VICTORIAN BAR NEWS

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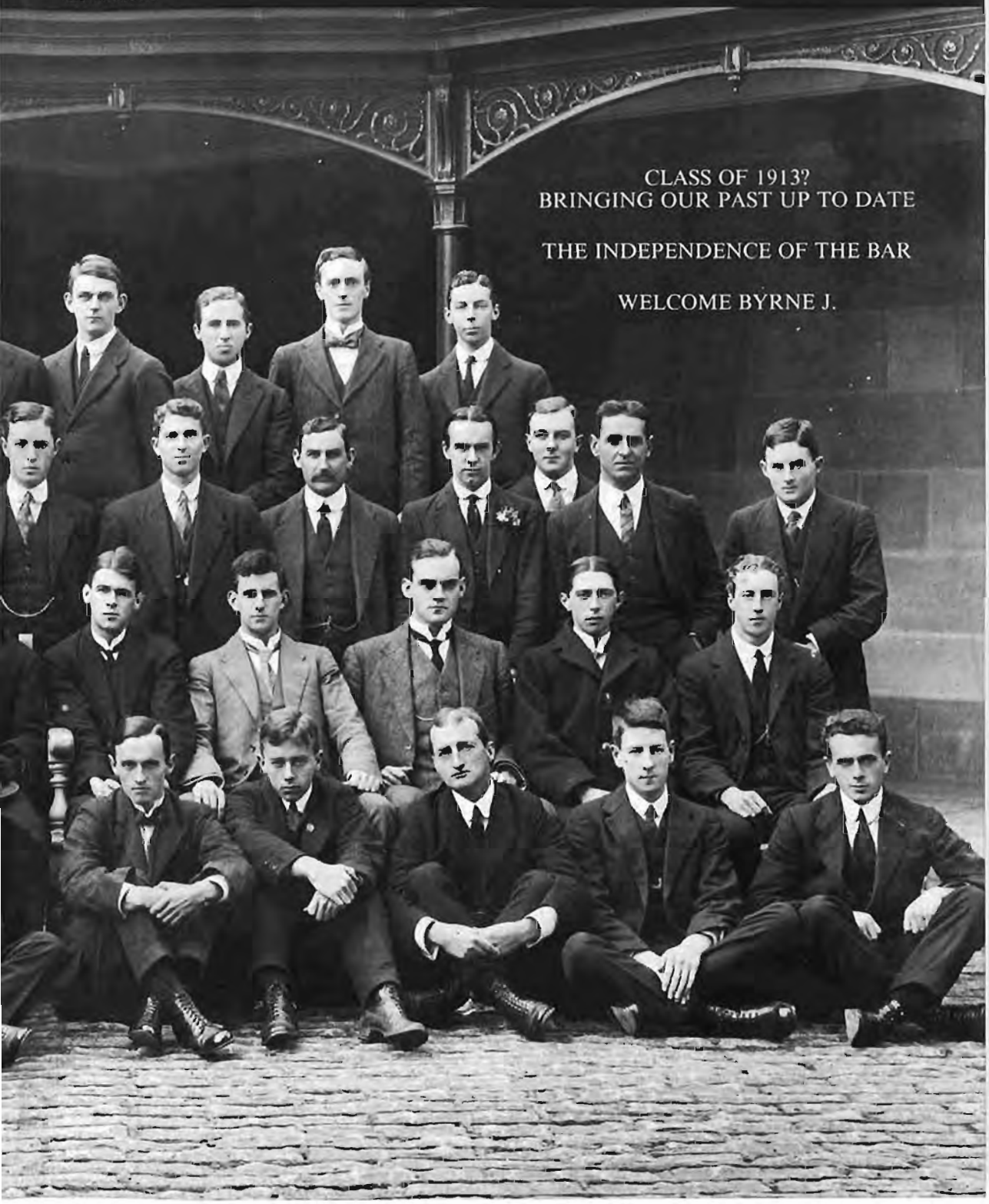
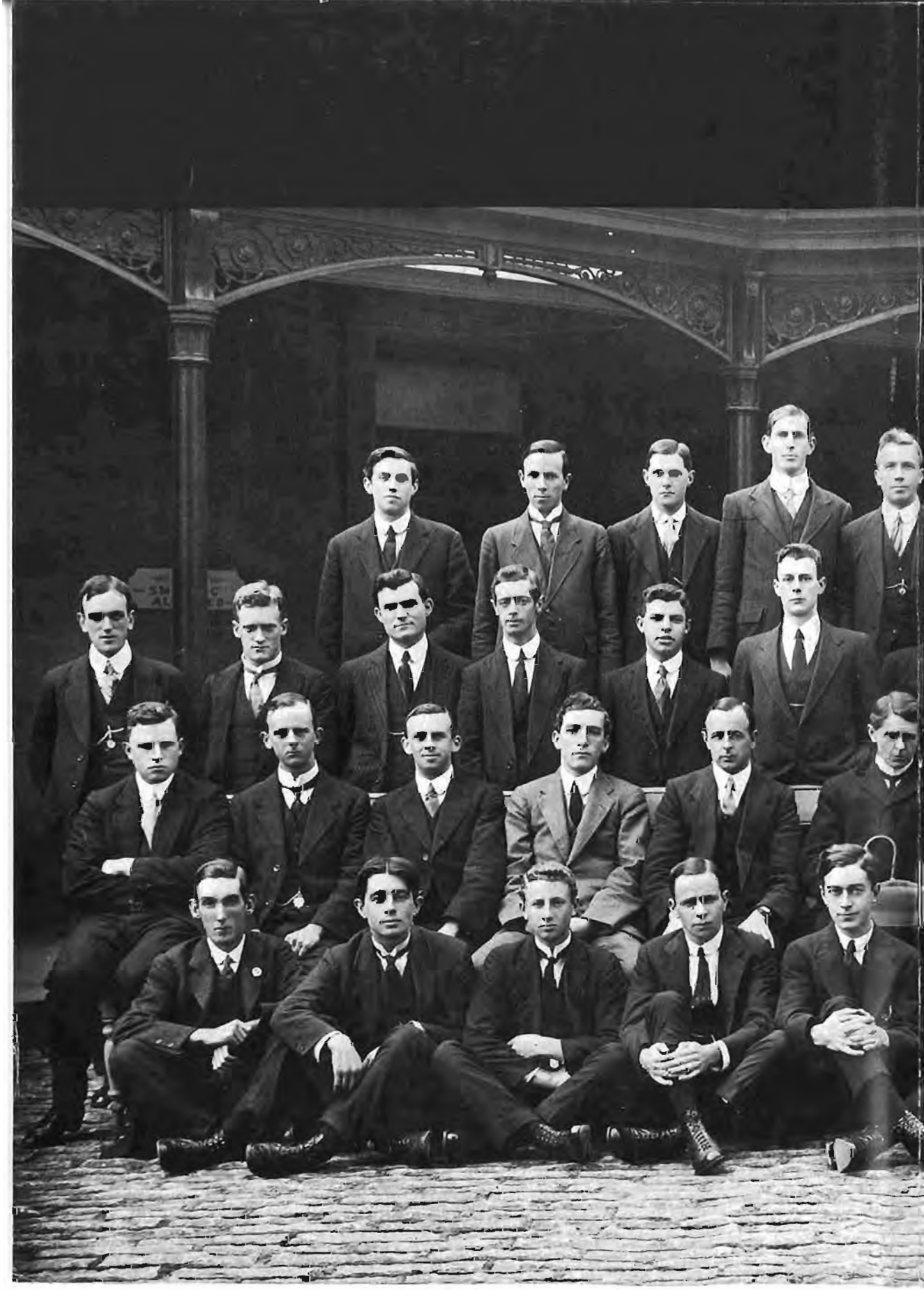


CLASS OF 1913?
BRINGING OUR PAST UP TO DATE

THE INDEPENDENCE OF THE BAR

WELCOME BYRNE J.



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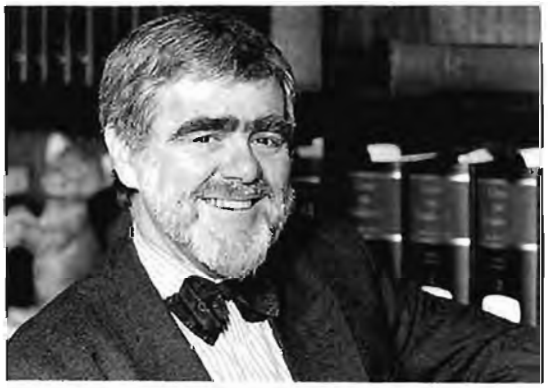
Bar's archivist Alison Adams: Preparing the way for a future historian.



The Supreme Court welcomes former editor Byrne J.

Robert Kent asks — why have an independent Bar?

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EDITORS' BACKSHEET

THIS ISSUE OF THE BAR NEWS STRIKES an unusually serious note. The legal profession and the Bar are under attack, in the *7.30 Report*, by Senator Chris Schacht in *The Age* and on *A Current Affair* and by the Honourable Mr. Justice Kay before the Senate Cost of Justice Inquiry. At a different level of responsibility and logic three discussion papers recently published by the Victorian Law Reform Commission contain proposals which if implemented could significantly affect the future of the Bar and access to justice in this State.

Extracts from the comments of Kay J. are set out in this issue together with a commentary thereon by Kent Q.C. Of the statements made by Kay J. the *Law Institute Journal* (not always the greatest supporter of the Bar) said in its September 1991 issue:

> "It is . . . disappointing when a member of the judiciary, who is well placed to make positive suggestions leading to an improvement in the court system, resorts to lawyer-bashing when asked the solutions to the high costs of conducting court cases."

The Age on 11 August 1991 ran an article with the following heading:

> "As legal costs rise the poor have been pushed off the scales of justice
>
> SOME CAN'T AFFORD TO PLEAD NOT GUILTY"

The article then contained a picture of the back of a bewigged head of a barrister. Underneath this picture was the following:

> "Too high a price on his head? The greed — is good — credo is still reverberating around the profession."

The article then went on to quote cases about lawyers and barristers becoming too greedy and pricing justice beyond the means of the very people it is supposed to serve. However hidden in the final column of the article were some interesting statistics and it is useful to quote them:

> "According to a recent NATIONAL INSTITUTE OF LABOR STUDIES REPORT ON LAWYER INCOMES, lawyers are not better paid than other professions, such as accountants or doctors, but include in their numbers some extremely highly paid members.
>
> "About fifteen percent of the Senior Counsel surveyed earned more than $200,000.00 a year,

$60,000.00 above the average for Senior Counsel and more than three times the average for a barrister or partner in a law firm, who earn $62,000.00 and $68,000.00 respectively.

"The median income for the whole profession (based on 1988/89 incomes) was $52,379.00 for men and $39,051.00 for females."

The key question to the argument is whether these earnings are too high. The average earnings for a barrister are $68,000.00 a year and the median for the whole profession is $52,379.00 for men and $39,051.00 for females. Can anybody seriously argue that these incomes are too high having regard to the difficulty and responsibility involved in the job? Just because there is a commercial market in which leading Q.C.s and other senior counsel are able to be paid large fees, in excess of the majority of the Bar, does not mean that the whole of the Bar is over-priced nor that it needs radical reorganisation.

Do these attacks on the legal profession and in particular the Bar reflect the true feelings of society? A strange aspect of Victorian society is that entrance into law at university requires higher marks than any other subject including medicine. If society believes that lawyers are bad, greedy, and amoral why do they want their sons and daughters to enter the profession? What happens if a son or daughter gets into the profession; do their parents suddenly change their opinion as to lawyers and their worth?

Why isn't there a Senate inquiry into the cost of sportsmen? Australian society seems readily to accept that those born with a sporting talent can be rewarded with huge amounts of money. Greg Norman can be paid a fat fee for simply turning up at a golf tournament. Tennis stars can be paid $100,000.00 just for an exhibition match. Nobody seems to question the vast amounts of money paid to those with the ability to drive a fast motor car or motor bike. Similarly film and media stars are expected to be paid vast amounts of money. The media do not question this. People with sporting or acting talent can be paid large amounts of money. However, people with intellectual and legal talent seemingly do not deserve to be rewarded with large monetary gain, even though these people are actually solving the disputes and problems of society.

This is a strange situation. The "tall poppy chip on the shoulder" syndrome works strongly against professionals. It does not work so strongly against sports and media stars.

Why isn't there a Senate inquiry into the cost and efficiency of journalists and the media? Is the public getting value for money for the press? Are journalists cost-effective? Do we need people standing in the street with microphones talking about legal cases and other events? Can a journalist get a simple set of facts correct? Perhaps the press itself should be pursuing these issues if it considers itself a profession like the law and medicine.

The "tall poppy chip on the shoulder" syndrome seems to contrast starkly with the lack of the puritan work ethic in Australia. Americans love to say that they dislike lawyers. However, if a lawyer or, anybody else for that matter, is successful, and by his success is paid monetary rewards commensurate with the work that he puts in, then Americans will admire that person. They will want their sons and daughters to aspire to that. That is not to say that the "greed is good" ethos should dominate society. However, Australian society has gone too far the other way; it seems to be saying that those with talent who pursue a profession should not be rewarded. If there is a market to provide the payments to lawyers, should that market be limited? The answer is "no".

On a happier note we are delighted to see that the precedent of appointing to judicial office editors of the *Bar News* and members of its editorial committee continues. We welcome David Byrne's appointment and wish him well. David, along with David Ross Q.C., was editor of the *Bar News* for over ten years up until 1986. David delighted in actually pasting together the magazine. This tradition has been discontinued by the present editors with some relief. Many nights were spent at David's house measuring columns to fit pages and ruling up squares for photographs. This task was assisted with some good port. We trust that this experience will assist His Honour greatly in the sticking and pasting of his future judgments. Perhaps without the aid of the port.

The Editors

CHAIRMAN'S CUPBOARD

THOSE WHO VIEW THE BAR FROM THE vantage point of the Chairman's Cupboard are not necessarily wholly detached observers. After 21 years at the Bar, the last 18 months of which were spent as close to the cupboard as possible, I have grown quite fond of the place.

Fondness sometimes leads to foolishness. Making due allowance for that possibility, I am nevertheless satisfied that an objective assessment of the work of the Bar, and of its value to society, would conclude that the Bar provides on a daily basis a service fundamental to the proper operation of a democratic community.

The legal profession need not be structured as it is in Victoria. The rule of law is not dependent upon the existence of a separate Bar. On the other hand, a separate Bar provides a readily accessible pool of advocates, many of them specialists in some other of the law's disciplines as well, to whom all solicitors from whatever kind of practice may turn. The benefits which flow from this circumstance have been analysed on many occassions. I need not repeat that analysis here. In my opinion, those benefits cannot be provided, or provided so well, by any other system. To them one may properly add the observation that the vast majority of barristers are acutely aware that if they do not discharge their responsibilities as well as can be done, and at an acceptable price, their instructing solicitor will instruct somebody else next time.

This gives rise to one conclusion above all others. It is that the present organisation of the legal profession in Victoria is best suited to the needs of litigants — and, indeed, of all those who for one reason or another wish to have recourse to lawyers.

The preservation of the independent Bar of Victoria must therefore be the central theme of the Bar's response to all the law reform of all the law reformers. This aside, there remains much room for flexibility. All the recent publications of the Victorian Law Reform Commission have by now been carefully analysed by the Bar Council, assisted by numerous others — but in particular, Connor Q.C. and Michael Crennan. We have approached the task with minds which are as open as possible; we recognise, and have attempted to make allowance for, our natural bias in favour of an institution (the Bar) for which we have affection and respect. We remain convinced that the community is much better served by an independent Bar than by a wholly-fused profession, albeit one with specialist advocates scattered here and there — generally, without true independence and captive to the overheads which large firms cannot avoid.

This being the view, as I understand it, of the Bar Council, we shall of course be charged with complacency. I reject that charge. I have stressed throughout my period as Chairman that the Bar Council will look carefully and with an open mind at proposals for reform. We approach that task on the basis that reform is appropriate where it leads to improvement. It is not appropriate simply because politicians need reform as a justification for their posturing, or because it might improve the image of the Bar.

The rule of law is not dependent upon the existence of a separate Bar. On the other hand, a separate Bar provides a readily accessible pool of advocates, many of them specialists in some other of the law's disciplines as well, to whom all solicitors from whatever kind of practice may turn.

I do not altogether dismiss the importance of image. But I disagree with those who say that the Bar is perceived in an unflattering light by the public, and that the initiation of reform — any reform — is the only way to do something about it. I accept that politicians and the media like to portray the Bar as being conservative, inaccessible and elitist. The fact that such a description is facile to the point of meaninglessness will never be allowed to stand in the way of a politician's ego or a journalist's story. No public relations managers, acting on behalf of the Bar, will significantly change that. As for the general public, it is doubtless happy to accept what the media

tell it — but most people would not spend a total two minutes of their lives thinking about the organisation of the Bar; and no amount of public relations work will change that, either. How many members of the public would see the Bar in a new light if (for example) we were to make clerking optional?

The conclusion is that reform instituted simply to improve the image of the Bar will not have any material effect on our image, but might result in a diminution in the Bar's ability to serve the public. On the other hand, reform which effects improvements while preserving that which should be preserved is wholly desirable. If we achieve that, by all means let us spread the word to all who are willing to listen. And if the engagement of public relations consultants is a cost-effective means of broadcasting our achievement, by all means engage them.

It is said that the Bar must reform itself or have (probably unacceptable) reform forced upon it. This is a consideration which must be taken into account, although it does not say much for the politicians. I accept that the Bar could not look to the public for meaningful support — not so much because the public is actively hostile, but because it is apathetic. I also accept that institutions which stand inflexibly against the tide of history are broken in the end. We must be on guard, however, against using this argument to justify the sacrifice of principle on the altar of pragmatism.

We must also remember that wholesale changes to Bar rules cannot be effected by the Bar Council alone. It does not have the power and, even if it had, ordinary fairness dictates that the Bar as a whole be involved in the process.

Nothing stands still. Change is inevitable. The only question is whether that change will retain that which is beneficial, while discarding that which is not. Real reform is not well served by those who, seized with the urgency of the moment, equate action with progress. Equally, the interests of the Bar are not served by an obstinate refusal to move.

Which brings me, in conclusion, to another aspect of the interests of the Bar. They have been very well served over the last 12 months by the Bar Council, by the Executive Committee and by the Bar staff. Ed Fieldhouse and Anna Whitney continue to give invaluable support. They work with an admirable group of colleagues, often under great pressure. Yet the job is always done, and done well. For my own part, I have been sustained by the friendship, wisdom and support of Kirkham Q.C. and Hansen Q.C. Indeed, their friendship will remain as one of the greatest of life's gifts.

David Harper

ATTORNEY-GENERAL'S COLUMN

THE REFURBISHMENT OF MELBOURNE'S Supreme Court building will continue this financial year.

The works, which will cost $1.4 million, include the refurbishment of the ground-floor corridors, the creation of two additional courtrooms and fire prevention facilities in the Supreme Court library. These works will assist in the functioning of the Supreme Court and provide better facilities for court users. The refurbishment programme will be carried out over two years.

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These works will build on the upgrading undertaken in the past few years when the first-floor corridors were totally refurnished with the wiring enclosed, repainting, reproduction period lighting installed and the floors carpeted; two additional judges' chambers created, a new Master's Court built; four jury dining rooms built and a massive increase in funding to the Supreme Court library which has enabled new books to be bought, the library facilities upgraded and work started on a computerised cataloguing system. In addition, all judges now have a lap-top computer.

The continuation of the court computerisation programme will see the Magistrates' Court civil system operating at the Melbourne Magistrates' Court with progressive State-wide implementation. $200,000 has been provided to improve facilities at the County Court including furnishings and improvements to the Jury Pool Rooms.

Some $60,000 has been provided to call for and evaluate submissions for the construction of

a multi-million dollar County Court on the Royal Mint site. A further $55,000 has been allocated to call for and evaluate submissions on either the construction of a new Melbourne Magistrates' Court or a fit-out of an existing commercial building.

Closed-circuit televisions will be introduced into selected courts for use by child sexual assault victims and protected witnesses. This will enable the proclamation of the final sections of the *Crimes (Sexual Offences) Act* which allow child sexual assault victims to give evidence through closed-circuit television to reduce the trauma of testifying.

The installation of teleconferencing facilities in courts is being investigated so that, for example, busy or interstate expert witnesses can testify with minimum disruption to their working day.

LEGISLATIVE PROGRAMME

In addition to the many Bills lying over in the Parliament from the last session to be debated in this session, some interesting new legislation will be introduced.

WHITE-COLLAR CRIME

A draft Bill is to be introduced which will expedite prosecutions in serious and complex fraud cases. It is based on the United Kingdom Serious Fraud legislation, the *Criminal Justice Act* 1987, which has been successful in speeding up the process of major white-collar crime cases before the courts.

If the DPP considers that a case is of sufficient seriousness and complexity he can give a notice of transfer which immediately transfers the case to the trial court. A judge will then be appointed for the duration of the case and may conduct a preparatory hearing to clarify issues, investigate ways to assist the jury's comprehension of evidence, make preliminary decisions regarding questions of law and admissibility of evidence. At this preparatory hearing the judge has wide-ranging powers including requiring full disclosure of the prosecution case to the defence in the form of a case statement. The judge may also order the defence to disclose in general terms the nature of its defence and any objections it takes to the prosecution's case statement. The defendant is also entitled to apply to the court for a dismissal of the case on the grounds that there is insufficient evidence to support the conviction. Hearing this application a judge would hold a preparatory hearing and take oral evidence if the judge believed it would be in the interests of justice to have that evidence heard.

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Greater involvement of all parties in the early stages of prosecution and the narrowing of the contentious issues will ensure these cases are pursued with requisite speed and thoroughness, avoiding unacceptably long delays often associated with major fraud cases. The procedure facilitates quicker prosecutions while including safeguards to protect the rights of the defendant.

With the extra resources provided to the Australian Securities Commission, which has its own investigative functions, this type of legislation should help restore Australia's reputation and encourage international investors to return.

CONTEMPT

I also intend to reform the law and procedures relating to contempt of court. The legislation will remove many of the uncertainties surrounding the present law of contempt. It will address the issues which in the present law limit freedom of expression, the summary procedures employed by the courts to deal with those committing contempt, and provide the courts with more effective procedures to protect and enforce their decisions. It will be based on the Australian Law Reform Commission's report and draft Bill.

CRIMES (SEXUAL OFFENCES)

Most of the Crimes (Sexual Offences) Bill has now been proclaimed. This Bill endeavours to reduce the trauma for sexual assault victims that is involved with taking their case to court whilst maintaining the rights of the accused. The remainder of the Act to be proclaimed deals with the introduction of closed-circuit television as a means of giving evidence for child sexual assault victims to minimise the trauma of testifying. These facilities are expected to be available in the new year.

CASE TRANSFER

This Act, which encourages flexible and efficient transfer of civil cases between the jurisdictions, has been proclaimed to take effect on 1 October 1991.

CULPABLE DRIVING

The Government is awaiting a final report from the Law Reform Commission following the release of its discussion paper on the law relating to deaths caused by culpable driving.

The discussion paper recommends abolishing the charge of culpable driving because many of those presently charged with this offence should be charged with manslaughter: creating a new offence of "causing death or very serious injury by dangerous driving" with a maximum penalty of seven years imprisonment; allowing alternative verdicts to be used so that juries can convict of a lesser offence if that is warranted.

Jim Kennan
Attorney-General

IT'S YOUR BAR COUNCIL!

A CONSIDERABLE AMOUNT OF THE BAR Council's deliberations during this quarter were devoted to membership matters including consideration of applications for leave of absence; applications to sign the Roll; Disciplinary Tribunal matters; requests to be removed from the Roll; removal from the Roll of Counsel in arrears of subscriptions and in default of payment of indemnity insurance.

DECISIONS OF THE COUNCIL

1. The "Young Barristers' Committee" be renamed the "New Barristers' Committee".
2. Counsel could be permitted to engage in the Duty Lawyer Scheme if properly instructed by a solicitor on behalf of the LACV, each client referred is given proper and adequate attention and no client is prejudiced by counsel acting for others.
3. To submit the Bar's views to the Senate Cost of Justice Inquiry: Lawyers' Fees including a response to remarks made by Kay J. of the Family Court.
4. To advise the Government of the Bar's view that no County or Supreme Court judge be removed except on an address from an absolute majority of each House on grounds of proved misbehaviour or incapacity.
5. Adopt a new form for applications to sign the Roll.

MATTERS CONSIDERED BY THE COUNCIL

1. Independence of the Judiciary (6 June 1991).
2. A proposal from the Public Transport Users' Association to rename Flagstaff Station as "Law Courts Station".
3. A proposal by the Queensland Bar Association to consider direct briefing of counsel by certain professionals.
4. The Law Reform Commission's Cost of Justice Report.
5. Replacing Four Courts Chambers.
6. Allegations of "poaching" by some clerks.
7. The LIV's draft *Working With Barristers — a Guide for Solicitors.*
8. The *7.30 Report* on the Cost of Justice.
9. Appointment by the Bar of public relations consultants.
10. Responses to the Law Reform Commission's Discussion papers.
11. Accident Compensation Tribunal proposal concerning application handling.
12. Procedures for dealing with applications to sign the Roll.
13. Whether the Bar Council should retain the absolute discretion to grant or refuse applications to sign the Roll.
14. Collection of fees directly from clients.
15. Distribution of Bar Roll to members.

YOUR COMMENTS

Bar News still welcomes comments from readers on these issues and indeed any issues that readers consider should be, or have been, dealt with by Your Bar Council.

Come next June, will you have any money left to put into super?

A surprising number of barristers arrive at the end of the financial year struggling to pay taxation, with nothing left for superannuation. This is because they have not put aside money equal to their future tax liability during the year, let alone saved to take advantage of tax-effective superannuation.

Now is the logical time to set up your superannuation plan, or increase your contributions to an existing scheme, month by month. Besides an average saving of up to 48.25% tax on every dollar you are able to put in, you will be building your future goal of financial independence.

I would like to show you a range of choices to get you in good shape for 30 June, 1992.

I will review any existing superannuation plans, and if necessary establish a supplementary plan to ensure that your contributions will deliver sufficient dollars in retirement to match your goals.

Threats to your income — how to be prepared for the worst

Accidents do happen! Risk analysis and management is about being prepared for the worst, facing up to the fact that you may not always be able to work. Ill health will affect your ability to earn enough to live, retain your family home, and educate your children.

Assess your financial position now — ask yourself these 10 questions

1. Will your life insurance payout in the event of your death only pay off your mortgage? If all your family own is the house, what are they going to live on?
2. How much a year are you sending forward (saving) for the time you wish to be financially independent?
3. Does your lump sum disability insurance match your family's life-style? Have you got disability insurance?
4. What will be the real value of your superannuation retirement payout taking into account the effect of in-

I can help you plan to avoid the pain and suffering that families endure when suddenly they do not have the income to maintain a normal and happy life.

To assist you in evaluating your real risk it is important to conduct an in-depth 'Risk Profile and Analysis'. *This will tell us precisely how much money you have to provide in the event of your inability to work due to accident or illness, or in the event of your death. We will review the adequacy of your existing life and disability insurance.*

OT

BY Mac Healy.

flation on money values when it becomes available to you?

5. When you do want your retirement benefit to be paid to you?
6. Have you considered the Capital Gains Tax ramifications on your estate in the event of your death?
7. Do school fees always seem to come due for payment at the time when you are strapped for cash?
8. Does your income protection cover provide inflation proof benefits that would adequately maintain your lifestyle if you fell seriously ill?
9. Do you have a disciplined approach to providing for sudden cash needs?
10. Do you have a strategic Investment portfolio?

Quality financial management advice for members of the Victorian Bar

Our Mission Statement is *to provide quality financial management advice to members of the Victorian Bar.*

This involves providing clients with a description of all the financial risks to which they are subject, and an ongoing management plan to ensure that at all times they are adequately covered for life and disability insurance, and that their superannuation plans meet their retirement goals.

Goal setting is the key. Goal setting in terms of future financial needs, education of children, acquisition of assets, being financially independent, planning to reduce the tax burden are all things we can help you do better.

Call Mac Healy now to discuss your own case.

Don't overlook the share market in your investment plan

In conjunction with one of Melbourne's oldest and most respected stockbrokers, I can help establish and manage a portfolio of blue chip stocks, as part of a total investment package. *There are significant advantages in negatively gearing a quality share portfolio.*

These include fully deductible interest on the borrowings, franked (tax paid) dividends, capital growth, and virtually immediate flexibility 'in' and 'out'.

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CRIMINAL BAR ASSOCIATION REPORT

CRIMINAL LAW REFORM

MUCH OF THE WORK OF THE COMmittee on behalf of the Association in the last twelve months has been to contribute to law reform debates.

Areas in which the Association has been active either by way of written submission or participation on relevant committees or at conferences include:

- ☐ proposed reform of the Commonwealth Criminal Law and development of a model uniform Code for criminal responsibility;
- ☐ the *Sexual Offences Act*;
- ☐ the *Penalties and Sentences Act*;
- ☐ legislation to address the High Court decision of *Latoudis* which acknowledged that a successful defendant in summary proceeding was entitled to costs;
- ☐ dangerous offenders' legislation;
- ☐ pre-trial disclosure in Magistrates' Courts;
- ☐ Law Reform Commission Report on Mental Malfunction and Criminal Responsibility;
- ☐ Law Reform Commission Reference on the Mental Element in Rape;
- ☐ Law Reform Commission Discussion Paper on Death Caused by Dangerous Driving.

PRACTISING ISSUES

Fees and their Funding:

It is not unexpected that in straitened economic times legal fees, including those of barristers, should be the subject of scrutiny by those who pay and our critics. However, from the point of view of the Criminal Bar there have been developments which may represent the threat of an erosion of fee levels.

First, there are proposals that persons whose assets have been frozen under the Commonwealth or State Proceeds of Crime legislation should no longer have released from those assets funds for reasonable expenses, but rather should be required to accept legally-aided representation at the usual rates. Not only does this proposal have the vice that a person who may be innocent and otherwise could afford representation of his choice is now denied that opportunity, but it places the Legal Aid Commission — whose primary function is to fund those who cannot afford their own representation — under further funding pressures.

Secondly, the Legal Aid Commission has recently advised that it is considering putting a cap of $200,000 on the aggregate fees it will pay to all counsel (be it one or six) in a trial. Where this aggregate bill is thought likely to exceed this aid will not be provided at all. Whilst the move has been prompted by a quest for special funding from Government for the defence of long trials, the implications for accused persons without substantial means in long trials and counsel are serious.

The Legal Aid Commission has recently advised that it is considering putting a cap of $200,000 on the aggregate fees it will pay to all counsel (be it one or six) in a trial. Where this aggregate bill is thought likely to exceed this aid will not be provided at all.

Thirdly, the hoary old chestnut of in-house counsel is about again. The Legal Aid Commission has floated the idea of engaging salaried Public Defenders. Further, the DPP has signalled an interest in more salaried prosecutors. There are, too, bleatings from some of our mega-firm solicitor brethren that their capacities will render the Bar significantly redundant. Not all of this is to be rejected out of hand. There may be a case for some salaried Public Defenders and more such prosecutors. However, fundamental to that is that these persons are able, indeed required, to adhere to the fundamental tenets of advocacy — as do our current prosecutors. This can only be achieved by guaranteeing their independence and providing them with a working

environment which permits them to perform the discrete functions of an advocate. The costs of this are not inconsiderable if it is not to be attempted on a cut-price basis. What we think will flow from this is that in the end the Bar and, in particular, the Criminal Bar will be seen as offering good value for the service provided.

In all these areas the Association has been active in making representation to the appropriate agencies also.

Procedural Reforms:

Early in the New Year, the new Fixed Date Listing system for criminal trials in the County Court came into operation. The Chief Judge gave a talk to a well-attended meeting of the membership regarding his aspirations for the system. Apart from the odd hiccup at the beginning and during July, it appears to be working reasonably well.

However, there are other more fundamental procedural changes in the air. There is an increased impetus for the abolition of committals not only in white-collar paper intensive trials but across the board. It will be necessary for the Association to contribute to this also. What is ill appreciated by many proponents of change is that committals often save money for the community by winnowing the weak cases in a fashion that will be difficult to duplicate by internal assessment by prosecution agencies.

More challenging yet are the proposals that there should be a mechanism that can effectively oblige both prosecution and defence to define the issues in criminal trials and prevent the defence from, with impunity, forcing the prosecution to prove at great expense uncontested facts. This requires some retreat from the notion that a defendant can without penalty simply put the Crown to its proof. The extent to which we would as an Association concede this, if at all, is difficult for it is apparent that there is a welling community intolerance of long and costly litigation. Added to this is the more practical and obvious consideration that for every twelve-week trial there could be heard twelve one-week trials!

THE ROLE OF THE ASSOCIATION

Many of the law reform debates seem somewhat remote from day-to-day practice and are also precipitated by media prominence given to narrow interest groups. Thus, we have to contend with agitation in relation to the offence of rape which is directed to doing away with subjective culpability and replacing it with some form of objective standard notwithstanding that there is no agitation that the same be done for what some might regard as the pre- eminent offence against the person, murder. Or that the offence of culpable driving be replaced with an offence of dangerous driving causing death available in the alternative so as to encourage more readily the charging of reckless murder or manslaughter — a proposal which, one would think, should be premised on the present law operating unsatisfactorily in some way. *Au contraire.* It is advanced notwithstanding the Law Reform Commission Discussion Paper's very acknowledgement of there having "been a significant and unambiguous fall in road fatalities in the last 25 years".

The range and extent of the matters outlined above point up one of the difficulties confronting the Association — and, indeed, the whole Bar organisation, I suspect — namely, the ability of such a group to make an effective contribution to the important debates on these issues.

There are going to be ever-increasing pressures to contribute to these debates if the position of an effective independent Criminal Bar is to be maintained. This must be the primary goal of the Association.

The Association has within its membership persons who are often through their great experience uniquely placed to make valuable contribution to these important debates. However, they simply do not have the time and resources to do so in a manner which permits a truly effective contribution. Often, reports are received in handwriting — many criminal barristers do not have secretarial assistance — which creates the obvious logistic problem of having them accurately typed for consideration by the Committee, approved and forwarded to the appropriate body. In these circumstances it is often impossible to compete with the full-time resources of the Government proponents of reform or our kindred organisation the Law Institute.

However, it seems that there are going to be ever-increasing pressures to contribute to these debates if the position of an effective independent Criminal Bar is to be maintained. This must be the primary goal of the Association.

Robert Webster

FAMILY LAW BAR ASSOCIATION REPORT

APART FROM THE HIGHLY SUCCESSFUL and entertaining dinner held by the Family Law Bar Association and reported in the Winter Edition of the *Victorian Bar News*, the Association has been active over the past months in ensuring the Association is heard in matters relating to practice.

Earlier in the year members of the Executive of the Family Law Bar Association met with judges of the Family Court to discuss areas of concern which resulted in the resolution of various contentious issues. In particular, practitioners were of the view that a duty counsellor should not have a discussion with a barrister on the opposing side prior to giving a duty report to the court. This concern was taken up by the Judge Administrator of the Southern Region, Justice Frederico, who after discussions with the court counsellors advised that in such circumstances a barrister should not approach the counsellor who is to give a duty report in the absence of his opponent. The Association was able to resolve a developing and undesirable practice, as such approaches to counsellors (who are independent witnesses called by the court) had the potential to lead to the appearance (or fact) of undue influence being exerted over that counsellor.

The Executive has been active in considering submissions to the Joint Select Parliamentary Committee which was established earlier this year to inquire into and report on certain aspects of the operation and interpretation of the *Family Law Act* 1975. It is believed that this committee was established as a direct consequence of complaints from predominantly male pressure groups who felt harshly treated by the Family Court.

During those months also, the Executive considered a discussion paper of January 1991 on Family Mediation and Guidelines for Legal Aid Funding.

Generally, the area of family law is one of the most demanding areas of legal practice as practitioners in the area advise their clients throughout very difficult and stressful times. This aspect of family law is often underestimated by practitioners in other areas of practice. The Association is supportive towards members and is ready to assist them with problems arising from difficult cases. Family law practitioners are obliged to be resilient individuals, with tolerance, stamina, and resourcefulness in their everyday practice. Apart from the practice of law they are sometimes required to arbitrate, mediate and conciliate for or on behalf of stressed individuals who may have little insight into their legal and personal problems. Given the difficulties of practice in family law, practitioners feel aggrieved by the recent attacks upon fees charged by barristers. Most barristers' fees are set by reference to the relevant scale and marked accordingly. They are also subject to a taxing process if the client so desires. Reports reaching the Association during the past month have indicated that Registrars are adopting a slashing attitude to counsel's fees on taxation, a matter which is being taken up by the Association.

Another concern in this area has arisen from the evidence given by Justice Kay of the Family Court of Australia to the Senate Standing Committee on Legal and Constitutional Affairs. This matter has been taken up by the Bar Council and by the Law Council of Australia. In making extremely derogatory remarks about the conduct of counsel in relation to charging practices and lack of social conscience, His Honour purported to be speaking on behalf of the highly-regarded and influential Family Law Council. Whether His Honour's remarks in fact represented the views of that body awaits clarification. His Honour's remarks are the subject of comment elsewhere in this issue.

On a more positive note, Mrs. Susan Blashki, one of the Association's most valued members, has been appointed a Magistrate. The Association wishes her all the very best success in her appointment. It is certainly the view of the Association that the gain to that court is the Bar's loss, as Mrs. Blashki's cheerful demeanour will be sadly missed.

During August 1991, the Association unexpectedly lost one of its long-standing members, Mr. Michael Kiernan, who practised extensively in this area. Michael's sudden passing was a great shock and is a loss to all. The Association sends Mrs. Kiernan and family its condolences in this difficult time.

All persons wishing to join the Family Law Bar Association should contact either Elizabeth Davis, Secretary, on Ext. 7592, or Clarinda Molyneux, Treasurer, on Ext. 8312.

FAMILY LAW AND PSYCHOLOGY ASSOCIATION OF AUSTRALIA REPORT

MEMBERS OF THE BAR WITH AN interest in family law and psychology may have heard of the formation of the above Society, which now has nearly 100 members.

Earlier this year Judy Hogg, a partner of Hogg Reid, Solicitors, and a psychologist, Sandra Neil, formed the view that it would be beneficial for both family lawyers and psychologists to have available to them an association which would facilitate the exchange of views and information between the two professions.

The first Steering Committee meeting was held at the Law Institute on 27 May 1991. On that evening John Dwyer Q.C. was elected President. Barristers on the committee included John Contwell and Dr. Dan Thompson.

Further meetings were held on 22 May and 3 July and these in turn led to a very successful cocktail party being held at the Law Institute on 29 July. Among the 75 people present were Mr. Justice Mushin, various Registrars of the Family Court and Lorraine Stokes, the Director of Court Counselling, together with many barristers, solicitors and psychologists. John Dwyer gave an excellent speech which explained the need for lawyers and psychologists to have an understanding and respect for each other's role in the area of family law. Sandra Neil responded on behalf of the psychologists.

The current membership fee is $50 and all barristers practising in the family law jurisdiction are most welcome to join.

On 5 October 1991 the Association is presenting a seminar on "Child Abuse and Mandatory Reporting" at St. Hilda's College at the University of Melbourne. It is hoped that Mr. Justice Mushin, Deputy Registrar Fitzgibbon, David Chong, Lorraine Stokes and Dr. Thompson will be the speakers on that day.

John Cantwell

CHILD SUPPORT LIAISON GROUPS

THE FAMILY LAW SECTION OF THE LAW Council of Australia has established a network of National and State Child Support Liaison Groups. This article sets out some information concerning this important project.

Following the implementation of Stage II of the Child Support Scheme, it became readily apparent that there were a number of teething problems, not only in relation to the implementation of the *Child Support (Assessment) Act* but also the way in which the profession and the agency interacted. Although the Family Law Section initially opposed the introduction of the administrative formula, it recognised that once the legislation had been passed, it was necessary for the profession to throw its support behind the scheme, ensuring that difficulties were identified and solved as quickly as possible.

Recognising that this might best be done on a co-operative basis, it was suggested to the Child Support Agency that a network of liaison groups might be established.

The proposal was warmly endorsed by the Child Support Agency and the first meeting of the National Child Support Liaison Group was held in October 1990.

The National Group has met on four occasions since and it proposes to continue meeting every two or three months. The objects of the National Liaison Group are to:

- ☐ formulate and publish rulings and guidelines which apply nationally;
- ☐ formulate national policies;
- ☐ discuss amendments to the Act;
- ☐ organise seminars on a national basis;
- ☐ supervise State Liaison Group meetings: and
- ☐ determine issues of principle which apply nationally.

State Liaison Groups have now also been established. These groups comprise representatives from both the Agency and the profession in each State. Most State Liaison Groups have now met at least once and the feedback so far suggests that a good working relationship has been established. The co-operative approach augurs well for the future.

The objectives of State Liaison Groups are to:

- ☐ facilitate communication on a State basis;
- ☐ organise seminars on a State basis;

- ☐ organise the publication of Notices issued by the State branches of the agency; and
- ☐ deal with specific cases on a State-by-State basis which raise issues of principle.

The range and complexity of topics discussed at both national and State meetings underlines the need for such a network. For example, on the national level the following are some of the topics which have already been discussed:

- ☐ improvements to the letters which the Agency sends to payers and payees:
- ☐ amendments to the Act;
- ☐ the development of a universally acceptable Child Support Agreement;
- ☐ section 102AG of the *Income Tax Assessment Act*;
- ☐ enforcement;
- ☐ the Fogarty Evaluation Report;
- ☐ internal mechanisms employed by the Agency for handling applications;
- ☐ delays in processing applications;
- ☐ enforcement;
- ☐ substitution agreements; and
- ☐ findings from a recent overseas study tour undertaken by representatives of the Agency, the Court and the Government.

Topics raised at State Liaison Group meetings have included:

- ☐ legal professional privilege (whether or not the Agency has the power to demand that a solicitor make available information concerning the whereabouts of the solicitor's client);
- ☐ the definition of Child Support Income;
- ☐ section 128 of the *Assessment Act* and its effect on the willingness of parties to enter into child support agreements.

Even though the project has only been operating for a short time, a number of significant developments have already occurred, including:

- ☐ a national round of seminars conducted jointly with the Agency and with the full co-operation of the Court;
- ☐ improvements to the letters which the Agency sends to payers and payees;
- ☐ an opportunity for the profession to comment on the Child Support Amendment Bill;
- ☐ the development of a Child Support Agreement which is "user friendly" and which facilitates the use of such agreements;
- ☐ the development of a computer software package containing the formula;
- ☐ a significant improvement in communication between the agencies and the profession.

It is important that cases which identify problems in the system should be brought to the attention of State representatives so that such cases may be discussed at State Liaison Group meetings. A number of cases have already been resolved after being raised at Liaison Group meetings. Thus, I encourage you to ring State representatives if you believe that you have a case which identifies an issue of principle which if discussed might lead to an improvement in the operation of the scheme.

A better understanding by the profession of the Agency and its problems (for example the sheer logistics of the operation) will almost certainly lead to better relations between the profession and the Agency. It is an important part of the network's role to ensure that members of the profession are educated about the difficulties which the Agency faces. The "them and us" mentality should be abandoned in favour of a more co-operative approach.

It may even be that the network will be able to assume some of the responsibilities currently shouldered by the Evaluation Advisory Group because it is expected that the body will not continue in perpetuity.

The Family Law Section is proud of the project. We think that it will provide a valuable service to both the community and the profession.

Representatives of the network in Victoria (chosen after consultation with local Law Society and Family Law Practitioner Associations) are:

Mr. Bernie McPhee
Director Child Support Agency
Australian Taxation Office
14 Mason Street
Dandenong VIC 3175
Telephone: (03) 797 2058

Mr. Peter Callahan
Director Child Support Agency
129–133 Myer Street
Geeolong VIC 3220
Telephone: (052) 25 1601

Mr. Peter Gillham
Ingpen & Bent
95 Yarra Street
Geelong VIC 3220
Telephone: (052) 21 1066

Mr. Peter Mackey
Ryan Mackey & McClelland
Solicitors
65 Main Street
Greensborough VIC 3088
Telephone: (03) 435 3811

C. J. Crowley
National Liaison Group

THE SALVATION ARMY COURT AND PRISON ADVISORY COMMITTEE

The Salvos in Court OR What are the Salvos doing in Court?

THE PUBLIC PERCEPTION OF THE SALvation Army is, arguably, that of a group of well-intentioned people who look after drunks and derelicts, don't drink themselves, but collect a lot of their donations from pubs. They also entertain us in the streets, particularly at Christmas, with brass band and tambourine. This is probably the view held by many at the Bar as well, save that the Salvo officer is occasionally seen, in passing, in some of our Magistrates' Courts.

As Bar representative on the Salvation Army Court and Prison Advisory Committee over the last 30 months, I have had first-hand experience of the extent to which the Salvos are involved in, and necessary to, our court and prison systems. The committee consists of representatives from bodies such as the relevant Salvation Army services, Children's and Magistrates' Courts, Community Services Victoria, police, Legal Aid Committee and Office of Corrections.

Chairman of the committee is Mr. Maurice Duncan, the senior magistrate at Prahran Court.

The committee has been on inspection visits to, among others, the new Barwon, Loddon, Tarangower and the old (soon to be closed?) Geelong prisons, and the new Melbourne Remand Centre. It was an eye-opener to observe the respect and trust accorded the "resident" Salvos, both male and female, by the prisoners, most of whom were known by first name. It was also

THE SALVATION ARMY CORRECTIONAL SERVICES (VICTORIA)

Cumulative Quarterly Report: 6 Months Ended 31 March 1991

During the designated period, The Salvation Army Court Welfare Services recorded the following evidence of service provision.

	Quarter to 31 March '91	6 Months to 31 March '91
Hours at Court	2,831	5,644
People Contacted	6,375	12,833
Interviews Held	2,793	5,541
Counselling Sessions	1,835	3,485
Home Visits	369	822
Court Representations	626	1,345
Supervised Bonds (New)	45	95
*Welfare Cases: Food		
Fares		
Accommodation	683	1,179
Etc.		
Emergency Accommodation Sought	93	164
Number of Courts	16	16
Number of Court Officers	9	9
City Watch-House: Food & Clothing	2,649	8,042
Cost of Service	$61,988	$118,467
***Cost of Welfare**	$30,362	$55,191
Total Cost (For Period)	$94,999	$173,658

Total cost of services was met by the Salvation Army.

pleasant and refreshing to see the relationship between prisoners and prison staff in the new prisons in contrast to that in some of the older colleges of correction. Of course, the better conditions were a constant inducement to good behaviour, with the ever-present threat of loss of privileges and transfer to, perhaps, Pentridge.

Of more pertinent interest, particularly to the junior Criminal Bar, is the fact that there is a Salvo representative at all of the larger Magistrates' Courts, many of the country courts and the Children's Courts. It will profit both the advocate and the client in many cases to make use of the Salvo's experience and recommendations, and, also the many Salvation Army facilities available. The programmes are too numerous to detail, but include drug and alcohol rehabilitation centres, emergency accommodation, child care and family services and accommodation centres for men, women, and young people respectively. A complete list is available from the Bar Council offices, or from the writer — provided you do your own photo-copying.

The representatives are invariably approachable, very experienced with courts and people, and sensible, with both feet on the ground. Most magistrates will respond positively to any of their recommendations, and the assistance of the Salvo is sometimes worth a dozen character references. A better idea of the assistance given to the courts is gained from the figures in the following cumulative report for the six months ending 30 March 1991; and those figures are only in respect of the Children's Court and Magistrates' Courts at Melbourne, Prahran, Preston, Broadmeadows, Ringwood and the south-east region. Take that assistance away from the courts and see how much the community would suffer.

CUMULATIVE REPORT

The Salvos are desperately short of funds, and some grants they would otherwise obtain have been markedly reduced. That brings me to one of the purposes of this article: to enable the Salvos to help us I suggest we must help them. Apart from routine donations, may I commend a procedure that could be of benefit to advocate and Salvos.

When making a plea in mitigation and it is appropriate to suggest a contribution as an alternative disposition, sometimes recommend a contribution to the Salvation Army — even to a specific programme — instead of to the Court Fund. I understand one magistrate in the Prahran Court displays an occasional partiality to the Army "Crossroads Homeless Youth Programme."

Go for it!

Kevin Whiting

VICTORIAN BAR SUPERANNUATION FUND

The Pros and Cons of "Personal" Funds

AS HAS BEEN DISCUSSED PREVIOUSLY, the large ranges of choices that are now open in regard to superannuation make it often difficult for barristers to decide how they should proceed.

A number of general indications can nonetheless be given.

1. For almost all barristers, adequate superannuation is a highly desirable part of their provision for retirement.
2. How much a barrister should put into superannuation depends entirely on his own particular circumstances. Barristers should not over-contribute merely to obtain taxation deductions. Each barrister should obtain personal (and preferably impartial) advice.
3. Although superannuation funds provide certain taxation advantages by reason of special concessions, those advantages must be weighed against the practical disadvantages of less control than of assets absolutely owned and of uncertainty in view of increasing government control and interference in regard to superannuation funds.
4. Caution should be shown by barristers who are approached by insurance company salesmen or advisors who will benefit to a greater or lesser extent if a particular fund is joined or a personal fund is set up. In particular, comparative rates of actual return for a number of funds for say a five-year period should be obtained in a reliable form before any decision is made.

As to "private" or "personal" funds the following additional considerations may be relevant.

1. Personal funds are most relevant for those who wish to build up very large aggregates within the superannuation system, and they have both advantages and disadvantages.
2. Personal funds enable individuals to control (a) the investments, and (b) the administration, of their superannuation assets.
3. The increasingly complex system of regulating superannuation funds will cause substantial increases in the costs of administering personal funds, and the significance of this consideration is sometimes understated by professional advisors. Further, there is a possibility that increasing restrictions will be imposed in order to favour the provision of pensions or annuities as opposed to lump sums.
4. Personal funds may obtain lower returns than funds for which professional fund managers act. Conversely, of course, they may obtain higher returns, according to the investment skills of the relevant barrister and the nature of the professional investment advice that he obtains.

The return of the Fund (10.44% after tax, or 12.3% before tax) for the year was, as expected, less than that in the preceding year. However, this return compares favourably with the median after-tax return for the year for large balanced funds, as per the applicable Noble Lowndes Performance Survey, of 9.8%.

The Trustees of the Bar Fund — Hayne Q.C., Habersberger Q.C., Robson Q.C. and myself — are happy to discuss these questions, or other questions relating to superannuation, with members of the Bar.

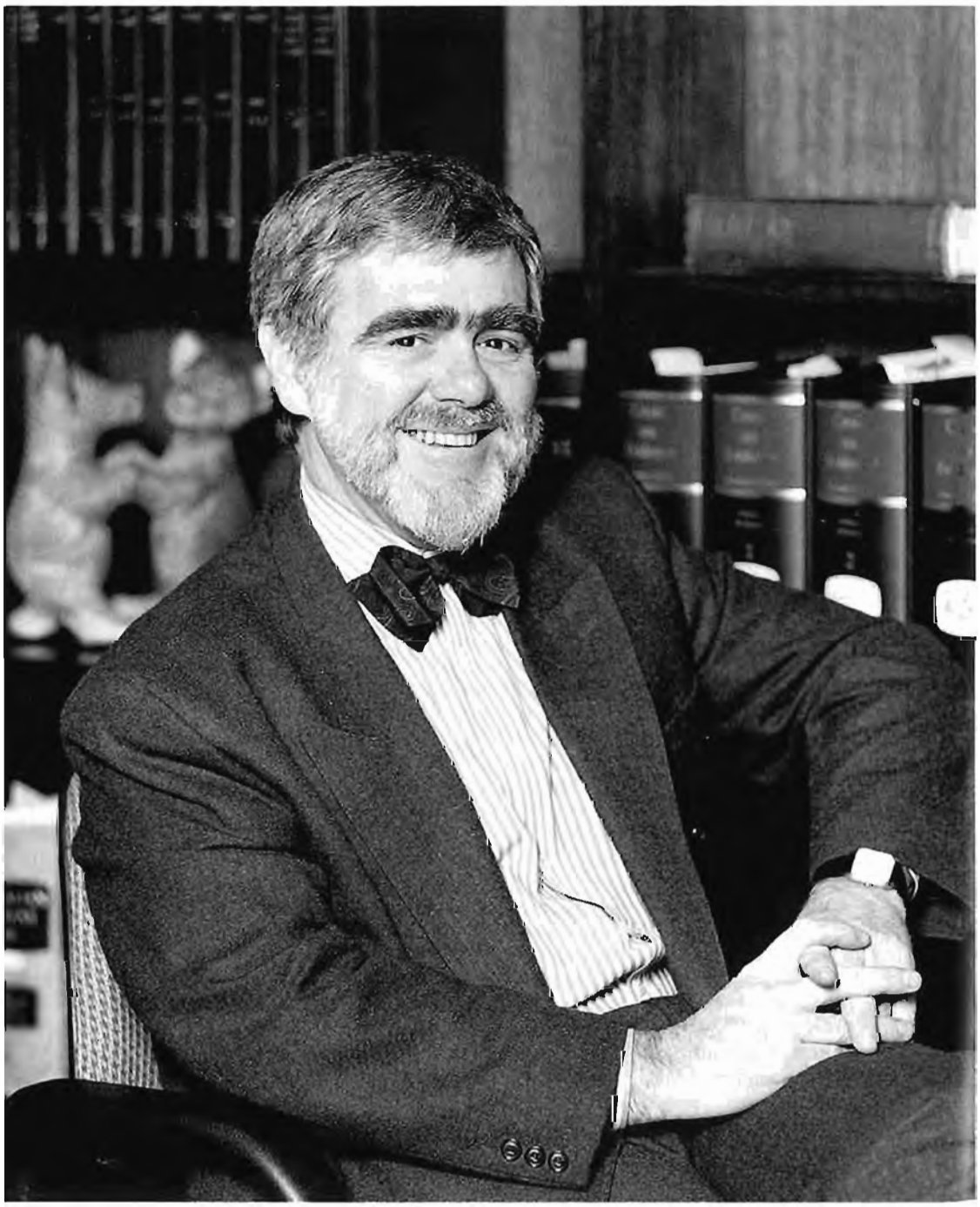
1990–1991 RETURN FOR THE BAR FUND

In view of the facts that during the 1990–1991 financial year the all ordinaries index rose only 0.3% and that bank bill rates have fallen greatly, the return of the Fund (10.44% after tax, or 12.3% before tax) for the year was, as expected, less than that in the preceding year.

However, this return compares favourably with the median after-tax return for the year for large balanced funds, as per the applicable Noble Lowndes Performance Survey, of 9.8%.

Ian Spry

WELCOME



Mr. Justice Byrne.

Mr. Justice Byrne

THE LAW REPORTS RECALL THAT Edmund Dundas Holroyd Esq., Q.C., was appointed a Judge of the Supreme Court of Victoria in the vacation after Trinity Term in 1881 (7 V.L.R.). He sat until his resignation on 9 May 1906 — all the while bearded. The State's newest Judge, David McCartin Michael Byrne, who was appointed on 22 August 1991, is also bearded and probably the only other Supreme Court judge this century to eschew the razor. It is difficult to enunciate any particular legitimate inference that can be drawn from these two apparently unconnected facts other than perhaps to conclude that there is legitimate judicial precedent for a Supreme Court judge to be bearded. As to the drawing of inferences generally, see *Cross on Evidence* (3rd ed.), Butterworths Australia, ed. D. Byrne and J.D. Heydon.

David Byrne was born on 31 May 1940, was educated by the Jesuits and took degrees in Arts and Law at the University of Melbourne. He has the (probably unique) distinction at the Victorian Bar of having received a Diplome du Droit Comparatif from the University of Paris. It is too early to tell whether this brush with the Civil Law will incline His Honour towards being receptive to arguments supported by commentaries by learned authors rather than judgments of deceased judges!

Mr. Justice Byrne's career at the Bar was spent mostly on the 4th Floor of Owen Dixon Chambers East and the 7th Floor of Owen Dixon Chambers West — in each case adjacent to the Chambers of Uren Q.C. and in close proximity to Hore-Lacy and McArdle. He edited the *Bar News* (jointly with David Ross Q.C.), was a very significant contributor to the design and construction of Owen Chambers West and then induced most of the Silks at the Bar to contribute to the two tapestries which now hang in the foyer of that building. Not only was he able to carry out these tasks with apparent consummate ease but was able to do so without, as far as is known anyway, being sued!

David Byrne served on the Bar Council, was Chairman of the Academic Committee, a member of the Bar Legal Aid Committee and in latter times Chairman of the Land Development Committee set up to develop the vacant land owned by the Bar in Little Bourke Street. All of these activities were able to be combined with a very active legal practice particularly in building and construction law which involved not only acting as counsel but also often as arbitrator. As light relief from measuring plans, counting purlins and discussing joists and bearers His Honour developed an active criminal practice, particularly in the field of murder.

Quiet determination to complete the task in hand, an ordered lifestyle and a relaxed family life have been observable traits in Mr. Justice Byrne over the period most of us have known him at the Bar. An ever readiness to feed Uren Q.C. and an ability to organise his activities so as to produce (apparently at least) a minimum of stress have also accompanied his professional journey.

Notes upon judges' appointments such as this are often effusive in their praise. In this instance, the Victorian Supreme Court is indeed fortunate to have gained a new member with as broad a professional vision and as warm an appreciation of the good things of human existence as David Byrne. The Bar wishes him a long and successful judicial career. May all his judgments be praised and all his appeals be dismissed.

Susan Blashki M.

SUSAN ADELE BLASHKI WAS APPOINTED as a magistrate in August 1991. Her Worship was educated at Lauriston Girls' School and as Susan Levy commenced her law studies at the University of Melbourne in 1959. In 1961 she married her husband Tim, then a medical student, and moved with him to Sydney. By 1969 she had produced three of her four children and completed her degree. Her Worship then continued her studies and completed a Diploma of Education in 1970. Her fourth child was born in 1971. In 1978 Her Worship was awarded a Master of Laws by Monash University.

In 1972 Her Worship took up an appointment at Rusden College of Advanced Education and was responsible for formulating, launching and teaching the first four-year Degree course in Legal Studies. Countless HSC and now VCE students have been taught by the graduates of the course she pioneered. At the same time she was responsible for establishing the Law Library at the College and also a Legal Referral and Counselling Service.

In 1981 Her Worship came to the Bar and read with Lyn Schiftan Q.C. She rapidly developed a very busy practice and an enviable expertise in all areas of the law as it affects children and the family. She has a reputation as a fearless advocate and sound lawyer. Her practice was by no means confined to the Family Court and she became an expert in the laws relating to adoption.

Her Worship has continued her involvement in legal education. She has been an instructor in the Advocacy Programmes for the Bar Readers'

Sue Blashki — Magistrate.

Course and the Leo Cussen Institute since 1984 and also conducts workshops for psychologists and social workers on cross-examination and the giving of expert evidence.

The contribution made by Her Worship to the wider community has also been extensive. She is a member of the Board of Management of the Montefiore Homes for the Aged and a member of the Council of the State Film Centre.

Her Worship, though a formidable opponent, was willing to share her expertise with her colleagues. Her advice was often sought by and freely given to younger barristers facing the daunting task of combining a busy growing practice with the demands of a young family. In this respect Her Worship provides a strong role model. Her ability to meet the challenges of a large and demanding practice and of a large and spirited family to which she has always given her unstinted devotion is an example to all. In her rare spare moments Her Worship is an indefatigable walker and opera-goer.

Her Worship's administrative skills, her sound knowledge of the law, her integrity, compassion and humour equip her well for her new career. Her colleagues wish her well.

OBITUARIES

John W. Galbally (1910–1991)

JOHN WILLIAM GALBALLY IS ONE OF whom it can be truly said that he did become a legend in his own lifetime.

His life was extremely diversified, although his achievements, many and diversified as they were, were solidly based in his love of the law and of justice being done.

He was one of eight children but he was intellectually gifted and, as a result, he obtained a scholarship from the Catholic parish school he attended to Melbourne High School, then to St. Patrick's College, East Melbourne, and then to Newman College where he remained in residence until he completed his law degree.

He was admitted to practice as a barrister and solicitor in 1933, a time when Australia and Victoria were in the grip of the infamous depression of the 1930s. This was certainly not a time when large monetary rewards could be expected by a young solicitor setting up a legal practice.

Perhaps he was fortunate that he had a good sports record, and he was a fairly consistent member of the Collingwood football team in 1933 and 1934, which not only assisted his finances, but enabled him to build up his legal practice by the requirements of the many people he met.

He was a lifelong supporter of Collingwood and was appointed an Honorary Life Member of the club in due course.

He was active in politics as a member of the Australian Labor Party and in 1940 was elected as member for the Province of Melbourne North in the Legislative Council.

He became Minister for Electrical Undertakings in the Cain Government of 1952–53, and Minister for Labour in 1955. He submitted many Bills as a private member to the Parliament (Upper House), including one which effected a significant change in the law of negligence.

Present-day lawyers take it for granted that where a defendant established that a plaintiff in a claim based on negligence is guilty of contributory negligence, the damages are apportioned.

It was not until the early 1950s that this became the law in Victoria, due to a Private Member's Bill introduced by John Galbally and passed by the Parliament. Up to that time it was an extremely hazardous undertaking appearing for a plaintiff (who was inevitably impecunious) where liability was in issue.

He introduced 22 Bills to abolish capital punishment, and although he was never successful, his moves did stimulate discussion in the community and ultimately the law was changed when Sir Rupert Hamer was Premier.

Present-day lawyers take it for granted that where a defendant established that a plaintiff in a claim based on negligence is guilty of contributory negligence, the damages are apportioned. It was not until the early 1950s that this became the law in Victoria, due to a Private Member's Bill introduced by John Galbally.

Jack's sporting interests were many and varied. He was a League footballer, as I have mentioned; he was a competent swimmer and diver and he swam in the 3-mile swim on at least two occasions; won the Murray Valley open tennis championship in 1939 and 1946–47.

He excelled at golf and although he had a low single-figure handicap of one, he was really a scratch golfer. He played with such well-known champions as Peter Thompson, Kel Nagle and Victorian Amateur champion Bill Edgar, and was never out of his depth.

What is perhaps a less well-known aspect of his life is his acquaintance with the Duke of Windsor. Jack was playing in the amateur championships in golf in France and Luxembourg. He was staying with friends in France and he saw the Duke on several occasions during this period. It was on one of his golfing trips to Europe that he

met and stayed with the writer Ian Fleming, of James Bond fame. He had a good friendship with Henry Longhurst, an excellent golfer, who also was a well-known writer on the subject. Another English writer friend was Herb Warren-Wynd, who became a close friend and stayed in the Galbally home whenever he visited Melbourne.

There was no pretence about Jack Galbally — he could and did win equally comfortably with all classes of society. He was well-read, a good and witty conversationalist and in reality a man for all seasons.

He was a man of great principle, who adhered to what he believed to be right. He was devoted to his wife Sheila and their five children, one of whom, Peter, is a Q.C. at this Bar.

Sheila (who invariably called him "GAL") was a wonderful companion for a man so much involved in public affairs, and it was a great sadness to him when she became ill and died in 1977. In fact he never really recovered from the shock of her death.

Her support of him was particularly important when he sustained the anguish of disloyalty in both politics and the Collingwood Football Club when he challenged for the presidency of the club (unsuccessfully) and when he was ousted as Leader of the Opposition in the Legislative Council by his Labor colleagues.

He was subsequently vindicated by a decision of the Federal Executive which reinstated him as Leader of the Opposition.

He felt keenly the duplicity of those who protested their support for him on both these occasions, but who swung away when support was crucial.

He was an able lawyer and built up a busy and varied practice, first as a solicitor and then after he signed the Bar Roll in 1957. He did not covet the office of Queen's Counsel, but the then Chief Justice (Sir Henry Winneke), who knew his capacity as a lawyer, told him he should apply for silk, which of course he did.

He was appointed one of Her Majesty's Counsel in 1968 and was involved in many notable trials and appeals (see, e.g., *Watt v. Rama* (1072 VR 353)). He appeared for several accused (out of about thirty) in Rabaul, I think about 1977; they were charged with murder and the trial was very complex. The trial was held before the then Chief Justice of Papua-New Guinea (Sir John Minogue) and lasted over several months.

He and I were both located on the 4th Floor, Owen Dixon Chambers, from 1961 until I left for the Country Court Bench in January 1971. I saw a great deal of him in that time and I believe I got an insight into the character of a man I admired and whose company I never ceased to enjoy.

J.G. Gorman

Michael Kiernan

OWEN MICHAEL KIERNAN DIED SUDdenly at his home on 15 August 1991, in his 64th year. His funeral was held at St. Patrick's Cathedral on 21 August, where a Requiem Mass was celebrated before a congregation of hundreds of people — family, friends, colleagues and associates who came to pay their tribute to a much-loved and respected man.

Michael, as he was known to all, was born in Fremantle, Western Australia on 19 January 1927. By the age of four, his family had moved to Melbourne where they lived at Alcaston House, at the corner of Collins and Spring Streets. Young Michael attended St. Patrick's Cathedral School.

Having completed his education Michael worked with his father at the Robur Tea company in South Melbourne. He joined the Royal Australia Navy Reserve. He served in that capacity for thirty-five years and for this was honoured with the British Empire Medal.

By the age of four, his family had moved to Melbourne where they lived at Alcaston House, at the corner of Collins and Spring Streets. Young Michael attended St. Patrick's Cathedral School.

He is survived by June and his five children, David, Edward, Susan and the twins Rosemary and Michael. He was to them an exemplary husband and father, devoted and loving. While working and supporting his family, Michael returned to study. He studied law at R.M.I.T. and did his articles with Barnet Rockman at Frankston. He was admitted to practice in 1973, read with Craig Porter, and signed the Bar Roll in November of that year.

After a general practice in his earlier years at the Bar, Michael later practised exclusively in family law, to which he was admirably suited by temperament and an attitude of compassion and tolerance of human foibles.

To his two readers, Pinuccia Hopkins and Dr. Anne Shorten, he showed great kindness, infinite patience and constant support.

The Bar will remember his scrupulous fairness in dealing with us all. He was a just man and his sudden death saddens us greatly.

LAW REFORM COMMISSION DISCUSSION PAPERS

THE LAW REFORM COMMISSION OF Victoria has recently published three Discussion Papers of vital significance to the Bar. Discussion Paper No. 22, entitled "Competition Law: The Introduction of Restrictive Trade Practices Legislation in Victoria", was published in April 1991.

Discussion Paper No. 23, entitled "Access to the Law: Restrictions on Legal Practice", was published in July 1991 and Discussion Paper No. 24, entitled "Access to the Law: Accountability of the Legal Profession", was also published in July 1991. Set out below is a summary of the contents of those three papers.

DISCUSSION PAPER NO. 22

1. This Discussion Paper arose out of a reference from the Victorian Attorney-General who requested the Law Reform Commission to:

   "Advise on the best means for ensuring that the principles and rules set out in Part IV of the Trade Practices Act 1974 (Commonwealth) are made applicable to all relevant transactions in this State, notwithstanding the lack of Commonwealth power to cover the whole field."

2. The Commission observes in the first chapter entitled "Trade Practices in Context" that:

   "There is no State legislation which supplements the Trade Practices Act in relation to practices which restrict competition. In that area, without complementary State legislation, the protection afforded by the Commonwealth is incomplete and uncertain."

   The Commission observes that there are a number of areas apparently outside the reach of the Commonwealth including corporations not engaged in trade or finance; holding companies; trusts; individuals and partnerships; and activities authorised by statute. The *Legal Profession Practice Act* 1958 is the sole example quoted of activities authorised by statute which are outside the reach of the *Trade Practices Act*.

3. In Chapter 2, "The Need for Restrictive Trade Practices Legislation in Victoria", the Commission concludes that:

   "At this stage, the Commission can see no reason why any aspect of economic activity within Victoria should be exempt from trade practices legislation."

4. In Chapter 3, "Options for Implementation", the Commission appears to opt either for State legislation which applies Part IV of the Commonwealth Act in Victoria, or the referral of the appropriate power to the Commonwealth. The Commission recognises that there are difficulties with all of the options considered, not the least the two that are preferred.
5. In Chapter 4, "Proposals", more detailed consideration is given to the application of the preferred option.
6. There then follows an appendix "Possible reforms for a Victorian Restrictive Trade Practices Act". This lengthy appendix which takes up more than half of the Discussion Paper looks at the modifications the Commission considers necessary to Part IV of the *Trade Practices Act* 1974 to be embodied in Victorian legislation.
7. In a further appendix "Exemptions under sub-section 51(1)(b) for activities authorised under State Acts", the Commission proposes that a number of activities protected by that section should be reviewed over a five-year period including those covered by the *Legal Profession Practice Act* 1958.

DISCUSSION PAPER NO. 23

1. The Commission states at the outset that:

   "Some of the conclusions reached in this Paper are not shared by some of the Commission's honorary consultants. Nor are they shared by every member of the Commission."

2. This particular Discussion Paper arose in part out of requirements of its terms of reference from the Attorney-General expressed as follows:

   (a) "the rules and practices which determine the fee setting arrangements between lawyers and

their clients, including the following —
whether there is a need for greater fee regulation
the use of contingency fees
ways of promoting fee competition between lawyers.

(b) the rules and practices governing legal representation, including —
limitations on the conditions on which people may appear in court
the rule preventing direct access of clients to barristers
the rule prohibiting the appearance in court of a Queen's Counsel unaccompanied by a Junior."

3. The Commission was also directed to take account of recommendations contained in the United Kingdom 1989 Green Paper on the "Legal Profession and Legal Services", the author of which was the Lord Chancellor's Department.
4. In discussing the approach and scope of the Discussion Paper, the Commission concluded that:

   "In many instances, an analysis within the framework of competition policy can be carried out without detailed empirical study. It is possible to examine a number of rules and practices that regulate the way legal services are provided, and to arrive readily at a conclusion about the benefits, by considering:
   what substantial benefits there may be in having a particular rule
   what the probable effect of limiting competition in that way has on costs
   whether similar benefits could be obtained, with a less restrictive rule."
   (para 11 at p.5)
5. Chapter 2 deals with "Rules Regulating Members of the Bar". The Paper concludes that the Rules that a barrister may only be engaged by a solicitor and must not perform the work of a solicitor may well be too restrictive, and consideration should be given to allowing counsel to receive instructions from members of other professional groups, such as accountants, tax agents, insurers and professionals who provide planning advice. (para. 30 p.13)
6. The authors believe that the sole practice rule may well be too restrictive and a consideration ought to be given to permitting members of the Bar to practise in association with each other, in partnership, by incorporation, or as employees of another barrister. (para. 41 p.17) The two-counsel rule and the ban on barristers attending offices of solicitors also are considered unnecessarily restrictive.
7. They believe that the rules relating to a barrister appearing with a person who is not "of counsel"; that a barrister must have chambers approved by the Bar Council; and, that a barrister must engage one of the barristers' clerks; are all too restrictive.
8. Chapter 3 deals with "Rules Regulating both Solicitors and the Bar", concentrating on two issues: contingency fees and advertising. Whilst the report appears to favour contingency fees, it concedes that further research may be necessary to test the arguments and the hypotheses advanced by both the proponents and the opponents of contingency fees. It is concluded that freer fee advertising for both barristers and solicitors, particularly barristers, is desirable.
9. Chapter 4 deals with "Restrictions on Solicitors' Business Structures" and concludes that:

   "There is clearly scope for a more flexible approach to business structures involving solicitors. The role of service provider and owner could be separated. It could be made easier for providers of different services to combine. Some professions could be more easily combined with solicitors' practices and others." (para. 150 p.51)

DISCUSSION PAPER NO. 24

1. Again, the Commission commences with the statement:

   "Some of the conclusions reached in this Paper are not shared by some of the Commission's honorary consultants. Nor are they shared by every member of the Commission."
2. Chapter 1, "Introduction", outlines the scope of the Paper.
3. Chapter 2, "Accountability Through Regulatory Structures", provides an overview of existing regulatory structures and goes on to propose a unified regulatory structure not the least because of a concern on the part of the Commission that there are differences between the powers and procedures of the courts, the Law Institute and the Bar, and there is a concern:

   "In the mind of an increasingly disenchanted public, there is concern about the independence of the disciplinary processes." (para. 30 p.12)

   A unified regulatory structure is proposed which would consist of a Board chaired by a judge or former judge appointed by the Attorney-General; a lay member from a panel of non-practitioners appointed by the Attorney-General; and a practitioner drawn from a panel comprised of Law Institute and Bar Council nominees, with the practitioner in a particularly proceeding being chosen on the

basis of experience in that activity from which the complaint arose. In addition, the Board would have a registrar being a lawyer appointed by the Attorney-General with adequate staff to investigate complaints and a power to mediate and conciliate in appropriate cases.

In addition to having the same disciplinary powers as the Bar Tribunal and the Solicitors' Board, this Board would take over the jurisdiction of the Supreme Court Taxing Master and the County Court Registrar in relation to client-lawyer bills and certain other powers in relation to solicitors' costs and other client-solicitor disputes.

The Paper also considers that rather than codified rules of professional conduct on the part of the Bar consistent with those in other States there should be a code of professional conduct common to the Law Institute and the Bar Council.

The Paper also considers that rather than codified rules of professional conduct on the part of the Bar consistent with those in other States there should be a code of professional conduct common to the Law Institute and the Bar Council.

4. Chapter 3, "Accountability through Legal Action", reconsiders the various issues determined by the High Court in *Giannarelli's case* and comes down in support of the closing passage of Mr. Justice Deane's dissenting judgment:

"I do not consider that the considerations of public policy which are expounded in . . . the majority judgments . . . outweigh or even balance the injustice and consequent public detriment involved in depriving a person, who is caught up in litigation and engages the professional services of a legal practitioner, of all redress under the common law for "in-court" negligence, however gross and callous in its nature or devastating in its consequences." (para. 51 p.22)

It is concluded there should be discussion of the proposal that: "The advocate's immunity be removed by legislation."

THE AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION INCORPORATED "GOVERNING AUSTRALIA'S COURTS"

By Thomas W. Church and Peter A. Sallmann

This is a detailed and academic consideration of "the Issues of Court Governance". In particular, it compares and contrasts three models: the "Traditional" model in Victoria; the "Separate Department" model in South Australia; and the "Autonomous" model of the Family Court of Australia. The authors conclude in their final sentence:

"In our view the preservation, integrity, effectiveness and efficiency of the system will be enhanced by the judiciary assuming a much greater degree of responsibility for the governing of Australian courts." (p.75)

THE AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION INCORPORATED "PAPERS PRESENTED AT THE NINTH ANNUAL AIJA CONFERENCE 18–19 AUGUST 1990, MELBOURNE"

1. These Papers cover three broad topics: Cost of Justice; Alternative Dispute Resolution; and, Electronic Recording of Police Interviews with Crime Suspects.
2. The Papers on the Cost of Justice are: A.J. Goldsmith, P. Williams, R.A. Williams, and P.A. Browne: "Litigation Efficiency in Intermediate Courts: An Empirical Study".
   The Hon. Sen. B. Cooney:
   "The Inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the Cost of Legal Services and Litigation".
   D.A. Miles:
   "The Cost of Justice — What Price Reform?"
   J. Wallace:
   "Managing Legal Change; Is There a Place for a Market?"

G. Devries

THE SHAPE OF THINGS TO COME

A difference that makes no difference is no difference at all.

WITTGENSTEIN

IN 1996 A FIRM OF LEGAL PRACtitioners operates from plush premises in St Kilda Rd. The firm contains a high proportion of the available practising experts in tax law. The clients of the firm are principally large firms of accountants and some individual clients. There are three senior partners in the firm and sixteen associates, together with a dozen or so employed practitioners. The firm is prosperous, partly because of a judicious mixture of contingency and non/contingency fees. Brilliant graduates are keen to join it and it, in turn, carefully picks out the best of the graduate crop. The firm has a select but limited client list. This is augmented from time to time by its discreet but powerfully appealing advertising, handled by a major agency, and appearing in those upmarket journals favoured by such members of the public who are prone, at times, to difficulties with the taxation authorities. Its members are rarely seen in Owen Dixon Chambers, because they tend to do their own appearance work.

This is not surprising, for they are all members of the Victorian Bar.

The firm's senior partners are all silks, who once practised from chambers. The solicitors who formerly briefed them have gradually stopped calling, for these particular silks are really too busy to take on the clients of some suburban or country solicitor, and the big city firms are not so foolish as to send their clients to a competitor.

The scene thus described is one which would be perfectly permissible under changes to the Bar which are mooted in two recent discussion papers published by the Law Reform Commission of Victoria. The Commission proposes that the Bar Council should reconsider its rules so as to permit, amongst other things, direct professional and lay access to barristers, the formation of partnerships between barristers, the incorporation of barristers' practices, the employment by barristers of one another, operation from chambers other than those approved by the Bar Council, and dispensing with the services of a clerk.

The Bar, in the past, has treated proposals for change with a world-weariness which is no longer appropriate. The Law Reform Commission of Victoria, the Australian Senate's Standing Committee on Legal and Constitutional Affairs, the Trade Practices Commission and other critics of the Bar are not creatures of a moment, a bad dream from which we shall soon awake. Nor, as the English example, not to mention the bipartisan history of our own trade practices legislation, convincingly demonstrates, is the call for reforms along the lines dictated by economic rationalisation confined to one political party or another.

The widespread questioning of the practices of the legal profession which we see almost daily in the press or elsewhere is the sign of a profound and, in my opinion, long-term set of changes in our society. Those changes include an insistent expectation that all of our institutions now justify their existence and nature. This expectation is enforced by relatively new institutions, the regulatory bodies of one sort or another, although that description, in an official atmosphere of deregulation, is not without its eloquent ironies. (Whether the regulatory bodies themselves are called upon by some higher tribunal to justify *their* existence is a question rarely asked, and never answered.)

There are several inter-related matters, some merely contingent, others more permanent in nature, which combine to create an atmosphere very conducive to change, and rapid change at that, in our profession. They in part derive from, and in part give strength and plausibility to, the doctrines of the free marketeers. They include the following (in no particular order of importance).

1. The plethora of inquiries currently under way into the legal profession. These include the Senate inquiry, the series of references to the Victorian Law Reform Commission, the Trade Practices Commission inquiry into the professions and, less formally, the scorching attention of certain journalists.
2. The overwhelming and largely unquestioned

Michael Crennan.

assumption that deregulation and the free play of market forces are an unqualified good which informs, or misinforms, so much government policy.

3. The proposed spread of trade practices regulatory authority outside purely Commonwealth jurisdictions.
4. The threatened replacement of courts of law by tribunals and arbitration ("alternative dispute resolution") as the preferred method of resolving civil disputes.
5. The emergence of the welfare lawyer as a vocational type, imbued with bitter hostility to the Bar.
6. Residual tensions and misunderstandings between the two branches of the legal profession in this State.
7. The economic recession.
8. An historic, profound and irreversible rejection of traditional forms of authority in Western society. Feminism is one of a number of such manifestations, but there are others. Arguments from entrenched authority and privilege no longer cut the mustard, and a good thing too.

Many of the questions of our critics can be met, and met easily. Other criticisms may not be so easily met. If we say that a particular practice which may appear to be anti-competitive is really for the public good, then we have to be able to say why, and with some particularity. The public, and regulatory bodies, are not even slightly impressed by talk about ancient and honourable professions, and the like. Critics who are met with such talk feel, quite rightly, that they are being patronised and treated to an exercise of communal vanity by the Bar.

The Bar, as a whole, will have to face the fact that the next few years may usher in a period of rapid change, which may not be entirely within its power to control or direct. We must all think hard about the central value of what it is that we do. Central matters must be distinguished from the merely peripheral.

Other writers in this issue deal with the independence of the Bar, an expression which, perhaps, contains the most central assertion of all those we make about our profession. The point of these reflections is not to assert such values, but to remark that no-one in the larger world will understand them unless we take the trouble to explain them. And in order to explain these central propositions about the profession of the advocate, we must first get them straight in our own minds, and in our own common agreement, which is expressed in the rules we choose to make and under which we work.

Michael Crennan

INDEPENDENCE OF THE BAR

By a Staff Writer

THE BAR AND ACCESS TO JUSTICE

THE VICTORIAN LAW REFORM COMMission, in its Discussion Paper No. 23 concerned with access to the law, has made a number of suggestions, the effect of which, if implemented, would be to reduce the access which the average person has to expert legal service and advice.

In round terms there are some 7,500 solicitors in Victoria. Of these, 1,522 practise as sole practitioners. A further 999 practise as members of firms with less than five partners. Although many solicitors practise in large firms in the central business district, others are scattered throughout the State in suburbia and in country towns both large and small. Their clients, wherever they are located, require access to the full range of legal expertise.

As Tomasic in *Lawyers and the Community* (1978) points out, access to legal services depends not on geographic location, but on the way in which services are delivered:

> "The achievement of suitable access to legal services by members of the community has been the subject of a major debate in recent years . . . one of the main points of contention in the debate concerning the access to legal services has been the belief that it is essential that legal services be located close to the potential client and not in some generally remote area such as a city centre . . . There are many difficulties with this perception of the nature of legal needs. For example, it is simply inadequate to assert that because lawyers are concentrated in a restricted number of locations, persons in other locations seeking legal assistance will be deprived of such assistance. We simply do not know enough about the work habits of lawyers and the mobility of clients to make such a leap from the facts of location to the inference of legal need" (at pp.35–36).

An independent Bar which ensures that a full range of legal expertise is available to the solicitor in the small country or suburban firm as well as to those in the nationwide mega-firms provides a buffer between the individual and government and between the individual and big business or other large corporate entities (including organised labour) by ensuring that any solicitor can call upon the professional experience and skill of any member of the Bar, chosen by the solicitor on the basis of the solicitor's pro-

fessional knowledge of the barrister's expertise, to act for a particular client.

It may have been possible, in the land of "Once-Upon-A-Time", for a single practitioner to have a basic grasp of the whole of the law. "But", as Marlowe puts it, "that was in another land; and besides the wench is dead".

Those days of omniscience, if they ever existed, pre-dated the introduction of trade practices legislation and equal opportunity legislation; they were before there was a *Credit Act*, a *Retail Tenancies Act* or a *Residential Tenancies Act*; they were days when the relevant companies law was contained in 308 sections and the *Income Tax Assessment Act* totalled only 268 sections.

An independent Bar which ensures that a full range of legal expertise is available to the solicitor in the small country or suburban firm as well as to those in the nationwide mega-firms provides a buffer between the individual and government and between the individual and big business.

That legal Camelot was probably a fantasy; but certainly it no longer exists.

The Victorian Bar provides a service in relation to the law akin to that provided in the field of medicine by the specialist physician or specialist surgeon. The existence of the Bar and the cab rank principle ensure that the suburban solicitor, using his professional knowledge, can seek advice or assistance or the advocacy services of that barrister or those barristers whom he considers most appropriate for the service required by his client.

Every client is entitled to justice before the law and no matter what solicitor a client consults, that solicitor can make available to the client an extensive range of expertise which: ensures the protection of the client's interests, without undermining the client's view of the solicitor's skill and competence; enables the best legal advice and service to be provided to the client, irrespective of the size of the solicitor's practice; and in most cases enables that advice or service to be provided at a lower cost than if the solicitor had sought to provide it himself.

To quote Tomasic once again:

"It is trite to assert, yet true, that the choice of a particular solicitor for a particular type of problem often determines the type of outcome that will result. Because solicitors are generally loath to refer their clients to other solicitors, when a problem is beyond their experience, because of the fear that the client may be lost to the referred solicitor, solicitors are often faced with having to solve a problem for which they are not particularly well suited. It can be argued that because clients are unable to readily determine which solicitor is most capable of handling their particular matter, clients have to suffer in some way. Also, the solicitor asked to advise on a type of matter with which he has little experience has to devote further time to learning what the law and practice is in this new area. In many areas there is little useful substitute for experience so that the client may suffer no matter how much time is spent by the solicitor researching a new field".

A MEDICAL ANALOGY

In the days of our legal Camelot, the practice of medicine was also approached on a much more simplistic basis. General practitioners in medicine, practising as sole practitioners, would diagnose and treat matters which are now referred to specialist physicians or specialist surgeons. They would carry out minor operations themselves without the help of any specialist anaesthetist. I recall having my tonsils removed by one such practitioner assisted by a nurse without the aid of any fancy instruments to see what was happening to my pulse rate or my blood pressure.

In a world of complex drugs and complex diseases of ever-increasing specialisation and in a world in which service to the patient or the client has become more important — or at least has

become more expected — it would be unusual for a general practitioner today to lay claim to the full range of medical skills. Today he would probably refer my tonsils to an expert; and it might well be that one expert would refer me to another. I would visit my suburban doctor or my country doctor and he would refer me to a specialist in Collins Street or in East Melbourne or at the Alfred or the Royal Melbourne. Because of the structure of the profession, although I attend a surgery staffed by one or two general practitioners, I have through them access to a whole range of specialist medical services.

THE BAR AND CONFLICT OF INTEREST

There is one significant and major difference between the practice of medicine and the practice of law which is vital to what is the appropriate structure for the profession. Lawyers are concerned with conflicting rights and duties. A medical practitioner acts on behalf of the patient in a fight with disease or injury, trying to ensure that the rights of the patient prevail over the rights of a particular virus or bacterium. The lawyer seeks to ensure that the rights of his client are protected not against injury or disease, but against the invasion of those rights by other individuals, by government action or by the practices of big business or big trade unions.

The lawyer's role is such that in acting for one individual, he acts contrary to the interests of others. For this reason it is essential that the range of expertise available from the Bar should be provided in a way which leaves the Bar independent of loyalties or pressures which may conflict with the interests of the client.

Under the present system each barrister is independent of any loyalty or obligation to partners — a loyalty or obligation which might otherwise conflict with his duty to the individual client.

The range of skills provided by the Bar includes specialised skills which cannot be provided by any individual practitioner or any small group of practitioners. They might be provided by large firms.

In a fused profession the expertise which is now at the Bar would tend to go to the large firms. Large firms tend to have large overheads and large charges. It is unlikely that they would be approached direct by many of the clients serviced by the smaller firms in the suburbs and the country.

If specialist services were available only from the large firms, then the willingness of those firms to supply those services — or by reason of conflict of interest, even their capacity to do so — would be affected by the impact which the provision of those services to the individual might have on the relationship between the firm and the large clients regularly serviced by that firm, whether those large clients be mining or manufacturing companies, insurance companies, trade unions, government instrumentalities or government departments.

Access to justice would be much more difficult for the average client. This view is not a novel one. In a letter written to English solicitors in 1960 (see (1970) 23 *Current Legal Problems* 1 at 13) Sir Sidney Littlewood, the then President of the Law Society, said:

"Under the present organisation of the legal profession the solicitor is very close to the client. Particularly in the provinces clients rely upon their solicitors for advice upon many subjects far outside the purely legal . . . by and large they have a good working knowledge of the law with which they come into contact in the normal course of their business, but now and then something out of the usual run comes to them . . . What does Mr. Smith do? He submits a case to counsel for an opinion and probably takes his client to see counsel, and the client, through Mr. Smith, gets the advice needed.

If we had fusion that would be impossible. Let me consider what would happen then.

In the first place, in large cities we should have large firms getting larger by introducing partners who were specialists in various subjects . . . Some of those experts would be 'paper' men only, some would be advocates. There would certainly be a number of lawyers who did nothing but advocacy.

What will Mr. Smith do? He cannot make himself a specialist in every subject and so he can either stumble through on his own or consult a firm of lawyers with a specialist in the subject with which he then has to deal. The first course is bound to be bad for the client and may land Mr. Smith with an action for negligence, and so he will really have to pursue the second course. The Law Society could and would make professional conduct regulations which would prevent the specialist firm from acting for Mr. Smith's clients in any other matter unless instructed by Mr. Smith, but the news will get around . . . that if you want anything out of the very ordinary run it is no use to go to Mr. Smith, he only sends you to another firm, far better to go to that firm direct. And that is what people will do with serious results to Mr. Smith.

I think it would drive solicitors out of small towns into large practices in large towns and that the loss to the public would be great".

SOME NECESSARY PRACTICES

The practices of the Victorian Bar include practices which improve access to justice or reduce the cost of that access; there are also practices which facilitate the maintenance of ethical and professional standards but which have no direct effect on the client; there are other practices where the benefit to the public or the client is less clear.

The rule in relation to partnership and the rule

in relation to direct briefing, in my opinion, each contributes significantly to rendering justice more accessible to the man in the street.

If barristers practised in partnership and, as I suspect would happen, those partnerships became large, conflict of interest problems would arise between on the one hand the duty to the regular client (and the duty to the partners to keep the income up) and on the other the duty to the new client and (if the cab rank principle continued) the duty to take the new client.

If barristers were permitted to practise in partnership, and in fact did so, the range of barristers available to any individual lay client would be reduced by:

(a) conflict of interest problems arising from the inability of two members of the same firm to act on opposite sides in the same matter;
(b) the allegiance of firms of barristers to particular (repeat) clients;
(c) the fact that there would be (say) 40 entities of which to seek advice instead of 1200.

If barristers were permitted to practise in partnership, and in fact did so, the range of barristers available to any individual lay client would be reduced.

If direct briefing were to eventuate similar problems would arise: and direct briefing would also raise problems of the kind faced by the small practitioner who might find himself compelled, if he is to obtain expert advice from his client, to seek assistance from one of the mega-firms. By seeking such assistance he may well lose his client to the bigger firm or the more expert firm which is in direct competition with him for clients. This is spelled out in the passage already quoted from Sir Sidney Littlewood. If direct briefing were permitted, there would be a reduction in, or at least an inhibition in, referral work from solicitors to barristers. This would, of course, reduce the services available to the individual lay client.

Practice in partnership or direct briefing of barristers would adversely affect the independence of the Bar and would reduce access to legal services. Neither course would significantly (if at all) decrease the cost of those services. In many cases it would increase the cost of service considerably, because the layman's diagnosis of his problem or his choice of appropriate specialist would be inappropriate, just as would be the case if the patient indulged in self-diagnosis and chose his own specialist medical practitioner; it would often be quite different from the diagnosis and choice which would be made by a professional man, as at present occurs.

PRACTICES WHICH FOSTER QUALITY

There are other practices of the Bar which the Law Reform Commission suggests might be abolished, and which certainly have no direct impact on the cost of justice one way or another. These include the requirement that a barrister occupy approved chambers and the rule that a barrister engage an approved clerk. From neither requirement does the consumer obtain direct benefit.

The accommodation rule, however, does serve two purposes: it makes entry to the Bar easier because, in effect, it ensures that chambers are available for young men and women who want to commence a career as barristers; and it ensures that barristers do not work in isolation.

By reason of propinquity and constantly rubbing shoulders with barristers in adjoining chambers, barristers are subject to continuous peer pressure to conform both to ethical standards and standards of professional competence. The value of peer pressure as a source of adherence to ethical standards is perhaps highlighted by the experience of the Law Institute in relation to defalcations. Of 61 defalcations which occurred between 1978 and 1991, 53 were by sole practitioners. Although there are factors other than peer pressure which inhibit defalcations, the role of peer pressure (or the absence of peer pressure) cannot on the figures be ignored.

The compulsory clerking system operates to reinforce ethical standards. by creating some form of loose group membership, and (by providing some sort of "central registry" of a barrister's activities) it inhibits some forms of unethical behaviour. It also provides a subsidy to the barrister who is just commencing his or her career, by giving him or her, at the expense of his elders (if not his betters) what is effectively a free booking service, switchboard, and accounting service. In addition it provides an easy reference point for solicitors seeking a barrister with particular skills who is available at a particular time and place.

There are those who contend that the clerking rule, of itself, is not essential for the efficient provision of ethical and high-quality service to the client. It is clear, however, that the clerking rule provides benefits similar to those provided by the accommodation rule. If the accommodation

rule were abolished, it would be the only source of direct peer pressure towards ethical and competent performance.

PRACTICES WHICH ARE NEUTRAL

There are other rules, such as the two-counsel rule which, in some economists' ideal model world, might ensure that the skills of the most talented practitioners were reserved for the cases which were in most need of those skills. But in any version of the real world, little *public* benefit flows from that rule or some others. It should not be assumed, however, that the two-counsel rule has a great impact on the cost of justice. Queen's Counsel comprise 10% of the Bar. Only a very small percentage of litigation requires the services of a Queen's Counsel and they are in fact involved in only a very small percentage of litigation. Any modification of the rule will affect the nature of the services provided to the public by, and the role of, Queen's Counsel. The two-counsel rule is, however, one which is largely misunderstood and some modification may be necessary, not to reduce the "cost of justice" but to take account of public perception of the rule and its operation.

There may be other practices of the Bar which do need reconsideration, because although they have no direct effect on the cost of justice, changing circumstances may justify or require their modification. Such modification requires careful analysis rather than a knee-jerk reaction.

I refer in particular to the restraints on advertising and the prohibition against visiting a solicitor's office without permission. While there are strong reasons for ensuring that the independence of the Bar and of the individual barrister is not adversely affected by a barrister becoming a mere "appendage" or ancillary to a large firm, there are times when large conferences (or conferences involving voluminous material) could more easily and practicably be conducted in a solicitor's office.

There is reason for modification of this rule to ensure that the barrister's independence is maintained while allowing him to attend a solicitor's office where the practicalities require it.

Those members of the Bar who are married to solicitors find some irony in the fact that they may eat and sleep with a solicitor, but they may not visit that solicitor in his or her office. That aspect of the practice does not, of course, affect the cost of justice or the efficient delivery of legal services.

THE BAR IS NOT A MONOPOLY

When analysing the practices of the Bar in relation to "competition", one must bear in mind that the Bar has no monopoly, de facto or de jure, in relation to any form of employment whatsoever.

It is true that in practice nearly all practitioners appearing in litigation in the Supreme Court are members of the Bar. This is by reason of a combination of specialisation, efficient use of resources and choice, not by reason of any monopoly. Any one of the 7,500 barristers and solicitors in Victoria who are not members of the Bar has a right of audience equal to that possessed by a barrister.

There is no reason why a person admitted as a barrister and solicitor and who chooses to practise solely as a barrister could not obtain a practising certificate from the Law Institute of Victoria and practise solely as a barrister. He would not be subject to the rules of the Bar and he could practise from his own home or from any accommodation he chose.

Practices which might be anti-competitive when practised by a group holding a monopoly do not necessarily acquire that characteristic when the group does not hold a monopoly.

If a group of independently-owned supermarkets comprising (say) 12.5% of the supermarkets in Victoria entered into an agreement under which they each used identical logos and a central purchasing system and then agreed to abide by certain practices in relation to marketing and the provision of certain cut-price specials, it would be difficult to contend that the agreement or the practices were "anti-competitive".

The Bar is in no different position.

SOME GENERAL OBSERVATIONS

Under the system as it exists any man in the street who can afford it, or whose circumstances and case justify the provision of legal aid, can obtain legal advice from an appropriate member of counsel. He can, subject to financial constraints, obtain the services of any member of the Bar to act on his behalf, provided the barrister in question purports to practise in the relevant jurisdiction, is not otherwise engaged, and has no conflict of interest.

The abolition of the Bar as we know it today would not only decrease access to service on the ground of conflict of interest; it would abolish that "cab rank" principle which is vital to the proper protection of unpopular causes and to ensuring justice for those who are alleged to have committed "unspeakable" crimes. Too often in criminal matters abhorrence of the act becomes abhorrence of the person *alleged* to have committed the act.

Without an independent Bar there would be persons and causes for whom and for which access to justice would be seriously prejudiced.

COMPULSORY CLERKING

THE LAW REFORM COMMISSION IN ITS discussion paper No. 23 on Restrictions on Legal Practice has suggested that the Bar Council reconsider the rule that a barrister must engage one of the barristers' clerks. It considers that an objectionable feature of the rule is that it creates a form of exclusive dealing.

The Victorian Bar now has a total of 11 clerks, some incorporated as companies, others operating as sole proprietors. They employ in all more than 60 people including telephonists, mail and delivery staff, accounts officers and assistant clerks. All the clerks except one are remunerated on a commission basis by the members of the list that appointed the clerk. Two clerks charge 4%, eight 5%. The clerking company which is the exception is a co-operative of the members of the list who share the expenses of clerking in proportion to their receipts; the clerk/executive director is paid a salary and commission. To date, that clerking company has not cost the members of the list it serves more than 2.5% in a full year.

The various clerking lists vary in size from the established lists, which have more than 150 members, to the newest list, which has 38 members.

The current rules of the Bar require each member to engage a clerk approved by the Bar Council. Why should members of the Bar be compelled to engage a clerk?

In Queensland, South Australia, Western Australia and the Northern Territory, barristers do not engage clerks; they do in New South Wales, but it is optional. In England, the requirement to engage a clerk has been abandoned. The Victorian Bar appears to be alone in requiring its members to engage a clerk.

In days gone by, when solicitors had only to ring three or four clerks to have access to the entire Bar, one might have justified compulsory clerking as a means of offering solicitors a convenient and comprehensive briefing service. Now, however, a call to four clerks secures access generally to less than half the Bar. This is not surprising with a Bar of 1,222 practising members plus the September intake of 43 Bar readers. There are a large number of solicitors who now brief barristers direct and bypass the clerk altogether. The direct dialling feature of the Bar's telephone system encourages this approach.

It has been suggested that the requirement to engage a clerk ensures that each member of the Bar maintains certain professional standards; for example, in the provision of accounts to solicitors, the maintenance of good accounting records and proper telephone answering facilities. But it is demeaning to the profession to suggest that barristers can only maintain suitable standards of professional practice by engaging a clerk — what other professional person is required to engage a minder in this way?

The list and the clerk can promote the interests of members by bringing work to the list and by sharing work within the list. Each clerk has a number of solicitors' firms that regularly brief through that clerk. This is especially but not exclusively so with work in the lower courts. In this sense, there is "goodwill" attaching to the business of each clerk which enures for the benefit of those new members of the Bar who engage that clerk. In this way, it can be argued, the new member does not start "from scratch". He or she does not have to depend wholly on contacts or good connections to develop a practice. With ability and hard work, a new member has as much chance of success as any other new member.

But even if, which is doubtful, the practice matches the theory in this respect, why force people to take up opportunities presented by membership of a list if they do not want to? The need to promote equality of opportunity is not a reason to compel people to engage a clerk.

In any event the present system which sees some Bar readers joining old-established lists and some joining newer lists falls a long way short of fostering equality of opportunity because of the imbalance of floating briefs sent to the various clerks. Clerks build up goodwill with solicitors over time and it is understandable that newer lists may have less patronage than older ones. The Bar reader who joins an old-established list has a distinctly better opportunity of receiving floating briefs than the member who joins one of the newer lists. In this sense, the equality of opportunity for new members held up as the justification for the current system of compulsory clerking is more hoped for than actual.

Some proponents of our compulsory system point to the unifying effect that compulsory clerking has on the Bar. It has been said that abolition of the rule may lead to fragmentation and ultimate disintegration of the Bar as a single entity.

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It is true that the clerk, or more particularly the list he or she serves, can in theory foster a collegiate spirit among the members of the list and provide an ideal unit within the ever-growing Bar for members to develop a sense of belonging and fellowship. It can provide an opportunity for new members of the list to become acquainted with more experienced members.

In practice however, generally, lists do not take seriously this role of promoting a collegiate spirit; they play a much smaller part in this respect than for example the association of barristers in a particular suite or floor of chambers. Indeed, does one ever foster a collegiate spirit by forcing people to belong to a group? Apart from a list dinner and Christmas party, lists do little to foster fellowship among their members. Such things as newsletters and regular meetings or lunches are generally a rarity. When new members join a list, are the other members notified? Does the list hold a welcoming function for its Bar readers? The largest lists now have more than 150 people — lists are now so large that members do not even know all their fellow members. All these considerations suggest that the abolition of compulsory clerking would have minimal effect on the cohesion of the Bar.

There are good reasons why each member of the Bar should choose to engage a clerk. But none of the benefits of the clerking system justify compelling people to do so.

In fact, the element of compulsion detracts from the optimum operation of the clerking system. It tends to encourage complacency

among the providers of the clerking services and the lists themselves. Most businesses today must earn and keep their clientele by providing competitive and high-quality goods or services. A business whose clientele are compelled to use it has less incentive to please. True, it is that members can change clerks; however, with only 11 clerks and some lists closed to transfers from other lists, the choice is limited. On the other hand, competition and the risk of losing members would provide a powerful incentive to the providers of clerking services to provide the best service.

If you took away the element of compulsion, lists and their committees might feel the need to do more to foster a collegiate spirit among the list or otherwise lose members.

Why then is clerking compulsory? It may be feared that, if it were optional, significant numbers of senior members of the Bar would dispense with having a clerk. These are the members who employ their own secretaries and depend less on their clerk for services than more junior members. If these senior members are allowed to dispense with having a clerk, so it is argued, the cost to the junior members of the list will increase substantially and the finances of the existing clerks will be undermined. The clerks do provide members of the Bar with necessary administrative services such as a switchboard and message service, accounting and recovery of outstanding fees. Under the existing system, the junior barrister obtains the benefit of these services with the benefit of a subsidy from other members of his or her list. The junior barrister grossing around $50,000 a year pays clerking fees of no more than $2,500 in return for these telephone, accounting and fee recovery services. The same services cost the barrister grossing $500,000 at most $25,000. That subsidy however operates as much for the benefit of less senior members as the most junior members and could on that basis alone be better targeted.

Existing clerks may of course lose revenue. Under the traditional system, in the first instance, that loss would be borne by the clerk and may be passed to the members of the list in the form of a higher commission charge. Under the co-operative clerking system under which one clerk operates, the financial impact would fall directly on the members of the list and would necessarily increase the cost of clerking.

For the traditional lists, the financial impact of making clerking optional can only be a matter of speculation. Although the Bar Council requires every member of the Bar to engage an authorised clerk, it exercises no ongoing supervision of the finances of clerks. It recently eschewed any responsibility to oversee the finances of clerks by regular financial accounting to it.

If making clerking optional were to impact to the substantial detriment of members of the Bar, particularly junior members (and this is by no means clear), the Bar Council could redress that position by a subsidy to clerks where appropriate. Bar subscriptions are already graduated according to seniority and some further refinement of that system allowing for those who do not retain clerks could finance such a subsidy.

But although the Bar Council has to date rejected any move to abolish compulsory clerking, it has made little if any attempt to gauge with precision the financial ramifications of such a move. It is indeed questionable in the case of the traditional lists whether the ensuing loss of revenue would do any more than reduce the clear profit to the clerk rather than cause an increase in clerking fees. If a clerking company serving a list of about 58 members with a relatively even mix of seniority including eight silks and employing a clerk of remuneration of more than $100,000 per year, can operate at less than 2.5% of members' gross receipts then there must be some margin for the established lists of 150 members and over 20 silks to lose members without causing any increase in the current charges of 4% or 5%.

In principle, it is wrong for the Bar Council to require members to engage a clerk as a condition of membership of the Bar but at the same time to countenance half-hearted supervision of the clerks and the terms and conditions under which they operate. Sensitive to this criticism, the Bar Council in June resolved to require each list committee to report annually whether it has reviewed the operation of the clerk, including the remuneration of the clerk, as being fair and reasonable. The Bar Council had earlier rescinded its resolution in March to require clerks to lodge financial statements each year with the Bar Council. Traditionally, list committees have proved reluctant to require financial reports from their clerks. The latter are believed to positively oppose any such move. There is therefore no cause for optimism that list committees will effectively discharge the supervisory role that the Bar Council itself is unwilling to take on. The result is that members are compelled to engage a clerk on terms over which individually they have no say and on a basis which may well leave them powerless to review the value of the clerking services they receive for the money they pay. When millions of dollars of public money are paid each year to the Bar in legal aid fees, the public too are not disinterested in the matter.

A thorough review of the rule compelling members to engage a clerk would appear timely.

Michael Shand

THE QUALITY OF JUSTICE: THE ENGLISH BAR'S RESPONSE

In 1989, in response to the Green Paper, the General Council of the Bar of England and Wales published a response which is reproduced below. Some of the matters canvassed in that response are irrelevant to the questions facing the legal profession in Victoria today. Many of the comments, however, are directly apposite to the Victorian situation.

PAUSE FOR THOUGHT

21.27 It is apparent from the naive references to the EC position (in Chapter 1 and Annex A of the main Green Paper) that the authors were not aware of the complex questions raised by the inter-play of the laws of the Community and the laws of 12 member States and by the character of their legal professions. It would be wise, before any firm proposals are embarked on, which have major EC ramifications (as these proposals have), to proceed, first, by thinking through what those ramifications are, and secondly, by securing an agreed and collaborative approach with the other member states.

THE UNITED STATES OF AMERICA

21.28 All lawyers in the U.S.A. are, by training, generalists; there is no division of function between barristers and solicitors. The U.S.A. has the highest ratio of lawyers to population of any country in the world, and a far higher ratio than in the United Kingdom. In 1977 the Chief Justice of the United States (the Hon. Warren Burger) gave evidence to the Royal Commission that, after taking soundings in federal and state courts throughout the country, he concluded that only about a half or less of American lawyers appearing in the Courts were "really qualified to represent their client properly and to move the case along adequately" (22 July 1977, page 3–4). It followed in his judgment that the length of trials in the higher Courts was substantially greater in the U.S.A. than in England and Wales:

"There is no way to make an accurate measure, but now, from well over 40 years of exposure both as a practitioner in the courts and as a judge in the intermediate court of appeal and on the Supreme Court, having reviewed thousands of records of trials of both civil and criminal cases, my intuitive judgment based on these comparative observations is that a case that is tried on our side generally taking 5 days or 10 days will be tried here in one day or a day and a half or 2 days at most, both civil and criminal" (22 July 1977, pages 4–5).

The Chief Justice accounted for this difference by pointing out that in England there are generally

"three experts who have all been trained in the same tradition and in the same pattern. The judge almost by definition has been one of the leading members of the Bar, and the two advocates appearing before him are trained in the same way the judge was trained. That is not so on our side"(22 July 1977, page 5).

21.29 He went on to point out that inadequate trial lawyers affected the fairness of the trial, and even more the cost of the paying client or to the public paying the legal aid bill. The best studies in the U.S.A. indicated that in damages cases about half of the amount awarded was absorbed by the costs of the cases. In his view,

"This is partly related to our contingent fee system; it is partly related to the fact that badly trained or untrained advocates just take too long to get the job done"(22 July 1977, page 6).

21.30 In 1986 a detailed report by the Institute for Civil Justice (R-3391-ICJ) concluded that in all U.S. tort litigation in 1985, of all the money paid in compensation and legal fees and related expenses of the tort litigation, injured plaintiffs received about 56% in net compensation. The litigation system consumed the rest. If the value of the time spent by the litigants was added to the costs, the injured plaintiffs received only 46% of the total expenditures. The ICJ estimates for 1985 were:

	$ billion
Total expenditures	29.2-35.6
Total compensation	20.7-25.1
Total litigation costs (including value of time lost)	15.5-19.2
Net compensation	13.7-16.4

21.31 The Chief Justice went on to criticise the American system for the lack of specialisation such as exists in England and Wales through barristers and solicitors (22 July 1977, page 8). For the United States he was "advocating an elite class of professionals" (page 9) as trial lawyers. "The technique of advocacy can be learned only by close observation and by participation . . . It cannot be taught in the way you can teach substantive law, and you cannot learn it out of a book" (page 10). He emphasised that lack of learning by regular practice in the Courts led to delay. The delays were unfair to plaintiffs and could be exploited by e.g. the large insurers (page 11).

21.32 Another report by the Institute for Civil Justice in 1984 (R-3165-ICJ) analysed in considerable detail the history of delays in civil cases in the Los Angeles Superior Court from about 1920 to 1981. Delay had throughout that period been a continuing and increasingly serious problem. Time-to-trial, i.e. time from the date the parties requested a trial (often months or years after the action started) to the date trial was scheduled to start, was shown to have increased from 6 months in 1940 to 40.5 months in 1981, despite large increases in the number of Judges. As the Bar Council has in England and Wales, so in Los Angeles the ICJ pointed to the failure by Court administrators to introduce up-to-date computer automated case handling to cope with the increasing case-load.

21.33 The Chief Justice emphasised again that lack of a specialised corps of barristers in regular practice was a defect of the American legal systems. He compared the position in medicine, where specialisation had developed, and where a specialist surgeon regularly performing a particular type of difficult operation achieved a higher degree of skill than one who performed that operation only intermittently (pages 12–13). He could not answer the question put by Lord Templeman, why such a specialist corps of advocates had not developed in the U.S.A. (pages 11–12), and could only regret that it had not developed.

21.34 At pages 16 to 17 the Chief Justice indicated his wish that future lawyers should decide after 2 years at law school "whether they want to be a litigation lawyer, a trial lawyer, or whether they want to be at large in the field of practising in what we would call the "office lawyer" on our side, the solicitor here". He rejected the suggestion that in England 2 lawyers had to be paid to do the work done by one lawyer in the U.S.A. (pages 17–18): in the U.S.A., it was often necessary to have 2 or more lawyers.

21.35 It was in response to the Chief Justice's concern about the increasing devotion of American lawyers to the making of money and their decreasing devotion to the principles of their profession, that the ABA Commission on Professionalism was formed.

The Chief Justice emphasised again that lack of a specialised corps of barristers in regular practice was a defect of the American legal systems. He compared the position in medicine, where specialisation had developed.

21.36 It is remarkable that the Government should wish to change the English legal profession towards the American profession, with its heavy weighting in favour of the large law firms and their ethics of high fees. Chief Justice Warren Burger's concern about the lack of competence of so many American advocates is reflected in

(1) the need for the Judges to do far more work out of Court than in Court, researching the facts and the law, rather than relying on the barristers before them as in England and Wales;
(2) the necessity for huge delays while everything is ponderously set down in writing;
(3) the short period allowed for oral argument which so often ensures that cases are inadequately decided and have to be appealed;
(4) the lack of good Judges especially in the State Courts which leads to a proliferation of applications and appeals, and causes trials to proceed too slowly.

The present Chief Justice, Rehnquist C.J., during his visit to Australia in 1988, expressed concern at the devouring of legal talent by the major law firms, with the result that access by

ordinary people to competent practitioners is seriously reduced.

The former Chief Justice of Australia, Sir Owen Dixon, in "Jesting Pilate" at pages 130–131, stated in relation to the division between counsel and solicitors that

"it is wise, useful and desirable in a very high degree ... I think that the administration of justice in the United States has suffered from its absence. There is no completely independent body of men qualified by full forensic experience from which to recruit the Bench ... There is not the same confidence between Bench and Bar. Nor is it regularly possible for litigants to obtain the services of counsel who, in the common phrase, know their court".

U.S. AND DISTRICT ATTORNEYS

21.37 The office of the U.S. Attorney was created by Congress in 1789. The U.S. Attorneys represent the federal government in federal district courts, and each federal district contains a U.S. Attorney's office, under the overall central control of the Department of Justice through the Executive Office for U.S. Attorneys. The central control is wide-ranging, including a central body of regulations and instructions in the U.S. Attorneys Manual, and centralised expenditure authority.

21.38 "The need to win cases constitutes the strongest incentive in the work environment of assistants" working in U.S. Attorneys' offices: see "Counsel for the United States" by J. Eisenstein, page 152. The record of the assistant in gaining convictions determines his standing and reputation among his peers, the Judges and the members of the private bar, and affects the job opportunities available to him when he leaves. U.S. Attorneys use conviction rates to assess the work of their assistants. A U.S. Attorney's standing with the Judges depends in part on his ability to maintain a high rate of turnover of criminal cases, which in turn depends on maintaining a high rate of pleas of guilty. Without a high conviction rate, the guilty plea system is jeopardised because defendants are less ready to plead guilty. Conviction rates provide an obvious and convenient measure to compare the relative performance of various Attorneys' offices, and the concern of the Department of Justice with conviction rates is reinforced by pressure from Congress.

21.39 The need for high conviction rates reflects itself in

(1) regular exercise of the discretion not to bring charges so as to avoid bringing cases without a perceived certainty of conviction;
(2) extensive reliance on plea bargaining to secure the highest possible conviction rate;
(3) extensive reliance on multiple charges, especially the inclusion of many stronger charges, so as to improve the U.S. Attorney's bargaining position in plea bargaining, including the unjustified inclusion of racketeering charges under the RICO Act with the aim of forcing defendants to settle for a plea of guilty to lesser charges;
(4) extensive reliance on plea bargaining to ensure quick convictions with minimal effort and anxiety;
(5) where plea bargaining fails, every effort in Court to secure a conviction.

21.40 Because plea bargaining plays so large a part, the relations between U.S. Attorneys' assistants and defence lawyers tend to be close. The assistants, if they are concerned about job prospects when they leave, shape their behaviour in dealing with defence lawyers so as to enhance their reputation for friendliness and cooperation. It is a major concern of the Department of Justice, and one of their justifications for maintaining control over decisions in U.S. Attorneys' offices, that assistants tend to try to curry favour with private lawyers. Similarly relations between U.S. Attorneys themselves and defence lawyers tend to be shaped by the U.S. Attorneys so as to improve their chances of appointment as federal judges.

21.41 The District Attorneys in the State legal systems show similar characteristics. Conviction rates and plea bargaining to ensure high conviction rates play a large part because of the need to secure re-election or other gainful employment when the term of office ends.

21.42 The lessons that examination of the U.S. prosecutors systems has for England and Wales seem to be these:

(1) high conviction rates and league tables of conviction rates inevitably come to play a large role in the assessment of individual prosecutors employed by the state;
(2) though plea bargaining plays a much smaller part in English criminal justice, the ability to bargain is likely to be used by employed prosecutors to as full an extent as possible, and in conjunction with the ability to control what charges are made, to ensure a good record of convictions;
(3) the ability to decide whether or not to proceed with charges will be used as it is in the U.S.A. so as to improve conviction rates.

(4) LESSONS TO BE LEARNED FROM THE COMMONWEALTH

New Zealand

21.43 Students after a 3 year university law course and a further part-time practical course for 1 year combined with work in a law firm, qualify as both barristers and solicitors. Most continue for their whole career to practise in a

law firm, as an employee and then a partner, as both barristers and solicitors. On admission a barrister/solicitor has full rights of audience in all Courts, having had virtually no training in advocacy.

21.44 Law firms attempt, regardless of their size, to provide a complete service to their clients. There is virtually no referral work between firms, primarily because of the fear of losing the client to another firm.

21.45 There is a small independent Bar which practises as sole practitioners taking work only on referral from law firms. This is based primarily in Auckland (the main commercial centre which is the financial centre of much of the South Pacific) and in Wellington (the capital).

21.46 Those who wish to work as independent barristers tend to move to the independent Bar after 10–15 years as a barrister/solicitor in a law firm. Independent Barristers work mostly on their own, though two embryo "chambers" exist in Auckland sharing common facilities. The independent junior Bar consists mainly of those who have not become partners in law firms or former partners who have left their firms to practise at the independent Bar with a view to becoming Queen's Counsel and subsequently Judges. Any barrister who wishes to become a Queen's Counsel must practise at the independent Bar, since that is a requirement of the status of Queen's Counsel. The High Court Bench is drawn almost exclusively from the ranks of Queen's Counsel. Usually appointment to the High Court Bench is within 3–5 years of becoming a Queen's Counsel.

21.47 Those who practise at the independent Bar receive much of their work from the smaller law firms, or in the case of the larger law firms from the firm where the independent barrister was previously a partner, since in that way the work can be seen to be kept effectively in-house. As far as possible the larger law firms like to keep their advocacy services for their clients in-house. The smaller law firms go to the independent Bar to fill gaps in their advocacy expertise or because the partners are too busy to go to Court. Queen's Counsel are instructed in large or difficult cases leading a partner or employee in the firm as the junior.

21.48 Because law firms prefer to keep work, especialy "quality" work, in-house, there has not developed the size of Bar to be found in e.g. New South Wales or Victoria. The age at which juniors start at the Bar, and the quick promotion of Queen's Counsel to the Bench, are further factors tending to keep the independent Bar small in relation to the number of barristers/solicitors.

21.49 That Queen's Counsel are appointed only from the independent Bar and have to practise as Queen's Counsel independently, and that the Judiciary is appointed mainly from the independent Bar, are important factors in maintaining an independent Bar. If Queen's Counsel were appointed from and able to practise in the law firms, and if the Judiciary were drawn to a larger extent from the law firms, it is likely that the independent Bar would wither away.

21.50 In the past it was usual for particular law firms to be given the task of providing prosecuting barristers. Those from such law firms who prosecuted gained much Court experience and tended to find their way to the Bench. But there was a noticeable degree of polarisation between those who always prosecuted and those who always defended. This polarisation was criticised by Sir Robin Cooke, now President of the New Zealand Court of Appeal, in his oral evidence to the Royal Commission (21 July 1977, pages 10–11). The system is now in process of change, in the reverse direction to that proposed in the main Green Paper. Panels of prosecuting counsel are nominated, who are from time to time (and not the whole time) instructed to prosecute.

21.51 Sir Robin Cooke in his evidence to the Royal Commission comented on certain aspects of the legal profession in England and Wales:

(1) **The existence of the independent Bar**

> "I am one of those who does subscribe to this concept of a separate Bar; **and I make no secret of the fact that I think it one of the great British achievements to have evolved such a system or institution. One would be somewhat dismayed to find that in the country of its birth it was either abolished or radically altered.** I think that the idea of an independent body of men and women, specialist and skilled in their type of legal service, and not mere paid agents for the clients, but recognising that they owe some responsibility to the Court; and having the confidence of the Courts, and the standard of ethics and professional skills that tends to go with it, is an extremely valuable concept, and long may that continue". (21 July 1977, page 3: our emphasis).

(2) The Inns of Court

> ". . . we have unfortunately no institution at all analogous to the Inns of Court here. That is a great gap I think in New Zealand. Perhaps in time we will come to fill it; but we lack that sort of corporate life within the Bar, which must be a great help as well as training to young barristers; and partly because of that I think that there has been some suggestion that people are going out [to the independent Bar] without enough training, but they would be a very small number". (21 July 1977, page 7).

Australia

21.52 The circumstances of the federal and state legal system in Australia differ to a con-

siderable extent from those in England and Wales, and also as between the different Australian states.

21.53 New South Wales This State has a divided profession with solicitors and barristers admitted under the Legal Profession Act 1987. Solicitors have rights of audience in all courts in any matter in which they are instructed by or on behalf of any person whether or not instructed by that person or by a solicitor acting on behalf of that person (section 18). Transfer is possible but in some respects less easy than in England and Wales (see e.g. section 17 of the 1987 Act). Appointment to the High Court Bench is primarily from Queen's Counsel (who are all barristers), though some solicitors have been appointed mostly as Family Judges.

The circumstances of the federal and state legal system in Australia differ to a considerable extent from those in England and Wales, and also as between the different Australian states.

Only barristers practising at the independent Bar are made Queen's Counsel. Some Queen's Counsel have left the independent Bar and become solicitors, retaining their commission as Queen's Counsel. The present Attorney General of New South Wales is considering whether to require surrender of the commission by those who become solicitors. Selection of Queen's Counsel is made in this way: the first list is prepared by the New South Wales Bar Council after detailed consultation within the independent Bar and with the senior Judges. This list then goes to the Attorney General, who again carries out full consultation especially with the Judges, and then makes the final selection on behalf of the Government.

21.54 In 1976 the N.S.W. Law Reform Commission was asked to enquire into the legal profession. The Commission reported in 1982 as being, by a majority, in favour of common admission and practice on the lines of the Victoria profession (para. 21.57 below). That recommendation was strongly backed by the "mega" firms of solicitors in Sydney who wished to establish in-house chambers containing partners and associates specialising in advocacy. The NSW Government rejected the recommendation, and accepted the view that

(1) the proposal represented a definite threat to the continued existence of an independent Bar;
(2) there was a real public interest in continued access to such a Bar which could provide advice that was truly independent, not affected by unseen conflicts of interest, and not likely to be leaked to partners and associates;
(3) there was also a public interest in the provision of advocacy services at reasonable cost by an independent Bar, rather than at the much higher cost necessary to cover the overheads of the "mega" firms;
(4) the independent Bar was able to provide a more efficient and flexible advocacy service and better able to fit in with the efficient running of busy Courts.

The NSW Government decided that there should continue to be separate professions. The Law Profession Act 1987 maintained the separate professions with separate training and entry, as set out in para. 21.53 above.

21.55 Crown Prosecutors In New South Wales prosecuting in criminal cases in performed in all but the most serious cases by Crown Prosecutors employed within the department of the Director of Public Prosecutions (DPP). There is recognised to be a significant degree of polarisation between the prosecutors and the independent Bar who almost always appear for the defence. The newly born Criminal Law Association has been formed because of concern that the criminal barrister is undervalued and because of this unfortunate polarisation between those who always prosecute and those who always defend. The delays in criminal cases are very serious indeed, being measured in terms of years, not just months. The period between arrest and trial can be as long as 3–5 years. The position as regards prosecutions is different in the State of Victoria. There the DPP has deliberately fostered a practice of using the independent Bar in most prosecutions (about 70% of cases) so as to avoid the polarisation that has developed in New South Wales. There is some astonishment that the U.K. Government should be proposing to abandon representation by independent barristers (which has worked well in Victoria) and to move towards representation by employed Crown Prosecutors (a system which has not worked well in New South Wales).

21.56 Rights of Audience So far as concerns rights of audience, solicitors generally in all the

States have rights of audience. It is of importance to note in what circumstances solicitors use these rights. In those States in which there is a formal division between barrister and solicitor (New South Wales and Queensland) or an informal but long standing division (Victoria) the main consideration governing the decisions by solicitors whether or not to do cases in-house, rather than to instruct independent barristers, is usually the cost to the solicitor. Except in very short cases solicitors are not able or prepared to bear the costs involved because their costs well exceed the charges they can make to their client or to the legal aid scheme, and well exceed the cost of instructing an independent barrister. However, if a case attracts a great deal of publicity, the potential financial loss to the solicitor may be outweighed by the publicity and the increased flow of work derived from the solicitors receiving that publicity. Too rarely is the test whether or not an experienced barrister would do the case better. The solicitor generally has the choice whether to do the case himself (and the choice is not left to the client) and exercises this choice too often on grounds of self-interest.

21.57 The Legal Profession in the other States
Turning to the States other than New South Wales, apart from Queensland which has a divided profession similar to New South Wales, all the other States have fused professions but with independent Bars.

(1) **Victoria** has only a formally or nominally fused profession. Lawyers practise either purely as barristers, or purely as solicitors, or as both barristers and solicitors ("amalgams"). Queen's Counsel are required to practise only as barristers, and appointments to the High Court Bench are made from the ranks of Queen's Counsel. Queen's Counsel are not permitted to appear with a junior who is not an independent barrister. Probably the greatest change in recent years has been the development of "mega" firms of solicitors.

(2) In **Western Australia** a separate Bar has emerged from the fused profession since 1963. Queen's Counsel are drawn from the separate Bar, or from those practising as barristers and solicitors who are required to join the separate Bar after appointment. Judges of the High Court are drawn from the ranks of Queen's Counsel.

(3) **South Australia** has a fused profession with a small separate Bar which emerged in 1964. Much of the conveyancing work is done by land brokers, rather than solicitors. Since 1978 the Chief Justice has limited appointments of Queen's Counsel to those who undertake to practise at the independent Bar. Only one Queen's Counsel remains who practises within a firm of solicitors. The South Australian Bar sees the advantages of this rule in relation of Queen's Counsel as being:

(a) the leaders of the bar are available to all solicitors, both "mega-firms" and small, and thus to a full range of lay clients;

(b) silks work in a more independent environment; independent, that is, from their instructing solicitors, their lay client, and financially;

Victoria has only a formally or nominally fused profession. Lawyers practise either purely as barristers, or purely as solicitors, or as both barristers and solicitors ("amalgams"). Queen's Counsel are required to practise only as barristers, and appointments to the High Court Bench are made from the ranks of Queen's Counsel.

(d) silks work with lower overheads than they would in conjunction with solicitors, so that junior silks can work for fees which would be uneconomic in a "mega-firm" (judging by the hourly rates of some solicitors).

The President of the South Australian Bar has said:

"I disagree with the idea that silks should be able to join solicitors' firms. It seems to me it puts restraints on the proper role of a silk. Inevitably the cab rank rule would be eroded, the firms' clients getting preference to other clients. No doubt large firms of solicitors would seek to engage silks within their firm. This would be a loss to other litigants.

If, having taken silk, a barrister wishes to practise as a solicitor then it goes without saying he should forego his commission . . . Silks 'sink or swim' at the Bar. I do not believe that would be the case if they worked from within solicitors' firms".

(4) **Northern Territory** has a single profession, but with a separate Bar which emerged following the Legal Practitioners Act 1973. Since 1979 Queen's Counsel have been appointed exclusively from the independent bar. Chief Justice Foster, now retired, said:

"I have practised as an amalgam and have had experience during 17 years on the bench of the appearance before me of amalgams and barristers whether belonging to a legally separate bar or a de facto separate bar. I have now no doubt that the Courts and the litigating public are, generally speaking, better served by cases being conducted by members of an independent bar."

(5) The **Australian Capital Territory** has had a small separate Bar since the early 1960's, with strong competition from New South Wales and Victoria barristers.

(6) **Tasmania** has a fused profession, but a separate Bar has recently emerged.

21.58 It is difficult to draw many clear lessons from the Australian states because the circumstances are largely dissimilar. But these lessons at least can be drawn:

(1) The large firms of solicitors many of which are based in Sydney would have rapidly expanded into advocacy work if they could have secured their object of being able to have barristers and Queen's Counsel within their own firms. This parallels the aims of the largest firms in London both of solicitors and of accountants. The consequences which would follow, if these large firms were permitted to do this, were succinctly stated by the former Chief Justice of Australia, Sir Harry Gibbs, when commenting on the Green Papers:

"A recent phenomenon in Australia, and I believe also in the UK and elsewhere, is the formation of the mega-firm of solicitors. Now, in Australia, firms of solicitors, enormous in size, span the continent and seek to command the commercial work of the nation. Their aim, which is undisguised, is to be self-sufficient in all the specialties of the law. If a right of audience in the superior courts were given to a class of advocates who might be either barristers or solicitors (or neither), and barristers and solicitors were permitted to practise in partnership, the consequences would certainly be that each large firm would have, among its members, its own advocates. The choice of the smaller firms in briefing counsel would be reduced. In the end, the best men and women would be attracted by the security and other advantages which the large firms could offer. It would be optimistic to expect that the provision of independent services of advocacy would survive."

(2) The existence of a rank of Queen's Counsel drawn from the independent Bar, and forming the only source or the primary source for promotion to the High Court Bench is a significant factor in maintaining an independent Bar. The Government's proposals would remove this factor in England and Wales.

(3) The trend in Australia is at present towards specialisation, and towards practical recognition of the separate specialised functions of barrister and solicitor. The Government's proposals would represent a large stride in the opposite direction, towards generalism and away from separate specialised function, e.g. in the proposal for the effective fusion of the professions of barrister and solictor, for direct lay access to barristers, and for the requirement that advocates do not specialise, and practise in both criminal and civil courts, if they are to be eligible for promotion as Queen's Counsel or as High Court Judges. The Australian experience demonstrates, as clearly as any, that these are steps in the wrong direction.

The trend in Australia is at present towards specialisation, and towards practical recognition of the separate specialised functions of barrister and solicitor. The Government's proposals would represent a large stride in the opposite direction, towards generalism.

(4) The Australian experience does not support the Government's expectation or hope that, if it makes its revolutionary changes, the Bar will proceed as if nothing had happened. On the contrary, it shows how difficult it has been for a specialised advocacy profession to emerge from a generalist profession, and that the emergence of a specialised advocacy profession has depended on economic and other circumstances, and in particular on the econimic power of the large firms. Where that power is not too great, emergence of the specialist profession has at last been possible. That is not the position in London,

especially if the possibility of multi-disciplinary partnerships is to be contemplated.

(5) The experience with employed Crown Prosecutors in New South Wales has been an unhappy one, as compared with Victoria where 70% of prosecutions are conducted by the independent Bar.

Canada

21.59 It is not proposed to deal at length with the position of the legal profession in Canada. In general, as a single profession, it follows much the same pattern as the U.S.A. The defects in the American system referred to above appear, though to a less marked extent in Canada. Contingency fees, in the Provinces in which they are permitted, lead for example to "ambulance chasing" but to a less extreme extent than in the U.S.A. The Queen's Counsel system is entirely different to that in the United Kingdom, Ireland, Australia or New Zealand, and has lost the mark of distinction which in these other countries it is intended to be. The polarisation between Crown Prosecutor and defending lawyer exists and is a phenomenon giving rise to concern, as is the problem of "success rates" of convictions.

21.60 The problems which affect barristers in the Canadian law firms, particularly in civil work include the following: They do not have enough practice in Court, because they have to spend so much time in the preparation of cases, doing the work which in England and Wales is done by solicitors. The result of having to do all the preparatory work is that barristers frequently have major back-logs of cases not ready for trial, which they cannot progress towards trial while engaged in court on another case. These back-logs are translated into serious delays in progressing cases to trial. Barristers are also exposed in their partnerships to pressures as to the way in which they conduct cases, pressures to satisfy clients' wishes, pressures to ensure that a large client does not move to another law firm, and pressures to protect the partnership. This is contrasted with the position in England and Wales where the independent barrister is insulated by the separation of the professions from these kinds of pressure.

21.61 So far as specialisation in concerned, barristers in Canada tend to have to be generalists, and to deal with the whole range of cases coming to their firms. Where they are specialists, their specialist services are available in practice only to clients of their own firm, and not generally as are the specialist services of an English barrister practising e.g. in the field of patents or trademarks. Barrister-only firms are non-existent. Litigation-only firms have not flourished. Law firms in Canada try always to keep cases in-house, even where the skills and experience available in-house are not adequate for the particular case.

21.62 As a distinguished lawyer, Mr. Rowland Williams, observed (after 13 years of practice as a litigator in a large law firm in a mid-Western city in Canada, and further practice in England, mostly in commerical work as a partner in a firm of solicitors in the City of London):

"Thus fusion, as applied to Canada's more de-centralized circumstances, has produced a firm-orientated legal system, with barristers generally overstretched, tending to be generalists rather than specialists in particular fields of law, not given enough courtroom time to develop forensic skills early or fully enough, outnumbered, sometimes dominated, by the solicitor members of their firms, obliged by their membership to give priority to their firms' largest clients, occasionally exposed to pressures from which they should obviously be free, private rather than fully public figures." (Law Society Gazette, 30 M 1977).

It is apparent that, based on the Canadian experience, the developments if the Green Paper changes were made would include:

(1) Solicitors seeking to recruit from the Bar in competition with each other so as to gain the benefit of having leading barristers' names on their notepaper, as is "de rigueur" in Canada.

(2) Solicitors seeking to recruit advocates at the younger end, and to make arrangements with chambers leading to "closed shop" or "most-favoured nation" situations, by which a barrister's skills are available only or primarily to particular firms.

(3) A movement towards generalist barristers dealing with a range of cases within the solicitor firm so as to make best use of the barrister's skills in-house.

(4) The specialist skills of specialist barristers, which Mr. Rowland Williams regards as "the highest achievement of the independent Bar", over a period disappearing.

AS OTHERS SEE US

Extracts from evidence given to the Senate Cost of Justice Inquiry by the Honourable Justice Kay of the Family Court

"MY OWN PARTICULAR BETE NOIRE IN the sense of the cost to the citizen — that is the client in the court — stems mainly from a lack of control over barristers' fees . . . I speak from the Victorian experience where there is a de facto Bar . . . There is a wonderful analogy drawn by a lady called Persia Wooley in a book called *The Custody Handbook* . . .

She says that she went to her lawyer looking for a guide dog to take her through the intricacies and the maze of the law. Unfortunately, she found she had bought a guard dog that bit anything that came near her, and this is one of the dilemmas in family law. But, moving on from that, placing her faith in the lawyer she says, 'We need to go to court', or 'I need a result'. The solicitor then says, 'Well, you will need to go to court. I will get a barrister.' Now, at this point nothing is said to the client to say there are barristers ranging from one day's standing to 25 or 30 years standing. The solicitor says, 'You can have a range of fees payable to the barrister from $100 a day to $2,000 a day; what do you want me to do?' They just take the licence of saying, 'I'll get you the relevant barrister'. There is no shopping around, there is no economic rationale in what basically the solicitor is doing in this existence. They are spending someone else's money. That is the first problem I come to with the barristers' fees.

The second, which is a more difficult, problematic one, is: what is it that barristers ought to be looking for in professional life? Should they be concerned to make as much money as is humanly possible and have the Rolls Royce by the time they are 30? They have a monopolistic licence virtually. But there is some social conscience involved in the exercise, that a fair day's remuneration for a fair day's work is what is appropriate. That is further complicated. Do you say at the end of the year, 'I have managed to get a brief twice a week. Two days a week I have been able to get work. At the end of the year I need to have a certain amount of profit for my family and me to survive. Assuming that figure is $50,000 and I can get 100 days' work per year, do I therefore charge each client $500 and if I happen to pick up an extra day's work per week, does that mean I get bonus money?'?

One of the problems that arises here is: what ought the barristers be endeavouring to achieve in exercising their monopolistic rights? It seems to me, unfortunately, that the Bar, as a general rule, from my observations, are looking to the Rolls Royce by the time they are 30 rather than saying, 'A fair day's pay for a fair day's work', and bringing that in line with the rest of the community.

I think this was one of the problems that faced the Government recently with the judges' salaries position. Everyone was equating them with the Bar and saying, 'The judges are underpaid because the barristers are getting X dollars', but the reality of that ought to be that the Bar are grossly overpaid and we ought to be focusing on some way of bringing that Bar back down . . .

What ought the barristers be endeavouring to achieve in exercising their monopolistic rights? It seems to me, unfortunately, that the Bar, as a general rule, from my observations, are looking to the Rolls Royce by the time they are 30 rather than saying, 'A fair day's pay for a fair day's work', and bringing that in line with the rest of the community.

This is my bete noire, and I am looking at how this can be overcome whether it is by price fixing, whether it is by education, whether it is by placing a requirement on the solicitors in a dual system to give proper educational material to the clients — although, I am not sure that ultimately that is the answer, because the client who is strongly enough emotionally involved will say, 'I want the best. All right, you have given me Joe Blow straight out of law school for $100. I don't want him. I want Melvin Belli', or whoever else he thinks is going to give him the right answer. The solicitor there has an obligation, I think, to say, 'You are just not going to get any more for your money. You can get the same for $500 a day as you are going to get for $1,000 a day' . . .

I think, Senator Cooney, you will have experienced that there were people at the Bar who were more than adequate appointees to the Bench but who never went to the Bench because of the economics. There have been experiences in our own Court of people leaving the Court — at least two that I can think of — because of the economics. Because of the level of judicial salaries, they felt they could not achieve a standard of living that met their own personal requirements. Now, that may have changed with the recent increases in judicial salaries but I think a lot of the culture of the Bar involves very high-fliers. Some of them will have lost the public service concept, but others really set expectations of the Toorak house with the mortgage and the Roller and the kids in the private schools and then cannot afford to go to the Bench. The difficulty is: how many of them look at the client and say, 'Should I be charging this fee for that client?' — with some sort of conscience — 'because, although it is my fee, although it is what I would like to earn, and although I know I can earn that somewhere else, this client really cannot afford to pay that fee and I should not be doing it'?

It is difficult. The same case can take half a day with barrister A, barrister B and judge C, and potentially can take three days with barristers D and E and judge F. That becomes a matter of control. It becomes professionally a matter of the lawyer saying, 'Really, this is a one-issue case. I am not going to back my professional judgment and run this case on this issue.' In that case, you can cut right down. It happens on circuit. When the barrister has got 15 briefs and he is not coming back next week, he gets through 15 cases. If he has only one brief in the city and he has three weeks to do it, he will get through only the one case. Work expands to fill the vacuum available. I think there are ways in which the profession, and indeed the Bench, can keep control.

It becomes the Bench's responsibility, I would think. The difficulty is that there are acceptable conflicting schools of jurisprudential thinking. There is one which says, 'My job is to sit there absolutely quietly, to rule only when I am asked to rule; and if there is no objection I am not going to lead the objections. I am going to decide the case on the way each party presents its case, and if they have got shortcomings in the way they present it it is not for me to say that I do not think that evidence is going to help.'

Yes. Then there is the other one which says, 'No, you should be interventionist providing you are not overly interventionist'. The difficulty is that every time a judge gets overly interventionist an appellate court somewhere reminds him he should not be. It is two steps forward and one step back all the time . . ."

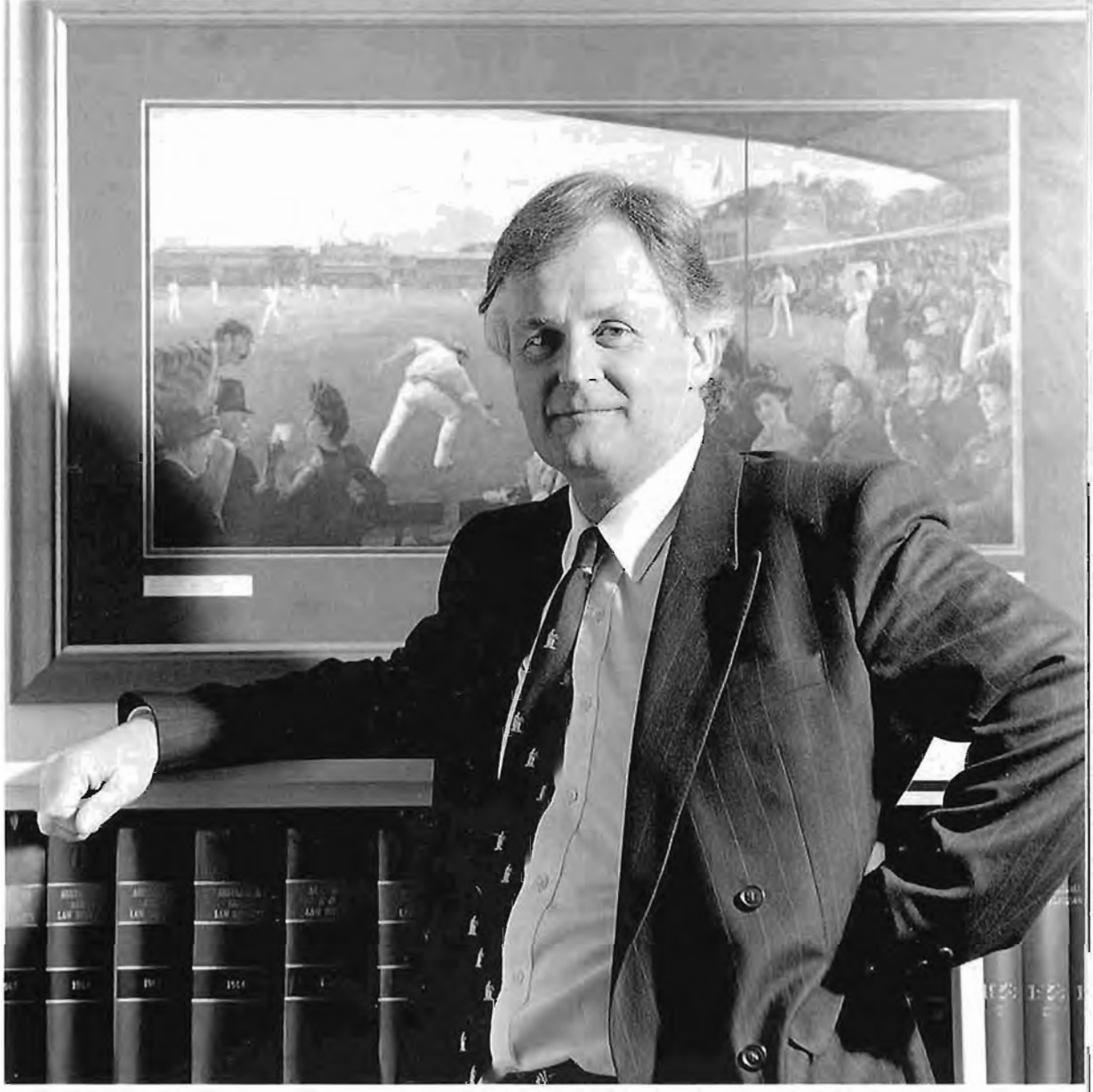
AN INDEPENDENT BAR — WHY HAVE ONE?

ON THE MORNING AFTER THE *7.30 Report* in which the Bar was roundly criticised by a number of people interviewed by the independent ABC team I was in the company of two members of counsel and a Supreme Court judge whom I have known for several years. As a result of knowing and working with them over several years I knew a good deal of their abilities, standards, ethics and approach to life and their profession.

> There was nothing in this for any of us apart from a sense of responsibility and the resultant satisfaction that flows therefrom. How could it be that members of such a profession as that of the Victorian Bar could behave in this way if what I had heard and seen on television was correct?

The Supreme Court judge had practised extensively in the criminal jurisdiction before his appointment. He had been appointed one of Her Majesty's Counsel not long before his judicial appointment. He had come to the Bar from humble but hard-working class origins. In the course of his career he had dedicated himself to accepting briefs for the less privileged, even extremely disadvantaged members of the Australian community. This had meant that he had denied himself the financial rewards that his ability as an advocate made available to him, had he been solely motivated to treat his profession as a business.

He had taken himself away from the comfort of his chambers in Melbourne to work amongst



Robert Kent.

the Aborigines of the Northern Territory. This he did for little financial reward. On his return to Melbourne he worked again extensively for people who were funded by the Public Solicitor's Office, later to be the Legal Aid Commission. In so working he had contact with a most dedicated band of lawyers concerned to stand for the rights of the individual in our community. I reflected that His Honour was also involved in the teaching of the skills of advocacy to the profession. There is no financial reward in this, this work is entirely voluntary. I did not see His Honour as being one of those referred to in the television programme. I recalled that in my career I knew many barristers whose attitudes and philosophies were the same as His Honour's.

Indeed in my company at the same time was a member of the Bar whose career has closely followed that of His Honour's. He also had left the Bar in Victoria to work for the Aborigines of the Northern Territory. Upon his return to Melbourne he has also largely worked for clients who were supported by Legal Aid. In fact I had recently returned from Papua New Guinea where both the judge and the member of counsel to whom I refer had voluntarily participated in a workshop concerned with teaching the skills of advocacy to the legal trainees at the Legal Training Institute in Port Moresby. There was nothing in this for any of us apart from a sense of responsibility and the resultant satisfaction that flows therefrom.

How could it be that members of such a profession as that of the Victorian Bar could behave in this way if what I had heard and seen on television was correct? In considering this question I thought of the third member of counsel who was present. This was a barrister senior in years of practice to me from whom I believe I have learned a great deal in the course of my own practice. The very day before this, that member of counsel had taken to court with him a young woman who was taking part in the schools' work experience programme with me. The case to which she was taken was one involving great tragedy for the clients of the counsel to whom I now refer. They were not wealthy people. The tragic case in which they were involved was an inquest into the death of their young baby. They had not enough money for legal representation. They did however have a small sum and their family home. To be able to have legal aid they were required to pay the small sum they had and to give a mortgage over their home to the Legal Aid Commission. On learning of this, counsel after some discussion volunteered to appear in the case for nothing. It was not the first time he had done so in his career. Neither was it the only example of this being done by those in whose company I was.

I recalled the time when His Honour volunteered to act free of charge in a case where a person had been convicted of murder and it was discovered that there was evidence available that cast significant doubt upon the correctness of this decision. Aid was refused but His Honour, junior counsel and their instructing solicitor all agreed to act free of charge. The conviction was as a result of their efforts quashed. A grievous injustice had been set right.

These matters came to mind from a group of no more than six or seven counsel. If they are representative of the Bar, these actions have been repeated manyfold. If they are not representative, then even so I could not have been in the company of the only people who have given so much freely to the community in which they live and work.

Why do these people do this? I think it is principally because they are decent human beings. Why is their story not told? I think it is principally because they are decent human beings who do not go about broadcasting these things. Why do they not broadcast these things? I think it is because they believe that what they do is not exceptional within their profession but is in fact commonplace and is a proper sharing of their talents for the betterment of the community in which they live and work.

What are the talents of which I speak? They are the special skills of the advocate, learned and honed by them as practising members of the Victorian Bar. In this State both barristers and solicitors have the right of audience in all courts. They all have the same basic training. The rules that are criticised of the Bar allow all persons admitted to practise the opportunity of specialising as an advocate. No key money is required. No select schooling is required. A full-time course in advocacy is provided by the Bar. This course involves approximately 200 judges and members of counsel as instructors in various areas of advocacy. Why do these people volunteer for this work? It is to endeavour to make available to the people of this community a trained, expert profession which can best look after the interests of the citizens should they need such service.

I reflected that there is a constant stream of new counsel to the door of more senior counsel. Advice is freely given. When a solicitor briefs a barrister, the Bar is briefed. This is possible because barristers are largely housed together and because they are willing to assist the community in which they both live and work. I recalled my own situation. Those upon whom I could call for assistance in my early years at the Bar now occupy the benches of the High Court, the Supreme Court of Victoria, the Federal Court of Australia, the Family Court and the County Court. I would not have been able to supply the benefit of this experience to my clients had I remained within a firm of solicitors. Neither do I think would clients have the same sound and objective advice available to them without the existence of an independent Bar such as we have in the State of Victoria.

The collegiate atmosphere of the Bar was another distinct advantage. Proximity and the peer influence which flows therefrom are the greatest guarantees of the recognition of and conformity with high standards of ethics and professionalism.

It occurred to me that it was interesting that in Australia only two States, N.S.W. and Queensland, have a strictly divided legal profession. All the other States have a fused profession. Despite this, there has developed in each State (and I add in New Zealand) a separate voluntary Bar. Is this the plot of people who see a separate Bar as a means to wealth? Of course it is not. If a valued service could not be provided by such an establishment there would not be a separate Bar anywhere in existence.

Is my attitude one which I subjectively hold because of the exposure I have had or is it more widely supported? Is the view I express novel?

On the day of the ABC programme I met with a professor of law from the United States of America. He was a teacher of advocacy. He longed for

the situation that we have in this country where lawyers can truly specialise as advocates. Who suggests that brain surgery should be conducted by the family physician? Such a physician has the same primary qualification as the specialist neurosurgeon. But the United States does not have a separate Bar as we do. Let me quote a leading United States attorney —

"It is often truly said that many of our best lawyers — I am speaking now especially of New York City — are withdrawing from Court practice because the nature of the litigation is changing. To such an extent is this change taking place in some localities that the more important commercial cases rarely reach a court decision. Our merchants prefer to compromise their difficulties, or to write off their losses, rather than enter into litigations that must remain dormant in the courts for upwards of three years awaiting their turn for a hearing on the overcrowded court calendars. And yet fully ten thousand cases of one kind or another are tried or disposed of yearly in the Borough of Manhattan alone.

This congestion is not due to the fact that there are too few judges, or that they are not capable and industrious men; but it is largely, it seems to me, the fault of the system in vogue in all our American Courts of allowing any lawyer, duly enrolled as a member of the Bar, to practise in the highest courts. In the United States we recognize no distinction between barrister and solicitor; we are all barristers and solicitors by turn. One has but to frequent the courts to become convinced that, so long as the more than ten thousand members at the New York County Bar all avail themselves of their privilege to appear in court and try their own clients' cases, the great majority of the trials will be poorly conducted and much valuable time will be wasted.

The conduct of a case in court is a peculiar art for which many men, however learned in the law, are not fitted; and where a lawyer has but one or even a dozen experiences in court each year, he can never become a competent trial lawyer. I am not addressing myself to clients, who often assume that, because we are duly qualified as lawyers, we are therefore competent to try their cases; I am speaking on behalf of the courts, against the congestion of the calendars and the consequent crowding out of weighty commercial litigations.

One experienced in the trial of causes will not require, at the utmost, more than a quarter of the time taken by the most learned inexperienced lawyer in developing his facts . . .

there is no short cut, no royal road to proficiency, in the art of advocacy. It is experience, and one might almost say experience alone, that brings success . . . When the public realizes that a good trial lawyer is the outcome, one might say, of generations of witnesses, when clients fully appreciate the dangers they run in intrusting their litigations to so-called "office lawyers" with little or no experience in court, they will insist upon their briefs being intrusted to those who make a speciality of court practice . . ."

I should have preferred to have included more, but time does not permit. These words were not uttered in defence of the current assault upon my profession; they were written as long ago as 1903, by Francis L. Wellman, regarded as one of the great nineteenth-century trial lawyers of the United States, in his work *The Art of Cross-Examination.*

Robert Kent

THE TRICONTINENTAL ROYAL COMMISSION

THE ROYAL COMMISSION INTO THE Tricontinental Group of Companies is continuing to take evidence at 55 King Street. The Commission sits from Tuesday to Friday each week from 10.00 a.m. to 4.30 p.m., Mondays being reserved for dealing with the vast amount of material that has been generated and preparing for the investigation of transactions that will be investigated shortly.

At the time of writing this piece the following members of counsel have appeared at the Commission (at various times):

- ☐ Counsel Assisting:
  S. Crennan Q.C.
  I. Sutherland Q.C.
  A. Howard
- ☐ Tricontinental:
  P. O'Callaghan Q.C.
  C. Maxwell
- ☐ Certain Officers & Directors:
  J. Middleton
  S. Anderson
- ☐ Dr. Ironmonger and I. Renard:
  I. Chernov Q.C.
  M. Sloss
- ☐ I. Johns:
  R. Merkel Q.C.
  C. Heliotis
- ☐ Commonwealth Bank:
  M. Shatin
  D. Beach
  J. Beach
  R. Moore

- ☐ Reserve Bank:
  M. Beazley Q.C.
- ☐ Auditors:
  A. Goldberg Q.C.
  K. Hargrave
  S. Marks
- ☐ Mr. Cain, Mr. Jolley & Others:
  R. Finkelstein Q.C.
  P. Sest
- ☐ Leader of the Opposition:
  E. Gillard Q.C.
  A. Sandbach
  V. Perton M.L.A.
- ☐ D. Williams:
  P. Vickery
- ☐ Kavanough:
  A. North Q.C.

The first report of the Royal Commission has been tabled, it runs to 491 pages plus appendices and is attractively priced at $25 (those members of counsel who, for one reason or another, cannot see their way clear to purchasing a copy and reading it can obtain a copy of the two-page press release made by the Government which summarises the findings of greater interest to the Government).

Having dealt with broader questions during the sittings held before 30 June 1991, the Commission is now examining individual transactions. At this stage the "Atoll", "Disctronics", "Pro-Image", "Quatro" and "Tibham" transactions have been looked at.

Looking at each transaction has involved hearing from employees and directors of Tricontinental, directors of the borrowing company and (in the "Atoll" transaction) auditors. In addition, the Commission was at one stage asked to look into a pair of silk pyjamas.

In due course it is expected that the Commission will hear some evidence from Mr. Johns (indeed it may have already done so by the time you read this) but in the interim it is expected that more transactions will be examined.

Anyone wondering how long the Commission will "go" would do well to ponder questions such as: "How long is a piece of string?". As is often said in the press: "The hearing continues".

David Beach

CHANGES IN THE MAGISTRATES' COURT JURISDICTION

WITH THE COMING INTO FORCE OF the *Magistrates' Court Act* 1989 on 1 September 1990, a great deal of concern was generated amongst those members of the Bar who practice in the Magistrates' Court civil jurisdiction.

In particular the establishment of the costs "cap" by the Arbitration Regulations was thought to resemble the "black cap" formerly worn in the Supreme Court in certain circumstances; it was seen as a portent of the death of representation in the Magistrates' Court in its civil jurisdiction in matters under $5,000.

That concern appears not to have been justified, inasmuch as business has proceeded as usual, subject, of course, to the downturn in the economy.

The cap came into being because, amongst other things, it was thought that it would apply to small claims which were capable of being heard in one two-hour session. Under the proposed system, the court would hear more cases per day; professional fees would be reduced accordingly; and counsel would, where appropriate, have been able to act in relation to more than one such hearing each day. In effect this aim has not been achieved.

At the Melbourne Magistrates' Court there was an attempt to implement the proposal by listing arbitration cases at 10 a.m. and 1.30 p.m.

The trial run at Melbourne of this multiple listing system did not appear on its face to provide counsel with "quinella" briefs at 10 a.m. and 1.30 p.m. on the same day. In fact, counsel and clients were often directed by solicitors to attend court for a normal 10 a.m. listing when their case was not to be heard until 1.30 p.m. What did appear to happen on a regular basis was that the magistrates at 471 Little Bourke Street sat long days on a regular basis in order to finish cases listed at 1.30 p.m., which did not commence until much later than that time and which invariably finished later than 4 p.m. Sometimes cases listed at 10 a.m. were part heard at 1.30 p.m. and were then adjourned to another day, thus causing inconvenience to the parties.

The implementation of the cost cap caused a great deal of confusion amongst the magistrates when it came to determining costs on matters

which commenced prior to 1 September 1990 but which concluded after that date. For many months there were as many decisions on this issue as there were magistrates in the metropolitan area, and in certain cases some injustices were done to successful litigants during that time. The cap in its present form and as it is presently applied continues to do injustice to parties who are 100% successful in their actions, as the difference between between party/party costs and solicitor/client costs is now much larger than it was prior to 1 September 1991. It also has led to many magistrates awarding costs on the basis of the cap notwithstanding that a party may have succeeded in bettering its offer of settlement, making such processes in arbitrated matters totally ineffective.

The change in the legislation brought with it a new set of court forms. In particular the forms for a complaint, defence and counterclaim in a motor vehicle matter have changed dramatically. Parties are now required to provide what appears, on first blush, to be considerably more information to one another concerning their cases prior to hearing. This obviates the need for interrogatories and discovery. That at least appears to be the aim of the change. In reality of course nothing is further from the truth.

The forms when filled out provide little assistance to anyone who views them and, in the end result, the use of the new forms has affected a solicitor's conduct of a "crash and bash" file little and counsel's role at hearing not at all.

The new Act continues the fiction that the hearing of claims under $5,000 can be conducted in a manner different from that applicable to actions for $5,001. The former have become but truncated versions of the latter. For those who do not know how an "arbitration" of a claim under $5,000 works, it usually involves a process where counsel opens his client's case in full, calls his client to adopt that opening on oath and then making his client available for cross-examination.

Experienced counsel can smooth off many of the rough edges and camouflage a lot of the weakness in a case with a skilful opening, leaving the opposing counsel little room even for a searching cross-examination. Searching cross-examination of course takes time and, under the regime created by "the arbitration", time is of the essence and searching cross-examination is frowned upon by the bench. In many cases it is the skill of counsel in his opening in an arbitration, particularly in a motor vehicle matter, which makes the difference between an apportionment and a 100% success. This seems to be one unwelcome result of the arbitration system: the skill of counsel can play too great a role in the determination of the issues between the parties.

One of the more positive effects of the legislation has been the increase in consultation between the magistracy and the Bar, to ensure the smooth implementation of the changes brought about by the new Act. This increased contact has improved what was already an excellent relationship between the Bar and the magistracy. The Chief Magistrate's practice notes will become available to the Bar and, as always, the Chief Magistrate is keen to consult with representatives of the Bar in relation to any suggested improvement in the administration of the Magistrates' Court.

The Attorney-General by way of press release has indicated that the jurisdiction of the Magistrates' Court will increase to $40,000 in the foreseeable future. Whilst this will provide more work for those in practice in the Magistrates' Court, it is doubted that this increase in the jurisdiction will be to the benefit of litigants, the magistracy or counsel in the long run.

Traditionally, the Magistrates' Court has dealt with cases of short duration involving a limited number of issues. The court has always provided a speedy hearing for a great many cases. At present, the volume of work dealt with in the Magistrates' Court means that cases of any length take months to get on; when they are listed for hearing they often have false starts; and to achieve any certainty of a hearing date, the booking of a "special fixture" is normally required.

Although in theory the number of issues in a case is not determined by the amount of money involved, when large amounts of money are involved in litigation it becomes cost-effective to search for issues and to argue them merely because more is at stake. The proposed increase in the jurisdiction will bring with it longer and more difficult cases to the Magistrates' Court. This will put additional pressure on the court, which is under-manned and not properly supported with adequate facilities including libraries or accommodation for the magistrates, let alone the parties and counsel.

In the end result, the last twelve months have been business as usual for those members of the Bar who practise in the Magistrates' Court. Successful litigants seem to have had their real costs increased and this is especially true of those at the arbitration level. The prospect is that the future will bring more work to an already overworked court which will be required to determine more difficult cases with no improvement to court facilities to assist it in its function.

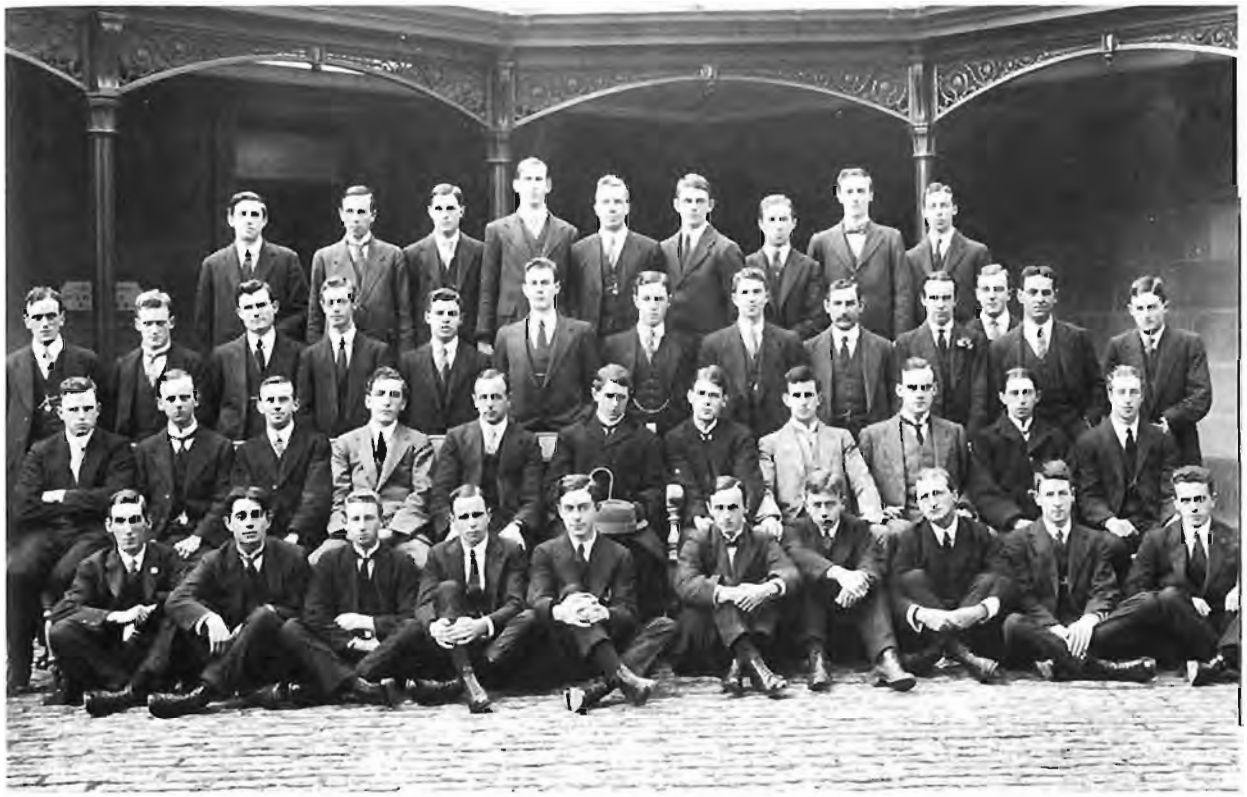
Chris Ryan

THE ARCHIVAL MATERIAL OF THE VICTORIAN BAR COUNCIL RE-DISCOVERED

Alison Adams.

THE COVER OF THIS ISSUE OF *VICTORIAN Bar News* comes from a photograph found recently in the Victorian Bar Council store room at South Melbourne. It depicts Professor William Harrison Moore of the University of Melbourne with forty-two of his students, believed to be from the year 1913 or 1917. The names listed are as recollected by Sir James Tait in 1980. We know that nine or ten of the men signed the Bar Roll. We would like names for the unnamed and/or corrections of names.

It is the finding of, cataloguing and storing of such material for easy retrieval which will facilitate the writing of any history of the Bar in the future. I am advising on the conservation of material in hand and reproducing delicate old material. Several members of the Bar have been able to help me with pristine copies of the Victorian



Back Row: *N. Frances; Southey; Ballard; Wilson; Moore (J.H. Moore, Roll No. 170, 8.3.1920); _____; E. Hayes (E.V. Hayes, No. 155, 5.6.1918, died Jan. 1924 or E. Hayes, No. 226, 13.6.1925); Tait (J.B. Tait, No. 166, 11.9.1919); Fink.*
Standing: *Burchill; W. Ball; D. Mackinnon; Burbridge; Joske (P.E. Joske, No. 151, 25.6.1917); Martyn; Bodycomb; Just; Ross; _____; _____; Murray; _____.*
Sitting: *M. Williams; _____; Fullagar (W.K. Fullagar, No. 194, 7.4.1922); Menzies (R.G. Menzies, No. 155, 13.5.1918); Middleton; Prof. Moore; Deans (did James Tait mean Arthur Dean, No. 165, 22.8.1919?); Ettelson; Stretton, Book (Clifford Book, No. 172, 26.3.20); Healy, (No. 154, 9.5.1918)*
Front Row: *T. Fulton; Beiske; Just; Rennick; Colahan; J. Rowan; Turner; Pitcher; Part (Cedric Part, No. 255, 7.11.1927); M. Cussen (Maurice Cussen, No. 171, 1920).*

Bar Council Annual Reports to make up a set 1963–1990 to be bound.

I would like to appraise documents, photographs, videos, tapes and publications which may be of relevance to the story of the Bar. Some of this material may not be available for acquisition by us but it would be useful to know of its whereabouts.

Information should be addressed to:
Mrs. Alison Adams
Victorian Bar Council
12th Floor
Owen Dixon Chambers

JUDGES' RECEPTION

ON 21 AUGUST 1991 A RECEPTION WAS held at the Essoign Club for members of the Judiciary. The reception provided a convivial setting for members of Bar and Bench to "interface in a deep and meaningful manner".

Judge Walsh and Peter O'Callaghan Q.C.

Tony Howard and Brind Woinarski Q.C.

Robert Osborne, Judge Strong, Judge Hassett and Justice Ryan.

Carmen Randazzo and Justice Weeramantry.

Judge Keon-Cohen, Nicole Feely and Justice McGarvie.

DISJOINTED JOTTINGS OF A "NEW" COUNTY COURT JUDGE

(As told to a Staff Reporter)

I AM TO START WITH A MONTH OF crime. Oh for a lengthy trial with competent and experienced counsel to guide me through the minefields.

DAY 1: Alas and alack! I am in Appeals and I am blessed with a pair of young counsel, who obviously appear regularly in the Magistrates' Court (or who indeed may not appear regularly anywhere), and who are more intent on flexing their muscles at each other.

The next appellant appears in person and, having resided for some time in Central Europe, insists on calling me "Your Majesty". I immediately feel better. He makes a greater impact than that of counsel previously mentioned.

Then follows another appellant in person who has an uncanny resemblance to Toby Mears from the *Callan* series. I wonder if that dates me. The prosecution informs me that he had used a stolen credit card to purchase four bottles of 1964 Dom Perignon at a local hotel for a total sum of $1,787.00. When I enquired of him as to whether he had considered satisfying his needs with Great Western at $3.99 he responded with a look of total disbelief and "Your Honour, one has one's standards!" So had I and this reflected in his sentence.

DAY 2: More appeals. A day of 0.05 appeals was slightly enlivened by an unrepresented appellant asserting that the police had only prosecuted him because of a number of (other?) unfounded allegations against him.

DAY 3: An early respite! Two pleas.

In the first, counsel managed to turn a near certain term of imprisonment into a suspended sentence for 14 counts including numerous car thefts and burglaries. She succeeded in establishing that her client had indeed been"on the run" since his initial apprehension some four years previously, but not from the police. He had been an interstate truck driver all that period! Indeed, he only came to the attention of the police again when he was pulled over for failing to wear a seat belt.

Her plea contrasted with one I had earlier observed, which began with those immortal words "My client was born on. . ." and proceeded to explain away priors as wrongful convictions and a bad "culpable" as worthy of a very light sentence.

DAY 4: Things are looking up. A trial! Early hopes dashed — a *voir dire*!

DAY 5: . . . and the *voir dire* continues . . .

DAY 6: . . . more *voir dire* . . . and I begin to muse on the cause of this phenomenon which has become all the more prevalent in recent times. Do I blame Legal Aid, especially when it is paid on a daily rather than lump sum basis, or do I blame it on the increasing scrutiny of criminal cases by the appeals courts?

DAY 7: The trial begins but not before a lady juror, not entirely happy at her number coming up, takes a swing at my tipstaff with her bag. Two other jurors appear less resentful at being chosen and indeed somewhat overpleased in each other's company.

The helpfulness, competence and cheerfulness of the full-time prosecutor is contrasted by counsel for the accused who has seen too much television, believing that repetitive verbal battering will deliver him of a Perry Mason-like miracle. None of the witnesses capitulate, throwing up their arms in a gesture of surrender and confession, and I am frequently forced to intervene.

DAY 8: The trial limps along. The lady juror with the swinging bag refuses to show the slightest interest in the proceedings.

DAY 9: The trial continues to limp along and the lady juror's lack of interest starts to become infectious.

DAY 10: The trial is still limping along. It dawns

on me after the fifteenth "If Your Honour pleases" delivered through tightly clenched teeth — in response, on each occasion, to my intervention as above — that those four words are meant to mean "Sod off and leave me alone!" and that counsel's looks roughly translate to "If we happen to be opposed in the next Bar/Bench tennis match you may be advised to come equipped with a box".

Counsel's looks roughly translate to "If we happen to be opposed in the next Bar/Bench tennis match you may be advised to come equipped with a box".

DAY 11: I had been up until 3 a.m. completing my charge. Reading the transcript hadn't been an elevating experience: I sounded pompous, didn't complete sentences, used two words when one would have sufficed and complicated phraseology when simplicity was demanded. I am three-quarters of the way through the charge when the court is adjourned for the day. The lady juror with the handbag looks positively cheesed off. I wonder whether she will vote with the other eleven for a speedy end to her purgatory or whether she will stick out 1/11 to punish all and sundry for her discomfort. I also ponder the lengths I have to go to satisfy the appeals courts on such issues as prior inconsistent statements.

DAY 12: I send the jury out and I go to work on a sentence in another matter. Two hours later, I am only beginning, and the jury is back: NOT GUILTY. Times haven't changed. Juries still look at prisoners when their verdict is not guilty. I worry for my brother judges. After this forensic triumph counsel for the accused will no doubt consider himself the Aussie answer to Clarence Darrow. He will probably hone his present technique and instead of asking the same question three times, he will no doubt ask it five or six times.

DAY 13: Back into pleas. In stifling the urge to deliver a terrific one-liner that had occurred to me, I realise that Mr. Justice Darling must have been more of a pain in the neck than wonderfully funny. Court is frightening and bewildering enough for a fellow looking down the barrel of a 15-year sentence without having Bob Hope and Woody Allen at the Bar Table and Groucho Marx on the Bench. The sentencing of two "first offenders" is very difficult: one has a raging heroin habit and steals to support it; the other, having conducted a business for twenty years, runs into the brick wall of hard economic times and "jumps off the deep end" into an ill-planned, amateurish armed robbery. It is back to the midnight oil as I plan the sentences and contemplate the next day's trial involving an alleged conspiracy to steal twenty huge pieces of earth-moving equipment.

DAY 14: [I have decided on the sentences and have drafted my reasons but they have to wait until the morrow]. It is 10 o'clock and the prosecutor is missing whilst defence counsel is off down the corridor talking with his client. I'd have readily given them time for their discussions but consider the court — not me — entitled to some respect.

They belatedly turn up and I am informed that there is a Preliminary Point. Bloody Hell! Notwithstanding the pre-trial conference sheet declaring in black and white "Is there any preliminary point you wish to raise? — No" and a host of witnesses hanging around, the question of an alleged confession is thrashed out through the greater part of the day.

DAY 15: The trial goes all day. The part-time prosecutor — obviously brought in at the last moment — makes heavy work of his opening and his early witnesses. Counsel for the accused appears keen for the jury to have a break at 12.45 p.m. It may not have been an odd request except that it had only been empanelled at 12.27 p.m. I recall that the counsel in question is well-known for his racing connections and I imagine that I hear the sound of thundering hooves.

DAY 16: The trial continues but bogs down with increasing strain between counsel. They appear to be jousting with their egos, oblivious of their impact on the

jury. Is it a case of the accused's counsel allowing his ego to obscure the best interests of his clients? A judge, though a member of the most obdurate group of people since the Spartans of Thermopylae, is not wholly insulated from the effects of factors outside the evidence.

One fellow given two years with a minimum of 18 months suggests, whilst leaving the dock, that I am an old goat and that I should demonstrate some overt affection for my mother . . . or words to that effect.

DAY 17: Before the jury is brought in I decide to suggest to counsel to "stop mucking around and get on with it". Let the transcript speak for itself:

"Gentlemen, it seems to be that during the last two days there has been a considerable degree of over-attention to what might be described as petty detail and controversy over unimportant points that have contributed largely to the very slow pace at which this trial is progressing. I urge you both to remember that I must finish by Friday and I seek your co-operation in achieving that end."

The response was interesting to say the least! Counsel for the accused blamed me for not intervening more often to curtail the "over-exuberant antics" of the prosecutor. That led to a somewhat heated exchange between him and me, and reminded me of the saying "Contempt of court is never being prepared to admit that you're sorry".

DAY 18: Blew it! A prosecution witness makes a gratuitous reference to the accused's previous spot of bother with the police. It was a totally unresponsive answer and no-one's fault. I have no choice but to accede to an application to discharge the jury. Perhaps I'll get the rest of the month to complete outstanding sentences?

DAY 19: No such luck! A plea in respect of forging and uttering cheques to the value of approximately $20,000. It appears that the accused, a garage mechanic, had been warned by his employer that he would be sacked if he continued to arrive late at work. He blamed public transport to which his boss responded prophetically "You idiot, why don't you get a car?" "Why not, indeed?", thought the mechanic later that day, when he spotted an unused cheque book on the boss's desk. Two cheques were removed, a car was bought and to his credit the accused was punctual for the next six days . . . until the police arrived to arrest him.

DAY 20: Last day of the month. I am off on circuit next Monday so I have a desperate clean-up of outstanding sentences. Three in all and two to receive terms of imprisonment. I wonder if any judge, however experienced he or she may be, ever comes to grips with the sheer sense of waste associated with lengthy terms of imprisonment.

One fellow given two years with a minimum of 18 months suggests, whilst leaving the dock, that I am an old goat and that I should demonstrate some overt affection for my mother . . . or words to that effect. I think that if I had been sent away for two years I might have had something to say at the time.

Sentencing is over by lunchtime. However, that afternoon I see that three Notices of Appeal have drifted in over some of the damage I did earlier in the month. A judge's lot is not a happy one, or has someone already said that?

That month was not totally lost. In my less occupied moments I had cause to commence a collection of legal doublespeak. What do you think of these examples?

"Beyond reasonable doubt" — Whoever heard of a policeman lying?

"My client is of unblemished character" — Although the police have been after my client for years he has been able to outsmart them, until now.

"Res Ipsa Loquitur" — Rae has decided to conduct her own defence.

"A hung jury" — A jury with at least one friend of the accused.

"Volenti non fit injuria" — Confidential treatment is available.

"Suspended sentence" — Not what some people would like it to mean.

"Polenta non fit injuria" — Good pasta is good for you.

BAR NEWS GOES TO DISNEYLAND

Bar News reporter and his children at Universal Studios.

DUE TO A VARIETY OF FACTORS BAR News found itself taking a mid-winter week's break in Los Angeles.

The break commenced inauspiciously enough: it was a fine, cool, crisp morning, and the taxi from the city to the airport was decrepit and dirty. Even the driver obviously had not shaved for quite some time. Processing at Tullamarine was remarkably efficient and Bar News actually got the seats previously requested!

Whilst awaiting the boarding call, Bar News and a number of other passengers were entertained by the efforts of a Japanese tour guide trying to arrange approximately 50 pairs of tourists in dead-straight lines. His efforts were to little avail as shortly after he had achieved his worthy aim, it was announced that the plane would be delayed by a little over an hour due to "operational requirements". It later turned out that "operational requirements" involved the replacement of a leading edge flap motor in one of the wings. Even later it turned out that the replacement of the motor was unnecessary as it was a warning light malfunction which was in turn dealt with in Sydney.

Thereafter the flight was uneventful. Between Sydney and Los Angeles the hour and a half lost at Melbourne and Sydney was made up. Bar News and son managed to spend some time in the flight deck — an educational experience indeed! Bar News was given to contemplate the various possibilities that arose out of a flight plan which would leave the aeroplane holding little more than two hours of fuel upon arrival at Los Angeles International Airport. Were we to be diverted to Las Vegas the margin for error would be remarkably fine!

Early, *very* early, next morning it was off to Disneyland. Despite the scepticism of Bar News and Mrs Bar News, Disneyland could only be described in superlatives. It was all we had been given to believe and then some! There was something for everyone. It was spotlessly clean, well organised, secure and fantastic value. Master Bar News, aged 7½ years, like his father, was not especially game when it came to the more hair-raising rides. The idea of rollercoaster rides in the dark appealed little to Master Bar News and a lot less to Bar News. As a consequence Bar News is unable to report upon "Space Mountain", the "Matterhorn Bobsleds", or even the "Runaway Thunder Mountain Railway".

Despite warnings to those with heart conditions, sufferers of vertigo and travel sickness and expectant mothers, "Splash Mountain" was ventured upon and is to be highly recommended, notwithstanding the two-second vertical five-storey plunge into water at speeds of up to "40 mph".Thankfully, similar warnings did not deter us from a trip to the Moon of Endor with "Star Tours" and its tyro robot pilot.

In the interests of providing a more complete report to readers, and wholly for that reason, a vast number of other activities were tried and

tested. Whilst it would be unfair to single some out over and above the others, the more immediately memorable are: the "Haunted Mansion"; "Pirates of the Caribbean"; "Snow White's Scary Adventures"; "Alice in Wonderland"; "Peter Pan's Flight", the Captain EO 3D movie starring, of all people, Michael Jackson; "It's a Small World"; and so on. Towards the middle of each day there was a parade devoted to "American suburban life". There appeared to be little significant difference between American suburban life and Australian suburban life.

After a few hours recuperation at the hotel, including an hour or two in the pool soaking up the 80°F heat, Bar News and family twice returned for the Electric Light Parade and fireworks display. Both were brilliant, notwithstanding the fact that the parade concluded with a vast series of floats celebrating the American flag and the fireworks were to the accompaniment of the full version of the "Star Spangled Banner". Bar News was given to muse whether it was a case of the Americans being a little overpatriotic or Australians not being sufficiently patriotic.

Putting aside their worst fears, one lunchtime, Bar News and family members decided to dine at Pinnochio's Cafeteria in Fantasy Land. The meal consisted of four vast hamburgers, a large fresh fruit platter, two ice-creams, two soft drinks, two cups of coffee and two serves of "French fries". The hamburgers were superb. The total cost of the meal was just over $US15. Other snacks consumed at Disneyland were of similar good quality and of equivalent value.

Bar News and family ultimately needed a full three days to sufficiently sample Disneyland, albeit that some time was spent on successive re-evaluations of "Splash Mountain". Bar News does not think that an additional day at Disneyland would have been easily survived.

Bar News decided to break up the visits to Disneyland with trips to Universal Studios, Knott's Berry Farm and various local shopping centres. The Universal Studio's tour commenced with a tour of Los Angeles, Hollywood and Beverley Hills. It is a source of wonderment as to just how grotty Hollywood has become. Universal Studios was a very well-spent eight hours, especially an 1½ hours-plus train tour which included the experience of an 8.3 earthquake; a ride across a collapsing bridge; a passage through the waters which parted for Moses; a view of the Bates Motel from *Psycho*; a meeting with Jaws; and an unexpected visitation from King Kong. As well, Bar News participated in the "filming" of an episode of *Star Trek*; went on a visit back home with E.T.; and much more.

Whilst the queues were longer, the food at Universal Studio's Commissary was of similar quality and value as Disneyland. In fact, the food throughout the week in the United States was extraordinarily cheap by Australian standards and of very good quality.

Knott's Berry Farm faded into insignificance after Disneyland — it was not as well organised, a lot more crowded and the queues were substantially longer — not the least because Bar New's visit coincided with that of a score or more busloads of children on school excursions and summer camp trips. It also tended to appeal more to those of braver mien than Bar News. The Triple Cork Screw and a ride called Montezuma's Revenge elicited more than enough squeals from its participants to disincentive Bar News, although little discouragement was needed. "Mrs. Knotts traditional chicken dinner" was close to the best mass-produced chicken that Bar News has eaten. The accompaniments, unfortunately, were not of the same standard.

Two shopping trips were undertaken — one to "South Coast Plaza" and the other to Santa Ana "Main Plaza". They were a shopper's dream; vast ranges, especially of clothing and accessories, and bargain prices by our standards. Insufficient time was allowed and there was a limited amount of travellers' cheques available.

Throughout the week Bar News was amazed at how friendly, helpful, cheerful and personable were all of the people dealt with, whether they were attendants at Disneyland and Universal Studios, or "associates" at the hotel. Even shop assistants were friendly and helpful. There is no doubt that Australia could learn a lot in this regard from the Californians.

Ultimately Bar News had to return to Los Angeles International Airport for the flight home to Australia. As vast as LAX is, the processing was efficient, friendly and speedy, and the airport was clean and well-organised. The flight back was at least as good as the flight out.

Upon arrival at Tullamarine Airport one was immediately struck by how efficient Customs and Immigration had become and how tatty Melbourne Airport was compared to other international airports and even Mascot. Having done the carousel calypso (where first one and then another luggage carousel breaks down and differing advices are given about the ultimate carousel from which to collect luggage), Bar News eventually ventured out to the taxi ramp. The taxi driver was unshaven, the taxi was dirty, the driver complained about having a fare only to the city, and it commenced to drizzle. Bar News knew it had arrived in Melbourne!

Bar News recommends California for a good holiday, happy shopping, Universal Studios, Disneyland, and an insight as to how a tourist industry should be run.

A CRUISE TO THE TOP

THE ROMANCE OF RETRACING THE travels of our earlier explorers must add piquancy to the excitement of a cruise. Two cruises I have undertaken in the past six months shared that piquancy, although they were quite different in most other respects.

The first was a cruise on M.S. *Tropicale* (Carnival Lines, Miami, Florida) through Caribbean islands "discovered" by Columbus, while the latter, on M.V. *Queen of the Isles*, followed some of James Cook's moves in the Great Barrier Reef (excluding, thankfully, the disastrous collision with Endeavour Reef, near Cooktown).

The Caribbean cruise was sheer hedonism and luxury — a 35,000-tonne liner, equipped with elevators, dance floors, swimming pools, casinos, and carrying more than a thousand fun-seeking Americans, some of whom seemed determined to eat all eight meals available between breakfast at 7 a.m. and supper at 1 a.m.

The Australian cruise was comparatively spartan — fifty or sixty passengers, mostly Australians, aboard a vessel only 48 metres long, with cramped accommodation (mainly in six-berth cabins with 3-tiered bunks) and homely meals — cafeteria-style breakfast, barbecue lunches on islands, and dinners served by the crew. For all that, the cruise to Cape York was superior to the Caribbean cruise in a number of respects, not the least of which was the friendly ambience created by the crew.

Queen of the Isles has a chequered history. She began her life, a mere quarter of a century ago, in England. Edward Heath sometimes chartered her to take his Cabinet on cruises in the Channel. She was later sold to the King of Tonga, who managed to sink her on one or two occasions. From there she was sold to a New Zealand syndicate, which used her as on off-shore casino, before selling her to a Queensland group, which saw her potential as a tourist vessel plying the Northern Queensland waters.

The vessel leaves Cairns every Sunday evening, and returns on the following Saturday morning. She travels at a mere ten knots, mainly at night, but that is adequate to get you to Thursday Island and back, and to enjoy daily visits to islands such as Lizard Island and One Palm Tree Island. A visit to the northernmost tip of Cape York is included.

The first night is spent travelling past Port Douglas, Cape Tribulation and Endeavour Reef — where Cook experienced his reef disaster — to Lizard Island. The ship anchors at Watson's Bay on the west coast of Lizard Island on the Monday morning, and stays for a few hours — long enough for the energetic to climb to the top of Cook's Look, enjoy a barbecue lunch, do some snorkelling, and to watch the large lizards after which the island was named. (Cook's Look is a hill which Captain Cook ascended in 1770 in order to view the outer reef and to see the gap (Cook's Passage) through which he was able to sail; he was by then quite disenchanted with reefs.) Lizard Island also has a maritime museum and an up-market resort. It would cost you almost as much to stay at the resort for one night as to undertake the entire week's cruise.

Queen of the Isles departs late afternoon on the Monday, and anchors at another island on the Tuesday. Snorkelling equipment is provided on the ship, to enable passengers to see some splendid coral and colourful fish in the waters surrounding each of the islands. Fishing on board a boat is available for the less active passengers.

Day 3 involves a visit to Thursday Island and Cape York, while days 4 and 5 are devoted to returning to Cairns, with similar stop-overs at islands.

Most passengers spend their evening in the bar, where fancy dress nights, talent quests and the like are organised by the crew, including Danny, a huge guitar-playing Torres Strait Islander. Participants in the fancy dress party on my cruise displayed considerable ingenuity. One member of the crew wore a convict's outfit with the symbols "O4AOE" on the back (the symbols need to be read aloud, with the penultimate symbol pronounced as "nought"). An 87-year-old passenger dressed in feminine garb, and altered the sign on his back from "Queen of the Isles" to "Queer of the Isles". For those who find such spectacles distressing, quieter activities such as reading and Trivial Pursuit are available in the observation lounge.

Fares for the cruise start at $680 for the six-night, five-day cruise. Since all meals are included, that represents excellent value. It would be almost impossible to spend less money over the same period in Cairns — where a Japanese tourist-led recovery, combined with cheap air fares, has increased the demand for rooms, tours and taxis.

In any event, the cruise, with its tranquillity and historical interest, has many advantages over the crowded Cairns scene, with its bungy-jumping back-packers, white river-rafting aficionados, night clubs, high prices and its busy but cavalier taxi drivers.

(*Queen of the Isles*, Trinity Wharf, Cairns, Queensland).

Graham Fricke

AN EXCUSE TO END A HOLIDAY, OR HOW TO BOTTLE A BOOMAROO

DO YOU GET SICK OF CRUISING — MAKing constant decisions of where to sail today or where to spend tonight? If yes, then the following may be of interest.

One needs an honourable and legitimate excuse to cut short a holiday. Have you thought of bottling your yacht?

This needs careful preparation. Ideally, the day must start warm with light breezes. Then one may motor/sail with genoa and boom tent top up (— be sure the tent top has been measured by the club's sail measurer lest some unsportsmanlike member lodges a protest).

A pin in the front hatch should be adjusted so that it will fall out under extreme pressure. Under no circumstances should the rear lockers be secured.

When it commences to rain the crew should be confined below, with the storm boards in place. They should disobey the skipper's instructions to fasten down the "pop-top" securely, and as far as possible all be on the port side.

Thus the stage is set — for when a 40–50 knot "bullet" hits from starboard, the genoa is let off, the yacht heels, does not answer the helm and will not "point up" into the breeze. The yacht tips and ultimately bottles — the boom tent acting as an auxiliary sail (hence the reason for measuring).

Water can enter the boat through the front hatch, rear lockers and the main hatch (through which the crew can escape). Once the yacht is upside down the keel can fall back into the boat, and the weight of water in the boom tent will

A PIECE FROM THE PAST

THE FOLLOWING POEM WAS WRITTEN by the Royal Commissioner into the collapse of the Westgate Bridge, during several days of incessant testimony on one superficially minor bracing member. Two key points were, first, that the brace had been manufactured in "mirror image" by using the detailed drawings of the East approach span for the West span, and secondly that on top of this the drawing had been mis-read and the bolt holes placed in the wrong location. Either one of these on its own would have resulted in a piece that clearly did not fit, and the mistake would have been found. The combination of the two produced a piece that looked OK, fitted, but was seriously weakened.

There was much (much, much, much, . . .) more to it all. And all of it highly technical.

"The very worst thing in this whole damn case,
Is the long sad tale of Diagonal Brace.

ensure it will not right itself.

It is wise for the skipper to count heads when he surfaces — very bad form to finish a cruise without a full crew.

One should carefully choose the spot — may I suggest the Hawkesbury just north of the Brooklyn Bridge — the water is considerably warmer than Port Phillip.

Of course it should be on a day when the visibility is down to 30–40 yards — one really does not want any landlubbers to enjoy the spectacle. The precaution should be taken of having two or three Halvorsen cruisers in the vicinity to pull the crew from the water and tow the yacht, upside down, to shore where it can be righted, pumped out and towed back, by the police, to Akuna Bay for recovery.

It will now be obvious that the state of preparation is essential — it allows for a bent mast, the tearing off of locker lids and the loss of one's clothing and personal effects such as wallets, car keys, money and credit cards, as well as essential boat items — anchor and barbecue.

Back at Akuna Bay the night security guard will arrange for towels which can be worn to dinner in the restaurant (creating a small sensation) and a motel for the night.

At this stage one's friends in the area should be informed so that by the time one, well-rested, arrives back the next day, they can be cleaning the mud out of the boat and generally attempting to bring order out of the chaos and ready the boat to be towed home.

Unfortunately, some may see through the ruse — if someone in a pseudo-captain's cap coming out of the grocery store at Akuna Bay suggests that the bottling was deliberate he should be ignored, nonchalance being the order of the day.

Hence the ideal excuse for coming home early — the crew (if they have exams shortly) may complain about staying up until 3 a.m. to dry notes, and travelling home in borrowed clothes is a little inconvenient. However, these are minor inconveniences compared with the prime object of the exercise in getting home, from where one can sympathise with those left in balmy northern climes having to cope with the problem of whether to consume an extra oyster or prawn.

Finally, any suggestion that the above procedure had been designed by the Boomaroo Yacht Club to test submarines prior to placing a tender to build same should be vigorously denied.

Charles Wheeler

From birth to death we had to trace
Its history. Was it a damn disgrace,
Or was it the Freeman Fox's ace?
If you look at the transcript any place,
You'll see why we dropped to a funeral pace,
Seeking to find if it had enough space,
To clear the edge of the carapace.
When at the end I have run my race,
And come to my final resting place,
You will find, carved deep on my tombstone's face,
His sins forgiven, by God's grace,
He's been troubled enough by Diagonal Brace."

Esler Barber

or "the Secretaries' Lament"

SCENE: Lunch time at Domino's.

Three Owen Dixon Chambers West secretaries are waiting to be served at the counter.

Carol (to serving person): Could I have a litre of chocolate Big M, a double serve of chips, two pies, a sausage roll, a vanilla slice, three pieces of cheesecake and two paddle pops and could I have a receipt, please?

Carolyn: Feeling depressed again?

Carol: What, oh no, it's not for me, His Nibs upstairs hasn't settled and is having a quick lunch on his own in Chambers.

Carolyn: (To serving person): Could I have two Ryvitas with mung beans and cream cheese and a cup of black tea please . . . no sugar?

Carol: Oh, back on your diet again?

Carolyn: Oh no, the boss can't face his Jenny Craig's curried tuna so he sent me down for this.

Carlotta: (To serving person). Two Disprins and a black coffee, please.

Carolyn: Oh, heavy night last night was it?

Carlotta: No unfortunately, His Lordship is getting over the judges' reception last night. He's thinking of applying for silk. So he had to work the room pumping flesh. I don't think he'll get it this time. God knows he's applied so many times. I don't know why he keeps trying.

Carolyn: Don't you get sick of being their surrogate mothers?

Carlotta: Oh, yes. I've got to pick up his dry-cleaning this afternoon, organise his wife's birthday present and make sure his friend gets a dozen roses for him being unable to go to dinner tonight.

Carolyn: I'm doing the nurse bit at the moment. He thinks he's got stress-related cancer. I have to keep telling him it's a mild head cold.

Carlotta: You're lucky . . . I'm counselling mine through his latest tax audit. He's blaming me for failing to keep his cheque book up-to-date. Carolyn, what are you doing for the holidays?

Carolyn: Oh, the same old thing. Every Christmas is the same for me. Each year mine offers to take me to lunch the last working day before Christmas. Of course, I have to take the bookings and organise the rest of the people on the floor. You know how hard it is. When the day comes it's a different story. There's a mountain of urgent work because he left it all to the last minute to have drinkies with his mates. There's no way I can get it done and still go out to lunch yet he still insists it will be something like — "Cazza" — I hate that name — "We can still have our Christmas lunch; it's now only 2.30. We'll get back by four and finish off what we have to do." He keeps insisting even though I explain that there will be hours of work for me to do. He seems to think that it's O.K. for me to work back late or even come in between Christmas and New Year's Day on my time, while he's off overseas enjoying himself. It isn't just bad luck that the days I must get away on time — and let The Almighty know about — he dreams up a last-minute crisis to keep me back for hours.

Every Christmas is the same for me. Each year mine offers to take me to lunch the last working day before Christmas. When the day comes it's a different story. There's a mountain of urgent work because he left it all to the last minute to have drinkies with his mates

Carlotta: Well I just love the variable starting hours; "Could you come in early say 8 a.m., I have an urgent defence to get out." I get in at 8 a.m., he gets in at 9.15 a.m. and the defence doesn't get dictated until 12 a.m. after coffee and more cheesecake. Then he'll stand at my shoulder until it's done.

Carolyn: I know, I get in on Monday and the Important One says, "Carolyn, I don't mind if

you come in about 9.15, there isn't much work on", so I do and then I get in and he says "Would you come in tomorrow at 8.30 a.m., not your usual 9.30?"

Carlotta: Yes, they are insensitive to everyone else's feelings, situation or position, and yet they expect us to be constantly sensitive to their whims, wishes and well-being.

Carolyn: I sometimes wonder why I put up with it. My boyfriend thinks I'm mad.

Carlotta: My husband thinks I'm a masochist.

Carolyn: Have you ever tried to take a sickie?

Carlotta: What! Take a sickie?

Carol: Sickies, who's allowed sickies? I'm expected to soldier on regardless. The boss acts as if it's a crime for me to be ill on his time and yet he's constantly taken ill. But I've got to be super-sympathetic about his minor illnesses and hypochondria.

Carlotta: I don't know what we do it for. Carolyn, did you hear what first-year solicitors are earning?

Carolyn: (Laugh) Yes, what a pittance.

Carlotta: Come off it, they don't deserve to be paid as much as us.

Carolyn: Quite right, Oh, could I have the latest edition of *New Idea*, please.

(And so life in Owen Dixon Chambers continues.)

More Mouthpiece or How To Handle a Snag

Once again, this time on Father's Day, the *Sunday Age* passed up the opportunity to feature Clive Penman in its article on "The Vexed Questions of Fatherhood".

Playing "kick to kick" out in the street in between the movement of neighbour's cars flitting backwards and forwards on their Saturday morning errands is the closest Clive Penman, barrister, and his twin sons John and James get to enjoy the rapport of father and sons at play. The constant stopping and starting is a good analogy of the working week relationship built up during the half-hour available each day between Clive's arrival home (*if* the Ferntree Gully train is on time — a rare enough event) and the twins' bed-time.

For Clive, a suburban Magistrates' Court hack, it isn't a matter of quality versus quantity of time but rather the best use of the time available. Of course, with his limited income and his wife's occupation of "home duties", there is no professional help, no nanny. More often than not it is a frazzled wife who greets him, almost as enthusiastically as the kids do. "They're yours", she says. "I have had them all day, bickering, fighting, arguing, refusing to do anything I ask them. You can stay home. I'll go to work."

Clive, exhausted by a day waiting to be not-reached, waiting for the as usual late train and waiting to get home and just put his feet up, is somewhat bemused by it all. The children, so obviously pleased to see him, badger him to read them a story, even before he has a chance to put his briefcase down or take his sodden coat off. "Daddy, James punched at me!" "No I didn't. John kicked me!" It's the final straw in a day Clive would rather forget. Restraint be damned! A few loud words and the twins are bundled off to bed, upset and hurt that the Dad they had so looked forward to seeing has so little time for them.

Once again, this time on Father's Day, the *Sunday Age* passed up the opportunity to feature Clive Penman in its article on "The Vexed Questions of Fatherhood".

"We think it is important that the kids are encouraged in sport. We try to get to the footy at least twice a year but it is getting more and more expensive, especially if we try to make a day of it and buy them a pie and chips and a can of soft drink. On Sundays, if I don't have the lawn to mow, the garden to clean up, things to do around the house or the odd bit of paperwork for my practice we try to get out. In summer we drive down to the beach — it is a long day by the time you take into account the travelling to and from. In winter, if it isn't too wet, we go to the Zoo or Healsville Sanctuary. Sometimes, we go to a park and have a picnic. I suppose that on Sundays, at least, I have quantity rather than quality of time perhaps because I lack quantity of money.

"I really don't get to see the twins all that much. I think in the end they'll be OK. There really isn't much I can do about it, can I? I suppose others with their greater resources can make a better fist of it, can't they?"

Clive often can be found with his sons splashing about in his Clarke's above-ground wading pool.

He characterises parenthood as bringing up "mini SNAGS (Sensitive New Age Guys)".

VERBATIM

County Court at Melbourne

Coram: Judge Cullity
R. v. Grimwade & Anor (page 6815 of transcript)
Swanwick: I take it that that means that Your Honour does not wish to hear anything further on that matter?
His Honour: No, I have heard everything, I think, with a fair degree of patience which I have absorbed into my head, that is split with a cursed headache, literally blowing the top of it, and that is the ruling and that is where it stands.
Swanwick: As Your Honour pleases.

Magistrates' Court at Melbourne

Coram: Power M.
R. v. Middap & Fourneaux

Kayser for one accused cross-examining prosecution witness as to the sending of a Valentine's Day card.

An objection arose to the tendering of the document and during the course of this discussion, the following exchange took place:
Witness: Don't you send Valentine cards to a few people on Valentine's Day?
Kayser: No.
Witness: Well, that doesn't surprise me.

County Court at Melbourne

Coram: Judge Walsh (Practice Court)
28 June 1991
Re: *National Australia Bank Ltd.*
Sandbach for the Applicant
Wyles for the Respondent
Wyles: It is a simple a matter as that, Your Honour.
His Honour: All matters in the Practice Court are simple these days, Mr. Wyles.
Wyles: Yes, Your Honour, that's why I'm briefed here!
Sandbach: In my submission, Your Honour, the court is here to enforce the law and that is what it should do in this case!

Supreme Court of Victoria

Coram: Nathan J.
29 August 1991
In the Matter of: An application by Community Services, Victoria
Solicitor for Respondent: "Some one-horse town near Foster Your Honour. I think it might be called Toora".
His Honour: "Well thank you very much, I happen to have been born there."

Supreme Court of Victoria

Coram: Senior Master Mahony
7 August 1991
Company Winding-up Applications
Franich for the Deputy Commissioner of Taxation
Franich: "I see the Master has prepared a certificate. I now see the problem. The affidavit is sworn on the 31st November 1989! November has only 30 days!"
Senior Master Mahony: "Yes, well that is the traditional view."

Magistrates' Court at Sandringham

Coram: Crisp M.
Applicant in person seeking return of licence

This exchange occurred the day after the first of a two-night series on [the late] Elvis Presley and raised on television the question whether "the King" was alive.
Crisp M.: Mr. Jackson, you want your licence back?
Crisp M.: What is your full name?
Applicant: Elvis Gordon Jackson.
Crisp M.: Your parents must have been glued to the television screen last night.

County Court at Melbourne

Coram: Judge Meagher
H. J. Reece P/L v. Handler & Ors
Judge (reading a notation on his file written by a Judge's associate): "There is an interesting note on this file, it says "Filed herein: Terms of Settlement in full and frontal settlement." I wonder what the associate was thinking when he wrote that?"
McInnes: "I have been an associate, Your Honour, and I know exactly what he was thinking about."

Tricontinental Royal Commission

(Transcript p. 1904)

Howard: Mr. Scott, could I take you to your comments about Tricontinental's auditors, which appear at paragraph 68 and following of the statement at page 20. We are essentially concerned with the period from 1985 and following. You say that although you had not spoken to Mr. Weir, you did speak with some of Peat Marwick's audit teams and found a number of them to be relatively young and inexperienced in terms of banking practices. I wonder if you would mind telling us, please, what it was that led you to that conclusion? — — — Certainly relatively young — would certainly be in age. More so a couple of examples. I believe that part of the audit was to audit securities, and one particular person on that team actually couldn't distinguish between a guarantee and a mortgage.

What do you mean by relatively young? It is like how long is a piece of string — what does it mean to you? — — — Relatively young would be age, most certainly. Would be — — —? — — — Age.

I am sure it would be, but perhaps you could just help us with a figure? — — — I have no idea, but I would say that looking at their age they were possibly — I would consider them probably junior staff in relative experience in audit procedures.

Are you talking about young twenties or mid twenties or young thirties, what do you mean? — — — I'd certainly be talking low to mid twenties.

Inexperienced in terms of banking practices — what led you to that conclusion? — — — Again, as I previously said — — —

30 August 1991

A group of Year 11 Xavier College students attended the Royal Commission as part of their politics class.

Howard: Mr. Chairman, you will note a contingent of Xavier College students are present.

The Chairman (Sir Edward Woodward O.B.E., Q.C.): Yes.

Howard: I understand they are the cheer squad for Mr. O'Callaghan's cross-examination.

The Chairman: Either way they are very welcome.

O'Callaghan Q.C.: (on commencing his cross-examination) Mr. Chairman, in respect of the extraneous comments from my learned friend as to the welcome audience, after a country convent my alma mater was only Taylor's Correspondence . . .

After O'Callaghan had cross-examined for five minutes the contingent of students suddenly stood up and walked out.

Howard: The transcript should note that the Xavier College boys have left during the course of Mr. O'Callaghan's cross-examination.

Commissioner Carden: When they heard that it was Taylor's College.

Goldberg Q.C.: No, I think it was the convent, Mr. Carden.

O'Callaghan: All in all, it is a petty revenge, and not only by the Xavier College students.

Californian (Not Queensland) Reasons for Removing Judges

Judge S was removed from office for conduct which included "giving the finger" to a defendant who came to court late for a traffic matter and expressing disbelief of the defendant's testimony by making a sound commonly referred to as a "raspberry." [*Spruance v. Commission on Judicial Qualifications*, 13 Cal. 3d 778 (1975)].

To enforce punctuality in his courtroom, Judge G sometimes began proceedings in the absence of a tardy counsel, questioning witnesses himself when necessary. On other occasions. Judge G excused himself from the bench and left the courtroom for various periods, instructing counsel to continue in his absence. For this and similar conduct, Judge G was removed from office. [*Gonzalez v. Commission on Judicial Performance, supra*].

Public censure was ordered for Justice B for attending an open meeting when he knew that the topic of discussion would be a criminal matter pending before his court and that the admission price charged would go to the defence fund in the case, and when he had his picture taken with the key speaker at the meeting. [*Matter of Bonin*, 378 N.E.2d 669 (Mass 1978)].

The "*Los Angeles Times*"

Friday, 26 July 1991 at Page 3

"California Fact

Is it just an interesting coincidence or are State Bar members planning a man-to-man defense of convicted felons?

- Number of California state prison inmates: 101,738
- Number of practicing California attorneys: 102,810."

In Victoria, there were 2,283 prison inmates as at April 1991 (the last date for which figures are currently available) compared to 1,230 counsel and 7,180 solicitors in active practice.

A FAIRY-TALE (CONTINUED)

Now gather around me my dears whilst I tell you further of the saga of the VicBees. I know that I have been promising for a long time to tell you of the progress of the building of their new hive. I cannot even tell you whether there have been a lot of secret developments or whether there have been no developments at all. All I know is that the site is no longer in the vogue of a "suburban tip circa 1980s" but has reverted to "London bomb site circa 1940s" with a view to possible redevelopment in the style of "Melbourne Cricket Ground pitch area circa 1980s". VicBees are fortunate in that the choice between the last two styles does not involve a great deal of expenditure or trouble — all that it requires is a bit of a clean-up to get from bomb site to cricket pitch. To revert back to bomb site from cricket pitch requires no more than the spreading of a little bit of rubble.

As you know, many many years ago, VicBees were able to communicate with each other without the assistance of mechanical aids. Over a lengthy period of time they became quite lazy and began to use devices connected with wires. As they became ever reliant upon this system of wires, they had installed in their hives more and more sophisticated systems. Unfortunately, as the systems developed in sophistication, they became increasingly prone to breakdown and reduced services. More recently, the VicBees have noticed that their sophisticated devices prevent them from communicating by wire from their hives. It appears that the problem is greatest in the morning and each and every afternoon. Some VicBees have resorted to devices that are not joined by wire and it is said that there is a move back to the good old days. It also is said that one reason the problem has developed is that there are more and more VicBees staying back in the hives rather than out collecting pollen and therefore there is a greater demand on the limited number of wires.

PLEASE CAPTION THIS PHOTOGRAPH Prize a bottle of Essoign Claret.

And if that wasn't creating enough problems, the VicBees have also noticed that transportation within their newest and biggest hive is similarly erratic and delivering a reduced service. In their own unique way, the Vic Bees have added to the problem by allowing lifts to be devoted to removalists at the same time that there is peak use of the lifts and lifts are out of service being maintained by LiftBees. On a good day, at 9.30 in the morning, there may be as many as two lifts opening at a time!

I have told you before about predictions of the number of VicBees being reduced by 25%. It appears that the latest prediction is 30–33%. One wonders that will happen to those 300 or 400 VicBees if they cannot continue as VicBees. Where will they go? There appears to be little scope for them to become LIVBees or even DoleBees. Certainly, there appears to be less and less pollen to be shared amongst the VicBees and yet there are more and more VicBees each year. It would seem that as the pollen reduces, perhaps by up to 25% per year, the number of VicBees grows by half that amount.

Whilst VicBees struggle to collect enough pollen to keep going, and whilst the VicBees as a whole are under attack from the A-GBees, the LACVBees, and the ReformBees, it is encouraging to see the attention of VicBees turned away — nay distracted — from matters of such importance and directed instead to the determination of the composition of the Council advising the QueenBee. Many meetings of VicBees have been held, and much paper has been devoted, to the discussion of the composition of this Council. The debate appears to be whether members of the Council should be elected by the different types of VicBees or whether there should be more VicBees with greater experience and knowledge.

Perhaps there is little wonder that there are rumours rife of small groups of VicBees considering, planning and perhaps likely to leave the main hives with a view to setting up their own little hives. If the rumours are to be believed, each of those little hives will have exclusive membership and will concentrate on collecting pollen from specific categories of flowers. I ask you, my dears, where will it all end? Is this the beginning of the end of the VicBees as we know them?

I think, my dears, that the time is late and we shall continue our discussion about the fate of the VicBees on another night. That is, of course, if they are still around!

WINNER OF COMPETITION

Best entries received:

Judge Gordon Spence *"Fifteen love"* *"Fifteen all"*

Nicholas Green *The Night Before?* *The "Mourning" After . . .*

"They said we'd never make it" *"Perhaps they were right."*

and the winner is: Judge Gordon Lewis.

Well Jim, I expect you'll be looking for a new Chief Justice soon! *Prick!*

Judge Gordon Lewis will receive a bottle of Essoign Claret.

LETTERS AND CORRESPONDENCE

A FAMILY MATTER

The appointment of Justice Colleen Moore to the Family Court created what may be the first husband and wife team in a superior court in the common law world. She is married to Justice Alwynne Rowlands, now the Judge Administrator in Sydney but previously of our County Court and the Administrative Appeals Tribunal.

While Her Honour's origins are the Brisbane Bar and she is presently based in Sydney she has, and will, sit in Melbourne, as befits a national court.

Together with her new legal and domestic responsibilities the judge is also chairman of the New South Wales Institute of Psychiatry.

BARRISTERS' CHAMBERS

The Law Reform Commission of Victoria in Discussion Paper No. 23, "Restrictions on Legal Practice", proposes a review of the rule that requires barristers to practise from approved chambers. The Commission considers that the rule should be abolished.

In at least one aspect I believe that the Bar should reconsider the accommodation rule. Some members of counsel in effect practise from home but are required to maintain token chambers in the city. This is an unnecessary expense that does not contribute to the efficient conduct of their practice.

The reasons why some barristers would prefer to work at home are varied but they include the location of their home, a family structure that operates on an equal-parenting basis, cost, the non-city nature of their practice.

If there was not the requirement to have chambers, more barristers would be able to consider the option of living outside Melbourne. With the advances in modern technology there should be no difficulty in communicating with clerks or solicitors from the home.

In many marriages both spouses are working and the only way to share the responsibilities and workload of raising children is to operate on an equal-parenting basis. This is difficult for a barrister who has to operate from chambers in Melbourne.

Justice Colleen Moore.

If the home barrister has to appear in the Melbourne County or Supreme Court, it should be a simple matter of the Bar renting facilities for conferences and robing, or sharing such facilities with other barristers, or using the court facilities, or, dare I say it, operating as on circuit from the solicitor's office.

The Bar should cater for the diversity of lifestyle and practices of its members and consider variations to the accommodation rule. I have only raised one aspect of the accommodation issue and it raises doubts in my mind about the legitimacy of the arguments in support of the current rule.

A LAWYER'S BOOKSHELF

The Law of Trade Secrets

By Robert Dean, Law Book Company Limited, 1990, pp. vii–xlix; 1–629.

THIS HARD-COVER BOOK COMPRISES over 600 pages in six Parts and retails for $125.

The book commences with an Introduction in Part 1 examining the nature of protection of secret information and its importance in a modern society. Definitions of trade secrets, confidential information, know-how, patents and unfair competition are also examined.

There is a useful discussion of the cases relating to unpublished works and the jurisdictional basis of the causes of action in such an area. The jurisdiction of the court to protect trade secrets is said to arise "from the equitable duty to act with good faith when dealing with secret information obtained in a confidential relationship". The interaction between common law and equitable remedies is examined, together with some recent cases which relate to the nature of the duty and the remedies available. The position of third parties coming into receipt of confidential information, together with damages, also is discussed.

Part 2 commences with an outline of the elements of an action for breach of confidence and the relevant principles which can be extracted from various cases. There is also a categorisation of the types of secrets which may or may not be protected, and an identification of the tests which a court will use to identify whether the relief sought will be granted. The "Spring Board Doctrine" is also discussed and the relevant cases relating thereto. The actual publication of the confidential information also creates a variety of problems, which are discussed at length. The position of the Government and use of information obtained from the Government also are discussed.

The next chapter in Part 2 analyses the nature of a fiduciary relationship and the duties which arise therefrom, and in particular the employer/employee relationship and the use of confidential information. Customer lists, which are often the most important asset of any business, can be used in a number of ways by a former employee and often there is a fine line between the ex-employer's own knowledge and knowledge acquired from an employer.

Issues such as the concept of ownership of inventions created by an employee, restraint of trade clauses, the misuse of trade secrets by third parties, the various defences available to a person who has allegedly used a trade secret and the range of remedies which may be invoked in relation to the misuse of confidential information are discussed.

There is also a very practical summary of the court's jurisdiction with respect to equitable damages, together with the assessment of same.

Part 3 deals with commercial privacy and other areas of the law which impinge upon trade secrets such as trespass, physical damage, economic loss, conversion, and damages. This part also deals with the tort of conspiracy and its application to confidential information. Other causes of action relating to the interference with contractual relations are discussed. Rules relating to restraint of trade covenants along with the relevant tests and cases are set out and the different types of situations discussed. The protection of computer software also is dealt with and, in particular, computer programs.

Part 4 relates to various remedies arising out of litigation including Anton Piller orders, and contains some valuable practical points in obtaining or resisting such orders, including a discussion on the types of pleadings, discovery, inspection and proceedings in camera.

Part 5 summarises various pieces of telecommunications legislation and in particular the use of listening devices. There is also a discussion of the theft of trade secrets vis-a-vis the Victorian *Crimes Act* and obtaining financial advantage by deception.

Part 6 contains very useful appendices of relevant cases and the nature of same, together with draft Statements of Claim in actions for breach of confidence and breach of fiduciary obligations. There is also a sample of an Anton Piller order, an order protecting trade secrets from discovery, and agreements relating to confidentiality.

This book is very conveniently categorised and is a useful reference source for a variety of actions involving trade secrets. The reader will benefit from the large amount of research which has obviously been undertaken in order to write this comprehensive book.

Leslie M. Schwarz

Australian Insurance Law (2nd ed.)

By A.A. Tarr, Kwai-Lian Liew and W. Holligan, Law Book Company Limited, 1991, pp. (i)–(xlvi), 1–452, cloth $95, limp $69.50.

The first edition of this work was published in 1987 shortly after the coming into force of the *Insurance Contracts Act* 1984 (C'th.) and the *Insurance (Agents & Brokers) Act* 1984 (C'th.). The passing of a further four years has enabled the authors of this text to incorporate into the second edition case law, articles and other references determining the scope of and interpreting this significant legislation.

The preface shamelessly indicates that the book is designed primarily for law students and those taking examinations for insurance qualifications. However, the generality and breadth of cover provided ensure that the work will be relevant to all legal practitioners. As opposed to some of the more established English texts on this area of the law, the book provides an easily readable and well-annotated description of this often confusing area. It also concentrates on the law as it has been applied in Australia, not only in relation to the new legislation but also by dealing where possible with Australian authorities.

A bonus provided by this book, and often left out of other general insurance texts, is a chapter on marine insurance. Whilst the book does not pretend to provide an exhaustive coverage of the law it will prove useful to practitioners as a convenient and up-to-date starting point in their researches.

Sam Horgan

Associations Legislation in Australia and New Zealand

By A. S. Sievers, Federation Press, 1989, pp. v–xxii; 1–145.

This small soft-cover book deals with both unincorporated and incorporated associations.

The introduction deals with the legal status of an incorporated association, and the following chapters discuss issues such as the formation, rules and management of unincorporated association. Various issues relating to the holding and co-ownership of association property, gifts to associations and the contractual and tortious difficulties which arise as a result of an unincorporated association not being a separate legal entity also are dealt with, and some cases in the area analysed.

Legal actions by or against unincorporated associations, the rights and liabilities of members of the committee of an association and the dissolution of unincorporated associations also are discussed.

The second part of the book deals with the incorporation of unincorporated non-profit associations and incorporated associations. Legislation in most States in Australia and New Zealand is referred to and recent developments enumerated.

The definition of non-profit association is canvassed together with the concept of trading, pecuniary profit and gain. Details are then provided with respect to an application for incorporating an unincorporated association and the documents required. The effect of incorporation on the liability, capacity and powers of an association is discussed.

The book finally discusses the constitution, rules and management of incorporated associations together with the functions and powers of a committee, general meetings and the rights and duties of members of incorporated associations, and interposes statutory provisions. Government intervention and offences against the relevant Acts are mentioned. A bibliography also is provided at the end of the book.

As both unincorporated and incorporated associations impact upon all areas of life, this book is especially useful to administrative lawyers and others involved in sporting, political and social clubs.

Leslie M. Schwarz

Proprietary Rights and Insolvency in Sales Transactions (2nd ed.)

By Professor R. M. Goode, Sweet & Maxwell, 1989, pp. v–xxii; 1–161.

This hard-cover book deals with the effect of proprietary rights upon the ownership of goods in an insolvency situation.

The concepts of ownership, possession and attornment are discussed in the context of the ability of persons supplied with the goods to pay for them.

The English *Sales of Goods Act* impacts upon these concepts; however, the book is useful in that the basic concepts have universal application and are modified by the current legislation. The sale of an unidentified part of a bulk held by the seller is of particular interest.

The second chapter relates to acquiring title of oil, gas and minerals and sets out some general principles and problems in relation to these products.

Chapter 3 canvasses the concepts of agency and the passing of legal and beneficial ownership between vendor and purchaser when an agent is involved. Similarly, the problems of transfer of title and the agent's involvement in the transaction are discussed, together with the problems of an agent acting without or in excess of authority.

Chapter 4 deals with documents of title, shipping contracts, indemnities with respect to various transactions and bills of lading.

Chapter 5 deals with principles of reservation of title clauses, the involvement of an agent, the commingling of goods and the authorised dispositions of the purchaser, together with the claiming of proceeds of sale by the vendor, the ability of the vendor to secure other debts via the use of "Romalpa" clauses and the problems which can arise between vendors and third parties. The requirements of an effective reservation of title clause are listed.

The final part of the book sets out a judgment relating to the effectiveness of reservation of title clauses in a case involving a receivership of a wine company.

This book provides a good illustration of the many practical problems which can arise as a result of the use of both agents and "Romalpa" clauses in sale of goods.

Leslie M.Schwarz

Computerised Litigation Support

By Jane Lodge, Federation Press, 1990.

Wherever one turns in modern society one sees keyboards, consoles and screens. Computers, which ten years ago were housed in specialised rooms and accessed only by a few privileged people, are now used in every bank, chemist and department store checkout, not to mention every corporation and professional practice. Word processors are the fundamental equipment of every office. Information is stored electronically in every increasing volume. In such a complex world, merely maintaining control over the information available to us is an awesome problem, and it is a problem which affects litigation in the same way as it affects other areas of human endeavour.

Jane Lodge has experience in a large solicitor's firm of designing, creating and using computer systems to assist in the support of litigation. Whilst the basic adversarial system may remain unchanged, the computer can fundamentally alter the manner in which the documents for a particular case are handled, so that they are stored, indexed, coded and retrieved in a manner which improves the service to the client. Ms Lodge, in a concise work of under 100 pages, attempts to educate those with no knowledge of the basic principles of computer litigation support systems to understand the concepts involved and thereby to enable them to participate in decision-making when such systems are being discussed and planned without feeling out of their depth.

Lawyers provide a service for their clients, and if there is a way in which we can deliver that service more efficiently, or with a greater degree of accuracy, then one might suppose we are fulfilling a consumer demand. To this end, an understanding of the possibilities and shortcomings of computer litigation support systems is necessary: we do not need to master the intricacies of any particular systems, but we should able to recognise when such a system is likely to provide cost benefits which should be investigated. It is at this basic level that this book has relevance for barristers.

It must be said, however, that the style of the work is concise and informative rather than discursive and elegant; and it does leave many questions of particular relevance for the conduct of litigation unanswered. Having observed that parties who have available litigation support systems can obtain immediate access to pertinent information in the course of a case at the touch of a button, Ms Lodge comments that the trial judge, without such information resources, may be swamped by the respective arguments founded on such information. She ignores any consideration of the policy implications of such a situation: should the judge be provided with the technical support developed by the parties; how could this be done in practice without each side gaining access to the database systems of the other? She also ignores any issues of court practice and procedure which will have to be addressed as such systems become widespread, such as should a party using a computer litigation support system be compelled to make discovery electronically to other parties, and if so how?

This book will be of use to anyone grappling with the concepts of using computers to assist in managing litigation. Whilst it may be of most direct relevance to solicitors who are facing the practical problems of designing systems for general use, rather than barristers who are usually brought into a case at a stage when the design of the litigation support system has been drawn up, it is a useful source of information to all involved in modern and increasingly complex litigation.

David Levin

FOOTBALL

"If you're fixed in your mind you're gone.
There are certain times when you've got to be daring."

Ron Barassi.
The Coach. 1978.

IT IS WITH THESE WORDS FIRMLY IN mind that members of the Bar entered upon Football Season 1991.

This season, the second in recorded history, was expanded to two games and all agreed it was a great success.

In all, 32 players made themselves available for selection and four offered their services as umpires.

THE FIRST GAME

The first game was played at Como Oval on Sunday, 4 August, against a team representing Mallesons Stephen Jaques.

The ground conditions were favourable and the game was played at a fast early pace with the Bar matching the younger players from Mallesons. The score at quarter-time was Mallesons 4 goals 5 behinds to the Bar 3 goals 5 behinds.

The Bar v. Mallesons.

In the second quarter the Bar managed 3 goals 1 behind to Mallesons 5 goals 3 behinds.

Although this left us some goals behind at half-time, hopes were high for a better second half, but despite determined efforts, Mallesons ran away to record an easy victory, kicking a further 6 goals to the Bar's 3.

The final results were the Bar 9 goals 8 behinds 62 points to Mallesons 15 goals 19 behinds 109 points.

Despite our loss, the performances of a number of our better players should be noted. New recruits Mark Gamble and Mark Hebblewhite dominated centre half-back and the ruck respectively.

Mark Gamble scored the goal of the day when he got onto a big "torp", sending the ball at least 60 metres through the big sticks.

John Jordan at centre-half-forward, Mordy Bromberg in the centre and Peter Lithgow at full-

forward played excellent games in key positions.

Patrick Southey, Sean Cash and Savvas Miriklis, in particular, performed well on the ball

and our tagger, Joseph Tslanidis, relentlessly pursued the B.O.G. law student playing for Mallesons.

The back line was well served by the more mature members of the side, Mick Bourke, Mick Quinlan, Ron Clark, Phil Kennon, David Myers and Lex Lasry Q.C.

Congratulations also to David Colman, Andrew Halse, Chris Howse, Michael Tinney, Andrew Donald and Steve Pica of the younger brigade.

Goalkickers were Mark Gamble 3, Mordy Bromberg 2 and singles to Peter Lithgow (who should have got 5), Mark Hebblewhite, John Jordan and Damien Maguire.

Best players — Savvas Miriklis, Mark Gamble, Mark Hebblewhite, Patrick Southey, Peter Lithgow, Mordy Bromberg and John Jordan.

The Bar provided the two field umpires, Mark Gibson and Chris Wallis, whose fine performances, in sometimes difficult circumstances, made the game all the more enjoyable.

Our efficient umpiring contingent was "topped up" by John Lee in the goals and Michael Maguire on the boundary.

THE SECOND GAME

The second game for the season took place at Ross Gregory Oval on Sunday, 25 August, against the Office of the Director of Public Prosecutions (Vic.).

There were high expectations of the Director, Bernard Bongiorno Q.C., playing, but we were sadly disappointed.

The Bar v. The Director of Public Prosecutions.

On this occasion, with the loss of Southey, Hebblewhite, Kennon and Gamble, we turned to new recruits Henry Jolson, Robert Barry, Jim Dounias, Frank Parry, Paul Santamaria and Chris Wallis, who had exchanged his whistle for a mouthguard to enter the fray.

Mark Gibson was joined by Richard Tracey to form another outstanding umpiring combination, together with John Lee, Michael Maguire and Ben Jordan.

In this game there were a few more highlights which will be covered shortly, but first, the scores.

The first quarter saw the opposition score 4 goals 1 behind to 1 goal 4 behinds. Things looked ominous. We fought back in the second quarter to have both sides on 27 points at half-time. After half-time, the Bar pulled away, scoring 4 goals 4 behinds to 1 goal 3 behinds, to WIN BY 13 POINTS.

Our first win was greeted with wild jubilation and a general consensus that we have "turned the corner".

Paul Santamaria turned in a wonderful performance on the forward line, kicking four fine goals. Singles were recorded by John Jordan, Andrew Halse and Andrew Donald, who scored the goal of the day, a 40-metre snap from the boundary line at full pace whilst under attack from three or four opponents.

A feature of the game was the marking of John Jordan and Steve Pica with Henry Jolson pulling down a screamer, only to find that a free kick had been awarded to another player in the pack.

John Jordan was the best player for the Bar and others who played well in an excellent team performance were Paul Santamaria, Peter Lithgow, Mordy Bromberg and Steve Pica.

All other members of the team put in top games with the backline being impenetrable.

And so another season passes . . . may the fun continue next year.

Damien Maguire

PROFESSIONAL CONDUCT BULLETIN NO. 1 OF 1991

Documents Produced Under Subpoena Duces Tecum

THE BARRISTERS' DISCIPLINARY TRIbunal has recently dealt with a charge that a barrister interfered with the administration of justice by receiving directly into his own custody documents brought to court pursuant to a subpoena *duces tecum*. The charge was dismissed. The Tribunal found that the person bringing the documents to court pursuant to the subpoena had been met by counsel's instructing solicitor and had handed over the documents to the solicitor.

In dismissing the complaint against the barrister, the Tribunal expressed strong disapproval of the practice of legal practitioners intercepting persons bringing documents to court under subpoena, and then dealing with the documents as they see fit without the documents ever having been produced to the court by the person to whom the subpoena was addressed. The Tribunal's particular concern related to documents containing medical records of one party (usually the plaintiff). It described as "extremely undesirable" the practice of legal practitioners securing access to such documents brought to court under

CONFERENCES

The 4th Annual Australian Stamp Duties Symposium

The 4th Annual Australian Stamp Duties Symposium is to be held at the Sheraton-Mirage Resort, Gold Coast, from 24–26 October 1991.

Highlights include participation from the following Stamp Duty Commissioners:

Mr. J. Purcell, Commissioner of Stamp Duties, New South Wales

Mr. B. Buchanan, Executive Director, Office of State Revenue, New South Wales

Ms S. Bath, Comptroller of Stamps, Victoria

Ms I. Bradley, Senior Deputy Commissioner (Policy), Office of State Revenue, Queensland

Mr. M.K. Walker, Commissioner of State Taxation, South Australia

Mr. G. Faichney, Commissioner for A.C.T. Revenue, Australian Capital Territory

Mr. D. Read, Commissioner of Taxes, Northern Territory

Mr. J. Burley, Deputy Commissioner of Taxes, Northern Territory;

and Tony Fitzgerald A.O., Q.C. will be the special after-dinner speaker at the Annual Australian Stamp Duties Dinner.

For more information: Adrienne O'Brien (02) 319 3755.

Local Government: Creating Safer Communities

A conference at the World Congress Centre Melbourne, 26–28 November 1991

Local Government around Australia is already active in creating safer communities. Graffiti, theft, assault, drugs, and better policing and planning strategies are now on the agenda of many council meetings.

In 1990 the National Committee on Violence (NCV) found that Local Governments are at the frontline in dealing with social problems such as vandalism, homelessness, child abuse, domestic violence and more.

In some places councils have combined to mobilise community and government support. Come and find out how your colleagues are treat-

subpoena before the documents were produced to the court.

The Tribunal indicated that, where documents are produced pursuant to a subpoena *duces tecum*, the proper course to follow was the three-stage procedure set out in *National Employers Mutual General Association Ltd. v. Waind* [1978] 1 NSWLR 382.

A person complying with a subpoena *duces tecum* produces the documents specified in it to the court, not to the party issuing the subpoena or any other party. A party has no *right* to inspect the documents which a subpoenaed person brings to the court before they are produced to the court. See *Burchard v. McFarlane* [1891] 2 QB 241, 247–248. Subject to this, a party may ask to see, and be shown, documents brought to court pursuant to a subpoena *duces tecum*, before their production to the court. See *Blann v. Blann* [1983] Fam. L.C. 78180. There is no obligation upon a party who has issued a subpoena to call upon the subpoena for production of the documents specified therein.

However, it would be improper to give the person subpoenaed the impression that the party issuing the subpoena is thereby entitled to inspect the documents brought to the court, or allow that person to permit inspection under that impression.

It would also be improper to make such a request where the documents specified in the subpoena *duces tecum* contain or may contain material in respect of which another party might be entitled to claim privilege or has a claim of confidence, where inspection may result in the disclosure of privileged or confidential material.

Caution would also have to be exercised if such a request were made in a case where the person responding to the subpoena is a relatively junior member of an organisation and hence may lack the authority to allow inspection.

C.N. Jessup Q.C.
Chairman
Ethics Committee

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ing these problems — and finding the resources to do so.

The NCV recommended a national local government conference to enable local council officials and elected members from around Australia to share their insights to develop initiatives and policies that make local areas safer places — THIS IS IT!

Attendance at this conference is essential for public administrators, planners, environmental designers, family and youth workers, elected members, community organisations, police and all those interested in local government and crime prevention.

Listen to local government speakers from Canada, the U.K. and Australia with hands-on experience in achieving safe places both here and overseas.

Discuss and exchange information with other councils, planners, welfare workers, police and community organisations.

Speakers will include Tim Kendrick, Director of the Safe Neighbourhoods Unit In London; Carolyn Whitzman, Toronto Safe City Committee; Peter Grabosky, Principal Researcher to the NCV; the Federal Minister for Local Government, the Hon Wendy Fatin M.P.; and representatives of local governments around Australia.

Inquiries should be directed to Sandra McKillop of the Australian Institute of Criminology, tel. 06 2740 223 or fax 06 2740 225.

Greek/Australian International Legal & Medical Conferences

AS THE CONFERENCE CHAIRMAN OF the Greek/Australian International Legal and Medical Conferences, I am writing to you as a supporting organisation to advise you of the success of the Third Conference which was held in Melbourne from 23–24 May 1991.

The next Conference will be held in Rhodes, Greece from 23–28 May, 1993.

Details of the Fourth Conference can be obtained from the Conference Secretariat, ICMS., P.O. Box 29, Parkville 3052 or by contacting Mrs. Ethel Barton at telephone number (03) 387 9955 or facsimile (03) 387 3120.

Sir Leo Cussen Lecture

Leo Cussen Graduates Association Incorporated presents its Annual Sir Leo Cussen Lecture to be delivered by the Honourable Sir John McIntosh Young O.A., K.C.M.J., Chief Justice of the Supreme Court of Victoria, on Friday 8 November 1991 at 7 p.m. at Leo Cussen Institute, 360 Little Bourke Street, Melbourne.

RSVP: Leo Cussen Institute, P.O. Box 853/C, Melbourne, Vic. 3001 or phone Jennifer on 602 3111