VICTORIAN BAR NEWS

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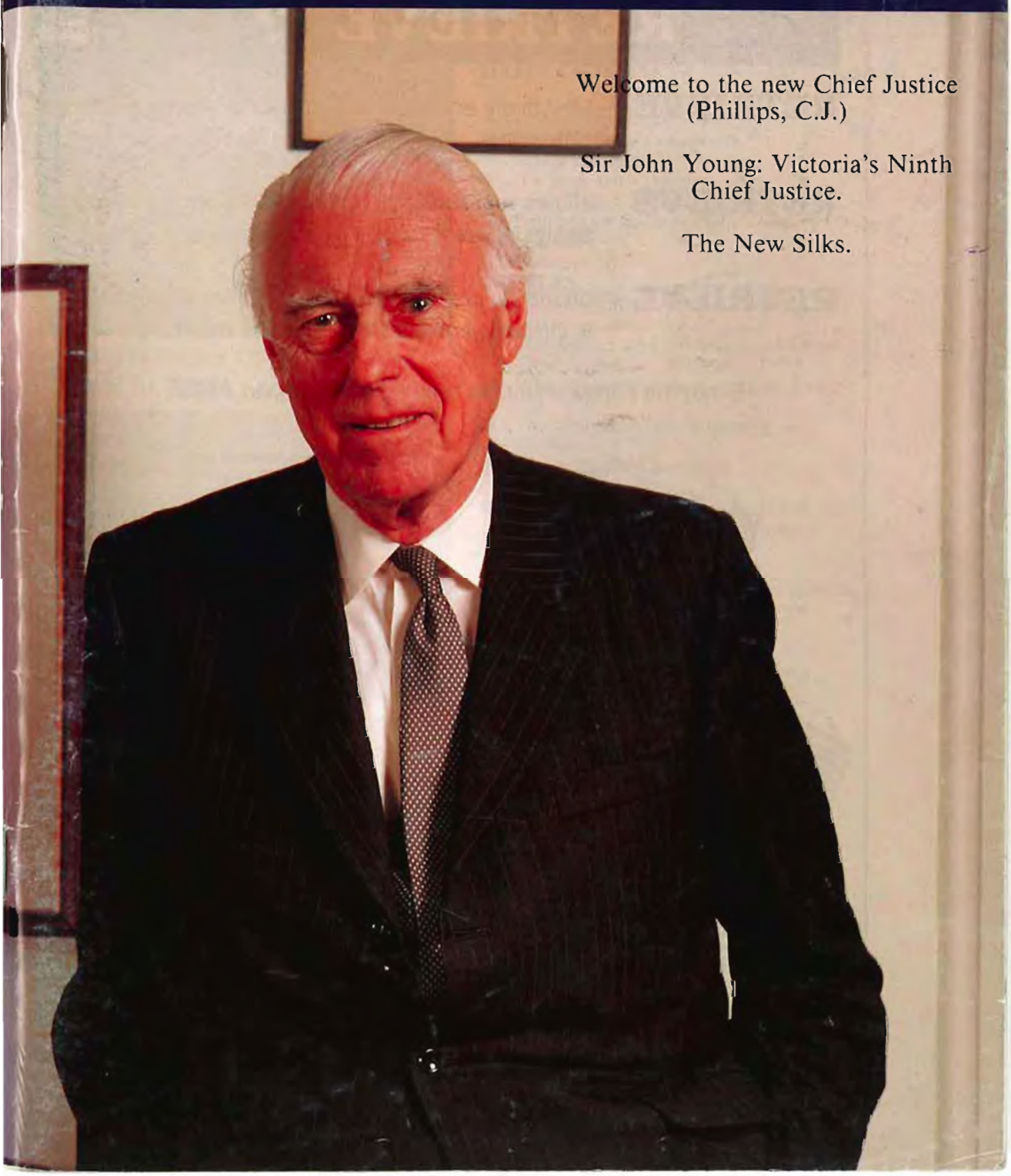

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Sir John Young: Victoria's Ninth Chief Justice.

The New Silks.

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EDITORS' BACKSHEET

1991 has been a year of change and of threatened change

RETIREMENT OF SIR JOHN YOUNG

Sir John Young, the ninth Chief Justice of Victoria, retires this month.

Sir John has presided over the Supreme Court for some seventeen years. They have been seventeen years during which the pressures on the court system, on the court structures and on the judiciary have increased by reason of:

(a) a growth in consumerism;
(b) the development of a whole new era of administrative law based on statutory reform;
(c) increased litigation;
(d) inadequacy of facilities;
(e) a down-turn in the real funds available to general government administration; and
(f) an unwillingness or ability of government to provide for the administration of justice on anything more than a grossly inadequate scale.

Sir John has brought about evolutionary change in the administration of the Supreme Court, quietly and unobtrusively, with inadequate funds and with little popular recognition.

The article by the Honourable Mr. Justice McGarvie published in this issue of the Bar News sets out in more detail Sir John's very significant contribution to the law in Victoria.

The editors congratulate him on what he has achieved and wish him well in his retirement.

PHILLIPS C.J.: THE TENTH CHIEF JUSTICE

Sir John's successor will be John Harber Phillips, Chairman of the National Crime Authority, a Justice of the Federal Court and a former Justice of the Supreme Court.

Chief Justice Phillips' appointment as our tenth Chief Justice was announced as this issue was going to press. The editors welcome his appointment. His Honour's career and achievements are canvassed in the "Welcome" printed in this issue.

EXPECTED LAW REFORM COMMISSION REPORT

The Law Reform Discussion Papers canvassed in the Spring issue of the Bar News are to

be followed by reports by the Victorian Law Reform Commission. In theory those reports will take into account the submissions made by the Law Institute and other interested bodies and the very detailed submission to the Commission made by the Victorian Bar Council.

The timetable projected by the Law Reform Commission, however, would seem to allow little time for analysis of any errors in the Discussion Papers. The timetable leaves barely enough time to restate conclusions already reached. It suggests that the Report may be such a restatement in a form which adverts to the content of the submissions received and which rejects any submissions which contradict the predetermined views of the Comission.

At the Law Institute on 8 November 1991 Commissioner Ted Wright gave a lecture on Regulation of the Legal Profession. Mr. Wright was dismissive of the Bar's response to his Paper. He made it clear that the "winds of change" (which the editors note Harold Macmillan first observed in Africa in about 1958) are not only still blowing but that they will sweep the independent bar into the sea (or perhaps under the rug). He stated that the solicitors have been more "strategic" in their response to the Law Reform Commission Paper. The solicitors realise they are being swept up by the winds of change and can see where they will come down. The Bar on the other hand is "hunkered down and is trying to hold its ground". Its response is not in terms that the public would understand. Any claim that an independent Bar is in the public interest was dismissed out of hand.

Commissioner Wright appeared to feel safe being "hunkered down" himself in the basement of the Law Institute far away from the evils of Owen Dixon Chambers. He criticised the Victorian Bar's response for seeing the reforms as a "life and death issue". However, when talking about the role of some sort of future Bar he could only say that he saw a role for specialist trial advocates practising on a consultancy basis.

We understand that, although Mr. Wright is a Canadian, he has had some experience of practice in Victoria. We would expect however that any recommendations in relation to the future of the Bar would be carefully researched and would be made only after a statistical analysis of the results of field work carried out by the members of the Commission in suburban, country and city solicitors' offices over a considerable period of time, in which the use made of counsel, the costs thereby incurred and the results achieved had been set against alternative courses of conduct available to the relevant solicitor and client, their costs and their efficacy.

It would be unfortunate if any such recommendations were based solely on the practical experience of the Commission's members in practice in Victoria, on anecdotal evidence or any understandable prejudice which Commissioner Wright may have for the Canadian system.

Whether the Commission has endeavoured to obtain any statistical information or to analyse it, the editors do not know. There is no mention of any such information in the Discussion Papers. But the editors believe that no responsible body charged with the task of law reform (and the Victorian Law Reform Commission is such a body) would make recommendations on a very serious question without very serious research.

It is very easy for the Law Reform Commission to take the high moral ground and simply assert that its reforms are in the public interest. This assertion is made without any evidence. From what Commissioner Wright said at the Law Institute, it appears to be a self evident fact that the existence of the Victorian Bar cannot be in the public interest. Mr. Wright believes that this is so obvious that it does not need discussion. He sees the future role of the professional bodies as being that of a trade union in the law industry. The regulatory aspects of the profession will be placed under a body known as the Law Board. This will be manned by a majority of non lawyers. Magically, it will not be part of the bureaucracy. However, it will be subject to review by the Auditor General and be under the Public Service Regulations.

Commissioner Wright is also strongly opposed to a law degree being a prerequisite to becoming a member of the profession — or should we say "industry". He believes that there are parts of the legal monopoly that can be removed. People with lesser qualifications should to allowed to join the profession to carry out such work as debt collection, probate and conveyancing. Law degrees, he indicates, simply support a monopoly which, again, is not in the public interest.

The editors invited Commissioner Wright to permit publication of his Law Institute lecture in this issue of the Bar News. Commissioner Wright declined. Apparently the talk is not in a condition suitable for publication in a permanent form, and other commitments prevented his rewriting it in the time available.

The Editors

THE CHAIRMAN'S CUPBOARD

IN THE SHORT SPAN OF ITS EXISTENCE the current Bar Council has spent considerable time dealing with matters raised as a consequence of the Victorian Law Reform Commission's concern to restructure the Bar in the interests of "public benefit".

There is no doubt that at present the legal profession in general and the Bar in particular is subject to a conscious and determined attack by the Law Reform Commission.

A united and reasoned response is required in the circumstances and this has been provided in part by production of the Bar's responses to the Commissions Discussion Papers No. 23 "Restrictions on Legal practice" and No. 24 "Accountability of the legal Profession".

Copies of such responses have been sent to the judiciary, politicians, academics and the media, and will be distributed to each member of the Bar.

The reaction to the Bar's responses thus far to hand has, with the exception of the Law Reform Commission, been positive.

The Bar's responses to the Discussion Papers was sent to the Law Reform Commission on 9 and 10 October 1991. The Commission had its draft final report printed and ready for discussion by 31 October 1991.

Arrangements are being made to respond to and comment on the draft final report, which regrettably misrepresents the Bar's position, in the next few weeks.

Members of the Bar should harbour no illusions as to the continuing determination of the commission and others to effect great change to our current practices.

The high quality of the Bar's responses was in large measure due to the hundreds of hours of voluntary work put in by Xavier Connor, a former Chairman of the Bar Council, and the great assistance given to him by Michael Crennan.

As a token of the Bar's gratitude for his work, Xavier was presented with an antique claret jug at a dinner held for the retiring Chairman and members of the Bar Council on 31 October 1991.

Xavier has offered his continued assistance for which I am most grateful. No one could have made a greater contribution to this Bar than this loyal and generous man.

Ray Lopez demonstrated the best aspects of professionalism in appearing without fee in the recent Baby M case. It was pleasing to note that this fact was recorded in the Age newspaper. The Bar Council resolved to write to Ray and to Mr. Peter Nedovic, his instructing solicitor who also worked without fee, commending them for their fine example.

A letter on behalf of the Bar was subsequently sent to the Age and Herald-sun newspapers pointing out that it was not uncommon for barristers to appear without fee, and that in fact barristers gave enormous amounts of unpaid time to the benefit of the community in advising the Government and Opposition on current and proposed legislation, serving on numerous committees and commissions set up to improve the legal system generally, participating in legal assistance services and being involved in legal education both in Victoria and Papua New Guinea. The letter was published in both papers.

The Bar Council is concerned to take what steps it can to remove some of the public's more commonly held misconceptions about the Bar. To this end a pamphlet is being prepared for public distribution containing questions most commonly asked about the Bar and answers thereto. It is proposed to make this available to all interested persons and to all schools within the State.

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1992 will be an interesting year for the profession as a whole and the Bar in particular. Both branches of the profession have given and will continue to give dedicated service, much of it unpaid, to the people of this State, a fact that the profession's detractors, with a singular lack of fairness and objectivity, persistently fail to acknowledge.

I wish all members of the Bar a happy and safe Christmas.

Andrew Kirkham

ATTORNEY GENERAL'S COLUMN

THE MOST IMPORTANT EVENT OF THE past few months has been the appointment of Mr Justice Phillips to be the new Chief Justice of the Supreme Court. I am very pleased that Mr Justice Phillips has decided to devote his immense talent to the job of Chief Justice.

He will take over from Sir John Young on 17 December. Sir John reaches the statutory retirement age of 72 in December. He has overseen the rapid and remarkable changes in judicial administration that in many respects have set Victoria apart as a world leader in this field.

I would like to pay tribute to Sir John's enormous contribution to the court system in Victoria. He has been universally admired for his integrity, his outstanding legal mind and his capacity to embrace new ideas and lead the way in judicial administration.

Mr Justice Phillips who has established a national reputation as a lawyer, a judge and an administrator, brings to the job of Chief Justice a unique combination of experience and qualifications: a proven capacity as an outstanding member of the Bar; organisational leadership demonstrated in establishing the first Director of Public Prosecutions in Australia and as Chairman of the National Crimes Authority; and judicial experience as a member of the Supreme Court for over five years.

Mr Justice Phillips who is 58, has had a most distinguished career, specialising in criminal law at the Victorian Bar. He was a member of the Victorian Bar Council between 1974 and '84 and a leading Queen's Counsel. He was admitted to the English Bar in 1979.

In 1983 he became the first DPP in Victoria. As a result of his successful establishment of the office of DPP in Victoria, an office of DPP was established at the Commonwealth level and in most other states. He was appointed as a judge of the Victorian Supreme Court in late 1984. Last year he was appointed the Chairman of the National Crimes Authority and he is widely admired for welding the NCA into an effective organisation achieving widespread co-operation and good-will.

YEAR AND A DAY RULE

Legislation abolishing the 'year and a day rule' has been passed by the Parliament. This was reintroduced after rejection by the opposition in the Upper House in the autumn session of Parliament. The opposition had indicated that it may be prepared to consider abolishing this archaic rule that required a victim to die within a year and a day after the infliction of the injury that caused the death before a person could be charged with a homicide offence.

HOMICIDE REPORT

The Victorian Law Reform Commission's report on Homicide is now being considered by the Government. It contains some important recommendations regarding changes to the law relating to homicide and manslaughter. It recommends manslaughter prosecutions against employers whose gross negligence kills their employees; making it mandatory for police to seize firearms where they attend calls in relation to domestic violence; abolishing the rule that bail on a charge of murder may only be granted by the Supreme Court and then only in exceptional circumstances.

I would like to pay tribute to Sir John's enormous contribution to the court system in Victoria. He has been universally admired for his integrity, his outstanding legal mind and his capacity to embrace new ideas and lead the way in judicial administration.

It also recommends that the category of murder based on intent to do grievous bodily harm should be abolished; the provocation defence be retained; the categories of battery manslaughter, unlawful and dangerous act manslaughter by gross negligence should be replaced by one category of dangerous act or omission manslaughter; the maximum fine for murder be unlimited and the maximum fine for manslaughter should be increased to $500,000.

The Government would be pleased to accept comments from the Bar in relation to the recommendations of the report.

PROFITS OF CRIME

The Government also introduced legislation in the Spring Session of Parliament that amends

the Crimes (Confiscation of Profits) Act 1986 which will make it easier for authorities to trace the complicated money trails to get the proceeds of crime. It also widens the pool of property which is capable of being seized. The legislation is based on recommendations from a review of the Victorian Act by Peter Faris Q.C., which has been widely circulated for comment in the past months.

It also enables the confiscation of benefits derived by convicted criminals 'cashing in' by selling the story of their criminal exploits to media organisations. The changes also give powers to the police to gain access to documents so they can follow the money trail and trace tainted property. These orders are available to Commonwealth and other State law enforcement agencies.

The Supreme Court will also be given the power to order the production of documents, search for and seize property tracking documents, and that financial institutions give information over specified periods of time to police about transactions conducted through accounts held by a particular person. It creates a money laundering offence where people can be charged with money laundering if they have engaged in a transaction involving money or property if they knew or believed it was realised, directly from the commission of a serious offence.

The amendments bring many aspects of the Victorian legislation into line with more recent legislation in other States and the Commonwealth, by introducing a number of important changes.

DEFAMATION LAW REFORM

Lying over in the Parliament over the Summer recess is the defamation legislation which is uniform to Victoria, New South Wales and Queensland. It is intended that it be reintroduced in the Autumn Session following discussion over summer. The Bill is the result of co-operation between the states and it is hoped that the other states will adopt similar legislation in the future.

Two discussion papers have been released since the three states agreed to work together on attaining uniform defamation law. Submissions have been received from the Law Institute of Victoria, the Law Society of New South Wales, the Queensland Law Society, the Free Speech Committee, a major media organisation and several academics.

The legislation is drafted in identical terms with only minor technical variations to take into account the varying situations in the respective states. However, in New South Wales and Queensland, judges will be given the task of assessing damages. In Victoria the jury system works well and large damages awards are a rarity. Assessment of damages will remain the function of the jury in Victoria.

The legislation enables the confiscation of benefits derived by convicted criminals 'cashing in' by selling the story of their criminal exploits to media organisations . . . and also gives powers to the police to gain access to documents so they can follow the money trail and trace tainted property.

CRIMES RAPE BILL

Among the legislation introduced this session was the Crimes (Rape) Bill which is based on the report of the Victorian Law Reform Commission. It is part of a package of reforms including important changes to procedures for dealing with complainants in sexual assault cases.

The Bill contains a clear and comprehensive legislative definition of the offences of rape and indecent assault. It will become an extremely valuable document not only for the courts, but to educate the general community about what the criminal law regards as unacceptable sexual conduct. The major elements of the common law offences are retained, but they are expressly stated and defined in order to remove uncertainty. The Bill makes it clear that consent means free agreement, no submission induced by fear of force or other harm.

The Bill also abolishes the separate 'aggravating circumstances' offences for rape and indecent asssault — resulting in an increase in the maximum sentences for rape and indecent assault to 20 and 10 years respectively. To prevent unwarranted attacks on the reputation of complainants, approval of the judge will be required before evidence is led about the complainant's sexual relations with the accused. It also provides the option of giving evidence by closed circuit television to adult complainants in sexual assault cases where they may suffer special traumas.

JIM KENNAN
Attorney General

IT'S YOUR BAR COUNCIL

Yet again a considerable amount of the Bar Council's deliberations during the past quarter involved membership matters.

DECISIONS OF THE COUNCIL

1. To prepare response to the proposals of the Law Reform Commission and the Cost of Justice Enquiry.
2. A sketch portrait of Sir Reginald Smithers be commissioned.
3. The AG's Department be advised that the Bar Council is of the view that the present fee for admission to practice as a barrister and solicitor of the Supreme Court of Victoria be reviewed and proposing certain interim measures.
4. The discretion which at present exists to refuse admission to the Bar be reformed so that the discretion of the Bar Council is no longer expressed to be an "absolute discretion".
5. A committee be appointed to draft a Constitution for the Bar.
6. The Bar Council agrees in principle with the continuation of the Leo Cussen Institute Practical Training Course subject to the Course finding adequate funding.

MATTERS CONSIDERED BY THE COUNCIL

1. The future of Four Courts Chambers and the leasing of alternate/additional chambers.
2. The Victorian Bar Council Budget performance for the 1990–91 financial year.
3. Filming of Bar Council proceedings by the "7.30 Report" (without sound).
4. Fees for admission to practise as a Barrister and Solicitor of the Supreme Court of Victoria.
5. Independence of the Judiciary.
6. Printed jury and personal injury suspended list.
7. The financial state of the LACV.
8. The establishment of an official record of dismissed complaints against individual members of Counsel.
9. The collection of fees directly from clients.
10. The requirement for Counsel to practise from chambers provided by BCL.
11. Magistrates Court practice on adjournments.
12. Operation of the Overdue Fees/Default List scheme.

YOUR COMMENTS

Bar News is still willing to receive your comments on Your Bar Council and the deliberations it has had and ought to have had.

LAW COUNCIL REPORT

NEW EXECUTIVE

David Miles, of Melbourne, is the new President of the Law Council of Australia. He succeeded Alex Chernov Q.C. at the Council's annual general meeting, held in Adelaide immediately before the 27th Australian Legal Convention.

The new Executive is:
President David Miles *(Melbourne)*
President-elect Robert Meadows *(Perth)*
Vice President Geoffrey Davies Q.C. *(Brisbane)*
Treasurer Stuart Fowler *(Sydney)*
Immediate Past President Alex Chernov Q.C. *(Melbourne)*
Member John Mansfield Q.C. *(Adelaide)*
Member Michael Phelps *(Canberra)*
Secretary-General Peter Levy

AUSTRALIAN ADVOCACY INSTITUTE

The Law Council has launched a body to work in the field of advocacy training. It is called the Australian Advocacy Institute, and is to be run by a board headed by Mr Justice George Hampel, of the Supreme Court of Victoria.

The administration of the Institute will be

handled by the LCA Secretariat and the guiding philosophy will be to facilitate and complement existing advocacy training programs conducted by the LCA's constituent bodies and practical legal training institutions. The board will appoint a Teaching Committee which will commission course materials, plan workshops and seminars and possibly run national conferences.

The other members of the board are Alex Chernov Q.C., Geoffrey Davies Q.C., Barry O'Keefe Q.C., John Chaney and Chris Crowley. The establishment of the Institute was announced by the President of the Law Council (David Miles) during an advocacy session at the Australian Legal Convention in Adelaide.

LCA BUILDING

The Secretariat expects to move into the new LCA headquarters in Torrens Street, Braddon (Canberra) in November.

The Chief Justice of Australia, Sir Anthony Mason, has accepted the Executive's invitation to open the building on Friday 21 February 1992. A meeting of the Council will be held in the new Council room the following day.

COURT FEES

The LCA, and the Family Law Section, have expressed strong opposition to the imposition by the Commonwealth Government of setting-down and other fees on matters in the Federal Court, Family Court and Administrative Appeals Tribunal. The opposition is based primarily on the view that it is wrong to take a "user pays" approach, and that it is the right of every citizen to have access to the courts without payment of "rent".

ABORIGINAL JUSTICE COMMITTEE

The LCA has established a committee to advise the Executive on legal matters relating to the Aboriginal people. The committee is chaired by Sir Edward Woodward, and other members are Ms. Pat O'Shane, Ms. Marcia Langton, Messrs Ron Castan Q.C. and Geoffrey Eames and Professor Garth Nettheim.

ATTORNEY-GENERAL

The outgoing President, Alex Chernov Q.C., reported to the Executive that he had discussions with the Attorney-General (Mr Duffy) on funding of law schools, the Australian Advocacy Institute, and LCA initiatives in relation to Australia-wide admission to practice.

Mr Chernov also reported that he had discussions with the Shadow Attorney-General (Mr Peacock) on a range of matters including Australia-wide admission, legal aid, the Human Rights and Equal Opportunity Commission and the independence of the judiciary.

LEGAL CONVENTION

The 27th Australian Legal Convention, held in Adelaide, was highly successful. The Council, at its annual general meeting in Adelaide, expressed its thanks to the President of the Law Society of South Australia (Brian Withers) and to the chairman of the organising committee (Terry Evans) and all involved in planning the Convention.

ROLE OF PRESIDENT

The Council has rejected the idea of a full-time President. It based this decision on a report prepared by three recent former Presidents — Miss Mahla Pearlman A.M., Mr Denis Byrne and Mr Darryl Williams Q.C. The report indicated that while the demands on LCA Presidents continued to increase, the time had not arrived when the post needed to be a full-time one and that, in any event, there were strong reasons for its being a part-time post.

FAMILY BAR ASSOCIATION REPORT

MUCH OF THE WORK OF THE FAMILY Law Bar Association and its Executive Committee over the past three months has focused upon concerns arising from the evidence given by the Honourable Justice Kay of the Family Court of Australia to the Senate Standing Committee on Legal and Constitutional Affairs earlier this year as reported in the last edition of the Victorian Bar News. A General Meeting of the Association was held on 15 October 1991, which was well attended by its members. The meeting focused upon the evidence given by His Honour, and a motion was passed that the Chairman of the Family Law Bar Association approach the Chairman of the Bar Council with a view to arranging a meeting with members of the Family Court bench to discuss the evidence given to the Senate Select Committee. It is the view of both the Executive Committee and the members in general that the current situation should not "get out of hand", as the Family Law Bar and the Bench have in the past enjoyed cordial relations.

The Family Law section of the Law Institute recently forwarded to the Joint Senate Select Committee a submission in which they criticised various areas of the practice of Family Law. Those areas included pleadings, excessive paperwork that pleadings created for solicitors, and of particular significance to members of the Family Law Bar Association, the submission criticised certain aspects relating to the conduct of the court itself. Members of the Executive Committee of the Family Law Bar met with the Judge Administrator (Southern Region) and other judges of the Family Court to consider this submission.

The Family Law Bar Association Executive Committee was of the view that the submission made by the Family Law Section of the Law Institute was unfair and had the potential to be divisive of the profession. The Committee disassociated itself from the critical submission made by the Law Institute (Family Law Section). It has been the experience of the Family Law Bar that the Bench has been most accommodating in extending to counsel and their clients time to settle or limit the issues before the Court. This has not been at the expense of proper and efficient operation of the Courts. The Family Law Bar Association is of the view that the Bench has acted so as to ensure the Courts operate in an efficient, appropriate and judicial fashion. It would be of great regret to the Association if any of the matters raised in this aspect of the submission of the Family Law section of the Law Institute could in any way disincline the Bench from continuing its practice of affording the same courtesies to counsel and their clients in the future.
their clients in the future.

In regard to the question of pleadings and excessive paperwork raised in the submission of the Law Institute to the Joint Select Committee, the Executive Committee has proposed that these matters will be dealt with at the next general meeting of the Association. It appears that there will be some review of pleadings in the Family Court.

By way of general business, the Association is considering a discussion paper by the Senate Standing Committee on Legal and Constitutional Affairs concerning dispute resolution.

On 3 October 1991, Ron Curtain and Elizabeth Davis attended a Dandenong Case Management Committee Meeting dealing with a proposal by the Dandenong Registry to re-introduce circuits in Gippsland during 1992. The meeting was also attended by the Chief Justice of the Family Court of Australia. It is proposed that a Registrar will visit Sale approximately one month before the circuit is due to take place and the circuit then following would be of approximately 2 weeks duration in Morwell and Traralgon. In addition, Dandenong is to introduce a mediation trial scheme on November 9 to continue until March 1993. This would be a secondary role in the counselling process. The Association would like to formally thank the Honourable Justice Mushin for having invited members of the Family Law Bar Association to participate at the meeting. This spirit of co-operation that exists between the Bar and the Bench is seen in this exchange of information and mutual goodwill.

The Association held its Annual Christmas Cocktail Party on 29 November 1991 at Seabrook Chambers and all members were invited. All Judges of the Family Court together with Judicial Registrars and Deputy Registrars have been invited as guests of the Association.

ADVERTISEMENT

GOAL P

The Solution to a Common Problem

The majority of barristers we speak to have a common problem. Their debt to equity ratios have increased dramatically due to the downward revaluation of their property portfolios.

This position has been compounded by the fact that there is no immediate relief to be found in the commercial, retail or residential property markets.

Due to the very nature of the investments the lack of capital growth in their property portfolios has meant that the basis of entering into the investment in the first instance has been removed.

Furthermore they see the only alternatives being to continue servicing the existing debt, or for a fortunate few, to reduce it to a more manageable level.

This is not the case!

Although it is not feasible in the current market to sell off the asset base, it is possible to implement a strategy that will add considerable value to your existing portfolio. To determine whether you may benefit from this strategy, ask yourself the following questions.

1. *Do I currently have a geared property investment?*
2. *Would I like to effectively reduce the existing debt?*
3. *Would I like to implement a strategy which will address my current problems and breathe life into my property investments?*
4. *Would I benefit from a structure which would release capital from my existing portfolio?*

If you answer yes to any of these four questions please call me for an appointment to discuss your situation in the strictest confidence. Let me help you make the most of your hard money and assist you in achieving your goal of financial independence.

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

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-

OT

BY Mac Healy.

of the Eighties

earn enough to live, retain your family home, and educate your children.

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.*

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?

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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.

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WELCOME THE CHIEF JUSTICE

"A welcome is red with the summer,
And hearty and bold . . ."

JOHN SHAW NEILSON'S VERSE PROVIDES an appropriate opening salute to the appointment of his biographer, John Harber Phillips, as Victoria's new Chief Justice. Shaw Neilson's poetry celebrates nature's simplicities, man's sensitivities and the virtue of hard work. These are qualities which His Honour has pursued throughout his lifetime. He is a well-rounded man of great dignity, warmth and charm.

After serving articles with Mr. Pat Dooley of Dooley & Breen, solicitors of Melbourne and a short stint with Mr. Gerald Berrigan of South Melbourne, His Honour came to the Bar in 1959. He read with the late Vic Belson. He remained at the Bar for 25 years until 1984. Throughout that time he served the Bar tirelessly and with distinction. He was a member of the Bar Council from 1974 to 1984 and a member of countless Bar committees. He had three readers, Hender, Robert Galbally and Phillipa Power.

With the current Chairman, Kirkham Q.C., he led an outstanding and comprehensive defence. While the press savaged Mrs. Chamberlain, it dealt kindly with her senior counsel whose ". . . impressive performance vindicated his reputation as one of the best criminal lawyers in Australia". His Honour's mastery of the art of advocacy and the experience he accumulated in trial and appellate courts have not been lost to today's practitioners.

His Honour's practice was in the criminal law and he soon became known as "Criminal Jack" (to avoid confusion with "Equity Jack" — Mr. Justice John D. Phillips of the Supreme Court). Throughout his career at the Bar His Honour demonstrated qualities of a keen and inquiring mind, a dry wit, an unfailing courtesy and a fierce determination to see justice done and done well. He has taken those qualities with him on to the Bench. When His Honour took silk in 1975 he was hailed as the first barrister who practised exclusively in crime to be so appointed.

His Honour appeared in many major and notorious cases. Apart from over 150 murder trials, he was well known for his successful defence of many police officers, particularly those who appeared at the Beach Inquiry in 1975 and who were charged thereafter.

Those who worked with him in the courts well remember his style as he ". . . fought in the fierce forensic fray . . ." (to borrow from a verse welcoming Mr. Justice Macfarlan to the Supreme Court in 1929). Mr. Justice Phillips was quite, measured and deadly. He was once described as "an elegant street fighter". He displayed a single-minded determination in both the preparation and conduct of his cases. He was a legend in police circles. It was said that to be cross-examined by Phillips was to *know* cross-examination. He was a model for the Bar. He brought to the practice of crime a dignity and respect which was long overdue. When he was appointed the inaugural Chairman of the Criminal Bar Association in 1982 the Bar witnessed the emergence of its largest sub-group.

It came as no surprise to anyone when in 1982 he was briefed to appear for Michael and Lindy Chamberlain in what became known as "the trial of the century". With the current Chairman, Kirkham Q.C., he led an outstanding and comprehensive defence. While the press savaged Mrs. Chamberlain, it dealt kindly with her senior counsel whose ". . . impressive performance vindicated his reputation as one of the best criminal lawyers in Australia".

His Honour's mastery of the art of advocacy and the experience he accumulated in trial and appellate courts have not been lost to today's practitioners. In 1984 he published the decep-

tively simple, yet eloquently written "Advocacy with Honour". During 1988 and 1989 he was the visiting Professor of Advocacy at Monash University. His Honour still writes regular columns for the Australian Law Journal ("Practical Advocacy") and the Criminal Law Journal ("Phillips' Brief").

For many years His Honour has had a profound and concerned interest in the role played by forensic science in the administration of criminal justice. In 1984, with J. K. Bowen, he co-authored "Forensic Science and the Expert Witness". His Honour played a central and energetic role in the creation of the Victorian Institute of Forensic Pathology in 1985. The Institute, of which His Honour was the founding Chairman, has become one of the outstanding establishments of its kind in the world. His Honour takes great pride in the fact that its services are available equallly to the crown and defence alike. His Honour is also Chairman of the recently established National Institute of Forensic Science which will co-ordinate research, training and standards for forensic science throughout Australia. The national Institute is housed at the State Forensic Science Laboratory at Mcleod, Victoria.

Shortly following the Chamberlain trial in 1983, His Honour was appointed Victoria's first Director of Public Prosecutions. This was the first such appointment of its kind in Australia and a major development for the criminal justice system. Although he had to leave the Bar, His Honour's greatest sacrifice was having to exchange his beloved 1951 Silver Dawn Rolls Royce for the ubiquitous white government Ford. In a very short time he had implemented a radical and successful programme to reduce significant delays in bringing matters to trial. As the DPP he was recognised as a skilled administrator

who devoted his considerable talents to dealing with many important law reform issues.

In 1984 His Honour was elevated to the Supreme Court. He served the court well for six years and proved to be an outstanding trial and appellate judge. During this time His Honour was Chairman of two important committees — the Criminal Justice Committee and the Attorney-General's Advisory Committee which examined DNA technology and its use in the courts.

In 1990 he left the Bench to become the Chairman of the National Crime Authority and a Justice of the Federal Court of Australia. Over the past fifteen months he has been an important stabilising influence and has spear-headed a major blue-print for the Authority's future as it engages in a concerted attack on corporate crime.

His Honour had another career move when in 1990 he left the Bench to become the Chairman of the National Crime Authority and a Justice of the Federal Court of Australia. He took over the NCA helm at an unsettled time for the Authority. Over the past fifteen months he has been an important stabilising influence and has spear-headed a major blue-print for the Authority's future as it engages in a concerted attack on corporate crime. His Honour won universal acclaim for his diplomacy as he traversed the delicate political pathways of Federal law enforcement.

His Honour has also been active in the international legal world. He is the Chairman of the Lanchid Society, an association of Australian and Hungarian lawyers. The Society was established to furnish assistance to the Hungarian Legal profession during and after its transition from a government service to an independent profession. His Honour is also Chairman of the professional programme of the Greek/Australian International Legal & Medical Conference. Some counsel will recall the very successful conferences held in Greece in 1988 and 1990.

His Honour's interest in writing and literature extends beyond poetry. He wrote the play "By a Simple Majority", based on the trial of Socrates, which was first produced in Athens in 1990. He has been captivated by the Ned Kelly saga for a long time. In 1987 he wrote "The Trial of Ned Kelly", a revealing account of the procedural and substantive deficiencies of the trial of the 19th century. Pursuing this interest His Honour wrote "Conference with Counsel", a play broadcast by the ABC earlier this year. It is indeed a quirk of history that His Honour's appointment as Chief Justice was announced on 11 November 1991, the very day on which Ned Kelly was hanged in 1880.

John Phillips has never been just a lawyer. His interests outside the law range far and wide. He is as much at home listening to his son playing in a rock and roll band as he is attending the opera. His early training as a baritone and his deep affection for his wife and family no doubt prompted him to say once — "Together with my wife Helen and family, Verdi and Puccini have sustained me over the years". He forgot to mention the noble wines of Italy, travel and his beloved Collingwood Football Club.

His Honour has been appointed the Chief Justice of one of the great courts in Australia. He becomes only the tenth member of a select group of famous and distinguished lawyers who have been appointed Chief Justice of Victoria since 1852. His appointment heralds a new era for the Supreme Court and for the pivotal role it plays in the administration of justice in Victoria and elsewhere. It is a crucial time ahead — weighty issues such as the speed and cost of justice, the accessibility of the courts, the conditions under which the judiciary work and the structure and responsibility of the legal profession have all recently excited vigorous public discussion. The Chief Justice and the Judges of the Supreme Court will have a special contribution to make to that debate in the future. On this occasion it is well to recall the words of Sir Henry Winneke upon his retirement as Chief Justice in 1974. While commenting on the demanding threefold function which a Chief Justice has to perform, as judge, administrator and standard bearer for the judiciary and the profession, he said of his successor —

"He will have little time to call his own, and will require all the loyalty and assistance that the members of the profession can give him."

His Honour's proven capacity as a judge, administrator and leader will equip him well for the task ahead as he steers the Supreme Court into the next century. No doubt His Honour will have the Bar's loyalty, assistance and continuing good wishes. The Bar warmly welcomes its new Chief Justice.

SIR JOHN YOUNG: THE YEARS OF VICTORIA'S NINTH CHIEF JUSTICE

The Hon. Mr Justice R.E. McGarvie

MORE IMPROVEMENTS IN THE JUDICIAL arm of government have been accomplished in the seventeen years of Sir John Young's leadership of the Victorian judiciary than in any other seventy years. Experience in all democracies shows that change in the actual operation of a court system seldom occurs unless the Chief Justice favours change and gives effective leadership to attain it. John Young has been such a Chief Justice.

His task has been a dual one. The first has been to give judicial leadership to maintain high standards in the essential judicial work of hearing, deciding and giving judgment in cases. The second is just as fundamental though neglected for a century. It has been to work for administrative and structural changes to place the courts in a constitutional and organisational position where judicial independence could be preserved, despite the exponential growth of the power of the executive in our time. Without judicial independence a democracy cannot operate.

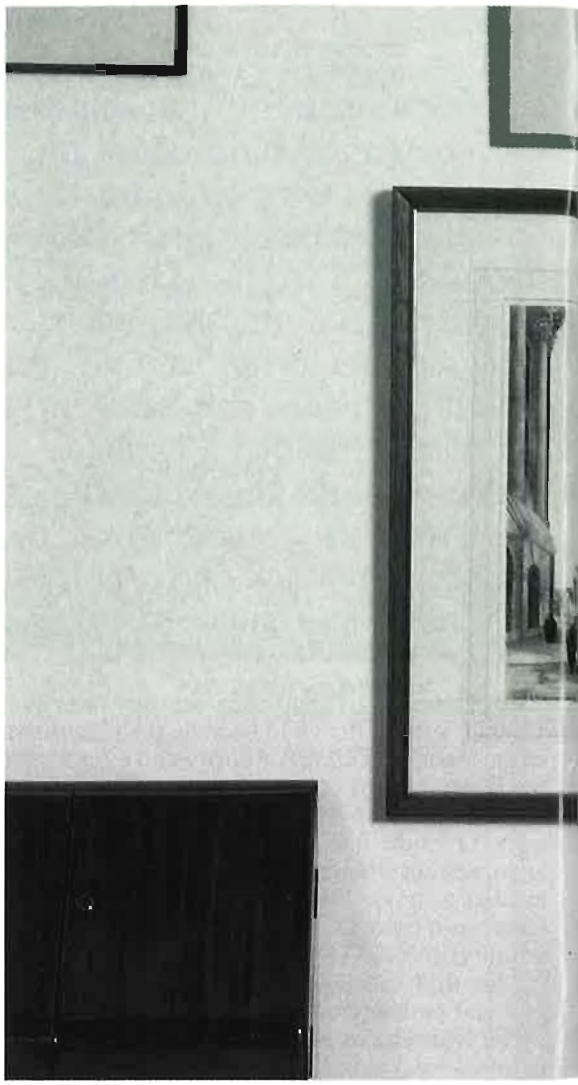
JUDICIAL WORK

In his judicial work the Chief Justice set high standards. Mainly he presided in Full Courts, more often than not the Court of Criminal Appeal. He presided with alertness and dignity and unfailing courtesy and respect.

His practice at the Bar had not often taken him to the criminal courts. It concentrated on company, commercial, equity and appellate work. He was co-author of Wallace and Young, Australian Company Law and Practice, and had been independent lecturer in Company Law at the University of Melbourne. His mastery of the criminal law came from application, ability and aptitude.

The Court of Criminal Appeal has maintained the standards established while Sir Henry Winneke was Chief Justice. As Chairman of the Bar, in farewelling Sir Henry, I said:

"You have ensured that the Full Court, sitting as a Court of Criminal Appeal, is a court in which appellants win cases they ought to win and lose cases that they ought to lose. One can ask no more than that. . . . Nor is it an accident that the decisions of the Full Court are so highly regarded throughout this country."



Sir John Young has earned the same words. As the Shorter Trials Committee, initially set up by the Victorian Bar Council, observed in its Report on Criminal Trials in 1985:

"In recent years the Court has been extremely careful, even painstaking, in its approach to criminal appeals. The result of this has, in the Committee's opinion, been to afford to accused persons a higher degree of

protection than was available twenty or thirty years ago.

[I]n general terms the Committee takes the view that the Appeal Court is to be applauded and encouraged in its endeavour to ensure that criminal trials are conducted thoroughly and fairly. It is highly appropriate that something as serious as a criminal trial should be conducted with painstaking care." (p.160)

The regular presiding judge in the Court of Criminal Appeal inevitably has an influence on the level of sentences in the State. Sir John's approach was not dissimilar from that of Wickham, J.:

"I am mindful of persuasive authority which warns a sentencing judge against being 'weakly merciful', but in sentencing in a particular case it is also necessary

not to be 'weakly severe', which latter mistake is as easy to make as the former." [1980] W.A.R. at p.119

In civil appeals John Young applied similar qualities. He wrote clear, concise, readable judgments which revealed the reasons which led to the conclusion. He avoided the tempting judicial device which justifies the conclusion by "on the whole I think". His judgments are highly regarded throughout the country.

The quality of judicial work done within a court or a court system depends on the standards of the individual judges, masters, magistrates and other judicial officers. However, leadership is important in the maintenance of standards. As Chief Justice, John Young has influenced, mainly by example, not only the members of his court but all who exercise judicial power in the State. The influence extends beyond ethics to work standards and practices.

John Young has been a prodigious worker. The early parts of many nights were consumed by the social obligations of Chief Justice, Lieutenant Governor and other offices. The administrative burden also took its toll of time. Yet the judgments were written and the administrative work done: no doubt at the sacrifice of sleeping time and weekend leisure. With all the pressures on his time, the Chief was never too busy to see a judge or court administrator at short notice, listen to what was said and give an opinion if sought. Any opinion given was wise. He found time to read and think about the contemporary problems of the judicial system and ways of overcoming them.

While at the Bar he had spent a year away from practice with an illness which raised doubt whether he would have the health and stamina to endure the gruelling work he has done as Chief Justice. Fortunately it was overcome.

In the hearing and determination of cases John Young has been a good Chief Justice. It could be said that he was a born Chief Justice. All his instincts led him that way. Over the years since 1852 Victoria has, I think, been fortunate in having Chief Justices whose standards have been high in that regard.

JUDICIAL INDEPENDENCE

John Young's unique contribution to his community has been in the crucial area in which there were no models of our century to follow in the common law world apart from North America. His achievement has been his effective influence towards the placement of the judicial arm of government where judicial independence has a real prospect of being preserved in this country, notwithstanding the countervailing tidal flows of the late 20th century.

It is infinitely more difficult to succeed as Chief Justice in this area than in the vital but relatively uncomplicated work of hearing and deciding cases. For case determination the professional skills are well honed upon appointment. The path is well trod and relatively clear.

John Young made a significant decision. He decided deliberately and cautiously to enter the thick, unfenced scrub which impedes and obscures the way to contemporary judicial independence. He could have enjoyed instead the ordered groves of case determination and pretended there was no problem. He would have had an easier judicial life and much more leisure if he had averted his eyes from the problems which existed.

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In the traditional area of Chief Justiceship, I have described John Young as a born Chief Justice. It could not be said, however, that he already had the knowledge, training or instincts for the task, when he accepted the challenge of finding and implementing modern ways of preserving judicial independence. There were no comparable precedents. Few Chief Justices away from the North American continent appeared to have attempted the task. The ways to go were not obvious. Knowledge was scarce: the ways of obtaining it obscure. By dint of a great deal of learning, thought, and readiness to meld his ideas with those of others, he made himself a good Chief Justice in this area.

THE CHALLENGE

The challenge may be stated shortly. Unlike some other systems of government a democracy

gives its law an exceptionally important function. By its law a democracy allocates discrete and different powers to the legislature, political executive (cabinet), administrative executive (public service) and judiciary. It is the law which keeps them all in their proper places. The law prevails over all arms of government, all organisations and all citizens. The community will not accept the predominant control of the law unless it is impartially applied. The members of the judiciary apply the law. A good judicial system, therefore, places them in a position where in practice they have as much incentive as possible to decide impartially and are freed as much as possible from pressures which could influence them to decide other than impartially. Freedom from such pressures in deciding cases is what is meant by judicial independence.

Judicial independence, a vital element in a democracy, has been neglected in this country for a century. The law schools know very little about it and teach virtually nothing about the practical ways of achieving it today. Those who have studied it overseas have concluded that the safeguards appropriate two centuries ago are hopelessly inadequate now. For a century Australian judges kept their heads down maintaining good standards in hearing and deciding cases but sparing hardly a thought to the maintenance of judicial independence in the changing community.

The party system ensures that governments usually control Parliament, not the other way around. In the modern corporate state, government and the public service control or reach accommodation with the representatives of most sectors of the community. The judicial arm of government is an exception. Its decisions frequently frustrate government and public service and build resentment there. The judicial arm of government in theory relies on Parliament, but in practice on government, for necessary finance, resources and legislation.

In reality, judicial strength and independence grow almost entirely from the confidence which the community has in the judiciary. That is a product of the judiciary doing its work with fairness, impartiality and independence, and running its courts efficiently. If the community has confidence in the judiciary and knowledge of its needs, influence is brought to bear on government to provide what the judiciary needs to fulfil its function.

THE VICTORIAN SITUATION

In Victoria since about 1978 important steps have been taken towards constructing a system which has the attributes essential to produce judicial independence: a system which can be operated efficiently and which has built into it the features which tend to protect and promote that independence.

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John Young has provided good leadership in the changes which have taken place or been set in motion. Leadership is something which can not be exercised alone. Tolstoy in the last chapters of War and Peace makes a telling use of history in demonstrating that a leader only leads in a direction in which those following have a conscious or unconscious desire to go. Change often occurs at a particular time because a number of underlying conditions which make it possible have fortuitously come into existence at the same time. That is the modern historical explanation for the industrial revolution. The early eighties were such a time.

The organisational desert from which the changes grew is depicted in the following two statements. The first is from a paper of Mr. John B. King, then Deputy Secretary for Courts, in 1984:

> "**There has been a lack of planning with regard to both specific courts and the court system generally.** The Courts and the Courts Administration Division ... have between them lacked the staff both in terms of numbers and competence to undertake the development of a comprehensive strategic plan for the development of the courts and the court system. Such planning as has occurred has almost exclusively been devoted to an incremental annual budget."

The second is from Sir John Young's Opening Speech at the AIJA Seminar on Constitutional

John Young in his early years as Chief Justice sought advice from an excellent source. On a day which has proved to be of significance to the judicial arm of government in Australia, 13 January 1978, during his first overseas leave since appointment, he sought advice from Professor Ian Scott at Birmingham on a cold winter's evening.

and Administrative Responsibilities for the Administration of Justice in 1985, in which he referred to the development of the administration of the Supreme Court over the years:

"That growth was certainly not pursuant to any logical development. Measures were taken from time to time to meet what were perceived to be some pressing needs but, on the whole, things just drifted along until we arrived at the present situation. One of the reasons for that was that hitherto judges have taken no interest in the administration of the courts and indeed they have, in the past, generally regarded it as being rather beneath them. In saying that and in saying some of the other things I intend to say, I should make it quite clear that I am not intending to be critical of the judges of the past or the present or of the administration of the past or present: rather what I am seeking to do is to state, as objectively as I can, the situation as I see it.

The general attitude in the past was that the public service, the executive branch, should provide what the courts needed to enable them to decide cases. They left it to the judges to ask for what they wanted as they were the ones who knew their requirements and that they were entitled to be very cross if things were not promptly provided. Paradoxically, whilst that attitude prevailed, I think that the judges, in this State at any rate, were very modest in their demands. I should make two comments about that situation. First, by taking that attitude, judges did not really realize or take into account that their very attitude put them into the hands of the executive in the sense of both the political executive and the administrative executive, to use the dichotomy in Professor Scott's paper. The other comment to make is that the attitude of the judges produced an enormous vacuum. They did not at all enter into the area of administration and nor, for one reason or another, did the Law Department enter into that area. There was a sort of 'stand off' situation in the sense that the Department thought that it was unnecessary to do anything unless they were asked for it and the judges did not ask for it, so nothing was done and that produced a very substantial vacuum which, in Victoria, we must now fill." (p.3)

By about 1984, alongside the realisation of the inadequacies and dangers of the existing situation, several developments had occurred, in virtual isolation from each other.

John Young in his early years as Chief Justice sought advice from an excellent source. On a day which has proved to be of significance to the judicial arm of government in Australia, 13 January 1978, during his first overseas leave since appointment, he sought advice from Professor Ian Scott at Birmingham on a cold winter's evening. Professor Scott, Professor of Law at the University of Birmingham, graduated in law from the University of Melbourne and practised here as a solicitor. He directed the Institute of Judicial Administration which in England is based in the University of Birmingham. They spoke of the difficulties besetting courts and court systems in the modern common law world and the feasible ways of preserving those basic values so needed by the community.

Until 1987, when Professor Peter Sallmann became Executive Director of the AIJA (Australian Institute of Judicial Administration), it was the close and continuing association between Professor Scott and the Chief Justice and others which grew from the meeting in Birmingham, which was the main instrumentality in the introduction of knowledge of judicial administration to Australia.

Sir John Young and Professor Scott were this year each made a fellow of the AIJA in recognition of their contributions.

In 1982 the Cain Government took office with John Cain as Premier and Attorney-General. A former President of the Law Institute and member of the Executive of the Law Council, he was well aware of the outdated court system in Victoria and determined to have it move to the latter half of the 20th century. That objective was shared by the later Attorneys-General, Jim Kennan and Andrew McCutcheon. For over nine years the courts have worked with influential Attorneys-General who have placed high priority on the improvement of the efficiency of the court system. They have been generally well disposed to changes which would enhance judicial independence.

When the Cain Government came to power, some people wondered how Sir John Young, former President of the Melbourne Club, would work with the Labor Government. They need not have worried. He has played a straight bat throughout, never diverting from advancing the interest the community has in a court system of independence and efficiency. His personal relations with Premiers and Attorneys-General

have been good and there has been mutual respect.

From about 1978 the Law Institute had had the good sense to be dissatisfied with the court system and from time to time to say so. Proposals for a project of court reform put by the Law Institute to the Victorian Law Foundation gave rise to the project of the Civil Justice Committee. After considering a preliminary study, the Attorney-General, John Cain, agreed that a joint Law Department/Victoria Law Foundation project be established. The Civil Justice Committee, chaired by the Chief Justice, included Chief Judge Waldron, the Acting Secretary of the Law Department, two members with extensive management experience and knowledge appointed by the Attorney-General, and a barrister and a solicitor.

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The project, led by Professor Scott, supported by skilled researchers from Australia and overseas, thoroughly examined the whole of the civil justice system of Victoria above the Magistrates' Courts. It cost about $500,000. Recommendations which in the then Australian context were quite radical were made in September 1984. It was probably the most intensive and best researched investigation of the circumstances of, and available options for, a common law court system in our time. Its four published volumes are a mine of contemporary information on the judicial arm of government and of judicial administration principle. While Professor Scott was the architect of the report, it was all carefully scrutinised by the Chief Justice and many parts were written by him.

Unfortunately the report was never reviewed in any Australian publication as far as I know and did not become as well known as it deserved.

Of its numerous recommendations, the most important was that the courts should be run by a partnership of judiciary and executive; there should be a Council of Judges in each of the Supreme and County Courts which should have primary responsibility for the operation and conduct of its court; the Council of Judges should have primary responsibility for caseflow management, court records and court information management; and the appropriate division of the Law [now Attorney-General's] Department should assist the Council in those functions and should itself be primarily responsible for personnel management, space and equipment management and the budgetary and financial affairs of the courts. (Vol. 1, pp.358–9).

At the same time the report contained the somewhat inconsistent statement that the recommendations for strengthening the role of the Councils of Judges did not involve any recommendation that the powers of the Chief Justice or Chief Judge be changed or in any way diminished. (Vol. 1, p.338).

By 1984, the Victorian Attorneys-General had introduced to their Department, management people of a high level of knowledge and experience to concern themselves with improvements of the court system. John B. King, who eventually became Secretary to the Department, was one. Dan Hourigan, who became Director of Court Operations within the Courts Administration Division was another. Serving on committees, and working on court change projects, with those possessing management skills introduced the judges and administrators of the courts to the realities of modern management.

Another separate development which, in about 1984, predisposed the Victorian court system to change was that the more junior judges in the Supreme Court who considered the Council of Judges should have and exercise responsibility for the administration, operation and wellbeing of the Court, had become a substantial majority. By mid 1984 that position had been established unequivocally by the Council. So far as the Supreme Court was concerned, any ambivalence in the Civil Justice Report as between the powers of the Chief Justice and the powers of the Council of Judges had been resolved in favour of the latter before the report was published.

The AIJA had commenced in active operation in August 1982. It drew extensively on the inspiration, advice and assistance of Professor Ian

Scott. From 1982 to 1984 he was in Melbourne as Executive Director of the Victoria Law Foundation engaged in directing the Civil Justice Project. Largely through the influence of the AIJA there were by 1984 a number of judges, magistrates and court administrators who recognized the inadequate and vulnerable state of the courts. They had become knowledgeable in matters of judicial administration and had a concern that, in general, Australian courts were ill fitted to serve the community in the days to come.

An overseas observer has written: "There is no doubt that on judicial administration matters, he is the best informed Australian Chief Justice. Australian lawyers will never know how deeply concerned he is about these matters, how hard he has worked to understand them and the effort he has put into improving things in the court system he has headed."

THE CHIEF JUSTICE'S ROLE

There were then, by 1984, the factors present which between them provided the latent preconditions for change. It would not, however, have occurred without the leadership of the Chief Justice. Any Chief Justice has the opportunity to apply the accelerator or the brakes or to leave the legal machine in neutral. A readiness by the Chief Justice (Chief Judge or Chief Magistrate) to apply the accelerator with discretion is almost always an ingredient of extensive change within a court. This is not to deny that many of the successful changes were proposed and implemented by others; sometimes the solution followed was one the majority had favoured and the Chief Justice had opposed. That is the nature of leadership. There was good leadership by the heads of the other courts. Many people within each of the courts made innovative contributions. There have been differences. The significant thing is that the last seven years, while not meriting the biblical description of years of great plenty, have been years of considerable achievement within the Victorian court system.

As Chief Justice, John Young's basic devotion has been to the community and to having the courts and court system provide the justice the community needs. An overseas observer has written:

"There is no doubt that on judicial administration matters, he is the best informed Australian Chief Justice. Australian lawyers will never know how deeply concerned he is about these matters, how hard he has worked to understand them and the effort he has put into improving things in the court system he has headed."

In addition he has a bigness of character which allows him to convince himself, or be convinced by others, not easily but ultimately, that a course in which his instincts or his initial persuasion would have led him would not achieve the objectives to which he is devoted.

Those who know John Young will agree with the comments of a perceptive expert who knows judges well:

"Sir John was the best kind of judicial collaborator. He is an intellectual conservative. He has to be convinced by dispassionate argument. Those trying to persuade him with trendy bombast will be disappointed, then frustrated and will get angry with him ultimately. If I ever put to him, what I believed to be, a sensible and progressive idea, he would, after some thought, come up with six possible objections to what I had proposed. Two of the objections would be misconceived and he would readily concede, another two would have answers which he would accept, but the remainder would be points of substance which I had not thought of (and jolly well should have). Sir John was never a passive client of mine. He always made telling contributions to the problem at hand; I learnt as much from him as he ever did from me."

The magnitude of Sir John Young's contribution to the judicial arm of government is reflected by the part he has played in the establishment of a system under which the Chief Justice has become a "constitutional" rather than an "absolute" Chief Justice. The changed role was not adopted easily but when the Chief Justice concluded that it was in the best interests of the Court, it was. For more than a century after the reforms of the Judicature Acts, Australian courts allowed themselves to slip into the mould of a government department. The Chief Justice evolved as the sole and independent controller of the administration and operation of the Court in much the same way as the head of a public service department. The other judges had little or no influence. During the time of Sir John's leadership, the Supreme court has moved to a system in which the Council of Judges exercises ultimate responsibility for the administration, organisation and wellbeing of the Court. The Chief Justice is the first amongst equals. That involves a reversion to the principle of the com-

During the time of Sir John's leadership, the Supreme court has moved to a system in which the Council of Judges exercises ultimate responsibility for the administration, organisation and wellbeing of the Court. The Chief Justice is the first amongst equals. That involves a reversion to the principle of the common law and the system intended by the Judicature Acts. It amounts to a rejection of the public service model.

mon law and the system intended by the Judicature Acts. It amounts to a rejection of the public service model.

It takes a person of character and quality to move away from the attractions of the "divine right of Chief Justices" which had applied for many decades and which he had inherited on appointment. History will regard him as having contributed wise leadership in enabling an essential advance to become part of the evolution of the judicial arm of this country, and making it work. He concluded that was the best solution and saw there were great dangers in allowing things to drift.

His action could be compared with that of Earl Gray. Williamson has said of him that it was under the shadow of disaster that he and his cabinet devised the Bill which became the Reform Act 1832. He says they were brave enough to face the facts.

"They knew that the old rustic England of their forebears was dead, and they saw that the new industrial England must be fitted with new institutions under which it could thrive."

He added:

"Who can say he was not a wise and courageous man? The easy course for men of the aristocratic tradition would have been to resist the canaille sword in hand and to die in the last ditch — and to run England in the process. The hard course was that of self-sacrifice in the public good."

Evolution of England, Oxford, 2nd ed., 1945, pp.394–5.

COUNCIL OF JUDGES

I consider it beyond doubt that the prime institutional mainspring for securing judicial independence in our time is the existence in each court of a Council of Judges (or Magistrates) which exercises ultimate responsibility for the affairs of the court. A strong proponent of that view is Professor Ian Scott. Since 1984 both the County Court and Magistrates' Court have by legislation obtained Councils. All the judges or magistrates are members of the Court Council. The Court Council system enables the basic unit of the judicial system, the individual court, to engender public confidence by operating the court efficiently and in a manner consistent with judicial independence. It involves all the judges or magistrates and builds a common approach for the achievement of those objectives and the knowledge and skills to attain them. The Chief Justice, Chief Judge or Chief Magistrate, speaking with the backing of Council or its Executive Committee, speaks with the actual authority of the Court.

The system requires a skilful and persuasive Chief Justice. In our Court the judges meet in Council one morning a month where the main policy decisions are made. An Executive Committee of the Chief Justice and six elected judges meets for an hour each Wednesday morning and makes the broad administrative decisions in application of those policies. Each elected member has a portfolio for an area of administration such as Buildings and Equipment or Staff. A Chief Justice who needs to gain the support of and accommodate to the decisions of a Council and Executive Committee must exercise capacities not needed by an "absolute" Chief Justice. Since the system commenced in full operation in 1985 the Chief Justice has almost always gained the support of the Council and Executive Committee for his policies.

The system enables the Court itself to initiate and make substantial change. The change to the Appeal Division system in 1989 was an example. The Chief Justice strongly supported the change.

Since about 1984 the Council of Judges of the Supreme Court has used its right to make an annual report which is tabled in Parliament, to inform Parliament and the community of the progress of and the unsatisfied needs of the Court.

ADMINISTRATION

The Chief Justice has been a good administrator. He did what some Chief Justices have been unable to do. He developed good working relations with Grant Johnson, appointed by the Attorney-General in 1986 as the first Chief

Sir John Young has been an exponent and strong supporter of the current method of making changes within the judicial system. No longer are changes in Victoria based on the "hunch" of a committee or on anecdotal evidence.

Executive Officer of the Supreme Court. He was selected by the Executive Committee of the Court from a large number of applicants from the public service and private sector who responded to the public advertisement. The Chief Justice is able to delegate, a quality not all judges have. There has grown between the two men the mutual respect of good managers.

MAKING CHANGES IN THE JUDICIAL SYSTEM

Sir John Young has been an exponent and strong supporter of the current method of making changes within the judicial system. No longer are changes in Victoria based on the "hunch" of a committee or on anecdotal evidence. The problem, options of reform and their consequences are investigated by use of the techniques of the social sciences and a full report recommending the preferred option is produced.

John Young has been a powerful supporter of the AIJA. He was the first of the Chief Justices to deliver a supporting address when its inaugural seminar launching it into active operation, was opened by Sir Harry Gibbs, Chief Justice of Australia, in Sydney on 14 August 1982. Sir John Young presented a paper "The Role of the Judiciary and the Executive in Court Administration" at the AIJA annual seminar in Adelaide in 1985. At every stage of the growth of that influential institute he has readily responded with advice, assistance and support whenever sought.

As President of the Victorian Law Foundation, John Young has had a significant influence upon reform and reconstruction within the law. Funded by the Solicitors' Guarantee Fund, the Foundation provides financial and organisational support for projects to investigate improvements of the administration of the law. Universities, court organisations and other community institutions may apply for this support for worthwhile research projects. Many of the projects in Victoria and many of the AIJA projects which have led to organisational and case-flow management improvements at all levels of the court system, have been made possible by the Foundation.

The Chief Justice has actively supported the process of change. Had he not thrown his weight strongly behind it, earlier this year, the case transfer system, for all the consensus produced over the years, might not have reached fruition.

VICTORIAN JUDICIAL COUNCIL

The initiative of the Chief Justice in proposing and having set up this year a Steering Committee to consider the establishment of a Victorian Judicial Council is one of great constitutional importance. The Steering Committee is investigating the feasibility and advisability of having what is now done by the executive in respect of the administration of the courts, done instead by a corporation to be created by the Victorian Constitution, the Victorian Judicial Council. It is contemplated that the majority of its members would be judges or magistrates. The project has the support of the Attorney-General and the active co-operation of his Department.

In his Sir Leo Cussen memorial lecture on 8 November 1991, "Who Should Run the Courts", Sir John explained that the partnership which the Civil Justice Committee envisaged had not worked as well as the Committee hoped that it would. I agree. While there have been shortcomings on both sides, the basic explanation, I think, is that the concept has proved organisationally unwieldy and has left the courts in their own administration reliant on the executive.

In the lecture Sir John used words which embody his approach:

> "[I]t is better that fundamental changes in the administrative system are not made quickly or without the fullest investigation. It is so easy to make the cure worse than the disease. Sweeping changes made quickly almost inevitably result in unsatisfactory situations and endless demands for reform." (pp.5–6)

He added:

> "It would be important . . . that the Victorian Judicial Council should recognise and support the complete authority of the Councils of Judges or Magistrates, as the case may be, in their own Courts. The Judicial Council ought not to do anything to interfere with the way in which the Court Councils conduct the affairs of the Court although the central body would necessarily have to determine the resources available to each Court." (pp.12–13)

The Steering Committee has only commenced its work and I do not presume to anticipate its findings. However, the Victorian Judicial Council could prove to be the vehicle for achieving within the State several essential requirements of

judicial independence supported by the Australian Bar Association. In its statement in March 1991, "The Independence of the Judiciary", the ABA stressed that it is a necessary element of judicial independence, which should be entrenched by statute, that courts have the right to control their premises, facilities and staff (p.8). It may be feasible for the land, buildings, facilities and staff of each court to be controlled by the Council of Judges (or Magistrates) of the court, but for the land, buildings and facilities to be owned and the staff to be employed by the Victorian Judicial Council.

Those who have sometimes said that there is too much admiration for things English in John Young, may not have noticed that his influence has been towards moving the control of the courts away from the English model and closer to the American.

In the initiation of this project, the long term influence of Ian Scott may be seen. His inaugural lecture as Barber Professor of Law in Birmingham in 1978 was "Court Administration: the Case for a Judicial Council".

Those who have sometimes said that there is too much admiration for things English in John Young, may not have noticed that his influence has been towards moving the control of the courts away from the English model and closer to the American. On his first meeting with Professor Scott he discussed the Beeching recommendations under which, since 1972, the executive has the primary role in running the English courts. The premise underlying the investigation of a Victorian Judicial Council is the same as that on which control of individual courts by a Council of Judges or Magistrates is based — that the judiciary should run the courts.

While he has been Chief Justice, a close relationship of co-operation between the three courts has developed. In latter years Chief Judge Waldron, Chief Magistrates Dugan and Brown and the members of all three courts have contributed to this. The operation of the Courts (Case Transfer) Act 1991 will advance the process. Such a relationship makes more feasible a Victorian Judicial Council which would provide administrative services for the whole judicial arm of government.

UNFINISHED BUSINESS

While much has been done, much remains to be done.

As Chief Justices Sir Edward Coke and John Marshall well knew, the Chief Justice who would protect the independence of court and court system has a political function to perform, although a strictly non-party one. This did not come easily or gladly to John Young. He did it and developed the required skills, because it had to be done.

Generally he drew the line at making use of the media to inform the community what the courts are doing and what their positions and needs are. Without this knowledge it is difficult for the community to develop a confidence in their courts. Much remains to be done here.

A good basis has been laid for the case management systems of the Court. Lists such as the Commercial List, controlled by a judge in charge have been very successful. In other areas much work by many people is still required to be done. But changes are in train.

SUMMATION

As I have written of the reforms and improvements which have been effected or initiated, I have been glad to recall some words I used when, as Chairman of the Bar, I welcomed the new Chief Justice on 1 May 1974. After referring to the many changes in the organisation and administration of the Bar which had followed recommendations of committees chaired by him, I said:

"One of your strengths as a reformer is that you neither look nor sound like a reformer. Those who have a liking for reforms like the reforms you propose. Those who have no liking for reforms are persuaded by the fact that you have put them forward."

I referred to reforms needed in the courts and added:

"The Bar looks to your experience as a reformer and knows that under your leadership these things can be accomplished."

I take some satisfaction in having made a correct prediction 17 years ago.

It is hazardous to assess in a published article the significance of recent events to which one has been close. Those who come later have so much time to find error. I will make an attempt. In my opinion Sir John Young has made a greater contribution to his community than any other Chief Justice of Victoria has made in that capacity. I am tempted to put the assessment higher, but something must be left for posterity to do.

ONE AND A HALF CENTURIES OF VICTORIAN CHIEF JUSTICES: 1841–1991

Sir William A'Beckett

THE FIRST SUPREME COURT JUDGES TO sit in Melbourne were in fact NSW Supreme Court Resident Judges at Port Phillip (then a district of NSW).

JOHN WALPOLE WILLIS (1841–1843)

The first was John Walpole Willis (1793–1877) who was appointed in 1841 and sat until his suspension by the Executive in 1843. Earlier "highlights" of his career should have forewarned the Colonial Office — expelled from Charterhouse (1809), he was admitted to Gray's Inn in 1811 and called to the Bar in 1816. His first judicial appointment was echoed by his last. He was "amoved" [removed from office] for declining to sit in the Court of Equity of Upper Canada (1827). The Privy Council upheld his appeal because he had been denied a hearing prior to his amoval. Thereafter he was appointed the Vice-President of the Court of Civil and Criminal Justice of British Guiana (1831). In 1837 Willis was appointed a Judge of the NSW Supreme Court arriving in Sydney in 1838. Perhaps to remove him from Sydney, he was appointed as Port Phillip's first Resident Judge 1841). Here his lack of judical temperament (possibly exacerbated by poor health) led to frequent clashes with the local profession, although it should be noted that he had supporters as well as detractors. Thus, Governor Gipps felt himself bound to amove him from office. Again, the Privy Council upheld his appeal; again, on the ground that he had not been granted a hearing prior to his amoval. However, he was not re-appointed to his position as Resident Judge or any other judicial post although he was paid his arrears in salary and costs.

SIR WILLIAM JEFFCOTT (1843–1845)

Willis was succeeded by Sir William Jeffcott (1800–1855). Irish born and educated at Trinity College, Dublin, Jeffcott was called to the Irish Bar in 1828 and emigrated to Sydney in 1843 where he was immediately appointed to replace Willis. A contemporary report was that:

"He was a vast improvement upon the gentleman he succeeded, and the Court business was no longer a series of gratuitous farces for public amusement. From a bear-garden, it became a decent, well-behaved place".

Jeffcott was in office only 17 months, in which time he opened the new Supreme Court building at the corner of Russell and La Trobe Streets. He felt compelled to retire because of his "conscientious scruples, not shared by anyone else, that his appointment as Judge might turn out to have been invalid if Mr. Justice Willis' appeal should be upheld". Thus, in 1845 Jeffcott left Melbourne, returning to Ireland and later holding judicial office in the East Indies until his death.

Sir William Stawell

Possibly Sir William's greatest claim to fame is as the younger brother of Sir John Jeffcott (Chief Justice of Sierra Leone and the Gambia, 1830–34 and instrumental in establishing the South Australian Supreme Court). In 1834 Sir John stood trial for murder following a fatal duel. He was acquitted but is one of the few (perhaps the only) British judges to be so tried.

SIR RICHARD THERRY (1845–1846)

Next was Sir Richard Therry (1800–1874), born in County Cork, educated at Trinity College and called to the Irish and English Bars in 1827. Appointed to the NSW Court of Requests in 1829, he was selected as Jeffcott's replacement in 1845 (he had earlier lobbied for the initial appointment given to Willis). Therry overcame his frosty welcome in Melbourne (engendered by a campaign from a prior political opponent and the public sympathy and affection towards the popular Jeffcott). When the opportunity arose, he lost no time in returning to Sydney (1846) and thus forfeited the office of Victoria's first Chief Justice which fell to his successor. Therry retired from the NSW Supreme Court in 1859 and returned to England where he wrote *Reminiscences of Thirty Years' Residence in NSW and Victoria* (Sampson Low, London, 1863; facsimile edition, Sydney University Press, 1974).

The Honourable George Higinbotham

SIR WILLIAM A'BECKETT (1846–1857)

Sir William a'Beckett (1806–1869) was the last Resident Judge and the first Chief Justice of Victoria. Born in London and called to Lincoln's Inn (1829) he emigrated to NSW in 1836 being shipwrecked en route. In 1843 he was appointed Solicitor-General of NSW and later an acting Justice of the Supreme Court. In 1845 he was considered for the vacancy on the Supreme Court (which was filled by Therry) and

consequently sent to Port Phillip upon Therry's return to Sydney in 1846. Upon separation from NSW (1851) and the establishment of the Supreme Court (1852) he became its first Chief Justice until his retirement in 1857 because of ill-health.

SIR WILLIAM STAWELL (1857–1886)

Born in County Cork, educated at Trinity College and called to the Irish Bar in 1838, Sir William Stawell (1815–1889) emigrated to Melbourne in 1843 when, practising on the Munster Circuit, he saw "forty hats on the Circuit and not enough work for twenty".

Active in politics, he was a member of the Legislative Council from 1851 and Victoria's first Attorney-General. His importance as advisor to the Government of the day was such that when he was absent on circuit, Government business was suspended. *As Attorney-General he prosecuted the Eureka rebels (all of whom were acquitted) leading to his temporary unpopularity. In 1857 he was appointed Chief Justice until 1886 when failing health forced him to retire.

THE HONOURABLE GEORGE HIGINBOTHAM (1886–1893)

Born in Ireland, also educated at Trinity College, The Honourable George Higinbotham (1826–1893) was called to the English Bar (Lincoln's Inn, 1853) and emigrated to Melbourne in 1854 where he was admitted to practice and was editor of the *Argus* from 1856 to 1859. In politics he held the Lower House seat of Brighton (1861–1871) and was Attorney-General (1863–1868).

An outspoken iconoclast, he was admonished by the *Australasian* newspaper for his support of women's right to vote (1873), never took silk and upon his appointment as Chief Justice (1886) refused the customary knighthood. Further, he disapproved of the additional £500 in salary enjoyed by the Chief Justice over the other members of the Court and consequently spent this sum on dinners entertaining his brethren and the profession.

Higinbotham was appointed a puisne justice in 1880 and, following Sir William Stawell's retirement, to the Chief Justiceship in 1886. In 1890 he completed the consolidation of the Victorian Statutes (as Attorney-General he had previously been responsible for the 1865 consolidation) and was accorded the thanks of both Houses of Parliament. Beyond asking that he might be given a copy of the completed volumes he refused to accept payment or reward for this work.*

* Australian Dictionary of Biography (MUP)

Sir Edmund Herring

During his time as Chief Justice he was never appointed as Acting Governor or Lieutenant-Governor during the Governor's absence — instead, the retiring South Australian Governor was appointed as Victoria's Acting Governor. This was because Higinbotham had indicated his belief that the Governor was bound by the advice of his ministers rather than that of the Colonial Office. In 1890 he contributed financially towards the relief of the families of striking workers giving rise to public controversy.

Following his death in office (1893) no public memorial was erected until 1937 when Donald Mackinnon (Attorney-General, Solicitor-General 1913), who had been associated with the 1890 consolidation of Statutes, bequeathed funds for this purpose and, until recently, the Seamen's Union of Australia laid a wreath on this statue every year on the anniversary of Higinbotham's death.

SIR JOHN MADDEN (1893–1918)

Also born in County Cork, Sir John Madden's (1844–1918) family emigrated to Melbourne where he was educated at the University of Melbourne (BA 1864, LL.B. 1865). In 1865 he joined the Victorian Bar and in 1869 took out the University's first LL.D. degree.

His public life was marked by critical letters in the *Argus*. In 1889 Professor Jenks of the Law Faculty was highly critical of the University administration under Madden as Vice-Chancellor. Madden's robust reply (q.v. Jacobs, *A Lawyer*

Sir William Irvine

Tells (1949) and Dean, *A Multitude of Counsellors* (1968)) was echoed three decades later when Jenks, after a distinguished career at Oxford as a legal historian and scholar, applied to the Lord Chancellor of England (Birkenhead) to be appointed King's Counsel. He received this response:

My Dear Jenks
In 1897 you gave the present Lord Chancellor a second in the BCL. In 1898 you gave a second also to the Vinerian Professor [Sir William Holdsworth]. These are, I think, sufficient honours for a single lifetime.

Yours faithfully,
B

In 1893, Madden's appointment as Chief Justice was attacked in an extraordinary letter in the *Argus* from Justice Williams complaining of the slight occasioned him by being passed over and comparing Madden's legal ability and attainments unfavourably with those of others, including the letter's writer.

On the bench, Sir John's loquacity was underlined in a judgment lasting eight hours, reputedly the longest on record in the Supreme Court.*

Sir Frederick Mann

SIR WILLIAM IRVINE (1918–1935)

After an education at Dublin's Trinity College, Sir William Irvine (1858–1943) emigrated from Ireland to Victoria in 1879 where he taught at Geelong College and studied law at the University of Melbourne.

Active in politics, first as MLA for the State seat of Lowan between 1894 and 1904 during which time he was the Attorney-General (1899) and Premier of the State (1902–3), and later as the Federal member for Flinders from 1906 until 1918 when he resigned upon his appointment as Chief Justice of Victoria. He was the Commonwealth Attorney-General in 1913.

On the occasion of his retirement in 1935 the commentator in the *Australian Law Journal* wrote

> ... and if proceedings in his Court are conducted rather more slowly than elsewhere, the absence of any trace of heat or impatience has always enabled counsel to present his case to the fullest advantage.

Sir William is perhaps best remembered for the 1923 "Irvine memorandum" which, in refusing to nominate a Supreme Court Justice to conduct a Royal Commission, established (in Victoria at least) an important principle of judicial independence.

SIR FREDERICK MANN (1935–1944)

Born at Mt Gambier, South Australia, Sir Frederick Mann (1869–1958) was Victoria's first Australian born Chief Justice. He was educated at the University of Melbourne (BA 1894, MA and LL.B. 1896; LL.M. 1898) and admitted to the profession in 1896 and employed in the Crown Law Department. In 1902, upon his return from the Boer War and having lost his seniority in the public service he signed the Bar Roll and commenced practice in Selborne Chambers.

In 1919 Mann was appointed a puisne justice of the Supreme Court and in 1935 succeeded Sir William Irvine as Chief Justice.

Sir Arthur Dean described him as possessing "a quick incisive mind and a direct manner of speech", "a store of legal learning and a common-sense rather than a technical approach to the cases coming before him" and a keen sense of what the justice of a case required.

Apparently it was his belief that as Chief Justice, he should remain aloof from public affairs and community activities.

SIR EDMUND HERRING (1944–1964)

Sir Edmund Herring (1892–1982) was the first Victorian born (at Maryborough) Chief Justice being educated at Melbourne Grammar and Trinity College at the University of Melbourne. He was the Victorian Rhodes Scholar for 1912 but his studies at Oxford were interrupted by the Great War in which he served being awarded the

* Australian Dictionary of Biography (MUP)

Sir John Young

DSO and the MC. Upon resuming his studies he took out the MA and BCL degrees and was called to the Bar by the Inner Temple in 1920. Returning to Melbourne in 1921 he read in the chambers of Gerald Piggott and took silk in 1936.

Sir Edmund also saw service in World War II (in the North African, Greek and New Guinea

campaigns) attaining the rank of Lieutenant-General by 1944 when he was recalled from military service to succeed Sir Frederick Mann as Chief Justice.

During his tenure of office one of the more notorious cases in which he was involved was the Whose Baby? case (*Morrison v. Jenkins* [1949] V.L.R. 277). The judgment of the Full Court was delivered by Herring C.J. and later upheld by the High Court. The case was argued successfully before both the Full Court and the High Court by Hudson K.C. leading H.A. Winneke.

SIR HENRY WINNEKE (1964–1974)

The son of Judge H.C. Winneke of the County Court (1913–1943), educated at Ballarat Grammar, Scotch College and the University of Melbourne which awarded him the degrees of LL.B. (1929) and LL.M. (1930), Sir Henry Winneke (1908–1985) was admitted to practice in 1931 and commenced pupillage with W.K. Fullagar (later appointed to the Supreme Court of Victoria and then to the High Court of Australia).

In the Second World War he served in the RAAF. In 1949 he resumed his practice and was appointed Solicitor-General (the first non-political appointment to this post) from 1951 until 1964 when he became Chief Justice and the first Victorian born Governor of the State. Upon his retirement as Chief Justice in 1974 he continued as Governor for the following eight years. The

Sir Henry Winneke

Australian Law Journal notes in its obituary notice that

> he was a fanatical devotee of Australian Rules football, and as Governor regularly officiated each year with obvious enjoyment in the presentation ceremonies at the conclusion of VFL Grand Finals.

Early in his term as Chief Justice, Sir Henry diplomatically resolved the controversy over the previously rejected applications of Joan Rosenove and Ted Laurie for silk (q.v. (Autumn 1990) 72 *Vic BN* 10).

In 1949 prior to taking silk, the then H.A. Winneke took into his chambers as a pupil a young man who had just completed a term as Associate to Dixon J. (as he then was) of the High Court. That reader was John Young.

SIR JOHN YOUNG (1974–1991)

Sir John was born in 1917 and was educated at Geelong Grammar, Oxford University and the University of Melbourne. He served in the Scots Guards from 1940 to 1946. He signed the Victorian Bar Roll in 1974 and practised primarily in the company and commercial areas.

Sir John's contribution to the Supreme Court is spelled out elsewhere in this issue.

Mal Park

Sir John Madden

PHOTOGRAPHS COURTESY: THE CHIEF JUSTICE AND THE SUPREME COURT LIBRARY COMMITTEE.

"WHO SHOULD RUN THE COURTS?"

The Sir Leo Cussen Memorial Lecture, Delivered by the Honourable Sir John Young C.J. on Friday 8th November 1991

THE GREAT LAWYER WHOSE NAME WE honour tonight would I suspect have been rather surprised by the question which I have chosen as the title for this paper. When he died in 1933 few people would have thought that the Supreme Court at any rate was run by anyone but the judges. In a sense the judges did run the Court. They were given power to regulate virtually all court activities by Rules of Court, including such things as the opening hours for Court offices and they could direct the non-judicial staff of the Court. From our view point today administration by Rules of Court seems a somewhat cumbersome means of administration and perhaps that very fact is one reason why judges on the whole paid little attention to administration. But it should be remembered that rule making can have a very significant effect on court administration. County Courts and Magistrates' Courts were in those days administered by a government department.

By 1933 the Welfare State had not had a great impact on the judicial system. Compulsory third party insurance for drivers of motor vehicles was first introduced in England in 1930 and it was copied in Australia in the following decade. Immediately after the Second World War, however, something like a litigation explosion took place. Nearly all the courts began to find that they could not handle the business coming before them or at any rate could not handle it expeditiously. The principal reaction of governments was to appoint more judges and many years passed before it began to be appreciated that other steps beyond merely increasing the number of judges had to be taken if the Courts were to be able to handle the new volume of litigation. It is not self-evident that an increase in the number of judges increases the rate of disposition of cases particularly when it is remembered that not more than about 5% of civil cases instituted in the Supreme Court are finally disposed of by a completed hearing and judicial determination. Criminal cases of course depend upon different considerations and raise different problems.

The litigation explosion placed new demands on the Courts, demands with which they were not equipped to deal. From time to time questions were asked in Parliament about backlogs and delays and successive governments were asked what they intended to do about it. As it was generally believed, however, that there were no votes in courts, very little was done. Up till 1985 at any rate Victoria was notable among the States for its low recorded per capita expenditure on courts[1]. In 1985 Victoria is recorded as spending almost 50 per cent less than the Australian per capita average.[2] Probably there has always been less spent per capita on the administration of justice in Victoria than in other States. Insofar as professional bodies since 1946 have taken up the cause, they have seldom, until very recent times, done more than ask for the appointment of more judges.

Up till 1985 at any rate Victoria was notable among the States for its low recorded per capita expenditure on courts. In 1985 Victoria is recorded as spending almost 50 per cent less than the Australian per capita average. Probably there has always been less spent per capita on the administration of justice in Victoria than in other States.

The huge increase in litigation put mounting pressure on the Court system, pressure which has steadily increased to this day. Successive governments expressed concern but little of a major nature was undertaken. The judicial system grew haphazardly and ineffectively. In 1982, how-

[1] Barnard and Withers "Financing the Australian Courts" AIJA 1989, p.v.

[2] ibid, p. 90 Some improvement was noted since 1985, ibid. p.v.

ever, the Victoria Law Foundation considered a preliminary study prepared for it at the suggestion of Dr. Robin Sharwood by Professor Ian Scott, who later succeeded Dr. Sharwood as Executive Director of the Foundation. That study suggested various matters which were worthy of investigation. As a result the Civil Justice Committee was established as a joint Law Department/Foundation project. It was the first time that the Department and the profession had joined together in such an enterprise.

During the course of the Committee's deliberations the Attorney-General of Victoria in a Ministerial statement in the Legislative Council drew attention to the fact that there was confusion as to whom was responsible for running the Courts. He acknowledged that the Law Department (as the Attorney-General's Department was then called) had a very large say in the operation of the Magistrates' Court but said that in the Supreme Court and the County Court responsibilities were divided between the Chief Justice in the case of the former and the Chief Judge in the case of the latter on the one hand and the Law Department on the other. He then posed these questions: "Who should run the Courts? Can and should judges be judges and administrators?" The Attorney-General said that he thought that consideration should be given to establishing a statutorily based independent Courts Commission "with the responsibility for the administration of all Courts in the judicial hierarchy."

As long ago as 1965 Professor G. Sawer in a paper delivered to the Australian Law Schools Association said:

"In my view, much more attention should be paid to a quite different feature of American judicial organization, namely the integration of a total court system into something like an autonomous statutory corporation with its own administrators, a separate budget and direct relations with the relevant supreme executive and legislative authority."[3]

The Civil Justice Committee in its report in 1984 noted the questions[4] posed by the Attorney-General but for various reasons did not feel able in the circumstances then prevailing to recommend the creation of a separate Courts Commission. It recommended instead that the Courts be administered by a partnership between the Courts and the Law Department, but it added that, if its recommendations did not prove effective, consideration could still be given to a Courts Commission.

I think it must be admitted that the partnership which the Civil Justice Committee envisaged has not worked as well as the Committee hoped that it would. I shall not go into the reasons for that in any detail but it may be noted that the recommendation was not really accepted by the Government. Whilst it was said that the general principles of the Committee's recommendations were accepted, significant parts of those recommendations were not put into effect. For instance, the Committee recommended that the chief executive officers of the Courts should not be subject to the Public Service Act 1974 but should be appointed by the Governor in Council on the recommendation of the judges. This was a very important recommendation for it recognized that it was not compatible with the independent responsibilities of the Courts that they should be dependent upon some officer of the Executive Government.[5] This recommendation was not implemented: a public servant was appointed, a part of the law department was, as it were, moved into the Courts and for a start at any rate the independence of the Courts seemed to have been diminished rather than increased. I am pleased to say that things are better to-day.

The idea of setting up a separate statutory body has however continued to be discussed and over time attitudes to the idea have developed and changed. Certainly some years have elapsed, but it is better that fundamental changes in the administrative system are not made quickly or without the fullest investigation. It is so easy to make the cure worse than the disease. Sweeping changes made quickly almost inevitably result in unsatisfactory situations and endless demands for reform.

Consideration of the means by which Courts should be administered is not only prompted by a search for ways of disposing of litigation more expeditiously. There is a further area of concern. It is felt in many quarters that the traditional safeguards of judicial independence, such as security of tenure, are no longer adequate. Certainly they have proved inadequate to prevent increasing pressure on the Courts and this pressure in part comes from the Executive Government. The pressure I am referring to is not the pressure of the volume of business but pressure of an administrative kind: pressure to alter the administration of the court, to reduce staff in the interests of economy, pressure to reduce or redeploy the meagre personal staff of a judge.

Curiously enough I believe that this pressure is sometimes significantly aided and abetted by the professional bodies, the Bar Council and the

[3] G. Sawer, Judicial Administration: The subject and some applications, at p.10

[4] C.J.C. Report Vol. 1 p.296

[5] Cf. Report of Royal Commission on Australian Government Administration (AGPS Canberra 1976), Appendix Vol. 3, The Administration of the Courts, p.340 quoted C.J.C. Report Vol. 1 p.306.

Council of the Law Institute, although I would not for a moment think that they would see what they do as attacking or even as impingeing upon the independence of the judges. These bodies, however, are apt to confer regularly with the Attorney-General and to complain to him about perceived inadequacies in the administration of justice. No doubt the Attorney-General, who in a sense has the responsibility for the Courts feels obliged to respond in some way and the result is often translated in one way or another into Executive pressure on the Courts of the kind I have described. The Courts struggling with ever increasing case loads are apt to feel such pressure is unwarranted and oppressive.

In so far as the professional bodies merely seek the appointment of additional judges no particular objection can be taken except that the appointment of more judges of itself achieves little. So far as the Supreme Court is concerned I do not think there are many who would oppose more appointments in principle. But before more appointments can be made more chambers, more courts, more staff and significantly increased facilities must be provided. It is no good making the appointments first and hoping that facilities will somehow later be provided. Bitter experience suggests that what is more likely to happen is that support for each judge will be diminished. Victorian judicial officers have fewer support staff per capita than the judicial officers of any other State in the Commonwealth[6] and it would be bad management to allow the figure to go any lower.

In 1981 when I was in California I visited the Chief Judge of the 9th U.S. Circuit Court of Appeals. He was engaged in preparing a submission to Congress for an increase in the number of Judges in that Court. He told me that he would have to appear before a Congressional committee to justify what he sought and he was expecting some difficulty in obtaining what he wanted. I asked him how he would fare if he wanted to increase the staff of the Court. He said there would be no difficulty, "I could employ three more law clerks to-morrow" he said. I could not help reflecting upon the situation in Victoria where almost exactly the opposite position obtained. Of course we all know that funds are very limited but it cannot be sound use of limited financial resources to deny to the highest paid judicial officers in the State the resources that they need to carry out their increasingly demanding work. Perhaps only someone closely associated with the work of the courts fully understands how restricted the courts are by lack of resources. There are many things judges would like to do to improve the system but for one reason or another — usually money — they are frustrated.

Executive pressure on the courts is of course not to be condoned even though in times of financial stringency it can be readily understood. It poses however something of a dilemma. If the courts resist the pressure so as to avoid Executive control and put themselves in confrontation with the Executive, the Executive government may be encouraged to seek to avoid the Courts. The Government can avoid them to an extent by setting up specialist tribunals of which we have seen many examples. Sometimes the justification for setting up specialist tribunals is said to be related to the costs and delays associated with court proceedings but sometimes I fear the real reason is that it is desired to use a tribunal as an instrument to carry out government policy. There are those who object to the Courts on the ground that they do not carry out government policy.

Sometimes the justification for setting up specialist tribunals is said to be related to the costs and delays associated with court proceedings but sometimes I fear the real reason is that it is desired to use a tribunal as an instrument to carry out government policy.

Considerations such as those that I have mentioned and the changing climate in judicial administration in Australia have led to the establishment here of a new project. The changing climate has been brought about in part by the activities of the Australian Institute of Judicial Administration, in part by increasing interest by judges and probably by those in the public service involved in court administration, and in part, no doubt, by the fact that the High Court, the Federal Court and the Family Court have what are described as one line budgets or one line appropriations in the budget.

The project is a proposal to examine the feasibility and the advisability of establishing in Victoria an independent statutory body tentatively named the Victorian Judicial Council to assume some part of the responsibility for the management of the Courts and possibly of other

[6] See Annual Report of the Judges of the Supreme Court of Victoria for 1987, pp.12–15

tribunals in Victoria. The project has the support of the Attorney-General and the active co-operation of his Department. The first stage of the project is being financed by the Victoria Law Foundation and the Executive Director of that Foundation is Executive Officer of the Project on behalf of the Steering Committee. The Steering Committee which has been set up consists of the Chief Justice, 3 Supreme Court Judges, 3 County Court Judges, 3 Magistrates, the Chairman of the Bar Council, the President of the Law Institute and the Secretary to the Attorney-General's Department. But the group is intended to be flexible and it is contemplated that other persons will be added from time to time. It is also contemplated that consultants, some outside the legal profession, will be engaged to assist on some aspects.

Work has begun and the Steering Group has divided itself into a number of sub-groups. Presently there are four: one group is concerned with budgetary and organizational matters and these are so important that this group is likely to be the co-ordinating sub-group for the whole project. Another group is concerned with personnel, a third with buildings, equipment and general services and the fourth with information systems.

It is an ambitious project which will take a considerable time to bring to completion but whatever the outcome — even if it be ultimately decided that an independent statutory organization should not be set up, I have no doubt at all that what is learned from it will be of great benefit to the proper administration of the Courts. The necessary investigation is very complex. This is partly because the courts are presently administered by the Courts Management Division of the Attorney-General's Department. That Division is an integral part of the Department and it depends upon other Divisions of the Department for support. The proposal is therefore not simply to sever the Division from the Department for if that were to happen the Division would not, as I understand the position, have sufficient personnel or resources of its own to administer the Courts properly. It may also render services to other Divisions outside the Courts.

I hope that the result of this project will be the setting up of a Victorian Judicial Council but it is a hope which I entertain with some trepidation. It is important I think that enthusiasm for the project should not be allowed to obscure the difficulties. The difficulties of the project will have to be squarely faced. Of course there will be many but the one about which I wish to say a little at the moment is that lawyers or at any rate judges and barristers do not in general make good administrators.

The project is a proposal to examine the feasibility and the advisability of establishing in Victoria an independent statutory body tentatively named the Victorian Judicial Council to assume some part of the responsibility for the management of the Courts and possibly of other tribunals in Victoria. The project has the support of the Attorney-General.

I assume for the purposes of discussion that the controlling body of a judicial council or Courts commission would be composed principally of judges or judicial officers. There would certainly have to be others on it but judges would I think have to be in a majority. Otherwise the body would hardly fulfil the role of making the administration of the Courts and the judiciary truly independent. But most judges are not accustomed to sitting on boards of directors or the like and particularly are they not accustomed to sitting on boards and taking decisions which have a significant effect upon what their colleagues may do.

Most of them have no experience of administration. Their training is wholly opposed to administration, it is to concentrate on the minutiae of the case in front of them, to take full personal responsibility for it and to get it right. Virtually no responsibility can be delegated. But it is not uncommon for judges to think that they are good administrators and in fact to administer something by attending to the administrative minutiae themselves. Indeed a former Chief Justice recently said to me that administration in the Courts with a single line budget involved a huge increase in paper work and dealing with a mass of trivia. But it must be recognized that administration does generally involve a mass of trivia. The questions always are who is going to deal with the trivia and what power is to be delegated? It may be all very well for the judges to attend to the administrative minutiae themselves if the thing to be administered is small enough but in a substantial statutory corporation with several hundred employees delegation of authority

would of course be esential. If authority is delegated then there will be times when things go wrong or are not done in the way that some members of the governing body might wish and yet the action of a subordinate may have to be condoned and even supported.

Moreover most judges tend to be fiercely defensive of their own Court and yet the kind of statutory body which is being contemplated may sometimes have to take decisions which favour one Court over another. There will never be enough money to meet all that the Courts would like to do and there might be a time when the judicial council would have to allocate funds, for example, to the Magistrates' Court in priority to the Supreme Court. The Council would have to be composed of people prepared to take a balanced view of the whole system.

It would be important however that the Victorian Judicial Council should recognize and support the complete authority of the Councils of Judges or Magistrates, as the case may be, in their own Courts. The Judicial Council ought not to do anything to interfere with the way in which the Court Councils conduct the affairs of the Court although the central body would necessarily have to determine the resources available to each Court.

When a practitioner is appointed to the bench he may well suffer something like a cultural shock. The culture of the independent practising profession is very different from the culture of the public service. I mean no disrespect to either by drawing attention to the difference. It is inevitable that it should be so. But the proper administration of the judicial system involves a marriage of the two cultures.

It may well be thought that the matters that I have been discussing are matters which are only of interest to the judges and for them to decide. It may well be asked what is the interest of all this to the practising profession? I think it is essential to the achievement of a sound system that the practising profession should become interested in the administration and indeed participate in it. It is important for more than one reason. It is important that the profession should understand the limits of what can be done within a restricted budget and of what can be done within the confines of public administration. The practising profession is largely concerned with private enterprise, with all that that concept implies. The administration of justice cannot be a matter of private enterprise. It is a responsibility of government and we are of course concerned to ensure that it is administered by an independent arm of government, independent of the executive government of the day.

When a practitioner is appointed to the bench he may well suffer something like a cultural shock. The culture of the independent practising profession is very different from the culture of the public service. I mean no disrespect to either by drawing attention to the difference. It is inevitable that it should be so. But the proper administration of the judicial system involves a marriage of the two cultures. Obviously such a marriage will be difficult to achieve and one question which will arise is which culture is to be dominant. Lawyers would I believe answer that question by asserting that the legal culture must prevail but I believe it will only do so satisfactorily if lawyers learn to appreciate the demands, the limits and the possibilities of public administration. Members of the public service and even those outside the law altogether seem to acquire the culture of the courts — the legal culture — quite readily if they work in the courts. They may find it all a little strange at first but that is only to be expected. As they learn about the function of the courts they readily accept the legal culture and indeed contribute significantly to it.

We have had some notable example of co-operation between the judiciary and the practising profession in improving the administration of justice in recent years. The Civil Justice Committee and the Case Transfer Committee are but two examples. But when the judiciary seek the co-operation of the profession in some project and sets up a Committee it frequently occurs that there is a difficulty in knowing the position of the professional representatives.

Inevitably the initial approach must almost always be made through the Law Institute and the Bar Council. If it is perceived that the subject matter of enquiry is of significance and importance those bodies are likely to want to express what for want of a better expression I will call "a corporate view" and will want to maintain some control over their members on the committee

We have had some notable example of co-operation between the judiciary and the practising profession in improving the administration of justice in recent years. The Civil Justice Committee and the Case Transfer Committee are but two examples. But when the judiciary seek the co-operation of the profession in some project and sets up a Committee it frequently occurs that there is a difficulty in knowing the position of the professional representatives.

whom they will probably regard as their representatives however they have been appointed. If the particular subject or project is one that extends beyond a year the "representative" may no longer in the second year be a member of the Bar Council or Law Institute Council as the case may be and may even be replaced altogether with consequent loss of continuity and of acquired understanding and expertise. Alternatively what may happen is that there is a breakdown of communication between the committee and the professional bodies. This may be disastrous, because if the ultimate result appears, when announced, to be unsatisfactory to the professional bodies they may oppose its adoption in a way that they would not do if they had participated fully in its development and therefore better understand the reasons for what is being proposed. They may not refrain from exerting pressure on the Executive Government to prevent the implementation of some aspects of what is proposed. I do not suggest that under our present system the professional bodies are not or should not be free to do so but I am concerned that we should develop a system that does not involve the introduction of the Executive Government into what should be capable of solution within the legal profession. It is of course a different matter if legislation is involved, but the day to day administration of the courts should not ordinarily involve legislation.

The difficulties and dangers to which I have just referred can of course be avoided by arranging special methods of consultation as was done by the Case Transfer Committee. At every stage of its deliberations that committee took great pains to ensure not only that the professional bodies were kept in touch with what was proposed but also to ensure that as many members of the practising profession as possible were given the opportunity of attending a meeting and expressing their views. At one such advertised meeting which I attended no members of the profession other than members of the Committee were present but even that was thought to be advantageous, if not beneficial, because it suggested that what was proposed was not highly controversial and in the circumstances it would obviously have been very difficult for those who failed to attend to complain thereafter.

The elaborate processes of consultation which the Case Transfer Committee undertook worked well but they would not of course be suitable for deciding every day matters concerned with the administration of the Courts. Yet it is of vital importance that the profession as a whole both understand the reasons for and accept decisions made by those responsible for the administration of the Courts. They will be the more likely to do so if members of the profession are members of the governing body and if those members keep the members of the branch of the profession to which they belong constantly informed as to needs, resources and developments. In other words, what we need to do is to develop better internal communication systems and I would hope that the professional representatives on the Victorian Judicial Council Steering Group will give special attention to this problem and to the means by which members of their bodies who are appointed to the Victorian Judicial Council keep in touch with and retain the confidence of the members of the branch of the profession to which they belong.

The Steering Group for the project will certainly have to turn its attention to the question how the Victorian Judicial Council should be constituted. I have already said that I have assumed that it would be controlled by judges. I think it essential that the practising profession be represented on it, but what other members should it have?

In attempting to formulate an answer to that question it must not be forgotten that the Council would have the responsibility — virtually the sole responsibility — for running the judicial system of the State. The answer to the question "Who runs the Courts?" would have to be the Judicial Council. It would follow that any perceived deficiencies in the judicial system other

than complaints against particular courts would have to be laid at the door of the Judicial Council. Put in another way and in the fashionable language of our time the Judicial Council would be "accountable" to the public for the conduct of the judicial system. How then would the public hold the council accountable? Under our system of government the citizen would arrange for his member to raise the matter in Parliament. But who would respond?

These theoretical questions are intended to show that some channel of communication with Parliament would be necessary. If a Victorian Judicial Council were set up by statute there would, I imagine, be a Minister charged with overall responsibility for it in the same way as a Minister is responsible for the State Electricity Commission or the Board of Works. But that would not mean that the Minister should be a member of the Council. There would be arguments both for and against a Minister's being a member of the Council.

A related question is which Minister should be responsible. Should it be the Attorney-General? We have been so accustomed in this country to having the Attorney-General responsible for the Courts that the instinctive answer would probably be in favour of his continuing to do so. But the question needs to be thought about. There might be something to be said for having a Minister other than the Attorney-General responsible to Parliament for the administration of the Courts. After all the prime function of the Attorney-General, at least in the traditional sense, as principal Law Officer is to advise and represent the Crown. Many see it as a very curious anomaly that a Minister holding that sensitive and independent role should be responsible for or indeed have anything to do with the administration of the Courts in which the Crown is the chief litigant.

I wish to make it clear that I am very far from having a concluded view on these questions, particularly on the questions of ministerial representation on the Council but I mention them because they are serious and difficult questions which the Steering Group will have to consider.

Should there be other persons also on the Judicial Council? I would abhor any notion that a person should be appointed to the Council to represent any sectional interest and equally anything that could be called tokenism but I think that it is possible that the Council would benefit from having on it one or two persons who have particular expertise in areas outside the law, perhaps in finance or public administration.

A related question is how or upon whose nomination the members of the Judicial Council should be selected. This is likely to be a difficult and sensitive question upon which I shall say no more than that I think much should depend upon the view of the Chief Justice. But it would clearly be necessary to devise some means of selecting from amongst the judges those who were thought to have some expertise outside the narrow confines of the law.

The recent study by Professors Church and Sallmann "Governing Australia's Courts" (AIJA 1991) which considered three models of Court governance together with their general observations and reflections will be studied carefully. The three models which they studied were the traditional model in Victoria, the Separate Department Model in South Australia and the Autonomous model of the Family Court. I shall only observe here that enthusiasm for particular solutions which have been adopted and which are said to work satisfactorily may often be found to depend upon particular personalities or the relationship between them. This is not to say anything against the particular solution but rather to warn against the too ready adoption of a solution that works in one place without a close examination of whether it would work here in Victoria.

Whether or not the setting up of a Judicial Council would be a good idea is not the present question. What we are doing is attempting to find an answer to that question. Much will ultimately depend upon the budgetary arrangements that can be made. I do not imagine that

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there would necessarily be much more money for the courts although the allocation of funds should be able to be carried out with greater concentration on the needs of the Courts and less on the competing claims of other interests embraced by the Attorney-General's Department. It would be absolutely essential to the success of an independent judicial Council that its first budget provide adequate funds for the courts as they exist when that budget is allocated. For that reason it may be more important to build up a budget based on perceived needs rather than upon what can be extracted from the public accounts as representing the cost of running the courts under present arrangements.

What possible advantages might flow from the setting up of a judicial Council? I have already referred to some, inferentially at least. A unit dedicated to running the courts should be able to do so more efficiently and more effectively than one concerned with other, sometimes, competing interests. Forward planning might be much more effectively carried out: at present the judges play little, if any, part in forward planning. It should also be possible to develop better career structures for those who work for the Courts, a very important aspect about which I have said little. It is the particular province of the Personnel Sub-Group which I mentioned earlier.

Advantages of the kinds I have mentioned might be achieved by a body which was not a Judicial Council but was dedicated to the running of the Courts. These advantages do not spring directly from the fact that the body envisaged is one under the control of the judges. That it should be under the control of the judges is in order to make the judicial arm of government independent of the other two arms and thereby to give effect to the philosophy of John Locke and Montesquieu viz. that liberty is most effectively safeguarded by the division of the three functions of government, legislative, executive and judicial between separate and independent bodies. Our direct inheritance derives from the Glorious Revolution in England in 1688 when an independent judiciary was established although it was not until the Act of Settlement in 1701 that judges' appointments were stated to be during good behaviour.

It is not my purpose to attempt to answer the question posed by the title of this paper. It will be answered for Victoria by the work of the Steering Group of which I have spoken. But I venture to hope that whenever the answer is given it will be an answer that would have been approved by the great judges of the past if they had had to grapple with the conditions of our present age.

THE NATIONAL CRIME AUTHORITY

Justice J.H. Phillips

ON 14 AUGUST 1990, I CEASED TO BE A Supreme Court judge carrying out exclusively judicial functions with a staff of two and became a Federal Court judge exercising no judicial functions with a staff of over five hundred. (My wife remarked — "Over five hundred staff — and you can't even organise yourself!"). I found myself, in Darwin's phrase, in "a strange new world".

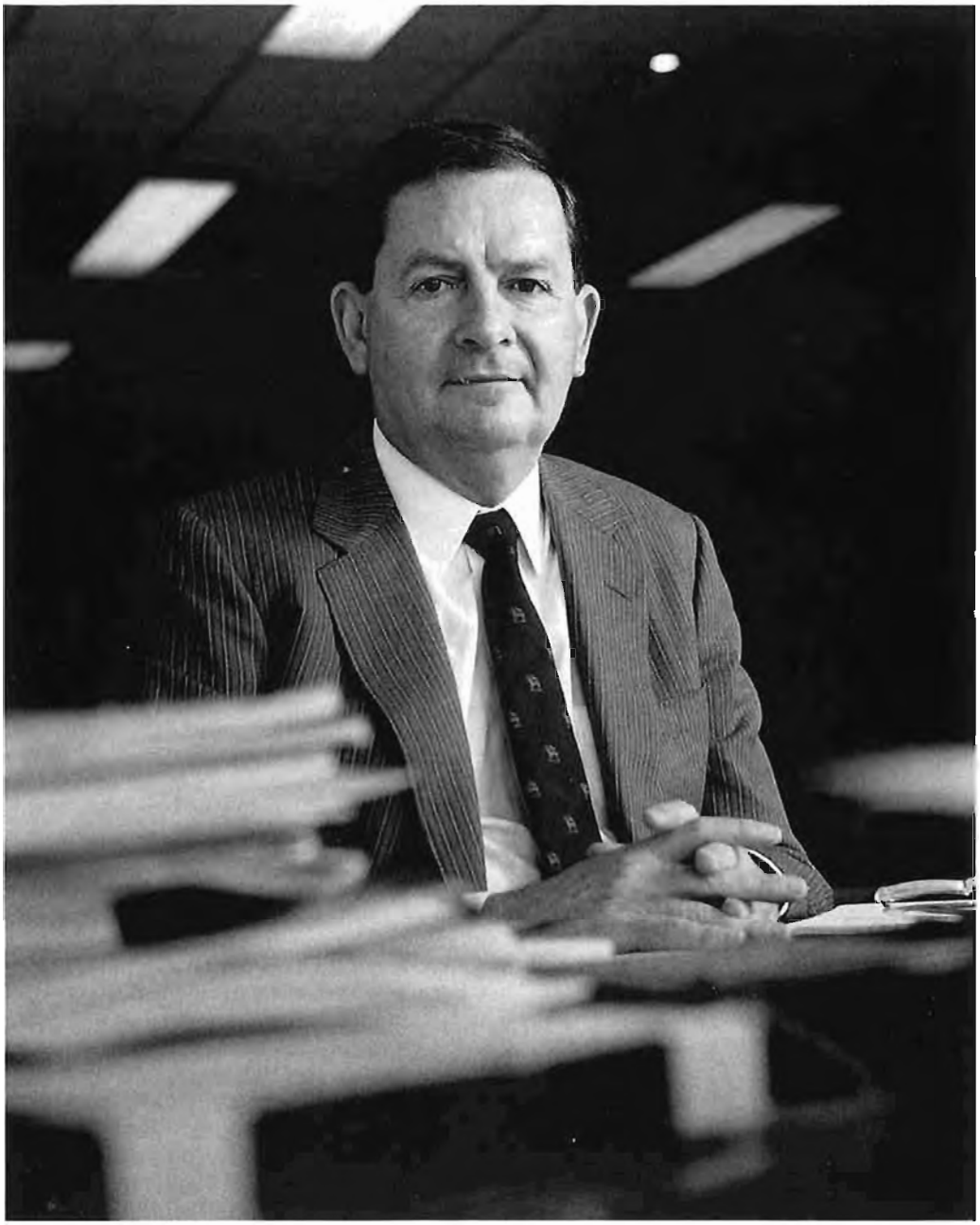
I must say that I had not paid appropriate attention to the formation of the National Crime Authority in 1984. I was then a brand new judge and preoccupied with learning my new responsibilities. So, last August, I had to refresh my memory. This involved reading a great deal. In doing so, I was reminded that the National Crime Authority grew out of a number of Royal Commissions conducted during the seventies and the early eighties. Royal Commissioner after Royal Commissioner had observed that there was a lack of a co-ordinating and facilitating body to complement the work of the existing law enforcement agencies and something should be done about it. In 1983 a crime "summit" was held and much debate ensued about the composition of this proposed body. At the end of the day Parliament opted for the National Crime Authority, with powers to compel witnesses to answer under oath (without self-incrimination) in private hearings; and very strict secrecy provisions touching disclosure of information obtained. To monitor this body two Parliamentary Committees were set up. These were the Inter-Governmental Committee which is composed of Attorneys-General and Police Ministers from each of the States and Territories and the Parliamentary Joint Committee which is composed of members of both Houses of the Federal Parliament.

The first Chairman of the National Crime Authority was Mr Justice Stewart of the Supreme Court of New South Wales. A former Royal Commissioner, he had acquired very great experience of drug-related crimes. Understandably, he took the NCA directly into the investigation of this type of criminal activity. Perhaps because of the danger involved, the NCA essentially operated as an isolated body and adopted a very confidential attitude to the information and intelligence it obtained. This approach first led to mistrust and, later, to overt hostility on the part of other law enforcement bodies who saw the NCA as a ninth police force without real links to them. In addition, the private nature of the hearings held and the general secrecy surrounding the Authority's operations combined to cause substantial misgivings among civil libertarians. Finally, the refusal of some persons in the Authority to answer questions administered by the parliamentary Joint Committee led that Committee to complain that it was unable to perform its monitoring task.

As I absorbed all this in August 1990, it became clear that there must be a very substantial change of directions for the Authority if it were to fulfill the role that Parliament had intended for it. Acting on my experience as Director of Public Prosecutions in 1983, I asked for three months to prepare a plan for "new directions" and the Parliamentary Committes were kind enough to agree. On 23 November I presented this plan to the Inter-Governmental Committee. In introducing the plan I said this:

"Essentially, I envisage the Authority as a body which should act as a *partner* to the other law enforcement agencies. It should not be — or appear to be — a competitor. Rather, it should follow the roles of a co-ordinator and an agency offering complementary services to the other agencies. It must not act so as to give rise to it being perceived as a "ninth police force". It should follow an operational mode based on the successful multi-disciplinary task force format — teams composed of police, financial and intelligence advisers and lawyers — and develop that so as to attain expertise in co-ordinating multi-agency task forces. It must give high priority to collection, analysis and dissemination of relevant criminal information and intelligence together with recommendations for relevant law reform."

I then set out a number of measures designed to redress and remove the problems I have earlier described. These included the use of a consultative committee composed of the Commissioners of Police and the heads of the other law enforcement agencies for the selection of future work for the NCA. This, I hoped, would remove duplication of effort and the territorial attitudes of the past. I proposed, too, that there be greater emphasis on white collar investi-



gations with the Authority operating — not as an isolated body, — but in co-operation with other agencies. I urged the establishment of an annual public conference on a law enforcement theme and for the regular conduct of intelligence dissemination conferences with the other agencies. The Inter-Governmental Committee, to my great satisfaction, unanimously approved my proposals.

Very shortly afterwards I was encouraged to read expressions of support for the new directions from representatives of all the political parties in the Federal Parliament. Media reaction was also positive, with favourable editorials in both the Melbourne dailies and in the Sydney Morning Herald. I felt I was moving in the right direction but that there was much more to be done. From its inception, the private hearings of

the NCA and the general aura of confidentiality had led to it being labelled "secretive" and, in addition, lack of co-operation with the Parliamentary Committee had produced the tag "unaccountable". I was convinced the Authority would not throw off this image unless the relevant legislation was amended. In February this year, I made a speech at the Law Institute. I called for amendments so as to give Members of the NCA conducting hearings the discretion to hold them in public providing proper regard was paid to the safeguarding of individuals' reputations. I called for the removal of the secrecy provisions in the Act from proceedings before the Joint Parlimentary Committee so that there was no room for doubt as to whether that Committee could properly inform itself about the NCA's activities. Once again, there was a general positive reaction.

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Since that time a number of the activities set out in my plan for new directions have taken place. They reflect fully, I hope the emphasis on partnership and co-operation with the other law enforcement agencies on which the plan depends so much. In July this year, the NCA conducted a seminar for senior white collar crime investigators. Twenty-nine senior investigators from no fewer than sixteen law enforcement agencies from Australia and New Zealand attended. The seminar took the form of an intensive two weeks course with the registrants living at the Police Academy, Waverley. Over fifty speakers delivered papers. All this was organised by Mr Bill Horman, my Director of Investigations, who would be well known to most members of the Bar. Bill had been, until February this year, the Commissioner of Police for Tasmania. Many law graduates from Monash tell me he was the best tutor they ever had.

Some weeks later, the NCA conducted its first public conference which was designed to make easier the task of jurors in complex white collar prosecutions. This conference was based upon the premise that the right to trial by jury is one of our ancient freedoms and that we should set our faces against it being removed or diminished. It followed that all serious criminal charges, including complex white collar ones, should be tried by juries and that juries are suitable tribunals for such cases providing the evidence is explained to them in a clear, economical and interesting fashion. As an integral part of the conference we set up a courtroom for 1990s and equipped it with all the latest technology and we assembled a group of expert speakers including Mrs Barbara Mills Q.C., Director of the English Serious Fraud Office; Sir Allan Green Q.C., the English DPP and his Australian equivalent, Mr Mark Weinberg Q.C. and Mr Michael Hill Q.C. a very distinguished member of the English Bar. Over ninety registrants from five countries and every State and Territory attended over the two and a half day conference. Also present were a number of members of the Criminal Bar Association led by Bob Kent Q.C. They made a substantial contribution to the conference and Paul Coghlan read a paper on behalf of the Association. I was very pleased to read in the Annual Report of the Association that following the Conference a liaison group between the Association and the Police Computer Graphics Group has been established "with a view to assisting members in developing an understanding of the benefits and processes of computer aided court presentations". There will be a follow-up conference next year and a working party selected from Conference delegates will be working side by side with a project team of the Australian Institute of Judicial Administration to do all we can to put into practise the lessons learned during our experience together.

In my dealings with the Joint Parliamentary Committee I have taken the attitude that, whatever the niceties of the secrecy provisions of the NCA legislation, a process of co-operation with it is essential. To that end, I have never once declined or refused to answer a question about the NCA's activities and at each of our regular meetings this Committee gets both a written report and an oral report by me which brings them up to the very day of our meeting. A similar situation prevails at meetings with the Inter-Governmental Committee. Members of both these

At the end of my first year here I was greatly encouraged by a generous review of it in "The Age" and by some very kind things that were said in the Federal Parliament by member after member from different parties . . . It is appropriate that I record here the support the Bar has given me as a body and the expressed support of individual members.

Committees have been good enough to express their satisfaction with these arrangements.

The Joint Parliamentary Committee is currently conducting an evaluation of the National Crime Authority and in this connection I have also adopted a policy of complete co-operation. The report of the Committee is expected early in November and there seems to be an understanding that further consideration of the legislative amendments that I have proposed will wait on that report. I am content with this.

On the 5th of June this year a Council of Ministers of G7 and associated countries appointed me President, from 1992, of the Financial Action Task Force. This body is the international community's instrument against money laundering and is comprised of some twenty-four countries including Australia and the Commission of European Communities. Countries joining this task force agree that they will have in place appropriate anti-money laundering legislation; that they will submit to audits by other member countries and that they will render assistance to other members in money laundering investigations. This appointment is an honour, not for me, but for Australia, and reflects the way in which the National Crime Authority is now regarded in international law enforcement cirles.

Needless to say I have learned much in the last fourteen months. In a large organisation there are a myriad of personal views to be understood, appreciated and somehow dealt with, each staff member being entitled to be treated with individual consideration even though their wishes cannot, of necessity, always be carried out. I have learned that we Australians are pretty unfair to our politicans — with whom I had previously scarcely any contact. Although they naturally have their own and their parties interests in mind, I am satisfied that the great bulk of those I now deal with are genuinely driven by a concern for the public interest and are very, very hardworking. I am still learning the task of dealing with the media. I confess to no talent for it but I am prepared to do it in the Authority's interest. Again, I think we are a bit harsh on media people. I have found that nearly all are very professional people who simply want to accurately report events.

At the end of my first year here I was greatly encouraged by a generous review of it in "The Age" and by some very kind things that were said in the Federal Parliament by member after member from different parties. In particular, reference was made to the "successful transition that has taken place in both the role of the NCA in its relationship with other criminal investigation authorities in Australia . . . and also in the style of work being carried out by the Authority". A current "constructive relationship" between the Authority and its Parliamentary Committee was acknowledged and the NCA described as being "now much more of a co-ordinator and leading light in the fight against organised crime".

It is appropriate that I record here the support the Bar has given me as a body and the expressed support of individual members.

OPENING OF THE LEGAL YEAR

TUESDAY 28 JANUARY 1992

RELIGIOUS CEREMONIES

9.30am	St Paul's Cathedral, Corner Flinders Street and Swanston Street, Melbourne
9.00am	St Patrick's Cathedral (Red Mass), Albert Street, East Melbourne
9.30am	East Melbourne Synagogue 488 Albert Street, East Melbourne
9.30am	St Eustathios Cathedral 221 Dorcas Street, South Melbourne

Attended by the Judges and other members of the legal community in procession.

For further details, please refer to insert in December edition of the Law Institute Journal.

THE PUBLIC AND BARRISTERS

The following is a part of a paper presented by Paul Elliott at the Law & Literature Conference, Monash University in September 1991 entitled "The Law In The Theatre".

THROUGH A REVIEW OF DAVID Williamson's play "Top Silk" the Paper attempts to analyse the public's view of lawyers in general.

To quote the Bible:

"Woe unto, lawyers, for yee have taken away the key of knowledge."

To quote Shakespeare:

"The first thing we do, let's kill all the lawyers."

To quote David Williamson:

Jane: "Why are you even contemplating taking the brief?"
Trevor: "It's against the Bar Rules to turn down a brief you're offered. Everyone is entitled to the best legal advice they can get —"
Jane: "A rule devised to maximise a barrister's income and minimise his conscience."
Trevor: (Defensively). "It's going to be an extremely intersting case."
Jane: "That seems a little like a German engineer saying, 'I don't go along with Genocide, but designing the gas chamber would be a hell of a challenge'".
(See *Top Silk*, Act 1, Scene 7).

Does the poor picture of lawyers depicted in David Williamson's play 'Top Silk' equate to the views of Australian society in general? If so, are these views correct? Are these views different to other Western cultures such as the United Kingdom and the United States?

There is no doubt that in Australia the legal profession is under attack. The media and in particular the 'Age' newspaper regularly attack lawyers. There is a senate enquiry into the cost of justice. The Law Reform Commission of Victoria has just published two discussion papers entitled "Restrictions on Legal Practice" and "Accountability of the Legal Profession". Both are critical of the manner in which the profession conducts itself.

On the 11th of August 1991 the 'Age' newspaper printed an article with the following heading:

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

This is followed by a photograph of a barrister in wig with the subtitle:

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

The 'Age' recently published a long article emphasising the high earnings of Q.C.'s.

These anti lawyer sentiments are clearly expressed in Williamson's play 'Top Silk'. The play concerns Trevor Fredericks, a Queens Counsel in his late thirties who is described as articulate, highly intelligent with a forceful personality. He is married to a Legal Aid Solicitor, Jane, who is described as emotional but not neurotic and very compassionate. Trevor is in a quandary. He is a member of the Labour Party. He has been offered a seat in Parliament with the prospect of becoming Premier. However he has also been offered a brief to appear on behalf of a Rupert Murdoch type character known as Paul Bradley. Bradley is described as being a media mogul, small and benign looking, polite and charming but utterly ruthless. He wants the Queens Counsel to represent him before the Broadcasting Tribunal so that he can keep his monopoly interests in newspapers and other media.

He wife Jane is instructed to represent one of her childhood sweethearts who has become a drug pusher. In order to do this she attempts to bribe policemen. Her ex lover is represented as a victim of society. He is only a small drug pusher who was pushed to it because of monetary concerns and his love of his family.

The Q.C. couple have a teenage son. The Top Silk does not relate to his son because his son is stupid. He is so busy being a Top Silk that he cannot relate fully on any emotional level with his son. To that extent he can't relate on any emotional level with anyone.

In essence the Top Silk is represented as amoral, ambitious, avaricious, disloyal and contemptible.

Unfortunately for Trevor his political opponents discover that his wife has been attempting to bribe policemen in order to get her ex boyfriend off. It is gently put to him by the Attorney General that if the charges are not brought against his wife, then he should not run for political office.

Even though Trevor leaves Jane, she then takes steps to resurrect his political career. Tony

Turner, the State Attorney General, in a conservative government is described as extremely confident, almost arrogant, intelligent, domineering and intensely competitive. He is the one who has blackmailed Trevor into stopping his political career by not revealing his wife's attempts at bribery and corruption. But Jane, the good hearted Legal Aid Solicitor, has one card up her sleeve. She fronts the cold hearted Turner, who was also a former boyfriend of hers. Turner has been campaigning on an anti-abortion platform and it transpires that Jane had got pregnant by him and he had forced her to have an abortion. Jane informs Trevor how she has resurrected his political career by blackmailing her former lover.

Trevor then has a flash of integrity because he believes he can get on in politics. He turns down the lucrative Bradley brief however he takes up Jane's challenge and instead represents Eddy, the man who was caught trafficking in drugs and another former lover of Jane. In a quite aston-

ishing scene Trevor does such a magnificent plea that instead of going to jail for twelve years, Eddy is let free on a good behaviour bond.

In the meantime, our Top Silk's son Mark has left home and has become a builder's labourer on a poor peoples' project, followed by selling suits in a shop. At the end of the play the Top Silk does not go back to his wife but it is shown that there might be some hope for a reunion.

All the lawyers in this play are truly dreadful people. The Q.C. will do anything to get on. However, because he is intelligent, he should go into left wing politics. We are supposed to empathise with his wife Jane. I found this extremely difficult. If she was supposed to show the warm side of the law then it did not succeed in the writing. Here was a woman who was quite prepared to bribe police in order to get a man off drug charges. I could not see any reason why she would do this in the play. It was too trite to say that the former boyfriend was a product of society. She was the prepared to blackmail another lawyer concerning an abortion she had had by him. In essence, although she might have been an emotional and loving mother, she was totally amoral. She was as amoral as the horrendous character of Trevor Fredericks.

It is only Australia that espouses sentiments that lawyers are totally devoid of any good and will do anything for money? It would appear that the English are not quite so hard on their lawyers. The views of barristers and solicitors in English plays are not as hard as those expressed by Williamson. Perhaps that is so because the recent plays concerning lawyers have been written by a barrister, John Mortimer. 'Voyage Around My Father' and the "Rumpole" series certainly painted barristers as real human beings. Although the barristers depicted have their foibles and failings they are not depicted as ruthless, greedy and totally bad.

Even Jeffrey Archer in his recent play "Beyond Reasonable Doubt' paints barristers in a favourable light. Archer's play was performed in Melbourne in the same year as Williamson's 'Top Silk'. Although 'Beyond Reasonable Doubt' is undoubtedly a pot boiler, barristers certainly do not get the same treatment. The play concerns the Chairman of the Bar Council Sir David Metcalfe Q.C. who is standing trial for the murder of his wife. He represents himself against his old arch foe at the Bar and is acquitted. His wife was suffering from incurable cancer and he was accused of poisoning her with her pills in order to gain her inheritance of one million pounds. Sir David, and indeed all the lawyers and the judges in the case, are painted as thoroughly decent people. The play continues the court room drama tradition of the English theatre as exemplified by Agatha Christie's 'Witness for the Prosecution', and going even further back, 'Justice' by John Galsworthy. The difference in views of lawyers can be gleaned from the following dialogue which appears in scene 5 at the very end of the play. The trial is ended. Sir David has locked himself away in his large house in Wimbledon for some two weeks. Finally his close friend the solicitor Hamilton manages to gain entry and speak to the Q.C. He congratulates Sir David on his acquittal and of course immediately offers him a murder trial brief. The following is the ensuing dialogue.

Sir David: "The black magic murder case. You almost tempt me, Lionel, but I can't return to the Bar. You see, it's no longer possible."
Hamilton: "Why not?"
Sir David: "Because I did kill my wife."
Hamilton: "It was an accident, we all realise that."
Sir David: "No, Lionel it was quite deliberate. That's what she wanted and I couldn't refuse her. I loved her too much.
Hamilton: "But you're the Chairman of the Bar Council. Of all people you cannot be above the law. . ."

Sir David then commits suicide by swallowing the same pills as killed his wife. However these pills were disguised in a marvellous bottle of 1961 Chateau Mouton Rothschild.

Americans love to hate lawyers and yet consistently represent them as heroes in many plays. The success of 'L.A. Law' is to the point. Even though the lawyers in that series to a degree have many failings, ultimately they are depicted as heroes. The Americans love court room dramas. 'Perry Mason', 'Petrocelli' and even 'Jake and the Fat Man' testify to an admiration for lawyers and their skills.

Why then is there seemingly a more inherent dislike of lawyers in Australian society? At first glance it is a love-hate relationship. People don't like lawyers and yet entrance to law at the universities in Australia requires the highest marks. The marks needed to become a lawyer are even higher than those to become a doctor. This seems at odds with the general dislike of lawyers in Australian society. Is society simply amoral and greedy and wants its children to get on the gravy train?

Perhaps the difference between Australian and American society is the puritan work ethic. In America it is extremely strong. People are openly applauded and congratulated for working hard and making money. Success is viewed as a virtue. Even those in some of the most menial jobs take pride in having that job and do not feel jealous of others who go on and become extremely successful. Inherent in their society is the view that everybody could perhaps go on and

become a success. That is not to say that American society is perfect.

However in Australia the 'tall poppy' syndrome is not just a joke. It is an inherent feature in the whole of Australian society. It is a feature which surfaces regularly in the press. There is a deep seated resentment against success in Australia. It may be that chip on the shoulder journalists really do present the views and feelings of Australian society.

Why then is there seemingly a more inherent dislike of lawyers in Australian society? At first glance it is a love-hate relationship. People don't like lawyers and yet entrance to law at the universities in Australia requires the highest marks.

David Williamson regularly rails against the tall poppy syndrome. He believes that he has become a victim of it. He believes that the critics in Australia are quick to deride but slow to applaud. However it appears that many of his recent plays and most importantly 'Top Silk' actually represent the tall poppy/chip on the shoulder syndrome of Australian Society.

There is nothing inherently wrong with being successful. Becoming a Queen's Counsel is not necessarily a bad thing. Being good at one's profession is not necessarily a bad thing. Being acclaimed for professional or other talent is not necessarily a bad thing. That is not to say that materialism and professional success are the only criteria upon which to judge a human being. I am not advocating greed is good. The problem with Australian society and the problem as shown in Williamson's play is that Australia has gone too far the other way. For whatever sociological and political reasons Australians in general resent those who stand out. They resent people who are talented. They resent people who gain money through their work and efforts. The attacks on professions and especially the legal profession, is an expression of these views.

Although, perhaps, this view must be modified. Is it that Australians resent people who are intellectually and artistically talented? There seems to be no objection to a tennis player receiving $100,000.00 for an exhibition game. Nobody attacks Greg Norman for his gigantic earnings on the golf course. Pages of the newspapers are devoted to sports people and their earnings. And yet there is no outcry for a Senate enquiry into the cost of sport. Nobody has said that the high price paid to sportsmen is necessarily passed on to the consumer. Yet those in the professions who actually solve disputes come under constant criticism should they be seen to be earning a decent living.

Why has Australia developed this way? Has it got something to do with the convict background of the country? Has it got something to do with the fact that the majority of the people who came to these shores were not conformists or particularly successful in the old country?

Whatever the reasons things have gone too far. The view of lawyers as crooked and amoral is a tired cliche. Williamson's play fails because it expresses this cliche over and over again. The people in the play are not real people. They are tired cardboard cut-outs. They are the cardboard cut-out lawyers that are thrust down the throats of society regularly by the media. Lawyers are not perfect and the profession is not perfect. However the views expressed by 'Top Silk', even if they express the views of Australian society must be reversed. The views go further than the hatred of lawyers. They go essentially to the fundamentals of this society. Unless there is more emphasis on hard work, recognition of talent and recognition of success then Australia faces many problems. It is up to the lawyers to help themselves change this picture. One can only hope that in the coming years with the many challenges of enquiries and reforms that they do so. Perhaps then a playwrite will come along and represent lawyers perhaps as they really are, not as other would have them.

Paul Elliott

RETIRING JUDGES

During 1991 there have been a number of retirements from the Supreme and County Courts. The Bar News proposes to write farewell articles on these Judges in our next edition.

THE NEW SILKS 1991

This year there were 68 applicants for silk in Victoria of which 11 were from interstate and 57 "locals" from the Victorian Bar.

This high number of applicants is about the same as for the last 3 years. The statistics for the successful applicants over the last 5 years fall into the following categories of practice:

	1987	*1988*	*1989*	*1990*	*1991*
Commercial Law	4	4	6	4	4
Family Law	—	—	—	—	—
Common Law	—	1	2	1	2
Administrative and Industrial Law	1	—	—	—	1
Town Planning and Local Government	1	—	1	—	1
Workers Compensation	—	—	—	1	1
Parliamentary Counsel	—	—	—	—	1
TOTALS	8	9	9	8	11

The average age of this year's silks is 44.6 years.

Name: John Eric Middleton
Date of Admission: 1976
Date of Birth: December 1952
Date of Signing Bar Roll: September 1979
Master: Michael Black
Readers: Dominic Benvenuto, James Kewley, Andrew Maryniak, Howard Rapke, Peter Booth, Pamela Tate
Area of Practice: Commercial and Administrative Law, Intellectual Property
Why I Applied for Silk: My gown was getting too old
Reaction on Appointment: Delighted

Name: George Henry Golvan
Date of Admission: 1 April 1971
Date of Birth: 10 February 1947
Date of Signing Bar Roll: 6 December 1971
Master: Mr. Justice Fogarty
Readers: Antonio Mazzone, Samantha Kirwan-Hamilton, Julian Nayar, Genevieve Howse
Area of Practice: Commercial Arbitration, Building and Construction Law, General Commercial
Why I Applied for Silk: It's Time!!
Reaction on Appointment: Pleased, relieved and a little apprehensive

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Name: Paul Andrew Willee
Date of Admission: 1966
Date of Birth: 20 November 1945
Date of Signing Bar Roll: 1967
Master: Judge Lazarus
Reader: Gerry Purcell
Area of Practice: Crime, Commercial, Computer, Maritime
Why I Applied for Silk: To get it!
Reaction on Appointment: Great joy

Name: Murray Bryon Kellam
Date of Admission: 2 April 1973
Date of Birth: 14 September 1946
Date of Signing Bar Roll: 8 December 1977
Master: John Strahan Q.C.
Readers: Michael Hennessy, Linda Rowland, Jessica Klingender
Area of Practice: Common Law
Why I Applied for Silk: No comment
Reaction on Appointment: No comment

Name: Stephen William Kaye
Date of Admission: 3 April 1975
Date of Birth: 13 December 1951
Date of Signing Bar Roll: 26 February 1976
Master: John Winneke Q.C.
Readers: Phillip Marzella, Richard McGarvie, Garry Cazalet, Maree Kennedy, Warren Mosley, Boyd Cohen, Kerri Judd
Area of Practice: Commercial, Defamation, Personal Injury, Crime
Why I Applied for Silk: I need a challenge and a new gown
Reaction on Appointment: Honoured

Name: Rex Wild
Date of Admission: 1 May 1968
Date of Birth: 27 January 1944
Date of Signing Bar Roll: 4 October 1973
Master: David Ross Q.C. and Adrian Smithers J.
Readers: Chris Northrop, Victoria Bennett, Frank Tallarida, Mary Mangan, Peter Baker
Area of Practice: General, Crime, Common Law, Family
Why I Applied for Silk: I missed out last year when Lasry got it
Reaction on Appointment: The greatest thrill of my professional career

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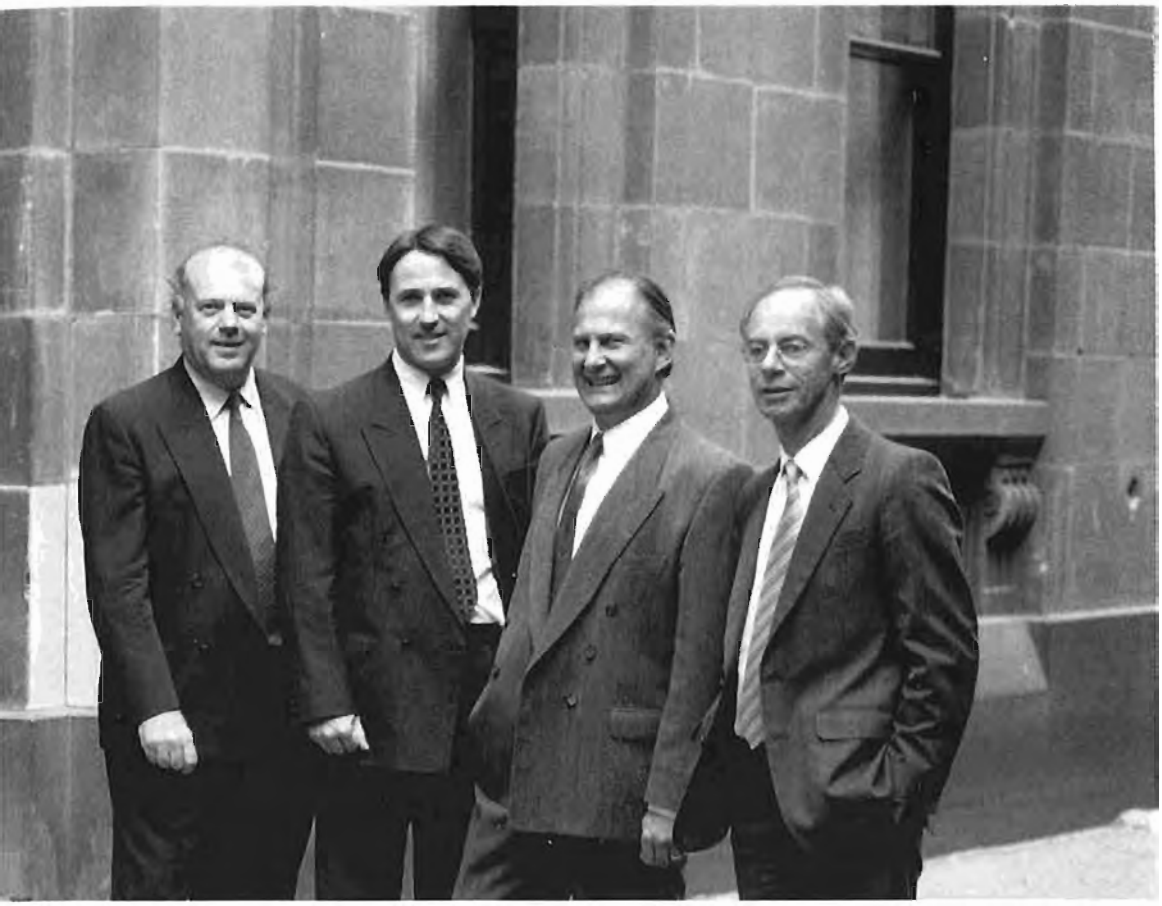
Name: Henry Jolson
Date of Admission: 6 April 1972
Date of Birth: 16 April 1947
Date of Signing Bar Roll: 18 October 1973
Master: Goldberg Q.C.
Readers: Cameron, Dr. Triggs, Loren, Hardy, Vandenberg, Ben-Simon, Messer, Williams, Glacken, D. McSteen
Area of Practice: Commercial, Customs
Why I Applied for Silk: Too far to walk to my car
Reaction on Appointment: Exultant

John Middleton *Rowena Armstrong* *Stephen Kaye* *George Golvan* *Henry Jolson*

Name: Stuart Ross Morris
Date of Admission: 1 April 1976
Date of Birth: 21 July 1950
Date of Signing Bar Roll: 22 April 1976
Master: G. Fricke
Readers: John Thwaites, Sarah Lindsey
Area of Practice: Town Planning and Local Government
Why I Applied for Silk: It is recognition of excellence as a barrister and I've always aspired to excellence
Reaction on Appointment: Ah, ah, oh ... I don't want to give you the full story on it ... I'm thrilled!

Name: Michael O'Loghlen
Date of Admission: 1969
Date of Birth: 21 May 1945
Date of Signing Bar Roll: 1970
Master: Frank Costigan Q.C.
Reader: George Andrews
Area of Practice: Workers and Accident Compensation and Liability Insurance
Why I Applied for Silk: For many reasons which I couldn't possibly articulate
Reaction on Appointment: Delighted



Murray Kellam Stuart Morris Rex Wild Michael O'Loghlen

(Richard Tracey and Paul Willee not present)

Name: Richard Tracey
Date of Admission: June 1975
Date of Birth: 18 August 1948
Date of Signing Bar Roll: February 1982
Master: Graham Uren Q.C.
Reader: Richard Waddell
Area of Practice: Administrative and Industrial Law
Why I Applied for Silk: Oh dear me! Just look at my desk at the moment! I wanted to escape all the paper work and have some leisure to reflect on my briefs.
Reaction on Appointment: Well at the moment total surprise! I'm still to see it confirmed.

Name: Rowena Margaret Armstrong
Date of Admission: 1967
Date of Birth: 14 October 1936
Date of Signing Bar Roll: 23 July 1970
Area of Practice: Parliamentary Counsel
Why I Applied for Silk: It's a great honour for the office of parliamentary counsel to have itself recognised in this way
Reaction on Appointment: Absolutely delighted

THE BITER BIT — LITERARY CRITICISM AND THE LAW OF DEFAMATION

Hon. Mr Justice Peter Heerey, Federal Court of Australia

THE FOLLOWING IS A PAPER PRESENTED at the Law and Literature Conference, Monash University in September

One of Australia's greatest jurists was Sir Frederick Jordan who was Chief Justice of New South Wales from 1934 to 1949.

His judgments were not only celebrated for their scholarship and lucid expression but were usually presented in striking and memorable language which argued the underlying common sense and logic of the law and its relevance to the needs of society.

His judgment in *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 NSWSR 171 is a classic statement of the law of the defence of fair comment in the context of literary or artistic criticism.

The following passage (at p.174–175) is a little lengthy but illustrates better than anything I can say why Sir Frederick held the pre-eminence that he did:

It is essential that the defamatory matter sought to be defended as comment should be statements of opinion only. Where, however, the matter complained of is, on the face of it, a criticism of a published work or public performance, the statements are *prima facie* comments unless they are seen to be statements of fact or are proved to be such.

The test whether comment is capable of being regarded as unfair is not whether reasonable men might disagree with it, but whether they might reasonably regard the opinion as one that no fair-minded man could have formed or expressed. The opinion must, of course, be germane to the subject matter criticised. Thus, if a critic denounced a book for its indecency it would not be beyond the bounds of fair comment if he also denounced the author for publishing such a book. But dislike of an artist's style would not justify an attack upon his morals or his manners. Whistler obtained his verdict, not because Ruskin had accused him of "flinging a pot of paint in the public's face," but because he was injudicious enough to call him a coxcomb into the bargain, and to suggest that he was guilty of wilful imposture.

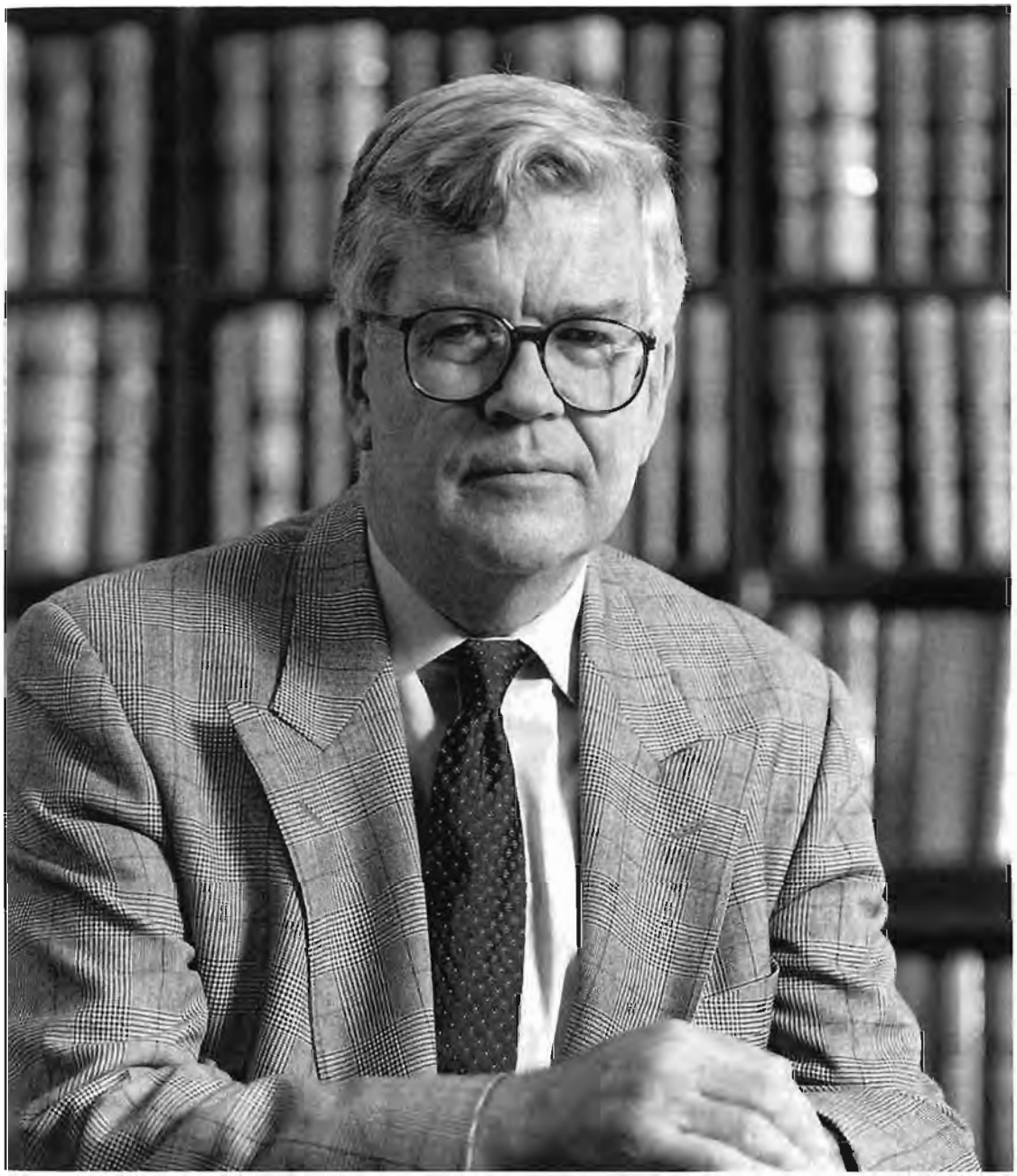
To establish malice, it is necessary to adduce evidence that the comment was designed to serve some other purpose than that of expressing the commentator's real opinion, for example, that of satisfying a private grudge against the person attacked. But this evidence is not supplied by the mere fact that the defendant has expressed himself in ironical, bitter or even extravagant language. A critic is entitled to dip his pen in gall for the purpose of legitimate criticism; and no one need be mealy-mouthed in denouncing what he regards as twaddle, daub or discord. English literature would be the poorer if Macaulay had not been stirred to wrath by the verses of Mr Robert Montgomery.

In a particular case, however, the language used may itself disclose an ulterior purpose in the criticism, or may serve to support independent evidence of malice or unfairness. But ridicule alone is not sufficient. A striking example of this is supplied by the recent case of *Bergman v Macadam* [1941] 191 LT Jo 131 in which a sporting critic, in order to express the opinion that a professional boxer was past his work, said, in a broadcast, "Speaking of old men, why, just as soon as he has drawn his old age pension next Thursday, Kid Berg will totter along to Earls Court and fight Eric Boon.... After that fight Berg is almost certain to start thinking of a better way of earning his living." In an action by Bergman for slander, malice having been negatived, the judge awarded the plaintiff £500 damages on the footing that the comment was unfair. The Court of Appeal set the verdict aside and entered judgment for the defendant, holding that the comment was not only not malicious but not unfair, notwithstanding that it was "couched in language of exaggerated jocosity which seemed to characterise criticism of boxing contests."

Thomas Babington Macaulay, politican and civil servant, poet, essayist and historian, was one of the great masters of English prose. He has a double relevance to today's topic. As well as providing the paradigm of libel-proof critical demolition, he played a major part in the drafting of the Indian Penal Code, which included provisions on defamation that found their way into the Criminal Code of Queensland and from there to statutory provisions in Western Australia and Tasmania.

Robert Montgomery was a popular poet in the heroic mould who wrote two epics, "The Omnipresence of the Deity", which ran to eleven editions, and "Satan: A Poem". Macaulay reviewed those works in the April 1830 issue of the Edinburgh Review. The criticism has survived long after the works which provoked it, and their author, have sunk into merciful obscurity.

Macaulay opened by attacking the then fashionable means by which publishers promoted worthless authors:



Devices which in the lowest trades are considered as disreputable are adopted without scruple, and improved upon with a despicable ingenuity, by people engaged in a pursuit which never was and never will be considered as a mere trade by any man of honour and virtue. . . . We expect some reserve, some decent pride, in our hatter and our bootmaker. But no artifice by which notoriety can be obtained is thought too abject for a man of letters.

After commenting that ". . . the praise is laid on thick for simple minded people" Macaulay observed that:

. . .we too often see a writer attempting to obtain literary fame as Shakespeare's usurper obtains sovereignty. The publisher plays Buckingham to the author's Richard. Some few creatures of the conspiracy are dexterously disposed here and there in the crowd. It is the business of these hirelings to throw up their

caps, and clap their hands, and utter their *vivas*. The rabble at first stare and wonder, and at last join in shouting for shouting's sake; and thus a crown is placed on a head which has no right to it, by the huzzas of a few servile dependants.

The opinion of the great body of the reading public is very materially influenced even by the unsupported assertions of those who assume a right to criticise.

Zeroing in on his target, Macaulay says:

We have no enmity to Mr Robert Montgomery. We know nothing whatever about him except what we have learnt from his books, and from the portrait prefixed to one of them, in which he appears to be doing his very best to look like a man of genius and sensibility, though with less success than his strenuous exertions deserve. We select him, because his works have received more enthusiastic praise, and deserve more unmixed contempt, than any which, as far as our knowledge extends, have appeared within the last three of four years. His writing bears the same relation to poetry which a Turkey carpet bears to a picture. There are colours in the Turkey carpet out of which a picture might be made. There are words in Mr Montgomery's writing which, when disposed in certain orders and combinations, have made, and will again make, good poetry. But, as they now stand, they seem to be put together on principle in such a manner as to give no image of anything "in the heavens above, or in the earth beneath, or in the waters under the earth".

The work which gave rise to *Gardiner v John Fairfax & Son Pty Ltd* was, to put it midly, undistinguished. It was a detective story called "The Scarlet Swirl" written under the non de plume "Mythrilla" and privately published by the author. Less than half a dozen copies were sold, but it attracted the idle talents of the Sydney Morning Herald reviewer. One of the passages complained of was:

And when Braithwaite is not being impressive as leading detective ("he drew himself up, walked across the room to the victim, stooped down, examined him "He's dead", he said, significantly and solemnly") the lovely Jean is making good resolutions that they could not meet again.

It had been earnestly argued on behalf of the plaintiff that this was a statement of fact and not comment and was inaccurate because it meant, literally, that the book was entirely or mainly taken up with descriptions of the matters referred to. Sir Frederick remarked at p.176).

He is evidently using clumsily a form of expression which was used effectively by the person who said, slanderously, of Jebb that he devoted such time as he could spare from the neglect of his duties to the adornment of his person. The way of a critic would be thorny indeed if clumsiness of expression were treated as evidence of unfairness.

The only Jebbs listed in the Dictionary of National Biography are Irish clerics, judges, prison reformers and physicians all of whose extensive good works suggest they could not have provoked the attack recorded by Sir Frederick Jordan. Our research continues.

Time for a little black letter law. We have been looking at the defence of fair comment, but of course no question of defence arises unless a plaintiff can show that what was published of him or her was defamatory, that is to say it imputes some condition or conduct which would damage the standing and reputation of the plaintiff in the eyes of members of the community generally. This need not be the assertion of a moral failing. It is defamatory to say of somebody that he or she is incompetent. However, as we shall see, sometimes what often provokes a plaintiff's claim for defamation in a critical setting is an assertion that there has been not just incompetence but a form of literary dishonestly.

It is defamatory to say of somebody that he or she is incompetent. However, as we shall see, sometimes what often provokes a plaintiff's claim for defamation in a critical setting is an assertion that there has been not just incompetence but a form of literary dishonestly.

In *Porter v Mercury Newspaper* [1964] Tas SR 279 the famours Australian writer Hal Porter complained of a review which he said imputed that he inserted "Anglo-Saxon" words in his autobiography "The Watcher on the Cast Iron Balcony" not with any concept of literary necessity in mind but in order to promote publicity by attracting the attention of the censor. In *O'Shaughnessy v Mirror Newspapers* (19070) 125 CLR 166 the actor and director Peter O'Shaughnessy complained that a review in "The Australian" of his production of Othello meant that the plaintiff, having at his disposal as good a group of players as Australia could produce, wasted their talents in a dishonest production devoted to enhancing his own role at the expense of the rest of the cast.

It can also be the critic who complains, as in *Turner v Metro Goldwyn Mayer* [1950] 1 ALL ER 449 where a prominent film critic complained of a letter from MGM to her employer, the BBC, complaining that she was "completely out of

touch with the tastes and entertainment requirements of the picture going millions".

Such a mild reproach can be contrasted with what was said of the plaintiff in *Cornwell v Myskow* [1987] 1 WLR 630. In a column in the "Sunday People" headed "Wally of the Week" the following blast was delivered:

> Actress Charlotte Cornwell made a proper pratt of herself in Central's crude new catastrophe, No Excuses. And then she foolishly prattled about it pompously in public.
>
> This repellent rubbish about a clapped-out rock singer is without doubt the worst I have ever clapped eyes on. It bears no relation to rock and roll today — all concerned must have been living down a sewer for the last decade — or indeed to human beings.
>
> As a middle-aged star, all Miss Cornwell has going for her is her age. She can't sing, her bum is too big and she has the sort of stage presence that jams lavatories.
>
> Worst, she belongs to the arrogant and self-deluded school of acting which believes that if you leave off your make-up (how brave, how real) and SHOUT A LOT it's great acting. It's ART. For a start, dear, you look just as ugly *with* make-up, so forget that. And as for ART? In the short sharp words of the series, there is just one reply. It rhymes.

The imputations, that is to say what are said to be the defamatory meanings arising from the publication, were drafted by the plaintiff's Counsel in the following elegant terms:

(i) that the plaintiff had taken part in a production so repellently filthy that she and the others taking part in it might have been living down a sewer,

(ii) that the plaintiff was a middle-aged failure as an actress and singer, with a stage presence that drove the audience to the lavatories,

(iii) that the plaintiff was a foolish, ugly woman whose pretensions at acting in an artistic manner were utterly bogus and unjustified,

(iv) that the plaintiff lacked any ability whatsoever as an actress and was guilty of arrogant self-delusion in presenting herself as an actress to the public.

The plaintiff was awarded £10,000 damages by the jury but the defendant's appeal succeeded on the ground of wrongful admission of evidence. It is worth noting that according to the law report, counsel for the defendant on the appeal, Mr Michael Beloff Q.C.,

> . . .suggested that the courts were not the place to deal with someone's sense of grievance that another person had been rude in print about their bottom.

Our defamation law imposes what a very experienced judge in the field has called a "low threshold" of defamation. Thus it has been held defamatory to say of the leader of a political party that he has lost the confidence of his party: *John Fairfax & Sons Ltd v Punch* (1980) 31 ALR 624. Therefore if the case is sufficiently serious to warrant getting to court at all, the chances are that attention will be mainly concerned with whether the defendant has made out a defence, and particularly the defence of fair comment.

Our defamation law imposes what a very experienced judge in the field has called a "low threshold" of defamation. Thus it has been held defamatory to say of the leader of a political party that he has lost the confidence of his party.

The defence of fair comment is important in this context because of the limitations which the common law places on the other two main defences of general application, justification and qualified privilege. To make out a defence of justification the defendant has to prove by properly admissible evidence the substantial truth of every defamatory meaning arising from the publication complained of. The defence of qualified privilege does not require the defendant to establish the truth of what was said, but it is only available if the publication was made on what the law considers a privileged occasion. It is now well established, at least since *Blackshaw v Lord* [1984] QB 1 and *Morosi v Mirror Newspapers* [1977] 2 NSWLR 749, that the mere fact of publication in the general media of matters of public interest is not in itself sufficient to constitute a privileged occasion.

A leading English text (Duncan & Neill on Defamation, 2nd Edition, p.57) summarises the elements of the defence of fair comment as follows:

(a) The comment must be on a matter of public interest.

(b) The comment must be based on fact.

(c) The comment, though it can consist of or include inferences of fact, must be recognisable as comment.

(d) The comment must satisfy the following objective test:

> Could any fair minded man honestly express that opinion on the proved facts;

(e) Even though the comments satisfies the objective test the defence can be defeated if the plaintiff proves the defendant was actuated by malice.

The first requirement will usually not present any difficulty since the courts have held clearly

that there is a public interest involved in the criticism of literary and artistic works presented to the public.

The second requirement, that the comment must be based on fact, is the legal equivalent of the old journalistic aphorism that "Comment is free but facts are sacred". The rationale is that if a defendant sets out true facts and then he comments on those facts, then as long as the facts are truly stated, the reader is equally able to make up his own mind as to whether he agrees or not with the defendant's comment. However, it has been recognised that it is unrealistic to expect commentators on matters of public interest to express themselves strictly in a fact plus comment formula. Therefore it is sufficient if the facts, although not stated in the article, are sufficiently indicated to the reader or if they are matters of public notoriety. In the case of literary or artistic criticism of course there is the twist that the more damaging the criticism, the less likely it is that the reader will buy the book or see the play or film, with the consequence that the reader will never be in possession of the facts and able to form his own opinion. However that theoretical difficulty has not troubled the courts much.

The importance of factual accuracy was demonstrated recently by the celebrated *Blue Angel* case in Sydney where a restaurant recovered $100,000 damages. A vital issue was the question of the lobster.

The importance of factual accuracy was demonstrated recently by the celebrated *Blue Angel* case in Sydney where a restaurant recovered $100,000 damages. A vital issue was the question of the lobster. The defendant argued that the review did not say that the lobster was broiled for 45 minutes, only that the reviewer had waited for 45 minutes to be served. It seems the jury disagreed.

The third requirement is often of critical importance because if a statement is held to be a fact, as distinct from comment, then it has to be proved to be true, and so proved by means of admissible evidence. A comment is something "which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark or observation": *Clarke v Norton* [1910] VLR 494 at p.499 per Cussen J. But the law is not so ritualistic as to require a defendant to preface every comment by some formula such as "in my opinion" or "it seems to me that". A comment can take the form of fact provided it is recognisable in the context as an inference from the facts on which the comment is based: *Kingsley v Foot* [1952] AC 345 at p.356–357. It was on this ground that the appeal succeeded in *O'Shaugnessy v Mirror Newspapers*. The High Court held that what at first blush might have seemed like an assertion of fact (that it was a dishonest production) was capable of being regarded by the jury as comment, and that the trial judge was wrong in withdrawing that issue from the jury.

The fourth requirement has recently become a controversial issue in the law of defamation. The defence we are considering is called fair comment, but that is a somewhat misleading label. The defendant may make out the defence even though the comment is by ordinary standards unfair, in the sense that it might be prejudiced, bigoted or unreasonable. The test usually referred to was formulated by Lord Esher MR in *Merivale v Carson* (1887) 20 QBD 275 at p.281 in these terms:

> . . .would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said.

But does the emphasis on honesty, as distinct from reasonableness, mean that a defendant can only succeed if he establishes that he in fact held the opinion expressed in the comment? This question becomes important when the defendant is publishing a comment of somebody else, for example a letter to the editor or a review contributed by someone not employed by the publisher of a newspaper. In *Cherneskey v Armadale Publishers Ltd* (1978) 90 DLR (3d) 321 a majority of the Supreme Court of Canada held that the defendant has to satisfy two tests: the statement must be objectively a fair comment which could be made on the facts in the sense abovementioned *and* it must in fact have been the real opinion of the defendant. The question arose in this way. A newspaper published a letter which accused the plaintiff of holding racist views. The writers of the letter were not called as witnesses and there was no evidence as to whether or not the views expressed in the letter were the honest views of the writers. The defendants, the publisher of the newspaper, did give evidence that the letter did not represent the editor's view or the views of the newspaper. The majority of the

Supreme Court held that the defence of fair comment failed because there was no proof of the honest belief of the writers and honest belief by the defendants themselves had been denied.

This decision caused a major controversy and provoked some legislative changes in parts of Canada. The reason is not hard to see. If a newspaper were to publish conflicting views by writers of letters to the editor or other commentators, the publisher could not possibly hold an honest belief in all the views expressed. Therefore the defence of fair comment would not be available and one of the vital functions of a free press, that of providing a forum for public debate, would be gravely impaired.

If a newspaper were to publish conflicting views by writers of letters to the editor or other commentators, the publisher could not possibly hold an honest belief in all the views expressed. Therefore the defence of fair comment would not be available.

The decision in *Cherneskey's* case was criticised in the 2nd Edition of Duncan & Neill (1983) and in *Hawke v Tamworth Newspaper* [1983] 1 NSWLR 699. See also (1985) 59 ALJ 371.

Recently the English Court of Appeal in *Telnikoff v Matusevitch* [1991] 1 QB 102 has in my respectful opinion comprehensively demolished the *Cherneskey* heresy. The court (at p.119) expressly adopted as correct the statement of the law from Duncan & Neill to which I have already referred.

The fifth requirement also bears on the question of the state of mind of the defendant, but with this important difference. If the defence of fair comment is made out it will only be defeated if the plaintiff shows that the defendant was actuated by malice. Thus it is not up to the defendant to establish the honesty of his state of mind. Malice in this context is a technical concept which includes what would ordinarily be considered as malice. that is to say spite or vindictiveness, but also it extends to what might be called wrongful or improper motives or a lack of honest belief in the view expressed or, to use the example given by Sir Frederick Jordan, the gratification of a private grudge.

Finally, I need to mention a continuing controversy affecting the law of fair comment where the comment imputes dishonourable conduct to the plaintiff. There are, on the analysis of the cases by Duncan & Neill (p.67) three possible views:

(a) the defence of fair comment does not apply at all. Suggestions of dishonourable conduct have to be justified by showing they are correct inferences from primary fact, that is by a defence of justification;
(b) the defendant has to show that the comment was a reasonable inference from the facts;
(c) the ordinary test of fair comment applies, viz could any fair minded person express that opinion on the proved facts.

There are authorities which support each view, but I think the third is to be preferred. This conclusion is supported by a remark of the High Court in *O'Shaugnessy* where their Honours said (at p.174):

> To safeguard ourselves from too broad a generalization we would add that it is not our view that an imputation of dishonesty is always an assertion of fact. It is part of the freedom allowed by the common law to those who comment upon matters of public interest that facts truly stated can be used as the basis for an imputation of corruption or dishonesty on the part of the person involved.

It is difficult to see the logic behind the contrary views. Dishonesty is to be deplored and an imputation of it is plainly defamatory, but there are other human failings just as bad or even worse.

In conclusion I think that the literary or artistic critic is not too badly restricted by the law of defamation. As Duncan & Neill say (at p.69), almost any comment is defendable as fair comment provided that contents of the work criticised is not misrepresented and no personal attack is made on the plaintiff.

It remains to be seen however whether the review of a recent work in England will provoke a libel action. The book in question was "Memoirs of a Libel Lawyer" by solicitor Peter Carter-Ruck and it was reviewed in "The Spectator" by Ian Hislop, who commented:

> When journalists read a particularly dull piece about a potentially interesting subject they tend to conclude that it has been "lawyered", i.e. that everything of interest has been removed for legal reasons. This is a whole book that has been 'lawyered' by its author and the result is that all Carter-Ruck's clients are praised extravagantly and so are all the solicitors, barristers and judges he has ever come across.

Is it defamatory to say of a libel lawyer that he has written a book which is dull because it is not defamatory?

TRIAL BY EXECUTIVE: WHY JUDGES SHOULD SAY NO

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Last week, a former Supreme Court judge acting as a royal commissioner, William Carter Q.C., found former Liberal Tasmanian premier Robin Gray may have been involved in an attempt to bribe a Labor MP. This commentary is provided by a serving Supreme Court judge on condition of anonymity

RECENT PUBLICITY GIVEN TO THE Carter inquiry in Tasmania has prompted me to say something about the practice of serving and retired judges conducting inquiries of that kind.

It is a fundamental principle held dear in society that no one should be permitted to suffer at the hands of executive government in his person, his reputation or his property except for an infringement of the law proved by due process of law.

Some people regard their good name as their most valuable possession. Society recognises the great value of a good name and the defamation laws exist to protect it.

But inquiries of the Tasmanian kind blatantly infringe this most fundamental rule: what we sometimes call the rule of law. The men adversely affected by that inquiry were not accorded the due processes of law. Some of the detrimental effects of Justice Carter's remarks about Mr Gray were:

1. Mr Gray lost his good reputation. He is now regarded as a person who was party to offering bribes to corrupt an MP, and as a person who fraudulently attempted to appropriate to his own use money entrusted to him for another purpose.

2. Mr Gray's right to sue for defamation has been effectively destroyed. Journalists and other experts have been able with impunity to represent him as corrupt and dishonest.

3. Mr Gray's political opponents, who set up the inquiry, have doubtless gained a great political advantage over him.

4. Unlike any ordinary person charged with crime and tried by jury, he has been tried by an administrator and denied the possibility of a verdict according to law, either condemning him or exonerating him.

5. He has no right of appeal. Even common criminals have a right of appeal.

6. He has been deprived of the benefit of the presumption of innocence to which everyone is entitled until a jury's verdict of guilty is given.

Not only is such an inquiry a statutory violation of the rule of law, it mocks the presumption of innocence. The presumption of innocence benefits every one of us.

Inquiries like the Carter inquiry abuse the status of judges in the community. The abuse is to be found in the chief reason why governments see so much value in using judges or retired judges in such inquiries.

No doubt governments use judges to conduct such inquiries for a number of reasons. But chiefly they do it because it confers on the inquiry the aura of judicial respectability: to which, as I have said, it is not entitled.

Governments no doubt believe that their constituents generally, perceiving a commissioner to be a judge or a retired judge, will regard his findings as having the impartiality and status of a verdict of a court.

But . . . during the currency of the commission, the commissioner — royal or otherwise — is an organ of the executive government. His functions are entirely executive: not in the least judicial.

It is my opinion that no lawyer, nor, a fortiori, any judge or former judge, should, except within very narrow limits, accept a commission of the Carter inquiry kind.

Such commissions do not serve the interests of justice because, by abusing the judicial status, in the long run they have a tendency to bring the judicial office itself into disrepute.

There may be times when the powers of a royal commission directed at corruption are justified. The public interest in the integrity of those in-

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volved in government is so great that extraordinary means of inquiry may sometimes be warranted.

Such a commission would normally be empowered to compel witnesses to discover documents and answer questions.

But such inquiries should always provide complete protection of what many believe ought to be the entrenched constitutional rights of any person involved.

As a minimum, I would insist upon the following conditions:

1. So long as the law of this country continues to recognise the right to silence of a suspected person, nothing disclosed under compulsion to a commission by a person or against objection should be able to be used as evidence in any subsequent trial of that person against their will.

2. No finding or opinion of a commissioner that any person has or may have committed a crime should be made public by the commission, by the government or by any other person, whether under parliamentary privilege or otherwise, until such time as the proper prosecuting authority may decide to charge the person with the crime.

3. Where a finding of impropriety amounts to serious but not criminal wrongdoing, it should be a positive finding based upon evidence identified by the commissioner in his report.

No inconclusive finding that a named person has or may have been guilty of serious wrongdoing should be made public by the commission, by the government or by any other person, whether under parliamentary privilege or otherwise.

4. The terms of reference should expressly require that if, in the opinion of the commissioner, there is any evidence to suggest that a person has committed or was implicated in the commission of a crime, the commissioner should refer the evidence to the Director of Public Prosecutions or his equivalent, and to no other person.

Any prosecution or follow-up investigation should be undertaken at the initiative of that officer.

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FEES OF BARRISTER ARBITRATORS: A CAUTIONARY TALE

A DECISION OF CONSIDERABLE IMPORTance to arbitrators, especially barrister arbitrators, and indeed to parties to arbitrations, has recently been given by the English Court of Appeal (Browne-Wilkinson V-C, Stuart-Smith and Leggatt LJJ) in *K/S Norjarl A/S v Hyundai Heavy Industries Co. Ltd.* [1991] 3 All ER 211; [1991] 1 Lloyd's Rep 534, affirming the decision of Phillips J in the Commercial Court reported in [1991] 1 Lloyd's Rep 260. The matters directly in issue related to the fees of arbitrators, but their Lordships also made observations on the nature and basis of the office of arbitrator. Except as noted below, the decision and reasons appear applicable in Australia.

The facts of the case, described by Leggatt LJ at 222 as "a cautionary tale for all barristers sitting as commercial arbitrators", make fascinating reading. A dispute between the claimant shipbuilders and the respondent oil company under a contract for the building of an oil rig was referred to arbitration in London. In January 1987 the respondents appointed Mr. Stewart Boyd Q.C., well known as an author of the excellent work, Mustill & Boyd, *Commercial Arbitration*, and the claimants appointed their arbitrator and in May 1987 the two appointees appointed Mr. David Steel Q.C. as third arbitrator. The appointments were accepted without reference to fees, but Mr. Steel's acceptance was on the understanding that the hearing would take place in May 1989 and last from 3 to 5 weeks. The claimants' appointee having died, they appointed a marine consultant in his place. In February 1990 the respondents' solicitors wrote to the arbitrators requesting that the dates provisionally reserved, a period of 12 weeks commencing in April 1992, be fixed for the hearing. The claimants' appointee replied that he had reserved those dates. He took no part in the communications that followed. By a letter of 1 March 1990 the third arbitrator stated that the tribunal was prepared to consider the course requested but on terms that the fee of each arbitrator would be £1,500 per day in 1990, £1,750 per day in 1991 and £2,000 per day in 1992 and that the fee of £120,000 for the 12 weeks set aside for the hearing would be payable in any event. The letter asked the solicitors for a non-returnable payment of 10% of the hearing fee on the fixing of the date of hearing, with the balance to be earned in equal monthly instalments from August 1991 and payable in any event. (It seems that in England is it not uncommon now for brief fees to be earned in progressive tranches in advance of the hearing.) Those terms were unacceptable to the solicitors for both parties because each member would receive a minimum of £120,000 in full before the hearing even commenced, which would not be returnable in the event that the hearing did not proceed, and the two Queen's Counsel were invited to withdraw the conditions. In reply, the third arbitrator stated that only the deposit was payable in advance and that the fees proposal was intended to strike a fair balance between the tribunal having to keep a quarter of 1992 clear and the possibility of the case settling before hearing and offered to consider any alternative suggestion. The claimants' solicitors answered that they had none and in response the two Queen's Counsel offered to resign their appointments. The respondents' solicitors then negotiated with those two arbitrators and agreement in principle was reached on a modified scale of fees, but this was unacceptable to the claimants' solicitors. The two arbitrators then sought an assurance from the respondents' solicitors before accepting their proposal that the claimants' solicitors had no objection to the respondents making the payments referred to subject to subsequent argument as to their reasonableness. But the claimants' solicitors reserved their clients' right to submit in due course that no part of the fees was recoverable, stating that arrangements of the type were inappropriate when agreed by only one party, having regard to the principle that arbitrators must be seen to be impartial. The two arbitrators informed both solicitors that they had no option but to resign. Further unseemly correspondence followed, concluding with a letter from the claimants' solicitors contending that the proper course was for both arbitrators to continue to act on the terms on which they had been appointed while withdrawing their demand in respect of fees, but that if they were not prepared to do so substitutes should be appointed. In the course of that correspondence the claimants' solicitors disavowed any imputation of partiality or unfitness against the two arbitrators.

The respondents applied for (i) a declaration that the acceptance of the fee arrangements proposed by their solicitors would not raise any imputation of bias against the two arbitrators and (ii) a declaration that the arbitrators were and remained fit and proper persons to act as arbitrators. The claimants by cross-summons sought removal of the two arbitrators for mis-

conduct for having made and maintained a requirement for the payment of a commitment fee. Phillips J granted the second declaration sought, but refused to grant any other relief. The claimants appealed against the dismissal of their cross-summons and the granting of the declaration made and the respondents cross-appealed against the refusal to grant them the first declaration sought. The Court of Appeal dismissed both the appeal and the cross-appeal. Leggatt LJ concluded that it was not unreasonable in the circumstances set out above for the arbitrators to request a commitment fee, whereas Stuart-Smith LJ held that they were not justified in doing so (and therefore had been guilty of misconduct). Browne-Wilkinson V-C found it unnecessary to reach a final conclusion on whether or not misconduct had occurred, though he was of the view that the arbitrators had gone far beyond simply suggesting a negotiation with both parties for the payment of agreed fees including a commitment fee and that the conduct, at the lowest, came "very close to the line". All members of the Court of Appeal considered that, even if there were misconduct, as a matter of discretion the arbitrators should not be removed because of the terms of the concluding letter from the claimants' solicitors and, to some extent, the disavowal of any imputation of bias. As to that letter, Stuart-Smith LJ pointed out that the effect of the primary judge's order was to achieve the position sought in the letter, whilst Browne-Wilkinson V-C was of the view that the letter meant that it did not lie in the claimants' mouth to say that the arbitrators were guilty of impropriety.

A decision of considerable importance to arbitrators, especially barrister arbitrators, and indeed to parties to arbitrations, has recently been given by the English Court of Appeal . . . described . . as "a cautionary tale for all barristers sitting as commercial arbitrators".

The following propositions emerge from a synthesis of the three judgments. Commitment or cancellation fees are permissible if specifically agreed to before appointment or, as an act of grace, afterwards by *both* parties. Otherwise, as quasi-judicial adjudicators under a trilateral contract, arbitrators are entitled only to reasonable (or other agreed) remuneration for work done. This does not include by implication a commitment or cancellation fee and is to be taxed or settled by the arbitrators acting quasi-judicially or taxed by the Taxing Master. Commitment fees should be moderate — sufficient to cover so much of the period from settlement until the arbitrator can reasonably expect to find substitute employment as has been reserved by the arbitrator. Appointment as an arbitrator is personal to the arbitrator, who therefore does not have the opportunity normally vouchsafed to both judge and barrister of "transferring" a case if necessary to another judge or barrister. In the absence of commitment fees, arbitrators are not under an absolute obligation to make particular dates available for hearing. Their obligation is to sit on such dates as may reasonably be required of them having regard to all the circumstances including the exigencies of their own practices. A spirit of give and take normally does, and should always, pervade the appointment of hearing dates. After acceptance of appointment, it is misconduct for an arbitrator to insist upon commitment fees (as distinguished from merely proposing them to *both* parties) or to agree them with one party only.

There are obvious lessons to be learned from the case. First, any commitment fee must be agreed before appointment. Secondly, as Leggatt LJ pointed out (at 222), barristers sitting as commercial arbitrators must not confuse the role of counsel with that of arbitrator: what is reasonable for the one to charge may not be so for the other. Thirdly, moderation and common sense are required if arbitration is to function efficiently. Thus, at the conclusion of this judgment, Leggatt LJ (at 225) said:

> "Whatever part at its inception the rapacity of the relevant arbitrators may have played, or their unbecoming bargaining stance, if that is what it was, there can be no doubt that the dispute has been sustained by the reluctance of [the claimants'] solicitors to pay commitment fees to counsel, especially when acting as arbitrators."

The Vice-Chancellor, for his part, began his judgment at 228 by pointing to the problem latent in every arbitration by reason that the arbitrator is in a quasi-judicial position and so must avoid both the reality and the appearance of bias and yet is paid by the parties. His Lordship went on:

> "How is this conflict to be resolved? To date moderation and common sense have provided the answer. Those virtues being singularly absent from the present case, we have to give a legal answer. Such answer should, if possible, continue to permit sensible arrangements to be made between arbitrators and the parties where cupidity and obstinacy are absent."

John Batt

LETTER FROM WASHINGTON

GARRY STURGESS IS A SENIOR REporter and columnist for the Washington based Legal Times: Law and Lobbying in the Nation's Capital. He covers the federal courts, and reported on the nomination and confirmation of Justice Clarence Thomas to the U.S. Supreme Court for Legal Times and for Court TV (Courtroom Television Network).

Not only do leaves scatter in autumn, fall is also the season in America for stripping down Supreme Court nominees. Not so long ago, Robert Bork and Douglas Ginsburg were torn from their branches. This year, Clarence Thomas teetered, and almost fell, but managed to scramble — injured — higher up the judicial tree.

NOVEMBER 16, 1991

Saturday. It's a mild day in late autumn here in Washington. Flurries of wind are stripping leaves from the giant oaks and elms outside my window. Each day, there is a little less gold in the trees.

Not only do leaves scatter in autumn, fall is also the season in America for stripping down Supreme Court nominees. Not so long ago, Robert Bork and Douglas Ginsburg were torn from their branches. This year, Clarence Thomas teetered, and almost fell, but managed to scramble — injured — higher up the judicial tree.

The battle over Thomas's nomination shook America — scraping raw nerves of race and sex, and gripping the nation like no other drama since perhaps — and, extraordinary as it may seem — the death of President John Kennedy.

The story washed around the world and detailed accounts of the event hit Australia's shores, I know. The chambers, corridors and coffee shops of the Victorian Bar were no doubt filled with barristers picking over, forensically, the carcasses of Clarence Thomas and Anita Hill. I imagine the subject was debated, with escalating vigor, in the Essoign Club.

Whether Thomas, or Hill, or both, or neither, lied to the Senate Judiciary Committee and, through it, to the world: I don't know, so hold off on collecting any bets.

But as I was able to watch the amazing Thomas imbroglio unfurl from up close, perhaps you may be interested in some personal reflections.

It may surprise you, but I supported Thomas's nomination to the court. I didn't think he was the brightest, the best qualified, the most experienced person for the job. I didn't agree with his strict constructionist, minimalist judicial philosophy.

But, at the same time, I thought he was extremely interesting — young, searching, independent, thoughtful, driven. And I thought it was important that he was black, that he wasn't a millionaire, that he knew about discrimination, and that he had wrestled with the problems of poverty, race and equality in America in a way that none of the other justices (save for Justice Thurgood Marshall, the man he was replacing) had.

And while I didn't think he was the best, I thought that he was probably the best of President George Bush's likely picks for the job. Obviously, the President was not about to appoint a liberal.

Also, in all his key appointments, Bush tends to select people he knows. That narrowed the field of candidates. In addition, Thomas was the only conservative black federal judge sitting on any of the nation's 13 courts of appeals.

I couldn't see the point in opposing Thomas either. The Bork battle was so corrosive, and for what purpose? After he was defeated, no one had the stomach for another fight. As a result, the nondescript Anthony Kennedy slid onto the Supreme Court without opposition. His voting record has been solidly conservative and in 1989, Kennedy wrote the majority opinion

slashing the scope of *Roe* v. *Wade*, the abortion case.

The bloodshed over Bork also paved the way for the nomination, and easy confirmation, of David Souter, another bland, white conservative justice. Again, after Bork, no one really had the heart for another stand-up, drag-down fight.

But four years after Bork, the politics of nominating Thomas became irresistible to Bush, and worth a little controversy. The President foresaw the tremendous political advantage of nominating a black conservative from a dirt-poor, southern rural background who had built a reputation as an outspoken critic of affirmative action.

Cynically and shrewdly, Bush saw in Thomas a wedge to split southern blacks away from their traditional allegiance to the Democratic Party. He saw, too, an opportunity to discredit the traditional civil rights leadership as no longer representative of black America.

Cynically and shrewdly, Bush saw in Thomas a wedge to split southern blacks away from their traditional allegiance to the Democratic Party. He saw, too, an opportunity to discredit the traditional civil rights leadership as no longer representative of black America.

That is why, on June 27, when Justice Thurgood Marshall announced his imminent retirement from the Supreme Court, a surge of electricity shot through the U.S. Courthouse where Thomas worked as an appellate judge on the D.C. Circuit — the nation's second most powerful court. There was a feeling, then, that Thomas's time had come.

I was at the courthouse when word came from the nearby Supreme Court that Marshall was Stepping down. I immediately went to Thomas's chambers, figuring him as the most likely candidate to replace the veteran justice. The next day, I wrote:

"Conservative. Smart. Black. Tricky to oppose. A federal judge on a top court."

"If President George Bush is seeking these qualities for Thurgood Marshall's slot on the Supreme Court, then Clarence Thomas, his March 1990 appointee to the U.S. Appeals Court for the D.C. Circuit, is on a short list of one."

The story was published on July 1, the day Bush nominated Thomas.

"The President's really wrecked my summer," Thomas later joked to me and a colleague, Terry Moran, in the only interview he gave prior to his confirmation proceedings.

In nomninating Thomas, Bush wrecked the summer for many people. From that day onward, what was often described as a roller coaster careened forward, severing friendships, dividing loyalties, splitting opinion, breaking open subjects previously taboo.

"I've said a lot of controversial things in my life," Thomas told us in the interview published the day before he appeared before the Judiciary Committee on September 10. "But I've never attacked someone personally. I'm not into this ad hominem stuff," he said.

Even at that stage, Thomas seemed to have some idea of just how rough the battle was going to be. Facing the confirmation gauntlet, Thomas looked to history for inner resolve.

"Have you read James McPherson's 'Battle Cry of Freedom?' " Thomas asked, referring to a recent history of the Civil War. "He writes about (Abraham) Lincoln in there, and when you think of Lincoln, you wonder where he got the strength to do what he did, to stay here (in Washington) surrounded by a Confederate state, Virginia, and a pro-slavery, pro-Union state, Maryland. They tried to kill him, you know, in Baltimore, when he was coming here for his first inauguration."

"I've always thought what was most important to Lincoln was simply to articulate the ideal: All men are created equal," Thomas continued. "He said it all the time. He was trying to establish the ideal for the country, even if the country and the Constitution didn't embody it. But just doing that was important. The ideal was important."

The interview, canvassing many of the subjects that were later covered by the committee — natural law, discrimination and other hot-button issues — made headlines across the country. It painted a flattering portrait of the nominee. But to Thomas, the interview itself was a betrayal.

When my colleague contacted Thomas to check quotes from the interview, Thomas was furious. Claiming the discussion was off-the-record, he told Moran he felt violated, betrayed, taken-advantage-of. He was disgusted, he said.

"He thought he was among friends," one of his clerks complained.

Before the interview was published, a mutual friend rang me.

"I hear from one of his clerks that you guys ambushed Clarence?" the friend said, pained.

(We had arranged a photo session with Thomas on September 4 and when the time came, Moran and I accompanied the photographer.)

"Yes," I replied. "I told Clarence we were ambushing him. I introduced Terry and said, 'We're ambushing you.' They were my exact words. We thought he would shake hands, and either show us the door, or immediately go off-the-record. We were amazed when he started talking."

"You guys will kill him before the Senate," the friend said, more in sorrow than in anger. "Clarence was under so much pressure that he let his guard down. Is there any way we can throw a bomb into the Legal Times printing press?" he asked, hopefully.

He was concerned, as was Thomas, that the nominee had breached constitutional propriety by talking to the media before going before the Judiciary Committee.

As it turned out, the senators didn't take umbrage, and the sensation paled into insignificance as the actual confirmation hearings unfolded.

But that was my first real slice of the stakes involved, personal and political, for all those participating in the extraordinary process by which Americans choose their Supreme Court justices. In the end, the entire country was tuned-in and affected. All have their personal stories.

For myself, I registered the anguish in my friend's voice when he called me.

"Oh Jesus," he sighed, when I related snippets of what Thomas had said to us, harmless and all as those snippets were.

"I don't know whether to be angry at you, I don't know whether to be angry at him," he said, wrought-up.

I witnessed also my colleague's ashen face as he put down the phone after speaking to Thomas.

"I feel sick," he said.

As we covered the hearings blow by blow, we got to know that feeling of sickness at a much more pronounced level. We also felt the exhilaration of being on the leading edge of a national story, shooting the roller coaster up and down, veering with it left and right, gripping the handrail until our knuckles were white at each threatened derailment, each shock zig and zag.

If Thomas felt we had betrayed him earlier, a much more uncomfortable time came on September 24 when we sent him this letter.

"We are preparing a story on the case of *Jerome Thomas Lamprecht* v. *Federal Communications Commission*, argued before the D.C. Circuit January 25, 1991. Based on interviews with a number of sources inside and outside the courthouse who are familiar with the case, we know that you wrote and circulated a majority opinion in this matter before you were nominated to the Supreme Court ... A number of people inside the courthouse have suggested that you may have deliberately withheld issuing this opinion because of its potential impact on your nomination."

In the case — the most controversial he had heard as a federal judge — Thomas had written and circulated an opinion that overturned the FCC's award of a broadcast licence to a woman under the agency's gender preference policy.

In the draft opinion, Thomas was in effect saying — no to woman, no to affirmative action, and no to Congress, which had legislated for the preference. His opinion also appeared to fly in the face of a Supreme Court precedent upholding a similar kind of preference for minority broadcasters.

Thomas had written an opinion that overturned the FCC's award of a broadcast licence to a woman under the agency's gender preference policy. In the draft opinion, Thomas was in effect saying — no to a woman, no to affirmative action, and no to Congress, which had legislated for the preference. His opinion also appeared to fly in the face of a Supreme Court precedent upholding a similar kind of preference for minority broadcasters.

The affirmative action policies at issue in the case were central to the debate over Thomas's nomination to the high court. Two key members of the Senate Judiciary Committee — Republican Arlen Specter of Pennsylvania and Democraft Dennis DeConcini of Arizona — had questioned Thomas closely on the subject.

Specter, in fact, had asked Thomas about the Supreme Court case upholding the race-based preference.

Thomas told Specter he had "no problem" with it.

Our letter to Thomas continued:

"We write now asking you to comment on, first, the disposition of the case, especially in the light of your comments to Senator Specter . . . and second, the reason for the apparent delay in handing down the decision."

Now, when you write a letter like that you know you are alive, and there is a slight tremor to the signatures appearing under the our questions.

The story about the delayed opinion was released on September 26, the day before the Committee was due to vote on Thomas. Although Thomas did not respond to our note, Specter questioned him about the allegation that he had deliberately withheld the opinion to smooth his confirmation.

"I wanted to look him in the eye and see what he said," Specter confided to me. I did not know at the time, that Specter had also questioned Thomas about Hill's allegation of sexual harrassment, known at that stage only to senators on the Committee.

In law, you can ask one question too many. In journalism, you can ask one question too few. But on this occasion, I was glad for a little legal training. Covering the Thomas nomination was ugly enough as it was, without getting closer to breaking the ugliest story of them all.

As to withholding the Lamprecht opinion, Thomas "categorically denied withholding any opinion," Specter told the Committee. Other Senators weren't so re-assured. Sen. Howard Metzenbaum (D-Ohio) called on the committee to inquire into the matter prior to any full Senate action, and other senators said further questions were likely.

Sen. Alan Simpson (R-Wyo), however, said the leakers of the information about the opinion should be fired. He added that any Senate inquiry into the draft ruling would violate the separation-of-powers doctrine.

In the meantime, you can imagine how all of this was playing at the D.C. Circuit. On the night the Lamprecht story broke, Chief Judge Abner Mikva rang me at home.

"You have broken a federal law and you have sought to have others do so," he fumed, declaring me *persona non grata*.

There is no such federal law, but I didn't take it personally. Mikva had a serious political and security problem at his courthouse. One of four remaining Carter appointees at the D.C. Circuit, Mikva was already battling to keep the lid on relations between the four liberals and the eight Reagan/Bush appointees as it was.

Now, the courthouse had been rocked by one of its few, if only, leaks — and it happened on Mikva's watch. The courthouse was stunned. It left some of the judges suspicious of their clerks and of each other.

It was perhaps no accident that the nominations of Bork, Ginsburg and Thomas had run into trouble. All of them came from the D.C. Circuit itself.

"We're terrified," one law clerk said. "None of us feel free to express our thoughts for fear of them being used for or against the nominee in the process."

It was perhaps no accident that the nominations of Bork, Ginsburg and Thomas had run into trouble. All of them came from the D.C. Circuit. itself.

Indeed, the circuit has a closeness to other centres of power — the presidency, the Congress, the Supreme Court itself — that may make it exactly the wrong place to look for Supreme Court justices. The proximity to the other pillars of Washington's political establishment, and to cutting-edge legal and policy debates, make the D.C. Circuit an especially political place.

The leaked opinion has left its legacy at the courthouse, but it, like everything else about the nomination — Thomas's judicial philosophy, his technical competence, his readiness — were overwhelmed by the explosive Hill allegation.

Hill's claims turned the confirmation process into a drama of a completely different order. Thereafter, I was often asked if I had ever seen anything like it before. In important ways, the experience was completely unique. It was for Americans too.

But it did have parallels for me, as I'm sure it must have done for most Australians. It reminded me of the extraordinary emotional slalom we all rode when the late Mr Justice Lionel Murphy of the High Court faced off through numerous inquiries and court cases against charges that he had attempted to pervert the course of justice. That episode too, split court and country, and generated emotions that severed friendships and strained institutions.

I suppose that happened because Murphy, and Thomas, and Bork too, were seen not just as individuals, but as powerful symbols striking to the core of deeply held values and beliefs. As individuals, they are, or were, extremely charming and fundamentally decent. As symbols, they are like gods or demons, depending, in each case, on which side of the cultural war you find yourself on.

At the end of the Thomas hearings, I tried to look positively on what had emerged from them. My editor asked me to write a story about the winners and losers. When I finished the story, my editor took a gloomy view. He turned all of the major players into losers — Thomas, Hill, the Senate, the interest groups, everyone.

I, though, still cling to the fact that some good may have come out of it. Here is what I wrote about the two principal protagonists!

JUSTICE CLARENCE THOMAS

Winner. Reputation is overrated and renewable. In any event, the true journey people make in life is inward. Much more important than how others see Thomas is how he views himself. The Anita Hill hearings gave Thomas the opportunity to make himself anew gritty, implacable, able to turn a phrase, and return a senator's head upon platter. Thomas goes to the Supreme Court as nobody's pawn, and with his own head held high. He has won a whopping payrise, the support of the majority of Americans, and a seat on the most powerful court in the land. At 43, he readies to alchemize his extraordinary life and most recent experience for the good of the court and the country. If he continues sound in wind and limb, he will be alive, and on the Supreme Court, long after the most hated of his Senate detractors have stopped leaking in the grave.

PROFESSOR ANITA HILL

Winner. Outed her from anonymity at an obscure law school and turned her into an instant celebrity. Her seven hours of composed, dignified testimony on an excruciatingly painful subject turned her into the Rosa Parks of sexual harassment. Although polls show the American public disbelieved her more than they believed her, there is a large chunk of people for whom she will always be a hero. Like Thomas, she has the sustenance of loyal friends and family, and is marching into the future with her head held high. Her options are many. Her triumphal return to Oklahoma, and her press conference following the hearings, showed a relish for the spotlight. Her future could be in politics, pictures, or crusading against pornography and sexual harassment in the workforce.

Well, there are books to be written about the Thomas nomination, but not by me. Here's where I end, with the air outside perfectly calm now, and with barely a leaf stirring. Believe it or not, there is a cat chasing a small dog through the fallen leaves. In Melbourne, there is another order altogether. It is spring, dogs chase cats, and judges get appointed without much fuss. The new silks have been chosen, and a new Chief Justice waits in the wings. Thank God, the State Upper House cannot advise and consent on the government's appointments. On the other hand, it would sure shake things up a bit.

Garry Sturgess

AS OTHERS SEE US

Court bonus plan unwise

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THE CHIEF JUSTICE OF VICTORIA, SIR John Young's accusation that the State Government is threatening judicial independence through placing various pressures on the courts ('The Age' 11/11) should win many knowing nods. Labor has displayed an alarming lack of sophistication in its approach to administration of the law.

Three months ago we were treated to the disclosure that police were to hand out more traffic fines to increase revenue while the Police Minister would ensure that, in a tight state budget, police staff numbers were not cut. Whether or not one uses the word "deal", as reported at the time, the nexus conjures disturbing images.

Now, a far more dramatic exercise in administrative naivety — or stupidity — is unfolding. Victoria's Prosecutors for the Queen, the senior barristers who for all practical purposes are the state's indicting authorities, and who historically are independent of Government, holding their statutory office directly from the Sovereign (by way of the Crimes Act), are being offered "productivity bonus payments".

There surely could be little more likely to be perceived as interference with the independence and sound-working of the prosecutors than attaching strings to their remuneration in the form of bonuses which, in effect, could be allowed or withheld at the pleasure of a government. Here

we are talking of criminal law experts who examine the evidence, settle the charges and sign the presentments upon which accused persons are tried before juries in our superior courts.

Justice demands time and careful deliberation. Prosecutors should not be put in a position where they might feel under pressure to rush into court to earn themselves extra dollars in "appearance" money.

As Mr Ross Smith, Liberal M.L.A. for Glen Waverley, put it in the grievance debate in the Assembly on 31 October, in which he offered a wide-ranging critique of the "undermining of the criminal justice system" in Victoria, "It is an extraordinary proposal. Will it be extended to judges and magistrates? It is a scandalous state of affairs . . ."

His understanding was that "the prosecutors do not want to be compromised in this way".

Prosecutors for the Queen might be considered particularly vulnerable at this point. Their salaries have been neglected for years and now, at $80,000, run $15,000 below those of their NSW counterparts. The bonuses, I must emphasise, are not keyed to the gaining of convictions — a horror from which, mercifully, we are as yet spared — but they *are* very much hitched to court attendances, with no distinction between brief or extended appearances in any one day.

Thus, late last month, with a tentative bonus scheme already under way, there arose a farcical situation in which two Prosecutors for the Queen, jointly briefed by the Director of Public Prosecutions, appeared before a County Court judge merely to announce that the DPP had declined to prosecute in a certain matter.

Prosecutors, or certainly some of them, see their increasing use in such minor appearances as demeaning and a tragic waste of expertise and cite this as just one more factor in a sea of sinking morale.

Since 1982 — the year in which the Cain Government legislated for a DPP office and strongly rejected suggestions that the law in Victoria could become vulnerable to political interference — there has been an unprecedented number of resignations by permanent prosecutors (eight since 1985 alone) leaving only 13 in the field at 30 April this year.

"This constitutes a serious and irreplaceable loss of specialised knowledge of Crown practice", one barrister told me. "This situation has led to serious questions, including questions by the Court of Criminal Appeal on at least three occasions, as to whether all criminal cases are receiving adequate consideration before they go before superior courts."

The run-down in Prosecutors for the Queen has occurred in almost inverse proportion to the increasing number and complexity of the criminal cases put before them (between 1980 and 1991, in the County Court alone, the workload for their consideration rose by at least 30 per cent). It has also been paralleled by a corresponding blow-out in the DPP's briefing costs for private barristers and, consequently, a heavy additional expenditure of public money.

Michael Barnard

CORRESPONDENCE

Dear Sir,

It was with interest that I read Mr. Shand's article in the latest Bar News which read like an unpaid advertisement for List "A".

As a person with over 50 years experience in a Clerk's office I take issue with some of his remarks. It may be that Mr. Shand was one of the fortunate ones who came to the Bar with a ready-made list of contacts. However the vast majority of junior Counsel rely heavily on their Clerk for work in their early days. Juniors consistently ask for guidance in a multitude of matters such as fees, multiple matters, ethics etc.

As regards the list run by the Clerking Company, it should be realized that their low overheads, as to rent, staff salaries etc, bears no comparison to those of a list of 150 counsel. In addition, the larger lists absorb a much higher proportion of readers than does his list. The instigators of his list scoured the Bar to recruit high profile and high earning counsel, irrespective of the damage done to the other lists, who had launched them on their career. Small wonder it has become known as an "Elitist" list.

It distresses me that some Counsel regard Clerks as second-rate citizens. Our industry, integrity, honesty and loyalty is every bit as good as the Counsel we serve.

It will be a sad day indeed if Clerks are ever abolished and the Bar, as a whole, will be the loser.

Yours faithfully,

H.D. MUIR.

ACCOMMODATION CRISIS FOR NEW BARRISTERS

THE CITY OF MELBOURNE IS currently experiencing the greatest oversupply of office space in its history. Twenty per cent of all offices are vacant and are expected to remain so for many years. Whole buildings, some brand new, are and will remain empty. Yet new barristers cannot get chambers.

The waiting list for chambers is estimated to be about 200. It is also estimated that 150 or more barristers now share chambers. This number is expected to increase. Those new barristers with chambers are mostly in the sub-standard Four Courts building.

By allowing the creation of "junior ghettos" (such as Four Courts), the Bar is falling down in its responsibility to educate and see to the development of new barristers. This can only work to the detriment of the Bar as a whole.

It would be instructive to investigate how this situation has arisen. More important, however, is to do something about it. With this in mind, a New Barristers Accommodation Committee was formed. Its members are drawn from the September 1990, March 1991 and September 1991 intakes. The convenor is John Wadsley (tel: 8549). After discussions with real estate agents, Ed Fieldhouse of Barristers Chambers Ltd and the Board of BCL, the Committee is forced to report that it sees little prospect of a satisfactory resolution of the crisis.

BCL is faced with the immediate issue of what to do with Four Courts. The lease expires shortly and BCL has the option of renewing the lease, purchasing the building or arranging for the Superannuation Fund to purchase. The Committee has expressed the strong view that Four Courts be abandoned. At the time of writing, though, it appears likely that the Superannuation Fund will purchase. Even if renovated, it is unlikely that Four Courts will provide accommodation of an acceptable standard. Given the current shortage of space, it is difficult to foresee when the renovations would take place.

The purchase of Four Courts or extension of its lease will not clear the backlog of barristers still seeking chambers. For this BCL seems to be relying on the new space in Latham and a proposal for 555 Lonsdale Street, next door to Owen Dixon Chambers West. The problem with these chambers is that they offer very little variety: the new rooms in Latham start at about $1500 a month and the proposed rooms at 555 Lonsdale will be between $800 and $1200 a month. It is true that they should open up cheaper rooms for relocations; however, the Committee regards this style of chambers as undesirable. It is vitally important for new barristers to be around more experienced people. By allowing the creation of "junior ghettos" (such as Four Courts), the Bar is falling down in its responsibility to educate and see to the development of new barristers. This can only work to the detriment of the Bar as a whole.

In any event, the proposals discussed above are only short term solutions. For the medium to long term, BCL has three main options:

(1) Develop the property purchased in Little Bourke Street.
(2) Purchase and renovate the Telecom headquarters at 199 William Street.
(3) Enter into long term leases for any of the major properties currently available.

Option (1) was thought to be unsustainable. The recent drop in interest rates might, however, resurrect it. The lead time for this option would be at least 3–4 years, probably more. It would presumably require some form of capital injection, probably by debentures. So would option (2). The renovation work on the old Telecom building would be substantial and it would probably require the better part of 2 years for completion. The value of purchasing a clearly obsolete building is also questionable.

The New Barristers Accommodation Committee favours option (3). The current rental market is so favourable for tenants that outstanding deals at good prices and with maximum flexibility are available.

BCL has hesitated for some time now over what to do. It claims the uncertainty facing the Bar from public inquiries make it difficult for it to make a decision. Its directors are concerned that the mismatch of long term liabilities (either head leases or purchase or development loans) and short term assets (sub-lease to barristers) could create personal liabilities for them under company law. The Committee accepts the legitimacy of these concerns but believes that they can best be met by the leasing option. The flexibility available in the present market offers an historic opportunity for BCL. For example, it has been mooted that BCL could take out some form of limited recourse head leases under which its liability would be limited to the extent of the sub-leases.

The leasing option also affords the shortest lead time. The Committee believes that unless an acceptable resolution of the crisis is found within the next 12 months, the rule requiring barristers to lease from BCL is likely to collapse. Barristers will have no option but to lease elsewhere and it is unlikely that the Bar would seek to enforce the rule in those circumstances.

The Committee would regard the collapse of the rule as regrettable. If BCL does its job, the rule can work to the advantage of new barristers by securing appropriate chambers with a mix of senior and junior people. This avoids the barrier to entry which exists, for example, at the Sydney Bar. At the moment, however, the rule looks unsustainable unless BCL acts to take advantage of present leasing opportunities.

Michael Pearce

ADVOCACY INSTITUTE
Programmes Under Way

THE NEW AUSTRALIAN ADVOCACY Institute will begin its work in November when two advocacy workshops are held in Brisbane under the auspices of the Institute.

The Institute has been established by the Law Council of Australia in response to growing demands by the legal profession for advocacy training.

The Brisbane workshops — one for the Queensland Bar and the other for the Australian Securities Commission — will be conducted by the Chairman of the Institute's Board, Mr. Justice George Hampel, and Mrs Felicity Hampel. Mrs Hampel is a member of the Institute's Teaching Committee.

Workshops will also be held in November in Melbourne in conjunction with the Leo Cussen Institute.

The announcement at the 27th Australian Legal Convention in Adelaide in September of the Law Council's decision to establish the Institute has attracted wide interest, and inquiries about the Institute's programs have been received from government and academic organisations as well as from the legal profession.

The Board at its first meeting asked the Teaching Committee to draw up a program of workshops and other activities for 1992. In the meantime, action has been taken to incorporate the Institute and to set up administrative arrangements within the Law Council Secretariat.

The Institute is planning a training workshop for teachers of advocacy to be held at the Leo Cussen Institute in Melbourne in February. Experienced advocates from all parts of Australia who wish to develop advocacy teaching skills and become involved in the Institute's programs will be welcome.

The Board of the Institute, appointed by the Law Council Executive, is Mr. Justice Hampel (Chairman), and Messrs Alex Chernov Q.C., Geoffrey Davies Q.C., Barry O'Keefe Q.C., John Chaney and Chris Crowley.

The Teaching Committee appointed by the Board is Mrs Felicity Hampel (Vic), Mr. Sydney Tilmouth Q.C. (SA), Mr. Philip Greenwood (NSW), Mr. Hugh Selby (ACT) and Mr. Laurie Robson (Vic). All are experienced in advocacy training.

The aims of the Australian Advocacy Institute are to improve the standards of advocacy throughout Australia, to provide an Australia-wide forum in which ideas and experience in advocacy can be shared, and to develop Australian materials and methods for teaching and appraising advocacy skills.

The Institute will not take over work already being done by others, but will work with them and complement and assist their programs. It will also conduct teacher-training workshops and provide other workshops at all levels as the need arises.

Information about the Institute can be obtained from the Secretary-General of the Law Council of Australia, Peter Levy, on (06) 247 3788. Details of the Institute's programs for 1992 will be announced shortly.

THE ADVANCED ARBITRATION COURSE

EARLY ON SATURDAY MORNING, THE 9th day of November, 1991 approximately 70 bleary eyed members of Counsel attended an Advanced Arbitration Course conducted jointly by the Institute of Arbitrators and the Victorian Bar Council.

Although this number was some 30% down on the attendance at the General Arbitration Course conducted earlier in the year (vide: (1991) 76 Vic. BN 64) the organisers appeared unperturbed, perhaps attributing the decline to potential participants becoming lost in the labyrinthian depths of the World Trade Centre or even being seduced en route from Car Park to Course by the promises of the 1991 Festival of Mind Body and Soul.

Whatever the reason those 30 or so missed out on an experience that was both educational and entertaining. After an opening by Bill Martin Q.C., Frank Shelton, President of The Institute of Arbitrators Australia and Andrew Kirkham Q.C., the course moved swiftly into a fine paper by John Batt Q.C. on "Standards of Conduct and Performance, Ethics, Natural Justice in Arbitrations." Given the debate in the later Panel Session it was obvious that ethical matters involving counsel are not only a grey area but a source of much disagreement.

Participants then moved eagerly into morning tea. It was a toss up as to whether the eagerness was borne out of two hours of caffeine deprivation (where was the pre-registration cup of coffee so welcomed last time?) or anticipation of the paper next to come!

Rushing back from morning coffee, participants were soon absorbed in a paper entitled "International Commercial Arbitration — Latest Developments and Current Issues" delivered by Tony de Fina, President Australian Centre for International Commercial Arbitration. There were many highlights — the observation that in Italy parties are not allowed to give evidence as it is assumed that they will be biased; the opinion that in a particular matter the NSW Court of Appeal "got it wrong"; the introduction of the term "arbitrability"; frequent promises to move to developments in the international scene; and statistics showing that, apart from the International Chamber of Commerce in Paris, the Republic of China conducted more institutional arbitration that the rest of the world combined. Perhaps, the high point was the description of the ongoing Iran-USA arbitration "circuit" which included the spectacle of the independent Chairman being tossed down the stairs of a hearing room by a fellow arbitrator. After hearing that the circuit had lasted 7 years to date and had many years to run a number of participants left the room to register their immediate availability.

Perhaps, the high point was the description of the ongoing Iran-USA arbitration "circuit" which included the spectacle of the independent Chairman being tossed down the stairs of a hearing room by a fellow arbitrator. After hearing that the circuit had lasted 7 years to date and had many years to run a number of participants left the room to register their immediate availability.

Geoff Masel, solicitor, provided the commentary on Tony de Fina's paper. He overturned Tony on the Court of Appeal judgment and opined that the prospects of Melbournians getting international arbitration work were poor. He put that down to Melbourne being at the butt end of Australia, Australians being monolingual and the difficulties in establishing a reputation as being expert without the opportunity to display expertise.

Immediately prior to lunch, Professor Michael Pryles gave a most illuminating paper on "International Arbitration — Rules and Conduct" which was much much more than a mere plug for the Third Edition of Sykes and Pryles on Private

International Law. Comparisons of the legislative backgrounds to the major institutional systems were provided in a most illuminating delivery, although one could not help but feel that he preferred the ICC system.

With great difficulty participants tore themselves away from the course for the purposes of lunch taking. Their amazement was great to discover that unlike the previous occasion wine was available on tables other than the head table. Perhaps, a prerequisite to imbibing wine was the successful completion of the General Arbitration Course. (One of the more senior members of the Bar News Editorial Committee who was "dissuaded" from departing the course prior to lunch by Mr. Ambrose (infra) must have found the meal particularly piquant although it appeared to insufficiently fortify him for the afternoon's proceedings).

Despite their reluctance to tear themselves from the fine food, wine and company participants soon found themselves enjoying a most entertaining and illuminating paper by George Golvan entitled "Court Annexed Procedures (County and Supreme Courts) Mediation and Conciliation".

Despite their reluctance to tear themselves from the fine food, wine and company participants soon found themselves enjoying a most entertaining and illuminating paper by George Golvan entitled "Court Annexed Procedures (County and Supreme Courts) Mediation and Conciliation". Drawing on his vast experience as County Court Buildings List Mediator George amazed many listeners with the breadth of devices used by the wily mediator to secure settlement by parties who do not always enter mediation as entirely willing participants. No one who heard George considered his declared 80% settlement rate as anything like an idle boast.

Although, advertised to give a paper on "Court Annexed Procedures (Family and Federal Courts) Arbitration and References Out, Mediation" His Honour, Mr. Justice Ryan confined himself to the Federal Court. Notwithstanding reassurances that the Family Court procedures would be the subject of a paper on day two, many participants pondered questions of false and misleading advertising and the like whilst listening to another excellent and far ranging paper. It was a measure of the quality of his paper that His Honour maintained the interest of participants late in the afternoon when normally many of them would be beginning to wilt under the combined pressures of many hours of concentrated input and the delayed effects of lunch.

It appears that afternoon coffee did not have the fortifying effects of the morning brew as slightly less than half the participants returned for the panel session. It may be that the Festival of Mind Body and Soul recruited a few more visitors. Whatever the reason, nearly 40 participants missed out on a three way debate between Harper Q.C., Charles Q.C. and Golvan on the ethics of accepting a brief to appear before an arbitrator selected by one wearing another hat as nominator of the independent arbitrator and further observations on the international arbitral scene by Tony de Fina.

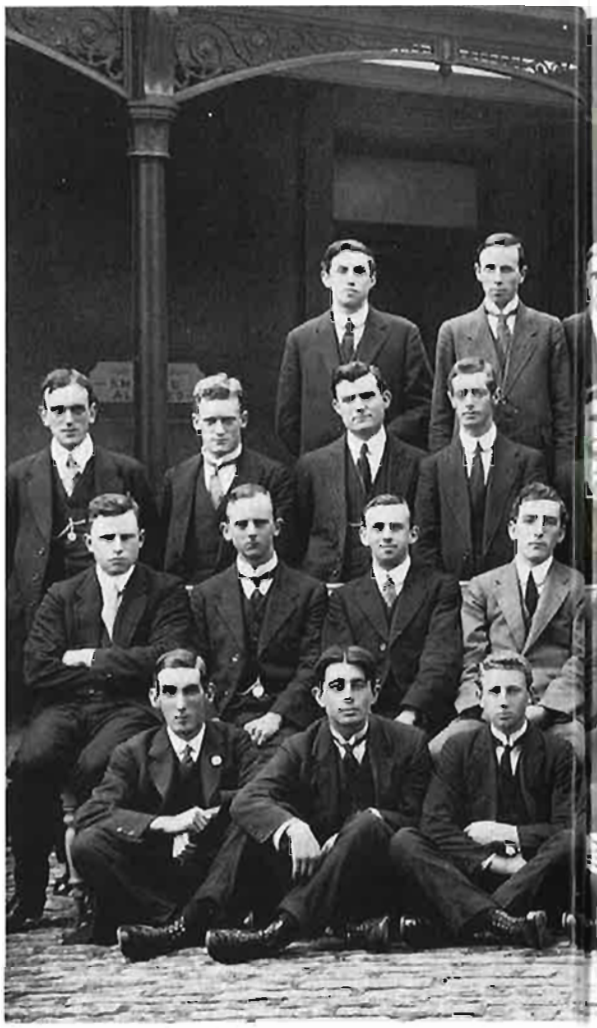
As participants wended their way out of the Course and tried to reorient themselves in their respective searches for their motor vehicles they undoubtedly left in pleasurable anticipation of the second day, scheduled for the 30th of November 1991, and a degree of apprehension concerning the 17th February 1992 grading examination (for those who wish placement on the list of arbitrators).

Papers scheduled for the second day were:
His Honour Mr. Justice Byrne "The Concept of Statutory Arbitration (Retail Tenancies, Building Control etc) and its Ramifications.
His Honour Chief Judge Waldron "Court Annexed Procedures (County and Supreme Courts) Arbitration and References Out.
His Honour Justice Emery "Conciliation and Mediation Theory and Practice in the Family Law Area.
Mr. Julian Reikert "Conciliation and Mediation Theory and Practice".

Unfortunately, copy deadlines prevent an account of these papers being given in this article. Undoubtedly, readers would be well rewarded by obtaining and perusing a pirate copy of each paper delivered at the Course.

As with the previous Course this would not have been anywhere near the success that it was without the hard effective work of Bill Martin Q.C., Maurie Phipps Q.C., Frank Shelton, Mr. Howard Ambrose, Chief Administrator of the Institute of Arbitrators Australia, the staff of the Bar Council of Victoria, the authors of the various papers detailed above and the members of the Course Panel Sessions.

THE MEN IN THE PHOTO



THE PHOTOGRAPH PUBLISHED ON THE cover of the Spring issue of the Bar News has caused Mr. Peter Balmford of the Faculty of Law at Monash University to write to Mrs. Adams providing additional information which identifies further some of the men in the photograph, reveals something of their subsequent history and seems to indicate quite clearly that the photograph was not taken in 1917.

The relevant part of Mr. Balmford's letter reads as follows:

I do have some additional information, limited to what I have been able to derive from the resources of my own library, which I hope you will find helpful.

I see that you believe the photograph to date from 1913 or 1917, though you do not say why you reach that belief. If you are right in thinking that it is from one of those two years, 1913 is I am sure the correct one, for reasons which will appear. From the fact that Professor Moore and [Judge] Book are wearing overcoats, I assume the photograph was taken during the winter. From the background, it would seem that it was taken in the courtyard or what is now the Supreme Court building in William Street.

The occasion of the photographs is not obvious: from the differing dates of graduation at the University and of admission to practice (see the lists below), it can hardly be the occasion of a graduation or an admission. What could take Professor Moore to the Law Courts with a group of students? Surely not an excursion! Judging by those dates, the individuals were from various student generations. That conclusion is supported by the large number of them (42): no single generation was as large as that. However, it may of course be that the people in the photograph were not all students at the time it was taken.

You query whether Jim Tait meant to refer to the person sitting on Moore's left as [Sir] Arthur Dean. I think not for two reasons: first, it does not look like Dean: and secondly there was, at about the right time, a law student named Arthur Deans.

There is a short biographical note on Arthur Deans on page 11 of H.W. Allen, *The University of Melbourne: Record of Active Service of teachers, graduates, undergraduates, officers and servants in the European war, 1914–1918*, Melbourne: H.J. Green, n.d. (but the editorial is dated March 1926). According to the biographical note, which appears in the 'Roll of the Fallen', Deans was first enrolled at the University in 1909, graduated as a Bachelor of Arts in 1912, 'went on to Law, and was doing course when he enlisted, 6.3.16 . . . He was killed in action on 1st June 1917'.

In the *Record of Active Service*, opposite page 11, there is a photograph of Deans which can be compared with the man sitting on Professor Moore's left in your photograph. I do not say the two are unquestionably the same, but I think they are — judging particularly by the shape of the head and the hair parting.

Another name among the 'Roll of the Fallen' in the *Record of Active Service* is that of John Maurice Orr Colahan: there is a biographical

note about him on page 8 and a photograph opposite page 9. On comparing the two photographs, it seems pretty clear that this is Jim Tait's Colahan. He enlisted in 1916, was a 4th year LL.B. student, sailed in November 1916 and was killed in action on 14 October 1917, aged 23.

I think we can safely conclude, on the evidence of what is said in the *Record of Active Service* about Deans and especially what is said there about Colahan, that your photograph cannot have been taken in 1917.

The *Record of Active Service* also contains biographical notes (but not photographs) of the 'Returned', including a number of the men whose surnames were given by Jim Tait. The details of the military service for four of them support, I think, the view that the photograph could not have been taken in 1917.

(1) [Sir] Wilfred Kelsham Fullagar, according to the entry on page 134 of the *Record of Active Service*, was enrolled at the University of Melbourne in 1911, graduated M.A. LL.M. and enlisted in October 1916. After service in France and England, he returned on 8.2.20. He had in fact finished his law course in 1915. See a biographical note in an article of mine in (1984) 58 *Law Institute Journal* 243, with photograph. See also *Who's Who in Australia 1959*. He is the eponym of the Fullagar Lecture at Monash University: see *Monash University Calendar* e.g. 1980 p. 189.

(2) Maurice Leo Cussen (page 107) who enrolled at the University in 1911, graduated LL.B., enlisted on 24.10.15 and returned in June 1919. See *Who's Who in Australia 1968*.

(3) [Judge] James Henry Moore (page 213; and 58 *LIJ* 249). Enrolled at the University in 1910 and studying Arts/Law, he enlisted on 24 June 1916, was dangerously wounded in

February 1917 and returned, 'physically unfitted by wounds for further service, September 1917'. He finished his law course in 1918. See *Who's Who in Australia 1974*.

(4) James Blair Tait himself is shown as having enlisted as a private in the Australian Flying Corps on 5 January 1917.

I have also extracted from the issues of the *University of Melbourne Calendar* between 1916 and 1921 (I do not have the issues for 1911–15) the names of those identified by Jim Tait who were admitted to the degree of Bachelor of Laws during the period covered. The results are shown in the following tabulation:

17 April 1915
Turner, Lindsay Robert (is this Tait's Turner?)

23 December 1915
Book, [Judge] Clifford Henry
Burchill, Gilbert Anderson
Cussen, Maurice Leo
Fullagar, [Mr Justice] Wilfred Kelsham
Healy, Eugene Francis
Joske, [Mr Justice] Percy Ernest
Rowan, Justin Fitzgerald
Southey, Allen Hope

8 April 1916
Rennick, John Gordon Reginald

20 December 1916
Hayes, Esmond Vaughan (is this Tait's Hayes?)
Menzies, [Sir] Robert Gordon
Stretton, [Judge] Leonard Edward Bishop
Tait, [Sir] James Blair
Williams, Michael Sydney

21 April 1917
Ballard, Richard Edward

13 April 1918
Ettelson, Phillip Windmiller
Turner, Leslie Fielding (is this Tait's Turner?)

5 April 1919
Middleton, Albert Edward
[Judge] Moore, James Henry

17 April 1920
Bodycomb, Bedlington Leslie

Further details on names identified by Jim Tait appear on the following pages.

Ball: presumably Wallace John Ball, enrolled at University of Melbourne 1913, 3rd year Law, enlisted 1916 (*Record of Active Service*). Presumably the partner of that name (adm. 1919) in the firm of solicitors Henderson & Ball: *The Law List — Australia & New Zealand 1926.*

Ballard: presumably Richard Edward Ballard, later a partner (adm. 1 August 1918) in the firm of solicitors Rodda & Ballard: *The Law List — Australia & New Zealand 1926.*

Burchill: presumably Gilbert Anderson Burchill, later practising as a solicitor: *The Law List — Australia & New Zealand 1926.*

Ettelson: presumably Phillip Windmiller Ettelson a partner (adm. 1919) in the firm of solicitors Upton & Ettelson: *The Law List — Australia & New Zealand 1926.*

Fink: presumably Thorold Fink, enrolled 1915, Articled Clerks' course, enlisted 30.9.16 (*Record of Active Service*).

Just: possibly the Herman Carl Just, adm. May 1918 and partner in Arthur Phillips, Pearce & Just: *The Law List — Australia & New Zealand 1926.*

Martyn: possibly the John Vivian Martyn, adm. 1 May 1919 and partner in John Martyn & Son: *The Law List — Australia & New Zealand 1926.*

Mackinnon: presumably Donald Mackinnon, enrolled at the University 1910, student of law: (*Record of Active Service*).

Middleton: presumably Albert Edward Middleton, enrolled 1908, B.A., LL.B., enlisted 1916 (*Record of Active Service*) and partner in the firm of solicitors Dobson & Middleton: *The Law List — Australia & New Zealand 1926.*

Pitcher: presumably George Frederick Pitcher, adm. March 1916 and later a partner in the firm of solicitors Pitcher & Orames: *The Law List — Australia & New Zealand 1926.*

Rennick: presumably Gordon Rennick, adm. 1 October 1916, who later practised as a solicitor: *The Law List — Australia & New Zealand 1926.*

Rowan: presumably Justin Fitzgerald Rowan, enrolled 1911, LL.B., enlisted 8.11.15 (*Record of Active Service*).

Southey: presumably Allen Hope Southey, enrolled in 1912, LL.B., enlisted 25.7.18 (*Record of Active Service*); and eponym of the Southey Lecture at the University of Melbourne: see *University of Melbourne Calendar* e.g. 1980 p. 677.

Turner: this may have been Lindsay Robert Turner, enrolled 1908, LL.B., adm. 1 May 1916, enlisted 1.3.17 (*Record of Active Service*) and later a partner in the firm of solicitors Shaw & Turner: *The Law List — Australia & New Zealand 1926*; or this may have been Leslie Fielding Turner, adm 1 August 1919 and later a partner in the firm of solicitors Snowden & Turner: *The Law List — Australia & New Zealand 1926.*

Williams: presumably Michael Sydney Williams, a partner in the firm of solicitors McInerney, McInerney & Williams: *The Law List — Australia & New Zealand 1926.*

Wilson: presumably Percy James Wilson, enrolled 1910, M.A., fourth year Law, enlisted 9.6.15 (*Record of Active Service*).

1991 HYLAND LIST DINNER
RETIREMENT OF MR. JACK HYLAND

Jack Hyland.

IF THE ANNUAL DINNER IS THE BAR'S block party, then a list dinner is more a family affair, and that was especially the case at the 1991 Hyland List Dinner on October 4th when 107 current members of the list accompanied by spouses and friends were joined by past members in entertaining Mr. Jack Hyland and members of his family at a celebration of the list's 30th anniversary and Jack's forthcoming retirement on December 31st.

Eschewing our traditional William Street venue, we gathered in best bib and tucker and highly polished shoes at the Radisson Melbourne for the landmark occasion.

Under the stewardship of our chairman, Colman Q.C., who more than once threatened to name some of the more exuberant of us, the veil was lifted from our "thirty year old clerk". Mindful of proposed after dinner festivities at the Redhead and the Radisson Kareoke Bar, Colman gave us as a timely warning concerning an alleged back injury sustained by one of his clients whilst leaving a nightclub under the influence of liquor.

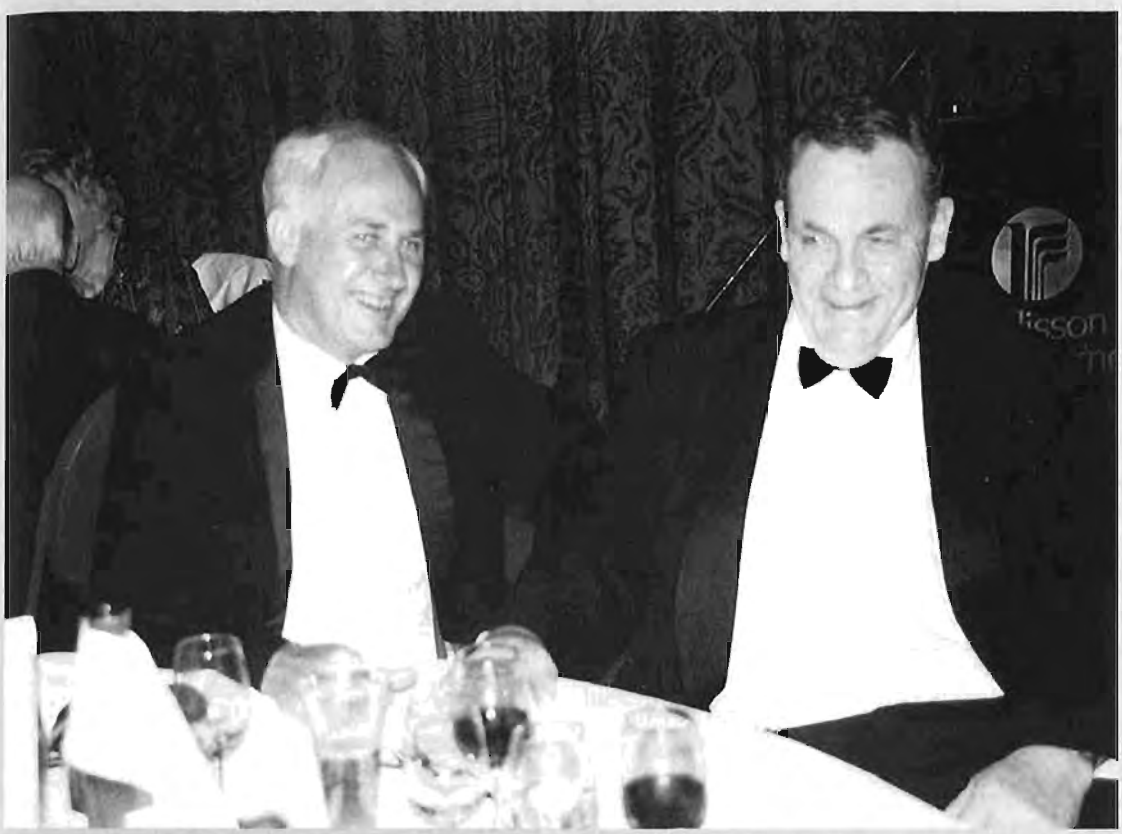
Wayne Duncan, John O'Toole, Jack Hyland and Gerard Hyland.

Some members of the list were unable to attend the dinner, and from past members apologies were received from various locations including a mediation bunker in Northern Ireland. In writing of the high standards adopted by Jack Hyland and his contribution to the development of our Bar, one absent member of the list provided an apt prologue to the expose of Jack Hyland provided by our principal speaker.

For those of us who may have missed the point, Meagher Q.C. commenced his speech: "In, 1992 Mr. Jack Hyland will be gone." Pretty strong stuff!

Grasping the nettle even more tightly, Meagher took us back to the origins of relationship between clerk and barrister, recounting the happy rescue in 1660 of North of Counsel by his clerk after North was thrown from his horse into a pond. Whilst Meagher was prepared to forgive Jack Hyland his lapses in that regard one can only speculate as to his view of Mrs. Hyland neglecting barrister's laundry.

We heard of the early life of Jack Hyland, a trumpeter in his school band and RAAF mechanic preparing planes for high flyers. Surely, no



Wayne Duncan and Jack Hyland.

Geoff Colman, Q.C.

two skills could be better employed than by a Barristers' Clerk. Jack Hyland became the Bar's third clerk at a time when it was seriously questioned whether the services of a third clerk was required and whether solicitors would use them. Happily, the answer has been self evident over the last thirty years, and no-one could be happier than John O'Toole, the list accountant and financial manager who was lured from the State Insurance Office by Jack in 1961, and whose quiet efficiency will be lost to the list when he also retires at the end of the year.

Since the shingle went up in June 1961, 257 members of Counsel, have engaged Jack Hyland as their clerk and the list membership now stands at 135.

When Jack Hyland and John O'Toole retire, and Gerard Hyland becomes the new list clerk on January the 1st, 1992 the first very happy chapter in the story of the Hyland list will be complete. With the standing ovation accorded to Jack by those at his dinner, go the best wishes of his barristers for a long and happy retirement.

In 1992 Mr. Jack Hyland will be gone.

Brent Hutchinson

MOUTHPIECE

The time: late October. The location: a "better" Chinese Restaurant. The participants: two reasonably portly, obviously well fed, prosperous looking if not especially well dressed gentleman.

"These dim sum are rather nice aren't they?"

"Yes, let us order another few serves"

"Is that such a good idea? We still have the full banquet to come plus the extra dishes we ordered!"

"There isn't a lot in the dim sum and they will take the edge off our hunger whilst we await the main courses."

"I suppose then I can always forego the apple and banana fritters and ice cream if I get too full."

"I always have room for dessert, especially after a Chinese meal. Have another drop of Ben Ean."

"It isn't too bad a drop is it?"

"I normally drink only French wines at home but here their French wines are rather limited."

"It was a good idea to get those extra dim sum, they certainly don't pall with repetition.

"A penny for your thoughts."

"A penny for . . ."

"Er, Um, I suppose I should have said $2,000 ha ha ha"

"I was just thinking about our discussions last time we ate here."

"That was quite a bit earlier this year wasn't it?"

"Yeah, the first week of the Legal Year, I think."

"Apart from praising the food and making dire predictions about the year to come I cannot really remember . . ."

"Remember, we talked about taking silk."

"Did we!?"

"Of course, don't you remember? You said you wouldn't be applying for a couple of years yet. Too young I think you said."

"I did? I don't remember. I wasn't drunk I am sure."

"You were quite adamant that you wouldn't be applying this year."

"Was I really. Are you sure?"

"Rumour has it that you applied."

"Does it? I've heard that you applied. Is it true?"

"You know what rumours are like at the Bar!"

"It's true then. You sly old dog. You've been saying for months that you couldn't afford to apply."

"You've applied haven't you?"

"Why would I want to! My practice couldn't be better. I am writing more than most silks. Why only yesterday I put $20,000 into my fee book."

"Apart from praising the food and making dire predictions about the year to come I cannot really remember . . ." "Remember, we talked about taking silk." "Did we!?"

"You saved up a fortnight's work or are you still writing up your paperwork when you receive it rather than when you send it off?"

"I've never done that."

"Of course you do. We all do. And I bet you told your Secretary "in strictest confidence" knowing that the whole world would soon get to know how much you wrote yesterday."

"We'd have to be mad to apply. We are both doing so well. Some silks are really struggling, I've heard. And they haven't the piles of paperwork to fall back on either like we have."

"Don't know if I really want the big drop in income, at least for the first couple of months until my regular instructors get used to the idea. I am sure they will stay loyal, don't you?"

"I suppose they will."

"On the other hand, we wouldn't have to put up with readers any more."

"They are a necessary pest-noblesse oblige and all that."

"Mine aren't so bad. I keep them out of my

Chambers. I let them share a spare Secretarial spot around the corner where they are out of sight."

"Out of mind too I bet. Did you say "they"?"

"Yes. I always have two. Need two to make the coffee, do the messages, shift my furniture, update my services, copy decisions, chase up a bit of research. One isn't enough. They aren't reliable. If they aren't doing the readers course they are in Court. Terribly inconvenient when they aren't around."

"Very convenient when they are underfoot too. Ha ha"

"I've heard they are not looking for "Commercial Silks" this year."

"And they would expect a year or two more seniority."

"I've heard that too."

"And if you apply, you've got to get it. You can't disappoint your family. They are always so confident when it comes to such matters no matter how carefully you explain the risks and the possibilities of being passed over."

"We can cope with such disappointment but they can't. Netiher can all the other people who rely upon us succeeding in the application like our Clerks, friends, secretaries and so on."

"Yes, we can take the disappointment."

"Well, it really wouldn't be a disappointment."

"No, not really."

"After all, you have to apply and be unsuccessful at least once before your application is successful."

"That is right. And we really are too Junior."

"And we couldn't afford it with our present practices."

"it isn't so important, is it?"

"No, there is always the year after."

"But what if a real no hoper took silk ahead of us."

"That wouldn't happen, would it?"

"It might if we didn't apply!"

"But you aren't really interested are you?"

"You're not, are you?"

"Well, have you applied or have you not?"

"Have *you*?"

"Do you want to finish that last bit of sweet and sour and I'll clean up that bit of spare rib?"

"OK"

"Do you think you could manage some Peking duck, they do it so well?"

"After all we have eaten so far? Well, alright."

"Well what about silk did you or did you not?"

"Did I what?"

"You know what I mean!"

"Know what?"

"Silk, did you?"

"Did you?"

They both return somewhat later to their spotlessly clean, scrupulously tidy Chambers. There are no telephone messages; there are no briefs that have come in in the meantime; and, the paper clip snake on the desk remains as it was prior to lunch. They sit down, move the paper clips aside and ponder their Chambers: there just isn't anything left to tidy up.

VERBATIM

Supreme Court of Victoria

Coram: O'Bryan J.
Occidental Life Insurance Co. v. Bank of Melbourne
10 October 1991
His Honour: Mr. Sackar, I looked at the document dated 7 October, the amended further amended third party statement of claim, a document dated 26 August 1991 which is the twelfth-named third party's defence to the defendant's amended further amended third party statement of claim and a reply to the twelfth-named third party's defence to the defendant's amended further amended third party statement of claim. Sackar Q.C.:

. . . . . .

His Honour: And you will pardon me for laughing. Dated 7 October.

County Court of Melbourne

Coram: Judge Bland
R. v. Virgo and Catchpole (18.6.91)
18 June 1991
Simon: "Your Honour whilst the jury are being brought up, I wonder if it would be possible for the two accused to go to the bathroon as I'm told they need to do so?"
His Honour: "Yes, yes as long as they shake it up". (much laughter)
His Honour: "No, no I didn't mean that. There's no need to transcribe that. I meant as long as they hurry up. Now off you go."

County Court at Melbourne

Coram: Judge Hanlon
R. v. Mark
15 May 1991
Simon: (Opening an appeal, where defendant had received 18 months for various car thefts and arson in the Magistrates Court). "Your Honour it is in the interests of my client, every owner of a car in Victoria and of the Victorian public generally that he be allowed to go and live with his girlfriend in the middle of Tasmania."
His Honour: "Not far enough away."
Simon: "It is 30 kilometres from the nearest town."
His Honour: "Not far enough."
Simon: "Your Honour I wonder if I might get some instructions from my client in relation to abandoning his appeal."

Supreme Court of Victoria

Coram: Master Wheeler
Elders Finance Limited v. Tilley
23 October 1991
Van Den Berg for the Plaintiff
Hammond for the Defendants
On the hearing of the plaintiff's application to strike out parts of the defendants' amended defence on the ground that the pleading was not in accordance with the rules.
Van Den Berg: "Given the way in which the defendants have pleaded their amended defence, we do not know how much we have to come to court to prove."
Master Wheeler: "There are two ways to deal with that problem. One, interrogate the defendants; two, serve a Notice to Admit on the defendants."
Hammond: "And 'three', send the Master a backsheet."

Supreme Court of Victoria Appeal Division

Coram: Fullagar, Brooking & Tadgell JJ.
31 October 1991
Final day of appeals by Accident Compensation Commission (Gorton Q.C., Noonan & Parrish) against determinations of various Judges of the Accident Compensation Tribunal in favour of an insurer, C.E. Heath (Buchanan Q.C., Tebbutt and O'Loghlen).
Dr. Buchanan: "Your Honour Mr. Justice Tadgell will remember deciding a series of cases, which have become known as the 'Fund Cases'".
Brooking J. (puzzled): "Fun cases?"
Tadgell J. (remembering): "With a 'd'; with a 'd'!"

Magistrates' Court at Ballarat

Coram: Batt M.
24 September 1991
Plaintiff sues for money due under contract of sale of an hotel. Defendants deny taking possession of the hotel.
Batt M.: How can you say that the defendants never took possession of the hotel, Mr. Northrop?
Northrop (for defendants): Because the third party took possession on the same day. The defendants never went into actual possession.
Batt M.: What's the name of this pub?
Northrop: "The Bull and Mouth", Your Worship.
Batt M.: It's well named.

Coram: Tricontinental Royal Commission

Commissioner Carden: — Could I just ask you while the matter is raised, why you left Tricontinental? — I had had a long standing promise to myself to try and get into business for myself rather than watch everyone else do it, do it for me, and so I did. It is as simple as that? It was not that you were dissatisfied with Tricontinental? — No, not really. I was aware that Tricontinental may become Australian Bank. I wasn't terribly interested in working in a trading bank. I thought the experience I had gained from Trico was good and I should try and have a little bit of a plunder for myself, and I guess at 27 or 28 if you make a mistake you've got time to do something more, but if I left it another five years and made a mistake, I'd have three kids, a wife, a mistress and different things, you know, so I just thought it was time to leave.

I'm sorry — ? — I really wanted to impress you, don't mention that.
It was a joke? — Just a joke.
The Chairman: It is just the sequence of the assets that intrigued me.

Occidental Life Insurance v Bank of Melbourne and Ors

Coram: O'Bryan J
(Day 64)

Counsel had referred to His Honour's earlier indication that the case would adjourn on 20 December and resume on 13 January. It was possible that submissions might begin on 13 January, with obvious consequences for holiday arrangements. A faint protest from Hayne QC . . .
HIS HONOUR: Yes, I know. All these matters have to be debated and they may take some time to sort out, Mr Hayne.
MR HAYNE: I accept that, Your Honour. Yes, Your Honour, I have in mind only the necessities of personal proceedings in Marland House if at least one week in January is not available.
HIS HONOUR: When the case finishes you may do what you like with your time, Mr Hayne.

Listing Court, 28 October 1991

Coram: Master Gawne

A solicitor sought to adjourn an application for a speedy trial to a date when a particular silk would be available to make the application.

On refusing the adjournment, the Master said in relation to the choice of Counsel:

"There are a thousand of them over the road. . . . Some of them are very competent!"

County Court

Coram: Judge Bland
12th November 1991
The Queen v. *Huy Tieng Le*
Mr. C. Smale on behalf of the Crown
Mr. I. McIvor on behalf of the Accused

His Honour: Mr. McIvor, are you here on your own today?
Mr. McIvor: I do have an accused with me, Your Honour, and an instructor. I'd better not say that in these troubled times, Your Honour.
His Honour: The Prison Officer has given you the chance to take the place of your client.
Mr McIvor: If I mention anything about my instructor, I may not be here in the future. Already, he's a bit suspicious.
His Honour: Where is he; do you know?
Mr. McIvor: He's here.
His Honour: In court?
Mr. McIvor: Yes. I think the Prison Officer was delayed, Your Honour.
His Honour: I thought he was waving you forward.
Mr McIvor: . . .He may have been. We came in almost at the same time, I think. As Your Honour knows, I'm invariably at court hours before the time.
His Honour: I do not think he could mistake you for a man of Vietnamese background. Could he?
Mr. McIvor: I'm sorry, Your Honour?
His Honour: I said I think it would be doubtful if the Prison Officer mistook you for a man of Vietnamese background.
Mr. McIvor: Other than in a special sense, Your Honour, as Your Honour may recall.
(At this stage accused placed in dock.)

LUNCH
RESTAURANT "PAUL BOCUSE"

PAUL BOCUSE IS ONE OF THE GREATEST chefs in the world. His restaurant in the suburbs of Lyon has held three Michelin stars since 1965. He has a restaurant in Japan. He has a restaurant in Disney World, Florida, now he has a restaurant at Daimaru, Melbourne.

It is interesting that one of the most well known chefs of France chose Melbourne in which to establish his third restaurant. Was it because of Melbourne's gourmet reputation? Or was it simply his connections with the Daimaru store? Whatever the reasons he has established a superb restaurant on the fourth floor of the Daimaru building.

The great man attended his new restaurant for a few days at its opening.

For those with a real interest in food the great chefs of France are stars. Bocuse, Verge, Pic, Blanc and Troisgros can walk on water. It is a stunning experience to eat at their restaurants in France. Waves of applause almost sweep the restaurant when the great men emerge from their kitchens to greet their guests. Patrons eagerly thrust their menus forward for the great chef's signature. And so it was at the Daimaru in Melbourne. Monsieur Bocuse tall, wide and imposing wafted around his restaurant at its lunch time opening. Even the annoyance of having to speak to the representatives of the 'Sun' and 'The Age' did not ruffle the great man. With Gabriel Gate interpreting he attended at every table in the restaurant and duly signed my menu.

The restaurant is all cream, white and restraint. Some of the tables are near the window over looking Latrobe Street. Even those without a view are all well placed and wide apart. When you step in the door it is quite clear that this is a place of style and refinement.

A glass of Kir Royal greets every guest. As you sip upon the cassis and champagne cocktail the menu is delivered.

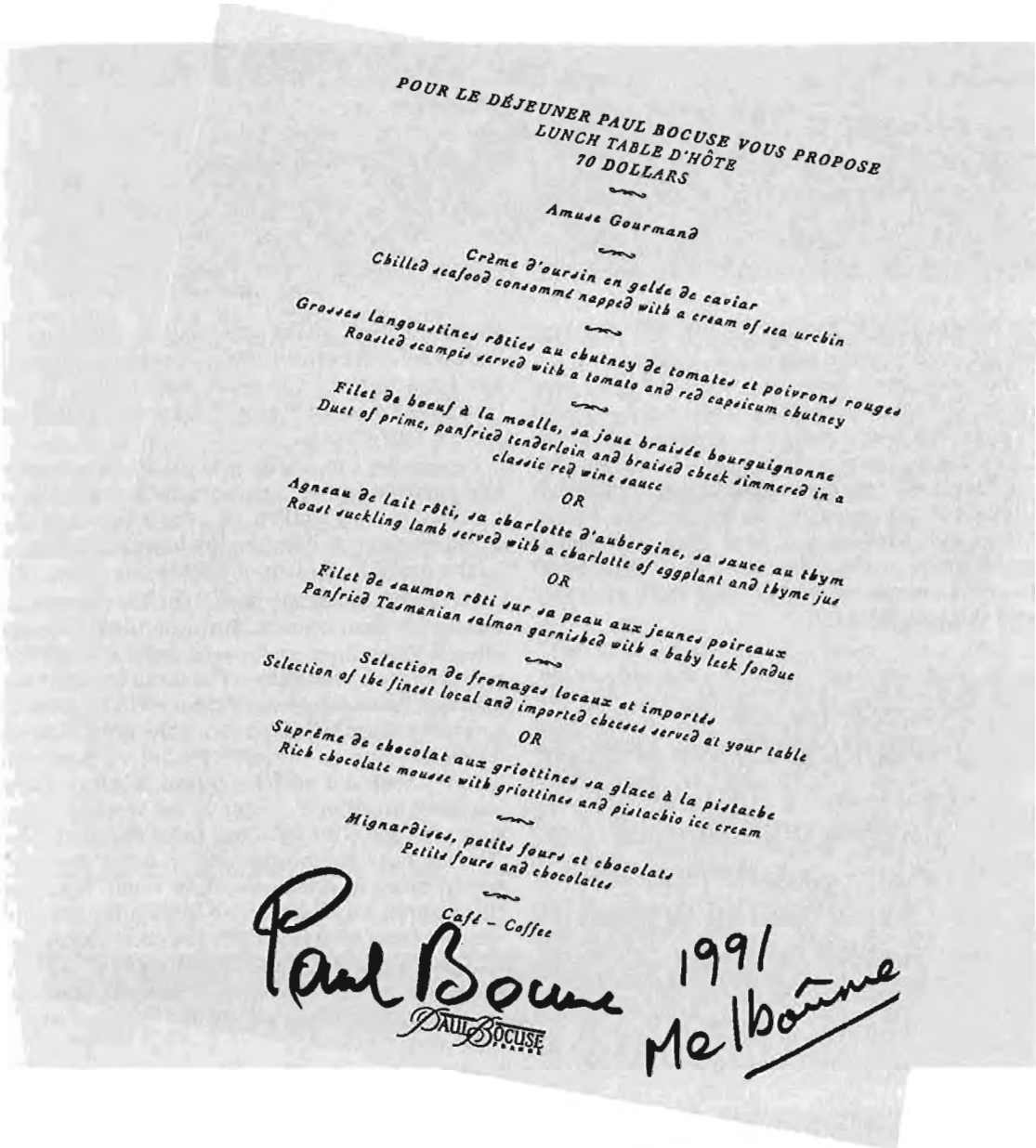
The said opening lunch was $70.00 and was as printed in this article.

The highlights of the lunch were the chilled seafood consomme and the roast suckling lamb. The consomme appeared in a tiny bowl covered with a cream of sea urchins. It was a chilled and concentrated delight. The type of under statement that requires great skill and long hours of cooking and refinement. The roast suckling lamb should have produced a picket from the vegetarian lobby. The dish is cruelty personified. A two week old suckling lamb is torn from its mother's teat and served pink and succulent to enthusiastic gourmets. The serving of the lamb included a small proportion of the tiny chops, the breast and even the kidneys. The head waiter informed me that it is available from Jonathon's The Butchers in Smith Street, Collingwood at the snap bargain of $40.00 per tiny lamb.

The chocolate mousse was the richest understatement I have had in Melbourne and even the Petits fours and chocolates with the coffee were a delight. I attended the opening with well known gourmand Douglas M. Salek. Douglas embarrassed the whole restaurant by producing a large plastic bag with Bocuse's picture upon it for the great man's signature. He now has the plastic bag framed and upon his kitchen wall. Such is the theatre of food. I have reattended for dinner. The prices in the restaurant are not high for the quality of the food. The set dinner menu is now $65.00 for four courses. The duet of prime pan fried tenderloin and braised cheek was magnificent. Also the barrumundi baked in pastry. At $23.00 per dish this was not expensive. The serving of the pastry enclosed fish shows the great skill of the waiters in the restaurant.

However all is not perfect. The restaurant is still getting its act together. The service, especially at the beginning of the meal, is slow. There is an inordinate delay before a menu is presented. There is even further delay before a wine menu is presented. The waiters seem preoccupied in giving out the free champagne rather than settling guests with a menu. Further the main courses are in general not served with vegetables. This is a European habit which I do not support. That is not to say that there should be meat and three veg. This is certainly not a meat and three veg restaurant. However the main courses should have been served with a vegetable or a salad of some form. If you are looking for big servings don't have tea at Paul Bocuse.

The wine list is huge. The prices range from $1,200.00 for a Chateau Y-Quiem to reasonable house wines at $20.00 to $30.00. Bocuse has his



own range of beaujolais and other wines which is excellent value.

Stephanie's and Mietta's have a large competitor. The chef is a Frenchman, Philipe Mouchel who has worked in Bocuse's restaurants all over the world. I ventured into the kitchen and found eight chefs at work. This is gastronomic professionalism at its best.

Although Australia cannot hope to be able to afford to put on the number of staff in order to equal the three star French restaurant, the standard of food in this restaurant makes it the best at the moment in Melbourne. At the moment there is a set lunch for $35.00. This can be contrasted with Bocuse's famous truffle soup. He presented this dish for the President of France in the 1960's. It is a large pastry dome enclosing a truffle soup. At $37.00 it is undoubtedly the most expensive soup in Melbourne; or Australia for that matter. One hopes that this restaurant will succeed. It is a great asset for Melbourne. Indeed the whole Daimaru Centre is an asset for Melbourne. One hopes that a restaurant situated in a department store will be well supported. I look forward to many good meals at restaurant Paul Bocuse in the future.

Restaurant Paul Bocuse Daimaru Melbourne
Open — lunch and dinner Monday to Friday
Dinner — Saturday Closed Sundays
Phone No. 660-6600

Paul Elliott

A FAIRY TALE (CONTINUED)

NOW GATHER AROUND ME MY DEARS whilst I tell you the tale of the VicBees.

For some time now the hives have been very quiet. The feverish buzzing of the past few weeks is over. No longer are small groups of VicBees gathering in conspiratorial groups buzzing away. No longer are rumours circulating so much that they catch up and overtake themselves. Things are so still; VicBees look as if there no longer is any meaning to their lives; as if there is no point to going on; no raison d'être for their existence and their social intercourse.

It wasn't the nature of the decision itself for the choice of CJBee set most of the VicBees humming in approval — apart from those few who expected the call which didn't arrive. It was the announcement of the choice itself.

What is it that has brought this to pass, you ask? Is it the plague? Is it the demise of ClerkerBees? Is it the destruction of their hives? Has the AGBee succeeded in his dastardly plotting? Was it the depression they had to have? Did the BankerBees foreclose? Did they starve from overpopulation?

No my dears it was none of those things. It was far more dramatic than all of those things. No it wasn't War.

It was the announcement of the choice of the CJBee! Why was that decision so momentous, you ask?

It wasn't the nature of the decision itself for the choice of CJBee set most of the VicBees humming in approval — apart from those few who expected the call which didn't arrive. It was the announcement of the choice itself. It ended all the speculation; all the gossip; all the guessing; all the books and all the wagers. There probably will not be a time like it again for another 15 or twenty years when many of the present VicBees will be past caring.

I suppose some will turn to discussing the rumoured shortlists for GovernBee but as it is unlikely to be a VicBee, or even a friend of the VicBees, there will not be the interest there was in the possible choices of CJBees.

Of course, there has been a further minor distraction in minor times. However, it has only got a few VicBees buzzing in anticipation, hope, expectation and prediction. The topic has been the speculation about which VicBees will be allowed to grow silkier pelts. In reality the only buzzing about has been on the part of those VicBees who actively seek out such elevation. Each of them has been much in evidence in the weeks leading up to the selection of those to be elevated. The buzzing has been noisier and in many cases directed more in self-praise than usual. Many of these applicants have come forth after years of absence from such functions to attend receptions for JudgeBees and the like and to press Judicial flesh as it were in an endeavour to ensure their candidature was not lost in the mass of applications.

Most of the VicBees intent upon silky pelts have engaged in a form of double-buzz in the weeks leading up to the selection of the successful candidates. Almost without exception they have professed to not really wanting to be successful because their share of the pollen would suddenly drop dramatically. The same "reluctant" applicants had also developed an unprecented — for them — self doubt opining that they were really too young or too inexperienced for such appointment, that no one was selected upon first application and that in any case there was an oversupply of SilkyBees already specialising in their particular flora. One could not be but sympathetic to their plight and their excruciating dilemma: they desperately wanted the appointment in case somebody less deserving — in their somewhat jaundiced eyes — beat them to it but wanted neither the ignominy of being an unsuccessful applicant nor the risks of suddenly

having less pollen to collect. They so desperately wanted the glory of such selection or did they?

Yes, my dear, you are right. They will have to turn their minds to their next hive. Rumour has it that they tired of the vacant block or rather that it posed too many options. It now appears likely that they will be asked to trade in the vacant block on a nearby run down officeblock that no one else wants. But that may mean having to choose between a "yes" or a "no" and we all know how the VicBees hate making tough decisions, or indeed any decisions affecting their collective well being.

Of course, they may be spared making any decision as they were spared the decision about the purchase of the vacant block. Perhaps, the run down office block will be bought at well above market prices with a financing deal that will encumber the VicBees for decades to come and enrich BankerBees and BuilderBees and PainterBees and the like. Perhaps too they will be able to eventually find out that the vacant block was a great investment — that it was sold for almost 80% of its original purchase price and that the interest on the loans taken out to purchase it was a mere 6 or 7 times the income earned from the rental of the land as hardlaid storage space.

It now appears likely that they will be asked to trade in the vacant block on a nearby run down officeblock that no one else wants.

But if the VicBees play it carefully, like they have done many times before, they can keep the debate about the new-old-rebuilt hive going for years. Maybe it will replace the hoary old debate about whether they really need ClerkerBees and the other one about the SilkerBees needing the help of VicBees in the collection of pollen and even the one about whether they should take any part at all in any of the public debate about the future of VicBees, the amount of honey they make and the Hive Rules.

Tonight's story was a long one and it is a schoolday tomorrow my dears. Now off and brush your teeth and perhaps a bit more about the VicBees another time.

To be continued.

WINNER OF COMPETITION

Tonia Komesaroff

Suggested Caption "THE LAW IS AN ASS — AND SO IS THE ARTIST!"

A LAWYER'S BOOKSHELF

Australian Law of Trade Marks and Passing Off

By D.R. Shanahan, The Law Book Co. Limited, 1990, pp. 1–702, price $125.00 (hard cover).

THE 1ST EDITION OF THIS WORK (PUBlished in 1982) established itself as the essential Australian text in the area of trade mark law and practice. The 2nd edition has maintained the high standard of the first.

The 2nd edition is considerably larger than the first due to the increase in the number of important cases reported in the area since 1982. The *Ritz, Riv-oland* and *"Moove"* cases, for example, have all been the subject of consideration and commentary in the 2nd edition.

The work is aimed at the practitioner and contains much useful information about trade mark practice and procedure and many helpful examples of conflicting and unregistrable marks.

The work is extremely thorough and this is reflected in the comprehensive footnotes and citation of authority.

Anybody currently relying on Mr. Shanahan's first edition should purchase the second edition, and for any practitioners who are now entering the trade mark field, this work is essential.

My only criticism is that is seems to me that the reproduction of the whole of the *Trade Marks Act* adds unnecessarily to the cost of the work.

Adrian Ryan

Words and Law — First Edition

By Colin Golvin, Penguin Books Australia Ltd. 1989, pp. VII, Price $11.99 (soft cover).

COLIN GOLVIN, BARRISTER/WRITER/ literary agent and consultant is a man of many talents. These talents have been combined in his new book entitled "Words and Law". Colin sets out to guide the writer through the mine field, we all know as the law, and at the same time provides his learned brethren with a fascinating insight into the world of the writer. The layout of book is straightforward and indeed it is this that gives the book such appeal.

From the "nuts and bolts" of writing, we are humorously introduced to the worlds of copyright, contract, defamation, moral rights, obscenity and contempt. A *"useful section"* entitled "Useful Addresses" precedes a mystifying glossary and index.

For the author's benefit, this particular reviewer was not so much mesmerised by the index (see comment on page 17), but rather terrified by the warning on p.108. "Fair comment" or not. The book is accessible, informative and witty. I highly recommend it.

Tim Seccull

Bailment 2nd Edition

By N.E. Palmer, Law Book Co. Limited, pp. IX–CXL; 1–1723.

THIS IS THE SECOND EDITION OF AN excellent text. Since it was first published in 1970, this text has provided practitioners and students alike with an invaluable reference to a subject which is vast and which affects many different facets of the law. There seems little doubt that Professor Palmer's three aims expressed in the preface to the first edition — providing a guide for practitioners, providing a comprehensive source on bailment for students and placing the law of bailment in perspective in the general law of obligations — were achieved with great success.

Since the publication of the first edition, there have been numerous developments and refinements in the law of bailment. Further, the principles and doctrines have been used in a wider variety of situations than had previously been the case. This has led to the substantial revision of some chapters (for example, chapters 3, 4, 19 and 20), the complete rewriting of several chapters (for example, chapters 15–18 on Carriage of Goods by Road, Rail and Air) and the inclusion of new chapters and sections of chapters (for example, chapter 22 on Pledges and Pawns). Professor Palmer draws on authority from many jurisdictions and uses it in a manner which is not confusing to the reader but which serves to provide a clear account of the various principles.

In a book covering as much ground as this book does, the importance of a comprehensive and workable index cannot be over-estimated. The index appears to be comprehensive without being cumbersome. The detailed table of contents and the tables of cases and statutes are also invaluable aids to a practitioner searching for an answer to a specific problem.

Professor Palmer's modest purpose of giving

"an account of the law of bailment which is both useful to practitioners and challenging to students" has clearly been achieved. As the Hon. Sir Anthony Mason A.C., K.B.E., Chief Justice of the High Court of Australia stated in his foreword to *Bailment*, "the new edition, like its predecessor, is the product of immense scholarship in a territory which seems to know no boundaries".

Susan MacCallum

Trust and Powers — First Edition

By D.M. McLean, The Law Book Co. Limited, pp. VII–XV, 1–139, Price $37.50 (hard cover).

D.M. MCLEAN SOUGHT INSPIRATION IN the bosom of Oriel College, Oxford and indeed has found such inspiration with his new book entitled "Trust and Powers". The principal concern of the book is a discussion of the discretionary trust and the way in which such trust gives powers and obligations to trustees and rights to beneficiaries. The opening chapter discusses the powers a trustee may hold pursuant to a discretionary trust and the extent and nature of the rights of the beneficiaries. The second chapter attempts to advance various tests by which one can gauge whether or not powers and discretions have been appropriately exercised. The third chapter, a fascinating chapter, seeks to up date and re-evaluate Farwell's final edition of "Farwell on Powers, 1916". An appendix follows which probes legislative attempts to regulate the discretionary trust following the decision of the House of Lords in *Chapman and Chapman* (1954) AC 429. English legislation is initially discussed followed by a detailed analysis of the Trustee Act 1958 (Vic.).

The author's aims are precise and he achieves them with authority and clarity. In a foreword to McLean's work the Right Honourable Sir Zelman Cowan states:

"This book will help to establish him as a legal scholar".

I can take it no further.

Tim Seccull

Business Associations

By Clement Shum, Hong Kong University Press (1989).

A FAIRLY ELEMENTARY PAMPHLET text produced for teaching accountancy students in Hong Kong. It covers the standard areas of Agency, Partnership and Companies — dealing with the common law as expatiated in mainly Hong Kong cases and the relevant statutory Ordinances comprised in the Laws of Hong Kong.

For anyone dealing in this area of the law, it is important to remember the principle from *Holland China Trading Co* v *Tong Tai Farm* [1906] HKLR 54 that an English principal will be liable for the misinterpretation in the translation by his Chinese agent of the terms of an English written contract.

Fortunately, this text is in English and eminently readable.

Eugene O'Sullivan

WICKETS AND WINE 1991

Wickets and wine 1991

"SHALL I COMPARE THEE TO A REAL scorcher", on doubt the bard would have mused, as teams drawn from Latham and ODCW assembled on the last Sunday in November for the annual "Wickets and Wine" match at the Corniston Oval, Romsey Vineyards, hosted by Gordon and Judy Cope-Williams. "Bodyline" took on an entirely new complexion as the assorted shapes graced the green in readiness for a fine day's play of village cricket.

The occasion provided a further opportunity to raise funds for the Chris Spence Fund administration by John Dever. As most would be aware, Chris suffered a tragic accident whilst skiing last year and remains in a coma from which, it appears, he is not likely to recover.

The day was full of highlights, too numerous to record, however of particular note was Michelle Quigley being gently coaxed into opening the batting for ODCW, Michael Wright jogging to Romsey for the match after completing a 22 km bike ride the previous day, Tony (Lightning) Cavanagh bowling a slow one, Paul Elliott per-

Bromberg going for the bash

severing with an injured fetlock, and Bill Gillard breaking his commentary during a brief interlude at lunch.

The day was also notable for fashions in the field. Andrew Watson's white board shorts were well set off by his black thongs; Robert Osborn's new cricket regalia got an airing (no doubt, for those lucky enough, it will be seen again at Point Lonsdale this year); Michael McInerney took no risks with his gridiron gear; and Jack Strahan sported what appeared to be a military helmet captured from a republican guard (taking understandable precautions after his unfortunate attempt last year to pull off the mother of all catches).

The day was not without its upsets. Elliott, just before lunch, bowled Thompson. This created a seemingly insoluble impasse within the ranks of the Bar News editorial staff.

Feathers were finally unruffled and calm restored with a delightful lunch in the pavilion. Platters of assorted meats and terrine, mixed garden salads, local breads and potatoes, country chutneys and pickles complemented the delicious Cope-Williams' wines, triumphing over the verbal pyrotechnics of the pre-luncheon event.

After lunch the uneasy truce was broken and rivalry flared as Elliott was caught Southell bowled Heerey.

The pace quickened as Owen Dixon West fought back to come within four runs of the high scoring Latham team; the day finishing with a 205–209 score (give or take a few).

Another match is planned for November next year, and the fund remains open to accept donations.

Peter Vickery

The stumping of Vickerly

Quigley in full swing

Robert (Bodyline) Osborne about to be hit

The assorted shapes graced the green

BAR HOCKEY 1991

Scales of Justice Cup Retained (Makes Ben Hur look like a mini series)

EVER SINCE ANDREW TINNEY'S exuberant celebration of the Bar Hockey Team's unprecedented thrashing of the Law Institute side in 1989, the Law Institute has been itching for revenge.

In 1990 the Bar squandered numerous chances in reaching a four all draw, and with two years of failure behind them it will be readily appreciated that the Law Institute Team was out to turn the tables in no uncertain fashion.

Preparations for this year's match did not proceed well. The traditional game against the RMIT side played on 16 October was attended by great foreboding. Up against a state league team with an average age in its early 20's, the Bar side seemed distinctly lacking in pace as the side limbered up, despite the addition of new recruits Colin Fenwick and Andrew Goatcher.

Early estimates that the Bar None team would lose by a least 7 goals however proved unfounded. Despite Young's incapacity through injury sustained during the game, the Bar side went down to a creditable 5–2 defeat, a score which did not fully reflect the run of play in that Burchardt missed two penalty stokes. Michael Tinney and Burchardt were the Bar scorers. An excellent game was played as ever by Meryl Sexton and Peter Burke, but the absence of Gordon Smith, His Honour Justice (it's me knees Rupert) Coldrey, Andrew Tinney and Dallas, (who has treacherously defected to the solicitors during the intervening year) boded ill for the forthcoming titanic stuggle.

A week later the game was played at the Hawthorn Hockey Centre. The Bar None Team's ranks were further debilitated by the loss of Wodak, but were augmented most fortunately by the arrival from Wangaratta of Andrew Tinney and by new star import direct from Mallesons, Peter Collinson.

In a spirit of generosity no doubt brought on by hard times at the Bar and the necessity of touting, the Law Institute was rapidly enabled to run

Left to right: Richard Brear and Rupert Balfe.

up a 2 nil lead. Failure adequately to mark the ever dangerous Tony Melville, combined with a most gracious pass from Balfe to one of the McNab brothers left Lynch in goal with no chance.

At this point, it might have been felt that the Bar team was finished. However, shortly before half time, the ball was passed at some speed across goal towards David Beach on the left wing. With the unhurried calm of a Junior Barrister having ten briefs in the Commercial List to

Left to right: Coldrey J, David Beach, Peter Burke, Andrew Tinney, Philip Burchardt, Peter Collinson.

complete before lunch, combined with the icy precision of the Silk adding another zero to his bill, Beach slotted the ball firmly into the net to reduce the deficit to 2–1 at half time.

Greatly encouraged by his fortuitous turn of events, the Bar pressed forward, and shortly after half time Collinson scored with a power-driving shot from a short corner.

The shock of seeing a comfortable lead dissipated against the run of play clearly upset the solicitors' team who responded with a positive barrage on the Bar goal.

Back left to right: Peter Burke, Andrew Goatcher, David Beach, Tom Lynch, Meryl Sexton, John Coldr

In goal, in the second half particularly, Lynch proved an impassable object. A strict training regimen on the day of a 6 hour lunch at Jean Jaques By The Sea made Lynch completely unable to move. This cunning tactic, clearly adopted from the British Foreign Office policy of masterly inaction, proved the Bar's saviour. The numerous bruises all over Lynch's body the following day were clear evidence of (a) his fortitude in remaining still and (b) the Law Institute's incapacity to hit the ball around him rather than straight at him.

At this point yet a further impetus to the Bar team's play was engendered by the arrival of Justice Coldrey. His Honour, who had very sportingly come to support the team along with Young despite being unable to play, purported to issue an immediate mandatory order to the Bar team to raise its game and score more goals. Whether this helpful instruction was the catalyst or not, the Bar proceeded forward and Beach scored another goal perhaps even better than the first. At this point it would perhaps in deference to tradition be appropriate to include a description of the goal by a purportedly anonymous writer, but all attempts to get Beach to describe the goal have proved fruitless. Suffice to say that the ball was played across at speed, and the Law Institute goal keeper was left sprawling on the ground as the ball powered into the back of the net.

(J.) on the Bench ("bung foot"), Rupert Balfe Q.C., Alistair McNab, Philip Burchardt.

Left to right: Richard Brear, Andrew Goatcher, Tom Lynch, Michael Tinney, Philip Burchardt, Peter Burke, Meryl Sexton, John Coldrey (J.), David Beach behind John, Andrew Tinney, Rupert Balfe Q.C., Alistair NcNab.

With 10 minutes to go the Bar team heaved a collective sigh of relief. Defeat had clearly been staved off and there were even some prospects of victory. The Law Institute Team proceeded to attack with great vigour, and were able to score a goal when no less than 5 players failed to stop Tony Melville, before he passed the ball to an unmarked forward who scored. In this case Lynch's masterly inaction prevented Melville from scoring but could not prevent the subtle tactic of passing to a player immediately behind him.

Despite effort by both sides no further goals were scored, and the score finished 3 all. Controversy then emerged as to the status of the Scales of Justice Cup, a controversy settled by an immediate ex tempore judgment from His Honour, who being completely impartial in the matter, determined that the Law Institute's complaints were without foundation and that the Bar retained the cup. This exceptionally sagacious judgment was greeted with appropriate enthusiasm by the Bar None Team.

Thereafter, following a debate more spirited than any other of the evening, the two teams repaired to the Riversdale Hotel, where many of the finer aspects of the game were not discussed. Following the usual degree of conviviality the parties staggered home and doubtless suffered the next day.

This represents the third year in a row in which the Bar has retained the Scales of Justice Cup,

and new recruits are certainly going to be necessary, as the years go on and the solicitors show every sign of youth and vigour. Notwithstanding this however, the Bar Team of Rupert Balfe, David Beach, Richard Brear, Philip Burchardt, Peter Bourke, Peter Collinson, Andrew Goatcher, Tom Lynch, Alistair McNab, Meryl Sexton, Andrew Tinney and Michael Tinney deserve every credit for holding out under considerable pressure.

Thanks are due to Richard Brear for his organisation of the event (Richard's mastery of the memorandum grows, as do the number of memoranda, each year). Further thanks are due to the RMIT for providing an umpire and to Joe Hough and Chris Woodward of the TEMC Club who also umpired the game.

Philip Burchardt

CONFERENCES

THE NATIONAL CONFERENCE ON Employment, Education and Training in the Criminal Justice System will be held in Perth between February 10 and 12, 1992. The conference organisers, the Australian Institute of Criminology and the Civil Rehabilitation Council of Western Australia are seeking papers for the conference and expressions of interest in attending the conference. Persons interested should contact the conference section, Australian Institute of Criminology, G.P.O. Box 2944, Canberra, A.C.T., 2601.

OBJECTIVES

THE OVERALL OBJECTIVE OF THE CONFERENCE WILL BE TO EXAMINE EMPLOYMENT, EDUCATION AND TRAINING IN RELATION TO THE JUVENILE JUSTICE AND ADULT CRIMINAL JUSTICE SYSTEMS IN ORDER TO INFLUENCE CURRENT POLICY AND PRACTICE. THIS CONFERENCE WILL GO BEYOND BEING A NARRATIVE OF PREVAILING PRACTICES BUT WILL IDENTIFY SUCCESSFUL POLICY AND PRACTICE.

THEMES

1 To examine the context, purpose and outcomes of employment, education and training in relation to criminal justice systems.
2 To identify what should be the key functions/models/outcomes for employment, education and training within the corrections systems in relation to:
   - ☐ Addressing the needs of special interest groups such as juveniles, Aborigines, women.
   - ☐ Government and non-Government community based program options.
   - ☐ Policy/Legislation and its relationship to practice.
   - ☐ Employment and Legislation.

AUDIENCE

The conference will be of vital interest to:

- ☐ Corrections Staff
- ☐ Policy Makers
- ☐ Educators
- ☐ Aboriginal Interests
- ☐ General Community
- ☐ Practitioners
- ☐ The Judiciary
- ☐ The Employment Field

OUTCOMES

The conference will provide a forum for interested bodies and will attempt to achieve:

- ☐ An interchange of information.
- ☐ A response to key issues identified through the conference process.
- ☐ The identification of successful and critical models and strategies.
- ☐ The identification of missing elements and unmet needs.
- ☐ The development of new models, programs and guidelines.
- ☐ The discussion and analysis of current non-government/government policies and practices.
- ☐ The examination and promotion of cooperation through all levels of government and community.
- ☐ Improved outcomes through education and training in the criminal justice systems.