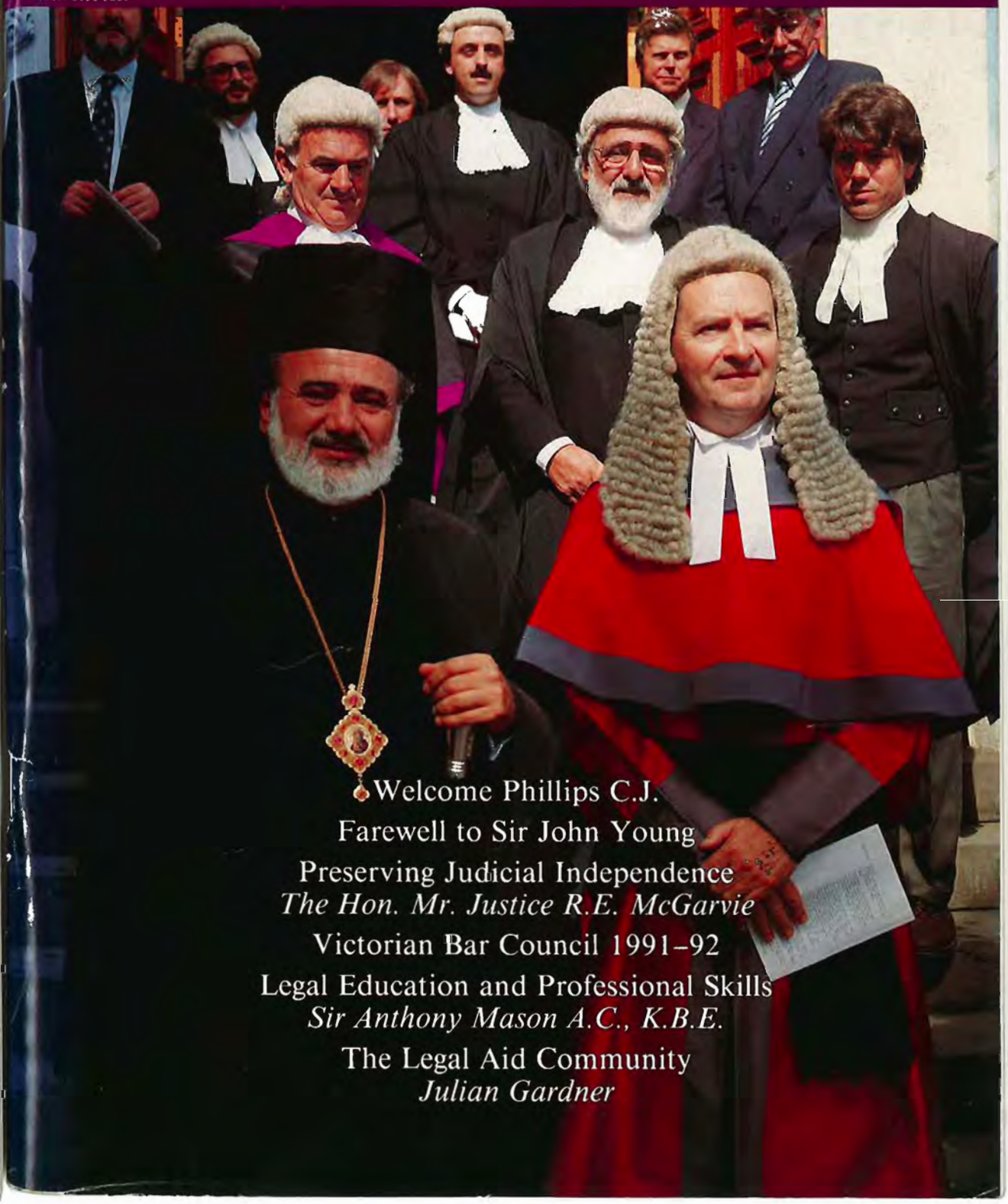
VICTORIAN BAR NEWS

No. 80 AUTUMN 1992
ISSN-0150-3285



Welcome Phillips C.J.

Farewell to Sir John Young

Preserving Judicial Independence
The Hon. Mr. Justice R.E. McGarvie

Victorian Bar Council 1991–92

Legal Education and Professional Skills
Sir Anthony Mason A.C., K.B.E.

The Legal Aid Community
Julian Gardner

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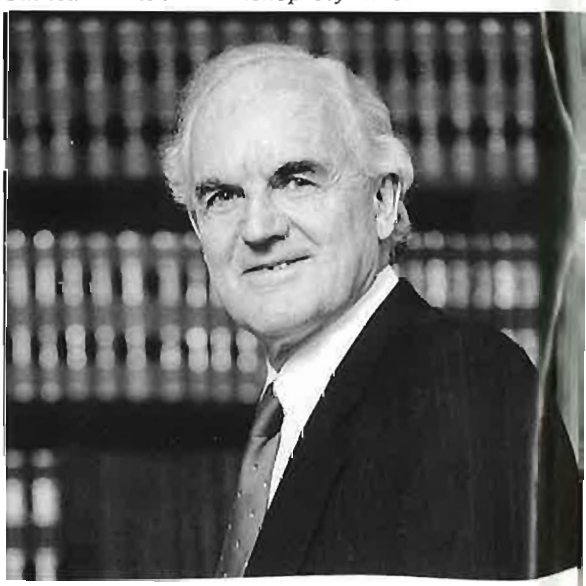

Preserving Judicial Independence, by the Hon. Mr. Justice R.E. McGarvie.

of this issue leaving St. Eustathios

Farewell to Sir John Young.

BAR NEWS

Editors:
Gerard Nash Q.C. and Paul Elliott
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Published by Victorian Bar Council, Owen Dixon Chambers, 205 William Street, Melbourne 3000.
Opinions expressed are not necessarily those of the Bar Council or the Bar.
Typesetting by Abb-typesetting Pty Ltd, Collingwood, Victoria.
Printed by the Craftsman Press Pty Ltd, Burwood, Victoria.

This publication may be cited as (1992) 80 Vic B.N.

EDITORS' BACKSHEET

FORMER EDITOR BECOMES GOVERNOR

The first editor of *Victorian Bar News* has, almost exactly coinciding with the 21st birthday of *Victorian Bar News*, been appointed Governor of the State of Victoria.

We welcome Mr. Justice McGarvie's appointment to the Governorship, which will take place shortly after publication of this issue.

His Honour, whose career is canvassed more fully elsewhere in these pages, has been a major force in the development of legal education and judicial administration in this State and, indeed, on a national basis. His contributions to those areas, as well as his incisive, though compassionate, contributions to the work of the Supreme Court will be sadly missed.

The editors warmly congratulate him on his appointment.

REFORM FROM WITHIN

The Bar Council is proceeding with a general reappraisal of the Bar Rules with a view to establishing a uniform set of Bar Rules throughout Australia. As part of this reappraisal it has abolished the two counsel rule. This reform, for which the Law Reform Commission had agitated, led the Chairman of the Law Reform Commission, consistently, if irrationally, to state on ABC radio that the Bar should not be permitted to regulate its own affairs.

ECONOMICS AND THE RULE OF LAW

The Victorian Law Reform Commission and the Senate Court of Justice Inquiry are continuing their analysis of the legal profession. The Trade Practices Commission has just commenced such an analysis.

We do not suggest that a critical analysis of the legal profession is not necessary. But do we really merit three separate inquiries? More importantly, an analysis from a purely economic viewpoint of the way in which the judicial arm of government operates and is serviced ignores the nature and role of the law in a democracy. The findings from such an analysis may make it much more difficult for the legal profession to play its vital role as a buffer between government, big business and big unions, on the one hand, and the individual on the other. But then, it is almost certainly not economically efficient for individuals to have any rights at all.

WELCOME HARPER J.

As this issue goes to press, David Harper, the popular former Chairman of the Bar, takes up appointment as a Justice of the Supreme Court.

We welcome his appointment.

A formal welcome will be published in the Winter issue of *Victorian Bar News*.

WE WERE WRONG

IN THE SUMMER EDITION OF THE *Bar News* we described Sir John Young as having signed the Victorian Bar Roll in 1974. The relevant sentence should have read, 'He signed the Bar Roll in 1949. He took Silk in 1961 and, until his appointment as Chief Justice in 1974, he practised primarily in the company and commercial areas'.

On page 93 we captioned a photo 'The Stumping of Vickerly'. We apologise to Mr. Vicery for the misspelling of his name.

The Editors

CHAIRMAN'S CUPBOARD

TIME CONSTRAINTS MEAN THAT THE cupboard is rather bare in this edition. Elliott said "do it yesterday" and "just put down a few of the important things that have happened since the last edition".

Further and better particulars follow.

After considering the matter since 1989, the Bar resolved to adopt the two counsel rule recently adopted by New South Wales and Queensland. Other Bars are expected to follow suit later this year.

Jack Sutton left the office of the Chief Justice, crossed the Rubicon and became the Administrator of the Victorian Bar last February. His depth of knowledge acquired over a lifetime in the law and his range of contacts similarly acquired have already been of great advantage to the Bar, and time will show that his employment was one of the better things the Bar Council has achieved.

The Legal Aid Commission unilaterally reduced fees in criminal matters in Supreme, County and Magistrates' Courts and in matrimonial matters in the Magistrates' Court. It is

expected that fees will be reduced in other areas. The Bar Council and the Law Institute of Victoria opposed the reductions on a number of grounds. Both bodies have urged an immediate streamlining of Legal Aid Commission administration and will press for increased government funding as an immediate imperative.

The Bar Council has met in special session on a number of occasions to finalise the draft of the proposed Australian Bar Association rules to be considered by all constituent bodies of the A.B.A. for national adoption later this year. The Rules Committee of Jessup Q.C., Hansen Q.C., Cavanough, McMillan and Sexton have put enormous amounts of time into preparation of this draft and deserve the thanks of all for a job well done.

To the Chairman who coined the term "Chairman's Cupboard" (David Harper), congratulations on his appointment to the Supreme Court bench (apotheosis). I continue to wonder how he found the time to write the polished, whimsical articles for this column whilst he was Chairman.

Finally thanks to the many who have supported the Bar and the Bar Council by words and deeds over the past few difficult months. All things pass. In the end I believe the Bar will overcome all the present difficulties essentially because, as thoughtful persons know, it contributes so much of value to the community of which it is an integral part.

Andrew Kirkham

ATTORNEY-GENERAL'S COLUMN

THE FORTHCOMING AUTUMN SESSION of Parliament will see the introduction of a number of new pieces of legislation as well as debate of several Bills that have been lying over between sessions.

Among the legislation to be introduced are changes to the forensic samples provisions of the *Crimes Act* which will allow police to take samples of hair, fingernail scrapings and skin swabs from people suspected of violent crimes against the person such as murder, rape, kidnapping and manslaughter.

If a suspect does not consent, then the police may apply to a Magistrates' Court for an order to compel the suspect to provide the sample. A number of strict safeguards must be met before the court can make an order including that there are already reasonable grounds to believe that the person has committed the offence and that there is a body sample at the scene of the crime which can be matched with the sample. The court must also be satisfied that the sample is likely to confirm or disprove the person's involvement. Ultimately the court has to be satisfied in all the circumstances that the making of an order is justified.

Blood samples legislation commenced in June 1990 and a sunset clause was imposed by the Opposition in the Upper House. The sunset clause was lifted by the Government last year. The operation of fingerprinting and blood sample legislation has now been observed for some time and we are in a position to be able to extend it to include these other forensic samples.

Blood and other samples are used for direct identification, for comparative purposes or for DNA analysis.

The extension of the legislation is based on recommendations by the Consultative Committee on Police Powers of Investigation chaired by the former Director of Public Prosecutions, Mr. John Coldrey Q.C. The Committee recommended that the range of samples could include hair, fingernail scrapings, swabs for gunshot residues and other skin swabs.

The legislation will also permit court-ordered post-conviction blood sampling in the case of serious sexual offences where there is a reasonable likelihood of repeat offences. Strict safeguards must be met before the court can make an order particularly that the convicted person is likely to repeat offend. This measure is expected to operate as a deterrent. It will also provide information for detection purposes.

The changes have been a carefully targeted extension which balance genuine concerns about privacy and civil liberties and the need for effective investigatory techniques. They complement a range of Government initiatives to combat sexual offences and violence against women and children.

DE FACTOS

The Government will again be endeavouring to have its Administration and Probate Bill passed by the parliament. The Bill makes provision for de facto partners if their partner dies intestate. Shortly, Victoria will be alone among the States and Territories in not making provision for de factos in that area. It also provides for children of previous marriages and relationships. This Bill has been before the parliament since before 1989. It also corrects the anomaly of where a married couple die simultaneously the older is deemed to have died first. There is con-

siderable support from the legal profession and other groups for the changes.

CRIMES FRAUD BILL

The Crimes Fraud Bill has been lying over between sessions of parliament and the comments of many people and groups have been sought. Under the legislation the DPP can apply in certain cases to forego the committal proceedings and go directly to trial. There will also be an opportunity for the defence to present a no-case submission on the basis of insufficient evidence to support a conviction. The Bill is based on the United Kingdom serious fraud legislation, *Criminal Justice Act* 1987.

CLOSED CIRCUIT TELEVISION

In the past year the Government has made changes to the *Evidence Act* which enable witnesses, both children and adults, in sexual assault cases to testify via closed circuit television. The facilities are now available in the Geelong Court, the Melbourne County Court and at Elwood for committals and matters that can be heard by a magistrate.

TWO COUNSEL RULE

I welcome the recent announcement by the Bar to abolish the two counsel rule. It is pleasing to see that one of the changes recommended in the Victorian Law Reform Commission's discussion paper has been adopted. The Commission's final report is expected at the end of March. I will consider carefully the recommendations in that report and will be consulting with members of the Bar and other interested parties at the appropriate time.

NEW COURTS

The new, $17 million Geelong Court was opened at the end of January. The complex contains seven courts and two hearing rooms. There is one Supreme Court, three County Courts, three Magistrates' Courts and two hearing rooms for matters such as Children's Court and tribunals. All jurisdictions have co-ordinated facilities which allow for enhanced flexibility of operations.

Since 1986 the Government has spent more than $70 million building and renovating courts throughout Victoria. As well, more than $30 million has been spent computerising the courts, with nearly all of the State's 69 Magistrates' Courts linked by a central computer. Supreme and County Court judges have access to laptop computers and both courts are supported by separate computer systems.

New Magistrates' Courts Complexes will be built at Frankston, Ringwood and Dandenong in a $30 million building program. Work is about to start on the Frankston complex and all three new complexes are expected to be finished in 1994. The new courts will meet the needs of these expanding population centres.

JUDICIAL STUDIES BOARD

A Judicial Studies Board had been established by the Government to research sentencing matters and conduct seminars for judges and magistrates on sentencing matters. It will also prepare sentencing guidelines and circulate them among judges and magistrates. It will be chaired by the Chief Justice of the Supreme Court, Justice Phillips, and will have a staff of researchers. The *Judicial Studies Board Act* was proclaimed in February this year and follows a recommendation of the Starke Committee. Headed by former Supreme Court judge Sir John Starke, the Starke Committee comprehensively reviewed Victoria's sentencing provisions. The Sentencing Bill based on the Committee's report was passed by the Parliament last year. It is to be proclaimed in the near future.

The Board Members are:
Chief Justice of the Supreme Court
Justice Phillips
Supreme Court Judge Justice Crockett
Chief Judge of the County Court
Judge Waldron
Judge O'Shea of the County Court
Chief Magistrate Sally Brown
Dr. Austin Lovegrove, reader in Criminology, University of Melbourne
Mr. Bill Kidston, former Director-General of Corrections and member of the Starke Committee.

BUREAU OF CRIME STATISTICS AND RESEARCH

A Bureau of Crime Statistics and Research has been established by the Government to improve the effectiveness of the justice system's response to crime. It will collect, collate and standardise criminal justice statistics in an independent manner. It will be able to provide a quick and accurate diagnosis of changing criminal patterns and monitor the effects of important criminal justice initiatives. Statistical information will be provided to judges, magistrates and other interested people, and the bureau will publish statistical reports on the criminal justice system and bulletins on issues of current importance.

Dr. David Brereton, a Senior Lecturer in the Department of Legal Studies at La Trobe University, is to be the director of the Bureau.

JIM KENNAN
Attorney-General

VICTORIAN BAR NEWS EASTER 1971

It is almost exactly 21 years since the first issue of *Victorian Bar News* was published at Easter 1971. It was originally designed as a means of keeping members of the Bar abreast of what the Bar Council was doing. Its aims have become more ambitious since then. But we hope that it still fulfills its prime purpose. The first issue of *Victorian Bar News* is reproduced in full below.

VICTORIAN BAR NEWS

No 1 Easter 1971

The Newsletter

"What's the Bar Council doing about it?" has long been the cry of members of the Bar. This question has often been provoked by a desire to know about the ethics rulings, investigations, representations to various authorities, procedural problems and sundry matters affecting counsel which have been or ought to have been the subject of the Council's attention.

By means of this quarterly publication the Bar Council hope to keep the Bar informed of these matters. This will be done by providing a brief account of the rulings made and other matters of interest.

Counsels' Fees

A committee has been appointed by the Bar Council to review the County Court scale of counsels' fees. It is now nearing completion of its work.

The committee will be in a position to expedite its recommendations if members of the Bar take the time and trouble to give their opinions in the questionnaire being circulated with the approval of the Bar Council.

The questionnaire raises issues of principle relevant to fees in all courts.

It is desirable that views on this questionnaire be given by **all members of the Bar** wherever they practice.

Victorian County Court fees have fallen far behind those in equivalent interstate courts — some examples:

Scale	Brief Fee			Percentage Above Vic.
Over $1,500 to $2,000	Vic $54	N.S.W.	$77.00	43%
		Qld.	$78.75	46%
Over $2,000 to $4,000	Vic. $65	Qld	$105.00	62%
Over $5,000 to $8,000	Vic. $80	Qld	$126.00	58%
		S.A.	$170.00	113%

Except for the addition of a further scale when jurisdiction was increased in 1966 and minor adjustments up or down upon the introduction of decimal currency the Victorian County Court scale has remained stationary since 1962.

Time for Payment

In the absence of an agreement to the contrary between the solicitor and counsel or his clerk, counsels' fees in all matters shoudl be paid within 90 days of the rendering of the voucher for fees. (Joint Statement 1962).

Civil Juries

In 1970 the Bar Council set up three committees to consider improvements in compensating injured persons.

It was one of these committees which initiated, investigated and formulated the reform of setting up a fund from insurance premiums to pay hospital expenses without the necessity of ascertaining liability in motor accident cases. This will enable hospital accounts to be settled promptly. The Attorney-General has announced that the scheme is to be implemented.

The Bar Council adopted the recommendation that the County Court jurisdiction be increased to $12,000 in motor collision cases and $8,000 in other personal injuries cases. It also supported a procedure for the immediate transfer from the Supreme Court of cases within the extended County Court jurisdiction.

The Bar Council is considering another report upon procedural improvements to speed up the hearing of personal injuries cases. It would welcome any suggestions from members of the Bar.

Law Reform

In response to representations from the Bar Council the Bill giving the Crown the right to appeal against sentences was amended to provide that no appeal be taken without the consent of the Attorney-General or a Minister acting on his behalf.

Legal Education

Steps are being taken to bring into existence an incorporated Continuing Legal Education Foundation to provide post graduate education for the legal profession. The Bar Council has appointed Ogden, Q.C. and Woodward, Q.C. as its representatives on the provisional board.

The law course conducted by the Council of Legal Education at the Royal Melbourne Institute of Technology again applied a quota of 95 new students this year.

Death of Maurice Ashkanasy, C.M.G., LL.M., Q.C.

The Bar mourns the passing of Maurice Ashkanasy. No member of the Bar is more responsible than he for the form and organization of the Victorian Bar today. It was the Bar Council under his vigorous chairmanship commencing in 1953 which initiated the change of role from the pre-war Bar Council concerned mainly with questions of ethics to the present position of a Council controlling city buildings and taking responsibility for accommodation, clerking, fees, superannuation and the other conditions of a barrister's practice. As Chairman, "Ash" insisted that junior counsel could not be allowed to remain in the corridors of Selborne Chambers. He spent his lunch hours searching for accommodation. He gave evidence in court proceedings to obtain possession of premises for chambers. He transmitted to later Bar Councils his concern for the welfare of the junior bar.

In court he was a redoubtable opponent and a master tactician. The underdog and clients with unpopular causes found a mountain of strength in Maurice Ashkanasy. The rule of law was basic to his philosophy. He held high office with the International Commission of Jurists.

He distinguished himself in the A.I.F. and within the Jewish community. The Bar has lost a strong, courageous and capable leader.

Licence

A committee appointed by the Bar Council has been investigating the feasibility of a liquor licence on the thirteenth floor. Its report has just been delivered to the Bar Council.

Counsel on the Roll

Signed the Bar Roll during 1971.

Name	Master	Clerk
P.J. Moran	G.A.N. Brown	Spurr
J.T. Hassett	McPhee	Dever
D.J. Walls	Dawson	Spurr
B.G. Walmsley	Storey	Foley
C.A. Connor	Hart	Spurr
W.M. Pinner	Tolhurst	Spurr
C.W. Rosen	Charles	Spurr
Hon. G.O. Reid	(Attorney-General)	
Z.R.G.C.B. Muftyzade	Asche	Spurr
F.W. Hender	J.H. Phillips	Foley
M. Raiskums	Smithers	Hyland
B.A. Murphy	Mattei	Calnin
R.B. Pritchard	Batt	Hyland

Name	Master	Clerk
P.E. Bennett	Ellis	Foley
B.D. Lawrence	Spence	Hyland
R.A. Wilson	A. Graham	Foley
C.D. Griffen	D. Bennett	Hyland
P. Hobson	Liddell	Dever
P.L. McCurdy	Monester	Hyland
M.J. Alexander	Winneke	Dever

The Future

8th May, 1971 Bar Dinner. Honoured Guests: Mr. Justice Aird, Mr. Justice Stephen, Judge Gorman and Mr. Justice Coldham.

June, 1971 Bar Revue.

Report in "Age" March, 29th

"Car Crash Juries May Be Dropped"

It is understood that the Attorney-General is not presently considering the introduction of legislation either to abolish the trial of personal injury actions or to introduce no fault liability.

IT'S YOUR BAR COUNCIL

ONCE AGAIN IT HAS BEEN A QUARTER of considerable activity on the part of your Bar Council. Apart from the considerable amount of time devoted to membership, the Bar Council's activities have included the following:

DECISIONS OF THE COUNCIL

1. To appoint Buckner Q.C. [Chairman], O'Callaghan Q.C., Emmerson Q.C., Myers Q.C., Habersberger Q.C., Jessup Q.C., Crennan Q.C., Kellam and Colbran as Directors of Barristers Chambers Limited.
2. To support the adoption on a national basis of the two counsel rule recently adopted in Queensland.
3. Annual Bar Subscriptions increased by 25%.
4. The Bar Council not to support Leo Cussen Institute financially.
5. To join with the Law Institute in supporting the securing of the Royal Mint site for the purposes of a new County Court building.
6. To meet the costs of the Bar's children's Christmas Party.
7. To appoint Mr. John Sutton as Assistant to the Chairman.
8. To rescind a previous resolution concerning the Duty Lawyer Scheme and to resolve that it is inappropriate for Barristers to participate in the scheme whilst it remains in its present form.
9. That it is inappropriate for Counsel to seek unrecovered fees from lay clients except in specified limited circumstances.
10. To appoint a Demographics Committee.
11. To appoint a Pro Bono Committee.
12. To endorse a Pro Bono Scheme under which it is recommended that members of the Bar provide one day each of their time free of charge to the provision of legal services to those otherwise unable to afford it.
13. The Bar Council resign as a member of the Victorian Council of Professions.

MATTERS CONSIDERED BY THE COUNCIL

1. Procedures for the listing of personal injuries actions in the Supreme Court.
2. The Law Reform Commission Discussion Papers.

3. Refurbishment of the 12th Floor ODCE and various other areas.
4. Various leasing and purchasing options being considered by BCL.
5. Thefts from BCL premises and the employment of a security guard.
6. The size of, and allocation of readers to, Clerking Lists.
7. Appointment of Office-bearers for the 1991–2 Bar Council.
8. The engagement of John Harvey and Associates as strategists for the Bar.
9. Bonus schemes for Crown Prosecutors.
10. New Rules of Conduct [This will be dealt with in detail in the next edition of *Bar News*].
11. Submissions from the Legal Aid Commission concerning Orders for Costs Against Police, Appeals Costs Certificates, Briefing of Counsel in Legal Aid matters, the proposed Pro Bono Scheme.
12. The proposed reduction of fees by the Legal Aid Commission.

YOUR COMMENTS

Although those outside the Bar have commented often and vigorously on the decisions made and not made by the Bar Council, members of the Bar have been strangely reluctant to air *their* views of *their* Council through *their* magazine, *Bar News*. As always *Bar News* is willing to share your views with its other readers.

CRIMINAL BAR ASSOCIATION REPORT

ANOMALIES IN CAP FOR LEGAL AID DEFENCE

THE LEGAL AID COMMISSION CAP FOR the defence (irrespective of the number of accused) of $200,000.00 is arbitrary and anomalous. In a recent case, three out of four accused obtained aid in what was to be a relatively lengthy trial. The fourth accused was initially denied aid, but after persistent representations on his behalf was granted it. However, it was assessed that the consequence of his being granted aid would bring the total costs of representation over the $200,000.00 cap resulting in the withdrawal of aid for all. Due to the difficulties in proceeding against four unrepresented accused, the prosecution made a successful application to sever the presentment with the original three with aid to be tried together and the fourth being ordered to stand trial alone. Aid for the three original recipients of aid was reinstated. Presumably aid will be granted for the fourth accused also!

We must, however, recognise the plight of the Commission called upon to fund an ever increasing number of difficult and complex cases in addition to the more run of the mill case on an ever diminishing budget. Much of that pressure comes, of course, from Government, in this instance particularly the State Government, whose contributions to the Legal Aid coffers are indeed miniscule (approximately 4%), the main State component coming from interest on the Solicitors' Guarantee Fund which of course is not public money in any real sense of the word but is money generated from within the profession.

In the debate about funding of long and complex criminal cases the following seems particularly apt:

"What should concern the public is that the capping of Legal Aid funds available for the defence is not going to be matched by the capping of funds available for the police and the Crown . . ."

Interestingly, this is an extract from a letter in *The Spectator*, 15th February 1992 by a provincial law society president responding to a letter to the same publication by the Lord Chancellor regarding, amongst other things, the cost of legal aid.

THE HAKKOPIAN CASE: A MEDIA BEATUP

Whatever the motives of the media might have been in the recent prominence given to the sentencing approach of Judge Jones of the County Court of the man convicted of raping a prostitute, they did not include promoting an atmosphere for dispassionate and sensible public dialogue about the real matter at issue. Anyone with a modicum of knowledge of the

principles of the criminal law and, in particular, sentencing would have appreciated that Judge Jones' decision was but an application of fundamental sentencing principles which recognise the following:

- ☐ within every category of offence there is a range of seriousness;
- ☐ an aspect of seriousness is the impact upon the particular victim.

Bearing these principles in mind the Judge has proceeded to do what should be obvious — in assessing the severity of the offence he has made the judgment that the horror and revulsion experienced by the prostitute who has just engaged in paid consenting sex with her assailant are probably less than that experienced by a chaste woman abducted in the street and raped. The Judge's (and the Full Court's) critics would, no doubt, contend for a standardised sentence which would apply the same sentence in both instances! The fact is that the issue beaten up by the media is not a real issue. The only issue is whether there are mechanisms by which the Courts might not be better informed as to the impact of crime upon a particular victim. Even so, that aspect must be but one of numerous other considerations a Judge must take into account in sentencing.

AN EYE FOR FIGURES

The financial difficulties of the Legal Aid Commission alluded to above do not justify the sleight of hand it has employed in its public dialogue about fee levels. Soon after the Commission's unilateral move to reduce fees payable to both barristers and solicitors, the Director of the Commission was reported in *The Age* (28/2/92) as having said that lawyers had resisted attempts to help the needy by rejecting an 8% fee cut.

Curious, because we all thought it was 10% for all barristers' fees, it having been changed from 20% of all Magistrates' Court fees as a result of Bar Council representations that this would operate inequitably.

How then 8%? Very simple. Take a fee of $100. Under Legal Aid the barrister gets 80%, namely, $80. Then cut his payment by 10% and the figure is $72. Alternatively, cut the initial fee to $90 and pay him 80% — again he gets 10% less — $72. But we have overlooked the realities — he once got 80% of the notional $100. Now he gets 72% of that same notional $100 — an 8% drop. See!

CRIMINAL BAR DINNER

Get out your diaries (or electronic organisers) — the first of this year's Criminal Bar Dinners will be held on Wednesday, 15 April 1992 at Diamond Dynasty Restaurant, 178 Little Bourke Street, Melbourne. Members will be able to bring a guest.

4th INTERNATIONAL CRIMINAL BAR CONGRESS — AUCKLAND 13–18 AUGUST 1992

Members are reminded of this coming event and encouraged to attend. It promises to be the best yet with the Chairman, Kent, and Lovitt leading the Victorian charge!

Robert Webster

PROSECUTORS FOR THE QUEEN: MORE WORK, OR COMPROMISE OF INDEPENDENCE?

The D.P.P. replies

IN THE LAST EDITION OF *BAR NEWS* there appeared an article, reprinted from *The Age*, by Michael Barnard, critical of what was described as a "bonus" scheme for the payment of Crown Prosecutors. As Mr. Barnard did not bother to ascertain the facts before he wrote, I should set the record straight. Indeed, the passage of a further few months since Mr. Barnard wrote has further changed the scene so that I am now able to present the current situation with respect to a salary increase for Prosecutors.

There are presently 13 members of the Victorian Bar permanently retained by the Crown to act as Prosecutors in criminal cases. The Office

of the Director of Public Prosecutions, which has the responsibility for the prosecution of all State criminal cases in the higher courts, provides them with all their work and pays their salaries (just over $81,000 plus benefits). In fact, most criminal cases (probably over 75%) are prosecuted by barristers in private practice briefed by the D.P.P. and paid on a fee for service basis.

At the time I was appointed to the position of Director of Public Prosecutions (February last year) the morale of Crown Prosecutors was not high; they believed their salaries had not kept pace with others in the criminal justice system (they were about $12,000 behind their N.S.W. counterparts); their numbers had fallen because of resignations and they did not all enjoy a reputation amongst their fellow barristers or the judiciary for hard work. The infrequent court appearances of some of them were becoming the subject of (sometimes ribald) humour.

I attempted to address this problem as much in the interest of the Prosecutors themselves as in the interest of the public who was paying them. I undertook a study of their work practices and found that their productivity (particularly in terms of actual court appearances) was far worse than I had ever imagined. In the financial year up to May 1991 one Prosecutor had been to court on only 6 days! In the previous financial year he had managed 18. The average for all Prosecutors who were available over the whole of the same period was about 50 days in court. By way of contrast, for the *month* of March 1991 N.S.W. Prosecutors available to prosecute in the Sydney region averaged over 10 days in court each. Whilst the comparison is not an exact one it is sufficiently accurate to indicate an order of magnitude. A busy Victorian junior barrister in private practice (not a Q.C.) would easily be able to achieve 12 days a month in court and many would achieve more.

In light of the above I could not support any increase in salaries for Prosecutors without a considerable increase in their work output, particularly with respect to work in court. Accordingly, I proposed to a meeting of Prosecutors that only if they were able to "lift their game" could I justify recommending an increase in salary up to the N.S.W. level. This increase would be funded from the savings effected by not having to brief out so much work to private barristers. The overwhelming majority of Prosecutors accepted the proposal enthusiastically and I obtained approval in principle for it from the Attorney-General.

On 1 July 1991 a briefing co-ordinator was appointed in the Office of the Solicitor to the D.P.P. His function is to make sure that Prosecutors are as fully employed as possible by co-ordinating their court appearances and chambers work in much the same way as a barristers' clerk does. This move has been remarkably successful in improving productivity. Although a lack of management data before July 1991 makes comparison difficult it seems that a productivity gain (measured in Prosecutor-court days) of well over 50% has been achieved. This improvement is little short of phenomenal when one considers that in the industrial area a productivity increase of 3% would be considered significant. There is still a wide disparity between the most productive and the least productive Prosecutor in terms of output, both in court days and in chambers work, but I am hopeful that disparity might lessen when performance standards based upon the 6-month period referred to have been formulated. It is upon each Prosecutor meeting these minimum performance standards that the higher salary will be paid.

There has not been, nor will there be whilst I hold this office, any interference with the independence of Crown Prosecutors. Independence in the proper performance of their function, however, does not confer the right to be paid without working. To equate the requirement that Crown Prosecutors work with an attack on judicial independence is tendentious to say the least.

Finally, I regard it as unfortunate that this matter took on the features of a public brawl. The majority of Prosecutors have expressed only enthusiasm for the new system. It is not fair to them, nor to those whose work practices have never been other than exemplary, for an artifically generated dispute, not of their making, to become public, but in the interests of the Victorian public I would not allow the article to which I have referred to go unanswered.

Bernard D. Bongiorno Q.C.
Director of Public Prosecutions

WELCOME

Richard Elgin McGarvie Vale Et Ave

RICHARD ELGIN McGARVIE WAS BORN in 1926. His parents, Richard and Mabel McGarvie, were on the land at Pomborneit East in Victoria's Western District where they ran a dairy farm, Dick being one of four brothers. His primary education was at the State School at Pomborneit East; his secondary education was at Camperdown High School during the early years of World War II. He had scarcely finished it when, in 1944, at the age of 18, he joined the Royal Australian Navy, serving as an Able-Bodied Seaman until his discharge in 1946. His association with the sea, however, continued and the lower deck sailor eventually obtained command of a craft — a Gwen class yacht. Sailing has been his chief recreation, although members of the Beaumaris Yacht Club would concede that his tactics on Port Phillip Bay have not quite reached the heights of those he displayed as a barrister.

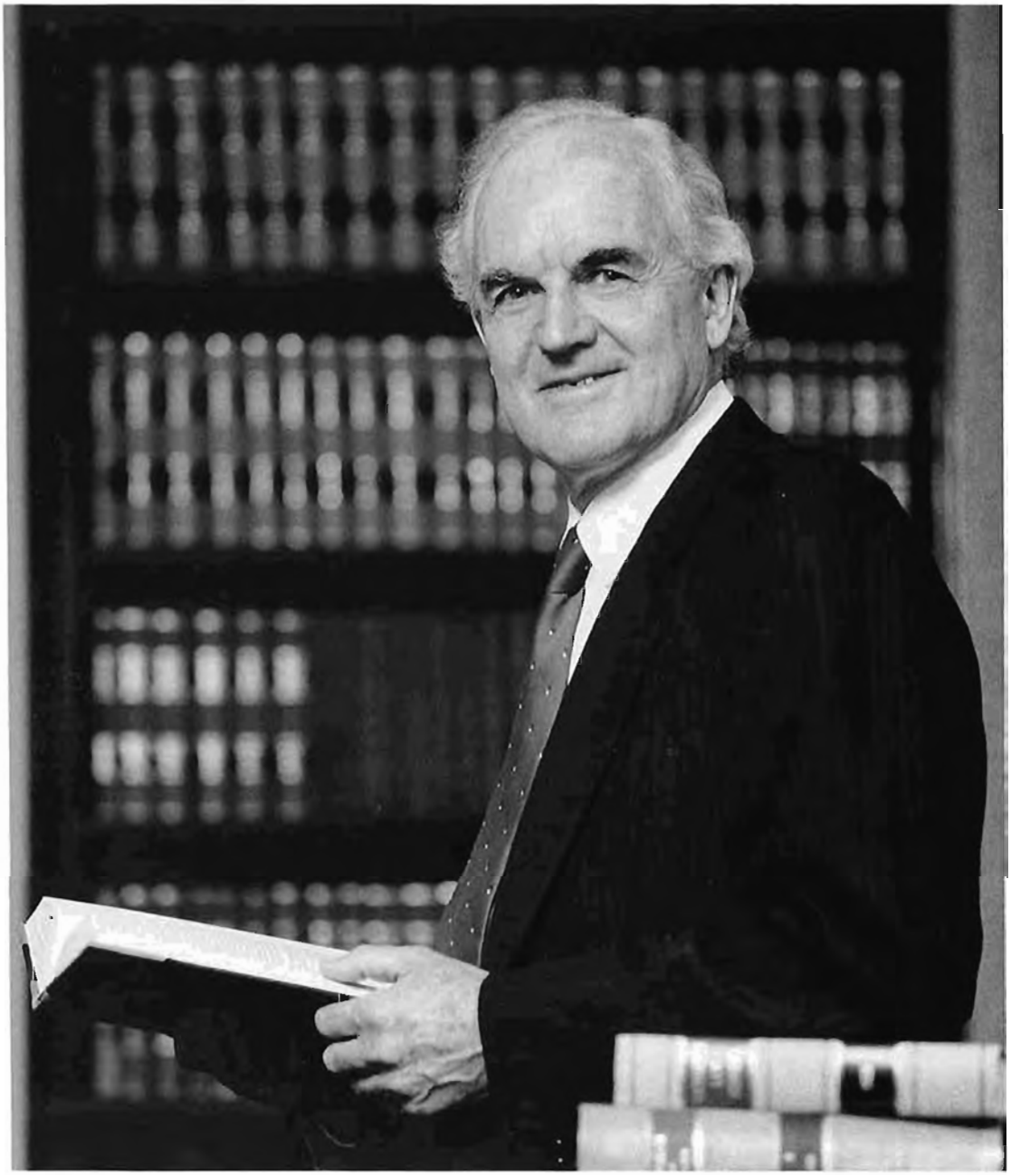
He began a law course at the University of Melbourne in 1947. He finished this with distinction in 1950 by taking the Supreme Court Prize. Throughout the course, he took a keen interest in the Law Students' Society, holding several executive positions. He also found time to take up boxing — a sport one might consider out of character. Perhaps he thought some practical experience in self-defence would assist in mastering the legal principles of that doctrine. Certainly his friend John Bland's (Judge Bland) lessons were more easily understood and applied than were the legal principles of self-defence as enunciated from time to time in the law books.

His Honour served articles with Phillips Fox Masel. In 1952 he signed the Bar Roll and read with Lush of Counsel. It could hardly have crossed the mind of the youthful reader that he and his master, thirty-three years on, would each be the Chancellor of a Victorian University.

In 1953 he married Lesley Kerr, the daughter of a Bendigo medical practitioner and a gifted musician. Lesley, a lady of considerable warmth, poise, and charm, and Dick, have proved to be perfect partners for each other in the ensuing forty years. Love of the law has rubbed off on three of their children. Richard is at the Bar and Michael a partner with Holding Redlich & Co Daughter Ann has just completed a law course and is doing articles this year. It is therefore left to daughter Robyn, a nursing sister, to bring some balance to family discussions.

He also found time to take up boxing — a sport one might consider out of character. Perhaps he thought some practical experience in self-defence would assist in mastering the legal principles of that doctrine.

In 1957, when he had been at the Bar for only five years, he was appointed Independent Lecturer in Contract at his old alma mater. In the same year, he became a member of the Faculty of Law at Melbourne and was there without a break for twenty-one years. One of his particular interests whilst on the Faculty was the content of the curriculum. He was a member of the Curriculum Revision Committee which introduced a new era of balance between core subjects and the ever-increasing range of optional subjects; this curriculum formed the basis of the original law course at Monash University.



Mr. Justice McGarvie.

In 1960 he began his first stint on the Bar Council and served on it until 1965. In 1962 the first of four editions of *Cases and Materials on Contract*, which he co-authored with Pannam and Hocker, was published; thereafter generations of law students have been brought up on it.

His outstanding ability as a lawyer and advocate was quickly recognised by solicitors and he established a busy junior practice in which he displayed an ability to excel in virtually every jurisdiction. It was no surprise to anyone when, in his thirteenth year of practice and at the age of 37, he took Silk in 1963. In 1966 when Lush Q.C. was appointed to the Supreme Court, he took over the chambers on the fourth floor of Owen Dixon East which had been occupied by his former master. He remained there until he himself was appointed to the Supreme Court in 1976. During this time, as if he had nothing else to do,

he completed a Commerce degree part-time at the University of Melbourne. He had a large appellate practice and appeared frequently in the High Court. Indeed, he must be the only Q.C. to leave the High Court's then premises in Darlinghurst by a perilous climb (risking his manhood) over the picketed fence, having been locked in with his junior, Len Ostrowski (Judge Ostrowski), after working back until 6.00 p.m. and having to catch a plane back to Melbourne at 7.00 p.m.

Monash University secured his services in two areas of the law, in 1965 as a consultant in Contracts and in 1969 as a consultant in Industrial Law. From 1970 to 1972 he served on the Molomby Committee on Fair Consumer Credit Laws.

Moving in high places has never effaced the genuine friendliness or the common touch of the country boy from the dairy farm in Pomborneit East. It is difficult to think of a more suitable couple than Dick and his wife, Lesley, to be Victoria's first citizens.

In 1970 he commenced his second stint on the Bar Council on which he served for the next five years both as Vice-Chairman and from 1973–75 as Chairman. During this period he was also a member of the Executive of the Law Council of Australia as well as being its Treasurer.

In 1973 he became the Foundation Chairman of the National Committee on Discrimination in Employment and Occupation and served on the Committee for the ensuing four years. He was also a member of the Law Reform Advisory Council of Victoria.

His Honour has always taken a keen interest in issues concerning human rights and poverty, particularly in our neighbouring countries. He was a founding member of the Beaumaris branch of Community Aid Abroad, its President for some twenty years and is still on the Committee. He visited Malaysia and made a study tour in India, living in a village, not in a three-star hotel, which is typical of the man. He has had a long association with Amnesty International. In 1975 he led an Amnesty mission to Indonesia and he has been involved in efforts to assist lawyers in Malaysia and Indonesia who have been victimised.

Although he had been a prominent and active member of the Victorian Branch of the Australian Labor Party, including chairman of its Disputes Tribunal, he was appointed by a Liberal Government to the Supreme Court in 1976 — a tribute both to himself and the Government. "E'en the ranks of Tuscany could scarce forebear a cheer." The Government made a wise choice. Qualities which had been noted by his colleagues at the Bar — patience, courtesy, a capacity for calm analysis of problems, a deep commitment to justice, an underlying sense of fair play — soon became apparent on the Bench and became the basis for an ideal judicial temperament.

In 1980 he became a member of the Council of Monash University. In 1981 he was appointed Chancellor of La Trobe University.

About the time of his appointment to the Bench he became a member of the Council of the Australian Institute of Judicial Administration. In 1980 he became Deputy Chairman and from 1984 to 1986 he was Chairman. By reason of his leadership and vision he rendered the Institute outstanding service. This was recognised when he was made a Fellow of the Institute in 1987. During the years 1985–87 he was a member of the Constitutional Commission's Australian Judicial System Advisory Committee. He has played a prominent role at the annual meetings of the Australian Supreme Court Judges' Conference. In recent years he has written a series of perceptive papers on Judicial Administration and the Independence of the Judiciary.

Throughout a long and distinguished career, His Honour has remained approachable, unassuming and entirely without pretence both on and off the Bench. Moving in high places has never effaced the genuine friendliness or the common touch of the country boy from the dairy farm in Pomborneit East. It is difficult to think of a more suitable couple than Dick and his wife, Lesley, to be Victoria's first citizens. The Vice-Regal appointment has brought great pleasure to their friends in the Law, particularly at the Bar; and *Bar News* confidently predicts that it will soon be shared by the people of Victoria when they get to know their new first citizens.

We say vale to His Honour with more than a tinge of regret. We say ave to His Excellency with great joy and enthusiasm and wish the McGarvies well in the discharge of their high office.

WELCOME

Michael Rozenes — Commonwealth DPP

IN DECEMBER 1991, MICHAEL ROZENES was appointed the Commonwealth DPP.

The path to this appointment started at the Law Offices of Galbally & O'Bryan and finished with a successful practice as a Silk at the Victorian Bar. When asked to write a short tribute to Michael, I asked a number of his friends and colleagues about him. The reply was: Michael — bow ties, intelligent, smiling etc. but the universal comment was '*He's a good bloke*'.

Michael was employed at the offices of Galbally & O'Bryan in the great old days of '*Mr Frank*'. His first court appearance for that firm was assisting Mr Frank, and his anxiety levels rose as they were walking into court when he was told '*You'll be making the legal submissions,*

Michael'. When Michael proffered a comment that he wasn't too sure what he should be submitting, he was told '*Don't worry, Michael, they're judges and they know the law*". On that day Michael demonstrated for the first time the agility and humour combined with powerful intellect that was to serve him well when he came to the Bar. Michael came to the Bar in late 1972 leaving behind many good friends at Galbally & O'Bryan. He read in the Chambers of his relative, friend and mentor, Mr Justice George Hampel. This meant an involvement in the life of the First Floor of Owen Dixon Chambers. The criminal Bar was very strongly represented on the First Floor — Jack Lazarus, Mr Justice Phillips, John Walker Q.C. and many others. Michael became an integral part of the lifestyle of the First Floor. The First Floor of Owen Dixon Chambers in the '70s, in addition to the strong criminal Bar, had a strong commercial Bar in Goldberg Q.C., Merkel Q.C. and Pannam Q.C. These Silks ran busy practices but invariably had an open hour after 6 o'clock at night, especially on Friday. Many a glass of wine and tall stories were told and Michael, to this day, had continued that tradition. Mr Justice Hampel, because of his close friendship with the commercial Silks, perhaps led the way to that cross-fertilisation between the criminal Bar and the commercial Bar that was later to serve Michael well in the development of his '*white collar*' practice.

Michael had a busy junior practice, finding time to assist the courts with '*intuitive synthesis*', and made frequent appearances before the Court of Criminal Appeal. The training afforded a criminal barrister by appearing in Magistrates' Courts and then doing Legal Aid trials is an invaluable one. Appearances in many robbery trials alongside Frank Vincent Q.C. and others, together with murder trials provided Michael with a strong sense of justice and feeling for the underdog which he retains to this day.

Clients didn't always remember the name and as one old lag said to Sir Henry Winneke in seeking to identify his mouth-piece, '*you know, the one like Sammy Davis Junior*' and the name stuck. Michael became increasingly involved in white collar crime, perhaps starting with the Magna Alloy trials and the Mount Ridley Land deals, and rose to pre-eminence at the criminal Bar.

Michael and Ray Finkelstein were the first Q.C.s to be appointed from those who had completed law degrees at Monash University Law School.

As a junior and a Silk, Michael was involved in the search warrant cases (*Baker* and *Campbell*) and this together with the prosecution of tax offences led to an advisory practice that was unique at the criminal Bar. For months on end Michael would not be in court but would be advising a series of sleek company directors and bankers. He did however get into court and in 1990 when appearing for a man by the name of Moses, managed a novel way of approaching the Prosecutor (Robert Richter Q.C.) by crooning before and after court '*Let my people go, let my people go*'.

Michael will be sadly missed by his fellow barristers in Golan Heights. He has been a fine barrister and tremendous friend. All those who know him, wish him well.

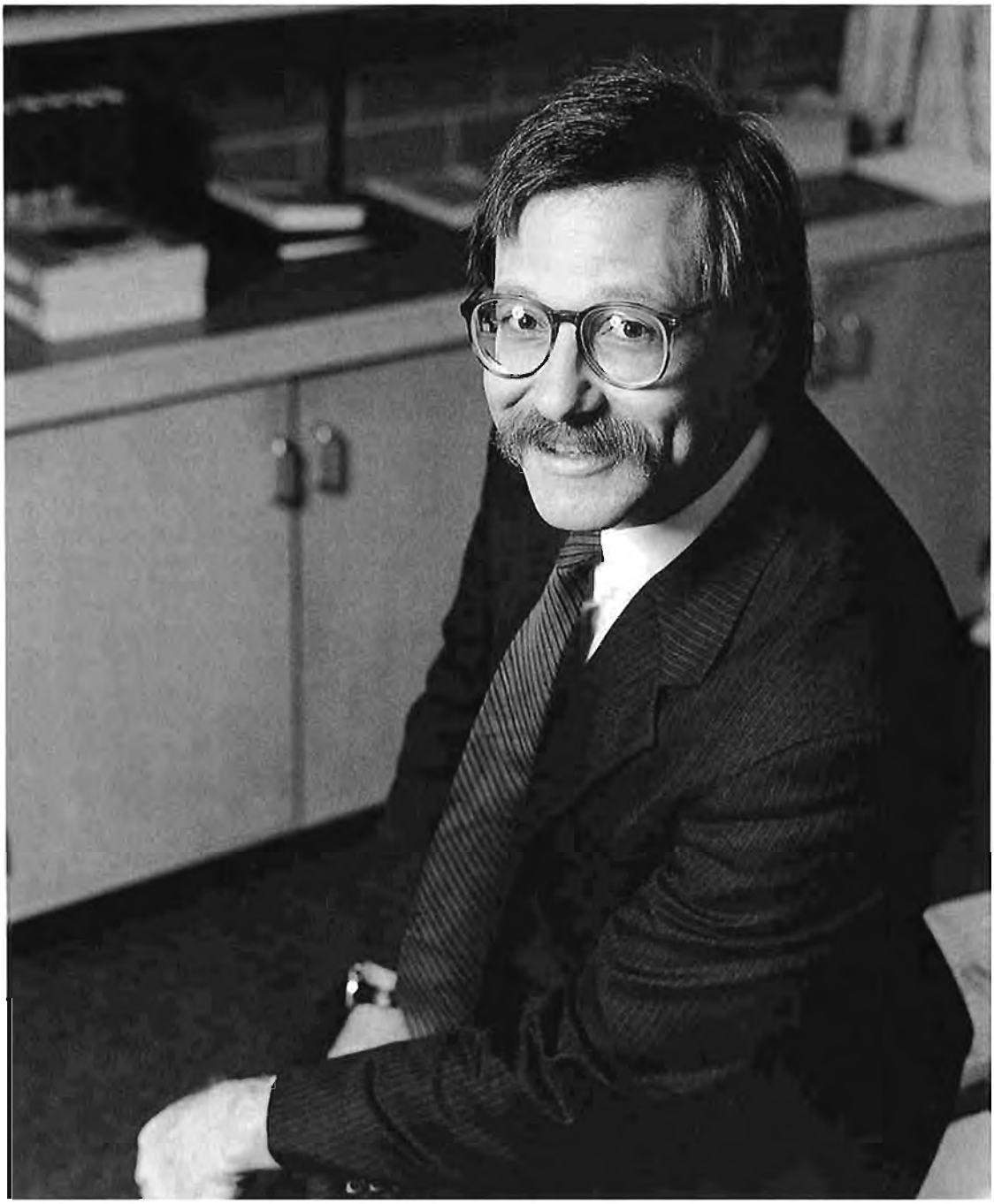
Goldberg M.

PHILLIP GOLDBERG WAS APPOINTED A Magistrate in August 1991 and even in the short time since his appointment, he has established a reputation for intelligent and insightful decision-making. He is courteous and tolerant to all who appear before him with the one exception of those who come to the Bar Table ill-prepared. His Worship expects that at least some of the thorough and purposeful preparation which he gave to his work whilst at the Bar will have been done by those who appear in his court.

His Worship acquired his urbanity from reading in the chambers of Porter in 1980. Prior to being called to the Bar, he practised as a solicitor with Behan and Speed where he had been articled. The tenancy of His Worship was natural and soundly tested with his staunch support of the St. Kilda Football Club.

His Worship's practice during the ensuing decade was wide and extensive, but was mainly criminal and civil work in the Magistrates' Courts. His advice was widely sought after by many of us and we rarely found him unable to give accurate and helpful extempore solutions to the thorniest of problems. If the answers were not immediately forthcoming, he would not delay in passing on the benefit of his overnight reflection on the matter. Only Fanning had the benefit of reading with His Worship, but we are sure he would have been the first of many to have learned the proper practice of the Bar from His Worship. Yet one could be mistaken for believing that he had numerous readers in the light of the many readers who took advantage of his "open door".

For many years His Worship has been a well regarded and successful sporting coach and team manager (Australian Women's Hockey Squad, St. Kilda Under 19s and more recently St. Kilda Reserves). No matter how tired from the busi-



Goldberg M.

ness of the day he may have been, he was for most evenings of the week and again on weekends unstinting of his time and energy in supporting and enhancing sporting skills and ideals in others. His ready wit and warm humour are as welcome on the field as they are in the courts.

Despite having a busy practice and sporting interests, His Worship was and remains keenly involved with his wife Evelyn in the parenting of their two young sons.

This relatively early appointment is applauded, and though the sentencing of His Worship to the Bench might be a lengthy one, he will serve it with grace and distinction and with no lack of learned charm. The Bar's loss will be the wider community's gain.

FAREWELLS

Mr. Justice Kaye A.O.

THE HONOURABLE WILLIAM KAYE A.O. retired as a Judge of the Supreme Court on the 8th February 1991, having served as a Judge since the 2nd March 1972.

Bill Kaye, as he was universally known, was born on the 8th February 1919 and was educated at Scotch College and the University of Melbourne, where he graduated as a Bachelor of Arts and Bachelor of Laws.

His Honour was an eminent member of that distinguished coterie within our Bar who were either students or very junior barristers when the Second World War began, who saw active service, and who in the late' forties and the' fifties formed a vital element in what came to be recognised throughout Australia as a very strong Common Law Bar.

Bill Kaye enlisted in the navy in 1941. He served as an officer in the Anti-Submarine Branch and was mobilized early in 1942 when he went to the sloop *H.M.A.S. Warrego.* He later served as anti-submarine officer on the corvette *H.M.A.S. Cowra* in the South-West Pacific and was promoted to Lieutenant. Late in 1945 he did his final law exams at the Naval Base at Rushcutters Bay.

His Honour was demobilised in February 1946 and, after completing articles, was admitted to practice on 1st October 1946. Three days later he signed the Bar Roll, joining what was, by today's standards, a very small Bar. He and Tony Murray (later Mr. Justice Murray), who was also a Naval Officer, signed the Bar Roll the same day, bringing the number in active practice to 95.

His Honour read with Trevor Rapke (later Judge Rapke) and Oliver Gillard (later Mr. Justice Gillard) and quickly developed a thriving practice. He was a fine advocate, a skilled cross-examiner, an able lawyer and most thorough in his preparation.

His Honour took silk in 1962 and was immediately in as much demand as a leader as he was as a junior.

Bill Kaye became a member of the Bar Council in 1966, was chairman of the Ethics Committee between 1967 and 1969, served on numerous sub-committees of the Bar, and also served on a number of bodies on which the Bar was represented.

His Honour became Vice-Chairman of the Bar Council in 1969 and early in 1971 became Chairman. He had taken an active interest in the proposal that we should have a *Bar News.* The first issue in 1971 appeared shortly after his appointment as Chairman and the short explanatory Editorial beginning "What's the Bar Council doing about it?" was written by His Honour.

His Honour was also an Executive Member of the Law Council of Australia (1971–72) and President of the Australian Bar Association (1971–72). He was also a director and later Deputy Chairman of Barristers' Chambers Limited.

On appointment His Honour became the 51st Judge of the Supreme Court and the first member of the Jewish community to be permanently appointed as a Judge of the Supreme Court. For the Jewish community it was a significant occasion and the present constitution of the Bench suggests it was later recognised as a wise and happy precedent.

As a Judge His Honour was dignified, humane, hard-working and learned, with a strong determination to achieve justice. At times His Honour had difficulty in maintaining patience with those whose standards fell far short of those which as a barrister His Honour had set for himself.

In addition to the heavy burden of the Supreme Court Bench His Honour assumed many other public duties. These included memberships of the Chief Justice's Law Reform Committee, the Supreme Court Library Committee of which His Honour was Chairman from 1988 until 1991 and of the Executive Committee of the Supreme Court Judges. He was also Chairman of the Solicitors' Remuneration Order Committee (1979–91) and a member of the Costs (Legal Profession) Co-ordination Committee (1987–91).

His Honour was also active within the Jewish community and held a number of executive positions on the International Association of Jewish Lawyers and Jurists.

Bill Kaye always continued to take a keen interest in the Bar and was a frequent visitor to Owen Dixon Chambers. A friendly gregarious

man, His Honour has enjoyed a long and happy marriage and has never hesitated publicly to acknowledge the care, encouragement and support of his wife Henrietta. In his retirement speech His Honour made special mention not only of his wife but also of his four children, whom he said "individually and collectively, have been a tower of strength to me". His eldest son, Andrew, is a prominent neurosurgeon. His second son, Stephen, was appointed a Queen's Counsel last year, and his third son, John, is a Senior Lecturer in Engineering at the University of New South Wales. His only daughter, Diana, is a bio-chemist engaged in research at the Burnley Horticultural School.

His Honour goes into retirement vigorous, healthy and active. For many years he has been a member of Greenacres Golf Club and a competent and ambitious golfer. He also has a small farm at Main Ridge, near Flinders, where he converted a neglected old tract into a rich pasture to breed valuable stock. One suspects Bill Kaye will continue to be both active and busy. His Honour departs from the bench not only with the very good wishes of the Bar and the profession, but also with the warm regards of a very wide circle of personal friends.

Judge Ogden

HIS HONOUR JUDGE HAROLD GEORGE Ogden Q.C. attained what is facetiously termed the statutory judicial age of senility of 72 years of age on 26 December 1988 — and retired.

Prior to that time his life had been a full and successful one. He was born on 27 December 1916. After his schooling at Melbourne High School, he completed his law degree at the University of Melbourne in 1940. He served in the Australian Military Forces as Lieutenant from 1940 to 1946. He went to the Bar in 1947 and took Silk in 1963.

From 1972 to 1988 he served as a County Court Judge. He was a great County Court Judge. The resolution, the strength of resolve which distinguished him as a barrister, did not desert him as a Judge. He did his duty fearlessly, conscientiously and fairly. He worked unflaggingly.

In addition to his judicial duties, he was the Chairman of the Leo Cussen Institute from 1972 to 1987. The success and strong growth of the Institute over the fifteen years of his Chairmanship were due in significant measure to his dedicated leadership.

He well deserved his appointment as an officer of the Order of Australia in 1989 for his service to the law and legal education.

As a happy demonstration of the unreliability of statutory presumptions, Harold Ogden continues to be as physically fit and mentally acute as ever. The Bar wishes him many more years of retirement in continuing sustained fine fettle.

Judge Read

HIS HONOUR JUDGE JOHN LEONARD Read retired as a fully-serving County Court Judge on 29 August 1991, having elected on that date to become a reserve Judge.

John Read was born on 22 July 1931 into a distinguished Melbourne legal family. His father Leonard Read served as a County Court Judge from 1945 to 1965, and during the latter two years of such service was Chairman of County Court Judges. His grandfather and great grandfather were each in their time the principal of the well-known Melbourne solicitors' firm of Read and Read.

John Read had his schooling at Melbourne Grammar School and gained his law degree at the University of Melbourne. Thereafter his career, first at the Bar and then as a Judge, was marked by his high sense of conscientious diligence. He always set and met a standard of near perfection for himself in his professional work.

Unhappily he suffered a severe injury in January 1986. Nevertheless, by the display of rare courage on his part and unfailing loving support on the part of his wife Hilary and children Ian, Roy, Sally and Christopher, he overcame the severe effects of that injury. During the last six years of his judicial service prior to retirement, he served diligently and well as a Deputy President of the Accident Compensation Tribunal.

Such a terse recitation of his "curriculum vitae" does insufficient justice to John Read. He is a great sportsman in the true sense of the phrase — whether playing tennis or golf or sailing his much loved Corsair yacht, he does it wholly for the fun and the sport of it, albeit, very well. He is a modest, unpretentious man. He thoroughly deserves his wide circle of friends.

Subject to the risk to which of course he is "volens", of being asked to return to judicial service from time to time as a reserve Judge, the Bar wishes him the long, relaxed and thoroughly enjoyable retirement which he so richly deserves.

Judge Harris

HIS HONOUR JUDGE CLIVE WILLIAM Harris, after serving 26 years and 242 days on the bench, retired on Monday the 12th day of November 1990, aged 72 years. This marked the close of a distinguished legal career spanning some 50 years.

His Honour, educated at Echuca High School, enrolled in 1936 at Queens College graduating with a Degree in Law and an Honours Degree in Arts. Whilst serving with the Army Service Corps he was admitted to practice in 1943 and on being discharged, signed the Bar Roll in 1946.

After reading with Mr. Alistair Adam, His Honour's practice grew quickly in all directions and by the early 1950s ended up largely in the Workers' Compensation jurisdiction, with the industrial field as a remunerative sideline. Finding himself often in the Full Court and indeed the High Court, His Honour demonstrated a great capacity in being able to deal with large volumes of work.

In 1964 His Honour was appointed a Judge of the County Court. After four years in the criminal and civil jurisdictions he was appointed a Chairman of the Workers Compensation Board. In the following 17 years at the Board, His Honour won the plaudits of his colleagues and the admiration of the profession for his unquenchable thirst for work. As well as being just and efficient with claims he was widely acknowledged as the de facto President of the Board, carrying out all administrative work.

With only a two-week break, His Honour returned to the general law of the County Court on Monday, 16th September 1985. What brought remark amongst his brethren and the profession was the remarkable ease with which he returned to this jurisdiction. In his first case involving an appeal, counsel were somewhat unprepared as they were sent scurrying to locate an authority quoted by a man who had been absent from "their" jurisdiction for many years.

Clive William Harris is a man with a delightful sense of humour and a quiet sense of fun. He was innovative in being one of the first to choose his Associates from enthusiastic law graduates.

Since his retirement His Honour has excelled as a student of French, and between excursions abroad has furthered his golfing skills and continued his obsession with that elusive trout.

His Honour is to be remembered for his outstanding temperament both on and away from the bench. The support and advice he has proffered to members of the profession, his family and friends over the years are immeasurable.

We wish His Honour satisfaction in the years to come. One of the law's true gentlemen.

Judge Howse

HIS HONOUR JOHN FREDERICK Bernard Howse was born in East Melbourne on the 24th April 1925. He was educated at St Patrick's College East Melbourne and subsequently graduated in law at the University of Melbourne, after having completed service with the R.A.A.F. as a Meteorologist from 1943–1945. He was admitted to practice in 1950 and practised as a solicitor with Oswald Burt & Co. until October 1954 having played an active role in Commercial and Common Law cases for that firm. It was no surprise when His Honour was seen to commence reading with Murray McInerney (later Mr. Justice McInerney), who had a substantial commercial practice. His Honour went on to establish a successful practice in the civil jurisdiction but like his ex-Master demonstrated versatility by appearances in criminal cases.

In February 1963 he was appointed Prosecutor for the Queen but more accurately his letter of appointment expressed that he had been appointed as Crown Counsel. As a Prosecutor for the Queen His Honour demonstrated once again his versatility by being able to change from conducting murder trials to understanding complex and very complicated commercial fraud cases which were starting to be prominent in the 1960s. His Honour prosecuted many murder trials in the period of time when the penalty was death by hanging. Of those many criminal trials none received more prominence than the case of "Ratten," a case comprising mainly circumstantial evidence which demonstrated the thoroughness with which His Honour prepared cases and the fairness with which he presented them.

His Honour was appointed Acting Judge of the County Court in December 1975 and was later appointed a permanent Judge in June 1976. His Honour always had a wry smile and a dry sense of humour which many members of the Bar enjoyed, none more so than the humorous debate that he and Judge Gorman entered into when challenged as to their knowledge of the Jamaican Customs Law. It is important to note this was one of the rare occasions on which His Honour was overturned. The home town decision resulted in His Honour's loss of one part litre of scotch. His Honour has always been interested in sport and in fact participated in early life as a foot runner and tennis player. His Honour matured later to take up golf where he can regularly be seen at Greenacres Golf Course. His great love of football was rewarded in 1990 when his team Collingwood Football Club registered a premiership after many years of unwavering support by His Honour.

His Honour is the father of five children the youngest of whom is now 32, and some of them have followed in the legal profession. With 10 grandchildren and after 29 years of service to the State of Victoria both as Prosecutor for the

Queen and Judge of the County Court and later a reserve Judge of the County Court, His Honour and his lovely wife Carmel now can look forward to a happy and long retired life.

Judicial Registrar Haines

THE OFFICE OF JUDICIAL REGISTRAR OF the Family Court was created by the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act* 1988. That Act provides:

"A person shall not be appointed as a Judicial Registrar unless the person is, by reason of training, experience and personality, a suitable person to deal with matters of Family Law".

The first person to be appointed under the Act was Kenneth Haines. His appointment occurred on 13 February 1989. Judicial Registrar Haines retired from office on 10 March 1992.

Judicial Registrars have an unenviable task in the work they undertake. It is difficult work, requiring dedication and swift decisions with little time for contemplation and little margin for error. Judicial Registrar Haines performed his role with expertise, dignity and good humour. In court he had a story and sometimes a joke appropriate for every occasion. His sense of humour is perhaps unique. His knowledge of Shakespearean lines, the work of Robert Burns and various musical scores was shared with those who appeared in his court. Members of the Bar learned in appearing in front of Ken Haines that the reference in the Bible that "the first shall be last and the last shall be first" very often applied in his court. Likewise Counsel were only too well aware that "people came before money or property". On one occasion in Court at Dandenong Counsel inadvertently referred to the Judicial Registrar as "Your Worship". Quick with a retort he replied to the effect that he did not need to be worshipped as Counsel was not an angel. To this Counsel responded softly but too loudly "That's for bloody sure".

Judicial Registrar Haines was born in country Victoria in July 1923. He was admitted to practice in Victoria as a Barrister and Solicitor on 1 December 1950. He remained an employee solicitor for less than one year and thereafter was employed in various legal practices in which he was well respected and widely admired. He practised in many jurisdictions for almost 40 years. His career prior to coming to the bench was extremely successful. His retirement from judicial office comes at a time when he remains fit, active and alert. The Bar wishes him a rewarding and fulfilled retirement.

OBITUARIES

The Honourable Sir Edward Hamilton Esler Barber

SIR ESLER BARBER DIED ON 1 DECEMBER 1991. An obituary notice setting out the narrative facts of his education and professional life will be published in the Victorian Reports and should already have appeared by the time this copy of the *Bar News* is circulated. Not all of the events there recorded will be repeated here: but some repetition is necessary in a notice of this kind and some for my present purposes.

He was born at Hamilton, Victoria, on 26 July 1905. His father was a Minister of the Presbyterian Church, a vocation followed also by other members of the Barber family. He was educated at Hamilton College, Scots College Sydney, and Scotch College Melbourne, the changes being dictated by his father's acceptance of the charge of successive churches. He entered the University of Melbourne in 1922, and, after spending his first year studying medicine, switched his attention to law, which he studied and learned as an articled clerk with the firm of Oakley Thompson & Davies. He was admitted to practice on 4 June 1929 and signed the Roll of Counsel four days later. On signing he read with Edward Hudson, later Sir Edward Hudson and a Judge of the Supreme Court from 1953 to 1966.

My personal acquaintance with Esler Barber began in about 1937. He was a gregarious man with a ready and rather boyish sense of humour. I

regarded myself as knowing him fairly well in the later years of the decade, but the outbreak of war in 1939 scattered the members of the Bar. Esler found an avenue for service in one of the war-time government departments.

When I resumed practice at the end of 1945 I found myself in a room in Selborne Chambers very close to his and in constant need of his advice on dozens of subjects. The advice sought was always gladly given to anyone who asked.

Among other interests Esler frequented Pym's Cafe in Bank Place, where at 11.00 a.m. and 4.00 p.m. some members of the Bar and solicitors would attend. The Bar contingent included Stretton, Gamble, Mitchell, D.I. Menzies, Norris, Gunson and others, most of whom could be relied on to display considerable wit in the denunciation of, for preference, absent friends, and, failing those friends, one another. Esler made his contribution in these sessions, with the qualification that his wit was devoid of malice, a virtue which could scarcely be claimed by some of the others.

That he made a more serious contribution to life at the Bar was in harmony with his off-duty association with its members. He served on the Committee of Counsel [now the Bar Council] and was a member, later Chairman, of the Ethics Committee, in those days an almost totally inactive body except in the talk of defining proprieties in various relationships.

His practice developed in the divorce jurisdiction, almost to the exclusion of other matters. Most people felt that his talents were under-used in a practice consisting largely of undefended divorce cases, and the accuracy of this was demonstrated in the later stages of his career. After taking silk in 1955 in Victoria and 1956 in Tasmania, he was involved in the Professor Orr case, up to the High Court. In 1957 he was appointed a Judge of the County Court and Chairman of General Sessions and in 1962 a member of the Youth Parole Board. Those offices he performed kindly and competently. In 1962 he was appointed Chairman of the Royal Commission into the failure of the King Street Bridge. It is worth noting that in that Commission he won the respect of the professional engineers who sat with him or gave evidence before him.

In 1964 he became an acting Judge of the Supreme Court. This was, in effect, a return to divorce, a jurisdiction then still exercised by the Supreme Court. In 1965 he was permanently appointed, but his work remained centred on divorce until he was assigned to the exercise of the Court's new jurisdiction under the *Valuation of Land Act*.

In 1970, within days of the collapse of the Westgate Bridge, the Government asked him to act as Chairman of a new Commission. In view of the 'Irvine doctrine' that Judges of the Supreme Court should not take part in Royal Commissions or similar inquiries, he consulted the then Chief Justice, Sir Henry Winneke, and a meeting of the Council of Judges was called. That meeting approved of his accepting the invitation, for two reasons — first, the gravity of the occasion [it was in Melbourne being treated as a national disaster] and second, that his earlier experience would be of value in the new Commission.

As the divorce work gradually left the Supreme Court his activities in the Court broadened. In addition to work in court, he was a participating member of the Council of Legal Education, and a member of the Legal Education Committee administering the law teaching done at that time at the Royal Melbourne Institute of Technology.

He was knighted in 1976, and retired on 25 February 1977.

On retirement he acted as Chairman of a Board of Inquiry into the causes of bush and grass fires which had occurred in the preceding January.

Esler Barber's tolerance was wide. Condemnation was not part of his nature, and he could laugh at and make jokes on religion and religious practices. It was he who forecast to me that the ecumenical movement would end as soon as anyone attempted to touch the Presbyterian Church's assets — a forecast which, in Victoria, was partly justified by events. In his own life, however, he never departed from the principles of his upbringing and he adhered to his Church without compromise.

In 1934 he married Helen Davidson, who died in 1942. Their only child was Kathryn, who has survived him. In 1954 he married Constance Palmer, who died in 1991, a very short time before him. He was a devoted husband to each of them.

G.H.L.

Jack Lazarus

THE VICTORIAN BAR HAS THE DISTINCtion of numbering amongst its members some truly outstanding advocates in widely ranging fields of endeavour. Jack Lazarus was one of those; indeed when Jack died on 14 January, 1992, aged 74 years, the legal profession lost the patriarch of the Criminal Bar.

Jack was born in 1917. He grew up in Melbourne and studied law at the University of Melbourne, gaining prizes in the Law of Contracts and Jurisprudence. Having established a general practice as a solicitor in 1940 he soon

became well known and highly respected for his able and tireless representation in the Workers' Compensation and Administrative Law jurisdictions. This was during the time when such cases were hard fought and the full extent of claimants' rights only just beginning to be recognised.

But it was when Jack came to the Bar in 1957 that his formidable reputation as an advocate developed. Those who took part in trials in which Jack appeared will remember his talent for analysis of evidentiary material, his perspicacity when assessing witnesses, his patient and shrewd cross-examination wherein he so often established those vital factual bases which rendered inevitable the ultimate answers he sought. He had the capacity to engage in searching and, where necessary, forceful cross-examination without ever demonstrating personal animosity towards or abuse of a witness.

Jack held firm to the view that Counsel who regularly engaged in the defence of those charged with criminal offences should never prosecute. He successfully appeared for the defence in many of the most notable criminal trials since the 1950s. He was committed also to the belief that every accused person was entitled to representation, and never would have entertained even a passing thought that one might decline to appear in an unpopular cause or reject a brief which seemed unwinnable. These beliefs were so entrenched that Jack never applied for Silk lest his services then be out of reach of the average citizen. His pre-eminence at the Bar would have surely assured his appointment had he applied.

Thorough preparation, constant application throughout his trials, a firm grasp of the criminal law all combined with his commitment to justice ensured that Jack was highly respected by his colleagues, his opponents and Judges. The Chief Justice of the Supreme Court of Victoria, the Hon. J.H. Phillips, in an article on practical advocacy described Jack Lazarus as "one of our country's most distinguished advocates". His Honour's analysis thereafter encapsulates the skill for which Jack was so famous: "... this is advocacy par excellence. Note the succinct phrases, the building up of an image — step by colourful step. Then, the logical conclusion is stated."

Because of his extensive previous experience in the law Jack was not required to read as a pupil when he came to the Bar. He was not minded to take readers himself, principally because he felt the presence of a reader in his chambers might be seen by his clients as an intrusion on their right to confidentiality. The one exception was David Galbally, who read with Jack in 1983.

In his personal life Jack was essentially a very private person and a strong family man. He and Mina, whom he married in 1940 and to whom he was devoted, had three children, five grandchildren and one great-grandchild. For relaxation he enjoyed painting and occasionally played golf and tennis. He served for many years as President of the Australia–China Friendship Society.

It is with great sadness that we record Jack's passing. The legal profession, the criminal justice system, and in particular the Criminal Bar were enriched by his participation. It has often been observed that one may judge the health of a community by answering the question "Who are its heroes?". Whenever a community can identify amongst its heroes professional men like Jack Lazarus then one may say "All is well".

Dyfed Williams

ALTHOUGH DYFED WILLIAMS HAD been a member of the Victorian Bar for just under 6 years (from the 21st day of October 1982 until he was removed from the Roll of Counsel at his own request on the 14th day of April 1988) his legal career was one of variety and achievement.

Dyfed was born in Wales in 1937 and admitted to practice there on the 1st day of May 1960 after completing articles with Cyril Jones and Co. Shortly thereafter he took up a position of Assistant Prosecuting Counsel (1961–1964) before venturing out to Hong Kong as Crown Counsel (1964–1967).

From Hong Kong Dyfed travelled to Papua New Guinea where he joined the Public Solicitor's Office in Port Moresby as Public Defender (1967–1970) during which time he represented the full range of clients from those charged with misdemeanours to those charged with murder.

From Papua New Guinea Dyfed moved to Fiji to become Chief Legal Officer and then Director of Public Prosecutions (1971–1982). During that period he was admitted to practice as a Barrister and Solicitor of the Supreme Court of Victoria (21st day of February 1980).

Having left Fiji for Australia, Dyfed read with His Worship David McLennan, Magistrate (as he now is) and signed the Bar Roll on the 21st day of October 1982.

Not only was Dyfed's career at the Victorian Bar cut short by chronic ill health but undoubtedly so was he prevented from achieving the practice that he could well otherwise have hoped to have developed.

Dyfed passed away on the 19th day of January 1992.

FAREWELL DINNER TO SIR JOHN YOUNG

On 7 December 1991 the Bar and the Law Institute gave a farewell dinner to Sir John Young, the ninth Chief Justice of Victoria. In his speech at that dinner, Sir John drew attention to the difference between a profession and a business and to the need for the profession to be fearlessly independent. The text of that speech is reproduced below.

MADAM PRESIDENT, MR. CHAIRMAN, Ladies and Gentlemen,

I simply do not know how I can thank you for this splendid evening and for the magnificent claret jug which you have just given me. I am really overwhelmed by it all. It had never occurred to me that my departure from the Court would involve anything like this. I suppose I thought you might feel obliged to have the usual formal farewell in the Court but I never dreamt that there would be anything else.

I was not quite sure how this evening might proceed or what the format would be. I was not sure whether I would be expected to make a speech and if I were, whether it should be a short speech or a long speech. However I have learnt that it is always as well to be prepared and therefore I prepared two speeches for this evening, a short speech and a long speech. But the evening is yet young and in the circumstances I think perhaps I might give you them both.

It is a long time since I addressed a gathering which in any way resembled this one. I have of course addressed Bar dinners but they are a little different. The nearest that I can remember was the annual dinner of the Law Institute in 1974 to which I was invited as guest of honour very soon after I had been appointed to the Court. I remember it very well. I had only been about a month on the bench so no-one knew what my judicial form would be and I was very nervous. Now everyone knows what my judicial form or at least my judicial reputation is and I am very nervous.

Very soon after I was appointed I met an old solicitor of my acquaintance in the street and we had a conversation that went something like this.

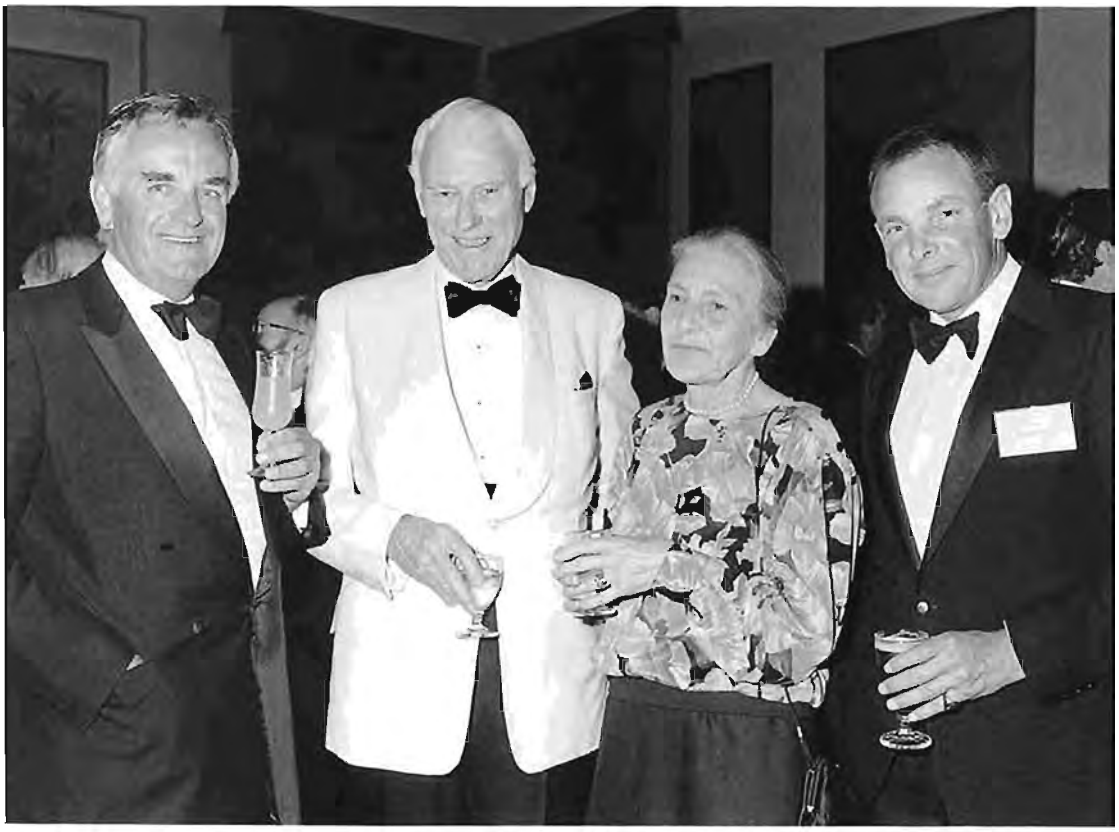
The solicitor said: "I see you've been sitting". "Yes," I replied, "Isn't that what I am supposed to do?" "Oh yes," he said, "but you've given a decision which must be wrong." I bridled a little at the suggestion and asked what he meant. "I read about your decision in the newspaper and I always work on the principle that any decision reported in the newspaper must be wrong."

I shall in a moment tell you a story about my judicial reputation, but first of all I want to advance the proposition that all legal anecdotes (except the one I am about to tell you) are apocryphal. They all get improved on the way of course but if you do enough research you can usually find that the story that you have just heard about what took place yesterday was told a hundred years ago about someone else. I have a good deal of confidence in the proposition but the only example that comes readily to mind is hearing R.G. Menzies say of Sir Charles Lowe that no-one could possibly be as wise as Charlie Lowe looked. I thought that was a very clever remark and absolutely right. Not long after I heard Menzies say it however, I discovered that it had been said of an earlier 19th century judge in England.

The anecdote which I am about to tell you is different. It is not yet apocryphal but you can work on it after tonight and I don't doubt improve it. It concerns two young Counsel who were approaching the Supreme Court and discussing what they were going to do. One said to the other that he was about to appear before the Chief Justice and he asked what the Chief Justice was like. The other replied that he didn't know but he went on to give the following encouraging information:

"They say that he is quite a nice chap when you get to know him but he is an absolute so and so in Court".

What the two young counsel did not know was that the conversation was overheard by the Chief



Bill Mackinnon, Sir John Young, Lady Young and Andrew Kirkham Q.C.

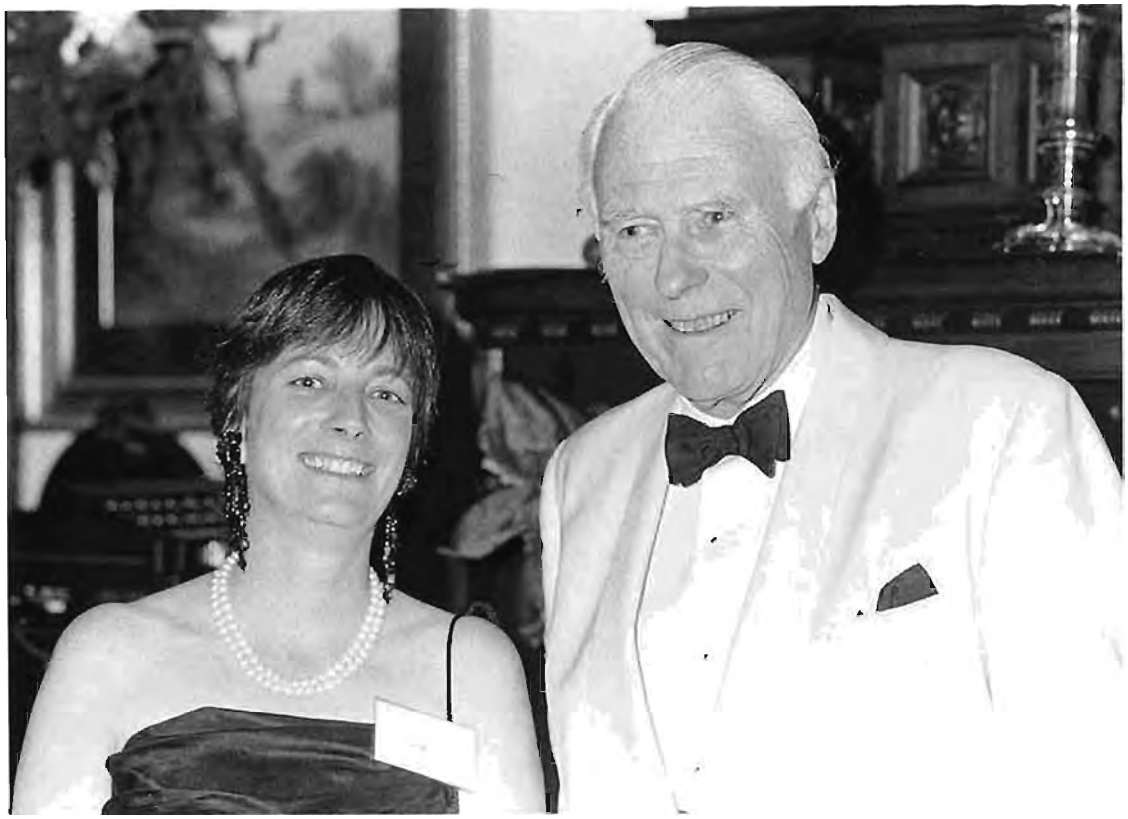
Neil Forsyth Q.C. and Rupert Balfe Q.C.

Justice's son. Unfortunately however (or stupidly one might say) the Chief Justice's son did not find out the names of the two counsel concerned. If he had done so, of course I would have liked to have met them. I would simply have told them that I was a changed judicial character, tolerant, helpful, patient, pleasant, understanding and indeed that I displayed all the judicial virtues. Now that surely is an anecdote to work on. In 10 years time its derivative should be worth telling.

I heard another one recently in which I am alleged to have taken part. I was sitting in the Full Court and we had a litigant in person appearing before us. She quite properly took her place behind the Barristers' row in the Court. But when her turn came to address the Court she had a number of papers to handle and I invited her to come forward to the Bar Table. One of my colleagues subsequently told me that he noticed that when she did stand up behind the Bar table the mini skirt did not quite reach down to the top of the table.

My colleague found it I think somewhat distracting. I of course did not notice it. I am not sure whether it was a ploy to divert attention from a poor argument but at any rate I think that it suggests that there is wisdom in retaining some formality in court dress. Well, that story I'm told is doing the rounds and I am also told that it is losing nothing in the telling.

Life in the Courts however is not all entertain-



Gail Owen, Law Institute President, and Sir John Young.

ment and it cannot be. Litigation is too serious and I hope that we will never see anything here comparable to the televised rape trial which is presently taking place in the United States. Of course the Courts must sit in public but I believe that it would be a great mistake to televise trials for public viewing. The reason is that television is basically entertainment and litigation is not. Litigation is very serious indeed for the parties and particularly for the party who loses the case. I have often told students to remember the most important person in the Court is the person who is going to lose the case. It is not the Judge, it is not counsel, it is not solicitors, it is not witnesses, it is the person who is going to lose because the person who loses must feel that his or her case has been fully put, has been fairly considered and he or she must accept the system and must accept defeat. That basically is why litigation can never be entertainment.

The legal system or the legal profession is currently very much under public attack or at least the profession sees itself as being under attack. This is not really anything new. The legal profession has often been under attack. It has often been the subject of public criticism. But the criticisms now seem to be said with more stridency and less knowledge. There seems to be developing a practice that nothing should be changed except by those who do not understand what it is they are seeking to change or who are resolutely determined not to find out. There are currently some sweeping changes proposed but sweeping changes tend to produce only the need for further reform and no doubt that is useful for keeping reformers in business. But it is not useful for improving the system.

Many of the sweeping changes proposed seem to me to proceed upon a fundamental misconception. The misconception is that there is no difference between a profession and a business and that legal practices should be conducted as though they were businesses and should compete in the way that businesses compete. If it is right to say that there is no difference between a profession and a business and if that is now the accepted wisdom, then I have indeed lived too long and it is high time that I retired.

A profession in my view is a vocation in which the learning of the professional is applied to the problems of others and professional rules are designed to ensure that as far as possible the learn-

ing of a professional is available to all. That is what the rules are for and they also exist to ensure that the professionals behave properly. For we all know what happens if they do not. Now of course I know that there are imperfections in the system, that not everyone can afford or have all the legal advice that he or she wants. But that is an inevitable part of our present society. Not everyone has the same kind of motor car, not everyone has the same wealth, the same house, the same health, the same resources.

A business is surely something different from a profession. A business must make a good return on the capital employed — as good a return as possible — and it does that regardless of concern for the affairs of others. You may not all agree with the details of my definitions of a profession and a business but I hope that you will essentially agree in the fundamental idea.

Further, I want to say that the ultimate control of professional standards and professional conduct must lie with the Courts. The Courts bear the ultimate responsibility for the administration of justice and in recent days I have sent a letter to that effect to the Law Reform Commission signed by the Chief Judge for the County Court as well as by me emphasising the responsibility of the Courts in the matter of professional standards.

There is no doubt that there are difficult days ahead but if you treat that essential distinction between a profession and a business as a guiding star I am confident that the profession will survive. What I have said is of course not inconsistent with the professional's earning a proper reward for his services. It is inconsistent however with treating the professional's practice as merely a business, as something to be advertised on television and with the availability of legal services being governed by commercial practices.

The other guiding star, if you can have two, but really I think it is simply another aspect of the same one, is the maintenance of the independence and the integrity of the profession. A professional's learning must be applied fearlessly and independently to the affairs of others. The legal profession must stand between the executive and the subject and must stand there independently. Without that stance there can be no true freedom in our society.

But I must not wander on. Thank you ladies and gentlemen for a very splendid evening. Thank you for the support which you have given to me over the years and thank you for the service which the legal profession renders to the community.

The legal profession must stand between the executive and the subject and must stand there independently. Without that stance there can be no true freedom in our society.

Denis Smith, David Munro, Stewart Campbell.

Perhaps I might conclude with an anecdote about Sir Winston Churchill which might conceivably be relevant to our present situation.

Sir Winston Churchill was attending a speech day or whatever they call it at his old school. He was not expected to be asked to make a speech and it may be surmised that he had not prepared anything for the occasion. But he was sitting in the front row and at the end of the afternoon or evening he was persuaded to mount the platform and to address the boys and their parents. He proceeded very slowly. He glared at the audience with that well-known bulldog expression and then he said:

"Never give up"
"Never give up"
"Never give up"

And then the old man sat down and so shall I.

Editorial Footnote:
Sir John has kindly "recreated" this speech for publication. He had asked us to inform the readers of the *Bar News* that he has no recollection of the ancedotes in which he features.

WELCOME TO PHILLIPS C.J.

The formal welcome of Victoria's tenth Chief Justice, John Harber Phillips, took place in the Banco Court on the morning of Tuesday, 29 January 1992. The court was crowded with members of the profession, with black gowns and white wigs prevailing. Set out below are the speeches of welcome given by the Chairman of the Bar Council and the President of the Law Institute and the Chief Justice's reply.

MR. KIRKHAM: IF YOUR HONOUR pleases, on behalf of the Victorian Bar I welcome Your Honour as the tenth Chief Justice of the Supreme Court of Victoria. You have, of course, been welcomed to this Court once before, but that welcome had more of an extemporaneous flavour to it than does this one.

After serving articles at Dooley & Breen, Solicitors, you came to the Victorian Bar in 1959. You read with the late Vic Belson Q.C., a most able common lawyer and a role model for the skilled and balanced counsel that you were to become over the twenty-five years you practised at the Victorian Bar. You had three readers: Hender, Galbally and Power.

I am pleased to record the Bar's gratitude for the service that you accorded the Bar through membership of the Bar Council from 1974 to 1984 and your services on many, many Bar committees.

You took silk in 1975 and for seven years enjoyed a very successful career in the criminal law. That your career was so successful was due in large measure to painstaking preparation of each case and a commitment to excellence. In other words, you acted in each case as a professional should act, professionally. It was this professionalism that enabled you to fight cases out to the end, often (and particularly in one case of which I have personal knowledge) in the face of seemingly overwhelming odds.

In 1983 you became Victoria's first Director of Public Prosecutions, and in 1984 you were appointed as a Judge of this Court. You served on this Court for six years, serving with distinction, particularly in the areas of criminal trials and criminal appeals.

In 1990 you left the Court to become Chairman of the National Crime Authority and a Justice of the Federal Court of Australia. You were appointed to the National Crime Authority at a time when that Authority was perceived to have significant difficulties associated with its operation, and it is through your efforts and to your credit that when you left the Authority after fifteen months' work it stood well in the estimation of politicians, lawyers and members of the public.

To the offices of both Director of Public Prosecutions and Chairman of the National Crime Authority you brought great administrative ability, an open mind and a capacity for innovation. Those same qualities applied to the operations of this Court can only serve to ensure that its already high standards are maintained and, where possible, improved.

Although practice of the law has been central to your life, you have avoided becoming absorbed in it to the exclusion of other important areas in life. You have written two books and two plays, thus having similar outside interests to this Court's first Chief Justice, Chief Justice A'Beckett. You have maintained a deep interest in the arts generally and opera in particular. You have enjoyed travelling and have travelled extensively, no doubt firmly believing in the old Chinese saying that it is better to travel a thousand miles than to read a thousand books. You used to do some of your travelling in a 40-year-old Silver Rolls-Royce which had the distinction

of having in its glove box an owner's manual which commenced with the words, "Owners would be wise to advise their drivers that . . .". For all that, you have remained fairly egalitarian and you will have no trouble in adjusting to the Chief Justice's white Ford Fairlane.

You have always been supported by your loved and loving family and it is pleasing that they are here in full to share this important ceremony.

The torch has been passed to you by a great Chief Justice. It has been passed at a time of great economic hardship in this State and intense public scrutiny of justice, its cost, its speed and the means of obtaining it, and at a time when the primacy of this Court and the independence of the judiciary cannot simply be assumed as a matter of course. The Bar is confident that Your Honour will provide the leadership, hard work and vision necessary to deal successfully with all such matters. This Court can and will be assisted by a strong and independent Bar, and the Bar stands ready to assist the Court where possible in the future. With the assistance of the Government and the profession, perhaps the worst of times may be made the best of times.

The Bar wishes Your Honour well in your new office and hopes that you will have sufficient time to keep up your contacts with the Bar at which you spent so many happy years.

If Your Honour pleases.

His Honour: Thank you. Ms Owen.

Ms Owen: If Your Honour pleases, on behalf of the Solicitors of Victoria I welcome you back to this Honourable Court as its Chief Justice. I do not propose to repeat the details of your career except to observe that after a relatively stable employment record, if one ignores your short time as a solicitor, your record since 1983 when you were appointed as Victoria's first Director of Public Prosecutions must raise serious questions about your ability to hold down a job for any lengthy period.

Your Honour has had the rare distinction of being welcomed twice to this Court, though never farewelled. At your first welcome you commented that your late mother had declared you should become a cardinal and that she would probably have only given qualified approval to your appointment to this Court. Perhaps this return to the Court would have met with something more.

When you first came to this Court you did so as a specialist criminal lawyer. As is necessary in a Supreme Court Judge, your horizons broadened considerably, and ultimately encompassed Greece. You were Chairman of the first Greek Australian International Medical and Legal Conference's Professional Programme Committee. At that conference you spoke about the legacy of ancient Greece to Australian law, in particular the adversarial system and the concept of equitable jurisdiction.

You used to do some of your travelling in a 40-year-old Silver Rolls-Royce. For all that, you have remained fairly egalitarian and you will have no trouble in adjusting to the Chief Justice's white Ford Fairlane.

At the second such conference in 1990 you commented on Socrates' trial. Regrettably I was unable to attend either conference, so I do not know whether our ancient Greek colleagues were able to control the cost of Greek justice or whether criminal trials ran for inordinate lengths of time. These are two of the major problems which now confront the Victorian legal system.

You come to the position of Chief Justice at a time when the profession and the legal system itself are under attack. You have recognised this in recent comments to the press when you suggested *pro bono* work as a partial solution. *Pro bono* work is alive and well in the profession, but can only be a band-aid solution. While most of the press has been directed at laywers' fees, the root of the problem lies in a cumbersome and slow-moving system which is labour-intensive.

These problems are not new. The matter of lengthy delays was raised in the welcoming speeches of your predecessor. Nor are the problems restricted to Victoria. However, it will be during your stewardship that changes will need to be made. Some of them will be unpalatable to the profession and possibly to the Court. It will be for you to assist in the implementation of those changes which will affect the Courts in a way which does not bring the law into disrepute and which maintains the independence of the Judges and the legal profession. The task will not be an easy one and will require co-operation from all those involved in the legal profession.

There was much criticism of the National Crime Authority when you took up your ap-

pointment as Chairman. That body is now well-regarded. That change is attributed to your skills, and we trust you can perform the same miracle for the legal profession.

The Solicitors of Victoria trust your term as Chief Justice of this Honourable Court will be satisfying and we wish you well as you lead the Court towards the next century.

His Honour: Mr. Kirkham and Ms Owen, thank you for your very generous remarks and also for recalling some of the slings and arrows and the better moments of a barrister's life.

My present appointment is the fifth commission that I have had the honour to hold under the Crown. It is fitting, I think, that I acknowledge before this gathering that I would have been quite unable to discharge any of them had it not been for the constant love and support of my family so freely given in times of stress and in times of calm. Mozart spoke truly when he said: "My family is not only my joy, it is my strength".

There have been many times in the past weeks when my mind has been drawn to reflection on my new responsibilities which include the administration of this Court, together with the Council of the Judges, the presidency of the Court of Criminal Appeal and, on occasion, the Court of Appeal in its civil jurisdiction, the presidency of the Victoria Law Foundation, the Chair of the Council of Legal Education, and membership of many other bodies which make a contribution to the administration of justice. There are, too, other less formalised responsibilities and duties. There is the need to spend time with both branches of the profession in order to better understand their problems and better appreciate their achievements. There is the need to spend some time with the teachers of law and their students, for they are respectively the light and the hope of our profession. There is the need to spend some time with the magistrates in order to refresh my knowledge of the way their important court operates, and it is necessary from time to time that the Chief Justice, as Sir Harry Winneke put it many years ago, act as the standard-bearer for the Judges on important issues that affect them. Ladies and gentlemen of the profession, in all these things I shall need your help and your support and I am confident that you will give it without stint.

This magnificent old court-room has many happy memories for me, including my own admission to practice and that of my daughter only two years ago. Today's ceremony will add greatly to those memories. Each of you honours me and my family by your attendance here this morning. I deeply appreciate your courtesy, and offer you my thanks.

THE WAYS AVAILABLE TO THE JUDICIAL ARM OF GOVERNMENT TO PRESERVE JUDICIAL INDEPENDENCE

The Honourable Mr. Justice R.E. McGarvie

JUDICIAL INDEPENDENCE VITAL TO DEMOCRACY

The basic premise underlying this paper is that parliamentary democracy is desirable for Australia.

In numerous countries throughout the world people are grasping for democracy and the freedoms it brings. Having enjoyed those freedoms for years, Australians are taking democracy for granted. Few ask whether its familiar but indispensable components are still securely and satisfactorily equipped to fulfil the needs of a modern democracy. Those who know they are not, are slow to accept personal responsibility for making them equal to the task. Unheeded are the words of Tom Paine, author of *Common Sense*, that

"those who expect to reap the blessings of freedom must undergo the fatigue of supporting it".[1]

Not every system of government requires independence in its judiciary. Absolute monarchies and communist states neither require nor tolerate such independence.

The highest judge in China, Mr. Ren Jian-xin, President of the Supreme People's Court, was strongly critical of those who during 1989 advocated judicial independence. Mr. Ren, himself a member of the Central Committee of the Communist Party, denied a separation of powers in China and stressed that in their judicial work judges must accept party leadership and the guidance of its policies.[2]

Returning in 1990 from a visit to the Soviet Union a Law School Dean reported:

"The diktat of the party official has been the law ... 'Telephone justice' has prevailed since Stalinist times. The party apparatchik calls the judge and tells him how to rule."[3]

Coincidentally with the 21st birthday of *Bar News*, its first editor, R.E. McGarvie Q.C. (as he then was), becomes Governor of Victoria.

At the Supreme Court and Federal Court Judges' Conference held in Canberra on 21 January 1992, His Honour delivered a paper which may prove to be, in the Australian context, the definitive statement on Judicial Independence. The first half of that paper is set out in the following pages.

Limitations of space prevent the whole of the paper being reproduced in this issue. The balance of the paper will be included in the Winter issue of the *Bar News*.

The paper will be published in full in the May issue of the *Journal of Judicial Administration.*

Our system is essentially different.

"[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."[4]

Commentators on the current attempts of eastern European countries to adopt democratic systems have emphasised the need for an independent judiciary and the absence there of the necessary components for the creation of one.

JUDICIAL INDEPENDENCE

It is important in this area not to cast a good principle too widely. The only independence which I seek to justify within the principle of judicial independence is that which, if absent, would put at risk impartiality in deciding court cases. Apart from that, judges,[5] as public officials, are not, and should not, be independent.[6]

In all aspects of making judicial decisions judges are bound by the law and liable to be set right in a most public way on appeal if they depart from it. Cases must be heard and decisions given in open court under the scrutiny of anyone who cares to attend and may be criticised by the news media or anyone else.

Judges are appointed by the political executive and may be removed by that executive for serious misbehaviour or incapacity, upon the address of both houses of parliament, by a process that attracts great publicity.

Courts depend on the legislature, and usually the executive, for the provision of the premises, facilities, staff and funds necessary for their operation.

To know what has to be done to preserve judicial independence, in the sense in which I use it, it is necessary to identify the kind of things that put impartiality in deciding court cases at risk.

DANGERS

In our modern democracy the main threat to judicial independence comes from the executive. Increasingly powerful, the executive in practice usually controls the legislature or at least its most influential house.[7]

The *Strategic Management Review of the Parliament of Victoria*[8] prepared for the President and the Speaker stated the modern reality:

"[A] system of government in which the executive branch was not subject to the requirement to operate within the rule of law (legislated by an independent Parliament and interpreted by an independent judiciary) would not be a parliamentary democracy at all, but at best a form of executive government disciplined only by elections if these were held.

These arms of government are not static in relation to one another, and commentators on constitutional

development frequently discuss the relative movement of one arm with relation to another. The three arms are in fact in a dynamic tension with one another, and the workings of the system can be seriously jeopardised if one arm achieves total dominance over the others.

In Australia there has been a serious tendency toward untrammelled executive dominance."[9]

"[We] ... consider that the underlying principle of executive dominance and the weakening of the other arms of government is a problem in this state, and we also consider that improvements need be made to better allocate powers and responsibilities among the arms of government in a number of areas in Victoria."[10]

"Unless the implications of [the] need to balance the arms of government are fully understood and acted upon, there is a real danger that the executive branch will make the other branches subservient, and the checks and balances required in the constitution will be lost."[11]

Only the naive could believe that the problem is confined to one State or to State level.

The good health of judicial independence is damaged in two ways.

CHRONIC AILMENTS

First there are chronic ailments which inflict gradual, corrosive damage, resulting more from neglect and an underlying frame of mind and perception of interest, than from a specific decision to curtail judicial independence.

I repeat some earlier words:

"The complexities of modern government lead ministers to depend very much on the public service for the policies and legislation they promote. In a system with increasing features of the corporate state, government and public service can control or reach accommodation with the representatives of most of the influential sectors of the community. The judiciary is the exception. It often acts as a thorn in the side of government and public service by holding legislation or the conduct of government or public service invalid.

This predisposes governments to be tolerant of legislation which in unspectacular ways reduces judicial independence or the area in which the judges have power to make decisions. Governments become prone to take steps which reduce the standing of judges."[12]

ADMINISTRATIVE DEPENDENCE

Judicial independence is seriously weakened both in actuality and public perception if the judges are administratively dependant. This occurs when those who administer the courts are responsible to and controlled by the executive rather than the judiciary. As was observed in the Fitzgerald Report:

"The independence of the Judiciary is of paramount importance and not to be compromised. One of the threats to judicial independence is an over-dependence upon administrative and financial resources from a Government Department or being subject to administrative regulation in matters associated with the performance of the judicial role. Independence of the Judiciary bespeaks as much autonomy as is possible in the internal management of the administration of the courts."[13]

The diluting effect on judicial independence is greater if the executive controls not only the staff but also the court buildings, premises and facilities, and the court's funds.[14] Such a relationship of dependence tends to ingrain a corresponding cast of mind in of both judges and administrators. This further factor also tells strongly against the desirability of such a relationship.[15]

The pressure which the executive can bring to bear upon the judges of a court, if it has the power to deprive the court of the services of its staff and the use of the courtrooms, facilities and funds on which the court's operation depends, is enormous. Similar pressure is exerted if the executive effectively directs that the staff perform their duties and that the courts, facilities and funds be used in a way different from that required by the judges for the proper performance of their judicial functions. It has to be remembered that it is not only an actual withholding or interference which has the potential to affect judicial independence. The potential of the executive's known power to do so has a similar tendency, even though no actual threat is made or step taken. The attempt in Malaysia on 2 July 1988 to prevent a vital sitting of the highest court in the land by a direction to the court staff to deny the judges both staff and access to the court building and facilities provides a chilling illustration of the way such powers can be used.[16]

It is not only the actual diminution in present and potential judicial independence which is engendered by a court administered by the executive but, importantly, the public perception of that diminution. As Mr. Justice Estey of the Supreme Court of Canada said in 1985 at the AIJA Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice:

"Whether there be a constitutional dichotomy in the establishment of courts or the appointment of judges, it is necessary to establish a single and paramount administrative authority over the non-adjudicative functions in the court. There are but two choices. That authority may be part of the executive branch of government or it may be a part of the judicial branch of government. The reality and perception of impartiality of a court and the independence of the court system from the government of the day makes it unacceptable to the public to assign the paramount authority over the running of our courts to a member of the executive. This is publicly unacceptable today for a number of reasons. The State today is a party before the courts in the vast majority of all cases, criminal and

civil. The executive branch exercises the prosecutorial function in the criminal law under our system of government. The executive branch is the tax collector, the disciplinarian and the administrator in many factors of community activity. All these executive functions lead but to the courtroom. The perception of impartiality is mortally wounded, if not destroyed, when the executive is, in reality, the day-to-day manager of the courts. The public cannot be expected to discriminate between adjudicative management and operational management. Indeed, the law profession itself will not make that distinction."[17]

Professors Church and Sallmann conclude their study with the words:

"The importance of the judicial branch of government and the judicial system generally to life in a democratic society cannot be overestimated. In our view the preservation, integrity, effectiveness and efficiency of the system will be enhanced by the judiciary assuming a much greater degree of responsibility for the governing of Australian courts."[18]

TRIBUNALISATION

In considering the chronic ailments currently afflicting the independence of the judiciary, it is necessary to give consideration to a co-ordinate requirement, equally indispensable to a democracy, and inseparable from its need for judicial independence.

The need for the judicial independence necessary to provide for impartial decision-making is predicated on the basis that those who decide on the application of the law in our democracy, in cases of dispute, are the members of the judiciary. The ordinary expectation is that that judicial function will be performed by judges. That it is not an expectation which is justified in all systems was emphasised by Sir Guy Green in his paper to the Annual Seminar of the AIJA in 1984, "The Rationale and Some Aspects of Judicial Independence". He wrote:

"Discussions about judicial independence often emphasise the need to ensure that the judiciary is able to carry out its work free from improper influence or interference. That, of course, is a very important part of judicial independence, but it is an empty concept unless the judiciary is also provided with the powers and facilities which are necessary to enable it to do its work. As a commentator writing about Franco's Spain cynically put it:[19] 'How are we to reconcile the existence of an independent judiciary with that of an authoritarian regime? Is not such a co-existence a flagrant paradox? The answer may be that the paradox is just apparent: the judges in contemporary Spain are independent but they are powerless. Or, as a Magistrado I interviewed put it to me, they are independent *because* they are powerless.' "[20]

With this consideration in mind Sir Guy Green defined judicial independence as:

"the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control."[21]

Because I consider that the narrower definition of judicial independence I have adopted makes the case for it clearer and more persuasive by emphasising that it springs from the need for judicial impartiality, I prefer it as a working definition. In a democracy there are concomitant requirements that not only should the judiciary be independent but that the judicial function of applying the law in disputed cases should usually be performed by that independent judiciary. Sir Guy Green and I see the democratic need as the same: our only difference is in the adoption of working definitions.

The wholesale move by governments, to have legal disputes of the kind traditionally decided by courts transferred to administrative tribunals, has a mixture of motivations. These include having disputes of a specialised type decided by those with experience and expertise in the activity from which the disputes arise; reduction of the time and expense taken in the decision-making process; the exercise of patronage in appointing people to tribunals; and the appointment of people who, because of their cast of mind and their awareness that reappointment at the end of a fixed term will depend on them then having government approval, will be inclined to interpret and apply the law in accordance with current government policy. The extensive by-pass of the courts in this way in recent times gives real cause for concern.[22] The reality of the pressures, express or implied, on members of tribunals appointed for limited terms to conform with government policy was the basis on which members of an important tribunal sought and obtained a confidential interview with the Constitutional Commission's Advisory Committee on the Australian Judicial System. In the interview it was put that to free members from such pressures in the many cases coming before them in which the Government was directly or indirectly an interested party, they should be appointed permanently to the tribunal. The Committee, as a general rule, confined itself to the court system and made no reference to or recommendation on the matter.[23]

ACUTE ATTACKS

Apart from the chronic ailments such as those discussed, the second way in which the good health of judicial independence is injured is by acute attacks resulting from deliberate government decisions.

One form of acute attack occurs in atypical

situations which occur from time to time in a democracy where a government controlling parliament sees its political survival or vital interest as jeopardised by the operation of an independent judiciary. There, the temptation, to which some governments have succumbed, is to curtail that independence in protection of self-interest.

The classical example of our time was the removal of the Lord President and two other judges of the highest court in Malaysia in 1988.[24]

The retirement of the Chief Justice and two other judges of the Supreme Court of Queensland, who were above the age of retirement introduced by the *Judges Retirement Act* 1921, may well be another example.[25]

In the United States two notable attempts which failed were the impeachment of Justice Samuel Chase in 1805 and Roosevelt's plan to pack the Supreme Court in 1937.[26]

Another form of acute attack is precipitated by a government rightly or wrongly taking the view that, left alone, a court or judicial system will not cope with difficulties which beset it, and which prevent effective operation. There, governments are apt to feel themselves under political pressure from the electorate to act so as to remedy the situation. Often government action has been hasty and legislation damaging to judicial independence has been enacted. The long-term implications have either not been considered and understood or have been disregarded. The introduction and enactment in New South Wales of the *Judicial Officers Act* 1986[27] and in Queensland of the *Supreme Court of Queensland Act* 1991[28] appear to fall in this category. The remarkably swift implementation of the recommendations of the Beeching Report after its publication in 1969 appears to be an English example.[29]

PRESERVATION

I turn from the dangers that threaten the good health of judicial independence to the steps which are necessary to preserve that health. There are questions of what steps can feasibly be taken, who should take them and when should they be taken.

It might be asked; If the executive branch of government in our democracy today is so powerful and has such a capacity to dispense with judicial independence, what, realistically, can the weakest branch of government, the judicial branch, do to preserve that independence?

The answer arises more from the assumptions and attitudes which underlie and permeate a democracy and the thinking of its citizens than from the location of actual power. In an increasingly educated community there is widespread acceptance of Churchill's view that democracy, though slow and exasperating, is the best system of government that has yet been invented. In recent times many throughout the world who have lived under other systems have reached that conclusion. It is obvious to most that democracy depends on the extensive acceptance of respect for others and their interests and rights and on the acceptance of decisions made in accordance with the laws and practices of the democratic community. It is equally obvious that an independent judiciary is vital to the effective operation of a democracy.

All mainstream political opinion in Australia supports democracy and the continuation of the conditions necessary for it. Those who constitute the executive branch of government, citizens themselves, usually support judicial independence as a general principle. In times of relative calm between executive and judiciary, those within the executive are open to persuasion that measures to preserve judicial independence in future should be taken. Opinion leaders in the community, if clearly apprised of the need for such measures, are prone to support them. I have listed some examples of recent actions by governments and parliaments creating significant institutional underpinning which has increased the potential of the court system for efficient operation and the protection of judicial independence.[30]

The theme of this paper is that the judicial arm of government has failed to organise itself and failed to assert itself in the manner necessary for the preservation of judicial independence in the modern democratic world. The seas are now relatively calm. There is urgent need for the judicial arm of government during the calm to organise and assert itself in the public interest so that it operates in the way of, and obtains the institutional underpinning necessary for, the retention of judicial independence. It is pointless for it to remain inert, passive and exasperated and hope that some unidentified person or authority will do these things for it. Delay would allow increasing deterioration from the constant corrosive action of the chronic ailments mentioned above. If there is delay until the executive and judiciary are locked in conflict over their respective rights, the seas will be too stormy and it will be too late to achieve the necessary changes.[31]

JUDICIAL ARM OF GOVERNMENT

What is the judicial arm of government? One may start will the statement by Brennan J. with regard to a State in *The Second Fringe Benefits Tax Case*:[32]

"The essential organs of government — the Governor, the Parliament, the Ministry and the Supreme Court — are the organs on which the 'existence and nature' of the body politic depends. (I mention only the Supreme Court, for that is the court of general jurisdiction in which, subject to the jurisdiction of this Court, the laws of the State are finally interpreted and the constitutional and administrative law of the State is applied.)"

I treat the whole judicial arm as including all the courts, their judges, magistrates and other judicial officers and the court staff responsible to them rather than to the executive. The legal profession is not part of the judicial arm but is intimately associated with it and performs a service essential to its operation. The university law schools have a less intimate association, but their co-operation is vital if the law and judicial system are to be adequate to the needs of this democracy in the coming years.

Posterity will be puzzled by the paucity of knowledge about its judicial arm of government available in this democracy a decade ago. Since then a good deal of information has been generated by research and writing mainly backed or inspired by the AIJA.

It is a moot point whether the more important administrative tribunals headed by judges, such as the Administrative Appeals Tribunals, should also be regarded as part of the judicial arm. I think they should but do not examine the issue here.

There is nothing incongruous in treating the composite organisation which provides judicial services to the community as involving all those component parts in its operation. The composite organisation that provides the community with its medical services similarly involves many diverse but interacting parts.

LEGACY OF INERTIA

Recently Lord Rees Mogg, a former editor of *The Times*, commented that the rules are the same for an individual, a nation, a species, a business, a university or a newspaper. To survive it is necessary to adapt to challenges, swiftly and decisively.[33] It is self-evident that the rules are the same for a judiciary obliged to retain the characteristics necessary to serve a democracy.[34]

Only latterly has the judiciary displayed a commitment to doing what is necessary to meet the challenges to judicial independence. As I recently wrote:

"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."[35]

They did not regard it as their obligation to accept responsibility for the administration, operation and well-being of their courts. They regarded that as being rather too menial for their attention.[36] That invited a fate similar to that of:

"a certain king of France, who is said to have lost his life through an excess of moral stamina in the observance of good form. In the absence of the functionary whose office it was to shift his master's seat, the king sat uncomplaining before the fire and suffered his royal person to be toasted beyond recovery. But in so doing he saved His Most Christian Majesty from menial contamination."[37]

This attitude left leaderless those involved in the judicial arm of government. The top echelon, the judges, did not lead, and no one else was in a position to do so. The contrast between the leadership from the top of the providers of medical services and the leadership vacuum for the providers of judicial services was dramatic.

Fortunately, in the last decade or so there has been a marked swing by the Australian judiciary to the acceptance of those responsibilities.[38]

How would the challenges to judicial independence be met?

KNOWLEDGE

Knowledge is the precondition of the capacity to adapt to challenges. Australian judges have for generations been highly professional in their adjudicative functions. Until about the eighties the cult of non-participation or amateurism in participation in the non-adjudicative functions of their courts prevailed. Now that judges are looking for the causes of, and remedies for, court problems and the vulnerable state of judicial independence, they find the available information quite inadequate.

Posterity will be puzzled by the paucity of knowledge about its judicial arm of government available in this democracy a decade ago. Since then a good deal of information has been generated by research and writing mainly backed or inspired by the AIJA.

The universities, which would be expected to provide the researchers, writers and storehouses of knowledge on the actual operation of the judicial system, have shown remarkably little interest.

In university law schools, where knowledge, research and analysis regarding the operation of the judicial arm of government and the significance of judicial independence would be expected to have high priority, little is to be found. The typical law school treats as its central task research and transmission of knowledge as to the existing legal principles and whether they should be reformed. This task is very well done.

Learning virtually no constitutional or legal history, the modern law student learns nothing of the lessons of history as to what happens to communities whose judges lose their independence.[39]

That educated people generally, and law graduates in particular, lack knowledge of the importance to a democracy of judicial independence and the ways of safeguarding it in the modern world is a serious weakness.

Engineering schools do not content themselves with teaching engineering principles as they are or ought to be. Their research and teaching extends so as to equip their graduates with engineering knowledge and skills sufficient to erect the engineering structures the community needs, to modify them to meet changed conditions, and to protect them from corrosion, damage and destruction.

A university teaching law today should perform a similar role. It should enable its students to develop comparable knowledge and skills in respect of the legal structures which the community needs, especially the judicial system. This would involve the students developing skills which go well beyond the capacity to obtain and analyse information from the written word of parliamentary statutes, judicial reasons and learned treatises. It would involve them developing the skills of the social sciences, enabling them to identify those features of a judicial system which give it the qualities needed by a democracy, and to know the ways of achieving and preserving those qualities in the real world.

If law students receive as extensive an education as engineering students, its cost could rise to something like the level of an engineering education. There could hardly be a higher priority for a democratic community.

A few Australian universities are now turning to remedy the deficiencies in legal education I have mentioned.

In the United States Profession Saari has written:

"[M]ore education and research on the basics of judicial impartiality, judicial independence and the separation of powers is needed by court managers and the bar and judicial leaders, as well as the public. There is need to spell out some of the educational implications, defining the role of education in this field more carefully."[40]

Members and organisations of the judiciary and legal profession are capable of having a real, persuasive influence on legal education. In my opinion they should take deliberate steps to persuade the universities to broaden and deepen legal education as indicated above, and to persuade the community to provide the resources to enable that to be done.[41]

TRADITIONAL SAFEGUARDS

While this paper concentrates on contemporary safeguards to judicial independence, it should be mentioned that the traditional safeguards remain essential. Those include: appointment to office until a specified retirement age appropriate for the end of a career; protection from removal from that office except upon the address of both houses of parliament on the ground of proved misbehaviour or incapacity; preclusion from taking other employment during the term of office; the payment of a relatively high salary, charged on consolidated funds and not to be reduced during continuance in office; and immunity from being sued for things done in the exercise of judicial power.

The safeguards against removal from judicial office and against reduction of salary are badly in need of structural remodelling to make them effective in the conditions of today.[42] It is desirable that, wherever possible, traditional and contemporary safeguards be entrenched constitutionally.[43] Those aspects are not discussed here.

COURT LEVEL

Contemporary Threats

The crucial level in the judicial system is that of the individual court. It is at that level that the independence of the judiciary will grow or wither.

In his influential essay, *Judicial Administration: Its Relation to Judicial Independence*,[44] Russell Wheeler wrote:

"The perceived threats to judicial independence in 1988 are much more complicated than they were in 1787, and the means to secure judicial independence are correspondingly more complicated today than the late eighteenth-century constitution writers imagined."[45]

"[N]o one seems to have given much worry to any auxiliary protections of judicial independence that are routinely expected today. They assumed that letting a

legislature withhold a judge's promised salary would promote a dependence. That assumption, however, stood by itself. It was not extended to include the administration of nonremunerative budget items, such as an adequate place to hold court, the furniture to go into it, and the equipment to enter and maintain records of proceedings. Modest as those accoutrements may have been in the eighteenth century, they too could also be manipulated to provoke a dependence. But no one thought to insist upon judicial control of their administration."[46]

Contemporary Safeguards

Durable judicial independence today requires two additional safeguards: that the judges exercise responsibility for the well-being of their court and for controlling its operation and administration; and that the court has an effective system of internal government and administration which enables the judges to do so.

The responsibility exercised should include control of the court's premises, facilities, staff and funds. Its well-being requires it to be sustained, maintained, protected, adapted and improved.

"[J]udges cannot plan an effective role in court administration unless, as a group, they are organised so that they can participate in administration. Obviously, the manner in which they organise themselves for this task must be a matter for them."[47]

It is not overstating the position to say that the preservation of judicial independence in Australia depends on whether, within a short time, judges can transform the administrative and operational side of their court, from a relatively passive inert structure, into an active, initiating organisational unit.

"This will involve a degree of reorganisation in some courts in which the internal government and organisation have hardly changed over the years. In those courts, the administrative decisions are made by the Chief Justice or Chief Judge, usually after conferring with some other judges. Unlike the organisations of the legal profession or the faculties of law, the judges of those courts lack the structures to make collective decisions as to the operation of the court or upon issues of importance to the operation of the court. A century or more after responsible government came to their communities, some courts still follow the model of a colonial government, a regiment or a warship. While it may have been possible to function in this way when the judges declined responsibility for the operation of their court, it is not adequate for a court in which that responsibility is accepted."[48]

Such systems have followed the public service model.

In considering ways of preserving judicial independence, it is necessary to remember that:

"Improvements in judicial administration start with an understanding of courts as institutions defined in organisational, and not purely legal, terms."[49]

COUNCIL OF JUDGES

The model appropriate to a modern court is that indicated by the wisdom of the common law, by research in the behavioural sciences and by contemporary experience. This model vests power to control the operation and administration of a court in the judges meeting collectively as a council and deciding by majority in case of difference. All judges have an equal vote and the Chief Justice is the first among equals.

That this is the position at common law is established by the very important paper presented to this Conference in Sydney in 1990 by Mr. Justice B.H. McPherson.[50]

I suppose it is universal human experience that we tend to protect and foster something which we have made or joined in making, and regard as belonging to us, alone or with others. Research in the behavioural sciences confirms that people are much more likely to implement a policy if they are intrinsically motivated to do so, than if the policy has been imposed upon them.[51]

A similar conclusion is reached by an application of the insight which underlies the old adage "You can lead a horse to water but you can't make it drink". The qualities the community requires in a modern judge are: a person with a strong independence of will, a good knowledge and experience of law, a good legal mind, a good understanding of human nature and a temperament suited to judicial work. They must devote the considerable time, effort and thought necessary to reach correct decisions in cases. They must also be impelled to take the initiatives and actions which will advance the court's caseflow management, administrative, and operational systems so as to enable them to function efficiently. Opinion is unanimous that a caseflow management system can operate effectively only if the judges have a strong continuing commitment to delay reduction.[52] Persons with those qualities will motivate themselves to take those initiatives and actions if they regard the court as their court in which they share with their colleagues an aspiration to make it work well, and an equal responsibility and influence for achieving that end. Whatever may be the position in other employment situations, judges with the qualities mentioned will be much less inclined to do what must be done to make the court work well if the policies directed to that end are not policies which they shared in making, but policies chosen and directed by an hierarchical superior, be it Chief Justice or Senior Judge Administrator. In practice there is no way in which reluctant judges can be made to do those things.

As Professor Scott told this Conference in

Adelaide in 1986:

"One of America's leading judicial administrators, Edward McConnell said:[53]

'Substantial overall improvement of the administration and operation of a judicial system cannot be made by a few administrative judges and their staffs, however dedicated and competent they may be. It can only come about if each judge — and judges certainly are the determining factor in the success or failure of any court system, not the supporting staff — develops a sense of responsibility, not just for his own performance but for the performance of the whole system as well.'

It is my view that judges can only be effectively involved in administration if they are prepared to act corporately (perhaps collegiately would be a better word)... I have seen many courts rendered ineffective by judges who would just not accept or would not enthusiastically implement ideas designed to improve court performance. Courts consisting of 20 or 30 judges have to devise ways which enable them to participate in court administration both as a group and as individuals."[54]

In about 1984 the Supreme Court of Victoria changed from the public service model to one in which the Council of Judges exercises ultimate authority for the administration, operation and well-being of the Court. Fortunately the statutory framework for the Council introduced in 1883 remained.[55] The Council meets monthly and makes the most important decisions of policy. In case of difference it decides by majority. An Executive Committee of the Chief Justice and six elected judges meets weekly and, consistently with Council decisions, performs the functions of a board of directors of the Court. Each elected member has a portfolio of responsibility for an area such as Buildings and Facilities, or Staff. The decisions of Council and Executive Committee are implemented and the Court administered by the Chief Justice and under his directions by the Chief Executive Officer who has line authority over court staff.[56]

Having spent about half my judicial years under each system I have no doubt that the Council of Judges system is vastly superior to that of the public service model.

The existence of recognised mechanisms for making regular collective decisions is the obvious advantage. Under the old system where the Chief Justice had in practice almost absolute control of the Court and its administration, criticisms of the operation of the Court or suggestions for change tended to be regarded by all concerned as criticisms of the Chief Justice. Now there are avenues for the ideas and criticisms of any Judge, however junior, to be placed before the Executive Committee or Council and considered. Individual judges no longer feel powerless and without influence. Responsibility for the administration, operation and well-being of the Court is spread and this of itself builds knowledge and experience in the judges.

When the Chief Justice speaks on behalf of the Court, what is said has the Court's authority. That carries additional weight and prevents the Court speaking with discordant voices.

Under the current system, the Court becomes capable of making, and taking steps to implement, decisions designed to protect the values of the judicial system, such as judicial independence. The system enables those with the natural authority within the Court, the judges, to exercise that authority so as to increase efficiency and economy. In this way they build the public confidence from which, in reality, the authority of the judicial arm of government comes. It also places the Court in a stronger position to resist intrusion from the other arms of government[57] and to put a strong case for needed funds.[58]

By spreading responsibility for the operation of a court, there is no government potential to control the Court by the appointment of a Chief Justice, as there is if a government appoints to a court, which the Chief Justice controls, a Chief Justice who will side with the government.[59]

Dedicated Court Administrators

Is it practicable for the judges, with their heavy adjudicative responsibilities, to shoulder also these non-adjudicative responsibilities? In my opinion it is, but it depends on the judges having the support of court administrators and staff who are responsible to the Court and dedicated to its values.[60]

Consistently with their other responsibilities, judges, as a general rule, should not be called on to do more than make the basic policy decisions as to the well-being, operation and administration of their Court. The implementation of those decisions and the administration of the Court consistently with them must be done by the Court's administrative staff.

Wheeler reports that in the United States, court administrators now have identity as members of a profession, possessing a basic body of practical knowledge, at least a rudimentary theoretical perspective and a concern for professional ethics.[61] He considers that court administrators responsible to the courts can provide the judiciary with the strength to protect its independence in three ways. First, they can help promote the effective administration of justice and enhance public confidence in the courts and tolerance of the concept of judicial independence. Second, they can reduce the courts' dependence on the other branches of government. Third, they can promote the courts' accountability through their relations with all the external

publics that have an interest in court operations and with internal judicial branch components with strong ties to external interests.[62] I take it that by the third way the author refers to court administrators providing information, answering questions and receiving criticisms. I assume the external publics include groups such as the police and insurers and the internal components include the legal profession.

Wheeler suggests that the fundamental goal of such court administrators is to promote and protect the court's ability to resolve disputes justly, expeditiously and economically. Inherent in this is the protection of judicial independence which is instrumental to that goal.[63] Professor Saari has put it that court administrators should share the goals, values and ideas of the judges. He says:

"[C]ourt managers must reflect and support the judicial role of independence, impartiality and separation of powers."[64]

He considers that:

"if court managers premise the value of their work on helping the judges to run the third branch in a separated, independent and impartial manner, their educational programs must logically examine through research and teaching, the basic history, values and moral aspects of impartiality and independence in whatever way educators can help to shed light on the subject of the third branch and its place in society, whether independent or subservient."[65]

There are now several educational institutions in Australia educating court administrators. The Law School of the University of Wollongong recently established a Centre for Court Policy and Administration and last year commenced a course for a Graduate Diploma in Law (Court Policy and Administration). I suggest that the courts and judges should take steps to let it be known that the court administrators they will desire to have in their courts will be those whose education has included that which is recommended by Saari.

CHANGING TO AN EFFECTIVE SYSTEM OF INTERNAL GOVERNMENT AND ADMINISTRATION

How does a court which for a century has followed the public service model make the necessary change?

As a general rule courts are firmly resistant to change. Vice-Chancellor Donald Aitkin, of the University of Canberra, has described parliamentarians (with respect to the institution of parliament) and judges (with respect to the courts) as the apostles of the true conservatism. He admits to a temptation to regard academics as in the same league.[66]

In a sense the judicial system of a democracy must be conservative. It must be a stable organisation with a constancy of purpose. The leading objective is to give fair trials.[67] It must retain its fundamental values. These have been described as:

"the basic principles of the administration of justice (impartiality, fairness, faithfulness to law, consistency, authoritative determination, finality and despatch)."[68]

In another sense, to continue to serve its democracy properly a judicial system must be progressive and prone to change. Its service is the provision of justice according to law. It must dispense this service so as to satisfy the current needs of the community. Thus it must continually inform itself of those needs. They tend to change with time. The system must, by self-examination and by heeding critics, know whether the needs are being satisfied.[69] Insofar as they are not, it must have the knowledge, will and capacity to select the most appropriate adaptations and actually implement the change.

The natural inclination of busy judges is to opt for inertia: to deny there is any real problem or to remain unconvinced that it is their responsibility or within their capacity to solve such problems as exist.

There are three interests to consider. The first is that of the Chief Justice. Experience throughout the common law world 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.[70] Under the public service model the Chief Justice inherits, from the previous holder of that office, in practice virtually the whole of the power to govern and administer the court. It is natural for a person in that position to desire to keep that power intact to pass to the succeeding Chief Justice. To do so accords with tradition. Yet there have been Chief Justices who, realising it was in the interests of the community, have foregone those prerogatives. Sir John Young, who recently retired as Chief Justice of Victoria, was one.

"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 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 well-being 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.

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 actions 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 that 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 ruin 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."[71]

Chief Justices of the High Court of Australia have adopted a similar "constitutional" role since 1980.[72] If anything, it has enhanced their standing.

It is in the overall interest of the puisne judges to move from the public service model to that of the Council of Judges. However, it does not follow that such a move will be initiated when the majority of the puisne judges are persuaded of its advantages for them, their court and their community. The concept of "disloyalty" effectively silences criticism or initiation of change within public organisations in which a person or group has near-absolute control. This concept is deeply embedded in the culture of courts which for a century have followed the public service model.[73]

Whether the interest of the public service department which has administered a court will lead it to oppose the change will vary. It will do so according to the local legal, public service and government culture. In some places the department will seek to facilitate and in other places to frustrate the proposed change.

STATUTORY FRAMEWORK

If there were no inconsistent legislation it would be open to any court without specific statutory authority to exercise the common law power to constitute and operate a Council of Judges. In England and Wales the Supreme Court mounted little or no resistance when its Council of Judges, which had existed since the *Judicature Act*, was abolished by the *Supreme Court Act* 1981. Now realising the extent of the loss, the judges of the Supreme Court have created a non-statutory Judicial Council for the Court.[74]

In my opinion any court which has not been fortunate enough to have the framework for a Council, created last century, remain in some forgotten corner of an Act, would be wise to obtain such legislation. It should give unequivocal statutory authority to the existence, powers and duties of the Council. In Victoria, legislation has recently created a Council of Judges for the County Court and a Council of Magistrates for the Magistrates' Court.[75]

HIGH COURT

The first and leading example of the operation of the Council of Judges system is of course the High Court.[76]

FEDERAL AND FAMILY COURTS

Power over court administration and operation has been located by legislation within the Federal Court of Australia and the Family Court of Australia. I have, however, expressed the view that it is a matter for great regret that such power has, in each case, been conferred on the Chief Justice and not on the collegiate body of judges.[77] In effect the legislation has imposed on those Courts the public service model.

SUPREME COURT OF QUEENSLAND ACT 1991

On 3 July 1989 when the Report of the Fitzgerald Inquiry made the statement quoted above to the effect that independence of the judiciary bespeaks as much autonomy as is possible in the internal management of the administration of the courts, it added:

> "It is not appropriate to devise any detailed scheme in this report to address this particular difficulty. The potential danger should be recognized and consultation should take place between the Government and Chief Justice. The Government should give the closest attention to any requests or comments that the Chief Justice or the Chairman should make as to the introduction of any procedures which in the administrative field will better reflect the Judiciary's independence."[78]

There were many who thought that statement, in that influential report gave Queensland an unparalleled opportunity of introducing to its judicial system the contemporary safeguards of

judicial independence so much needed today.

There is little information available as to what requests or comments were made by the Chief Justice or Chairman or what attention was given to them by the Government.

What is clear is that on 10 October 1991 the Bill was introduced to the Queensland Parliament which was enacted as the *Supreme Court of Queensland Act* 1991. The Act commenced in operation on 12 December 1991. It divides the Court into the office of Chief Justice, the Court of Appeal Division and the Trial Division: s.16(1). I limit my examination to the likely impact of the Act upon judicial independence.

As mentioned above, the situation appears to be one where the Government concluded that the Court would not, if left alone, cope with the tasks which confronted it, and acted quickly to enact the legislation which it considered would provide the remedy.

Government power to promote judges has been seen as having potential to detract from judicial independence.[81] That potential is the greater if the power is to promote for a term.

There is a good deal of wisdom in this passage from the Statement by the Australian Bar Association of March 1991, *The Independence of the Judiciary:*

"It is the duty of each court, within the limits of the resources and powers available to it, to dispose of its business as quickly and efficiently as is compatible with its primary duty: the dispensation of justice. In this context, the Australian Bar Association recognises that the involvement of government may be necessary if a particular administrative problem is to be solved. Extreme care must be exercised in those cases to ensure that such involvement does not compromise judicial independence. It should never encroach upon the judicial functions of the court. It should never be initiated until the relevant Bar Association and Law Society have been consulted."[79]

An article by Peter Charlton in the *Courier Mail* on 9 November 1991[80] suggests that neither the Chief Justice, the Bar Association nor the Law Society was consulted or involved in the discussions, proposals or drafting that led to the Bill.

I am not sufficiently familiar with the legislation of Queensland to compare the Act with the position which previously existed. I assess it by reference to general standards.

So far as the Trial Division is concerned the Act gives a government significant potential power to exert pressure on judges.

The Governor in Council may, by commission, appoint a judge to be Senior Judge Administrator: s.60(2). As is mentioned below, the Senior Judge Administrator has extensive powers of control within the Trial Division. A Senior Judge Administrator may be appointed for a term of not less than five years: s.60(3). If appointed for a term the Senior Judge Administrator vacates the office when the term ends: s.62(2)(b). While holding the office the Senior Judge Administrator has senority in the Court after the Chief Justice and Judges of Appeal: s.21(5). Presumably the salary of a Senior Judge Administrator will be higher than that of the other judges of the Trial Division. A Senior Judge Administrator appointed for a term could understandably feel or be placed under pressure to act so as to ensure that there would be the Government approval for a reappointment at the end of the term, which would continue the status, seniority and salary of the office.

The Governor in Council may by regulations divide the Trial Division into further Divisions and specify the matters that are to be heard in the various further Divisions: ss.17 and 18(1). The Governor in Council may, by commission, appoint a judge to be Senior Judge of such a Division: s.65(1). The appointment may be made for any term specified in the commission: s.65(2). If appointed for a term, a Senior Judge vacates the office when the terms ends: s.67(2)(b). Senior Judges are to assist the Senior Judge Administrator in the discharge of the functions of that office: s.69. The Act contemplates that the Senior Judge of a Division will be in charge of it: see s.64(5)(b). The Senior Judges rank in seniority after the Senior Judge Administrator: s.21(6). Presumably their salaries will be higher than those of the judges of their Division. Similar pressures to act so as to retain the Government's approval could apply as in the case of a Senior Judge Administrator appointed for a term.

Government power to promote judges has been seen as having potential to detract from judicial independence.[81] That potential is the greater if the power is to promote for a term.

The Governor in Council continues to intrude into the making of the rules of court which apply to the Trial Division. The Litigation Reform Commission must now be involved. It consists of the President and other judges of the Court of Appeal and such additional members as the President appoints: ss.74, 77, 79 and 81.[82] The Governor in Council is given power to make regulations not inconsistent with the Act with respect to any matter that is necessary or convenient to be prescribed for carrying out or giving effect to the Act: s.109(b). A report and recommendation from the Litigation Reform Commission or its Division must first be obtained: s.75(6).

Otherwise the power over the administration and operation of the Court is to be located within the Court. That is a desirable situation. The power, however, is not vested in the judges of either the Trial Division or of the Appeal Court Division but in the heads of those divisions.

The Senior Judge Administrator is responsible for the administration of the Court in the Trial Division and for ensuring the orderly and expeditious exercise of the jurisdiction and powers of the Court in that Division. The Senior Judge Administrator has power to do all things necessary or convenient for those purposes, including making arrangements as to the judges who are to constitute the Court in particular matters; issuing instructions as to the practices and procedures in the Trial Division; and controlling and managing the declared precincts of the Court in the Trial Division: ss.63 and 68. The power to manage and control the precincts includes power to prohibit access to them: s.6. Although the Senior Judge Administrator is said to be responsible to the Chief Justice in these things, the responsibility appears to be limited to consulting with the Chief Justice before exercising powers.

Power in a Senior Judge Administrator, who may be appointed by a government for a term, to decide which judge hears which case is an undesirable feature.[83]

Thus the Trial Division has a public service model of internal government with the Senior Judge Administrator instead of the Chief Justice in the position of departmental head. Moreover this model is imposed by statute. Professor Shetreet has said that hierarchical patterns introduced into the judiciary:

> "have the result of chilling judicial independence. These hierarchical patterns may even bring about attempts by judges to influence other judges' decisions, or give rise to latent pressures on the judges which may result in subservience to judicial superiors. Hierarchical patterns are usual in the civil service, a typically hierarchical organisation, but are objectionable in the context of the judiciary whose members must enjoy internal independence vis-a-vis their colleagues and judicial superiors.
>
> Both the International Bar Association Standards and the Universal Declaration on the Independence of Justice recognize this issue and emphasize the importance of internal judicial independence."[84]

The view of the Australian Bar Association is:

> "An independent judiciary is a judiciary in which each individual judge is free from improper pressures. Subject of course to appropriate appeal structures, it is incompatible with an independent judiciary that one judge should be subject to the control of another in the execution of the duties of his or her office. This danger is reduced if the administration of the courts is the responsibility of the judges as a whole (or a representative committee of them) rather than the head of the court or an unrepresentative committee."[85]

It is worth mentioning, by way of comparison, that throughout the history of the Supreme Court of Victoria the only legal power it has been found necessary to give one judge over another is the power of the Chief Justice to require a judge to attend a sitting of the Full Court.[86] The usual position of a Chief Justice is described by Mr. Justice McPherson:

> "Specific powers of controlling the Court are generally not easy to locate, and in matters of court administration his authority may be seen as resting on acquiescence rather than law."[87]

A good court operates on a combination of leadership and the sensible concession of authority by one equal to another.

When the control which the Senior Judge Administrator has over the Trial Division and its judges is considered in conjunction with the governmental pressures which may be imposed if a Senior Judge Administrator is appointed for a term, there is cause for concern as to the impact on judicial independence.

The judges of the Trial Division other than the Senior Judge Administrator appear to have been bereft by the Act of all common law rights to participate in decisions made within their Court as to its administration and operation. They appear to be quite powerless in that regard. The Supreme Court of Queensland now seems to lack even the potentiality of developing effectively what I have called the contemporary foundations of judicial independence, which I regard as the mainsprings of judicial independence today.[88]

No doubt the present incumbent of the office of Senior Judge Administrator will act with fairness and due regard for judicial independence. The Act, however, may be in operation for a very long time.

The Act to a marked degree deprives the Chief Justice of standing and power. The Chief Justice

now appears to have virtually no powers over the administration or operation of either Division of the Court beyond a right to be consulted. The Chief Justice is unable to sit in either Division of the Court unless the President of the Court of Appeal or the Senior Judge Administrator arranges for the Chief Justice to do so: s.16(2).

There has been a de facto removal of the present Chief Justice from much of the substance of his office. He has been given somewhat similar treatment to that given to judges when most of the jurisdiction of their court has been transferred to another court to which they were not appointed.[89] The effect on judicial independence, of judges seeing what can happen to them if they displease government, does not need to be elaborated.

There is some prospect that the features of the Act inimical to judicial independence could be eliminated. The Act sets up a Litigation Reform Commission consisting of the President and other judges of the Court of Appeal and such additional members as the President appoints: ss.74, 77 and 79. The functions of the Commission include making reports and recommendations with respect to the structure of the court system and the administration of the courts of Queensland: s.75(1)(a) and (e). The Commission clearly has power to recommend the elimination of the above features.

I return to the Statement of the Australian Bar Association. From this distance it is not possible to know whether there was justification for the Government to form a view that legislative intervention was necessary to enable the Court to cope with its work. I do, however, consider that the legislative intervention has compromised judicial independence.

I suggest that it is important that Australian judges give careful consideration to the factors which produced that result. It provides a home-grown demonstration of the vulnerability of judicial independence and will serve to indicate what actions and safeguards could have protected it from diminution.

R.E. McGarvie

[1] Quoted by Rabbi John S. Levi, "The Meaning of Freedom", address published in *The Age*, 2 February 1991, 16.

[2] *The Australian*, 6–7 January 1990, 13.

[3] Mary Doule, Dean of the University of Miami School of Law, "From Russia, With Doubts", *New Jersey Law Journal*, 29 November 1990, 9 at 19 (126 N.J.L.J. Index p. 1503).

[4] R.E. McGarvie, "Sir John Young: the Years of Victoria's Ninth Chief Justice" (1971) 79 Vic. B.N. (Victorian Bar News) 4 at 20–21. See also Professor Geoffrey de Q. Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melb. U.P., 1988), 29–36.

[5] In this paper a reference to judges usually includes magistrates and other judicial officers.

[6] G. de Q. Walker, *op. cit.*, n.4, 120–121.

[7] Compare: Sir Gerard Brennan, "Courts, Democracy and the Law" (1991) 65 A.L.J. 32 at 34–37.

[8] Kevin J. Foley and Bill Russell, (Govt. Printer, Melbourne, 1991).

[9] *Ibid.*, 9–10.

[10] *Ibid.*, 11.

[11] *Ibid.*, 13. See also Professors Derham and Cowen, "The Constitutional Position of the Judges" (1956) 29 A.L.J. 705 at 713.

[12] R.E. McGarvie, "Securing the Independence of the Judiciary in a Modern Democracy"; paper presented at Conversazione, Seminar on the Sociology of Culture, La Trobe University, 25 March 1991. Publication of the greater part is forthcoming in *Quadrant* under the title "The Independence of the Judiciary". See also: Mr. Justice Peter Underwood, "The Myth of Judicial Independence"; a paper presented to the Supreme Court and Federal Court Judges' Conference, Perth, 1989, unpublished; David Feldman, "Democracy, the Rule of Law and Judicial Review" (1990) 19 F.L. Rev. 1 at 18–23; Michael Pusey, *Economic Rationalism in Canberra* (Cambridge U.P., 1991), 4–23; Professor R.G. Hammond, "The Judiciary and the Executive" (1991) 1 J.J.A. (Journal of Judicial Administration) 88; Professors Thomas W. Church and Peter A. Sallmann, *Governing Australia's Courts* (AIJA (Australian Institute of Judicial Administration Incorporated), Melbourne, 1991), 7–14. The reference last mentioned outlines competing views.

[13] Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Mr. G.E. Fitzgerald Q.C., Chairman), *Report of a Commission of Inquiry Pursuant to Orders in Council* (Govt. Printer, Brisbane, 1989), 134.

[14] Sir Guy Green, Chief Justice of Tasmania, "The Rationale and Some Aspects of Judicial Independence" (1985) 59 A.L.J. 135 at 143–8; Chief Justice King, South Australia, "Minimum Standards of Judicial Independence" (1984) 58 A.L.J. 340 at 342–3; R.E. McGarvie, "The Foundations of Judicial Independence in a Modern Democracy" (1991) 1 J.J.A. 3 at 30–32; Statement by the Australian Bar Association, *The Independence of the Judiciary*, March 1991, 8.

[15] R.E. McGarvie, "Judicial Responsibility for the Operation of the Court System" (1989) 63 A.L.J. 79 at 83–84.

[16] R.E. McGarvie, *op. cit.*, n.14, at 18–19.

[17] "The North American Experience: a Theorem on Judical Administration" in G.J. Moloney and G. Fraser (eds.) *Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: the Partnership of Judiciary and Executive* (AIJA, Melbourne, 1986), 19 at 20.

[18] *Op. cit.*, n.12, 77.

[19] Jose J. Toharia [1975] *Law and Society* 475 at 486.

[20] *Op. cit.*, n.14, 135.

[21] Ibid.

[22] See Supreme Court of Victoria, *Annual Report 1988*, 16–27; R.E. McGarvie, "Litigation and Arbitration: A General Account of Dispute Resolution as It is and as It is Developing", in *Dispute Resolution in Commercial Matters* (AGPS, Canberra, 1986), 27 at 38–44; Civil Justice Committee, *Preliminary Study* (Vic. Govt. Printer, 1984), 71–88, 263–264 and 273–274; Civil Justice Committee, *Report* (Vic. Govt. Printer, 1984), Vol. 1, 207–247.

[23] I was a member of the Committee.

[24] R.E. McGarvie, *op. cit.*, n.14, 15–20 and the references there given.

[25] *Ibid.* at 13.

[26] Professor David J. Saari, "Separation of Powers, Judicial Impartiality and Judicial Independence: Primary Goals of Court Management Education", at 21–22, in Conference Papers of Second National Conference on Court Management, National Association of Court Management,

Phoenix, Arizona, 9–14 September 1990. These papers were kindly made available to me by Mr. Frank W.D. Jones, Registrar of the High Court of Australia.

[27] R.E. McGarvie, *op. cit.*, n.14, 35–39.

[28] Discussed below.

[29] Professor I.R. Scott, *Court Administration: The Case for a Judicial Council* (University of Birmingham, 1979), 3–9.

[30] R.E. McGarvie, *op. cit.*, n.14, 42.

[31] Australian Bar Association, *op. cit.*, n.14, 1.

[32] (1987) 163 C.L.R. 329 at 362–363.

[33] Quoted by Graham Barrett in "Europe's age of uncertainty", *The Age*, 27 December 1991, 11.

[34] Civil Justice Committee, *Preliminary Study*, *op. cit.*, n.22, 288; Chief Justice King, South Australia, "... and the Chief Justice says: 'We must listen to our critics!' ", *Australian Law News*, Vol. 26, No. 10, 1991, 11; Mr. Justice D.L. Mahoney, "Delay ... A Judge's Perspective" (1983) 57 A.L.J. 30 at 41–42.

[35] R.E. McGarvie, *op. cit.*, n.4, 21.

[36] Compare: Sir John Young, former Chief Justice of Victoria, "Opening Speech", 3, in Moloney and Fraser (eds.), *op. cit.*, n.17.

[37] Thornstein Veblen, *The Theory of the Leisure Class* (Modern Library, New York, reprinted in 1931 by Viking Press, New York), 43. I am indebted to Mr. Peter Ryan for this reference.

[38] R.E. McGarvie, *op. cit.*, n.15, 79–80.

[39] Compare Geoffrey de Q. Walker, *op. cit.*, n.14, 52.

[40] *Op. cit.*, n.26, 8.

[41] I stated my views more fully in "The Function of a Degree: Core Subjects", a paper presented at Legal Education Conference, Law Council of Australia, Bond University, Queensland, 14 February 1991; publication forthcoming in *Journal of Professional Legal Education* (1992), Vol. 9, No. 1 and in the proceedings of the conference; and in the paper "Legal Education: Pulling its Weight in the Nineteen Nineties and Beyond", presented at Monash University on 12 July 1991 to the Conference, Education and the Law: Law and Policy in the Nineties, organised by the School of Graduate Studies, Faculty of Education, Monash University and to be published in the forthcoming issue of the *Monash University Law Review*.

[42] R.E. McGarvie, *op. cit.*, n.14, 11–20.

[43] Sir Guy Green, *op. cit.*, n.14, 140; R.E. McGarvie, *op. cit.*, n.14, 32–33; Australian Bar Association, *op. cit.*, n.14, 8.

[44] (National Center for State Courts, Williamsburg, 1988).

[45] *Ibid.*, 6.

[46] *Ibid.*, 11.

[47] Civil Justice Committee, *Report*, *op. cit.*, n.22, Vol. 2, Appendix I, "The Administration of the Supreme Court", 88.

[48] R.E. McGarvie, *op. cit.*, n.15, 90–91.

[49] Civil Justice Committee, *op. cit.*, n.47, 82. See also: *ibid.*, 81–88; I.R. Scott, "Is Court Control the Key to Reduction of Delays?" (1983) 57 A.L.J. 16 at 21; I.R. Scott, The Foundations of Judicial Administration, unpublished paper delivered at Supreme Court Judges' Conference, Adelaide, 1986, 11–15 and Appendix.

[50] Structure and Government of Australian Courts: unfortunately it is not published: it is quoted with the permission of the author.

[51] Professor E. Scott Geller, "Applied Behaviour Analysis and Social Marketing: An Integration for Environmental Preservation", *Journal of Social Issues*, Vol. 45, No. 1, 1989, 17. I am indebted to Professor Margot Prior, Professor of Psychology at La Trobe University, for reference to this article.

[52] Peter Haynes, "Planning and Executing a Delay Project" (1983) 57 A.L.J. 24 at 29; Mr. Justice D.L. Mahoney, *op. cit.*, n.34, at 31 and 41; Ross Cranston, "Approaches to the Delay Project of the Australian Institute of Judical Administration and Plans for the Future" (1983) 57 A.L.J. 8 at 11–12; Civil Justice Committee, *Report*, Vol. 1, *op. cit.*, n.22, 148–154.

[53] McConnell, "Court Administration" in American Bar Association Section of Judicial Administration, *The Improvement of the Administration of Justice* (5th ed., 1971), 14.

[54] I.R. Scott, The Foundation of Judicial Administration, *op. cit.*, n.49, 40–41.

[55] Over the years the Council had not fulfilled the expectations of its creators. Civil Justice Committee, *op. cit.*, n.47, 27–29. The Civil Justice Committee recommended that the virtually unused Council be strengthened, have primary responsibility for the operation and conduct of the Court and form an Executive Committee. *Report*, *op. cit.*, n.22, Vol. 1, 59–60, 87–88 and 335–344.

[56] Sir John Young, *op. cit.*, n.36, 5–7; R.E. McGarvie, *op. cit.*, n.15, 91–92; *op. cit.*, n.14, 25; *op. cit.*, n.4, 25.

[57] Peter Haynes, *op. cit.*, n.52, 29.

[58] Peter Haynes, *ibid.* I.R. Scott, "Is Court Control the Key to Reduction of Delays?", *op. cit.*, n.49, 18 and 23.

[59] R.E. McGarvie, *op. cit.*, n.14, 31.

[60] R.E. McGarvie: *op. cit.*, n.15, 92–94; *op. cit.*, n.14, 40–41.

[61] *Op. cit.*, n.44, 33.

[62] *Ibid.*, 37.

[63] *Ibid.*, 4.

[64] *Op. cit.*, n.26, 10.

[65] *Ibid.*, 8.

[66] "How research came to dominate higher education and what ought to be done about it", *The Australian Universities' Review*, Vol. 33, 1990, Nos. 1 and 2, at 8.

[67] Compare Sir Guy Green, *op. cit.*, n.14, at 138 quoting Professor Goodhard.

[68] Civil Justice Committee, *Preliminary Study*, *op. cit.*, n.22, 288.

[69] Shirley S. Abrahamson, "The consumer and the courts", *Judicature*, Vol. 74, 1990, 93.

[70] Compare, I.R. Scott, *The Foundations of Judicial Administration*, *op. cit.*, n.49, 21.

[71] R.E. McGarvie, *op. cit.*, n.4, 24–25.

[72] *High Court of Australia Act* 1979; Sir Harry Gibbs, "The High Court as a Separate Entity" in Moloney and Fraser (eds.), *op. cit.*, n.17, 101; R.E. McGarvie, *op. cit.*, n.14, 28.

[73] R.E. McGarvie, *op. cit.*, n.14, 39–40.

[74] R.E. McGarvie, *op. cit.*, n.15, 84–86.

[75] The provisions for the Councils of the Victorian Courts are in *Supreme Court Act* 1986, s.28; *County Court Act* 1958, s.87 and *Magistrates' Court Act* 1989, s.15.

[76] See references in n.72.

[77] R.E. McGarvie, *op. cit.*, n.14, 28–30.

[78] *Op. cit.*, n.13, 134.

[79] *Op. cit.*, n.14, 8. See also I.R. Scott, *op. cit.*, n.29, 18.

[80] "The case behind our new judges".

[81] G. de Q. Walker, *op. cit.*, n.4, 34.

[82] The rules for the Trial Division are made under s.11 of the *Supreme Court Act* of 1921 by the Governor in Council with the concurrence of any two or more judges. See R.E. McGarvie, *op. cit.*, n.12, 28. By s.75(5) and (6) of the Act of 1992 such rules may not be made unless a report and recommendation from the Litigation Reform Commission, or one of its Divisions, has been obtained. The rules for the Court of Appeal Division are made under the Act of 1991 by the President, subject to a veto by a majority of the judges of appeal or the Governor in Council: s.32.

[83] G. de Q. Walker, *op. cit.*, n.4, 35.

[84] "The Limits of Judicial Accountability; A Hard Look at the Judicial Officers Act 1986" (1987) 10 U.N.S.W.L.J. 4 at 15.

[85] *Op. cit.*, n.14, 8.

[86] *Supreme Court Act* 1986, s.9.

[87] *Op. cit.*, n.50, 44.

[88] R.E. McGarvie: *op. cit.*, n.14, 20–21; *op. cit.*, n.4, 25.

[89] R.E. McGarvie: *op. cit.*, n.14, 14–15; Australian Bar Association, *op. cit.*, n.14, 3.

OPENING OF THE LEGAL YEAR

Archbishop Stylianos and Phillips, C.J.

THE FORMAL OPENING OF THE LEGAL year took place in Melbourne on Monday 28 January. In Geelong, where things are presumably a little slower, the opening of the legal year took place on Tuesday 29 January.

Services were held at St. Paul's Cathedral, St. Patrick's Cathedral, St. Eustathios Cathedral, and the East Melbourne Synagogue. Our cover photo shows the Chief Justice and Archbishop Stylianos leaving the services at St. Eustathios.

It is perhaps unfortunate that, in the interests of efficient use of resources and adequate service to customers, the courts resume well before the legal year opens, with the consequence that the opening of the legal year has now become symbolic rather than real.

Efficient service is important to the community, and resources must not be wasted. Yet concern for the environment should include concern for the environment of our institutions.

It will be a sad day if the opening of the legal year becomes merely an empty symbol sandwiched between the early morning conference and the 2.15 p.m. appearance.

VICTORIAN BAR COUNCIL FOR THE YEAR 1991/1992

Victorian Bar Council.

NAME	CLERK	CHAMBERS PHONE NO.
Front row left to right:		
Chris Jessup Q.C.		
Junior Vice-Chairman	Duncan	608 7801
Hartley Hansen Q.C.		
Senior Vice-Chairman	Spurr	608 7709
Andrew Kirkham Q.C.		
Chairman	Spurr	608 8097
Michael Colbran	Foley	608 7296
Robert Kent Q.C.	Spurr	608 7718
Nicole Feely	Hyland	608 8409
Stewart Anderson	McNaught	608 8448
Back row left to right:		
Jenny Richards		
Assist. Honorary Secretary	Hyland	608 8590
Andrew McIntosh		
Honorary Secretary	Dever	608 8203
Gerard Nash Q.C.	Spurr	608 7730
Brind Zichy-Woinarski Q.C.	Foley	608 7377

NAME	CLERK	CHAMBERS PHONE NO.
Rodney McInnes	Dever	608 8254
David Habersberger Q.C.	B.C.S.	608 7506
Paul Elliott	Hyland	608 7417
Graeme Uren Q.C.	Foley	608 7277
John Middleton Q.C.	McNaught	608 7341
Phillip Dunn	Foley	608 7305
Joseph Tsalanidis	B.C.S.	608 8931
Cathryn McMillan	McNaught	608 8076

NAME	CLERK	CHAMBERS PHONE NO.
Absent:		
Ross Gillies Q.C.	Dever	608 7196
Susan Crennan Q.C.	B.C.S.	608 7014
Treasurer		
Murray Kellam Q.C.	Stone	608 7036
Robin Brett	Duncan	608 7770

Note: Robert Kent Q.C. resigned in March 1992.

LEGAL EDUCATION AND PROFESSIONAL SKILLS

This year two new law courses commenced in Victoria, one at Deakin University, the other at La Trobe University. The Deakin Law Program is unusual in that the degree is a degree specialising in Commercial Law and is taught, at present, within the Faculty of Commerce. At the opening of the Deakin University Law Program on 17 February 1992, The Honourable Sir Anthony Mason A.C., K.B.E., Chief Justice of Australia, gave the occasional address and, in doing so, commented not only upon the Deakin degree but also upon the role of the law school in the training of lawyers.

THE NATION-WIDE EXPANSION IN THE provision of Law courses will result this year in the commencement of two new Law courses in Victoria: one here at Deakin University and the other at La Trobe University. This expansion comes at a time when the exponential expansion in the demand for legal services, which has continued for so long, has come to a halt, even if it be only temporary. So the challenging world of competition confronts the architects and teachers of Law courses, as well as university administrators, perhaps for the first time in the history of this country, just as it confronts so many other sections of the community.

That statement requires some explanation. The present shortage consists of university places, not of students. But, if the employment market for Law graduates contracts or does not expand, as presently may seem to be the case, then each university which offers a Law course comes under pressure to design a course which better equips its graduates for professional practice or endows its graduates with particular skills to meet new or special demands. The traditional image of the university — a community of scholars — an image beloved of, and promoted by, academics, has given way in modern times to the more mundane, popular conception of the university as an institution which imparts to students knowledge and skills which will qualify them for employment, professional and otherwise. Consequently, a university has some responsibility to ensure that its teaching programs are oriented towards satisfying those demands that reflect employment prospects. Employment prospects entail a demand not only for academic qualifications but also for professional skills. And that raises a serious critical question: whose responsibility is it to ensure that the future generations of Law graduates receive adequate training in professional skills? Is it the profession or the universities or, perhaps, a combination of both? I ask the question because the output of Law graduates from the universities seeking to enter professional practice in future years may well exceed the present capacity of the profession and the professional institutions to provide professional training for them.

In speaking of the modern role of the university as I have done, I am not suggesting that the university should desert its historic role. Far from it. A university must conserve, extend and transmit knowledge; it must also encourage and stimulate a spirit of inquiry. Indeed, a strong criticism of legal education in Australia is that we have focussed on professional knowledge and skills instead of relating Law as a subject of study to the context in which it exists as a discipline. That deficiency, it is said, is now evident at a time when our legal system is being subjected to ever-increasing scrutiny by critics who see it as non-responsive to the legitimate demands of society.

The Law course introduced by this university has obviously been crafted with a view to meeting some, if not all, of the objectives which I have mentioned. The course is specialist in nature and is designed to produce graduates who are commercial lawyers. It will be administered not by a Faculty of Law but by a Department of Commercial Law in the Faculty of Commerce. And it will require students who have not previously undertaken commercial study to undertake such studies in association with their legal studies. The course is available on- and off-campus and may be undertaken on a full-time or part-time basis. Although the course is offered primarily as a means of qualification for entry into the legal profession, it is also offered as a means of developing and enhancing a career already established in a law-related occupation.

Although some traditional lawyers may look quizzically upon a commercial law course which is designed and administered under the aegis of a Faculty of Commerce, it is an interesting development. Faculties of Law at Australian universities have not succeeded in building enduring bridgeheads between Law and other academic disciplines.

A Law course specialising in commercial law should succeed in avoiding some of the more difficult problems which face courses more general in their scope. The principles of commercial law are largely settled and it is not suggested, as it has been in other areas of the law, that the principles of commercial law are in need of comprehensive renovation. There are those who say that the pristine clarity of commercial law has been obscured by the advance of the doctrine of estoppel and the expansion of equitable principles into the mercantile area. But these developments are perhaps no more than gentle undulations on what is a settled landscape. There are, of course, areas of contract law which need judicial elucidation or legislative renovation in order to ensure just and sensible outcomes. The law relating to acts done under heads of agreement which turn out not to be a binding contract is one such area. But, generally speaking, the principles of commercial law give more satisfaction than the principles prevailing in most other branchs of the law.

Commercial law has another advantage which is not insubstantial in times of recession. It does not depend upon government subsidy and legal aid to the same extent as do other branches of our law. It can pay its own way or, to put it more accurately, commercial clients are more likely to be able to pay their own way, notwithstanding the spate of corporate collapses that have occurred in recent times. Commercial law may be better able to withstand an application of the "user pays" principle. That is not to say that the level of legal costs is not a problem in the commercial field. Business people as much as ordinary citizens are seriously concerned with the level of costs and with the inefficiencies and delays associated with recourse to the law.

Although some traditional lawyers may look quizzically upon a commercial law course which is designed and administered under the aegis of a Faculty of Commerce,it is an interesting development. Faculties of Law at Australian universities have not succeeded in building enduring bridgeheads between Law and other academic disciplines. That is one of the challenging tasks, perhaps the most challenging, confronting academic lawyers and its accomplishment is of major importance to the development of the law and related disciplines. One possible reason for past lack of success in this field is that a Faculty of Law naturally treats law and legal interests as paramount and may not take sufficiently bold steps to encourage or stimulate input from other disciplines.

A Faculty of Commerce, not being inhibited in quite the same way, may be in a better position to stimulate and maintain interaction between laywers, economists and accountants and other business and financial experts. The corporate collapses to which I have referred, the complexity of the Corporations legislation, the inability of our regulatory system to cope with the widening array of problems and the difficulties attending major criminal prosecutions for corporate and commercial offences all underline the urgent need for co-operative dialogue between lawyers, economists and accountants on a broad range of issues of contemporary significance. The promotion of such a dialogue is essential not only to the solution of national problems but also to effective academic research and the instructive teaching of students. Commercial law students, like other law students, must have a perceptive understanding of the entire context in which the relevant law operates.

I notice that the Director of the Law Program, Professor Philip Clarke, in an article in the *Law Institute Journal* on "The Deakin Law Program" said:

"Unfortunately, the Deakin law program can permit only a small student enrolment. On the positive side, however, this will allow lectures and tutorials to be conducted in small groups, facilitating those close working relationships between students and teachers and among students themselves."

Being small . . . enables a concentration of resources and effort for maximum effect on a special area to the exclusion of other distractions. It enables those who are teaching to pursue the goal of excellence, a goal which is much more difficult to achieve in the context of large classes.

I agree with the second sentence in the passage I have just quoted. But I do not see a limited enrolment necessarily as a disadvantage in the early stages of the Program's development, though obviously it presents a problem to the university in funding a comprehensive law library and an array of specialist teachers. In the case of specialist Law courses, it may perhaps be desirable to limit enrolment and avoid the transition to a "Big Law School" with all the complications attendant upon that transition. If that transition is to take place, then it would be accompanied by the setting-up of a fully-fledged Faculty of Law which would, presumably, administer the Commercial Law Program.

Being small, at least in the field of education, has some advantages. It enables a concentration of resources and effort for maximum effect on a special area to the exclusion of other distractions. It enables those who are teaching to pursue the goal of excellence, a goal which is much more difficult to achieve in the context of large classes.

In conclusion, I congratulate the university on its initiative in establishing a specialist Commercial Law course in an appropriate commercial environment and I trust that the initiative has the success which it so obviously merits.

CREATING AN AWARENESS OF THE LEGAL AID COMMUNITY

IT IS MY THESIS THAT THE PRINCIPAL players in the legal aid community — legal aid workers, judicial administrators, and practitioners — should in their own interests and that of the community they serve, recognise how some of their past actions have been directed more to their own interests than those of legal aid and should resolve to identify areas of commonality.

First however a question for you to think about:

Assume that the Director of Public Prosecutions is given an increase in funding when Legal Aid funds are reduced. Would there be any adverse comment either within the legal profession or outside in the community? What underlying assumptions, what values, what perceptions of society are reflected in those funding allocations?

I will come back to that question later.

It is necessary to establish what can be encompassed within the term "Legal Aid Community". The term is an artificial construct for which there is no correct definition. By discussing what I mean by the term I seek only to facilitate communication by avoiding unspoken and differing assumptions. The most obvious definition of the term is that it includes those who are engaged in providing legal aid services. For some the provision of legal aid is their primary focus. These include the Legal Aid Commissions, the Community Legal Centres, and Aboriginal Legal Services. For others, it will be a secondary focus, namely members of the legal profession who spend varying degrees of their time in delivering legal aid services. The obvious definition, however, is one that has its shortcomings. For example, it is arguable that this list is far too confined: that there are many others who are engaged in providing services that are a form of legal aid. Such persons may include Ombudsmen, Health Services Complaints Commissioners, Community Justice Centres, Citizens' Advice Bureaux, Industry Complaints Service (for example the Banking Ombudsman

Legal Aid is in crisis throughout Australia and, not least, in Victoria.

The Office of Legal Aid and Family Services sponsored a conference on "Legal Aid and Legal Access" in Sydney in February this year. One of the key papers was given by Julian Gardner. That paper, save for half a dozen paragraphs, is reproduced below by kind permission of the author and of the Office of Legal Aid and Family Services.

or insurance complaints officers), consumer advice centres, government trustee offices that prepare wills, Chamber Magistrates and so on.

Most, if not all of these, would not consider themselves to be delivering legal aid services. Depending upon your definition of legal aid, they may in fact be doing so. It is doubtful that they would see themselves as part of the legal aid community. That they do not leads to a fragmentation of a potentially larger and more influential community. Perhaps it is best to characterise them as potential members. It may well be worthwhile to give further consideration as to whether such people or some of them can be drawn into the legal aid community, whether they would want to be drawn in, what benefits would flow and what strategies are required to achieve their incorporation.

Another approach to giving meaning to the construct of a legal aid community is to ask who is affected by and benefits from the provision of legal aid services. This clearly requires us to consider those who consume legal aid services, although their involvement with the legal aid community may be transient. This approach would also draw within its compass Judges and Magistrates who are the indirect beneficiaries of legal aid services. If there is any doubt about this ask a District Court Judge whether they welcome the prospect of a two-week trial with an unrepresented accused or ask any legal aid director about the response from those involved in judicial administration when there is any suggestion of a withdrawal of legal aid services from a particular jurisidiction.

It is this larger and more embracing concept of the legal aid community that I favour. In saying that, I recognise difficulties with using the term in this way. The weakness of this construct is that it becomes less manageable. It can be criticised as being a meaningless definition in that it is legitimate to argue that all members of society are affected by and are the beneficiaries of legal aid services.

Past relationships between the major legal aid players have been characterised by a lamentable lack of common endeavour. The principal conflict has been between the private legal profession and the Commissions. Ostensibly the conflict has been over the issue of how to deliver legal aid services. It the advantage of private practitioners in being able to offer choice of solicitor. In reality the issue has been the division of the legal aid dollar. If there were doubt about this then look at the pressures placed on Commissions over the level of fees payable to private practitioners which serve to illustrate that the basis for conflict has been more financial than ideological.

For their part, Community Legal Centres, while at times taking broad perspectives, have primarily been concerned to secure their own funding and then to increase it as a share of total legal aid funding. In support of their arguments, they have emphasised their uniqueness and the benefits that can arise from their method of operations. The Aboriginal Legal Services have remained detached and even unconcerned about the issue of funding other than their own. There have from time to time been concerns over the possibility of incorporating Aboriginal Legal Services into the mainstream but once they have received assurances that Legal Aid Commissions were not intent on expanding their empires then the normality of detachment has returned.

During the 1980s the strategies adopted by the major legal aid players can be characterised as strategies of differentiation. They were strategies that emphasised differences; promoted the competitive advantages; and laid claim to ideological superiorities. The objective of such strategies was to acquire a greater share of the funds available for legal aid or if possible to eliminate another player thereby acquiring their share of those funds. Legal aid resources were seen as a prize and, during most of this time, a prize that was growing. It is possible, it must be conceded, that such growth was in part the outcome of or

response to this competition. For example, the significant increases in Commonwealth funding for CLCs did not involve a reallocation of resources but an increase in total resources. It is therefore possible that these policies of differentiation were the correct strategies for those times. They are, I believe, strategies that are not longer tenable nor tolerable. If such strategies are no longer tolerable, then with what should they be replaced? It is unrealistic to expect that the force of self-interest will disappear, but it is realistic to suggest that the self-interest of all concerned could be best served by identifying the commonalities and by pursuing actions that further those common interests. That, as I understand it, is the objective of the workshops that follow: to create an awareness of others within the legal aid community.

Before turning to that, it should be noted that creating awareness can, as well as this internal focus, have an external focus. The latter involves creating an awareness of the legal aid community in the minds of those external to that legal aid community. At present, there is little objective information of the extent and nature of the community's knowlege about legal aid. In other industries market research would have been appropriate. Surveys would have been undertaken of consumers to gauge the degree of product identification, their knowledge of legal aid and their attitudes to it, and would have provided valuable information upon which to base strategies for creating public awareness of legal aid.

Such research is not likely to occur. At a time when the demand for legal aid overwhelms supply it would be seen to be inappropriate to contemplate expenditure on such projects. It is not possible therefore to be authoritative about what the public knows of legal aid or thinks about legal aid. My belief is that it knows very little and that it has a simplistic view of legal aid which probably connects it principally to criminal law. (An example of the level of understanding appeared in a editorial in the Melbourne *Age* which ascribed responsibility for legal aid to the Law Reform Commission. It is hard to imagine such an obvious error being made in an editorial on other areas of public expenditure).

If I am correct it follows that the public requires a better understanding of what legal aid does, the services it provides and the range of areas in which it operates. There is an understandable reluctance to promote or appear to advertise services when there is no capacity to meet present demand. It is seen as almost misleading to hold out the possibility of providing a service only to reject requests to provide it. As a consequence, such promotional exercises are avoided. There is an assumption in such avoidance that I suspect is not always appreciated. It is my recollection that prior to the 1970s information about Commonwealth pensions and benefits was similarly begrudgingly withheld. Information was obtained only if you asked for it. Since that time the availability of pensions and benefits has been promoted despite the fact that the consequent increase in recipients is an additional cost to the Government — a cost I might add far greater than that occasioned by legal aid. Why is there a difference between advertising pensions and advertising legal aid? The answer lies in part in the fact that pensions and benefits are seen as entitlements, the cost of which is to be adjusted not by withdrawing them so much as by adjusting their quantum. No such perception of legal aid exists. The reluctance of Legal Aid Commissions to advertise is, I suggest, an implicit acceptance of the assumption that the provision of legal aid is not an entitlement but, as it were, an optional extra.

To change that perception it is necessary to change the understanding of the role that legal aid plays in society. This brings me back to the question that I posed about the increase in funding to the Director of Public Prosecutions.

Governments respond to community concerns and pressures. These may or may not be real. Perceptions are the reality. Our society places a high value on law and order and the current perception is that law and order are threatened most by those who commit the more visible crimes against property and the person. Personal knowledge of theft and disproportionate publicity of serious crimes serve to reinforce the perception. The apprehension and prosecution of offenders therefore assumes high priority. The DPP is seen to be part of this process.

In contrast there is the disturbing perception that legal aid is money spent on criminals (there being no distinction between the accused and convicted in the public mind nor in statements of many in the self-proclaimed law and order lobby). It is seen as resources diverted to the undeserving. Thus different value is attached to the funding of legal aid and the funding of law enforcement agencies.

There is also a difference in the criteria for funding. To a certain extent funding of law enforcement agencies involves demand-led budgeting. It is worth reflecting in passing that the establishment of Legal Aid Commissions in the 1970s, events that were applauded by many within the legal aid community as a major advance, has meant that these broadly representative bodies have a significant degree of control over the expenditure of their budgets. Unfortunately these are controlled budgets in contrast to

the demand-led budgets in, say, criminal defence matters in the US or more generally in the UK. In the latter country the legal aid expenditure has burgeoned. During what are popularly seen as the fiscally severe Thatcher years, legal aid was once described as the fastest-growing social service. Per capita expenditure has been estimated to be somewhat more than double that of NSW.

It is, however, the different value reflected in the funding decision that is important, a government that decides to increase DPP funding implicitly reflects and responds to community perceptions (whether or not they are accurate)

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and at the same time assumes that there will be little protest about lack of legal aid funds. In other words, it adopts the proposition that law and order is about enforcement of the criminal law and the confidence of individuals in their own safety rather than being about the maintenance of the rule of law and the confidence of the individuals in the fair and equal operation of the legal system.

The task therefore is to create an awareness of legal aid as being part of the structure that serves and supports law and order. In doing so it must be established that law and order extend beyond the mere control of crime and conviction of offenders. It requires the maintenance of respect for the rule of law, a prerequisite of which is to ensure equality of access to the protections that the law offers and an equality of application of the sanctions that the law applies. Without legal aid the rule of law is threatened. Without the rule of law, law and order are threatened.

For example, if a person took your lawn mower, an action in tort or contract may enable you to secure its return. If you are unable to take such action a cheaper form of alternative dispute resolution is to punch the person's nose and seize the lawn mower.

Legal aid will never assume the importance of law enforcement until society sees that its role is to assist victims and to prevent the vulnerable from becoming victims. Representing a young person in the Children's Court should not be seen as spending money on an offender. It is designed to achieve an outcome that best serves the interests of society by both maintaining lawfulness and good order and by securing the young person's rights to an opportunity for rehabilitation, support, education and to realise their potential. The same is true of the person charged with a criminal offence, the separated spouse, the defrauded consumer and so on. In all of these cases, the objective is to realise and secure their just, lawful and rightful entitlements; to secure their lawful share of the wealth of society; to ensure that the outcomes are fair and the laws are made to work and to work equally. It is the creation of an awareness of these principles that should be our ultimate objective.

I return now to the internal focus of creating an awareness of the legal aid community. That is an awareness of each other's role, the inter-relationship of their actions and how an awareness of commonalities is important in achieving a greater degree of access to justice. First it is necessary to recognise that the action of one group of members of the community in pursuit of their individual objectives can have negative consequences for legal aid. A clear example of this is in Victoria where most laudably a program was introduced to reduce delay in criminal trials. The program involved increasing the average number of County Court judges sitting in criminal lists from 13 to 17. As legal aid funds are required for possibly 70% of these trials, the 30% increase in throughput has an obvious and immediate impact on legal aid expenditure within a given year. Despite original assurances that funds would be found for the cost of prosecution, adjudication and defence, the increased defence costs borne by legal aid have not been met.

A quite different example arises in the Family Court jurisdiction. Again most laudably action has been taken to increase the efficiency of the Court. The last two years have seen the introduction of pleadings and more recently the implementation of case management guidelines. The Court is to be praised for its production of a statement of case management principles. However, the earlier action of introducing pleadings has had a dramatic impact on costs. Anecdotal evidence from practitioners estimates that costs to the pre-trial stage have increased from between 50–100%. Figures from the Legal Aid Commission of Victoria for the last financial

year show that costs in family law matters that were commenced and paid in the one year increased by 33.5% in the space of that one year.

While it is possible to introduce requirements for statutory impact statements and regulatory impact statements, neither would have covered changes such as the examples given. There are many other examples also that could be given in which the actions of Commissions or private practitioners or CLCs have been designed to increase their own efficiency or profitability by shifting costs elsewhere. In these circumstances impact statements alone would not have assisted.

The only solution is for the players to recognise their interrelatedness and accept a shared responsibility. This requires an acceptance that the goal of increasing access to justice is common to all concerned. The evidence to suggest that such acceptance of shared responsibility is achievable is unfortunately not strong. Nevertheless considerable importance should be attached to causing the members of the legal aid community to adopt a common voice so that they collectively create an awareness of their role and their needs in the minds of the community and particularly in the minds of the decision-makers.

The decision-makers, those who determine the allocation of resources within society, do so by balancing shifting and competing patterns of expressed needs. It is not a rational and pure process of differentiating and according priority to need. Rather it is a balancing of competing pressures which may reflect needs or which may reflect the strength of sectional interests and their capacity to present their case. Some decisions are made to avoid political pain or to minimise discomfort. The squeaky wheel does not always get the oil but it gets far more than if it remains silent. Thus is created an industry of lobbyists, publicists and advertising agencies engaged to promote sectional interests. Such promotion involves at least two strategies. The first is to identify the decision-makers and those who influence them and to seek directly to impinge on their thinking. The second is to create a more general climate of opinion so that decision-makers, rightly or wrongly, perceive that they must respond to it.

The notion of establishing a professional lobbyist for legal aid or of using the services of an existing lobbyist is on its face quite ludicrous. This is a time of austerity, a time for expenditure restraint, a time to ensure that resources are spent only on the most essential of service needs. Despite this, I am suggesting that legal aid interests, not necessarily just the Commissions, should direct funds for this purpose.

If it is not possible to engage a legal aid lobbyist then at a minimum the members of the legal aid community must redirect some of the effort of their own lobbyists to common goals. Reflect for a moment on the fact that following this session are six workshops featuring Legal Aid Commissions, CLCs, private practitioners, ACOSS, Aboriginal Legal Services and the courts. All of these, all except the Legal Aid Commissions, have or are considering having a structured lobbyist function.

The squeaky wheel does not always get the oil but it gets far more than if it remains silent. Thus is created an industry of lobbyists, publicists and advertising agencies engaged to promote sectional interests.

The legal profession has an office in Canberra in the form of the Law Council Secretariat. It performs among other functions that of a lobbyist. It is interesting to note that the peak body for a private profession which at times is avowedly anti-public sector and anti-public employee has appointed as its last two Secretaries General persons from within the ranks of the Commonwealth Public Service. Quite sensibly it was recognised that there is a need for a lobbyist to be familiar with the workings of the decision-makers.

The Community Legal Centres are about to establish a national secretariat which no doubt will have the objective not just of co-ordinating some activities of centres but also of publicising, promoting and pressing for their own interests.

ACOSS, of course, has a far wider brief than that of legal aid. As a group with limited resources it has been extremely successful in establishing its voice as one to be respected and listened to. It is an organisation that has been farsighted and bold enough to decide that although its funds are small the priority of establishing an office in Canberra to provide permanent professional advocacy is of the highest priority.

The Aboriginal Legal Services have a national body (the National Aboriginal Islander Legal Service) which was established with the objec-

tive of providing a national voice and gaining access to decision-makers focussed specifically on the need for services for Aboriginal persons.

As for the courts it would be an anathema to the traditional view of the role of the judge to enter public debate. To date the approach has been more subtle; for example, through the workings of the Australian Institute of Judicial Administration. However, earlier this year the annual conference of senior judges was reported as having agreed to investigate a proposal put by a Supreme Court judge to establish a judicial committee to make submissions to Government on behalf of judges and to issue news releases on such matters as proposed legislation and conditions of service. The Melbourne *Age* reported that the conference was told that: "Judges must unashameably take part in the political process, and instead of always appealing to logic with politicians, take deliberate action to mobilise public opinon so as to influence them."

Of the six groups represented in the workshops only the Legal Aid Commissions do not have a proposal for an office to perform a promotional role. True it is, that in part the Office of Legal Aid and Family Services performs that role quietly and discreetly behind the scenes by pursuing claims for budgetary resources. It is a role that should not go unrecognised nor unapplauded. However, it is a difficult role as the Office must also monitor and audit the work of Commissions. The fact that it may at times deliver the bad news should not lead to the assumption that it was the author. I digress to comment that the same is so of the relationship between Commissions and CLCs. It was always frustrating to encounter resentment and hostility in prising out of some CLCs financial and descriptive documentation upon which the soundness and value of their operations could be established. The reality was that the Victorian Commission was and is a great supporter of the CLC cause and that it has a responsibility to ensure that mismanagement does not occur in one centre that would adversely reflect upon all others. It, like OLAFS, needs to collect information of achievements so that it can present a positive picture.

The existence of or proposals for lobby groups serve to highlight in part the problems that this session was intended to consider. Each of these groups has a sectional focus the pursuit of which may override common goals of legal aid or at best make them a secondary consideration. For example, the Law Council's submission to the NLAAC Review had its focus more on protecting or furthering the position of its members than on benefiting legal aid. So much energy, so much talent, so much effort has been invested over the last 10–15 years not to create an unassailable position for legal aid in the priorities of the community and of Government but in fighting for a greater share of the existing Legal Aid cake.

Some of the old rhetoric lingers on. The introduction of the ALAO in 1973 and the use of salaried lawyers led to fears of a nationalised legal profession. And what has happened? The Australian Bureau of Statistics concluded that "payments by legal aid providers to private practitioners constitute about 3% of the gross income of the legal services industry". Surely it must be seen that the fears have not and will not be realised. It is time for the debate to be buried.

When I reflect upon the sterility of the debate over alternative delivery methods, whether over US Judicare v. in-house counsel models, whether over open and closed panels, or whether over private practitioner and salaried lawyers I am ashamed. Long ago I observed that whatever study had been done has resolved nothing, because whoever was not favoured by the outcome of that study set about to effectively discrediting the methodology. My regret is that I did not see earlier how this debate was not only sterile but that it had divided and therefore weakened the legal aid community. NLAAC in its 1990 Report concluded, too: "the protracted debate within the legal aid community over relative cost differences of legal services provided by private legal practitioners and salaried lawyers in Legal Aid Commissions is an insignificant issue in the efficiency and effectiveness of national legal aid program management and should be discontinued."

There is now, I cautiously suggest, some cause for optimism. The crisis in legal aid may produce positive outcomes. Adversity may lead to progress. I am aware already of people with CLCs who are seeking a greater understanding of Commission finances not to criticise but so that they can pursue the broader interests of the legal aid community. I am aware of discussions within the private profession that are motivated by the reduction in funding. Arrangements over fees or proposals for pro bono work that were not acceptable before are now being seriously contemplated. For example, the Law Institute of Victoria is supporting a short-term pro bono proposal made by the Legal Aid Commission of Victoria.

What must now happen is for the emerging attitudinal change to lead to united action to create an awareness of the role of legal aid in maintaining law and order and in maintaining the structures of our society that are important to the continued enjoyment of fundamental freedoms.

AUSTRALIA AS A CULTURALLY-MINDED COLONIAL POWER

IT IS INTERESTING TO REFLECT ON THE cultural influences that Australia, as one of the administering powers, had on the good citizens of Nauru during the 1930s.

On 4 July 1936 the Administrator of Nauru made regulations to control native dancing in Nauru:

"These Regulations may be cited as the *Native Dancing Regulations* 1936 and shall come into operation forthwith.

1. No Native shall be forced to dance.

2. Dancing shall take place only in the District Meeting Houses, Domaneab, or other places authorized by the Administrator in writing which authority may be withdrawn at any time and is strictly prohibited in other places.

It is interesting to reflect on the cultural influences that Australia, as one of the administering powers, had on the good citizens of Nauru during the 1930s. On 4 July 1936 the Administrator of Nauru made regulations to control native dancing in Nauru . . .

3. Dancing is allowed only on Wednesdays, Saturdays and Public Holidays of a non-religious character.

4.*(a)* Dancing before 6 p.m. and after 9.30 p.m. is prohibited.

(b) At 9.30 p.m. on dancing days the District Constable shall sound his conch shell (dobwn) beside the Meeting House and the dance shall cease.

5. No dancing shall take place in darkness. All males attending a District Dance shall carry lamps (not electric torches). Any man attending the Dance without a lamp shall be sent home with all his womenfolk. This applies to spectators as well as dancers.

6. No girl under the age of 18 years shall, unless accompanied by her parent or guardian, approach the District Meeting House or Domaneab. The parents or guardian of girls who are negligent shall be deemed to have committed an offence.

7. Anything of an indecent nature is forbidden including indecent words, gestures, or movements of the body. Songs which appear at first sight to be clean, but which convey an indecent meaning are also prohibited.

8. Any person who acts in an indecent manner as described in section 7 shall be deemed to have committed an offence. Any Chief or District Constable who is negligent in preventing indecent dancing or in charging offenders under this section shall be deemed to have committed an offence.

9. Any person desiring to bring evidence of an offensive dance shall do so through the Chief of the District. The Chief and the District Constable shall diligently inquire into the truth of such evidence and shall within three days after hearing of such evidence report to the Administrator.

10. Mixed Dancing (male and female) is strictly forbidden.

11. Dancing rehearsals are allowed in private houses on Mondays and Thursdays from 6 p.m. to 9 p.m. provided the number of persons does not exceed four. It is an offence to chant in a loud voice at such rehearsals.

12. Any person doing anything forbidden by these Regulations shall be deemed to have committed an offence. A person who is deemed to have committed an offence under these Regulations shall be liable to a fine of 10s. or imprisonment for not more than one month or both. A Chief may, with the approval of the Administrator, suspend the dance in any District for any period, on account of the offence of any individual.

13. Chiefs and District Constables who are weak or negligent in the enforcement of these Regulations shall be deemed to have committed an offence under these Regulations and shall be liable to a fine of 10s. and the authority granted to dance in that District may be withdrawn.

Dated at Administration Head-quarters, Nauru, this fourth day of July, 1936.

Rupert C. Garsia, Administrator."

Maybe we should consider their potential application as social guidelines for our own society.

Certain aspects of the regulations would probably commend themselves to the Rev. Fred Nile. He would, one presumes, endorse Regulations 5 to 8 and 10.

Most parents would, in all likelihood, welcome Regulation 11, whilst abhoring those parts of the Regulations which would make them responsible for the sins of their children.

Possibly the Law Reform Commission might be requested to consider whether some of these Regulations ought to be adopted for Victoria in a gender-neutral form. At least the exercise would keep the Commissioners busy.

Michael Shatin

TALES FROM THE COLONIAL JUDICIAL SERVICE

The Summer 1991 issue of the *Bar News* (p.29) said of Sir William Jeffcott, the second Resident Judge of the Port Phillip District: "Possibly Sir William's greatest claim to fame is as the younger brother of Sir John Jeffcott . . .". This brief history of the colourful career (judicial and otherwise) of Sir John Jeffcott owes a great deal to R.M. Hague's *Sir John Jeffcott: Portrait of a Colonial Judge*, MUP (1963).

BORN IN TRALEE, IRELAND IN 1796, SIR John Jeffcott was the first judge of the South Australian Supreme Court. His younger brother William was the second resident judge in the Port Phillip District of New South Wales.

Sir John matriculated at Trinity College, Dublin in 1815 and graduated BA (1821) and MA (1825). Called to the English Bar (the Middle Temple) in 1826 he practised on the Home Circuit until 1829. As with other newcomers to the Bar, his practice was sparse and in 1828 he began "an extraordinary bombardment of the Colonial Office" seeking a legal appointment in the colonies and applied successively for posts in Grenada, St. Christopher, Dominica, Lower Canada, Ceylon, Tobago and in 1830 was appointed as Chief Justice of Sierra Leone and the Gambia at a salary of 2000 pounds p.a.

In the early nineteenth century the desirable qualities for colonial posts, particularly equatorial West Africa, were the good health and mind of youth rather than the experienced wisdom of maturity. The English colonies were the white man's burden and Sierra Leone was the white man's grave. The high salary was commensurate with the prospects of an early demise. Jeffcott's was the sixth appointment to the position. The first was dismissed and thus survived to return to England while all his other predecessors had succumbed to the misery and the mortality, the swamps and the savages and the yellow fever. *John Bull* magazine offered its sincere condolences to Jeffcott upon his appointment. Presumably he accepted the position to enable him to pay off his creditors.

Installed in office in April 1830 Jeffcott was able, with the assistance of the newly appointed Lieutenant-Governor, to impose a peace of some sorts between two warring factions of the colonists. Almost immediately upon his arrival he made numerous requests of the Colonial Office for leave to return to England to attend to his private affairs. These requests were refused until he had served two years.

On a voyage to the Gambia in December, 1830 the French brigantine *La Caroline* (carrying slaves) was captured by the ship in which he was travelling (HMS *Conflict*) and the Chief Justice took an active part in the boarding party which captured the slaveship.

The more congenial climate of the Gambia induced Jeffcott to stay over and upon his return to Sierra Leone he found that an enemy he had made in Sierra Leone, and whom he had dismissed from his government post, had returned to England and was buying up Jeffcott's notes from his creditors in an effort to embarrass him.

In April 1832 he was given leave to return to England. By now he was suffering from tapeworm and he sought to use this fact to either delay his return to Sierra Leone or obtain a more congenial posting. He also importuned for a knighthood.

In a wheedling letter he hinted that he had become engaged to be married and, whereas he himself was prepared to serve the Empire wherever the Empire desired him to, "the climate of Sierra Leone, which as Your Lordship well knows is not very favourable to me, has always been peculiarly fatal to women".

In a similar vein was his angling for the knighthood. Whereas he himself possessed no overweening anxiety for such an honour, it was in deference to the wishes of others that he was moved to request the honour. It was, after all, a

slight upon the loyal colonists of Sierra Leone that their legal affairs were to be presided over by a Chief Justice without a knighthood.

In fairness to Jeffcott, what may be seen today as the wheedling tone of the letter may be no more than flowery nineteenth century writing.

Jeffcott sought a vacancy in Mauritius or possible postings to the Cape or the Australian colonies. Because of his ill health the Colonial Office felt bound to accede to the request for extended leave but, as the political climate in Sierra Leone was deteriorating, wished to persuade him to return on the basis that he would be viewed favourably for future vacancies and also the knighthood. The rigours of the climate on the female body were no longer relevant as his engagement had been broken off.

Consequently Jeffcott forewent further leave so that "the public service should not be impeded by the want of efficient authority in the colony". In the same letter he noted the sailing date of his ship to Sierra Leone and the limited opportunity this departure date provided for His Majesty to bestow a knighthood upon him if "therefore you should feel disposed to recommend me for the honour . . .".

On May 1, 1833 Jeffcott was knighted by William IV and ordered to embark for Sierra Leone five days later. His ship was delayed for a further five days, which time permitted rumours alluding to the cause of his broken engagement to reach his ears and for him to challenge the alleged rumour monger. In a great flurry over very little, imagined slights on the honour of both sides saw Jeffcott and a Dr. Peter Hennis engaged in a pistol duel on the eve of Jeffcott's departure which left Hennis mortally wounded.

A week after the duel, with Jeffcott, who had borrowed 50 pounds from one of his seconds, at sea en route for Sierra Leone, Hennis died. Warrants were issued and the seconds were arrested. In July Jeffcott was charged, in absentia, with murder.

At the trial of the three seconds, notwithstanding a strongly worded direction from the bench and the strong evidence led by the prosecution, the jury acquitted. It seems clear that had Jeffcott stood trial he would have been convicted as the jurors later stated the ground of their verdict to be that the seconds "never titched him [the deceased]".

Present at court was Jeffcott's younger brother William, then a Dublin barrister and who was later to become the second Resident Judge at Melbourne (*vide* Victorian *Bar News* No. 79). Upon the jury's verdict being announced William sought to intervene with the Colonial Office on his brother's behalf.

Having returned to Sierra Leone prior to the news of Dr. Hennis's death, Jeffcott was in a state of ignorance regarding his own status, although he feared the worst, having been appraised of the severity of the wound suffered by Dr. Hennis. Supposedly because of ill health he returned to Europe (not England) and was thus not within British jurisdiction when the warrant for his arrest arrived in Sierra Leone in early September requiring Sir John to be returned in custody to England.

Jeffcott landed in Normandy in October 1833 and awaited developments from without the jurisdiction while proclaiming his desire to submit himself to trial at the earliest opportunity in order to vindicate his character. The earliest opportunity was March 1834 after agreement had been reached that if he returned to England and stood his trial, no evidence would be led against him.

Accordingly, later on Friday March 21, Sir John pleaded "Not Guilty" to the charge of Dr. Hennis's murder and Mr. Bere, for the Crown, advised the jury that he had been instructed to offer them no evidence at all. Williams B then directed the jury to enter a verdict of Not Guilty. Thereafter the Judge, counsel and the accused proceeded to the Guildhall to answer the Coroner's inquisition where a similar course of conduct and result took place.

With his career now in tatters, Jeffcott began "an epistolary bombardment" of the Colonial Office seeking another position. His biographer, Hague, notes that a weary copier of Jeffcott's letters feelingly remarked "[t]hat man certainly spilled a quantity of ink in his time".

At this time there were moves afoot to found a colony at Spencer Gulf (South Australia). This held out some hope for Jeffcott but the recent events in his life rendered such an appointment impossible.

Next he sought a New Brunswick (Canada) posting and was unsuccessful. His friends pushed for his appointment as Lieutenant-Governor of Sierra Leone. Thereafter he applied for a similar position in Dominica and by the close of 1835 was seeking either employment or a pension to tide him over until he could obtain a posting. All to no avail.

April 1836 saw Jeffcott (who had been forced to live on the continent where the cost of living was cheaper and he was outside the reach of his creditors) make a renewed application for the Spencer Gulf judgeship. The founding of the colony had become bogged down in red tape, and by now his past was no longer so recent. His application was successful.

Jeffcott was not the first choice for the South Australian position. Daniel Wakefield, who had

drafted the Act creating the Colony, was the favoured candidate. However, he had a convict brother and had incurred the wrath of influential members of the South Australian Association, and Henry Walter Parker was appointed. Unfortunately, even before the colony's founding there were intrigues and plots between the colonists and Parker resigned in disgust before he was able to take up the position. The judgeship was again vacant and the difficulty in deciding between the two leading contenders, Harrison and Hanson, was resolved by appointing the outsider Jeffcott at a salary of 500 pounds p.a. (his salary as Chief Justice of Sierra Leone had been 2000 pounds).

Present at court was Jeffcott's younger brother William, then a Dublin barrister and who was later to become the second Resident Judge at Melbourne (*vide* Victorian *Bar News* No. 79). Upon the jury's verdict being announced William sought to intervene with the Colonial Office on his brother's behalf.

Sir John's reputation as a duelist and his debts were not a serious impediment to the appointment. As John Dunmore Lang facetiously observed:

"It was an ancient practice of the Colonial Office to send out men for the highest appointment in the colonies who have been bankrupt alike in character and purse."

Jeffcott arranged to travel out to South Australia via Van Diemen's Land with the newly appointed Governor of Van Diemen's Land, Sir John Franklin, on the *Isabella*. To avoid the risk of arrest by his hostile creditors, it was necessary for him to steal aboard the *Isabella* after being rowed out to her in darkness.

Contrary to his promise to the Colonial Office to proceed promptly to South Australia upon arrival in Tasmania, Sir John stayed three months as a guest of William Kermode, a distant relative by marriage, at Mona Vale in Tasmania. He explained the delay to the Resident Commissioner at Adelaide as stemming from the desirability of learning from the Tasmanian Chief Justice and the Attorney and Solicitor-Generals the manner in which the judicial business of that colony was conducted. Notwithstanding this explanation Sir John appears to have spent his time in Tasmania sightseeing and courting his host's daughter Anne, to whom he became engaged.

Jeffcott arrived in Adelaide to find, as he did on his arrival in Sierra Leone, squabbling among the settlers. It is conjectured that his delayed arrival permitted the quarrelling to simmer too long and added to the gulf that had opened between the Governor (Hindmarsh) and his opponents. Certainly, after arrival his restraining influence upon the autocratic Governor reduced the friction and brought a semblance of peace.

At this stage, one of the seconds from the Hennis duel, Milford, was dunning the Colonial Office for the 50 pounds lent to Jeffcott prior to his departure for Sierra Leone after the duel. There were fears expressed in the Colonial Office that Sir John might find himself being sued in his own court by his English creditors.

After only six weeks in Adelaide, Sir John returned to Tasmania, his journey being brought forward three months by the necessity of replacing his personal effects which had been lost when the ship carrying them was wrecked off Portland. They were uninsured and the Colonial Office refused his request that it reimburse him for their loss, although it did provide 100 pounds towards replacing his law books on the understanding that they were to remain the property of the Government of South Australia.

In Tasmania, Sir John borrowed money from Kermode to pay off Milford.

In his four months absence from Adelaide, there arose two celebrated legal disputes involving constitutional and jurisdictional issues. That the disputes arose may in part be attributed to his absence from the colony and the lack of a restraining influence on Governor Hindmarsh.

Within a month of his return to Adelaide from Tasmania, Sir John applied for the newly vacated position of Attorney-General in Van Diemen's Land. He even contemplated resigning his post without first obtaining a position and commencing private practice in Tasmania, such was his distaste for the South Australian colony's squalor and the seemingly never-ending bickering. With regret, Governor Hindmarsh supported Jeffcott's application for the Tasmanian position.

In the meantime, Jeffcott also sought leave from the Governor to travel to Tasmania to seek counsel with the judges there in regard to the two forthcoming legal disputes involving constitutional and jurisdictional issues. It was imperative that Jeffcott avail himself of the assistance

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he could obtain at Hobart "at the sacrifice of a little personal inconvenience because the cases coming up involved points of the highest importance to the welfare of the colony and the stability of the government". Again reluctantly, the Governor approved Jeffcott's leave. He was to be away one month. So far, he had spent only about ten weeks in the colony and had sat as judge twice only. There were some in Adelaide who conjectured that he was proceeding to Tasmania to shore up his relationship with his fiancee.

Jeffcott sailed for Kangaroo Island expecting to find there the *Hartley* ready to depart for Tasmania. It was not there and he proceeded to Encounter Bay (Victor Harbour). Again there was no awaiting ship and he decided to while away his wait by joining an exploration party which was investigating Lake Alexandrina and its sea access (Governor Hindmarsh was hoping to establish Encounter Bay as a more superior site for the colony than Adelaide).

For ten days in December 1837 the party explored the lake and then sought to return to Victor Harbour. There were two available modes of travel — to walk or return by whaleboat through the mouth of the Murray River. Jeffcott elected to go by boat notwithstanding being warned of the danger of the wild surf at the mouth and, with three others, was drowned when the whaleboat foundered.

His drowning ensured him of a place in the history of South Australia which would have been lost to a mere short-term judge who in all likelihood was already permanently departing the colony at the time of his death.

Mal Park

BECOMING A SILK

"*BECOMING A QUEEN'S COUNSEL IS NOT necessarily a bad thing*"; so said one of this journal's esteemed editors, Paul Elliott, tongue firmly in cheek, in a paper presented at Monash University in September 1991 (reported in the *Bar News*, Summer 1991).

As I have just received such legal preferment (my appearance in photograph and pen profile appearing in the same addition of the *Bar News*), I felt particularly moved by Paul's analysis of "*The Public and Barristers*". Like most barristers in the last year or so I have been aware of the media criticism of, in particular, our branch of the legal profession.

I must say that the responses from my non-legal friends to my appointment have all been very congratulatory . . . only the occasional reference has been made to my newly-acquired right to print money. Most friends appear to regard it as a thoroughly "good thing". Well, is it? As yet, I do not know.

I had applied for silk in 1990 and was unsuccessful. I was then disappointed without really expecting at that time to be appointed. Nevertheless, the days prior to the anticipated announcement were nervous ones and I can remember being a little cranky that the announcements appeared to be delayed. I now know the "system" a little better; I thought that other members of the Bar might like to know the sequence of events that does take place when appointment as Queen's Counsel is made.

It is well known, of course, that Counsel must apply to the Chief Justice prior to the end of August if he or she is seeking appointment that year. The material which the recently retired Chief Justice required was set out in an article in the *Bar News* some years ago. Copies of that information can be obtained from the barristers' clerks. There is then a system and method of consultation employed by the Chief Justice which results in a final list of proposed appointments. I have no idea how he consults. There is a suggestion in the hand-out material of the methodology adopted. Last year, in 1990, there was a great deal of speculation as to who might be appointed. It appeared that the consultative process had become rather public. Everybody seemed to know who had applied and rumours abounded as to the likely appointments. For once, a number of them were quite accurate. I

was not aware, in 1991, of similar publicity to the appointments and the selection process. It seemed to be kept far more confidential.

Silks, traditionally in Victoria now, are presented to the Full Court on the first sitting day in December. It follows that their appointment should be made by the Monday of the previous week or thereabouts. The State Executive Council meets on Tuesdays of each week. That is the day upon which appointments usually are made, whether of judges or other important offices. It is therefore necessary, presumably, for the Chief's proposed list to be in the hands of the Attorney-General no later than the Tuesday morning (and presumably the Monday night before). It seems that this year all *the* letters went out on Monday 25 November (coincidentally my wedding anniversary) and were received, at least in my case, on the following day at Chambers. The "letters", of course, are written by the Chief to each of the applicants for silk advising them of the outcome of their applications.

Last year, in 1990, there was a great deal of speculation as to who might be appointed. It appeared that the consultative process had become rather public. Everybody seemed to know who had applied and rumours abounded as to the likely appointments.

Despite the fact that I thought that I might hear something on Tuesday morning I was not able to be in Chambers to receive my letter. I had family commitments which required my attendance at home for the whole of the morning. One of my friends thought that I would be anxious enough to want to come in regardless and check the mail. I really was not confident of appointment and thought it unnecessary.

I received a telephone call from my secretary at home at 9.30 a.m. "Have you heard any news?" she asked. She asked the question with some suppressed excitement. Mine was not so suppressed. "No", I said, "Have you?" She in fact had received a call from a fellow member of counsel who apparently had the news. The grapevine works incredibly quickly once the first letter is received and publicised. The letter itself provides not only for the name of the appointee but also of the person immediately senior on the proposed list. Although the source was a reliable member of Counsel, I was not convinced. I told my wife the news. We were both as excited as could be. I rang my secretary back within a few minutes to find out exactly what had been said in the congratulatory phone call. It sounded convincing. I asked her to run down to the clerk (yes, I did say "run") and get my mail. She was back in a few minutes and read the letter to me. It sounded pretty good. It was in the following terms:

"Dear Bigwig,

I have considered your application to be recommended for appointment as one of Her Majesty's Counsel for the State of Victoria and have made a recommendation that you be so appointed with precedence next after Mr. Slightly Bigger Bigwig.

I expect that the appointment will be made tomorrow but you should keep the information confidential until you are informed that the appointment has been made. My Associate will inform you as soon as advice of the making of the appointment is received.

With the concurrence of the Bar Council I have dispensed with the former practice of sending notice to your seniors at the Bar.

I invite your attendance in the Full Court on Monday, 2nd December, 1991 at 10.00 a.m. and enclose a statement of the procedure to be followed.

Would you please inform my Associate whether you will be able to be present?"

I still could not believe it. One of our neighbours rang shortly afterwards to pass on some news. I could not contain myself and immediately breached the Chief's confidentiality request. She congratulated me. I sat down and made myself a nice cup of tea. The phone rang.

"It's Forsyth here, from the Attorney General's Department, Mr. Bigwig."

"Yes", I said. I was a little anxious.

"There has been a terrible mistake", he said.

"Oh, no", I thought.

"Mr Forsyth" could obviously sense the concern in the short silence that followed.

"Its 'Michael' here," he said, "Congratulations".

I was not pleased! "Michael", who is not a lawyer, had somehow in his innocent practical joke identified correctly the department from whom it was most likely that an apologetic phone

It was suggested that one of the greatest benefits of being a leader was to have the assistance of competent and hardworking juniors. Having done a few cases as a "junior" leader these benefits were obvious to me.

call *would* come. And, it was necessary that the Chief's recommendation's still had to get through the Executive Council. Would it be stopped? What would the Council think of my appointment?

Well, it seemed that another letter was due following the Cabinet decision. This arrived at my Chambers around mid-day. I was still home at this stage when my secretary rang to read the following letter:

"APPOINTMENT OF QUEEN'S COUNSEL

Advice has been received from the Executive Council that the following (whose names appear in order of seniority) have today been appointed to be Her Majesty's Counsel for the State of Victoria:

[then followed the list]"

It seemed official; the Executive Council had not woken up either!

(I remembered, in this context, the famous story about Woods Lloyd. He dearly loved the practice of law as a barrister. His recurring nightmare was, he used to say, that one day he would come into Chambers and find the doors of Owen Dixon barred. "They" had woken up to us!)

My domestic commitment was to take my daughter to the airport. I left home at 1.00 p.m. or thereabouts. I dropped her at Tullamarine, and was in Chambers by 3.00 p.m. There I was met with three or four pages of telephone messages, a number of handwritten congratulatory notes, flowers and champagne. There were smiles everywhere. I could not get the grin off my face. By this time I knew all the other appointees (it was in the second letter). The next thing that arrived was a letter from Graeme Thompson of the *Bar News* asking me to provide some information and attend the next morning for a photographic session at the Supreme Court. Everybody seemed to have the same information and I was becoming used to the idea.

Over the next few days it was difficult to concentrate on work in hand. I was aware of the "rule" that newly-appointed silks can continue to act as juniors in matters in which they already hold a brief. I was firmly encouraged by my "betters" to hang on to all such work as it would hopefully tide me over the anticipated quiet transition stage. The other advice I received was that in cases (will there really by any?) where I receive a true leader's brief I ensure that where possible (and in accordance with the appropriate ethical rules, I assumed) I have with me the best possible junior available. It was suggested that one of the greatest benefits of being a leader was to have the assistance of competent and hardworking juniors. Having done a few cases as a "junior" leader these benefits were obvious to me.

[Editor's Note: This article predates the decision of the Bar Council to abolish the two counsel rule].

The formal business of appointment as Queen's Counsel is simple. As indicated in the Chief Justice's letter, the new silks are invited to attend before the Full Court on the Monday where their appointments are announced by the Attorney-General or his Deputy. The announcements in 1991 were made by the Solicitor-General. We all attended on this day in our new regalia (hastily ordered from Ravensdale). The respective families of the new silks attended. It was very similar to admissions day. The Court was packed with other members of the Bar and other well-wishers. Mr. Solicitor announced to the Court the name and precedence of each of the new silks in turn:

"If the Court pleases, I have the honour to announce that Mr. Bigwig has been appointed one of Her Majesty's Counsel for the State of Victoria with precedence next after Mr. Slightly Bigger Bigwig QC."

The Chief Justice then asked

"Mr. Bigwig, do you move?"

As instructed in my procedural notes, I then arose, bowed to the Court and resumed my seat. There was a short address made by the Chief Justice at the conclusion of the announcement. Some reference was made to the importance of the role and the honour bestowed upon Counsel. The Chief Justice referred, in passing, to the attack on the Bar and on the two counsel principle. He defended the existing practice.

The ceremony completed, there were photographs in the foyer of the Court and champagne and sandwiches in my Chambers. My family and close colleagues all shared my happiness.

A similar "invitation" was received from the Federal Court and all new silks were invited to attend before the Full Bench of that Court later

in the week to announce their appointments. This was a slightly more anxious formality as each silk had to speak for himself. The occasion was nowhere near as grand and did not attract either the family spectators or many members of the Bar.

I had also received in the meantime a letter from the Secretary to the Attorney-General's Department confirming the appointment at the Executive Council Meeting held on 26 November 1991. I was advised that:

"In accordance with the usual practice, Letters Patent for your appointment will be issued to you, for which a fee of $50 is prescribed under the appointment of Her Majesty's Counsel Regulations 1978. Would you please forward the fee to Ms. . . . . of my department, who will arrange for the Letters Patent to be sent to you."

One of the other great benefits of achieving silk, so I am led to believe, is that the appointee is thereafter treated by the courts with a great deal more deference than hitherto applied. Arguments which the day before might have been disregarded entirely are now treated as though they may have some substance.

I received this note on 28 November and sent my cheque by return! It seemed a small price to pay.

Over the next week or so congratulations in letters and in kerbside meetings continued unabated. There was a very small announcement of the appointments in *The Age* which attracted the attention of a number of non-legal friends and acquaintances. Letters were received from judges, old silks and all sorts. The generous nature of the expressions of congratulations and best wishes (and the confidence expressed as to my future success) were both heart-warming and heartening. One of my colleagues drew my attention to the following passage from Dean's book, *A Multitude of Counsellors* (pp. 264–265):

"Every intending applicant for Silk is very familiar with the acute personal problems he has to face and has spent very anxious days in trying to resolve it. The position has been thus stated by a writer quoted in the *Australian Jurist*. "Rely upon it, the barrister's gown is the wedding garment to the British feast of fat things . . . Silk is perhaps the means of gaining the surest admittance to the banquet. It has, however, the disadvantage of preventing the wearer from enjoying certain of the smaller dainties, which are reserved for wearers of stuff."

A letter from one of my lay friends contained the following reference:

"When Marco Polo opened up the Silk Route, he observed that the challenges facing those who would embark upon it would be arduous but their tenacity for completing it will be rewarded well".

My elevation was marked by an invitation to the Supreme Court Judges' Reception to be held on the day of the opening of the legal year in January. I was invited to the County Court Judges' Christmas cocktail party. As is the custom, my past readers arranged a dinner for me in honour of the occasion. I received a letter from the Australian Bar Association advising me of the practice to hold a dinner in Canberra on the night of the announcement of new silks in the High Court in early February. This is a grand occasion apparently. With the letter from the ABA was a note of the procedure to be adopted. It involves each silk announcing his own appointment from the rostrum of the Court which obviously involves moving from some seated position in the Court itself. This will be attendant with some anxiety! The dinner itself is held in the Great Hall of the National Gallery which, I am told, is a magnificent venue.

There is a great deal of excitement involved in the appointment itself and from the contact I have had thus far with my "seniors" at the inner Bar all the signs are positive. There is little doubt that the many silks to whom I have thus far spoken, and have received letters from, enjoy their status as leaders. This is particularly so, as you would expect, of those who were appointed in the last year or so.

One of the other great benefits of achieving silk, so I am led to believe, is that the appointee is thereafter treated by the courts with a great deal more deference than hitherto applied. Arguments which the day before might have been disregarded entirely are now treated as though they may have some substance. I am not yet able to report that this is so. I have not, at the time of writing over the Christmas vacation, had a great deal of opportunity to test the proposition.

This has been an exciting month or so, now I will await anxiously the most accurate guide to the success of my appointment — the operation of the market forces.

Bigwig Q.C.
Barristers' Chambers Melbourne
(early) January 1992

MOUTHPIECE

PICTURE IT IF YOU WILL. TWO INDIVIDuals are seated at a laminex table. All around them are other persons also seated at laminex tables. All of the males are dressed in either cardigans or pullovers. Without exception the cardigans and pullovers have leather elbow patches. All of the females are dressed either in office "uniforms" or white blouse/black miniskirt outfits. The location, of course, is a canteen heavily subsidised by a Government. No fringe benefits tax paid!

Francis: "You seem a little bit agitated today? Did you get an unfavourable decision from the Appeal Committee?"

Robin: "No I haven't even heard a whisper from the Appeal Committee. I wouldn't expect to for a few weeks yet. After all it is only two months since they interviewed us all and that is hardly enough time for Audrey to act in the position and make it hers. No it is far more serious than that!"

Francis: "Not the great golden handshake?"

Robin: "If only . . .

Francis: "They're going to take your Government car away?"

Robin: "No it's . . .

Francis: "Not the mobile telephone, surely not."

Robin: "Of course not, the union wouldn't let them!"

Francis: "Well it wouldn't be flexitime, they'd have a revolt."

Robin: "Don't be stupid."

Franics: "Bloody hell!! Its overtime! It must be! You wouldn't go so pale otherwise. They're going to take away your regular 8 hours per week. No wonder you're shocked. None of us could survive without the extra 8 hours at double time each week — even if it doesn't need to be worked."

Robin: "It's nothing like that!"

Francis: "Tea money — not the tea money."

Robin: "You can rest easy. They are not going to put tea money up — it'll stay at fifty cents a week for at least another year."

Francis: "I give up! What is it then?"

Robin: "It's my court case, it's on tomorrow."

Francis: "Court? You in trouble with the Police. You!"

Robin: "No, not the Police."

Francis: "Surely not the tax man. He couldn't 've found out about the tea money rort, could he?"

Robin: "No. It's my car accident. Remember?"

Francis: "What, the one that happened two years ago? I thought that was dead and buried."

Robin: "Yep. That's the one."

Francis: "Why so long?"

Robin: "Well, you know how I went and saw the union and they told me to avoid going to the lawyers and how it would be a waste of money and how we can do it as well as them?"

Francis: "We *are* as good as any lawyers. Any mug can do it. After all we've done the Assertiveness Training course, and the chairing committees one. You also did the public speaking didn't you?"

Robin: "Of course! I've been to them all, even the Advanced Interfacing, First Aid and Fire Warden's."

Francis: "So the union were right then . . ."

Robin: "Not exactly."

Francis: "Not exactly?"

Robin: "I went to the Magistrates' Court just like the union told me and got the forms. Then I went and saw Helen who works there. You know Helen. She used to be at the front desk in Personnel. She told me how to fill in the forms."

Francis: "Good old Helen. She was always helpful. She put me onto the travelling time lurk."

Robin: "She was just like the union. Told me that lawyers were just a waste of time."

Francis: "And overpaid."

Robin: "Yeah! She said I'd be throwing away my very hard-earned cash on them."

Francis: "Couldn't agree more. Just 'cos they've been to university they think they can charge heaps for doing what any one of us can do."

Robin: "That's exactly what Helen was saying".

Francis: "Yeah I'd like to see them cope with the pressure we have to put up with. I bet they couldn't hack the pressure of ten calls from the public in a day."

Robin: "It doesn't exactly happen each day though, you've gotta admit."

Francis: "Yeah, but you know when it's happened. You feel that you've been put through the wringer. Well I'd just like to see them try my job for a change."

Robin: "Well back to the story. I fill in this form."

Francis: "Filling in forms wouldn't be all that foreign to you would it? Heh Heh."

Robin: "That's what Helen said. She said it was one of those plain English forms. Designed by a public servant and not one of those namby pamby lawyers, she said."

Francis: "It'd be a breeze for you — after all

that's what you've been doing for twenty years now."
Robin: "I thought I did a pretty good job. Had some trouble with the diagram so Helen gave me another form to copy from."
Francis: "Salt of the earth, Helen. So you were on your way then."
Robin: "So I thought."
Francis: "Something go wrong?"
Robin: "Well, I am not really sure. I paid the stamp duty, and stuck a copy in the other bloke's letter box. Next thing I know I am before Court."
Francis: "Slay them in the aisles eh! Perry Mason."
Robin: "Not quite. The Magistrate said something about a strike and a lack of particles and ambushes. Next thing I know he tells me that I have to start all over again and to pay heaps of money to the other bloke's lawyers."
Francis: "I always knew that the lawyers were only after the money of hard workers just like us. It's just as they say in the papers. So what did you do next?
Robin: "I went back to Helen to find out what went wrong."
Francis: "Yeah she'd never let you down."
Robin: "She said that I must have got the beak on a bad day. His kids probably kept him awake all night. We filled in the forms again."
Francis: "Second time lucky?"
Robin: "Not exactly."
Francis: "Another bad-tempered Magistrate?"
Robin: "Not really."
Francis: "Huh?"
Robin: "Actually the same one. He wasn't too bad. Said I should go and see a lawyer."
Francis: "Well Magistrates are lawyers and they all stick together. Probably remembering his mates."
Robin: "That's what Helen said."
Francis: "She's right. It's just like what the newspapers say. The law's a closed shop. They're all out to make money from the public like us. Don't give value. They all make heaps of money. I reckon they deserve about half of what we make."
Robin: "It seemed to pain him a bit. Said it would make like easier for me. That he had been around for years and that in his opinion the lawyers help people like me. He was so reasonable."
Francis: "And you fell for it."
Robin: "Bloody hell Francis, wouldn't you? I had two grand at stake and he said he wouldn't throw out my case if I promised to go and see a solicitor. And as Helen reminded me, he used to be a public servant just like us so he would know, wouldn't he?"
Francis: "I suppose you did go to a lawyer who ripped you off for heaps. Just like the papers say."
Robin: "It wasn't quite like that. The Magistrate had said to go and see the Law Institute and they would recommend some firms who wouldn't charge like a wounded bull."
Francis: "The Law Institute! Aren't they the mob who jail solicitors who refuse to contribute to their Christmas Party?"
Robin: "Well I wouldn't know about that. They put me onto a couple of firms out my way who they guaranteed wouldn't charge above 'scale'."
Francis: "Scale — that's the licence to print money according to the papers."
Robin: "Well, I thought my two grand was too much to throw away. They were quite good."
Francis: "Hummph!"
Robin: "Once they got on to it everything seemed to go quite well and it hasn't cost an arm and a leg."
Francis: "Well what about the barrister? The papers say that they all charge at least two grand a day and some even five grand a day."
Robin: "I could have got one for about three hundred."
Francis: "Three hundred bucks! Why that's how much we earn in three days. Bloody daylight robbery. What do they reckon they are? Ned Kellys! You told the solicitor where to go, didn't you?"
Robin: "I told him I wanted the very best and he said that would cost me a bit more. He said that a three hundred buck jockey would be good enough. I said it was my money at stake and I wanted the very best. He eventually agreed and he got me a bloke for six hundred."
Francis: "Six hundred. A week's pay with overtime. You've got rocks in yer head."
Robin: "I reckon when your money's at stake you want the very best. I bet if it was your court case you'd want to shop around for the best."
Francis: "What did Helen say?"
Robin: "She asked around about my bloke and it seems that he is absolutely tops."
Francis: "But six hundred . . ."
Robin: "You'd want the best wouldn't you, even if it cost six hundred? Wouldn't you?"
Francis: "I dunno. It'd grate to pay somebody a lot more than I earn. I mean they don't even have the expenses we have such as union dues, Friday night drink sessions, regular collections for colleagues who are leaving or getting married, superannuation, PAYE tax and so on."
Robin: "You'd pay if it was your money at stake, wouldn't you?"
Francis: "Well . . . err . . . um . . . err I suppose that I might."

They then spent a bit of time discussing the

quality of the fittings provided in their offices, the relative sizes of various colleagues' carpet squares, the impossibility of getting more than a dozen biros each week and when their cars would be upgraded. About an hour after the end of the official lunch break they returned to their desks and filled in their flexitime sheets. Needless to say the sheets did not record the slightly longer lunch break, or did they?

IT IS THE FAMILY ROOM OF THE Penman residence, one night recently. Clive is browsing through an *Age* of early March 1992.
"$80,000!"
"It is a position with the Legal Aid Commission."
"Me!"
"Yes, I know that the bulk of my practice is now Legal Aid work."
"I suppose that I would be qualified for the position."
"No, I can't think of any reasons why we would not be better off."
"It comes to around $1,600 per week — and that doesn't even include the performance premium. Whatever that is!"
"I *know* that is a lot more than I am getting at the moment."
"How much am I getting? I reckon I am averaging about three briefs a week, each legally aided and each around $200."
"No, my dear, that doesn't add up to $600 per week. Legal Aid takes 20% off, which brings it down to $480 or $420 if their latest proposals come into being."
"I know that is a lot more than many people are earning but they don't have to pay for rent of their work place, travel all around Melbourne and occasionally into the country, insurance, Bar subscriptions, looseleaf services and even the paper and pens they use."
"It does include a car. I suppose that would mean that I wouldn't have to take the mini off you for the country and outer suburban briefs."
"I suppose you are right. I could take regular holidays without worrying about not earning money whilst I am on holidays."
"I believe they do pay sick leave."
"Overtime!"
"I don't think they would work much overtime."
"It probably *would* mean that I would be home early each night and not have to work at nights or at weekends."
"Yes, I would then be able to help the twins with their homework."
"I have never refused to in the past."
"It is just that I haven't had the time."
"Alright! I *will* apply. Just don't get your hopes up too high! Good things like that never happen to us."
"Yes, first thing tomorrow. I'll have to find someone to type it for me though."

Instead of preparing his plea for the next day, Clive spends many hours musing over what could be . . .

CORRESPONDENCE

DEAR SIRS,

It is distressing, to say the least, to find that so many texts are either permanently missing from the Supreme Court Library or 'borrowed' for lengthy periods.

As a case in point, the library staff inform me that, the CCH Vol. 1 Family Law text has been missing for some weeks and similarly the Butterworth Vol. 1.

These are of course the most referred to texts in the Family Law sphere. The degree of inconvenience caused to various users of the library is self-evident.

Of course, not only barristers use the Supreme Court Library, it is also available to solicitors and a small group of others. The preponderance of use is however obviously by members of the legal profession and the many disquieting examples most of us have no doubt encountered can only reflect poorly on our profession.

I can only urge anyone who notices a Supreme Court text in any member of Counsel's possession for an inordinate period to insist that it be returned.

Peter H. Cash

DEAR SIRS,

Having read your 'Editors' Backsheet' in the last issue of the *Bar News*, I regret that I declined to publish the text of the speech I made to the Labor Lawyers on November 8. Your report of

what I said contains a number of errors and embellishments and has the effect of grossly distorting my views, the proposals which have been made by the Law Reform Commission, and the extent of the consideration which the Commission is giving to the responses to those proposals.

I did not say anything about the Victorian Bar being swept into the sea (or any other place). Let me be absolutely clear about this: I have never — and more importantly the Law Reform Commission has never — made any suggestion that there should not be an independent Bar. I do *not* regard it as self-evident that the existence of the Bar cannot be in the public interest.

I did suggest that assertions about the importance of an independent Bar were not a self-evident justification for the Victorian Bar's freedom from any real public accountability for the way in which it regulates its members. I also suggested that is was unfortunate that members of the Victorian Bar have chosen to portray the Commission's proposals as attacks on the Bar's existence. This has badly coloured the debate — a point confirmed by the quality of your editorial. I said there would, of course, always be a Bar, because there would always be a role for specialist advocates practising on a consultancy basis.

I am described as being 'strongly opposed to a law degree being a prerequisite to becoming a member of the profession'. That is not so. What I said was that the Commission has a reference on admission to practice which specifically asks it to consider whether people other than 'legal practitioners' as defined in the *Legal Profession Practice Act* should be permitted to offer some legal services over which the profession now has a monopoly.

The Commission will consult widely on that issue before it publishes a discussion paper. I simply expressed my present view that work like debt collection, probate and conveyancing could be done by non-lawyers. In practice much of this work is done by non-lawyers now in Victoria. I note also that, as the result of recent reforms, this form of practice by non-lawyers (without the 'supervision' of solicitors) is wholly legal in England, as it is in many other jurisdictions.

At this stage, the Law Reform Commission has not reached any concluded view on the proposals made in its two published discussion papers dealing with restrictions on competition and accountability. A draft report was considered by a group of consultants, including members of the Bar, in late November and the draft was not adopted by the Commission's division (which also includes a member of the Bar). A number of suggestions were made by consultants, including ones that the report should address more closely some of the submissions made by the Victorian Bar. These suggestions were accepted. The next *draft* will again be the subject of consultation when it is written — it is hoped in March.

In the meantime, the Commission has asked the Bar and the Law Institute to consider a modified proposal that the rules of both bodies concerning professional practice and conduct should be subject to the provisions of the *Trade Practices Act* 1974 (Cth) applied in the normal way. There is much to be said for this proposal, although this is obviously not the place to say it. I simply note that a similar reform in England has *not* spelled the end of the effect of re-vitalising that body. If the Commission's proposal is adopted, it will bring to an end its interest in most of the issues raised in the discussion paper 'Restrictions on legal practice'.

Finally, I am forced to say that it appears to be your view that if the Commission does not accept all of the submissions put to it by the Bar, this will be because the Commission's views are 'predetermined'. As my national origin seems now to be something of an issue, may I say that there is, where I come from, a saying about pots calling kettles black.

Yours sincerely,
Ted Wright
Commissioner.

[EDITORS' NOTE: The Editors do not accept that they "grossly distorted" Mr. Wright's views. The Editors' Backsheet stated (as does Mr. Wright in his letter) that Mr. Wright "saw a role for specialist trial advocates practising on a consultancy basis". This does not constitute an "Independent Bar" — especially if the "consultants" practise in partnership and are briefed directly by the public.]

AVAILABLE FOR BORROWING

HAVING TROUBLE FINDING SHELF space for a voluminous case, and difficulty transporting it to court?

Would you be assisted by the use of a robust steel trolley easily capable of holding 32 ring binders, lengthy rolls of plans or other awkward articles, and still having space for a computer or anything else capable of sitting on a flat surface?

Such a trolley is available on loan by contacting David Levin on 7043.

APPOINTMENT OF BAR ADMINISTRATOR

JOHN (JACK) SUTTON HAS BEEN appointed as the Administrator of the Victorian Bar. This is a new position brought about by the ever expanding workload placed upon the Chairman of the Bar Council. The role of the Administrator will be that of right-hand-man to the Chairman. The Administrator will undertake research in order to assist the Chairman. The Administrator will also liaise with various bodies involved with the Bar Council's work in order to provide further background for the Chairman to report to the Bar Council and make appropriate decisions. The job of the Chairman of the Bar Council is becoming increasingly onerous, especially in these testing times. The services of an Administrative Assistant will be extremely useful for a Chairman trying to juggle the demands of what is a full-time job with the pressures of a practice.

John Sutton in well qualified to cope with the demands of his new job. After initial experience as a common law clerk and conveyancing clerk, John spent many years as a teacher with the Education Department. In 1975 he completed his Articled Clerkship and became a solicitor of the Supreme Court of Victoria. After a spell as Deputy Director (Acting Director of Training) Social Welfare Department Victoria, he became a legal officer in the Crown Solicitor's Office from 1976 to 1985, eventually being second in charge of the common law branch. From July 1985 until December 1991 he became well-known to members of the profession as the Associate to the then Chief Justice Sir John Young of the Supreme Court of Victoria.

The Bar welcomes him and trusts that he will enjoy the challenges of his new position.

A FAIRY TALE
(Continued)

NOW GATHER AROUND ME WHILST I continue the saga of the VicBees. As you all know, when the weather starts to warm up VicBees usually gather up their accumulated pollen and leave their hives to sample different flowers such as crocus, bougainvillea, tulips, cherry blossom and so on. Many will even fly over vast expanses of water to indulge their midsummer fancies. It was once not unusual for such indulgences to extend over periods of up to three months. If was also quite common for the Silky-Bees to fly further and for longer periods.

However, this summer far fewer VicBees, both Silky and ordinary, decided to venture away from their hives and even then they travelled shorter distances and for briefer periods. I cannot tell you whether it was because of the so-called "Greenhouse Effect", because VicBees individually and collectively had accumulated much less pollen in the proceeding eleven months, because the BankerBees were unwilling to advance VicBees pollen for their travels or because of a collective fear that if they left their flowers untended the GovBees would move in and plough them under.

So shortly after the New Year began there were far more VicBees inhabiting their hives than ever before at such an early stage of the year. And those poor early returning VicBees: not only did they find that there were more of them sharing the few flowers that had survived the ravages of the searing summer heat but those that were around had to suffer the slings and arrows of ignorant JournoBees who had little else to report upon or indulge in that a spot of VicBees bashing.

If that wasn't enough the JournoBees, hungry for a "good story", were constantly fed stories by those with an axe to grind against VicBees. Whether because of laziness or the stupor brought upon by the summer heat and the legacies of too much post-Christmas indulgence the JournoBees forgot their creed and chose not to question their informants or to test the accuracy of the stories that had fallen so easily into their laps. It was too good to be true, indeed it was.

Unfortunately for the bulk of VicBees there were stories about the few of them who garner large amounts of pollen on each foray into the fields. They were reputed to gather even more pollen than PMBees and Prembees. This so outraged the JournoBees that they shouted even

louder about the injustice of a system which allowed some Bees to do so much better than other Bees. They chose not to listen and certainly not to believe the VicBees' side of the story. More particularly, perhaps because it ruined an otherwise spectacular story, they elected not to accurately put the VicBees' position to their ReaderBees. It did not matter to them that the VicBees who may have been fortunate enough to garner very large amounts of pollen were extremely few in number, were extremely skilled in their specialities, were highly sought after, worked very hard and very long hours and more often than not undertook tasks well beyond the abilities of most other Bees. Why ruin a good story with unpalatable, unsensational fact? The irony of it all was that whenever their newspapers got into any sort of trouble they always turned to the VicBees who gathered the most pollen and insisted on thrusting vast amounts of pollen onto them for their skills: even more than they gave their best JournoBees!!

To top it all off the poor beleagured VicBees found themselves attacked from within by some of their own number who, for no apparent reason, leapt onto "the bash the VicBee" bandwagon and fed the frenzied JournoBees more disinformation. One of them, for instance, who had been a VicBee for a matter of mere moments, was able to convince the JournoBees the personal advancement of that VicBee had been stymied and would continue to be stymied by inherent faults in the VicBees' system. Unfortunately, the faults so minutely detailed by that VicBee were so inaccurately portrayed that many VicBees wondered where that VicBee had spent the entirety of its time as a VicBee — certainly not researching the system even to a superficial extent.

So you will well understand why the VicBees are beginning to wonder whether it is all worth it, whether they will be around in years to come and whether there is any point to considering much less debating the creation of future hives even though the existing hives are crowded to bursting point!

Well the hour is late and you all have school tomorrow. I hope to be able to continue the story of the VicBees next time — if there are any VicBees to tell you about, that is.

PERSONALITY OF THE QUARTER

Raymond Anthony Finkelstein Q.C.

IN NOVEMBER 1986, RAYMOND ANthony Finkelstein (known as "Fink"*) was appointed one of Her Majesty's Counsel. Since that time, as in fact was the case when he was a junior, he has developed a thriving practice in general commercial law, company law and trade practices law. Many a solicitor and junior barrister will recall going into his room on the 27th floor of 200 Queen Street (Golan Heights) only to have difficulty finding a space to walk through papers, assorted briefs and books, and then to find a chair unladen by similar items. Once conferences commenced there inevitably would be many knocks on the door and many answering of phone calls in an endeavour to satisfy the needs of so many instructing solicitors.

Well, for a period of time at least, all this is behind Fink. He has been appointed Acting Solicitor-General for and in the State of Victoria, now that Hartog Berkeley Q.C. is taking a holiday. Fink no longer willl have the clamouring of juniors and instructing solicitors at his door, but will have the serenity and peace to delve into the many problems that confront modern governments today, and in particular the Victorian Government. He now will have the time to consider and research at leisure deep constitutional and administrative law problems and prepare at leisure for battles before the High Court of Australia.

Fink, of course, is no stranger to the High Court of Australia, although one would anticipate that his appearances will now be more frequent. He should be careful, of course, when he does appear in Canberra in the First Court, because of the lectern. Whilst there is a device for lowering the lectern, it may be that the High Court will have to provide a box upon which

Fink can stand so that the High Court can not only hear him, but also see him.

We should not assume that Ray has left the Bar permanently. Still only "Mr Acting Solicitor" he undoubtedly will have the choice to come back to full-time practising at the Bar and resume the practice he has left behind. Of course, when Gavan Griffith Q.C. succeeded Sir Maurice Byers Q.C. as Solicitor-General for the Commonwealth of Australia on 1st January 1984, Griffith Q.C. was recorded to have said "one term would be enough". Griffith Q.C. still remains Solicitor-General for the Commonwealth. Although, of course, he has tried to come back to the Bar on a part-time basis.

For those of the readers interested in statistics, Fink was admitted to practice in 1971 and signed the Bar Roll in 1975, reading with Michael Black, now Chief Justice Black of the Federal Court of Australia. He had five readers: David Clarke, Trevor McLean, Susan Morgan, Justine O'Bryan and David O'Callaghan. He took Silk in 1986 at the age of 40.

*"Fink": means "1. a strike breaker or blackleg. 2. a contemptible or undesirable person, esp. one who reneges on an undertaking": *The MacQuarie Dictionary*. To suppress any urge any one's part to supplement their income with an award of damages for defamation, we assure readers that in referring to Finkelstein as "Fink", we do not adopt the *MacQuarie Dictionary* definition.

J.E.M.

VERBATIM

Court of Criminal Appeal

Coram: McGarvie, Southwell and Nathan JJ.
December 1991
Glennon v. DPP

Walmsley to McGarvie J.: Does Your Honour's copy of the trial transcript have pages 1877 A to ZZ prior to page 1878?
His Honour: My copy has page 1877 prior to page 1878 which is what I have come to expect over the years.

Supreme Court of Victoria

Coram: Byrne J.
Torcasio Developments Pty. Limited v. County Park Developments Pty. Limited and Anor

His Honour: Yes, Mr. Merkel?
Mr. Merkel: Your Honour, the little light I told Your Honour about last night at the end of the tunnel did bear some fruit.

Moonee Ponds Magistrates' Court

Coram: Mr. Barry Maher M.
14 November 1991

Luisa Bazzani (for Defendant): Your Worship, there is a problem. My client is a paranoid schizophrenic. He arrived at court a few minutes ago but has run away. I cannot find him.
Mr. Maher: Do you know where they've gone?

Full Court

Supreme Court
Coram: Brooking and Gobbo JJ.
28 February 1992
Point of Purchase Media Pty. Ltd. & Ors v. Pyramid Building Society (In Liquidation)

[Appellants' application to Full Court to restrain Respondent from filing an application to wind up the Appellants, pending the hearing and determination of the appeal].

Brooking J. [after commenting on the Appellants' financial position]:
"The trouble is, Mr. Hammond, companies like your clients are dropping like flies at the moment".
Hammond: "That might be so, Your Honour, but that's no reason for the Court letting the other side swat us while we're still flying".

Supreme Court of Victoria

Coram: O'Bryan J.
Occidental Insurance Co. Ltd. v. Bank of Melbourne
Day 77

His Honour: Well, let me ask you, Mr. Marks, as I have alerted you to it. Your response to Mr. Roeder was to say "Well what the hell is it if it is not a security". Did Mr. Roeder's explanation to you for the escrow bank arrangement satisfy your mind?
Mr. Finkelstein: The answer — he has already — I object to the question, Your Honour.
His Honour: Well, you cannot.
Mr. Sher: I uphold the question.
Mr. Finkelstein: I asked Mr. Marks about that yesterday.
His Honour: Well I am asking him today.
Mr. Finkelstein: I am sorry, Your Honour.
Witness: The answer to Your Honour's question is, no, it did not.
His Honour: Yes, thank you.
Mr. Finkelstein: At least it was the same answer that he gave yesterday.

Extract from Interrogatories Recently Delivered

1. What was the deceased's date of birth?
2. (a) What was the date of the deceased's death?
   (b) What was the cause of the deceased's birth?

Extract from an Affidavit Sworn in a Supreme Court Action in December 1991

THE DEFENDANT IS THE BROTHER OF the deceased and has been in possession of the property during the lifetime of the deceased, with the consent of the deceased. However, the deceased's consent has since been revoked.

The "Age"
21 February 1992
Charges Withdrawn

THE VICTORIAN DIRECTOR OF PUBLIC Prosecutions yesterday withdrew charges in the Melbourne Magistrates' Court against two men alleged to have abducted, and raped her in a Brunswick warehouse.

The magistrate, Mr. Julian Fitz-Gerald, struck out the charges against Abraham Greig, 20, of Kitchener Street, West Brunswick, and Spiro Robotis, 21, of Caroline Court, Preston.

Mr. Simon Cooper, for the DPP, gave no reason to the court for the withdrawal of the charges.

[The Editors sympathise with Bongiorno Q.C. who, at the time of the events reported must, it seems, still have been recovering from a very serious (and little publicized) operation.]

LAWYERS' BOOKSHELF

Data Protection in Australia

By Gordon Hughes, Law Book Company Ltd., 1991, $79.50

ANY AUTHOR WHO ENDEAVOURS TO clarify the state of law across Australian jurisdictions on a topic as nebulous as 'privacy', and is prepared to tackle subjects such as the protection of data in computerised storage systems, deserves praise. After all, few of us are familiar in any detailed way with the effect of computerised filing systems and the ease with which data in such files can be manipulated. When the author includes in his work the results of intensive analysis and a broad range of research and study, and presents the subject in a clear, concise and readable manner, he is to be doubly applauded.

In his recent work *Data Protection in Australia*, Gordon Hughes has tackled a subject which would terrify most practitioners. He identifies and explains the threats to privacy which computerised information databases have created and highlights the dangers inherent in such systems unconstrained by the physical difficulties of data manipulation to which manual storage systems are subject. He analyses in considerable detail how 'privacy' has been defined and interpreted in jurisdictions in Australia and overseas, and highlights the deficiencies in many such definitions.

Mr. Hughes refers to Australian statutes with which, I venture to suggest, most members of the Bar would be unfamiliar. These include the *Data-matching Program (Assistance and Tax) Act* 1990 (Cth), the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), and the *Privacy Act* 1984 (Q'ld). Of considerable interest to practitioners and academics will be the extensive footnotes provided by the author and the detailed bibliography covering references to books and articles around the world.

At the conclusion of each chapter, the author provides a concise conclusion in which he analyses the topic under discussion and includes, on many occasions, stimulating items for further consideration. How many people, I wonder, appreciate that (under the *Privacy Act* 1988 (Cth)) the Privacy Commissioner's determination that an agency found to have breached an Information Privacy Principle is to compensate a complainant in a specific sum may be the subject of an application for review by the agency to the Administrative Appeals Tribunal, but that there is no corresponding right in a complainant to review a finding by the Privacy Commissioner that a complaint is unsubstantiated. The author provides considerable analysis to justify his conclusion that the *Privacy Act* 1988 (Cth) (save in a minor and rather cumbersome way in very recent amendments) provides only a half-hearted advance towards the protection of individual privacy, particularly given its reluctance to address the obligations of the private sector as opposed to Commonwealth Government instrumentalities. Furthermore, he draws attention to the supreme irony that it has been the *Privacy Act* which has facilitated the conversion of the Tax File Number system into a national identification system which was the subject of screams of outrage when proposed as the Australia Card.

In addition to the author's explanation of the state of the law of privacy and confidential information in Australia with detailed cross-refer-

ences to parallels in other jurisdictions overseas, he has managed to include in the volume a considerable amount of secondary reference material, thereby providing a convenient source of publications which might be otherwise difficult to locate, such as extracts from Law Reform Commission Reports, Senate Standing Commission Reports, State Inquiries into privacy, the OECD Guidelines, the Guidelines contained in Schedule 1 of the *Data Protection Act* 1984 (UK), and the New Zealand Information Authority Recommendations 1987 and the *Privacy Act* 1988 (Cth) Interim Tax File Number Guidelines. Also included are a number of Second Reading speeches from various Commonwealth and State Parliaments which provide a wealth of material explaining the legislative intention behind various statutes.

I commend the book as a detailed and comprehensive study of a difficult but extremely topical subject.

David Levin

Australian Private International Law (3rd ed.)

By Edward I. Sykes and Michael C. Pryles, Law Book Company, 1991, Soft Cover $95

I WAS ASKED TO REVIEW THIS BOOK IN November of 1991. Until now I had not done so; my idle mind thought it was too daunting a task.

I had a problem that involved the question of staying an action where service had been effected out of the jurisdiction (or, as Sykes and Pryles would say, 'ex juris'). I pulled down this rather weighty book from its pristine state on my shelf.

It provided a most incisive and thorough review of what is a very difficult area of law. I was directed almost immediately to the most relevant and most recent cases in the area, with useful comparisons of the statutory position that exists in the Australian States and the position existing in England.

It was easy to read; so much so that I read the whole chapter (perhaps digressing from the real requirements of my research).

Other chapters provide a thorough and readable analysis of such areas as standing, foreign judgments and the application of foreign law, cross-vesting and choice of applicable law and jurisdiction in specific instances of contract, tort, property, company and family law situations. In all, this book covers all those difficult and peripheral issues which confront most lawyers from time to time. If I did not get a copy of this book free for providing this review, I would have immediately gone out and bought it.

For the purpose of this review I have not read the whole book, it is just too substantial. However, if it provides the same assistance for others as it did for me in my researches, then it will be a most valuable addition to any lawyer's library.

S. R. Horgan

Family Law Financial Settlements

By Peter Szabo, 1991, Centre for Professional Development (Aust.) Pty. Ltd., $59

PETER SZABO, FAMILY LAW SOLICITOR, has written a very useful and practical guide entitled *Family Law Financial Settlements*. The book is prepared as a manual for the Family Law practitioner and accountants who require reference material for property and maintenance settlements in the Family Court. This area of legal practice has become increasingly complex and requires specialist knowledge. While this publication does not aim to provide 'all of the answers' in this difficult area, it does give a thorough overview of the approach taken by the Family Court to these problems and a 'check list' for the legal advisor. The importance of this publication is highlighted in the preface:

"The advent of the discretionary trust during the late 1960s and early 1970s and the relatively low threshold for high taxation has led to a growth in estate and taxation planning. Couples who have arranged their affairs within such structures need to obtain competent professional legal and accounting advice to ascertain the best approach for re-arranging them upon a separation occurring. The Court now has a well defined method for distributing assets between the parties which is discussed in detail. The first step involves the examination of the assets and their worth. Then the Court maps a blueprint for dismantling that structure, taking into account what is a 'fair distribution'."

The benefit of this publication lies in its pragmatic analysis of the Family Court's approach towards maintenance and property issues, its outline of court procedure and the documentation required. It also has a useful analysis of the Court's approach to corporate structures, trusts and other tax and estate planning devices. With this manual an accountant or lawyer who practises in the Family Court can advise clients as to the requirements for preparing their case for court.

This publication is the second edition of this work. It was first published in 1984 under the

title *Understanding Family Law*. It is recommended for those professionals who practise Family Law.

Graeme P. Thompson

Current Family Law

By Michael Watt and Cecile Hall

THIS PUBLICATION, WHICH FIRST appeared in February 1992, is advertised as being 'pertinent, practical and portable'. Being slightly larger than the *Australian Bar Review* and consisting of 44 firmly bound pages of high quality paper, it immediately meets the portability claim. The feature offered in Volume 1 No. 1 to sustain these claims appear under the following headings:

Special Feature. In their first special feature, the authors present '*a chronology of major developments affecting family law and practice — January 1990 to January 1992*'. This is a most useful chronology that describes changes to the *Family Law Act* 1975, the Child Support legislation, the Family Law Rules and Regulations, legislation affecting mediation and arbitration, and notes a small number of leading cases.

Pleadings — Pointers and Precedents. In this section, the law applicable to overseas and interstate moves by a custodial parent is summarised. It outlines the facts of a hypothetical case and then sets out a pleading precedent containing the orders to be sought and the material facts to be alleged in support of an application for those orders. This is a most useful aspect for the family law practitioner.

Child Support. This section begins by drawing attention to the Child Support Agency's crackdown on defaulting child support payers pursuant to which it will issue 2,000 summons per month throughout 1992. There follows a helpful analysis of the first Full Court decision — *Gysleman v. Gysleman* (date of judgment, 19th December, 1991) which sets out guidelines for the determination of departure order applications under the *Child Support (Assessment) Act* 1989. Then follows two case notes of decisions where expenditure by the non-custodial parent was, in one case and, was not, in the other, found to be a sufficient basis for a departure order.

Law on the Move. This is an innovative section in which the authors summarise and explain recent changes affecting law, practice and procedure. In the issue under review, changes noted include changes to the Family Court; the very contentious regulations intended to come into effect on 1st April 1992 imposing substantial filing and hearing fees in Family Court proceedings; amendments to the pleadings rules and new Order 32A which establishes procedures for seeking leave to appeal from interlocutory orders pursuant to section 94AA of the *Family Law Act* 1975, and for the hearing and determination of such applications. Finally, in this section, there is a short summary of the Case Management Guidelines introduced on 2nd December 1991 by Practice Direction No. 3 of 1991. These guidelines bring about a new case flow management system for proceedings in the Family Court. An understanding of them will be essential for all those who practise in the field.

From Overseas. Any impression that Australia is the only country in which family law generates heated debate and controversy about issues such as child support is quickly dispelled by a reading of the two articles from American family law publications which are discussed in this section. Both offer some amusement in their own way. The first report relates to a departure order made in New York requiring a star baseball player to pay $60,000 by way of child support. The second relates to a Bill introduced by a West Virginia senator which would require the involuntary sterilisation of child support defaulters in arrears for 12 months or more. A future update to the passage of that Bill will be eagerly awaited.

Alternative Dispute Resolution. Much has been said and written about mediation as a means of resolving family law disputes at an early stage. In this section, the authors note the commencement, in December 1991 and January 1992 of amendments to the *Family Law Act* 1975, new family rules and new family law regulations which establish a system for the mediation of family law disputes. There follows an interesting interview with the director of the pilot mediation scheme.

Casenotes. In addition to the child support cases already mentioned, some of the more important decisions to emerge in the latter part of 1991 are noted. These deal with issues such as principles for the refusal of access, the test to be applied in granting leave to appeal from an interlocutory order, and a case in which last-minute amendments to a pleading were refused. In each instance, the analysis is both accurate and helpful.

The authors, Michael Watt and Cecile Hall, both members of the Victorian Bar, have produced a publication that meets the needs of the busy family law practitioner. It is a publication that is pertinent, practical and portable. It offers immediate update to and explanations of current family law problems and is a necessary addition to the library of those practising in family law.

Paul M. Guest

Product Liability

By Ellen Beerworth, The Federation Press, 1989, $35

IT WILL BE INTERESTING TO SEE whether Australian and indeed English law follow the significant advances made in America in respect to product liability and in particular such American legislation as the U.S. *Uniform Product Liability Act*. This question would appear to be one of the main themes of Ms Beerworth's very discursive text.

The comparisons with the development of American law do not take away anything from the incisive discussion of the development of the Anglo-Australian position. The work includes a very thorough analysis of the development of our law through *Donoghue v. Stevenson* and *Hedley Byrne v. Heller*, up to more recent developments such as *Caltex Oil v. The Dredge 'Willemstad'*.

Included in the work is an extensive consideration of all existing legislative provisions affecting the law with respect to product liability. Whilst Ms Beerworth includes valuable case references and references to other articles on the subject, the book cannot be used as a simple legal text. Therefore, the work does not provide a reference book on the subject but more a guiding and incisive commentary through the developments in the law.

I think this is quite a valuable book for any lawyer who practises not only in the area of product liability but also in any area of general law where questions of negligence, representations or exclusion clauses are in issue. The development of the law of product liability, as described excellently by this book, is merely an example of how our law changes with the times to fit policy and other economic considerations.

S. R. Horgan

THE ADVANCED ARBITRATION COURSE
(Continued)

THE VICTORIAN BAR/INSTITUTE OF Arbitrators, Australian Advanced Arbitration Course was scheduled to resume at 9a.m. on 30th November, 1991. Unfortunately, a number of participants were unable to be in attendance during much, if not all, of the morning. It was not clear whether this was due to:

(a) the list dinners and Family Law Bar Association functions of the previous evening;
(b) the unscheduled and unmarked change of venues; or
(c) the competing attractions of the 9th Perinatal Society Conference, the 1991 Australian Music Awards or the "liquidation sale" of carpets and crockery being held elsewhere in the vast complex of the World Trade Centre.

Late and non-attendances missed out on informative and interesting papers from Byrne J. and Chief Judge Waldron. Those in attendance not only had the benefit of hearing the papers being delivered but could have been forgiven for imagining that they were at the theatre, what with dimmed lights, closed doors and groups of late arrivals being ushered in during appropriate breaks in the entertainment by Howard Ambrose, who lacked only the averted torch.

Notable in the delivery of Byrne J.'s paper on "The Concept of Statutory Arbitration and Its Ramifications" were some interesting excursions into the web of contradiction woven by legislation which appeared to have been passed without consideration of pre-existing statutory provisions and a "hot off the press" account of very recent additions to the Supreme Court Rules.

Given Byrne J.'s earlier paper, the Chief Judge's paper, entitled "Court-Annexed Procedure (County and Supreme Courts) Arbitrations and References Out", naturally enough concentrated on the County Court. In the recent climate of unremitting attacks on the legal profession it was comforting to hear His Honour observe that the overall success of the pre-trial procedure has been due in large part to the "ongoing support of the [legal] profession" and that:

> "I find it interesting that the parties chose legal practitioners [in the choice of mediators] in the overwhelming majority of cases and that in turn barristers were preferred in the great majority of those cases . . . It is obvious, nevertheless, that legal expertise is generally required of a mediator rather than practical knowledge of building."

It was more surprising that statistics produced by the Court disclosed that although a formula of listing 1.5 cases per Judge per day was still maintained "the average 'not reached' percentage of

Hartley Hansen Q.C., Chief Judge Waldron and Byrne J.

cases . . . [remained] . . . well below 10% of cases listed". Immediately prior to lunch Mr. Julian Reikert, Solicitor, gave a most interesting "hands on" discourse dealing with how he came to do his first conciliation/mediation and some of his more entertaining experiences.

Lunch was enlivened by a most personal view of *Gas and Fuel Corporation of Victoria v. Wood Hall Ltd. et al* [1978] VR 385 given by Stephen Charles Q.C.

Those who survived lunch were treated to a detailed account of the forthcoming introduction of mediation and conciliation in the Family Court of Australia by the Hon. Harry Emery Q.C.

Afternoon tea wiped out a few more participants, and thus the numbers who enjoyed more of Mr. Reikert's experiences and warnings to the innocent were greatly reduced. That was a great pity because they also missed out on a brief discourse on the law of negligence by Mr. de Fina, who closed the programme on behalf of the IAA, and the acknowledgement, by Mr. Hartley Hansen Q.C. on behalf of the Victorian Bar, of the detailed efforts put in by the organisers.

It would be remiss not to mention again the efforts of Messrs. Maurice Phipps Q.C., Bill Martin Q.C., George Golvan Q.C., Tony de Fina, Frank Shelton and by far not the least Howard Ambrose.

On the 17th of February, 1992 approximately 40 members of the Bar, fortified by a tutorial conducted by the Institute of Arbitrators some 12 days prior and in most cases by hours of last minute study in the 24–48 hours prior sat the Institute's grading examination. From the wringing of wrists and the complaints of cramp it was obvious that most of them had not sat a 3-hour written examination for many decades and were regretting the lack of practice. We wish all of the examinees the best of luck with their results, which are due out towards the end of May. Assuming that they all pass the examination it will be a very good recognition of and reward for all the hard work put in by the Institute and the representatives of the Bar who put together the General and Advanced Arbitration Courses at the beginning and end of last year respectively.

The *Bar News* wishes great success to those who remembered to enrol for the grading examination before the end of December last year and who sat the examination in mid-February this year. For those who successfully negotiated the examination may we wish you successful arbitrations and a minimum of applications to disqualify on account of alleged demonstrated bias.

Peter Vickery and Rupert Balfe Q.C.

Peter Golombek, Byrne J. and Frank Shelton.

BAR CHRISTMAS PARTY

THE BAR CHRISTMAS PARTY IS A tradition. It is a signpost for all that the legal year is drawing to an end. It is a time for members of the Bar, their spouses, secretaries and members of the judiciary to gather in the pink and lofty foyer of Owen Dixon Chambers West. For many it will be their last Christmas party for the year. The last occasion in the festive season when they will be offered an open rare roast beef sandwich and a glass of Angus Brut.

In 1991 it fell on Friday the 13th of December. This date was notable for a number of reasons. It was the date of the retirement of the Chief Justice, Sir John Young. His farewell earlier in the day was a moving and well-attended occasion.

Friday the 13th was also the official end of the legal year. Some would say that this was prophetic. Others would say it was premature. Others yet again would say that it allowed them an extra week of Christmas activities.

The cocktail party was, as usual, well attended. It was given special significance by the attendance of Sir John and Lady Young and provided

Ken Spurr and Mr. and Mrs. Lou Past.

Judge Fagan, Di Farlow, Sir Kevin Anderson and Lady Mann.

BAR CHILDREN'S CHRISTMAS PARTY

YET AGAIN MANY MEMBERS OF THE BAR and their off-spring attended the Botanical Gardens for the annual children's Christmas Party. This has become a regular and well-attended event. Children and parents turn up expectantly hoping for a nice present from Santa. This often leads to tears and disappointment, particularly from the parents.

This year Maxwell Perry was the resident Santa Claus. Embodied with his vast experience of haranguing readers and unfortunate students of the Leo Cussen Institute, Max was the perfect Bar Santa. He both gave and took away. Tears were mixed with laughter. Rumour has it that Max lost a stone in weight on the day.

Santa . . .

Santa . . .

A reformed cocktail party can go hand in hand with a reformed Bar. Gaggles of cardigan-clad advocacy consultants will huddle in the Flagstaff Gardens feasting upon tap water and 80% of a Salada cracker.

Carmen Randazzo, Ian Hill, Liz Curtain and Tom Hurley.

Tina Giannoukas, Adrian Ryan and Rosemary Carlin.

many with the opportunity to wish them farewell in their retirement.

Thoughts of this year's cocktail party and open rare roast beef sandwiches seem a long way off. If the press and its cronies have their way, perhaps there will not be a 1992 Bar cocktail party. But the reformers cannot be so harsh as to take this last vestige away. A reformed cocktail party can go hand in hand with a reformed Bar. Gaggles of cardigan-clad advocacy consultants will huddle in the Flagstaff Gardens feasting upon tap water and 80% of a Salada cracker. But even this may seem to be elitist. Then again Christmas itself is an elitist event in our present-day society.

Roll on Christmas 1992!!!

and more Santa . . .

Max was new to the role of Santa. His predecessor, another well-known rotund member of the Bar, had gone professional. Rumour has it that he was performing at the Freemasons' Hospital on the day of the Christmas Party. It is good to report that on the day while Max was giving freely from his sack, so too was 'S.K.W.' at the Freemasons'.

A jolly and happy day was enjoyed by all.

COMPETITION

EARLIER THIS YEAR, A SUPERIOR court judge in Australia said:
"Counsel for the respondent directed a number of valid criticisms to the evidence of [the applicant's key witness] primarily concerned with a notable lack of specificity in his description of the operations of the [enterprise] but which also pointed to some significant inaccuracies in statements made by him. These have been taken into account."

1. Identify the author of this statement.

2. Express His Honour's views *more* subtly.

The winner, as determined by the Editors, will receive a bottle of Essoign claret.

CRICKET MATCH - v - MALLESONS

Brian Meuller (keeper).

THE BAR 'CRICKET SEASON' commenced with the annual game against Mallesons Stephen Jaques, now in its third year. With the seasoned Gillard Q.C., otherwise engaged, and the injured Connor restricted to his unique impersonation of Dicky Bird, the Bar was without two of its regular players. McTaggart was given the honour of captaining the Bar XI, and the experienced Kendall Q.C. and Neal were brought in to bolster the Bar's hopes of making it three in a row.

Having won the toss, the Bar elected to field, and the match was under way at Como Park.

The initial breakthrough came after a magnificent piece of fielding by Radford, who with the speed of Dean Jones swept in from mid-wicket breaking the stumps from side-on with a superb throw.

The Bar was given further inspiration in the form of a marvellous catch at fine leg from Ramsay who, running at full pace and with arms at full stretch, dived to catch a ball which was intent on gravitating to earth well beyond the boundary. Of course, to the team's disbelief, Donald alleged that he had 'set the trap' with what could only be described as a medium pace long hop.

The Bar attack was steady with Glover, Jordan, Middleton and Donald each taking two wickets whilst Radford and Matthews bowled well at the end of the Mallesons' innings. The Mallesons' score of 147 was thought to be easily obtainable.

When the Bar innings commenced, Middleton and Southall plundered the attack mercilessly, and the Bar raced quickly to 50. At that stage, we all hoped that the beer would be chilled sufficiently in view of the early finish!

The score reached 70 before Middleton was caught for a well-compiled 33. Southall followed soon after with the score at 73 when he was caught for an equally well-compiled 31. Then, disaster struck as is its wont with the Bar Cricket Team. The Bar top order batting collapsed with only Mueller reaching double figures, making 16. The Bar was bundled out for 111. The game was lost, the beer wasn't chilled, and the match had finished early.

Once again the Bar thanks Mallesons for arranging the match, and looks forward to aveng-

Ross Middleton.

Neville Kenyon and Michael Shatin.

ing our defeat next year. We also thank Magee (Tony) and Connor for providing their services as umpires.

Andrew Donald

MALLESONS STEPHEN JAQUES' 2ND XI's FIRST WIN OVER THE BAR's 2ND XI

THE THIRD ANNUAL CRICKET CHALlenge match between the Bar's 2nd XI and the MSJ 2nd XI on Sunday, 16 February 1992 was different from those played in 1990 and 1991. This time the MSJ 2nd XI won the match.

In a game that was played in extremely hot conditions the younger players prevailed. Unfortunately for the Bar, most of them were playing for MSJ.

The Bar's most successful batsman, Adrian Ryan, ironically ex-MSJ, made 37 of the Bar's total of 139 runs. Adrian came in to bat when the Bar was 8/66. The score was 139 when he was bowled out only minutes before the innings was over.

Apart from Adrian, only John Lewisohn (22) and Rex Wild Q.C. (32) reached "double figures" for the Bar. John played some beautiful drives and Rex put some excitement into the game with six boundaries, including 2 "sixes".

Unnecessary run-outs and some "lazy shots"

Rex Wilde.

Bill Gillies, Malcolm Strang (and offspring), Michael Shatin and David Haberberger.

from good players contributed to a smaller score than the Bar was capable of achieving. This is not to say that there was not some excellent bowling by MSJ, but a little more concentration and common sense might have resulted in the Bar winning the game.

When MSJ batted, their openers Hong Seng (33) and James Baillieu (49) had to withstand some excellent bowling by David Myers (0/6) and Rex Wild Q.C. (0/16) in the early overs. That they did so was a tribute to their patience. They put MSJ into a strong position. Eventually their partnership was broken by David Habersberger Q.C. who ran out Hong Seng. Bowling with tight control, David took 2/27.

MSJ's Luke Gannon (34) ensured that MSJ's scoring rate would not leave them short of the necessary overs after the Bar decided to set defensive fields to keep down the runs.

Neville Kenyon (3/14) demonstrated his competitive spirit by taking two wickets when the scores were tied at 139 each. However there were no fairy tale endings to this story for the Bar, and MSJ scored the extra run to win in 35 overs with a final score of 6/140.

Paul Santamaria, Adrian Ryan and Malcolm Strang bowled well for the Bar. Each was unlucky not to take wickets.

The Bar's fielding was like the curate's egg, good in parts. Wicket-keeper Mordy Bromberg only allowed 1 bye and 1 leg bye, John Lewisohn took a difficult catch at deep mid-on, and Phil Trigar saved numerous runs whilst fielding at square leg. On the other hand there were several dropped catches and a "regulation" run-out that was messed up.

The umpire for the 2nd XI game was *Age* finance and cricket writer, Gideon Haigh. His good judgment and fairness earned him the respect of both teams.

It goes without saying that MSJ's captain, Phil Opas Q.C., is a very happy man. And so he ought to be. He led his team to a well deserved victory.

Michael Shatin

CONFERENCES

THE AUSTRALIAN BAR ASSOCIATION Conference 1992 will take place in London and Edinburgh from 3rd July to 10th July 1992. The conference carrier is Qantas.

The keynote speech in London will deal with the Independence of the Bench, the Independence of the Bar and the Bar's Role in the Judicial System. At Edinburgh, Barristers' Immunity for Negligence will be canvassed. Other topics to be canvassed are Fusion; The Institution of Silk; Direct Professional Access; Advertising; The Overriding Duty to the Court; Procedures for Judicial Appointment; Time Costing of Fees; Partnership or Employment; Use of Computers in Everyday Practice.

Westpac Travel is the official conference consultant. Enquiries should be addressed to Mr. Said Abdou, Westpac Travel, Bondi Junction, telephone: 008 8559; 02 391 4247;
fax: 02 391 4255.

The Inter-Pacific Bar Association will hold its Second Annual Conference at the Regent of Sydney Hotel from 3rd to 6th May 1992. The conference will cover the following topics: Regional Economic Integration — the Asia-Pacific Response, Crossed Border Investment, Immigration, Legal Practice, Challenges for the Construction Industry, Developments in the Protection of Trade Secrets, Arrest of Vessels, the Award of International Air Routes to Carriers, Taxation of Foreign Enterprises, Competition Law in the Region, Dispute Resolution and Arbitration and other topics.

The 14th Annual **Conference of the Australian Society of Labor Lawyers** will take place in Melbourne over the weekend of 22–24 May at the Southern Cross Hotel.

Highlights of the Conference include the Lionel Murphy Memorial Address to be delivered by Sir Maurice Byers Q.C., former Solicitor-General and Chairman of the Constitutional Commission.

Other highlights include a session on Human Rights to be addressed by the President of the New South Wales Court of Appeal, Justice Michael Kirby, and one on Law & Order to be addressed by the Director of the Australian Institute of Criminology, Professor Duncan Chappell.

The **Australian Institute of Criminology** has the following conference program planned for the balance of 1992:

May 19–21	Homicide — Melbourne
June 23–25	Aboriginal Justice Issues — North Queensland
August 3–5	Criminal Justice Policy: Issues, Management and Evaluation — Brisbane
September 22–24	National Conference on Juvenile Justice Venue: The Terrace Hotel, Adelaide.

Persons who wish to be involved in any of these conferences, kept informed of planning for them, or who have any suggestions for other Institute conferences should contact the Conference Unit, Australia Institute of Criminology, GPO Box 2944, Canberra, A.C.T., 2601.

The Australian and New Zealand Forensic Science Society, Victorian Branch, which aims to cultivate an interest in the Forensic Sciences, states that it has 'a varied and stimulating program of meetings'. It would welcome membership inquiries which can be directed to the Secretary, ANZ F.S.S.S., P.O. Box 395, Melbourne 3001.

VICTORIAN BAR COMPUTER USERS' GROUP

A LITTLE OVER ONE YEAR AGO I WAS the Victorian Bar's representative at a meeting of the County Court Computerisation Committee. In the course of the discussion, the chairperson, Judge Jones, asked what the attitude of the Bar would be to a particular option. I had no idea. 'The Bar' had no view; at least it was unable to make any view manifest to me. Concern at my inability to respond in any meaningful way led me to consider the situation of the Bar and computerisation and discuss it with a number of people, particularly Julian Burnside. Together we decided to canvass the views of the Bar, to attempt to establish the level of knowledge of computers at the Bar, and to see whether there was any useful way in which we could raise the consciousness of the members of the Bar to the way in which computers could assist them in their individual practices. From such humble beginnings the Victorian Bar Computer Users' Group (VBCUG) was founded. Membership of

the VBCUG is open to all members of the Bar and the Judiciary. The cost has been set at a modest $20 (half-price for Readers) and the moneys so collected have been used to cover photocopying expenses and the hire of overhead projection equipment.

During 1991 meetings have covered a diverse range of topics, including a general overview of the use of computers in a barrister's practice, word processing for beginners and advanced users, information retrieval, chronologies, transcript, spreadsheets and litigation support. We have tried to ensure that the information presented and the discussions held remain capable of being understood by persons with very little knowledge of computers, whilst still of interest to those with more experience. Of all the difficulties inherent in presenting information in this general forum situation, the ability to cope with different levels of experience and knowledge is, to my mind, the most demanding.

VBCUG has no constitution, although a member has been cajoled to act as 'treasurer' to keep an eye on the accounts. An informal group of interested people form an ad hoc committee to attempt to set an agenda for forthcoming meetings. We always need ideas from members of the Bar for topics which can be usefully covered in the forthcoming year. If you want to join the Group, just come along to the next meeting, which will probably be held in the Readers' Common Room on the 2nd Floor of Four Courts Chambers. Meetings are widely advertised in the lifts and on notice boards. Please do not feel that your level of knowledge of computers is so abysmally low that you cannot attend without embarrassment. We all have something to learn from each other and it is to be hoped that by sharing knowledge amongst ourselves we will not each have to 're-invent the wheel' as we began to use electronic equipment.. . .

David Levin

ANNUAL LEGAL FUN RUN

THE ANNUAL LEGAL FUN RUN HELD for the first time in the evening proved to be more popular than ever. Of the record 208 entries a large percentage, namely 177, actually arrived to contest the event.

The Bar equalled its best previous effort in the overall race when Mark Purvis (a previous winner, as a solicitor) came second. It's this writer's memory (no doubt imperfect) that no barrister has ever won the legal fun run. Yet a number of solicitors who have won, upon coming to the Bar have been relegated to second place. Is there a deep and underlying message in all that? Are we just second best in the profession or are solicitors just too good for us?

No doubt in these troubled economic times we could spend a great deal of editorial space usefully debating the pros and cons; however, perhaps the results are more interesting.

The Bar, who maintain that Judges remain part of them, won the Judges' race. His Honour Judge Duggan led the field (of Judges) home — due diffidence and loyalty to the Judge do not allow the writer to disclose how many other Judges ran.

The first barristers' team was SWAP Counsel. Your investigative journalist has been unable to unearth the real meaning of SWAP — briefs, clerks or partners? Perhaps this could be a competition the Editors of our illustrious magazine would like to organise; with a bottle of Chateau Neuf de Plonk as a prize.

The first barrister home in the power walk was Ian Crisp who finished in the middle of the field. When one looks at all the Barbaras, Jos, Sues, Heathers, Felicitys etc. who walked, that seems a pretty good place to be.

Tom F. Danos

VICTORIAN COUNCIL OF PROFESSIONS ANNUAL GOLF DAY

7th October, 1991

THE DEFENDING CHAMPIONS, THE VICtorian Bar, fielded a new team for the defence this year. Unfortunately the entire 1990 team was unavailable due to other commitments including several being in Brisbane to be admitted to practice in the deep North.

On a mild and slightly breezy day at Yarra Yarra the new Bar team consisting of Stephen O'Bryan, Bruce McTaggart, John Tebbutt and Ray Lopez confidently teed it up. O'Bryan soundly upheld the tradition established by Rice last year in winning the trophy for the best individual score (39 points), needing to hole a testing 10-footer on the last to do so. Ray Lopez also pleased the selectors with 32 points. McTaggart and Tebbutt, sure match winners on paper, unfortunately did not perform well enough to avoid disciplinary proceedings from Captain O'Bryan.

1992 BAY RUN

DURING THE WEEKEND OF 14–15 March 1992 a team comprising 10 Barristers and Judges took part in a gruelling relay race around Port Phillip Bay. The object of the run was to raise money for charity. A similar event was held in 1988 and the Bar then raised over $7,000.00. For the statisticians, in 1988 the Bar team was placed 17th out of 100 teams and our rivals, Minter Ellison, finished 63rd (see *Bar News*, Autumn 1988 pp.41–42). This year, the Bar team finished 16th and once again finished ahead of Minter Ellison.

The run received the approval of the Bar Council and members of the Bar were encouraged to make such donation as they considered appropriate.

Generous donations were received.

Detailed results of the 1992 Run will be published in the Winter issue of *Bar News*.

After strong representations Captain O'Bryan has decided that their scores will not be disclosed.

With all four scores being counted in the requisite total, the Bar missed out by only 7 points from conducting a successful defence of the proceeding. The 1991 trophy was won by the quantity surveyors, closely pursued by the dentists. Perhaps in 1992 the Bar can take a leaf out of the dentists' book since to even obtain a place on their team it is necessary for intending competitors to participate in a play-off.

The Victorian Council of Professions Shield has unfortunately left its resting place in the Bar Council Chamber, hopefully to be returned in 1992.

A Player

WARNING TO BARRISTERS

This is not a practice note, but a timely warning to barristers that their libraries and legal friends will need a copy of

Pith Without Thubtanth

THE BOOK BY COLUMB BRENNAN, TO BE launched on 5 May, is elegantly written with enough legal anecdote to last a lifetime.

Younger barristers will learn how Sir John Barry freed Victoria of unwanted marriages when there were all sorts of bars to divorce. Finally he bucked the system.

After the Bar's move to Sir Owen Dixon in 1961, the venerable Selborne Chambers was converted into a tavern. The menu for *Selborne Counter Lunches* was chalked on a board at the cathedral-like entrance. Two rooms once occupied by Sir William Irvine, Sir Frederick Mann, Sir Owen Dixon, Sir Thomas Clyne and other notables became private bars. All is told in the chapter *Old Glories Marinated*, which may moisten the eye of the older practitioner.

In the County Court an embarrassed gentleman was directed by Judge Mitchell to say exactly what the bawdy lady said. He blurted out, 'She called me an Honour, you bastard.'

During the post-war stringency of landlord-and-tenant laws, an elderly house owner got his solicitor to send a heart-rending letter to the tenant that he needed his house in his declining years. Back came the reply: 'Dear Sir, I remain, yours faithfully'.

Pith Without Thubtanth is a book for everybody who is anybody and those who aspire to be such.