon. Jim Kennan, M.L.C. sponsored a large number of Bills, on a wide range of issues, which passed through all stages and will in due course become law. The Bills were:

Administrative Appeals Tribunal Bill

The Bill provides for the establishment of an AAT along the lines of the Federal AAT. Membership will consist of a President, Deputy Presidents and Members. The President and Deputies must be, or be qualified to be County Court judges while the Members must be lawyers or have skills in the areas where decisions are to be reviewed. The initial jurisdiction of the Tribunal is to be in respect of decisions under the Freedom of Information Act, Motor Accidents Act, Estate Agents Act, Criminal Injuries Compensation Act, Adoption Bill, Taxation Appeals Act and other taxing statutes, the Infertility (Medical Procedures) Bill and the State Employees Retirement Benefits Act. The Bill provides that where an appeal lies the applicant has the right to seek a statement of reasons, and the Tribunal has the power to affirm, vary or set aside the original decision. Appeals on a question of law are to the Supreme Court. There is a right of legal representation before the tribunal, It is expected that further jurisdiction will be conferred on the AAT in 1985.

Commercial Arbitration Bill

This Bill codifies and revises the law relating to commercial arbitration. The Bill has been developed by the Standing Committee of Attorneys-General and identical legislation will be brought forward in other states. The Bill will apply to arbitration agreements made before or after its commencement.

County Court (Amendment) Bill

This Bill provides for the appointment of a County Court Master to assist in the disposition of court business and to exercise such powers as are conferred under the Rules. Appeals will be to a judge of the Supreme Court. The Bill also validates from 3 September 1984 the County Court (Pleadings) Rules 1984. This provision of the Bill has already come into operation.

Infertility (Medical Procedures) Bill

This Bill substantially implements the recommendations of the Waller Committee on the Social, Ethical and Legal Issues arising from In Vitro Fertilisation as well as addressing a number of other issues relating to artificial conception. Artificial insemination by donor must now only be carried out by medical practitioners or in approved hospitals. Counselling must be provided and records kept. IVF can only be undertaken in a hospital on terms approved by the Minister of Health. Couples must have had alternative treatment, counselling and give written consent. Freezing of embryos is only permitted for the purpose of subsequent implantation. Comprehensive records must be kept as to donors and participants in the programs. Non identifying information as to donors must be provided to children born as a result of the program. Identifying information can only be given if the person likely to be identified consents. Sale of Gametes is prohibited and research on embryos must be approved by a multidisciplinary Standing Review and Advisory Committee which is to advise the Minister. IVF programs are to be restricted to married couples although de facto couples on the programs may continue. Payments in respect of, and advertising of surrogacy is banned, and contracts are declared void. This Bill is the first time that these programs have been subject to a comprehensive regulatory framework.

Law Reform Commission Bill

This Bill establishes a collegiate Law Reform Commission. No mandatory qualifications are laid down for Members and the Commission is empowered to operate in divisions. The Commission to report on references made by the Attorney, to suggest references, to report on minor matters without reference and to monitor and co-ordinate law reform. The Commission will take over the operations of the Office of the Law Reform Commissiioner, which will be abolished.

Magistrates Courts (Appointment of Magistrates) Bill

This Bill moves Magistrates from being appointed pursuant to the Public Service Act to being appointed, like judges, by the Governor in Council. A procedure is provided for removal from office and all existing Magistrates will continue to hold office under the Bill. The requirement for appointment is to be admitted to practice. The Bill has come into operation.

National Crime Authority (State Provisions) Bill

This Bill complements the National Crime Authority Act 1984 (Cwlth) and provides for the National Crime Authority to investigate, following a reference to it by the State Minister and the Inter-Governmental Committee, alleged offences against State laws. The Authority can then exercise powers comparable to those which it exercises when investigating federal offences, viz. the power to apply for search warrants, summons witnesses, obtain documents, conduct hearings and take evidence. The Bill makes provision for dealing with witnesses who fail to answer questions, claims of self incrimination and legal professional privilege, and challenges to jurisdiction.

Penalties and Sentences (Amendment) Bill (No. 2)

This Bill makes a number of important changes relating to sentencing. Courts are not to impose a sentence of imprisonment unless they are satisfied that no other sentence is appropriate. Magistrates' Courts are required to record their reasons for imposing sentences of imprisonment. The financial circumstances of an offender are to be taken into account when imposing fines, provision is made for instalment orders and oral examination of offenders as to their names. The provisions are designed to ensure that imprisonment as a sanction for the non-payment of fines is only applicable where the default is wilful.

Subordinate Legislation (Review and Revocation) Bill

This Bill originated as the Subordinate Legislation (Deregulation) Bill 1983 which was introduced by the Hon. Alan Hunt, M.L.C. The Bill was referred to the Legal and Constitutional Committee which reported to Parliament generally supporting the provisions of the Bill. As a result of the report a number of amendments were moved by both major parties. The Bill provides that statutory rules made prior to 1962 are repealed, rules made between 1962 and 1972 to be revoked in 1988, those made from 1972 to 1982 to be revoked in 1992, and rules made after 1982 to be automatically revoked after 10 years. The role of the Committee in scrutiny of rules is expanded and includes the power to suspend the operation of rules. When new rules are to be made they must, unless exempted by the Premier, be accompanied by a regulatory impact statement. Guidelines for the preparation of such statements are to be settled between the Attorney and the Committee. This Bill will have a major impact on the existing system of statutory rules and on the process of making such rules in the future.

Trustee (Amendment) Bill (No. 2)

The main provision of the Bill is to enable the development in the State of a secondary mortgage market in mortgage-backed certificates. The issue of such certificates will be strictly controlled and they will have authorised investment status.

Trustee Companies Bill

The Trustee Companies Bill re-enacts the law relating to the trustee company industry. The Act eases the formerly restrictive shareholding limitations, requires companies to establish a Reserve Fund, authorises two new trustee companies and deals with potential conflict of interest problems.

In the Spring Session the Attorney-General made four major Ministerial Statements to the Parliament. These were:

Delays in Courts

On 19 September the Attorney-General presented the Government's Formal Response to the Legal and Constitutional Committee's Preliminary Report on Delays in Courts. The Report and the Response dealt mainly with issues relating to delays in criminal trials. The Response noted that rules have now been made for pre-trial hearings in criminal cases and that the Flanagan Committee had been broadened to encourage a co-ordinated approach to the problems facing the criminal justice system. This statement has been circulated to all members of the Bar.

Judicial Administration in Victoria

On 9 October when tabling the 1983 Report of the judges of the Supreme Court the Attorney-General made a statement detailing initiatives in Judicial Administration as well as up to date details of delays in civil lists which indicates that the delays have been reduced in all lists, except Supreme Court juries, to the shortest in recent memory. This statement has been circulated to all members of the Bar.

Section 460 Crimes Act

On 22 November the Attorney-General made a short statement on the experience with the amendments to the Crimes Act relating to police detention of arrested persons for the purpose of investigation and questioning. The legislation, passed in the Autumn Session and operative from June, provides that police may detain offenders for up to six hours with provision for extensions where the offender

consents. Monitoring of the provision shows that police fears that it would be unworkable have not been borne out and that of the first 154 applications for extension of time only eight were refused. The Attorney said that the provision was working satisfactorily and he would report to Parliament again next year.

Sentencing Statistics - 1983

The Sentencing Statistics for Higher Criminal Courts for 1983 have been tabled in Parliament. These statistics will be of great interest to all barristers practising in criminal law. Copies may be purchased at the Government bookshop.

Court Buildings

The Government has approved the building of a new Coronial Services Centre in South Melbourne. This centre will replace the existing Coroners Court.

The Law Department is preparing a study of court building options in the Central Business District. It is intended that a plan for new Supreme Court accommodation be developed in association with the refurbishment of the existing Supreme Court building.

KENNAN

PROPERTY LAW ACT

The Attorney-General has appointed a small working party to consider the Property Law Act 1958, and other acts relating to Real Property including the Transfer of Land Act, Settled Land Act, Sale of Land Act and Strata Titles Act.

Persons interested in these areas are invited to draw the attention of the Working Party to particular areas of these laws which may require reform.

Any member of the Bar wishing to make submissions should contact Hayne Q.C. (Clerk S).

ACKNOWLEDGMENT

Shortly before the Bar vacated Selborne Chambers, Mr. Doug Muir took a series of photographs of its architectural features. One of these photographs in the custody of P. Galbally was lent to **Bar News** and reprinted in the Centenary Edition. We omitted to acknowledge that it had been taken by Mr. Muir. We regret this oversight.

UNSWORN STATEMENT ON THE VOIR DIRE

In three separate Supreme Court trials, judges have allowed accused to make unsworn statements on the voir dire.

The arguments advanced stem from Evidence Act 1958 S.25 "It shall be lawful for any person who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction (whether such person does or does not make his answer or defence thereto by counsel or solicitor) to make a statement of facts (without oath) in lieu of or in addition to any evidence on his behalf." In **Jackson v. R.** (1963) 108 C.L.R. 591 the High Court was concerned that a psychiatrist's evidence was not shown to have an accurate basis in any history taken from the accused. The Court said "It might have been expected that the applicant would have either made a statement from the dock or given evidence on the voir dire relating to the circumstances surrounding the making of the confessions." (P. 594)

In **R. v Boag** October 28, 1975, McGarvie J. ruled that the accused might make an unsworn statement on the voir dire. The point arose again in 1982 in **R. v. McNair.** The accused was unrepresented before King, J. His Honour had to advise on the voir dire on the courses which were open. He advised the accused that he could give sworn evidence, remain mute, or make a statement of facts not on oath.

Again, on October 17 1984, Gobbo J. allowed an unsworn statement to be made on the voir dire **(R. v. Meadows & Meadows).**

The use of such a procedure has limited practical value, particularly since **Wong Kam-Ming v. R.** [1980] A.C. 247 (Privy Council) for judges ordinarily will not be persuaded by a statement from the dock.

I recall employing the procedure twice in the County Court once when the accused was a drug addict still on drugs; and again when the accused suffered chronic schizophrenia. With both accused their powers of concentration were extremely limited, and the pressure extraneous to the happenings in court were great. So it was that they probably would not effectively have been able to give adequate responses to questions.

DAVID ROSS

CRIMINAL BAR ASSOCIATION

On the 30th October 1984 the Criminal Bar Association held its Annual General Meeting. The following members were appointed to the Executive of the Association:

Chairman	—	Vincent Q.C.
Vice Chairman	—	Lovitt
Secretary	—	Lasry
Treasurer	—	Tovey

During the year the Association involved itself through its representatives in a number of areas relevant to the interests of its members.

Coroners

Barnett, Webster and Vaughan were appointed by the Bar Council to prepare submissions regarding the role of the Coroner. Barnett is on a committee investigating setting up an Institute of Pathology and a new proposed Chair of Forensic Medicine at Monash.

Discussion Papers

Discussion Papers have been prepared by the Association including:-

Aboriginals & Legal Aid	—	Hore-Lacy
Ethics	—	Shwartz
Role of Prosecutors	—	Langton & Maidment
Two Counsel Rule	—	Francis Q.C. & Kirkham Q.C.

Law Reform

A number of seminars, working parties and committees included representatives of the Association. Vincent Q.C. and Lovitt attended a seminar conducted into the "defence" of intoxication. Lovitt and Barnett attended the Attorney-General's working party on the new Conspiracy Bill whilst Vincent also assisted in a working group of questions on insanity and fitness to plead. Cashmore prepared a discussion paper on Consorting and Langton and Shwartz made representations concerning the Criminal Procedure Bill. During the year a number of reform proposals were discussed between the Association's Committee and the Attorney-General. Some questions raised have now been the subject of legislative change including the Coroner's power to grant bail in murder cases. Other matters discussed included defence opening addresses and the increasing of Supreme and County Court sentencing options.

In addition, Thomas and others prepared a response to the Child Welfare Discussion Paper, Vincent Q.C. gave evidence before the Senate select Committee on the National Crimes Authority; Lovitt, Barnett and Maidment gave evidence before the State Parliamentary Legal and Constitutional Committee which has now prepared an interim report concerning court delays in criminal cases; Vincent Q.C. was a member of the Phillips Committee on S.460 of the Crimes Act.

Prisons

Submissions have been made for the provision of better visiting facilities at Pentridge, and for improving arrangements for the passing of property to prisoners at the County and Supreme Court cells. Tovey and Maguire represented the Association in discussions concerning the new remand centre.

Other States

New Criminal Law Associations have been set up in South Australia and Western Australia modelled upon the Victorian Criminal Bar Association. The South Australian Association is holding a conference in Adelaide - October 26 to November 1, 1985. Recently, Vincent Q.C., Lovitt and Barnett met with Abbott Q.C. (S.A.) to discuss proposed topics and speakers. It is hoped that Victorian criminal lawyers give the conference their full support with a view to staging a reciprocal conference in Melbourne (or perhaps a slightly more exotic venue) in 1986.

Listing

Problems still exist and Barnett has liaised with the Listing Registrar over the last 12 months. Barristers both prosecution and defence are urged to contact the Registrar (Ph. 67 6776) and inform the co-ordinator of realistic estimates of length of trials, any general difficulties anticipated, and, in particular, whether any settlement is proposed or has been effected. For obvious reasons the Registrar relies greatly on this sort of information.

Committals

Representations have been made concerning committals. Lovitt has been appointed to a Committee to be chaired by the D.P.P. to look into the entire question of committal proceedings. The Association strongly defends the right of persons charged with indictable offences to a properly conducted, searching preliminary hearing. Recent examples have left a lot to be desired and the call by some with a particular barrow to push to do away with committals will be stoutly resisted by the Association.

Fees

Most were increased by 12% on May 1st, 1984. After considerable negotiations with the Legal Aid Commission, the remaining fees (committals, circuit and overnight fees) were also increased by 12% on August 17, 1984. Highlights of other fee changes are:

> New fee of $625 - County Court Trial where maximum sentence is life imprisonment (Federal Drug cases);
>
> Supreme Court Preparation and Conference fees ($114 p.h.) for Murder Inquests (formerly County Court rates).

The Legal Aid Commission has given 6 months notice of its intention to terminate the agreement reached with the Bar Council in 1980 regarding the annual review of fees in criminal cases. The Association is considering the implications of this decision.

Appointments

The Association congratulates Mr. Justice Phillips, Judge Hassett and Judge Fagan on their appointment to judicial office. Mr. Justice Phillips is a former Chairman of the Association, Judge Hassett a very industrious Vice-Chairman and Secretary, and Judge Fagan author of the important Fagan Report (commissioned by the Association in 1979 regarding delays in Criminal trials).

Congratulations also to Coldrey Q.C. the new D.P.P.

The Association has offered and each of the above-named has graciously accepted honorary membership. A complete list of honorary members is currently:

> Mr. Justice Hampel
> Mr. Justice Phillips
> Judge Dixon
> Judge Kelly
> Judge Hassett
> Judge Fagan
> Coldrey Q.C. D.P.P.
> Flannagan Q.C., Crown Counsel
> Gaffney, Criminal Appeals Registrar.

Social

On the 16th April 1984 yet another of the Association's successful functions was held at the Tandoor Restaurant in South Yarra. Guests of the Association included Attorney-General Kennan, Judge Nixon, Julian Gardner and Michael O'Brien from the Legal Aid Commission, as well as the then former Secretary Lex Lasry. John Coldrey kept everyone entertained with his reminiscences of "a little Aussie pleader" amd so far as the Association could tell everyone enjoyed themselves. Another function with a different culinary flavour will be conducted relatively early in 1985 and, given the popularity of these dinners, members are urged to book early.

Current Activities

The Association is presently preparing submissions on a number of topics which include the future of unsworn statements and also a proposal for "Burg lary Courts". Offers of assistance in the preparation of these documents are invited and members interested are asked to contact the Secretary, Lex Lasry Clerk H (608 7434).

Subscriptions

This year's subscription, at $10.00, should be paid to Tovey (Clerk B) as soon as possible.

JOHN BARNETT

OLAF MOODIE-HEDDLE

OLAF MOODIE-HEDDLE

E.O. Moodie-Heddle, Q.C. ("Moodie") was an advocate whose stylish air, gifts of self expression and wordly experience make Counsel of the modern era seem pallid. Perhaps we have all been overpowered by the suffocating weight of the output of the photocopier.

Moodie was a distinguished figure. A tanned, rather weatherbeaten face, with sweptback grey hair, either dressed in Bar dress or dark coat and striped trousers, or Prince of Wales checks. Far from a profligate with words, his utterances were direct and striking. He was a great advocate in the era when Starke, Smithers, Sweeney and Ferederico dominated the common law stage. In those days, the fastidious exchange of insults between Counsel in the course of the case was an art form.

Cases were as much fought for the fun and glory as for the damages at stake.

Heddle, who was known to like a glass at lunch, was said by his inferiors to be better in Court before than after. Such self indulgent misconceptions were frequently fatal; he was a danger at any time.

Widely read, of seafaring stock, anxious to conceal his erudition, he was regarded with great affection bu his readers - Snedden, Wilson, Waldron, and Hedigan, to whom his generous and highly entertaining ancedotes concerning Bar notables provided vast enlightenment and amusement. Such tales, eminently retellable, must be related elsewhere. Perhaps Starke J. (who was a good friend when one was needed) will tell you a few at lunch, or Glen Waldron at a Bar function.

Heddle had been a gunner in the Middle East in World War II and came to the Bar in 1946. He took silk in 1957, was appointed to the County Court Bench in 1962, retired in 1964 and died in 1975. The author of this brief memoir can testify that Heddle has the record for the quickest discharge of a jury on record - one minute. The late Judge Rapke, in a Railway's Case, discharged the jury, on the Defendant's application (Noel Burbank Q.C.) on the announcement by Heddle of his appearance for the Plaintiff. Details on application.

He practised mostly in civil juries but, like common lawyers of his day, ranged far and wide into other fields. Few of his contemporaries would dispute that his total exact recall of evidence outdid the shorthand writers in accuracy.

Sadly, he did not fulfil the gifts that he had in abundance. But his quick intelligence, his breadth of experience, the articulate grasp of the fashions and passions of human affairs - that was Heddle, a great advocate in an age of great skills.

HEDIGAN Q.C.

FORTHCOMING CONFERENCE

1985 February 22nd - 25th

World Congress on Law and Medicine at New Delhi. Topics for Discussion will include issues affecting Law, Morality and Medicine, the impact of technological developments on medicine and public health, law, family welfare and population control, professional regulation and legal responsibility, law psychiatry and mental illness.

Enquiries: The Executive Officer, Victorian Bar.

PERSONAL INJURIES BAR ASSOCIATION

On the 18th and 19th October, the Bar's interests were represented by Uren Q.C. and G. Garde upon an appeal from the decision of the Registrar of the County Court who, upon taxation of a party and party bill of costs, disallowed Counsel's fees for settling interrogatories in a personal injuries action. The appeal provided an opportunity for the Chief Judge to examine generally fees allowable to counsel for paperwork in personal injuries actions.

The following matters were clarified by Chief Judge Waldron.

* Barrister's fees as set down in the Costs Schedule will be allowed for pleadings (Statements of Claim, Interrogatories, Answers to Interrogatories, List of Special Damages etc.) unless there are exceptional circumstances.
* Upon the allowance of barrister's fees, 50% of the fee allowed for the paper work shall be deducted from the solicitor's item under the schedule of costs.
* The ordinary rule that two medical experts be allowed for each medical speciality on taxation is confirmed.
* If the defendant does not properly admit liability on a "with prejudice" basis then the plaintiff is entitled to interrogate until such time as liability is properly admitted. The usual form is to be either a payment into Court with an admission of liability or an open letter.

It is of concern to Counsel appearing in the County Court jurisdiction that the pre-trial system will in the long term fail. The Personal injuries Bar Association supports the retention of the pre-trial system and applauds its introduction as a means of resolving litigation and promoting a venue for the sensible compromise of actions. But, as a result of the introduction of the pre-trial system, State Insurance has adopted an attitude in the County Court jurisdiction that it will not negotiate further if its final offer at the pre-trial is rejected.

We consider that this attitude is regrettable and will eventually lead to enormous delays in a matter coming on for hearing or re-hearing when it has been marked "Not Reached". At the present time the delays of obtaining a new date when an action has been marked "Not Reached" exceed those delays prior to the introduction of the pre-trial conference system.

The Association is very concerned that the potential for settlement of cases which are subject to refixing in this way is different from those prior to the introduction of the pre-trial conference system. These are all cases (where State Insurance is concerned) where Counsel's hands are tied by an inability to negotiate and the parties are firmly fixed in an attitude of having the Court decide the case.

The result therefore will be a dramatic increase in the number of cases that will have to run to verdict and an obvious shortage of Judges to be able to cope with the increase in work. These difficulties have been further compounded by an increase of 40% in the number of personal injuries cases issued in 1984.

The Association considers that the ability of a party to negotiate at Court would not reduce to a marked degree the settlement rate at pre-trial conferences. The cost of solicitor's and barrister's fees in settling an action after the pre-trial conference would be very slight when the overall settlement figures are considered.

We are concerned by reports from our members who appear for State Insurance that recommendations regarding settlement figures are disregarded and are met with the blanket assertion there will be no movement past the pre-trial offer. Due to the frequency and number of cases being marked "Not Reached" in this jurisdiction and the reducing possibility of cases not being disposed of within reasonable time, our committee is now examining the introduction of a daily fee payable to Counsel whether the action is reached or not.

We also note with some alarm that the pre-trial settlement rate has markedly dropped which will further increase the proportionate rate of cases not being reached and congestion to the Courts.

In summary, we are very concerned about the ability of the County Court Judges to cope with the number of cases that will require to be determined by either a Judge alone or jury. This will be further compounded if the recommendations of the Civil Justice Committee are adopted and the County Court becomes the primary Court for disposing of this type of litigation.

JOHN WILLIAMS

"THE FAMILY THAT PLAY TOGETHER STAY TOGETHER"

The inaugural meeting of the Victorian Bar Family Lawyers Association was held at the Council Chambers on Wednesday 21st November, 1984. The meeting was attended by approximately 40 members of the Bar.

The meeting adopted a draft constitution which sets out the objects of the Association to be:-

"(a) To provide a common meeting ground for Barristers who practice in or have an interest in the area of Family Law and to promote a greater working relationship between Barristers in that area.

(b) To make suggestions about the work for the development and administration of Family Law in Australia.

(c) To liaise with other associations and bodies concerned with the administration and practice of Family Law.

(d) To participate as a body in matters of interest to the Victorian Bar in the area of Family Law.

(e) To further the knowledge of members of the Association in the area of Family Law by seminars and lectures and by the dissemination of information and developments through regular newsletters."

Membership of the Association is open to any person on the roll of Counsel who desires to be a member. Membership is free of cost (save that there was a whip-around to buy flowers for Beverley Hooper who is recouperating at Cabrini Hospital from a back injury).

As a clear example of providing value for the dollar, the Executive have organized a lecture tentatively set for the 18th December, at 5.00 p.m. whereat the proposed new Judges Family Law Rules will be discussed by Lyn Opas Q.C., Kay and Watt.

Any member of Counsel who is interested in joining the Association is asked to contact Molyneux.

J. KAY

MILESTONES 1984

100 Years

Supreme Court Opened: 19 February 1884
Bar Rules first adopted: 12 July 1884

	Admitted to Practice	Signed Bar Roll
45 Years		
Starke J.	1.3.1939	14.3.1939
C. A. Sweeney J.	1.3.1939	14.3.1939
Master P. A. Jacobs (Retired)	1.3.1939	
Sir John Minogue (former CJ of P.N.G.)		15.4.1939
35 Years		
A. G. Gillespie-Jones		3.6.1949
Professor		
Sir D. P. Derham		5.8.1949
Judge O'Shea	1.6.1949	5.8.1949
Judge Lazarus	1.8.1949	7.10.1949
Fullagar J.	3.10.1949	4.11.1949
Judge Shillito	2.11.1949	
Strauss J.	1.9.1949	
Judge Ravech	4.10.1949	
30 Years		
J. M. Morrissey Q.C.		11.4.1954
Asche S. J.		7.4.1954
E. D. Lloyd Q.C.	1.6.1954	25.6.1954
Judge Howse		8.10.1954
Judge Read	15.3.1954	5.11.1954
Chief Judge Waldron	15.3.1954	
Haddon Storey Q.C.	19.2.1954	
25 Years		
J. Galbally Q.C.		2.2.1959
D. B. Blackburn		24.2.1959
Phillips J.		24.2.1959
B. J. Shaw Q.C.	2.3.1959	3.4.1959
Judge Nixon	2.3.1959	3.4.1959
Hase J.	2.4.1959	3.4.1959
Judge Murdoch		30.4.1959
H. Berkeley Q.C.	1.6.1959	25.6.1959
J. J. Cantwell	1.5.1959	
P. G. Nash		6.8.1959
D. A. Kendall Q.C.		17.12.1959

20 Years

H.A. Winneke C.J. appointed 2 September 1964.
B.L. Murray Q.C. appointed Solicitor-General: 2 September 1964.
Starke J. appointed: 31 January 1964.

10 Years

Winneke C. J. retired: 30 April 1974.
J. McI. Young C.J. appointed: 1 May 1974.
Murray J. — appointed: 5 September 1974.

REPORT OF THE CIVIL JUSTICE COMMITTEE

On 12th November 1984 Attorney-General Kennan formally launched this report which has come to be known as the Scott Report. It is a report which should interest all barristers. First it is a comprehensive view of the civil court system within which we work. Second, and more important, the Attorney says that it is his intention to implement it. Given his track record we must take this statement seriously.

It is formidable work in two blue bound volumes; the first containing 382 pages of the Committee's discussion of the matters it was asked to consider and its recommendations upon those matters, the second containing appendices, discussion papers and submissions by interested bodies.

The recommendations number 120. They have been circulated amongst the profession and little value would be had by rehearsing them. The purpose of this note is to select certain of the recommendations and to outline the Committee's thinking.

The Full Court

The Committee rejects the idea of a permanently constituted Court of Appeal. There is just not enough work to warrant this. But:

> *Although all the judges should be both eligible to sit and should sit in the Full Court from time to time, consideration could be given to devising some means by which the expertise of particular judges is employed in particular cases or classes of case. The Committee believes this matter is best left to the judiciary and it does no more than draw the matter to attention. (par. 4.8)*

In the future the civil and criminal work of the Full Court is likely to increase. In anticipation of this, consideration should be given to methods of improving the efficiency and effectiveness of its procedures. These will include written arguments and requiring a Respondent to file a notice in reply to the notice of appeal and requiring the parties to file an "agreed statement". The material in Appeal Books should be reduced, and the cost of trial transcripts reduced. Moreover:

> *Experience in other jurisdictions suggests that if appellate courts are to survive and keep on top of their work, they need to adopt an interventionist role. (par. 4.10)*

This will require administrative support.

County Court — Supreme Court

> *If it were possible to start afresh the number of trial courts in Victoria would probably be reduced to two, one a court of unlimited jurisdiction and the other a court of limited jurisdiction. (par. 4.13)*

But there are of course three levels of Courts, Magistrates' Courts, County Court and Supreme Court and the Committee did not propose a change. The Committee noted that judicial productivity, i.e. the ratio of cases disposed of in any court, is greater in a second level trial court. This does not seem to be because Supreme Court Cases are more difficult nor is it related to the relative skills of the judges. It is thought that "to some extent Supreme Court cases proceed more slowly than County Court cases simply because they are Supreme Court cases." (par. 4.14)

The solution espoused by the Report is that the jurisdiction of the County Court be increased, gradually (so as to enable the Court to keep on top of its caseload) until it becomes the major trial court. Meanwhile the assignment of judges and the allocation of cases should be more flexible.

At present it is the parties, particularly the Plaintiff who selects the appropriate court for his case. If he thinks his judgment is likely to be small, he is encouraged to select the County Court by the rules relating to costs. This the Committee thought (par. 4.30) is inefficient. Very often where the claim is for an unliquidated sum the amount at stake is not known. The report discusses three methods of efficiently and flexibly matching case loads with judge-power.

* Case removal — this involves the court assuming an active role in remitting up or down a case which is commenced in the wrong court. (par. 4.32)
* Jurisdiction delegation — County Court judges might be empowered to try certain Supreme Court cases. In general this procedure was not favoured. (par. 4.33)
* Rectifying jurisdiction imbalance — the jurisdiction of the County Court might be increased to empower it to have concurrent jurisdiction with the Supreme Court over a larger range of business. In general, the Report recommended that existing monetary limits on the jurisdiction should be maintained and kept under review. (par. 4.35)
  But certain statutory jurisdiction presently vested in the Supreme Court by the Property Law Act and the Transfer of Land Act should be given to the County Court. Moreover, its jurisdiction to deal with recovery of land (par. 4.44) and its equitable jurisdiction in respect of land (par. 4.49) should be enlarged.

Part-time Judges

In England extensive use is made of Recorders as part-time judges recruited from the Bar. The ordinary obligation of a Recorder is to serve 20 days in a year for a daily fee. The Bar has consistently opposed such a scheme as obnoxious to the independence of the judiciary. The Committee recognised that because of the relatively small size of the Victorian community, especially the legal community, situations of conflict and embarrassment might arise if part-time judges were to be used. (par. 4.68)

The report does not recommend the appointment of part-time judges at present. It recommends a thorough evaluation of the adequacy of the full-time bench be undertaken. If this discloses that sufficient flexibility cannot be achieved by using full-time resources, then the question of part-time judges might be reconsidered. "If the matter is not approached in this way, part-time judges might be used, not . . . to provide flexibility . . ., but as a permanent substitute for additional full-time judges". (par. 4.68)

A novel suggestion contained in the Report is for the use of Senior Judges. Upon attaining sixty-five years a judge might apply for "senior status". If granted this would enable the judge to work on a part-time basis until his normal retirement age. (par. 4.69)

Caseflow Management

This concerns the arrangements and procedures for fixing the date and place of trial of an action which has completed the interlocutory process.

At par. 7.40 the committee observes "No Listing System is perfect". The major problem identified is the uncertainty of the duration of any one case. It is this that disrupts the efficiency of the listing system. Judges for this reason castigate the practitioner who underestimates the length of his case.

> *Ironically, if a case settles at the door of the court or very early in the period set aside for it, this is usually regarded by judges, lawyers, parties and witnesses alike as a most satisfactory outcome. (par. 4.71)*

Having so perceptively identified the problem, the Committee recommends by way of sound solution that the judges must accept responsibility for the management of caseflow. They should establish procedures for continuing consultation with court staff, the legal profession and "major court users". These last are not identified. It may be supposed that the class would not include vexatious or merely enthusiastic litigants. Having passed the problem to the judges, the Report makes one practical suggestion The system of monthly sittings should be abandoned in favour of terms — four per annum, but this is a matter for the judges. (par. 4.83)

The Practice Court

The Committee recommends that a co-ordinator be appointed from the Prothonotary's Staff to relieve the Senior Practice Court Judge for much of his work organising the business of that court each day. In conjunction with the Judges' Associates he should be responsible for ensuring that the appropriate files are in Court.

The Practice Court should be reserved for cases of short duration. It is not thought practicable to limit its work to cases of length not exceeding 30 minutes as is being attempted in London. As to urgent chamber applications of longer duration:

> *The Committee recommends that in consultation with the profession, the judges give attention to identifying matters which ought to be heard in the Practice Court by appointment, or by a judge by special appointment, and those which should be entered into a list for hearing when a judge is available.*

The Report notes that the new procedures adopted for the distribution of work between Masters of the Supreme Court have removed the problem of delays in their disposition of cases. It recommends the appointment of a Practice Master for the County Court from whom appeals should lie to a judge of the Supreme Court.

Wrongful Death and Personal Injury Cases

These types of cases are singled out for separate treatment in Chapter 5 of the Report. This is because they have two unusual features.

First, they are the most numerous class of cases in the Supreme Court (70% of cases listed in 1983) and in the County Court (80% of cases listed).

Secondly, these cases have a high survival rate. A large proportion (60%) can expect to be set down for trial and of these only 27% were settled before a date was fixed. The typical scenario is settlement at the door of the court (47.5%) or in running (16.9%): par. 4.57.

The Report notes (paras. 4.60 ff and ch. 5) the criticisms of the existing fault based system of compensation and observes that "unless an immediate and concerted attack on the problems of cost and delay is made, the case for sweeping away the fault system may in time prove irresistible". (par. 4.64)

The reforms recommended by the Committee are based on the concept that all personal injury cases will commence in the County Court and will be dealt with in the County Court by a panel of County Court Judges and Supreme Court Judges. In particular the law should provide:

(i) that the jurisdictions of both the County Court and the Supreme Court be unlimited;

(ii) that Supreme Court judges have jurisdiction to deal with County Court cases;

(iii) that cases commenced by writ of summons in the Supreme Court but, in accordance with rules, be capable of being transferred to the Supreme Court from the County Court;

(iv) that Section 61 of the County Court Act 1958 (power of Supreme Court judge to order that a County Court action be transferred to the Supreme Court) continue to apply.

(v) that the procedural rules for cases proceeding in the County Court be the same in all major respects as those presently applied in the Supreme Court;

(vi) that juries in the County Court consist of six members unless the parties agree to a smaller number;

(vii) that the court scales applicable be the same in both Courts and that the scales regulate barristers' fees as well as solicitors' costs. (par. 5.25)

A separate personal injuries registry should be established within the County Court. (par. 5.30). Interlocutory jurisdiction over all cases should be vested in the Masters of the Supreme Court with a right of appeal to a single judge in the usual way.

The Committee did not embark upon a general examination of the procedural rules appropriate for these cases — pleadings, discovery etc. These are presently under scrutiny as part of the Supreme Court Rules revision. (par. 5.38)

In paras. 5.39 - 5.44, the Report deals with the expert witness. Rejecting the idea of court-appointed medical or other experts, it endorses the new procedures contained in RSC 0.31(A) for the disclosure of medical reports.

Pre-trial conferences are now a feature of the personal injury case in the County Court. Between February and May 1984 115 cases were listed for pre-trial conference. Settlement was achieved in 61.7%. (71% of motor accident cases and 48.7% of industrial accident cases). In this way a large proportion of the 90% of listed personal injury cases which settle before trial were removed from the court calendar. (par. 5.46).

The Committee expressed concern that "the effectiveness of the pre-trial conference procedure should not be measured in terms of the number of cases settled, but rather in terms of the reduction in the number of cases settled at the door of the court." (par. 5.47)

For it is these cases which statistically used to have little chance of being taken to judgment, were wasteful of costs, court time, practitioner time and the time of parties and witnesses. The Report makes no mention of the prospect that the procedure in question, together with the settlement policy of certain insurers, may in fact result in an **increase** in the number of cases which go to verdict, a phenomenon observed by many barristers and which itself is wasteful of resources.

The Report in the main deals with delays in these cases after they are set down. With respect to pre-setting down delays, it recommends that the Judges themselves in consultation with the Court administration and, presumably, lawyers and "court users" should address themselves to this problem.

It concludes the Chapter with the following enigmatic sentence:

> *The Committee also recommends that as part of this exercise, consideration should be given to the impact of the rule that interest on damages runs from the commencement of personal injury actions. (par. 5.50)*

Magistrates' Courts — Small Civil Claims

> *It is particularly unfortunate that the Magistrates' Courts in Victoria, in the exercise of their civil jurisdiction, have not played the role for which they were designed. These Courts ought to have retained their goal of being community based forums offering an inexpensive and informal service for the resolution of minor civil*

disputes. If this had occurred procedures akin to those used by tribunals would have developed naturally. There is undoubtedly a need in Victoria for informal and inexpensive dispute procedures to which parties genuinely in dispute over minor matters may have recourse. The Magistrates' Courts network, with its State-wide resources, staff and administrative support provided by the Law Department, should provide the basis for such a system. (par. 6.35)

The official response to this adverse judgment on the Magistrates' Courts has been the establishment of a variety of specialist, non-legalistic tribunals, notably the Small Claims Tribunal and the Residential Tenancies Tribunal. These tribunals have proved extremely popular — considerably more cases are listed before them annually than before the Magistrates' Court. The Small Claims Tribunal is shortly to be invested with jurisdiction over credit contracts and certain chattel securities disputes where the property concerned is of less value than $20,000.

The Report rejects as confusing and inefficient such a fragmentation of jurisdiction. The preferred solution is for the integration of the Magistrates' Courts with the specialist tribunals as part of one system with simplified and innovative disputes resolution procedures. (par. 6.34)

These procedures involve an emphasis upon a court annexed arbitration. Cases would be automatically referred to specially trained Stipendiary Magistrates augmented where necessary by practising lawyers. But the parties may agree for the dispute to be determined by normal court procedures.

The primary aim of such an arbitrator should be to achieve settlement by mediation or conciliation. Where this fails the arbitration should proceed. Strict rules of evidence should not apply. The Arbitrator should be empowered to act according to equity, good conscience and other substantial merits of the case without regard to technicalities or legal forms.

The Report does not address the problem of the potential embarrassment to the parties or to the arbitrator where he switches from a conciliation function to an arbitration.

Where a case is referred to arbitration, legal representation for the parties should be permitted as at present. In this respect the Committee is not supporting the policy of much legislation recently passed by the State Government. But no party and party costs should be allowable except the disbursement on the summons. (par. 6.45)

Costs

It was on this part of the Committee's reference that the Bar presented a Submission. It will be recalled that this Submission was summarised in **Bar News** Spring Edition 1983.

In its Preliminary Study the Committee considered the question of regulating legal costs. The justification for such regulation may be the implementation of broad economic policy or of social policy such as the need to implement income distribution or income equalisation schemes. These matters, the Report argued were not the principal justification for regulating legal fees — it was rather the need to ensure that customers of legal services are treated fairly and reasonably and that access to justice is provided. (par. 7.7)

The principal recommendation of the Committee was that a single independent fee — fixing authority be established by Parliament. This Legal Fees Commission should comprise three part-time members. The Chairman is to be a judge of the Supreme Court sitting with an accountant and a person experienced in the management and ownership of small business. (par. 7.36)

The Commission should review annually cost scales in the Courts and in various Tribunals. It should hold public hearings and solicit input from all persons or groups likely to be interested in its activities. Its determinations should have the force of statutory rules subject to disallowance by Parliament with the exception of the power to fix scales of costs, the existing rule making power vested in the judges should remain.

The Commission, in addition, should be charged to keep under review all aspects of the remuneration of lawyers for court work. In its report the Commission would offer such advice upon these matters as it thought appropriate.

Finally:

The Committee recommends that in discharging this advisory role the Commission should as a matter of priority, give attention to the manner in which lawyers are remunerated for personal injury cases . . .

Further, the Committee recommends that the Commission should give immediate attention to the regulation of barristers' fees for Supreme Court work. (par. 7.44).

BYRNE

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THE CONTRIBUTION OF THE BAR TO THE TASK OF PROSECUTION

In this discussion paper I deal with the question by reference primarily to the role of the 'outside' prosecutor as opposed to that of Prosecutor for the Queen (permanent prosecutor). The second limb of the question, which relates to the importance of the Bar as a collegiate body and of the Bar ethical system and rules, appears to apply to each category. I discuss that in part B.

A. **Outside prosecutor or permanent prosecutor?**

1. Anyone who has had experience prosecuting in jury trials knows that it is a task which requires skills which can only be acquired through years of experience in the practice of courtroom advocacy. Those who have had significant experience at both ends of the bar table in criminal jury trials know that (generally) the task of the prosecutor is the more demanding and difficult. Indeed, the competence required to prosecute the more complex cases can only be acquired through many years of wide experience in the role. It takes years even to begin to appreciate the subtleties of it.

   The fundamental point, therefore, is that it is **essential** that there be available at all times a sufficient number of barristers with the competence and experience necessary to cope with **all** criminal trials (whatever their complexity) throughout the State. There are people in that category at the Bar currently doing an excellent job (some of them former permanent prosecutors) but I believe that, at present, their number is far too small. The reasons why are probably too numerous to particularise. I shall attempt to list those which I believe to be the most significant.

   (a) **the two tier system** with the permanent prosecutors getting the best work and the outside prosecutor having little hope of graduating to the better class unless he becomes one of the former;

   (b) **the disparity in fees** between the outside prosecutor and defence counsel over many years has led to a situation where the more competent only defend and those insufficiently competent to pick and choose are left to prosecute;

   (c) **the status of the outside prosecutor** is (for the reasons given) low within the Criminal Bar which is itself regarded by the remainder of the Bar as the bottom end of the market;

   (d) **the terms and conditions of the appointment of Prosecutor for the Queen** are not such as would attract the more competent and successful barristers as a goal to be achieved through practice as an outside prosecutor. Thus, a career as a prosecutor is not attractive to the more able and ambitious.

   (e) **the practice of late briefing** of outside prosecutors (a deliberate policy to avoid the payment of proper preparation fees) has resulted in barristers being inadequately rewarded for preparation work. The most competent and conscientious will do the work anyway. The less scrupulous will only do as much as they perceive they will be paid for, secure in the knowledge that more competent barristers are not rushing to take over their practices.

   For these reasons (and others I shall refer to later) the general standard of prosecuting within the State is not as high as it should be. Indeed, if the trend is not reversed I fear that the profession will have increasing difficulty in providing a proper answer to the challenge of professional and commercial crime.

2. I believe that the establishment of the offices of Director of Public Prosecutions and the setting up of a Commercial Crime group have both been important steps in improving the standard of instruction and preparation but they do not go to the fundamental problem. The only significant step which has been taken in recent years to improve the standard of counsel briefed to prosecute is the abolition of the former fee scales. Whilst that was essential to meet a problem which was near crisis point it did little more than ward off imminent disaster.

   The solution to the problem is, in my view, far more complex. If it is to be achieved it will require the elevation of the issue to a much higher priority than it has (apparently) been accorded hitherto by successive Governments. If 'law and order' is not a major election issue in 1984/85 it is sure to be in the near future and the subject of this discussion must loom large in that debate if a satisfactory answer is to be found.

3. It is to be recognised that the Bar should provide (and should be seen to be providing) a **service** to the public in maintaining the highest standards of competence and efficiency in all their contributions to the criminal justice system. This necessarily means that such services should be provided at a **reasonable** cost to the public purse. It is not, however, in the overall interest of the public that prosecutors fees be set at a level which makes it impossible to maintain a satisfactory standard.

   Whilst, perhaps, the Bar could do more to instil such a **spirit** of service amongst its members as would persuade its most competent members (even those engaged in highly paid civil practices) to contribute to the maintenance of standards in the criminal justice system, the Government must be prepared to play its part. Once it is recognised that the very highest advocacy skills are required to prosecute the sort of difficult and complex cases which are arising with an increasing frequency, it should be recognised that it is essential (in the public interest) that such skills be employed. In blunt terms that requires that the Government be prepared to pay fees which ensure reasonable reward for those skills.

4. Adequate fees are only part of the solution to the problem of maintaining that essential pool of expertise upon which the system depends. I am of the view that this will never be achieved until the permanent prosecutor system is abolished. My reasons are as follows:

   (a) Those who can maintain the sort of output of work, standards of preparation and court room performance whilst in a secure, nine to five, five-day week salaried job are few and far between. One of the reasons why most barristers work long hours and consistently maintain their highest standards of performance is that they know that they are being constantly judged by those who brief them. They may lose their whole practice as a result of one sloppy performance.

   (b) No outside prosecutor is in complete charge of his case. The presentment is signed by a permanent prosecutor. The approval of a permanent prosecutor must be sought if it is to be amended. All decisions relating to the acceptance of pleas, as to whether the case should be discontinued and the like are made by permanent prosecutors. Frequently presentments are signed and decisions made which on close analysis of the case are plainly wrong. The reason for that is not necessarily that the permanent prosecutor is incompetent, rather that it is only when the stage is reached that the case is prepared by the person briefed to prosecute that the mind is sufficiently focused on the issues for the correct decisions to be made. It is my firm opinion that the barrister briefed to conduct the case in court should be in complete charge of the case. He should be responsible for the presentment and all decisions affecting the conduct of the prosecution (albeit after consultation with those instructing);

   (c) The existence of the two tier system contributes to the vice of late briefing. For the reasons outlined in 4(b) a barrister briefed late frequently finds that the advice given by a permanent prosecutor on further investigative or preparatory steps is inadequate. The result is that either the outside prosecutor is forced to obtain an adjournment or that he has to conduct a case which is inadequately prepared.

   These factors are calculated to undermine the morale of the outside prosecutor, lead to a duplication of work and a reduction of both efficiency and standard.

(d) It is not in my view in the interests of justice or in the interests of promoting high standards of skill that any criminal barrister confine his practice to either end of the bar table to the exclusion of the other. It is particularly important that prosecutors avoid becoming too partisan. It has long been recognised that 'Prosecuting counsel should regard themselves as ministers of justice assisting in its administration rather than advocates' (per Compton J. in R. v Puddick (1865) 4F. & F. 497, 499). There is a clear division within the Criminal Bar between those who prosecute and those who defend. The principal reason is that referred to in 1 (b). There are those (quite unethically) who so restrict themselves for philosophical reasons. Those who maintain a mixed practice are very much in the minority. The permanent prosecutor system contributes to this unhealthy situation. Not only do they prosecute all the time but they are isolated from the rest of the Bar in a separate building. To that extent they are not part of the Bar. That separation leads to mistrust and ill-will. A prosecutor who knows that at the end of the day he returns to his chambers as part of the rest of the Bar and whose next case may see him at the other end of the bar table prosecuted by his present opponent, is more likely to have the recognised standards of conduct and etiquette in the forefront of his mind. The argument that a prosecutor who changes roles may feel constrained to use confidential information acquired in his prosecutorial role against the State is arrant nonsense. It ignores all the established rules of professional privilege, conduct and personal integrity required of counsel;

(e) because the remuneration of the permanent prosecutor is lower than a competent barrister can expect to earn in private practice there is little incentive for the able young barrister to choose a career in prosecuting. Through the experience acquired by monopolising Supreme Court trial and appellate work permanent prosecutors claim a greater expertise than their counterparts amongst the outside prosecutors. Whether or not that claim is well-founded the standards set are unlikely to be as high as might be achieved if they had to compete for such work in a free market and such work was allocated on merit. Unfortunately, it is they who set the standards rather than those who might (given the opportunity) prove to have far greater ability. In summary, I submit that the existence of the office of Prosecutor for the Queen severely curtails the development of the required pool of expertise amongst the outside prosecutors. How can they gain the necessary expertise and experience if they are not given the chance? It also leads to a career structure which will continue to ensure that the office is unlikely to attract the more able practitioners. It is impossible to train a prosecutor at the Leo Cussen Institute (or similar establishment). The only way he can acquire the tools of his trade is through years of courtroom experience as a prosecutor. Years of experience in defence work are of enormous assistance but insufficient alone to provide the expertise necessary for the more complex prosecution. It should be remembered that the vast majority of criminal trials are prosecuted by the independent Bar and unless the number of permanent prosecutors is trebled, that will continue to be so. It is therefore essential, in my view, that priority be given to increasing the overall standard of skill and efficiency amongst prosecutors rather than settling for the lower standard which exists at present.

5. Once the office of permanent prosecutor is abolished how will it be possible to ensure that there is a pool of barristers with sufficient skill and experience to replace them? It **may** be necessary to retain a number of suitably qualified counsel willing to give priority to prosecution work. I envisage that the vast majority of presentments can be drafted by preparation officers of the D.P.P.'s Office (as indeed they are now). They can be signed by senior officers of that department. The more complicated presentments would be drafted (as they are now) by counsel briefed to prosecute the case. **All** briefs should be delivered to counsel briefed to conduct the trial as **early** as possible together with instructions to advise on evidence, further investigations and any amendments required to the draft presentment. They would be briefed on the basis that they, and they alone, are responsible for the presentment at the time of trial and for the overall conduct of the case. This is not a novel concept. (See Annexure A).

It would, of course, be essential that fees be fixed at a level necessary to attract the more competent counsel to fulfill this role. This could not be achieved overnight but I am confident that it would elevate prosecution work to the status it deserves within the profession and redress the gross imbalance which exists at present with the bulk of the talent opting for either defence work or a civil practice. If this scheme proves to be more expensive (and I am not convinced that

it would), then so be it. The administration of criminal justice is so fundamental to an ordered society that the increase in cost would be miniscule compared to the benefit derived from a higher quality service.

If there be any doubt that this proposal is workable I cite the system which has operated successfully in central London for many years. Counsel strive to achieve the status of 'Prosecuting Counsel for the Crown at the Central Criminal Court'. They are ordinary members of the bar paid on a brief-fee and refresher basis. They operate from the chambers they have always occupied amongst other barristers, including those who may be appearing against them.

It is not unusual for those so retained to accept the odd defence brief between major prosecutions. Far from being the tail end of the market, those who prosecute are, or are drawn from, the very cream of the profession. To undertake a major prosecution is regarded as an honour and a privilege. The pool of those retained as prosecutors (they are commonly referred to as Treasury Counsel) are supplemented by a large number of both junior counsel and silks who have acquired great experience through many years at both ends of the bar table. Indictments are generally prepared and signed by clerks of court who are civil servants without legal qualifications. It is only in the rare case that amendment is necessary and only in the most complex case that the task is left to prosecuting counsel. Briefs are delivered to the counsel briefed for the trial weeks or, more often, months before the case is due to be heard. Once instructed that counsel has full control over the prosecution.

In other parts of England including large urban centres the local Bar copes with all prosecutorial roles (including all of those performed in Victoria exclusively by Prosecutors for the Queen) without any difficulty (and on my own observation) with considerable skill and much greater expedition than that generally demonstrated by their salaried counterparts in Victoria. Indeed I have never heard it suggested that those who prosecute from the English Bar are instrumental in causing delays in Court. That the situation may be different in Victoria is a reflection on the present system rather than upon the quality of counsel who would become available under the system I have proposed. Provision of criminal justice on the cheap leads to a second-rate system.

B. **The importance of the Bar as a collegiate body and of the Bar's ethical system and rules to the task of prosecutor.**

6. It is clear from the comments I made in paragraph 4 (d) that I believe that fulfilment of the task of prosecutor requires observance of the highest standards of professional ethics and personal integrity. It also follows from those remarks that I am of the opinion the fact of the Bar being a collegiate body helps to ensure that such standards are observed.

   The fact that the permanent prosecutors are, to an extent, isolated from that collegiate body is unfortunate. I believe that this isolation has contributed to a lack of trust and mutual understanding which is quite alien to any such collegiate body. For example, there is an almost paranoid fear of proper disclosure as between defence and prosecuting counsel which tends to lead to a prolonging of trials and may even lead to injustice. I would like to see incorporated into the rules (without prejudice to my arguments on the abolition of the office of permanent prosecutor) the guidelines for the disclosure of 'unused material' to the defence issued by the Attorney-General of England (see Annexure B). Such guidelines merely encapsulate the practice which has been generally followed by prosecutors in that jurisdiction for many years. It does not seem to reflect the general practice in Victoria.

   There may be other areas in which doubts and suspicions as to what is and is not acceptable conduct could usefully be dispelled within this jurisdiction also.

7. In my relatively short experience of practice at the Victorian Bar I have observed counsel at both ends of the Bar table (apparently deliberately) straining rules of professional conduct to their limits (and in some instances beyond). Where the presiding judge has been aware of what has happened he has in no case dealt with the matter with the required strength. The culprits in each case of which I speak have got away with it. In many cases I believe that the judge was too inexperienced in criminal cases to have the necessary confidence to tackle the situation, in others he simply didn't spot what counsel was up to. Whilst it is encumbent upon the professional conduct and disciplinary committees of the Bar Council to take appropriate action, it is the Judges who preside over criminal trials who must act as the front line of attack against transgressors. The rules exist, but a much greater number of judges experienced in crime are required to ensure that they are obeyed and the ethical standards, which are vital to the maintenance of public confidence in the system, are observed both in letter and in spirit.

The higher the calibre of those briefed to prosecute the less likely it is that such tactics will be employed. Such people should naturally progress to the Bench and thereby ensure that the whole system of criminal justice in the higher courts is not only the stronger but has a built in system of policing professional malpractice.

It is essential that the Bar be seen to deal severely with proven breaches of the rules.

RICHARD MAIDMENT

ANNEXURE 'A'

GUIDANCE FOR ENGLISH PROSECUTION COUNSEL ON THE ATTENDANCE OF WITNESSES AT CONFERENCES

It is a recognised practice that witnesses (other than the parties and expert or professional witnesses who are instructing Counsel) should not be present at consultations or conferences with Counsel and that Counsel should not interview such witnesses before or during a trial. It is recognised, however, that there must necessarily be exceptions to this practice. It is not possible to formulate the circumstances in which a departure from the practice is permissible. This is a matter which must be left to the judgment and discretion of Counsel in each case

Different considerations apply to prosecution counsel and the following general guidance is therefore given:

(i) Counsel for the prosecution is in overall charge of the conduct of the case and should therefore not regard himself as appearing for a party. The Professional Conduct Committee when asked for guidance as to prosecuting Counsel's duty in the event of disagreement with the police as to whether or not to proceed on a particular charge or to accept a plea to a lesser charge, advised (see Annual Statement (1980-1981) pp. 44, 45) that prosecuting counsel has control of the case. He must override any instructions from the prosecution authority if, in his professional judgment, such action is necessary and he should not withdraw from the case in the event of a disagreement with that authority. He should, of course, pay close attention to the authority's instructions and should discuss fully any points of disagreement before deciding on his course of action. The Committee invited attention to the following passage in **Abbot v. Refuge Insurance Co. Ltd.** (1962) I Q B. 432 at 451:

> *"It is a long established practice that, if counsel in charge of a prosecution at any stage is convinced that there is no evidence against the defendant, or so little evidence that it would not be safe to leave the case to the jury, it is then the duty of counsel to acquaint the court with his view and to ask for leave to withdraw the prosecution. I certainly have never known such an application to be refused. As I say, that is well established as being the duty of counsel and does not depend upon any instructions at all. Whoever is instructing counsel, whether it is a private person or the Director of Public Prosecutions, he may violently disagree with counsel's view, and though as a matter of courtesy the prosecutor would naturally be informed by counsel of what he proposed to do, it would be quite wrong of counsel to accept any instructions to go on with a prosecution, once he had formed a view that the prosecution should not continue."*

(ii) Counsel for the prosecution may see and confer with investigator witnesses in the case but only if they have discharged some supervisory responsibility in the investigation.

(iii) Counsel for the prosecution ought not to confer with investigators or receive factual instructions directly from them on particular aspects of evidence to be given by them about which there is known or reasonably may be anticipated to be dispute.

ANNEXURE 'B'

DUTIES OF THE PROSECUTION

U.K. guidelines for the disclosure of "unused material" to the defence in cases to be tried on indictment: (1982) I All E.R. 734; (1982) Cr App.R.302.

The Attorney-General has issued (December 1981) the following guidelines on the disclosure of certain categories of information to the defence:

1. For the purpose of these Guidelines the term "unused material" is used to include the following: (i) All witness statements and documents which are not included in the commital bundles served on the defence; (ii) The statements of any witnesses who are to be called to give evidence at committal and (if not in the bundle) any documents referred to therein; (iii) The unedited version(s) of any edited statements or composite statement included in the committal bundles.

2 In all cases which are due to be committed for trial, all unused material should normally (i.e. subject to the discretionary exceptions mentioned in paragraph 6) be made available to the defence solicitor if it has some bearing on the offence(s) charged and the surrounding circumstances of the case.

3. (a) If it will not delay the committal, disclosure should be made as soon as possible before the date fixed. This is particularly important — and might even justify delay — if the material might have some influence upon the course of the committal proceedings or the charges upon which the Justices might decide to commit. (b) If however it would or might cause delay and is unlikely to influence the committal, it should be done at or as soon as possible after committal.

4. If the unused material does not exceed about 50 pages, disclosure should be by way of provision of a copy — either by post, by hand, or via the police

5. If the unused material exceeds about 50 pages or is unsuitable for copying, the defence solicitor should be given an opportunity to inspect it at a convenient police station or, alternatively, at the prosecuting solicitor's office, having first taken care to remove any material of the type mentioned in paragraph 6. If, having inspected it, the solicitor wishes to have a copy of any part of the material, this request should be complied with

6. There is a discretion not to make disclosure — at least until Counsel has considered and advised on the matter — in the following circumstances:

   (i) There are grounds for fearing that disclosing a statement might lead to an attempt being made to persuade a witness to make a statement retracting his original one, to change his story, not to appear at Court or otherwise to intimidate him

   (ii) The statement (e.g from a relative or close friend of the accused) is believed to be wholly or partially untrue and might be of use in cross-examination if the witness should be called by the defence.

   (iii) The statement is favourable to the prosecution and believed to be substantially true but there are grounds for fearing that the witness, due to feelings of loyalty or fear, might give the defence solicitor a quite different, and false, story favourable to the defendant If called as a defence witness upon the basis of this second account, the statement to the police can be of use in cross-examination.

   (iv) The statement is quite neutral or negative and there is no reason to doubt its truthfulnes — e.g. "I saw nothing of the fight" or "He was not at home that afternoon". There are however grounds to believe that the witness might change his story and give evidence for the defence — e.g. purporting to give an account of the fight, or an alibi. Here again, the statement can properly be withheld for use in cross-examination. (N.B. In cases (i) to (iv) the name and address of the witness should normally be supplied)

   (v) The statement is, to a greater or lesser extent, "sensitive" and for this reason it is not in the public interest to disclose it. Examples of statements containing sensitive material are as follows: — (a) It deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those Services once his identity became known (b) It is by, or discloses the identity of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger. (c) It is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known. (d) It contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect; or it discloses some unusual form of surveillance or method of detecting crime (e) It is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplier — e g. bank official. (f) It relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matter prejudicial to him (g) It contains details of private delicacy to the marker and/or might create risk of domestic strife.

7. If there is doubt as to whether unused material comes within any of the categories in paragraph 6, such material should be submitted to Counsel for advice either before or after committal

8. In deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence. If, to take one extreme, the information is or may be true and would go some way towards establishing the innocence of the accused (or cast some significant doubt upon his guilt or upon some material part of the evidence on which the Crown is relying) there must either be full disclosure or, if the sensitivity is too great to permit this, recourse to the alternative steps set out in paragraph 13. If, to take the other extreme, the material supports the case for the prosecution or is neutral or for other reasons is clearly of no use to the defence, there is a discretion to withhold not merely the statement containing the sensitive material, but also the name and address of the maker

9. Any doubt as to whether the balance is in favour of, or against, disclosure should always be resolved in favour of disclosure

10 No unused material which might be said to come within the discretionary exceptions in paragraph 6 should be disclosed to the defence until (a) the investigating officer had been asked whether he has any objections, and (b) it has been the subject of advice by Counsel and that advice has been considered by the Prosecuting Solicitor Should it be considered that any material is so exceptionally sensitive that it should not be shown to Counsel, the Director of Public Prosecutions should be consulted.

11. In all cases Counsel should be fully informed as to what unused material has already been disclosed If some has been withheld in pursuance of paragraph 10, he should be informed of any police view, his Instructions should deal — both generally and in particular — with the question of "balance" and he should be asked to advise in writing.

12. If the sensitive material relates to the identity of an informant, Counsel's attention should be directed to the following passages from the judgments of (a) Pollock C B in **Attorney-General v. Briant** (1846) 15 Meeson & Welsby's Reports 169 and (b) Lord Esher M.R in **Marks v. Beyfus** (1890) 25 Q B.D.:

   (a) "The rule clearly established and acted on is this, that in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been the settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public convenience . and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer"

   (b) "If upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail".

13. If it is decided that there is a duty of disclosure but the information is too sensitive to permit the statement or document to be handed over in full, it will become necessary to discuss with Counsel and the investigating officer whether it would be safe to make some limited form of disclosure by means which would satisfy the legitimate interests of the defence. These means may be many and various but the following are given by way of example:

    (i) If the only sensitive part of a statement is the name and address of the maker, a copy can be supplied with these details, and any identifying particulars in the text, blanked out. This would be coupled with an undertaking to try to make the witness available for interview, if requested; and subsequently, if so desired, to arrange for his attendance at Court.

    (ii) Sometimes a witness might be adequately protected if the address given was his place of work rather than his home address This is in fact already quite a common practice with witnesses such as bank officials.

    (iii) A fresh statement can be prepared and signed, omitting the sensitive part. If this is not practicable, the sensitive part can be blanked out.

    (iv) Disclosure of all or part of a sensitive statement or document may be possible on a Counsel-to-Counsel basis although it must be recognised that Counsel for the defence cannot give any guarantee of total confidentiality as he may feel bound to reveal the materiald to his instructing solicitor if he regards it as his clear and unavoidable duty to do so in the proper preparation and presentation of his case.

    (v) If the part of the statement or document which might assist the defence is factual and not in itself sensitive, the prosecution could make a formal admission with section 10 of the *Criminal Justice Act* 1967, assuming that they accept the correctness of the fact.

14. An unrepresented accused should be provided with a copy of all unused material which would normally have been served on his solicitor if he were represented. Special consideration, however, would have to be given to sensitive material and it might sometimes be desirable for Counsel, if in doubt, to consult the trial Judge

15. If, either before or during a trial, it becomes apparent that there is a clear duty to disclose some unused material but it is so sensitive that it would not be in the public interest to do so, it will probably be necessary to offer no, or no further, evidence. Should such a situation arise or seem likely to arise then, if time permits, Prosecuting Solicitors are advised to consult the Director of Public Prosecutions

16. The practice outlined above should be adopted with immediate effect in relation to all cases submitted to the Prosecuting Solicitor on receipt of these Guidelines. It should be adopted as regards cases already submitted, so far as is practicable

NOTE: Comprehensive though the above guidelines are, it should be remembered that the word "documents" embraces artists impressions, photofits and notes of oral descriptions given by identifying witnesses.

For a restatement of the principle that there is no property in a witness, see Harmony Shipping Co. S.A. v. Davis and Others (1979) 3 All E.R. 177, C.A. (Civil Division).

NEW D.P.P.

The appointment of John Coldrey Q.C. as the second Director of Public Prosecutions for the State of Victoria, following the appointment of J. H. Phillips Q.C. to the Supreme Court Bench has been met with dismay by long-standing readers of **Bar News.** It is true that his appointment will be of great assistance to the administration of criminal justice in this State. But, selfishly, they see in this executive decision, a loss to the Bar of one of its wittiest members. It is little consolation to them to suppose that his talents will be hereafter contained in memoranda to prosecutors and bureaucrats, ultimately to be found in some obscure pigeon hole.

He came to the Bar in 1966 after serving articles with the firm of R. H. Dunn. He read with the late Kevin Coleman. His readers were A. Kelly, Jedwab, Miss D. Fagan, Dodson and Borchers. He practised mainly in Criminal Law and appeared in such notable cases as **Renzella, Eastwood** and the Huckitta trial **(R. v. Collins).** He spent some sixteen months as junior counsel assisting the Beach Inquiry.

He has practised extensively in the Northern Territory in criminal matters, and more recently on behalf of aboriginals making claims pursuant to the Aboriginal Land Rights (N.T.) Act, 1976. In 1982 he was appointed Director of Legal Services with the Central Land Council in Alice Springs, a position he held until this year.

He has a passion for hockey and is currently the oldest living player with Melbourne University. He is a renowned yachtsman in the Mirror dinghy class and, with the assistance of Vincent, has gained an enviable reputation after colliding with the Port Melbourne pier and bottling in the international shipping land. Other awards include three gongs on Radio Auditions for a rendition of "Sweet Violets".

He was involved in writing and performing in earlier Bar Reviews at the dining-in nights between 1971 - 1975. It is said that the best of his material suffered from the blue pencil of his less courageous colleagues.

The Bar wishes Coldrey well in his new role to which he takes his strong beliefs in the protection of the rights of the individual and the fair administration of justice for all those involved.

THE NEW SILKS

JOHN ALLEN COLDREY

Date of Admission — 1.3.66
Date of Signing — 9.6.66
Master — Kevin Coleman
Readers — A. Kelly, N Jedwab, D Fagan, M Dodson, G. Borchers

JAMES HOWARD MORRISSEY

Date of Admission — 2.3.53
Date of Signing — 9 4.54
Master — J. Minogue
Readers — None

GRAEME REUBEN GLOVER CROSSLEY

Date of Admission — 1.3.63
Date of Signing — 25.2.65
Master — G. V. Tolhurst
Readers — R. Osborn, M. Preston, R. Middleton, F. Casely, R. Maxted, J. Dugdale, J. Drake, D. Findlay

ANTHONY GRAHAM

Date of Admission — 1.3.65
Date of Signing — 17.8.65
Master — H. R. Frederico
Readers — R. Wilson, J. O'Bryan, J. Lee, D. Curtain, C. Johnson, M. Wood, J. Logan, P. Kovacs, J. Gobbo

ROSS ALAN SUNDBERG

Date of Admission — 2.5.66
Date of Signing — 16.10.69
Master — John D. Phillips
Readers — Frank Callaway

HARTLEY ROLAND HANSEN

Date of Admission — 1.6.66
Date of Signing — 9.2.67
Master — D. Dawson
Readers — G. Johnstone, A. Lovejoy, N. Reeves, J. Whitehead, M. Taylor, G. Nettle, D. Staindl

LYNNETTE ROCHELLE OPAS

Date of Admission — 1.6.67
Date of Signing — 12.10.67
Master — A. Asche
Readers — J. Langslow, C. Douglas, E. Curtain, C. Grey, S. Blashki, M. Slade

PETER BUCHANAN

Date of Admission — 1.6.67
Date of Signing — 9.4.70
Master — J Gobbo
Readers — E. Moran, P. Brennar, J. Singh, H. Reicher, J. Judd, H. Gillespe, B. O'Brien, D. Staindl

KENNETH MADISON HAYNE

Date of Admission — 1.4.69
Date of Signing — 5.8.71
Master — John D. Phillips
Readers — M. Macnamara, B. McCarthy, H. Fraser, W. Houghton, G. Nettle, P. Cosgrave, A. Richards

ROBERT FRANK REDLICH

Date of Admission — 1.8.69
Date of Signing — 13.11.69
Master — John Greenwell
Readers — E. Tonner

LAWYER'S BOOKSHELF

1842: THE PUBLIC EXECUTIONS AT MELBOURNE; compiled by Ian MacFarlane: 101 pages; Victorian Government Printing Office; paperback $4.95.

The Victorian Government Printing Office has just published a documentpacked account of the crimes, capture, trials and public hanging of three bushrangers and three Aborigines entitled **1842: The Public Executions at Melbourne.** The release of this publication is a timely, if somewhat gruesome contribution to the current sesqui-centenary celebrations commemorating the arrival of Edward Henty at Portland in November, 1834.

This is another example of dubious anniversary celebrations. The land now described as the State of Victoria had been settled by the Aboriginal inhabitants for many thousands of years before the Henty's arrival. If the celebrations are to mark European settlement, then we should perhaps look back at least to the 1820's when sealing stations were established in Portland and on Phillip Island. In any event, European settlement was no event to be celebrated, as the sealers had brought degradation, disease and death for many Aboriginal inhabitants. Perhaps the best reason for celebrating Victoria's official 150th birthday in 1984 is to follow the hidebound precedent of the 1934 Victorian Centenary celebrations, just as twenty first birthdays continue to be celebrated although the age of majority has been eighteen years in Victoria since 1st February 1978!

The book under review has been compiled by Ian MacFarlane from the resources of the Search Room at the Laverton Base Repository of the Public Records Office. Over forty photographs and illustrations, many previously unpublished, have been gleaned from government records and flowery official correspondence which often differ from contemporaneous newspaper reports on which so much pop history of early Melbourne has been based. Numerous portraits and photographs by A.T.F. Chuck have been reproduced in the book together with maps, sketches and handwritten documents. They flesh out the tales of further life of the Port Phillip District in the early 1840's.

The frontispiece makes the modern reader feel at home. It is a fascimile of "A Bill to provide for the Speedy Trial of Offenders in the District of Port Phillip". One such speedy trial was conducted in the criminal sessions of the Supreme Court held at Melbourne before Resident Judge Walpole Willis and led to Melbourne's first public hanging. Earlier, in 1839 the Chief Protector of the Aborigines, George Augustus Robinson had brought five Vandiemonian Aborigines to Port Phillip via Flinders Island to help "civilize" their mainland brethren. There were Robert Timmy Jimmy Smallboy ("Bob"), Jack Napoleon Tunninerpareway ("Jack"), Lallah Rookh Truganina (later known as "the last of the Tasmanians"), Fanny Waterpoorderyer and Maria Matilda Nellepolimmner. However, the newcomers were not supplied with government rations or maintenance and they allegedly resorted to guerilla warfare or bushranging in the Westernport district. On 6th October, 1841 two whalers, William Cook and "The Yankee", who had been overlanding to Melbourne from Lady Bay, were murdered and some six weeks later their bodies were located in the vicinity of the Powlett River outlet. The five "protected" aborigines were apprehended in a dawn raid and taken before Police Magistrate Major St. John who committed "Bob" and "Jack" for trial on charges of murder with the three women as accessories to the murders.

Redmond Barry as Standing Counsel for the Aborigines, requested a mixed jury of whom at least half could speak the accuseds' language, but his motion was refused by the trial judge. On 22nd December, 1841 the three women were acquitted, but Bob and Jack were found guilty of murder and sentenced to death, despite the jury's recommendation for mercy. Superintendent La Trobe felt unable to recommend that the Governor-in-Council should exercise the prerogative of mercy and on 20th January 1842 Bob and Jack were clumsily executed on gallows hill, the name then given to a small knoll to the northwest of the walls of the New Melbourne Gaol in La Trobe Street near Russell Street. W.F.E. Liardet's naive watercolour, painted later from memory in 1875, shows the macabre procession including soldiers with fixed bayonets, the chaplain, the sheriff and the gaoler following the covered cart with the two condemned men seated on their coffins.

"Garryowen" (Edmund Finn) later recounted in **The Chronicles of Early Melbourne (1835/1851)** how Hangman Davies, a convict transport for life, had "grinned horribly a ghastly smile" at the angry crowd of sickened spectators after the bungled amateur executions for which he earned £5 blood money.

The second chapter of the book recounts the events following a series of armed robberies around Dandenong in April and May 1842 which culminated in a siege on Campbell Hunter's station near what is now the Yan Yean Reservoir. Five gentlemen settlers were sworn in as special constables known as the "Fighting Five" to track down four armed and mounted bushrangers. Following a gun battle Charles Ellis an expiree convict, Daniel Jepps an American sailor and Martin Fogarty a bounty immigrant, surrendered after the death of John Williams, another bounty immigrant. Jepps was recorded as having "coolly stood beside the hut lighting his pipe with banknotes" and asked that he be shot "rather than being taken to Melbourne and made a public show of on the gallows". On 11th May 1842 after an inquest and a committal hearing, the three surviving bushrangers were tried before Resident Judge Willis and a jury. Ellis, Jepps and Fogarty pleaded not guilty to charges of highway robbery and shooting with intent to kill and the jury brought in verdicts of guilty on counts of wounding with intent to murder. On 13th May 1842 the judge passed sentence of death on the prisoners and proposed that he, as local judge, be empowered to have the sentence executed forthwith, without confirmation from the Executive Council in Sydney. In this way "Speedy justice may be meted out". But the Colonial Secretary rejected this proposal, insisting that every case in which sentence of death is passed on a criminal should be placed by the Executive Council in Sydney. According to the **Port Phillip Gazette,** on 28th June 1842 the three prisoners were conveyed to the scaffold in a cart "seated on their own coffins . . Ministers respectively of the churches of England, Scotland, Rome and Wesley attended the unhappy men to the last". A more expensive scaffold had been erected on the Sheriff's instructions "to avoid any of the extremely painful incidents which marked the last execution in the province" and Hangman Davies was observed to have had "frequent private rehearsals" with a straw effigy. Subsequently, the defendants' counsel, Erskine Murray, was reported to have attended a testimonal dinner held for the Fighting Five at the Royal Hotel in Collins Street on 20th May, 1842.

Chapter three of the book deals with the events of 19th May, 1840 at squatter John Cox's Mt. Rouse station in the Western District when, in the words of an overseer, James Brock, "At about ten o'clock Mr. P. Codd and I were standing near the fire in front of my tarpaulin. I was playing my bugle, when suddenly the natives appeared . . . one of my servants then proposed to try and induce the natives to carry out some tea tree which he had been cutting in a scrub". In the ensuing fracas, Mr. Codd was killed, possibly as a reprisal for his participation in a previous skirmish with aborigines at the Wedge station on the River Grange.

Mr. Justice Willis

In April, 1842 Figara Alkepurata, who the settlers called "Roger the Russian" or the "Vile Savage Roger", was apprehended by Commissioner of Crown Lands Foster Fyans, armed with a warrant and accompanied by a troop of about a dozen Border Police. Roger the Russian was shipped to Melbourne via Launceston and on Saturday 16th July 1842, Standing Counsel for the Aborigines, Redmond Barry appeared before a jury at a preliminary hearing to decide whether or not the prisoner was of sufficient mental capacity to stand trial. The question having been decided in the affirmative, Roger the Russian went for trial three days later and a Supreme Court jury purportedly aided by four interpreters was sworn in. Notwithstanding several objections to the information, equivocal identification evidence and a belated alibi, the jury returned a verdict of guilty within ten minutes of a harangue by Resident Judge Willis. The learned trial judge opined that the "example would have a better effect if the execution took place at Mt. Rouse rather than at Melbourne." Despite a private letter from Superintendent La Trobe to the Executive Council in Sydney urging clemency because Codd's murder was "far from unprovoked", the **Port Phillip Gazette** reported that Roger the Russian was "strangled like a dog" on gallows hill on 5th September, 1842.

There were no further executions in the Port Phillip District for several years and on 25th November, 1854 "An Act to regulate the Execution of Criminals" was gazetted providing that death sentences were to be carried out "within the walls or within the closed yard of such gaol as the Lieutenant Governor may.. direct . . ."

Following an infamous massacre of three aboriginal women and a baby in February 1842 at Muston's Creek near Mt. Rouse, six European men were charged with murder and appeared at committal proceedings at the Magistrates' Court in Melbourne. However only three defendants, namely, Richard Hill, Henry Beswicke and Joseph Betts were committed for trial before the new Resident Judge William Jeffcott and the jury interrupted the prosecution case with a verdict of not guilty.

Chapter five recounts some further misadventures of Judge Willis who was removed from office on 24th June, 1842 and forthwith left the colony. Moreover, there are several tantalising sub-plots towards the end of the book, such as the account of the unsavoury affairs of Charles W. Sievwright, the suspended Assistant Protector of Aborigines, who had been involved in the trial of "Roger the Russian".

1842: The Public Executions at Melbourne contains a postscript which should provide solace for practitioners who have problems trying to locate missing documents and files. The author, employing lateral historical thinking, fossicking and imaginatively interpreting the titles of files, has contrived to give fascinating glimpses into the turbulent frontier life of Port Phillip District in the 1840's. In short, the book is excellent value for just on $5 and should be of interest to the legal profession, to amateur and professional historians, and to students of all ages of Victorian history before the Gold Rushes.

WHITEHEAD

LETTER TO THE EDITORS

Dear Sirs,

In the last issue of **Bar News** you published an article on Negotiation Techniques.

The very best authority on negotiation is the small book: "Getting to Yes" by Roger Fisher and William Ury, Hutchinson, 1982.

It contains an explanation of the method of principled negotiation developed at the Harvard Negotiation Project.

Sincerely,

RAYMOND JOHNSTONE

THE FOUNDATIONS OF THE MODERN BAR; Raymond Cocks, Sweet and Maxwell, London, 1983, 257 pages.

THE VICTORIAN BAR; J. R. Lewis, Rob and Hale, London, 1982, 174 pages.

With the 19th Century, much of English life and institutions lost their Georgian, and assumed their modern, forms under the impetus of reform on scientific principles. The Courts and the law were no exception. The Bar, inevitably, had to change or die. As barristers and pragmatists at heart it chose the former course — or perhaps, in its haphazard way did not choose to change but merely changed because the law and the Courts were changing. These books both show what the changes were and how they were effected. They also show what the Bar was like it ins old unreformed state. The first book is an historic study, the second much more lively and anecdotal. What story do they tell, and is it relevant to our circumstances?

In the 1830's life at the Bar must have been very cosy. In term time the judges sat in London, and the Bar practised there. At circuit time the judges all left London for the circuit towns, and the Bar left London to follow the judges from town to town. The organised life of the Bar was circuit life, and professional life was regulated by circuit opinion. Each circuit had its organised circuit Mess, and lots of conviviality. The Inns of Court were moribund. Legal education was non-existent. Single barristers lived in their Chambers, which became the haunt of women of loose character. There was no central Bar organisation. The law, legal procedure and law reports were in a state untouched by the hand of any scientific reformer. Barristers were practical men, rather than members of a learned profession.

None of this survived the end of the 19th century and the Bar of that period survived changes so severe as to make one think that it is perhaps after all a necessary institution, and likely to survive any shock. Even changes in mechanical things had a substantial effect on barristers' lives and work. Who, for instance, would have foreseen that the railway system would help to destroy circuit life, by enabling barristers to speedily return to the family bosom, instead of staying for long periods with a circuit mess? Perhaps the delights of the circuit mess seemed greater in retrospect than in their actuality. Social changes also had substantial professional effects. Barristers then made large amounts of money fighting election petitions, for the corruption attendant on every election ensured that each would be followed by lots of legal work. That work has almost gone now. So has the parliamentary work which the passage of railway and canal bills entailed. However the law of the motor car has replaced the law of the horse almost exactly.

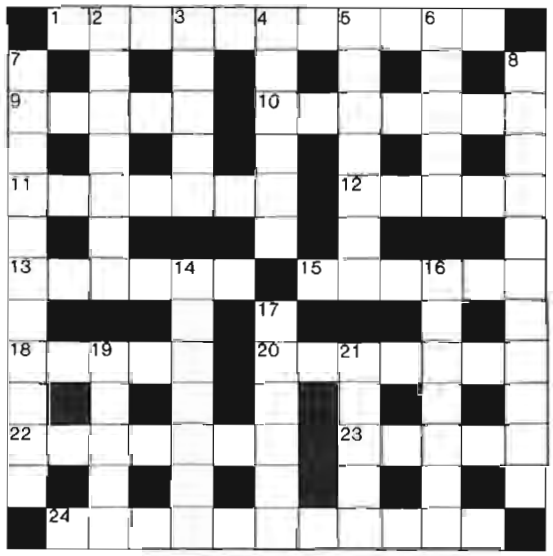
Reforms of the courts and of court procedures removed much work with one hand, yet gave it back with the other, for in cheapening the law, it was made more accessible to a wider class of litigant. The formation of the County Courts removed much work from the superior courts (where the Bar had an exclusive right of audience) and subjected it to competition from solicitors. The effect on circuit work was drastic. As an example, the Oxford Circuit's work dropped from 127 causes to 4 in 4 or 5 years. Many barristers left for the Colonies. Reforming governments reduced work by simplifying legal procedures, reducing circuits, and centralising legal work in London. The Bar's old circuit life was inevitably broken up, and local Bars formed in the new circuit towns. No longer did the judge traipse all over the countryside, followed by the cream of the Bar. The size of the Bar may have almost doubled between 1835 and 1845 (1,300 to 2,317) and almost doubled again by 1863 (2,317 to 4,360). There was a Royal Commission set up to investigate the Inns of Court. Articles critical of the Bar appeared in newspapers. Legal philosophers subjected the law to criticism and analysis. However, the Bar survived.

Although a barrister's eduction (once exams were introduced) seems on today's standards to be no great thing (6 months work of 5 - 6 hours per day was said to be enough for a university graduate to pass the bar exams), barristers who had work must have worked very hard indeed. The Courts sat from 9.00 a.m. to 9.00 p.m. (with meal breaks at 3.00 p.m. and 5.00 p.m.). Conditions in court were foul, and were thought to have caused the deaths of 5 judges. Professional life was hard, but its rewards were in some cases well beyond the simple dreams of today's barrister. A barrister with a busy practice was said to be up at 4.00 a.m., reading his papers, and seeing clients before Court, and then again afterwards. The work schedule of one demanded a start at 6.00 a.m. and a return home at 2.00 a.m. Four years after call Coleridge earned 28 guineas, yet in 1860 the head of the Chancery Bar earned more than 30,000 Pounds.

In many respects, the problems of the 19th Century Bar resemble our own, for present parallels can be seen with many of the problems which the Victorian Bar faced. It is helpful to see that what those problems were, and that they were dealt with and overcome. Not all proposed change is to be construed as an attack on the Bar, and those which are mere attacks will be successfully repulsed, provided that the Bar knows that it in fact performs an essential social function, acts with the confidence that that knowledge gives, and with the knowledge that it has all happened, and been faced, before.

A. G. UREN

CAPTAIN'S CRYPTIC
No. 50



ACROSS:

1. Written acknowledgement of payment (11).
9. Baby owl (9).
10. Passer of counterfeit (7).
11. More on top makes too many (7).
12. Different sorts of quires make this sound like a French cathedral (5).
13. It is an old crime to deprive me of a member (6).
15. Stableman at an inn (6).
18. Copying Godzilla (5).
20. Kidney bean (7).
22. Pronunciatory sin of omission (7).
23. Oh base bass! (5).
24. D.P.P.J. (1,1,8,1).

DOWN:

2. Successor of 24 down (7).
3. Up to (5).
4. Most staunch (6).
5. Accepts a new landlord (7).
6. Court (5).
7. Completed, of a marriage or other difficult enterprise (11).
8. Discharge of impossible bargain (11).
14. Denizens of England (7).
16. Insects food of St. John (7).
17. Likely ingredient of lawyers' favourite smoke ball (6).
19. Bane of the 14 down (5).
21. Jewish LL.D. (5).

(Solution Page 40)

LEGGE'S LAW LEXICON

"R"

Rabula ??? 30 L.Q.R. 167.

Racial Discrimination As early as 1808 the Irish Bank Bill provided that "one half of the profits shall go to the ordinary share holders and one half shall go to the preference share holders and the residue shall be paid to the Governor."

Readers Pups - noisy hungry and incapable of seeing anything.

Real Estate Agent A species which became extinct with the passing of the Trade Practices Act.

Reasons The alleged connection between the evidence and the judgement in a case.

Reasonable Man Does not have the charitable decency of a gentleman [1940] IK.B. 390. There is no reasonable woman.

Reasonable Time Any time before closing time.

Rebutting Evidence The last resort of the Crown Prosecutor.

Reciprocity of Admission A condition from which the State of Queensland is happily exempt.

Recklessness Masterly inactivity (1890) 59 L.J.Ch. 618.

Reconstruction Evidence in chief in the running down jurisdiction.

Record of Interview An unsigned series of questions and answers typed by 2 policemen in the absence of the accused. Its purpose is to be available for the jury in the event of the trial taking place in the County Court.

Rectification The last resort of the solvent debtor.

Redemption An event that very seldom takes place during the lifetime of the mortgagee.

Re-examination Unnecessary perjury.

Refresher Our daily bread.

Relevant That 5% of the evidence which both counsel ignore.

Relief The reward of a Plaintiff who holds out until both counsel stop talking.

Remand A punishment imposed to deter a suspect from being suspected of further offences.

Reporter A barrister who signs his name in block letters.

Repugnant A criminal junior offered to an equity silk.

Reservation Facts that Plaintiff's counsel is not obliged to tell his opponent when negotiating a settlement, e.g. in a Wrongs Act claim, that the widow is pregnant.

Reserved Judgment The fallacy that a question of fact improves with keeping.

Res Ipsa Loquitur If the phrase had not been in Latin no one would have called it a principle. 1923 S.C. (H.L.) 56.

Restitutio in Integrum Relief which is not available in an action for breach of promise.

Restraint of Trade (Except for Solicitors) It is not in the public interest to find employment for an unprincipled lawyer practising in violation of his solemn engagement [1984] A.C. 573.

Retainer A fee simple.

Reverse The Full Court in top gear.

Right of Way A senior silk in the Practice Court.

Robes A method of distinguishing the sheep from the shearer.

Root of Title The ius primae noctis.

Royal Commission Mode of acquiring pelf by saving politicians from embarrassment.

Royalty A fee for settling running down interrogatories.

Rules of Court There is an assumption that a judge does not know the rules of the Supreme Court. [1937] A.C. 479.

MOUTHPIECE

The meeting was called for Monday November 19, 1984 at the Customs House, the New Customs House, not the Old. Many of a more conservative cut found their way to the wrong venue and time was lost as they were gathered in.

The question was whether without special dispensation we should be forbidden to practise from Chambers other than those provided by the Bar. The issue was whether the decision to build the new building had been a prudent one.

Those who had called the meeting, were worried about the new building. Rents will be too high and incomes too low for us to practise from there, they said. Let us buy our own chambers. We are concerned for the junior bar.

The other side was that a new building was the only solution, and besides we will have egg on our faces if the new building is abandoned. Any short term gains by private purchase of chambers will result in long term disadvantage. We are only concerned for the junior bar, they said.

How quaint it was to see those of Tory disposition argue the merits of a strong centralised system. Against them were the inclined socialists who wanted permission to be free marketeers. And true to political style, each side unashamedly wooed the silent majority, that 60% of the bar under six years call. They might have saved their breath. Most of these did not turn up.

It was very polite: no brawling, no dirt. A long period of internal peace has dulled the once sharp wits and the barbs hurled with intent to hurt. That is not to say that there were no tricks at all. Chairman Charles tried to spike the guns of the yes vote in his first few sentences. A no vote is not forever he promised. It can be reviewed and probably will be reviewed in two years time. One can only wonder how that little time bomb was received by those aspirants to the chairman's throne. Thereafter it was politeness all round. Each side demolished arguments that the other side had never put, perhaps only to prove that the rehearsed final address is not always the most effective.

This was not a knock-em-down drag-em-out style of meeting. Not like some of the meetings in the late 60's and early 70's. They were real humdingers. By comparison this was very bland. No suggestions of impropriety or skulduggery. Perhaps that was how it should have been. Barristers have never been much good at arguing their own finances. What we really need is a threat to principle for the knives to be drawn.

The vote was taken. 88 for and 168 against.

The 88 looked across the room at the 168, and the 168 looked back. We looked at each other. "I am only trying to act for the good of the bar" each of us thought. And each was right.

BYRNE & ROSS D.D.

REPORT OF THE LAW REFORM COMMITTEE

The following matters have been discussed by the Law Reform Committee over the last three months.

A. Uniform Defamation Bill

The views of a member of the Bar with considerable experience in the area of defamation, indicating that the above Bill should not be passed in this State, have been forwarded to the Attorney-General.

B. Privilege for Media for Publishing Information Supplied by Government Officials

This topic created considerable discussion in the Law Reform Committee and it was eventually resolved that a letter be written to the Attorney-General by the Chairman of the Law Reform Committee stating that the Law Reform Committee agrees to a form of protection to be given in defamation cases to the media:

(a) in respect of a publication made at the request of an officer of police of the rank of inspector or above;

(b) in respect of Ministerial statements made in the public interest, in circumstances where such statement is reasonably necessary.

Statutory Immunity should not be given to the informant who provided the information. The immunity afforded to the media is to cover a full and accurate summary of the information provided as well as the situation where the information is published verbatim. Such immunity should only be qualified and will be defeated by proof of malice.

In reaching the above decision the Law Reform Committee was assisted greatly by the opinions of several members of counsel with considerable experience in the area of defamation law.

C. Administrative Appeals Tribunal Bill

This matter was discussed at the Law Reform Committee and also by the Victorian Bar Council. Many interested bodies thought that the initial Bill was defective in several areas. The Government proposed certain amendments but was unwilling or unable to release those for discussion by the interested parties until after they had been laid before Parliament. This procedure effectively stifles any further discussion or representation on the Bill before it is passed. The adoption of this procedure by the State Government means that the opportunity to comment on or suggest changes to proposed legislation is considerably limited.

It is hoped that in the future the Victorian Bar will be advised at an earlier stage in the preparation of legislation so that various comments and suggestions can be taken into account in the initial drafting of legislation rather than being asked to comment at a later stage.

In fact, such procedures are presently being implemented. Following representations from the interested bodies, the Government agreed to amend clause 34 of the Administrative Appeals Tribunal Bill to allow representation as of right.

D. County Court Juries

The Attorney-General has indicated to the Law Reform Committee that he is looking at recommendations made through the Law Reform Committee in regard to County Court Juries.

E. The Law Reform Commission Bill

The Submissions of a member of the Bar with experience with the Australian Law Reform Commission have been forwarded to the Attorney-General and are under consideration by him.

F. Statutory Law (Miscellaneous Provisions) Act

The Law Reform Committee resolved to write to the Legal Constitutional Committee of the State Parliament indicating that the Law Reform Committee takes the view that a Statutory Law (Miscellaneous Provisions) Act should only contain amendments to correct typographical or grammatical type errors and nothing which could be said to be of a substantive nature.

G. Infertility Medical Procedures Bill

A member of the Committee with experience in the area of Family Law is considering the above Bill and will report to the Committee within the near future.

H. Australian Law Reform Commission — Paper on Foreign State Immunity

A member of the Law Reform Committee is considering the above Discussion Paper to see what, if any, recommendations the Bar should make in regard to the above topic.

I. Discussion Paper I of the Companies and Securities Law Review Commission on Forms of Legal Organisation for Small Business

A member of the Committee is considering the above Report. One of the recommendations of the Committee is that a form of "limited partnership" be used as a form of organisation for small business. Any member of the Bar with any views on this topic should write to or contact the Secretary.

J. Appeal Costs Fund Act

The Law Reform Committee has been asked to comment on the Report of the Appeal Costs Fund Act Review Committee Report. In the past, the Law Reform Committee has written to the State Government suggesting that the Appeal Costs Fund Act be amended to include hearings before "State Tribunal" and "Appeals from a Master".

Members of the Bar with views of further amendments necessary or desirable to the above Act should contact the Secretary.

K. Legal Implications of Frangible Poles

A letter from a Mr. Judd Epstein of Monash University in regard to the legal implications of Frangible Poles has been forwarded to the Secretary of Personal Injuries Bar Association for comment and report.

The Law Reform Committee is always receptive to any comments on possible changes to the law suggested by counsel. Any counsel with any such suggestions should forward them to the Secretary.

JOHN HOCKLEY
Hon. Secretary to the Law Reform Committee of the Victorian Bar

INNS OF COURT HONOUR VICTORIAN BAR CENTENARY

The absence of representatives of the English Bar at the recent Centenary (sic) Dinner of the Bar caused some adverse comment. In what may be perceived by some as a gesture of reparation, the Inns of Court have presented the Victorian Bar with a handsome gift, described below.

The subject of the donation came to light during excavation of the Gough Square area, north of Fleet Street where, it will be remembered, Samuel Johnson and his team of assistants worked on the great Johnsonian Dictionary. It seems that the Inns of Court have obtained on advantageous terms the financial support of a Saudi Arabian group to erect for an undisclosed figure a new and spacious building on the site of *inter alia* 17 Gough Square in order to replace the cramped and outmoded accommodation available heretofore to the Bar.

In the course of levelling the site, workmen came across a metal strongbox containing the archaeological lexicographical find of the century: several as yet unpublished sheets of the Dictionary. Whether these sheets form part of Johnson's contemplated but abandoned third supplement or were merely misplaced it is impossible to say. The Syndics of the Oxford University Press have agreed to publish the sheets in facsimile, together with an amended version of each entry with modern examples of usage. The gift referred to above is a handsomely mounted diptych of two of the leaves together with an individually numbered copy of the Press's modern version. The diptych is available for inspection by all members of the Bar in the office of Barristers' Chambers Limited, by appointment. The modern entries are reprinted herewith.

McPHEE *(Makfee)* (origin obscure, possibly Gothic Macfeoan to squat, or Sanskrit maccveeion, a water course).

A. Substantive 1. A dilatory rogue, a maker of false excuses.

(a) "For who would bear the whips and scorns of time, Th' oppressor's wrong, the proud man's contumely The pangs of despised love, McPhee's delay." (Shakespeare)

(b) "Here am I, an old man in a dry month, Waiting for McPhee". (T. S. Eliot 1917)

2. Inexplicable absence (1744); **3.** Excuse for absence Court (vide Essoign)

B Verb 1. To omit or eschew appearance. **2.** To create a gap or hiatus. **3.** To leave a lacuna. **4.** To fail to welcome, be inhospitable **5.** To be silent.

CENTENARY (from the Urdu *Sentenri*, a savage feast at which the women of the warrior caste were temporarily released from purdah)

Substantive 1. An occasion of wanton mirth, a celebration **2.** A celebration, esp. of an anniversary of uncertain period, thus 100, 115 or 124 years. (Meaning 2 has given rise to the false etymology from the Latin *centennius*, leading to the corrupt pronunciation *senteenary*. The phonetic spelling of the Urdu original is the preferred guide).

M. CRENNAN

SPORTING NEWS

Those who had backed Palooka at Flemington during the Spring carnival were heard to utter some expletives when that chaffbandit saluted the Judge in the Ballarat Cup on the 21st November 1984. This day is deemed to be a public holiday at Ballarat and coincidence had it that Peter Young was on circuit in that vicinity during the week. He was about the only person with a smile on his face when it won because its previous run at Flemington had been a shocker. Young is a part owner of the horse and odds of about 30 to one on the tote may have explained his apparent mirth. It is believed that first prize was in excess of $20,000 with a $4,000 trophy. Unfortunately, the winnings had to be shared amongst other owners.

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Most of us do not relish having to go on a view. Whether it be to inspect some intersection, assess the quality of stumps under a house or run the risk of falling on some slippery hospital floor — such chores are generally regarded as unwelcome.

On the other hand, how would you like a 3 or 4 days trip to Vanuatu to view an island! This was the unfortunate fate which befell Charles Q.C. and Macaw a few months ago during the depths of winter. We cannot go into the details of the view as it is the subject of litigation, but we would welcome an increase in litigation of this kind.

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Scotty Macleod spent his 50th birthday in India. He apparently did not regard the occasion as one for public celebration. He describes his trip as a fact finding tour and claims, for some reason or other, that he made sure he visited the Supreme Court in Delhi. He meandered through Indian villages - attended a Hindu wedding; went to a cremation ceremony on the River Ganges and hiked through Katmandu. He visited the famous hotel where parts of "Jewel in the Crown" were shot and witnessed some poor groom arrive at his wedding on an elephant.

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Crossley has had success in more than one way in recent times. Competing in a "Sparrow" with his son and daughter, he won the Club Championship for the Merricks Yacht Club for the season against all classes. In his case, ballast was never really considered a problem although we have it on good authority that he "bottled" on one occasion during the events. Attempts by him to re-enter the craft led to predictable joviality amongst the onlookers and his reaction ill behoved a Club Champion.

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Skiing enthusiasts have likened the exploits of Arthur Adams to those of the legendary Cliff Young. Competing in the Veteran's Cross Country Ski Run between Mt. Hotham and Fall's Creek, he ground the opposition into submission and won by approximately one minute. One competitor matched him for most of the 13 kilometre trip but he finally succumbed to the superior staying strength of Adams. The terrain was extremely taxing and at stages competitors had to remove skis and run through a creek. When it was later discovered that he had won despite having a broken ski, suggestions are being made that the event will be conducted on a handicap basis next year and not be a scratch event.

Following the race Adams spent a short time at the nearby hotel. He returned to Fall's Creek and was asked by his wife if he had been drinking. He truthfully replied that he had only been in the pub for a short while and only had time "for a pot or two". She was apparently content with the reply. She was unaware that the bus trip between Fall's Creek and Mt. Hotham is an extremely long and thirsty one.

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If one turns to Page 1288 of the November 1984 issue of the **Law Institute Journal** he or she will observe two Photos. One is of 15 smiling members of the Bar's victorious hockey side and the other is of the losing Law Institute side. Tom Lynch appears in the latter photo as he was seconded by the opposition to be their goalkeeper. The match was played in pouring rain on the 3rd October 1984 and Balfe captained the winning side. Elizabeth Murphy was team nurse and gave treatment to the opposition for a bruised reputation. The team adjourned to the Clyde Hotel in Carlton for celebrations.

FOUR EYES

FROM OUR EASTERN CORRESPONDENT

It is always interesting to stand back and see oneself through the eyes of outsiders.

The following article from the **South China Morning Post** of 20th October 1984 has been provided by Linda Dessau and Tony Howard who will be themselves returning to Melbourne next March after a term as Prosecutors in Hong Kong.

CLOSING TIME AT THE BAR?

Guess what the latest topic of conversation is on the legal circuit?

No, it's not about briefs or about judges but about travel

And guess where to?

No, it's not to exotic destinations in Fiji or the Caribbean but to the land of "Oz".

For the past year or so, ever since the countdown to 1997 took on frantic proportions, our legal bigwigs have been gradually sneaking down to Australia en masse, to get themselves admitted to the Bar of Victoria, as a kind of insurance policy.

Up to now, the tiny Australian state has welcomed our barristers and solicitors with open arms as anyone who qualified in England and was called to the English Bar is almost always admitted without objection

The major reason is that there are no residential requirements attached to being admitted in Victoria, which applies to all the other states.

For as little as A$550 (about HK$3,600), a local lawyer can get an Australian law firm to arrange the whole package — to file the application in the High Court, to get it stamped, get it registered and to let you know when you are called

However, all that seems poised to change at the end of the year which is why the big rush is suddenly on

A few lawyers who have recently come back say that they seem to have made it in the nick of time as they were told legislation was in the pipeline to alter the admission criteria to bring them into line with the other states

They say that no official announcement was made to this effect as this might create some sort of an exodus from Hong Kong.

One barrister estimated that at least 20 per cent of the Hong Kong Bar had gone through this procedure

Another solicitor said that he did not know of any solicitor who had not qualified in England who had not registered in Victoria

"There are many names of local solicitors that appear on the letterheads of several Australian law firms," he said

"They are not practising now but might at a later date".

(In Australia, no distinctions are made between a barrister and a solicitor although there are specialist advocates)

Many admit that they have done this as a safeguard to 1997 in case there is a need to leave

Victoria is the only jurisdiction in the region — or for that matter in the world — that recognises their qualifications and admission is irrevocable

"There's no harm done," said one barrister, noting that if he could establish that he practised in Victoria for at least three months, he was eligible to apply for admission to the state of New South Wales — a far more lucrative market

Others see that getting admitted there means getting a foot into Australia and might go to some extent to helping them meet the strict immigration requirements that apply

"Besides it was fun," said another barrister who went down with a group of fellow lawyers

"Instead of taking the wife on a trip to Japan, I took her to Melbourne," he said

"And if you've ever been to Melbourne, you'll know what it means to have company"

By way of interest, Howard says that an Australian practitioner will be admitted to practise in Hong Kong only after five years' residence in the Colony.

VERBATIM

A character witness was called. He gave his name.
Q. Your occupation.
A. Retired . . . gentleman.
His Honour: What were you before you were a gentleman?

Cor Judge Lazarus
29 November 1984

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The phone rang in Chambers.

"Hello" said a voice, "it's Holdings here, we want you to get someone for No. 1 Board tomorrow".

Counsel was not quick enough. The message did not make sense and he asked for it to be repeated.

"How did you come to ring", he asked.

"Well we rang the switchboard and asked for one of the Clerks" said the voice.

So of course the call was switched through. To Ron Clark.

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His Honour was in the process of charging a civil jury:

> "You understand, members of the jury, there are three criteria for appointment to judicial office. First, you have to have failing hearing; secondly, you have to have failing sight and. thirdly, you have to be conceited."

Cor. Judge Cullity
Brooks v. Arnold,
1 November, 1984

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Stott Q.C. was taking Mr. J. Bryant Curtis through his evidence in chief:

Q. Did you form an opinion Doctor . . .?
A. Were you going to say something else!
Q. As to what injuries the Plaintiff suffered as a result of the collision?
A. Well I wasn't going to give a philosophical opinion on the meaning of life nor was I about to express an opinion on the outcome of the American Presidential Elections.

Cor. Judge Read and Jury
Geelong
7 November 1984

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For those with an apprehensive eye to things to come, Acts Interpretation Act 1958 (6th Reprint) provides a clue:
"S.32 Every Act passed by the president or any future Parliament . . ."

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The Taxation Commission was obtaining a Winding Up Order.

Solicitor for the Petitioner: ". . . in this matter, Your Honour, the liquidator has not nominated a bank."

Starke J: "Don't worry about that, I'll nominate one. I only know the address of one bank in Melbourne. That's my own bank. (Pause). Don't think I have any partiality to that particular bank because I haven't.

Practice Court
4 October 1984

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"A spokesman for Mr. Coldrey said negotiations over the transcripts were continuing between Mr. Coldrey's office and Mr. Justice Hope. 'Hope is not completely dead here'," the spokesman said.

The AGE
29 November 1984

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A mother was giving evidence of how her injured son was faring.
Counsel: Is he enjoying the fitness centre attendance?
Mother: I think he does, but actually, in all, if you don't mind me saying, I think he enjoys the scenery more than what is actually there in the sense of -- you know the young ones today call girls birds, I don't know whether you have heard the expression. Your Honour? In our day they might have called them sheilas - did I say the wrong thing did I?
McGarvie J: No, you didn't say the wrong thing.
Mother: I'm sorry if I did.

Bolitho v. Shang & Ors.
Cor. McGarvie J. & jury
of six
19 November, 1984

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This issue's plain speaking award goes to Jenkinson J.:

The etiolation of delictual colour in s. 32(1) derives, in my opinion, not only from merger of the tortious liability in a judgment or from extinction of the tortious cause of action by payment of a claim, satisfaction of either of which gives rise to the cause of action created by the sub-section, but also from the use in the sub-section of the phrase "as a debt". Neither of those considerations obtains in respect of s. 113(1).

Ryder v. Hartford Insurance Co.
(1977) V. R. 257 at 266

● ● ●

Chris Ryan was appearing for an accused charged with various thefts and burglaries. His witness was describing how the arresting detective had assaulted the accused with a claw hammer, striking him in the stomach and on the fingers. Outside, renovations were in progress. The sound of a hammer could be heard.

Priest (prosecuting) mutters: "He must be interviewing another suspect".

R. v. Ronalds
Cor Judge Howse and Jury
20 July 1984

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A Mr. Touzeau was giving evidence on the subject of music.

Mr. Touzeau: Rostropovich. A most marvellous person. Wonderful opportunity he has had in his life because again he had the potential of being a great player when he was a student and what do the Russians do during the war? Buy him a house in the mountains and give him the best teacher they could get, send him up there for five years and he turns out a great man indeed. But what a physique he has got too!

Murphy J: Big man.

Mr. Touzeau: Strong!

Murphy J: Thank you very much for your help.

Mr. Touzeau: That's a pleasure my dear.

Whitford v. King
Cor. Murphy J. & jury of six
19 October, 1984

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Male Chauvinist SM to female member of Counsel: "You are seeking costs — you better hand up your brief so I can work out the costs."

F.M. of C.: "I had better put something on it then."

M.C.SM: "OK — as long as it's not the Shopping List".

Cor Dugan SM
District Court
7 September 1983

● ● ●

SOLUTION TO CAPTAIN'S CRYPTIC No. 50.

	1 A	2 C	Q	3 U	I	4 T	T	5 A	N	6 C	E	
7 C		O		N		R		T		U		8 F
9 O	W	L	E	T		10 U	T	T	E	R	E	R
N		D		I		E		O		I		U
11 S	U	R	P	L	U	S		12 R	E	A	M	S
U		E				T		N				T
13 M	A	Y	H	14 E	M		15 O	S	T	16 L	E	R
M				N		17 P				O		A
18 A	P	19 I	N	G		20 H	A	21 R	I	C	O	T
T		R		L		E		A		U		I
22 E	L	I	S	I	O	N		23 B	A	S	S	O
D		S		S		O		B		T		N
	24 J	H	P	H	I	L	L	I	P	S	J	

MOVEMENT AT THE BAR

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