VICTORIAN BAR NEWS

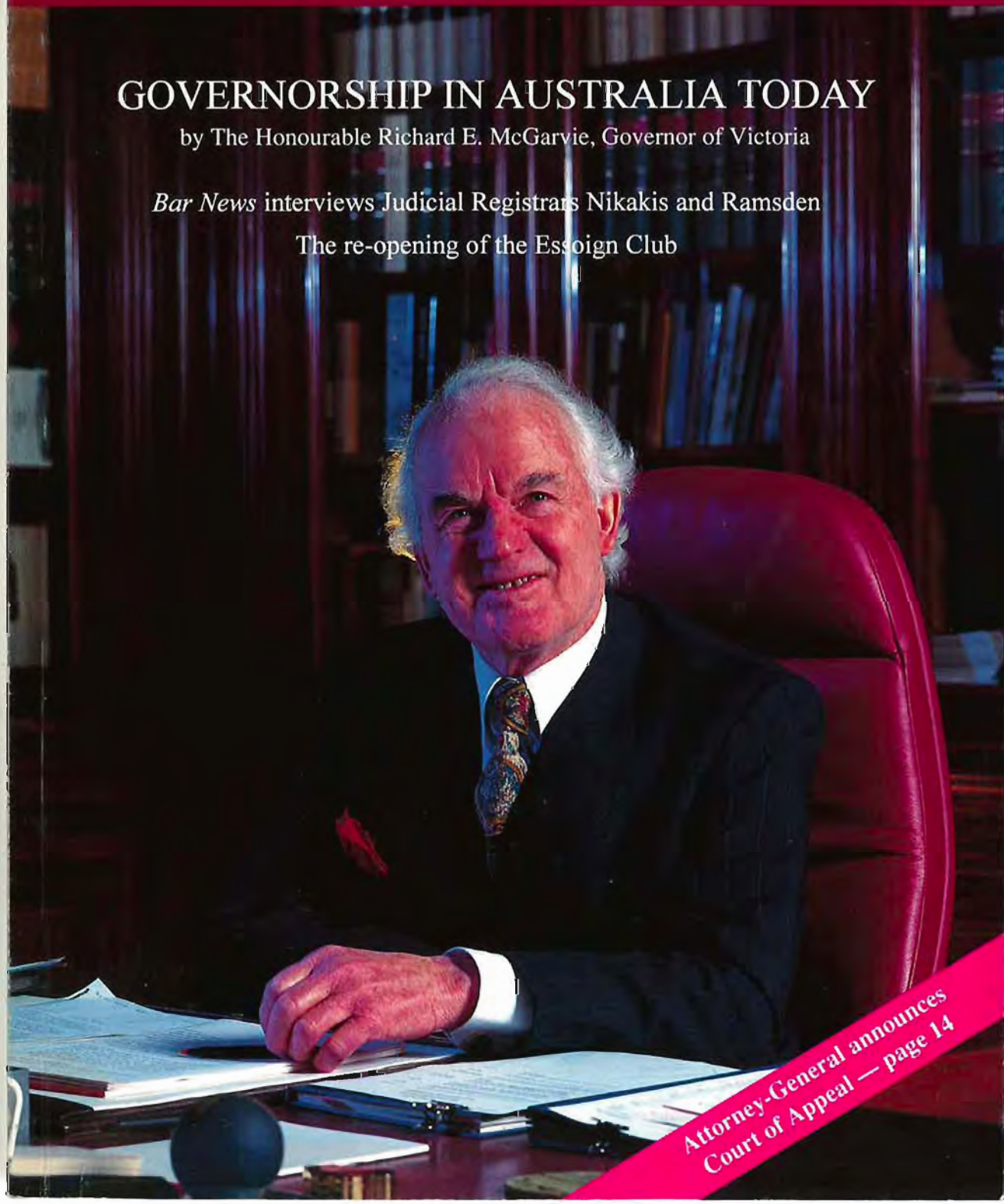
No. 90
ISSN-0150-3285
SPRING 1994

GOVERNORSHIP IN AUSTRALIA TODAY

by The Honourable Richard E. McGarvie, Governor of Victoria

Bar News interviews Judicial Registrars Nikakis and Ramsden

The re-opening of the Essoign Club



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The Governor of Victoria, The Honourable Richard McGarvie, photographed at Government House.

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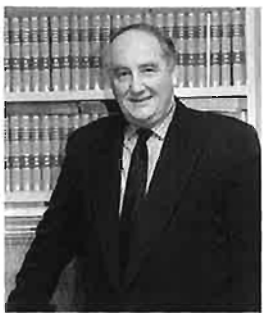
Welcome Judge Campbell

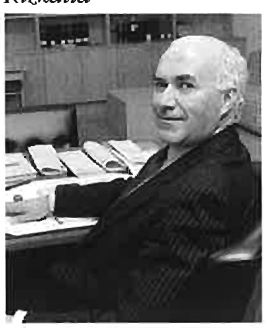


Welcome Judge Morrow

Welcome Judge McInerney

Welcome Judge Rizkalla

Welcome Judge Wodak



Welcome Judge Shelton

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EDITORS' BACKSHEET

WE WERE WRONG

RONALD SACKVILLE IS NOT JUST A VERY clever academic. He has written us a letter (printed below) pointing out that he has been ten years at the New South Wales Bar.

According to *Who's Who in Australia*, Mr. Sackville has been a barrister (a member of the New South Wales Bar) since 1985 and was Chairman of the (Victorian) Accident Compensation Commission from 1985 to 1989.

If *Who's Who* is correct it would seem that he has been in active practice in New South Wales since some time in 1989.

In late October 1993 the Access to Justice Advisory Committee was established and he was appointed its Chairman. Since 1993 no doubt some of Mr. Sackville's time has been taken up with the deliberations of, and preparation of the Report by, the Access to Justice Advisory Committee.

His letter seems to suggest that he brought to the preparation of that Report the experience of a decade "spent" at the New South Wales Bar.

Dear Sir,

The Editors' Backsheet (Winter 1994) rhetorically asks:
"Why should we put any faith into what Mr Sackville says? There is no doubt that he is a very clever academic, but that is all. He has now left Victoria and gone to New South Wales."

I am happy to be regarded as a very clever academic, but I am troubled that the 13 years since I left University teaching and the 10 years at the New South Wales Bar appear to have added nothing whatsoever to my modest credentials. I had not realised that life at the Bar was so futile.

But perhaps the problem is that the decade has been spent at the *New South Wales* Bar.

Plainly time at the Victorian Bar is adequate to rehabilitate academics. Otherwise the second sentence in the Editors' incisive analysis would describe precisely the senior Editor of your Journal (although perhaps the word "very" might be omitted).

Yours faithfully,
Ronald Sackville

Extract from *Who's Who in Australia* (1994 ed.)

SACKVILLE Ronald, LLB (Hons Melb), LLM (Yale); Barrister; *son of* J W Sackville; *b.* June 5, 1943; *ed.* Melb. H Sch., Univs Melb. and Yale; *Career* Appt. QC for NSW 1991, Barr since 1985, Chair Accident Compensation Commsn Vic, 1985–89, Memb, Cwealth Schs Commsn 1983-85, Chrmn NSW Law Reform Commsn 1981–84, Dean Fac. Law UNSW 1979–81, Prof. Law 1972–85. Chrmn Royal Commsn into Non-Medical Use of Drugs SA 1977–79, Commsn for Law and Poverty Cwealth Commsn of Inquiry into Poverty 1973-75, Snr Lectr Law Univ. Melb. 1967–71; *publications* Law and Poverty in Australia (Second Main Report, Commission of Inquiry into Poverty) 1976, Final Report (SA Royal Commission) 1979, Property Law: Cases and Materials (4th Ed) (jointly) 1988 *m.* Aug 10, 1965 Pamela, *d.* M Goldberg, 2 d; *address*: 5/180 Phillip Street, Sydney NSW 2000.

The "senior Editor" was a full-time practising member of the Victorian Bar when Mr. Sackville was still a schoolboy.

The senior Editor certainly does not claim to be "*very* clever".

MURRAY DONALD CARNE

In the winter issue we printed an obituary for Murray Donald Carne. That obituary appeared over the signature of Tony North Q.C. It was, however, a piece jointly written by Tony North and by Stephen Howells. We apologise for the printing error which omitted Mr. Howells' name. Much of the material used in the obituary was taken from the eulogy delivered by Mr. Howells at Murray Carne's funeral.

AGE RECOGNITION

So far as we can recall the Editors' Backsheet had not prior to this year been quoted by the Melbourne *Age*. That has now changed. Bob Millington says:

"Editorials in the *Victorian Bar News* have been known to send barristers into comas lasting days. Not any more. The magazine has erupted with a hard-smiting editorial criticising recommendation made by the Trade Practices Commission for change in the legal profession"

Age, 11 August 1994.

Although there is usually some collaboration by the editors in the preparation of the editorials, primary responsibility for the Editors' Backsheet normally resides with one editor or the other. The innuendo in the *Age* article is clear: the person who wrote the winter editorial has some journalistic capacity. The writer of other editorials is boring, tedious, non-controversial, non-racist, non-sexist and generally non. Not very flattering!

In commenting on *Bar News* Bob Millington says: "We can't wait for the editorials on the flag and the Republic".

To satisfy Bob Millington's needs here goes.

THE FLAG

Strong arguments of a racist kind are advanced against the retention of the flag in its present form. It is argued that there are a great many Australians (and their numbers are increasing) whose ethnic roots and cultural background are totally unconnected with the United Kingdom of Great Britain and Ireland. Therefore, it is said, the Union Jack should be removed from the corner of the flag.

It is also argued that the Union Jack in the corner is offensive to Aboriginal people whose country was not "settled" but was "conquered" - the first invasion fleet landing in 1788.

The Union Jack in the corner of the flag recognises that this country, as it exists today, stems from a convict settlement in 1788. That convict settlement was an English convict settlement, not a Spanish, Chinese or Scandinavian settlement.

The system of government in this country stems from that settlement. The principles of responsible government, democracy, cabinet responsibility and the Westminster system by which this country is governed (or purports to be governed) today come from England. The Australian Constitution, our system of law, the adversarial system of trial come from England - not from Utopia or Disneyland.

Aboriginal peoples who consider that they were invaded and conquered from 1788 onwards may properly have an objection to the Union Jack. They may see it as the flag of the conqueror. But as a matter of historical reality this country as it exists today, for good or evil, stems from the English heritage. There may be arguments that modification of the flag could be achieved without rejecting the English heritage to recognise the Aboriginal people and the early history or prehistory of this country.

Immigrants who fled here from Nazi Germany, from post-war Europe, who came here from Greece or Italy or Eastern Europe or who sought asylum as refugees from Indo-China or who now wish to escape from Hong Kong, decided to come here because they thought what Australia had to offer was better than that which existed at home.

Many of those immigrants came to this country to start a new way of life based on the history and culture which they found here, and they came because they saw this country as representing a chance for a better life for them or for their children. If they wish to reject or change the flag because of what it represents, that wish is a paradox of Gilbertian dimensions.

The immigrants of the last half century have given a lot to this country. That is not, however, a reason for saying that the history of this country and the origins of its political institutions should be deleted from the flag.

There is no reason why the largest ethnic group in this country should abandon its historical ties, should ignore its history and the history of this country or change its flag.

There is no reason why the largest ethnic group in this country should abandon its historical ties, should ignore its history and the history of this country or change its flag.

THE REPUBLIC

The *Age* will be surprised to hear that the editors are divided on the question of a Republic. The Bar is not a monolith! One of us believes there should not be such a thing.

If there is to be a Republic, however, it would be undesirable to have the sort of Republic that Mr. Keating has suggested, with the Governor-General's name changed to "Mr. President". If there is to be a change it should be a real change, not mere nominalist "window dressing". There is no point in changing the name of the Governor-General or putting just another political nominee or retired politician into a "presidency".

One of the problems in Australia at the moment is the overweening power of the executive. By rea-

son of the strength of party discipline and the inability of the executive (whether through ignorance or arrogance or both) to recognise the difference between executive and legislature, the Prime Minister and his Ministers consider (and the facts justify them) that the legislature is their tool.

The Senate has failed to fulfil its role as representing the States. The "public servants" have become clearly subservient to their political masters since the historical role of the career permanent head was abolished in the Whitlam years. And, as illustrated by the question of whether the Minister for Foreign Affairs should be given the seat at present occupied by the Jones boy, the Prime Minister sometimes finds it difficult to distinguish between his role as Prime Minister of the country and his role as leader of the parliamentary Labor Party.

Many of the advantages behind the Westminster system have been given away or abandoned by our political leaders over the last 30 years but we have been given none of the advantages of a presidential system such as exists in the United States.

It was to stop executive interference with the legislature and to prevent the executive from overriding the legislative will that Magna Carta and the Bill of Rights 1688 came into existence. The executive from which those documents sought to give protection was an executive in the person of the King and his "cabinet" in the sense in which that term was used by the Stuarts.

Today the executive is part of the legislature. It consists of the most powerful members of the political party which has a majority in the House of Representatives. By that very fact it exercises de facto control of the legislature. The control is such that the Prime Minister and his Ministers do not, even as a matter of semantics, recognise the distinction. They say "I will legislate" or "we will legislate" when talking as Prime Minister or Minister — not even recognising the contempt for the so-called democratic government of this country which their words imply.

The words of Brennan J. in *A* v. *Hayden* 156 C.L.R. 532 should be read in the light of the fact that the executive today believes it can, and too often does, escape the restraints of "government under the law," not by over-riding the will of Parliament, but by telling Parliament what to do.

What Brennan J. said in *A* v. *Hayden* was:

"The incapacity of the Executive Government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a Parliamentary democracy. A prerogative to dispense from the laws was exercised by medieval kings, but it was a prerogative 'replete with absurdity, and might be converted to the most dangerous purposes' . . .James II was the last king to exercise the prerogative dispensing power and the reaction to his doing so found expression in the Declaration of Right . . .Whatever vestige of the dispensing power then remained, it is no more . . .This is no obsolete rule; the principle is fundamental to our law, though it seems sometimes to be forgotten when Executive Governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies. Then it seems desirable to the courts 'that sometimes people be reminded of this and of the fate of James II . . .' "

The executive — in theory subservient to the legislature — in fact controls the legislature. The treatment of the judiciary by the executive has to be seen in the light of this fact. The executive expects to exercise untrammeled power and resents the fetter on its power represented by an independent judiciary.

If in a "Republic" with a true separation of powers the executive were to lose its control of the legislature, the arrogance which power breeds might be modified, so that the executive could actually live in only mild discomfort with the theory and fact of an independent judiciary. The executive might accept that there should be government under the law and not government by ministerial fiat.

TOTALITARIAN GOVERNMENT

The comments above express some concern at the excessive power of the executive. In the winter issue we expressed concern at the attacks on the legal profession. However, what we did not realise at the time of writing either the Winter issue or the comments in this issue was the source of the attack on the legal profession.

At its meeting on 25 February 1994 the Council of Australian Governments requested a Report to the August 1994 Council Meeting of "detailed proposals for further reform of the legal profession with the objective of removing constraints on the development of a national market in legal services and developing other efficiency-enhancing reforms".

In a draft paper of 7 July 1994 it is stated:

"This reference stemmed from work by the Independent Committee of Inquiry on National Competition Policy (*the Himler Report*) (sic)" (emphasis added).

Is this a Freudian slip? Or are we paranoid?

COURT OF APPEAL

The Attorney-General has announced Cabinet approval of the creation of a Court of Appeal. Her paper, which also defends us against the "necromancers" of the Trade Practices Commission, appears on page 14 of this issue.

POSTPONED FAREWELLS

Due to an administrative breakdown for which the editors accept full responsibility, a number of farewells which should have been published in this issue of *Bar News* will appear in the Summer issue.

POSTSCRIPT TO THE CRENNAN YEAR

THE FORMER CHAIRMAN SENT A LETTER to Mr. Lavarch on 2 September 1994 in the following terms:

My Dear Attorney,

I refer to your remarks in Parliament on 24 August 1994 concerning the Victorian Bar. A copy of the Victorian Bar's recent co-advocacy rule was forwarded to you on 29 August 1994. You should note the Victorian Bar is the first independent Bar to introduce a co-advocacy rule. Thus your very valid concerns about the costs of Commonwealth prosecutions can be wholly put to rest for Victoria. The co-advocacy rule has been introduced in Victoria without any legislation imposing it which is the position in New South Wales.

Our co-advocacy committee, chaired by Alex Chernov Q.C., worked very hard to come up with a rule which was fair, flexible and wholly competitive. If you had checked the progress of the Victorian Bar on introducing co-advocacy with me before 24 August last I would have been delighted to report on progress to you. I regret being unable to speak to you about the Victorian Bar in Canberra on 22 August at the Access to Justice Forum, but you were called away much earlier than I expected.

I ask you to announce the Victorian Bar's co-advocacy rule in Parliament to ensure the House is not left with a false impression. I would appreciate a copy of the relevant *Hansard*. Please feel free to contact me any time about changes, as they do occur rapidly and embarrassment over failing to keep abreast of them can easily be avoided.

As to recent changes I must advise you the Victorian Bar at a referendum recently voted to make clerking optional. This is highly persuasive for the Bar Council. You will appreciate from previous discussions that the Victorian Bar cannot change its chambers rule overnight because to do so would create legal difficulties under the Corporations Code. If the Victorian Bar is to be mentioned in Parliament by you because of its chambers rule I respectfully request some prior consultation with you so that you will be fully briefed on the financial implications of the rule. You will be kept abreast of any developments here as will be the State Attorney-General.

Finally, I note from *Hansard* that you not only mentioned the Victorian Bar over co-advocacy but also called on members of the Victorian Government "to reconsider their opposition to the application of competition policies to the legal profession". As far as I am aware the Victorian Government has no opposition to the application of competition policies to the legal profession. During my year as Chairman of the Victorian Bar I have had discussions with the Victorian Attorney-General and other members of the Victorian Government. I have been struck by the unanimous and unwavering dedication of them to the application of competition policy generally and in particular to the legal profession. The Victorian Bar, like every other legal body on the Law Council, welcomes competition policy but says it must be done through State-based legislation. This is because lawyers understand the formidable, if not impossible, structural and constitutional problems in applying the *Trade Practices Act* to the legal and medical professions. It is no criticism of economists that they do not necessarily understand these issues.

The Victorian Bar is the first independent Bar to introduce a co-advocacy rule.

I propose to make a copy of this letter available to each of the Premier and the Attomey-General for Victoria as they may have been concerned by your remarks in Parliament on 24 August. I propose also to circulate members of the House who are also members of the Victorian Bar with a copy.

Please do not hesitate to call on the resources of the Victorian Bar at any time as it always stands ready to contribute to sensible reform and is doing its best to ensure equality of access to justice.

Yours faithfully
Susan M. Crennan

ATTORNEY-GENERAL'S COLUMN

IN THIS ISSUE I WILL EXAMINE IN DETAIL the operation of section 85 of the *Constitution Act* 1975. I will then briefly outline three matters discussed at the recent meeting of the Standing Committee of Attorneys-General, and foreshadow one reform now proposed to be introduced in the Spring 1994 session of Parliament.

Jan Wade, M.P.

SECTION 85 OF THE CONSTITUTION ACT 1975

INTRODUCTION

The exclusion of the review jurisdiction of the Supreme Court of Victoria in particular circumstances specified in legislation is a matter that has attracted some adverse comment. It is asserted that the independence of the Supreme Court is being increasingly and unnecessarily eroded by the government. It is apparent however that, on an examination of the current parliamentary practice, the adverse comment is, at best, misinformed.

OVERVIEW

The Constitution Act 1975 ("the Act") reflects the Westminster system of government by effecting a division (rather than a strict separation) of the powers between the Parliament, the executive and the judiciary. Each of the three elements of the Westminster system of government is therefore, to a significant degree, functionally independent of each other. Section 85 of the Act recognises the independence of the judiciary by conferring unlimited jurisdiction in all cases on the Supreme Court of Victoria.

The Act has always, to varying degrees, entrenched the jurisdiction of the Supreme Court. The process of entrenchment renders the repeal or amendment of a particular statutory provision more difficult than would ordinarily be the case. In general terms, by entrenching the jurisdiction of the Supreme Court, any provision purporting to repeal, alter or vary section 85 which is contained in an *ordinary* Bill, *viz.*, one that has proceeded through the normal parliamentary procedure, has no effect. A Bill excluding the jurisdiction of the Supreme Court has since 1975 required the concurrence of an absolute majority of both Houses of Parliament. In 1990, the Legal and Constitutional Committee was asked to consider the question of the entrenchment of the jurisdiction of the Supreme Court. The Committee recognised that a requisite balance must be struck between maintaining the independence of the Supreme Court, as a matter of constitutional principle, and permitting the effective achievement of administrative and governmental policy. To ensure that the Act embodied the appropriate balance, the Committee recommended that the Act not only continue to entrench the jurisdiction of the Supreme Court, but that additional safeguards be inserted to protect such jurisdiction.

The Committee's recommendations formed the basis of amendments to the Act (specifically, to sections 18 and 85). The amendments were introduced in 1991, at the insistence of the Coalition parties while in opposition,

The amendments place Victoria in an unique position. Equivalent legislation in other States does

CCH UPDATE

Mention last month of Sir Julian Salomons (pictured) is a reminder that he was for something less than a month the Chief Justice of NSW.

He was appointed on 13 November 1886 and resigned before the end of that month ... having been prompted to do so by some unflattering remarks as to his suitability by one of the puisne judges. If those remarks had been as one generally held and often repeated report had them, they might well have landed the judge who spoke them before an anti-discrimination board today... but that report is apparently wrong and the more authoritative explanation of this incident[1] dismisses that idea, saying that "no evidence has been uncovered to suggest that religious differences ... played any part in the matter."

In the event, Salomons returned to the bar, was a prominent MP and subsequently received a knighthood ... and, as recounted last month, was obviously a fairly close friend of old Sam Griffith.

■ ■ ■

There's a Chinese poem[2] with the line:

"A waterfront pavilion is the first to get the moonlight."

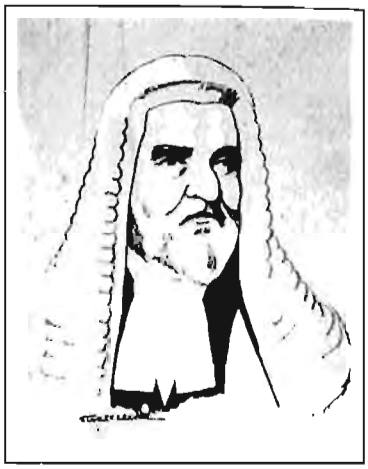
This is said of the person who is the first to enjoy some benefits because he or she is in a favourable position ... and may well be applied today to those practitioners who have the knowledge and expertise to advise their clients about the People's Republic.

Now of course is the ideal time to be giving thought to this prospect because foreign companies are now permitted to set up branches in China to undertake production and operational activities.

Before China's national company law came into effect on 1 July 1994, the only way a foreign company could do business in China was by way of a joint venture or as a wholly foreign owned enterprise. Under the national company law, foreign companies can undertake business activities in China in their own name without the cost and delay of setting up a joint venture or a wholly foreign owned enterprise.

Clearly this will mean that more companies will want to do business in China, and our advertising department has seized upon this development to suggest that our ***China Laws for Foreign Business*** is the ideal tool for practitioners to find out:

- tax implications and accounting requirements;
- how to remit profits back to their home country;
- foreign exchange restrictions;
- what are the compliance regulations, eg necessary licences, approvals;
- what special investment incentives are available in the Special Economic Zones and which one would best suit their needs; also the special incentives available to overseas Chinese;



- what they need to know as a joint venture partner;
- what's necessary for setting up a branch or representative office in the PRC;
- what protections are available to businesses in China, eg intellectual property protection;
- the relevant labour laws, trade unions, etc.

■ ■ ■

On 1 September radical new third party legislation[3] came into operation in Queensland.

Our Torts editor describes it as the most generous third party scheme in the country: the third party policy under it indemnifies not only the owner and driver of a motor vehicle, but also anyone else whose wrongful act or omission causes or contributes to a "motor accident", as defined, in respect of personal injury or death arising therefrom.

Thus even where the driver of the vehicle at fault establishes the absence of negligence on his or her part, for example because the accident was solely attributable to the defective manufacture or repair of the vehicle, the plaintiff will still succeed against the third party insurer. In such a case the Act gives the insurer a right of recourse against the manufacturer or repairer.

The initial report on this legislation in our ***Australian Torts Reporter*** made this comment:

"The new Act will streamline actions arising out of motor accidents because all such actions, even where the party allegedly at fault is a passenger, a pedestrian, a highway authority, a motor mechanic or a motor vehicle manufacturer, are governed by the requirements of the new Act and the liability is that of the third party insurer. It should be noted that the third party insurer has no right of recourse against a highway authority whose wrongful conduct is responsible for a motor accident.

The new Act ensures that a wrongfully injured plaintiff will recover in some circumstances where in other jurisdictions recovery would effectively be denied, for example if the accident was caused by a pedestrian or motor mechanic who was otherwise uninsured, or by a motor vehicle or component manufacturer who had no office in Australia and who refused to submit to the court's jurisdiction."

■ ■ ■

The inclusion of an explanation and the full text of the Queensland motor accident insurance legislation in our ***Torts Reporter*** is a good example of what that loose-leaf service sets out to do.

It doesn't seek to present what might be called a traditional text on the law of torts but rather it is designed to assist practitioners to advise on matters involving personal and property injury suffered by (or perpetrated by) their clients with reference to all the legislation that encroaches on what were once simply common law rights.

■ ■ ■

Legal historians will probably draw our attention to much earlier legislation (which encroached on the common law in regard to torts) than the *Fatal Accidents Act* of 1846 which is generally known as *Lord Campbell's Act* ... but it does bring to mind his other great achievement, the *Lives of the Lord Chancellors*, which, though eminently readable, was, we're told,[4] in parts biased and inaccurate and provoked quarrels with many other judges and lawyers ... and which prompted the comment that Lord Campbell's biographies "added another sting to death".

■ ■ ■

And as a final thought there's the promise that we're all faced with great opportunities ... brilliantly disguised as impossible situations.

■ ■ ■

1. JM Bennett, The Journal of the Royal Australian Historical Society, Vol. 58, Pt 2, June 1972.
2. "Notes Taken on Quiet Nights" written by Yu Wenbao in the Sung Dynasty (960-1279).
3. *Motor Accident Insurance Act 1994*.
4. See *The Oxford Companion to Law*.

■ ■ ■

Stanley Leaver

not embody corresponding provisions, with the consequence that provisions excluding the review jurisdiction of superior courts are passed by the various Parliaments with minimal parliamentary control and public awareness. In stark contrast, the practical effect of the amendments to the Act is that in Victoria any proposed diminution of the jurisdiction of the Supreme Court now not only requires an absolute majority, but must also be exposed to the widest possible parliamentary scrutiny.

The amendments place Victoria in an unique position . . . any proposed diminution of the jurisdiction of the Supreme Court now not only requires an absolute majority, but must also be exposed to the widest possible parliamentary scrutiny.

SECTIONS 85 AND 18 OF THE ACT

Pursuant to sub-sections 85(5) and 18(2A) of the Act, any clause purporting to repeal, alter or vary section 85 must now be contained in a Bill which satisfies four conditions:

1. the Act must expressly refer to section 85 and expressly state that the provision in question is intended to repeal, alter or vary section 85;
2. the member of Parliament (in effect, the Minister) who introduces the Bill containing the provision in question must make a statement explaining the reasons for repealing, altering or varying section 85 ("section 85 statement");
3. the section 85 statement must be made during the second-reading speech, or with at least twenty-four hours' notice of intention to make a statement, or with the leave of the Council or Assembly; and
4. the Bill must be passed with the concurrence of an absolute majority of both Houses of Parliament.

In relation to paragraphs 2 and 3, it is customary for the section 85 statement to be made during the second-reading speech. The other alternatives detailed in paragraph 3 apply in the case of a failure on the part of the member of Parliament to recognise that a Bill affected the jurisdiction of the Supreme Court, or in the case of a House amendment. In either case, twenty-four hours' notice would be given or the leave of the Council or the Assembly sought.

ADDITIONAL SAFEGUARDS

Recent initiatives taken by the current government reflect the appropriate gravity with which it approaches moves to limit the jurisdiction of the Supreme Court.

In addition to the safeguards which it insisted on when in Opposition, the current government established an all-party Scrutiny of Acts and Regulations Committee pursuant to the *Parliamentary Committees Act* 1968. The Committee is required to examine each proposed exclusion of the jurisdiction of the Supreme Court, and to submit a report to Parliament. In the report, the Committee must *inter alia*:

1. confirm whether or not a Bill expressly or impliedly alters the jurisdiction of the Supreme Court, or raises an issue as to its jurisdiction;
2. address the full implications of any alteration to the jurisdiction of the Supreme Court where a Bill repeals, alters or varies section 85; and
3. address the full implications of any alteration to the jurisdiction of the Supreme Court where a Bill does not repeal, alter or vary section 85, but in circumstances where the jurisdiction of the Supreme Court is in issue.

The Committee's report serves to alert and inform members of any proposed restriction of the jurisdiction of the Supreme Court. To that end, the report complements the section 85 statement.

Furthermore, a party resolution was recently passed requiring the Chairman of the Bills Committee to report to the Coalition parties on any section 85 statement the Committee receives in relation to a Bill, prior to consideration of that Bill by the parties.

These initiatives are consistent with the policy of the government to ensure that any proposed diminution of such jurisdiction is exposed to public scrutiny. The policy is clearly in contradistinction to that of the former administration, under which Bills excluding the review jurisdiction of the Supreme Court occurred by legislative stealth.

Unlike the philosophy of the former administration, liberalism recognises the individual as a person in his or her own right, not merely as a component in the production of the collective good. The position of liberals that individual freedom should be maximised, and government interference kept to the minimum level required by good administration, is entirely supportive of the existence of the review jurisdiction of the Supreme Court. Such jurisdiction secures the right of the individual to challenge unlawful administrative interference. Judicial review and the policy of the government towards it therefore share a similar theoretical

touchstone: individual liberty. By maintaining tight control over proposals to limit such jurisdiction, the government is ensuring that individual liberty to exercise such right is not unnecessarily compromised.

CURRENT LEGISLATIVE PRACTICE

It is sometimes asserted, usually without any detailed supporting argument, that the current government is increasingly diminishing the jurisdiction of the Supreme Court. Statistical information, compiled from 1991, negates the assertion. From 1991 until 1992, under the former administration, 24 Bills were introduced which affected the jurisdiction of the Supreme Court. From 1992 until the 1994 Autumn session of Parliament, just over 50 of such Bills were introduced, The latter figure represents a yearly figure fully comparable to that of the former figure.

The Annual Report (March 1994) of the Scrutiny of Acts and Regulations Committee provides valuable statistical information that puts in perspective any doubt that the current legislative practice is of concern. During the period of the Annual Report, the Committee considered 29 Bills containing clauses affecting section 85 of the Act. Only four such clauses required further explanation while the remaining clauses were considered appropriate. In this connection, it must be recalled that the Scrutiny of Acts and Regulations Committee is an all-party parliamentary committee.

Moreover, accurate discussion of section 85 would distinguish between two quite different types of "limitations" of the jurisdiction of the Supreme Court. The safeguards discussed above are regarded as applicable not only in circumstances where *existing* jurisdiction of the Supreme Court is diminished. The unlimited jurisdiction conferred on the Supreme Court by section 95 is seen as extending to both existing and *new* areas of jurisdiction. To that end, clauses purporting to confer new areas of jurisdiction also invoke the safeguards whenever such jurisdiction is not conferred on the Supreme Court, but rather on some judicial or quasi-judicial body, such as a tribunal.

An examination of the current legislative practice reveals that the majority of provisions "limiting" the jurisdiction of the Supreme Court do so by conferring new areas of jurisdiction on other bodies. It is obviously inaccurate and misleading to fail to make the distinction between the two relevant types of provisions. More accurate discussion of the current legislative practice would reveal the fact that the current government is not setting out to diminish the constitutional position of the Supreme Court. Rather, particularly in the case of provisions conferring new areas of jurisdiction, the government is responding to public concerns by providing new avenues of review in a way which recognises the need for accessibility and procedural flexibility.

PUBLIC EXPOSURE

It is intriguing that little or no interest was shown in the exclusion of the jurisdiction of the Supreme Court prior to October 1992, if only because the use of such clauses was well established under the previous government. The real reason that such instances are now regularly brought to public attention is because of the amendments to the Act.

It should not be forgotten that these amendments:

- operate to ensure that the exclusion of the jurisdiction of the Supreme Court is made readily obvious to the community at large, rather than occurring by legislative stealth; and
- were introduced at the insistence of the Coalition parties.

CONCLUSION

The purpose of protecting section 85 from repeal, alteration or amendment in the manner illustrated above provides Parliament with a reminder that any alteration to the jurisdiction of the Supreme Court requires serious consideration. The at-

tention of Parliament will be clearly drawn to the issue, while the absolute majority requirement embodied in the Act will underline the gravity of that issue.

An examination of the existing parliamentary practice negates any assertion that the current government is increasingly and unnecessarily excluding the jurisdiction of the Supreme Court. In fact, the examination reveals that the current government exercises more control than its predecessor on moves to limit such jurisdiction. It also reveals the intention of the government towards such limitations: an intention to ensure that any proposed restriction of the jurisdiction of the Supreme Court is subject to close, comprehensive parliamentary scrutiny. Such scrutiny ensures that all related issues are given serious consideration.

Judicial review and the policy of the government towards it therefore share a similar theoretical touchstone: individual liberty.

STANDING COMMITTEE OF ATTORNEYS-GENERAL

I attended a meeting of the Standing Committee of Attorneys-General ("SCAG") in Brisbane on 21 July 1994, along with the Attorneys-General from every other Australian jurisdiction. The Attorney-General for New Zealand also attended. I have discussed the role and operation of SCAG in an earlier issue.

One of the major issues discussed at every SCAG meeting is censorship, Ministers are currently giving a great deal of attention to the problem of computer games, and other interactive forms of computer programs produced for entertainment purposes, which may have pornographic or violent content. Ministers are working on a classification system which recognises the particularly harmful potential of computer games with pornographic or violent content, given that the player has control over the outcome. I am especially concerned that any classification system should not apply only to games of skill or chance, but to any interactive program where the user may control violent or pornographic visual display.

An important matter affecting domestic violence was resolved at the meeting. There has been a problem with inconsistencies between domestic violence orders made in the Magistrates' Courts and child access orders made in the Family Court. Ministers agreed that the Magistrates' Court should have the power to vary an access order made in the Family Court whenever it is apparent that the operation of the access order is likely to expose a family member to domestic violence. The *Family Law Act* will be amended accordingly.

Finally, Ministers have been examining for some time the question of each State and Territory's requirements for admission to legal practice, and the right to practise unrestricted. The matter has been considered in the light of the scheme for mutual recognition of legal qualifications between the jurisdictions. Ministers agreed in Brisbane that there should not be any rigid national standard to be met before an unrestricted right to practise in all Australian jurisdictions is granted. Rather, it was agreed that the maximum requirement that may be imposed to obtain unrestricted right to practise should be two years' practical experience, with each admitting authority deciding how much of that period, if any, should be served post-admission.

VALUATION OF LAND (AMENDMENT) BILL

Consistent with the government's policy to reduce the number of tribunals, the Valuation of Land (Amendment) Bill will establish a Land Valuation Division of the Administrative Appeals Tribunal and transfer the jurisdiction of the Land Valuation Boards of Review to that Division.

In addition to establishing that Division, the Bill will introduce a number of procedural amendments to improve on the operation of the Boards. At present, the *Valuation of Land Act* requires some valuation matters to be heard by two or three-member Boards. The Bill will remove this requirement so that single-member tribunals may hear these matters. The President of the AAT will be empowered to determine the number of members to be appointed to hear a particular matter.

The Bill also provides that a single-member tribunal will be able to make orders as to costs. Further, the requirement that rating and taxing appeals be heard in the vicinity of the property in question will be removed. This is intended to give the Division more flexibility. Tribunals will continue to sit in country regions when appropriate. The Bill will also provide a clear link between valuation terms used in the *Local Government Act* 1989 and the *Valuation of Land Act.*

Jan Wade, M.P.
Attorney-General

THE LAW, THE LAWYERS AND THE COURTS

Inaugural Dean's Lecture on Law Reform, Law School, University of Melbourne, 12 September 1994. Delivered by the Hon. Jan Wade, M.P., Attorney-General for Victoria

MAY I SAY AT THE OUTSET HOW honoured I am to be here at the University of Melbourne speaking on the subject of law reform.

Notwithstanding the fact that my husband, who is present here tonight, is General Manager of Monash University, which I understand to be an educational facility somewhere to the north of Springvale, I have always prized my personal connection with Melbourne.

It was at this university that I received the legal training which elevated me to my present peak of prominence, or crag of infamy, depending upon one's political point of view. I even enjoyed a notably brief period as a tutor within the cloisters of the Law School at the behest of the then Dean, Professor (later Sir) Zelman Cowen. Had I continued in academia, I might even now be in the fortunate position of hurling constitutional abuse at the miserable occupier of the office of Her Majesty's Attorney-General for the State of Victoria.

I believe that it is singularly appropriate that an annual lecture on law reform should take place within the University of Melbourne's Law School. The Law School of this university has always been at the forefront of law reform in this State, from the time in the nineteenth century when Professor Hearn was seeking to codify as much of the laws of Victoria that he could get his hands on, to the present, when the Secretariat of my own Law Reform Advisory Council is based in the Law School. It is the happiest of coincidences that the very able Academic Secretary of that Council, Professor Sally Walker, holds a chair which bears the name of her illustrious predecessor as a law reformer, William Hearn.

I am fully aware in giving this speech that there is a range of views held in the community concerning the record of the Government of which I am a member in relation to law reform. I have even heard it said — inaccurately, I may add — that this is a Government which has no commitment to law reform.

Here, it occurs to me that a Government usually will be said to have no commitment to law reform if the reforms of the law that it has instituted are reforms with which the person speaking disagrees, and that the definition of law reform to many legal minds is a legal policy initiative of which they happen subjectively to approve.

Pondering upon this subjective character of law reform has lead me to form the view that the compound expression "to law reform" is one of those irregular verbs so beloved of Bernard from the television series *Yes Minister*: *I* reform the law; *you* change the law; *he* or *she* subverts the fundamental principles of the law.

In any event, it seems to me that an annual lecture on law reform will be a valuable contribution to legal debate in Victoria. It will serve to remind us not only that the law is never static, but also that reasonable minds may well differ fundamentally as to the direction in which the law should develop.

GOVERNMENT AND LAW

The first subject I should like to consider tonight, within the general context of law reform, is the relationship between government and law. This is a matter which has been the subject of some discussion in Victoria of late, and could do with some dispassionate exploration from an absolutely neutral person, such as myself.

Inevitably, there is something of a creative tension between a government — any government — and the law. This follows from the fact that Government, like anyone else, is the subject of the law; but, unlike anyone else, Government knows that if the law is not to its liking, it can seek to change the law. In this sense, Government both creates the law, through Parliament, and abides by the law, in the character of the executive. Paradoxically, therefore, Government is, to a significant extent, both the master and the subject of the law.

This said, the capacity of Government to change the law is not unrestricted, legally, practically or

morally. Legally, it is a truism that a State Government is bound by both the Federal and, in a different way, the State Constitutions. Practically, there are limits to the legislation which may be enacted by even the most resolute government: habeas corpus and Australian Rules Football, to give just two examples, are subjects which are probably beyond the practical reach of State legislative power. It is the third limit, that of moral, or value-based, limitations upon the legislative capacity of government that is most worthy of exploration in the present context. In my view, the width of the canvas upon which a government may paint its legislation is not limited solely by the bounds of constitutional and political capacity. On the contrary, in making legislation, all governments are (or should be) constrained by certain fundamental values, or principles of public morality or constitutional conscience, call them what you will. These are, in effect, the outer limits of the rules of the legislative game, beyond which political victory, even if achieved, will have been achieved at a cost which is too heavy to be contemplated.

In making legislation, all governments are (or should be) constrained by certain fundamental values, or principles of public morality or constitutional conscience, call them what you will.

To a certain extent, the exact content of the applicable basic values will depend upon the particular character of the political party or parties which are in government. In the case of the Liberal Party, to which I belong, it would seem clear that there are at least two basic values which operate in practice to restrain significantly the exercise of the law-making power.

The first of these is the proposition, fundamental to my understanding of a liberal approach to law, that power is not a quality to be accorded an unfettered and absolute field of operation. While those with more radical agendas may be impatient of constitutional or other impediments to the free and swift exercise of power for the purpose of re-casting the social order, a liberal will welcome checks upon, and divisions of, power as essential to the maximising of liberty within society. To this extent, any Liberal in government carries within him or herself a healthy suspicion of the capacity of government to solve every conceivable problem, if only it is given sufficiently compendious power, and has also an instinctive regard for those mechanisms in society which act as a drag-chain upon the boundless ingenuity of the public sector.

The second liberal restraint on the exercise of legislative power is founded in a general respect for the rights of the individual. By this I do not mean merely an acceptance of the commonplace that particular rights inhere in individuals, but also — and in contrast to a good many strands in the social theories of the left — that individuals do not exist merely as integers in the production of the collective good. From this liberal viewpoint, it follows necessarily that the interests of particular individuals may not be sacrificed to the achievement of this or that policy objective, even if it can conclusively be demonstrated that the achievement of that objective would redound to the greater happiness of society as a whole. To a significant extent, it is this acceptance of the irreducible value of the individual which underlies the liberal tolerance of inhibitions upon power and its exercise which I have previously mentioned.

These basic values are reflected in the enthusiastic defence by liberals of some of our society's key constitutional precepts. The accountability of the executive arm of government to the parliament, for example, is a notable reflection of the broad proposition that it is fundamentally appropriate that power be checked, balanced and divided, however desirable it might appear to the executive for the time being that its insightful prescriptions for the community should be implemented free of scrutiny and criticism. Similar considerations underlie liberal support for the pervasive division of power between the legislature, the executive and the judiciary effected under our general constitutional arrangements. Federalism is also supported by liberals, not as a concession to narrow "States Rights" philosophies, as is often naively suggested in the media, but as expressing in a geographic sense the same concept of division of power that is achieved analytically under the doctrine of the separation of powers.

Lest it be thought that what the Government defends in the abstract, it neglects in the specific, let me give you three examples of action by the Coalition parties which reflect their concern for the basic values and derivative constitutional principles which I have outlined.

First, upon coming to power in October 1992, the Government established the parliamentary Scrutiny of Acts and Regulations Committee. To

the best of my knowledge, this is the only Scrutiny of Bills Committee operating within an Australian State Parliamentary system. It is modelled on the immensely successful Senate Scrutiny of Bills Committee, and it has rigorously examined all Bills introduced into the Parliament, as well as discharging its functions in relation to subordinate legislation. In assessing the commitment of the Kennett Government to the principles of parliamentary government, it should be remembered that the establishment of this committee was undertaken voluntarily by the present Government, after the former Labor administration had three times rejected recommendations by the all-party Legal and Constitutional Committee that such a committee be created.

As a second example, I would refer those present to section 85 of the Victorian Constitution, which requires clauses depriving the Supreme Court of jurisdiction to be passed by an absolute majority of both Houses of Parliament, and only after a statement has been made by the relevant Minister to the Parliament explaining the reasons for that deprivation. This commendable provision, which is unique among the constitutions of the Australian States, was forced upon the former Labor Government by the Coalition parties when in opposition.

Those of you with longer memories than some media commentators may recall that the extraordinary position adopted by the former Government was, in fact, that provisions in the *Constitution Act* protecting the jurisdiction of the Supreme Court should be repealed, a matter which now seems conveniently to have been forgotten. It is a matter of wondering amazement to me, then, that the present Government should be lambasted for its use of privative clauses, when it is entirely due to its own efforts that Victoria has the most protective regime in relation to such clauses in Australia. I may add that my own researches reveal that, numerically, such clauses are not being resorted to on any exponentially more frequent basis under the present than under the former Government.

My third example is, perhaps, a controversial one. You may recall the controversy that surrounded provisions of a draft Bill which would have subjected some of the powers of the Director of Public Prosecutions to the concurrence of a Deputy. These provisions were subsequently replaced by a regime which required the Director to consult a special committee before exercising the powers in question, and it is this regime which is now embodied in the *Public Prosecutions Act.*

Either way, and without wishing to re-open the issue, the principle of collective decision-making remains essentially the same, and is firmly founded not in the various conspiracy theories propounded at the time but in the basic liberal principles and values which I have outlined. By this I mean that just as the quantum of power in society as a whole should not be capable of arbitrary exercise, but should be subject to checks, balances and measures of accountability, so the very considerable coercive powers of individual public officials — including the Director of Public Prosecutions, with his far-reaching prosecutorial discretions — should be similarly constrained.

The real danger here is that the indiscriminate invocation of such sacred constitutional principles as the separation of powers in situations where they are really inapplicable will reduce the potency of such principles when the occasion for their application truly arises.

In the same way, the replacement of a single Equal Opportunity Commissioner by a five-person Commission is calculated to down-play individual power and discretion in favour of collective and accountable decision-making. In mentioning these two offices, I should not be understood as singling them out beyond the extent to which they have been high-lighted already by the course of current events. The principles which I have outlined are equally applicable to the exercise of other sensitive statutory discretions having a major effect on individuals by public officials.

Before leaving the topic of the relationship between law and government, I should note that I believe there is a current tendency for some opponents of Government proposals to use extravagant language, and to call in aid quite irrelevant constitutional principles, whenever seeking to air their essentially political grievance to the media. I have in mind particularly the grating calling-in-aid of the doctrine of the separation of powers, which, according to some commentators, would appear to have been breached on an hourly basis by the Kennett Government, in every context from the criminal law to the Grand Prix.

The real danger here is that the indiscriminate invocation of such sacred constitutional principles as the separation of powers in situations where they are really inapplicable will reduce the potency of such principles when the occasion for their application truly arises. The present tendency to cry constitutional "Wolf" recalls the thoughts of Clive James on the late Dr. Leavis, who, having denied himself no invective device in the criticism of his literary opponents on such weighty subjects as the proper construction of *Paradise Lost*, was left entirely without words apt to describe the Stalinist terror when he came to write about it. What he should have reserved for mass murder, he had already let fly against uncongenial scholarship.

LAW REFORM

Turning specifically to the subject of law reform, it has to be acknowledged from the very beginning that it is one of the great truths of contemporary legal culture that everybody loves law reform, however much difficulty they may have in defining what law reform is. As I have already suggested, in my more cynical moments, I have suspected that "law reform" is an all-purpose label attached by Attorneys-General to any change to the law which they personally favour, primarily in the hope that it will secure favourable treatment in the media. In this connection, I am confident that had Henry VIII been aware of the term, he undoubtedly would have characterised the various novel tortures authorised during his grisly reign as significant reforms of the law. In short, all the world loves a law reformer.

Certainly, over my years in the law, I have seen the largest imaginable range of legal proposals — good, bad and absolutely appalling — all hailed as "reforms". None of this is intended to question the value of law reform as such, but rather to indicate that we are a little too inclined to accept anything which comes with the law reform tag attached as an objective good, whereas it is far more probable that it represents a particular person's own very subjective idea of the direction in which the law should move. Moreover, because we tend to be dazzled by the undeniable glamour of being involved in the process of law reform — and thereby seeing ourselves as the heirs of Bentham, Romilly and Hearn — we are apt to be less than insightful into the nature and limitations of the process itself.

It is this general question of the whole process of law reform that I would like to address now. I would begin by making the point that one's broad attitude towards law reform, and the approach which should be taken to law reform, will vary to a significant extent according to one's political, social and intellectual perspective. More specifically, it seems to me that there are two quite different strands of thought in relation to law reform.

The first is what might be called the "comprehensivist" approach, although other adjectives, ranging from "adventurist" to "imperialist" might aptly describe the more extreme expressions of this philosophy of law reform. In any event, the view I am describing is one which sees the whole of the law as one spreading canvas, eager for the attentions of the law reformer. No problem, small or large, simple or complex, is incapable of solution by the ingenious mind of the reformer. Moreover, the law reformer him or herself need not be an expert in the field of law in which the problem is located. On the contrary, every law reformer carries with them an intellectual spanner which will fit any legal nut. Only show them the problem, and they will solve it by the application of tried and true techniques of law reform, which are elastically adaptable to the most fearful legal conundrum.

Best of all, miracle solutions do not take veteran law reformers long to produce. Any professional law reformer worth their salt will be able to grapple with an area of the law which may have taken centuries to develop in a few intense months, and then proceed to comprehensively resolve its difficulties over much the same period.

I pause at this moment to make the customary cautionary remark that my portrait of the comprehensivist school of law reform may be a little over-drawn, but upon reflection, I am not sure that this is much more than a conventional gesture of politeness. The reality is that the world is full — or seems to be full — of those who would see no element of parody in what I have said, but merely a well-earned tribute to their far-sighted capacity.

There is, of course, a far more limited view of law reform, and it is a view for which I have a great deal of sympathy. According to this view, law reform is more of a reflective than a high-octane activity. Ideally, it should be carried out in relatively small, manageable bites, and over a time-frame which allows ample opportunity both for deliberations and for the identification of possible deficiencies in reasoning. Correspondingly, adherents of this view would maintain that it is highly desirable that the reform of an area of law be undertaken by those who are expert in that area, and who may thus bring their expertise and experience to bear in the solution of the relevant legal problems. I would refer to this view of law reform as the "gradualist" approach.

I appreciate, of course, that it is not always possible for the reform of the law to be the sort of leisurely activity that I have just described. Particularly in the situation where the "law reform" aspect of a proposal is really little more than a watery shadow cast by the achievement of this or that major government policy imperative, the exigencies of time, politics and cost are unlikely to permit the adoption of the philosophical approach recom-

mended here. But at least in the case of law reform in the strict sense, by which I mean the more or less discrete programme now pursued by virtually all Attorneys-General to reform the law for the sake of the law itself, rather than as part of a political policy or platform, I believe that a gradualist, expert-based approach is greatly to be preferred.

This preference is reflected in the structure and role of Victoria's umbrella body of law reform, the Attorney-General's Law Reform Advisory Council, established by the Government at the same time as the abolition of the former Law Reform Commission.

The Law Reform Advisory Council is essentially a supervisory and co-ordinating body, drawn both from persons eminent in the law and those without legal qualifications. It is presided over by the Chief Justice and as I have mentioned, is co-ordinated by its Academic Secretary.

The Law Reform Advisory Council is not a high-profile body with a taste for publicity. It does not descend upon an area of law like a swarm of intellectual locusts, and strip it bare in a matter of hours. It does not possess a large staff which regards itself as having the generic expertise to recast any area of the law nominated by the government of the day. Its operations do not involve large recurrent costs in respect of salaries and accommodation.

Rather, the Law Reform Advisory Council is essentially a supervisory and co-ordinating body, drawn both from persons eminent in the law and those without legal qualifications. It is presided over by the Chief Justice and as I have mentioned, is co-ordinated by its Academic Secretary, Professor Walker of this Law School. Its role is to identify areas of law which usefully may be considered as potential subjects for reform, and then to commission research and reports from persons who are already leading experts in the relevant fields. In this way, the Advisory Council brings to bear, over time, the maximum degree of experience and consideration at what I am pleased to say is the minimum degree of cost. After receiving the report of its consultants, the Council considers their advice, and makes whatever recommendations it thinks appropriate to Government.

I have occasionally heard it said — out of ignorance rather than malice, I am sure — that there is no concerted programme of systematic law reform under the Kennett Government. On this point, may I share with you a part of the programme of the Law Reform Advisory Council? The Council is either about to conduct, is presently conducting, or has already completed, research on the following topics:

- reform of Part IX of the *Instruments Act*;
- reform of Testator's Family Maintenance legislation;
- reform of the Victorian *Administrative Law Act*;
- reform of personal property securities law in Victoria;
- a proposal for a *Royal Commissions Act* for Victoria;
- reform of the law relating to easements and covenants;
- time limits for oral arguments in court;
- model mediation standards; and
- an overhaul of the *Summary Offenders* and *Vagrancy Acts*.

Inevitably, a certain amount of lead-time is required before the products of the research of a brand-new body of law reform start to come on stream, and in this sense the true extent of the efforts of the Law Reform Advisory Council will only become fully apparent over the course of the next couple of years. But on any analysis, the list of projects to which I have just referred is highly suggestive of a splendid start, and prophetic of an even more splendid future.

One thing which I believe to be vital in relation to bodies of law reform, properly understood, is that they be set apart from politics. I use law reform here once again in its stricter sense, as involving altruistic reform of the law for its own sake, rather than any legal policy initiative to which a person, and more particularly a government, happens to be committed. Indeed, if law reform as a concept of non-partisan improvement of the law is to survive, it is vital that those entities to whom the task of law reform is entrusted discharge that task free of political agendas.

In this connection, I note with pleasure that the Law Reform Advisory Council, while including senior Government officials, such as the Solicitor-General, the Chief Parliamentary Counsel and the Crown Counsel, is fundamentally independent of Government. Indeed, unlike most law reform bodies, including most Law Reform Commissions, it is

entirely free to generate its own inquiries, and has done so on a regular basis. If one is to have a general agency of law reform, it must be an agency of this sort: pursuing an independent and vigorous course of law reform, mindful of the views of the Government of the day to the extent that it wishes its labour to bear practical legislative fruit, but ultimately answerable only to itself for its views and proposals.

The central role played by the legal profession in the justice system means that the Government is concerned to create an optimum regulatory environment, in which the profession will be able to provide an effective and efficient service to its clients.

LEGAL PROFESSION

I now want to turn to another topic. You are probably all aware that I am currently conducting a review of the regulation of the legal profession in Victoria. I hope you have seen a copy of the discussion paper which we called "An Agenda for Change". If you have not, that may be because this Government is *so* good at saving the taxpayers' money that we did not distribute enough copies. If anyone missed out, copies are available from my office.

The reason for the review of the legal profession is quite simple. As the Attorney-General I have particular responsibility for the health of the justice system. One crucial aspect of the health of that system is public confidence in the administration of the law, and that confidence must be maintained by constantly striving to ensure that justice is impartial, fair and at the same time responsive to the needs and expectations of the community.

In order to be responsive to the needs of the community, the justice system obviously must be accessible. It must be accessible to companies so that business is not burdened by unnecessary costs and delays; it must be accessible to a person with a small civil claim who feels a compensable wrong has been done; it must be accessible to all those whose rights are affected by the operation of the law.

There has been a great deal of recent public discussion and debate over access to justice; some of it far less honest about the real impediments to swift and economical justice than should have been the case. I am speaking to an audience of experts on the subject when I say that there are a great many components which together form an accessible justice system. They include, amongst other things, the availability of legal aid funding and the capacity of the courts to handle their case flow. However, one very important component of access to justice is the service provided by the legal profession.

The legal profession is an essential element of access to the courts and to justice because access to the courts, and to the knowledge necessary to negotiate the justice system, is mediated by the profession. The increasing complexity and the technical nature of the law mean that most parties dealing with the legal system find they need expert advice from a lawyer.

The central role played by the legal profession in the justice system means that the Government is concerned to create an optimum regulatory environment, in which the profession will be able to provide an effective and efficient service to its clients. Public confidence requires that the service provided by lawyers is seen to have those characteristics and that lawyers are seen to be accountable for their maintenance.

I want to make it very clear that I recognise the traditional strengths of the legal profession. It is committed to high standards of ethical conduct and professional competence; it is committed to our justice system; and I recognise the voluntary work it undertakes for individuals and for charities. None of this is to be lightly thrown away in the interests of the crude lawyer-bashing rhetoric favoured by some media outlets.

However, I also recognise that the traditional independence of the profession from scrutiny by non-lawyers has played a significant part in the creation of a general belief amongst members of the public that the profession does not deliver a responsive and reasonably priced service to its clients. In most cases, this perception is probably incorrect, and it certainly fails to acknowledge the large majority of lawyers who deliver a solid service to their clients. But it is not enough that lawyers properly discharge their responsibilities to the public. In their own interest, as well as in the public interest, they must be seen — objectively — to do so.

Thus, in giving credit to lawyers who provide an efficient and cost-effective service, I do not back away from my belief that it is vital, for the sake of public confidence in our justice system as a whole, that the issue of the public's confidence in lawyers be dealt with comprehensively. Moreover, quite apart from issues relating solely to public confidence, I accept that some practices of the profession have led to areas of the market for legal services being arguably less than competitive in circumstances where competition would be appro-

priate and probably would reduce the cost of those services.

I do not delude myself that the reforms I have proposed will suddenly result in a new-found love in every person for their friendly lawyer. Although I am optimistic, I am not deranged. Encounters with the law, and with the court system, are inevitably stressful for those not familiar with the legal world, and no amount of brilliant legal service will remove the negative impression often engendered by the unpleasant nature of the legal problem. However, I am determined to deal with criticism that the profession is overly protective of its practices and insufficiently accountable, and that the market for legal services is not as competitive as it might be.

I do not delude myself that the reforms I have proposed will suddenly result in a new-found love in every person for their friendly lawyer. Although I am optimistic, I am not deranged. Encounters with the law, and with the court system, are inevitably stressful.

I have asked the working party which I established last year on the legal profession to consider the Agenda for Change, to consult on all the proposals and to make recommendations to me. I am expecting to receive their report by the end of this year. The principles driving the proposals which were put to that working party can be summarised in three main points.

The first principle is increased public accountability in the regulation of the profession, and I have already spoken about that topic.

The second principle is that the profession should operate in the optimum competitive environment. To expand on that topic somewhat, I want to emphasise that this Government is not interested in competition as part of some abstract economic thesis concerning the operation of the legal profession, and will enforce increased competition only in areas where benefits to the community clearly can be shown. To give an example, greater competition will exist within the legal services market now that the co-advocacy rule which applied for so long has been amended by the Victorian Bar and barristers are allowed to appear with solicitors. The potential benefits to the client include a reduction in the overall expense of their case as the necessity to get a third person up to speed on the facts is eliminated.

I wish to make the point that I understand that the special nature of the legal profession makes it undesirable to apply the principles of competition indiscriminately to every nook and cranny of the profession, without due consideration of wider factors. For example, I accept that the public interest requires that lawyers be adequately qualified before commencing legal practice, while I have the gravest doubts as to the advisability of permitting lawyers to operate on the basis of pure contingency fees. I understand that the Trade Practices Commission and other economic necromancers refer to considerations such as these as "externalities". Whatever the jargon, there is more to justice, and more to the legal profession, than economic competition, important as that may be.

The third principle which underlies my proposals for change to the legal profession is that of freedom of association. Most of you are probably aware that this is a principle that this Government has gone to some pains to support. We do not want any lawyer to be forced to pay fees to a professional association only to receive benefits which are undesired by that person. Under our proposals, lawyers would still have to make a contribution to the cost of regulating their profession, but they would not have to fork out to receive the publications of legal professional associations if they never get around to reading them, or to help fund educational or recreational activities if they never have a chance to take advantage of them.

Of course, in achieving accountability for the profession, it is essential that we retain its fundamental independence. Throughout all this talk of legal profession reform, the Government remembers that lawyers form a vital part of the justice system, and to some extent are both derivative and productive of the courts before which they appear. They ultimately are accountable to the Supreme Court of Victoria, which has the power to strike them off the Roll. It must always be kept in mind that lawyers are the pool from which the State's judges are chosen. I strongly believe that we are unlikely to continue to achieve an independent judiciary unless those judges are chosen from a legal profession which feels itself to be substantially independent of the influence of the executive government in its actions.

Recent pressure emanating from Canberra has

been for a nationally-regulated legal profession. I believe, however, that it is far more appropriate for State legislatures and State Governments, which have responsibility for the independence of the courts and for justice in the State, to judge the appropriate degree of professional regulation and to balance the competing demands of independence, accountability, competition and efficiency. In this connection, I do not ignore the question of admission to practise before Federal courts. I merely acknowledge that lawyers fundamentally owe their entry into the profession and their rights to practise to the State Supreme Court, and that they are an intrinsic part of a complex system which is the responsibility of each State.

It seems to me that the present clamour for national uniformity in all things, of which calls for a nationally-driven legal profession are only one part, involves a complete failure to understand our federal structure. Probably the most basic principle of Australian federalism is that the States should exercise responsibility for all functions which are *not* required to be discharged on a national level, while the central Government is accorded those functions which *do* require a national focus.

The justice system and, as part of that system, the legal profession, is not and never has been truly national in focus. The market for legal services is *not* essentially national in character and *there is absolutely no need* to regulate it from Canberra. Inefficiencies which may occur through differences between the States can be resolved by the application of such principles as mutual recognition. The local nature of the profession means that local regulation will always be the most responsive and appropriate to the needs of lawyers and their clients.

Victoria has a fine justice system, and access to that justice system is one of the inalienable rights of every Victorian. It is the Victorian Government's responsibility to ensure that this access is maintained and extended, and as part of this responsibility to ensure that the Victorian legal profession operates in the interests of justice and the public. This is not a responsibility which the Victorian Government will shirk, nor is it a responsibility which should be exercised by distant bureaucrats in Canberra. In the comprehensive reform of the legal profession, as in so many other areas, Victoria will lead the way, unhampered by regulatory imperialists alike in Canberra or the closed shop approach of some other States.

TRIBUNALS

Turning to my next subject, tribunals, it is perhaps as well to begin by casting our minds back approximately thirty years. Of the boards and tribunals falling within my portfolio, the first established was the Appeals Costs Board in 1964. Since then, boards and tribunals have proliferated, and I now find that within my portfolio there are some fifteen fully-fledged quasi-judicial bodies, as well as a number of other entities with some quasi-judicial functions.

Whereas the proponents of alternative dispute resolution have now focused much of their attention and energy on such matters as pre-conference hearings and arbitration, the 1970s and 1980s saw them espousing the virtues of boards and tribunals as appropriate forums for the resolution of particular kinds of disputes.

One need only note the rapid growth in number of these forums to recognise that governments, too, saw considerable benefit in establishing boards and tribunals. Boards and tribunals were created primarily in response to the perceived slowness, formality, complexity and expense of court proceedings. They were also established in response to the difficulty the courts were having in coping with increasing caseloads and with cases of increasing complexity.

By and large, each board and tribunal was established for a unique, specialised purpose. For example, in an effort to reduce the cost of justice for particular disputes the Small Claims Tribunal was established in 1973, and the Residential Tenancies Tribunal was established in 1981. In addition, another group of boards and tribunals was established to protect disadvantaged groups, such as the Crimes Compensation Tribunal (established in 1972), the Equal Opportunity Board (established in 1977) and the Guardianship and Administration Board (established in 1986).

I must say that I have noted a marked increase in community concern regarding the operation of boards and tribunals over the years. Much of the criticism of boards and tribunals stems from an ambivalence as to their place in government, and a perception that they are not impartial, but are pursuing either policies of the government of the day or agendas of their own. It is clear that, particularly for many lawyers, boards and tribunals challenge the fundamental and historical constitutional principle of the separation of powers. Boards and tribunals tend to be created by the legislative arm of government at the behest of the executive arm of government, to perform functions from which the executive arm believes it should distance itself. However, while remaining in terms of their appointment structures and administration creatures of the executive, in respect of the discharge of their essential functions boards and tribunals are akin to the judicial arm.

It has become apparent to me that there are a number of major problems arising from the current structure and operation of tribunals in Victoria. I shall take the opportunity here to elaborate on only three of these problems.

First, it is often argued that tribunals are insuffi-

ciently independent of the executive arm of government, and too subject to the influence and control of that arm. Of particular concern here are the processes for the appointment and re-appointment of board and tribunal members. The Government recently attracted criticism over the appointment and re-appointment of members of the Administrative Appeals Tribunal. It was asserted that the Government's present attitude is undermining the independence of the tribunal.

Interestingly, the Government was called upon either to reinstate the former Government's alleged practice of re-appointing all members who wish to continue in office, or to appoint members for a term of sufficient duration to ensure their independence from government influence.

I say "interestingly" because the former Government did not, in fact, always re-appoint members. There are repeated instances where sitting members of tribunals were not re-appointed by the former administration. I note also that under the present Government, there have been major advances in the procedure for the appointment of tribunal members. Shortly after the change of government, one of my officers in the Department of Justice informed me — with considerable trepidation, I might add — that he could not outline to me the former Government's process for appointing tribunal members. This was because the Department simply was informed who to appoint by the relevant ministerial advisor, after appropriate consultations had been carried out with Labor Party factions. This is the Tammany Hall theory of administrative justice.

As Attorney-General, I have instituted a more principled process. Expressions of interest in appointment to tribunal positions are sought by press advertisement. Applications are vetted, and candidates interviewed by an Appointments Advisory Committee. Sitting members seeking re-appointment are also interviewed by the Appointments Committee. The Committee itself is composed of a mixture of high-ranking government lawyers — including the Chief Parliamentary Counsel and both Crown Counsel — and representatives from the Bar and the Law Institute. Its central role is to prepare recommendations concerning appointments for the Attorney-General.

I may say that I have long accepted the view that there are arguments for changing the future terms of appointment of board and tribunal members. I am troubled by the possibility that at least some tribunal members who hope for a renewal of their appointment would experience a certain uneasiness when deciding matters affecting the interests of government. The matter is particularly acute in the case of those boards and tribunals which regularly decide high-profile matters of importance to the Government.

A second matter often raised in connection with tribunals is that their jurisdiction is inappropriately protected from judicial review by the use of ouster clauses. Based on recent media comment, one could be forgiven for assuming that the Government is increasingly and unnecessarily diminishing the review jurisdiction of the courts. Concern over the use of such clauses is not, of course, confined to Victoria, and the use of ouster clauses in connection with the conferral of jurisdiction upon tribunals has been a long-standing matter of concern among administrative lawyers.

Based on recent media comment, one could be forgiven for assuming that the Government is increasingly and unnecessarily diminishing the review jurisdiction of the courts. Concern over the use of such clauses is not, of course, confined to Victoria.

The reality in Victoria is that the jurisdiction of the courts is considerably better protected against inappropriate legislative incursion in the way of privative clauses than in any other Australian State. As I said earlier, pursuant to section 85 of the Victorian Constitution any proposed diminution of the jurisdiction of the courts contained in an Act of Parliament must not only be agreed to by absolute majorities in both Houses of Parliament, and be accompanied by a ministerial statement explaining the reasons for diminution, but it is also exposed to the widest possible parliamentary scrutiny by, in particular, the all-party Scrutiny of Acts and Regulations Committee.

I would note that while I have only the most cautious of enthusiasms for privative clauses, their careful deployment in connection with tribunals can, in limited situations, be justified. I have in mind particularly the situation when one is seeking to create an inexpensive, informal and user-friendly tribunal, and the effect of the Victorian *Constitution Act* would otherwise be to simultaneously con-

fer the first-instance jurisdiction on both the tribunal in question and the Supreme Court. In such circumstances, the enactment of a limited privative clause clearly will be worthy of consideration. A privative clause might also properly be employed to limit rights of appeal to the Supreme Court, where too extensive a right of appeal would have the effect of negating the accessibility and flexibility achieved by the creation of a tribunal jurisdiction.

A third major concern arising in connection with the creation of boards and tribunals relates to their procedures. Based upon the perception that courts contained features not conducive to the widest possible access to justice, boards and tribunals were vested with considerable discretion regarding the conduct of proceedings before them. Consequently, just as you will find a broad range of different boards and tribunals, so you will find a similar variety in the range of the formality of their procedures, from strictly adversarial proceedings conducted in compliance with the rules of evidence to an inquisitorial, investigative and informal manner of proceedings.

One consequence of this diversity of procedure amongst boards and tribunals is that doubts are often raised as to whether tribunals are applying equally acceptable minimum standards of procedural fairness and adjudicatory competence.

In any event, it seems clear that the common thrust between government policy and the usual diversity of public opinion in this context is that boards and tribunals have a legitimate role to play within the adjudicatory system of Victoria, but that their proliferation over many years necessitates their review in order to ensure a high and uniform standard of justice and efficient use of limited resources.

In recognition of this common concern I have convened a Working Party to review the operation of boards and tribunals. The Working Party, which is composed of a range of experienced administrative lawyers, including the President of the Administrative Appeals Tribunal, Judge Warren Fagan, is focusing on the boards and tribunals administered by the Department of Justice and will make recommendations for reform to their functions, structures, appeal processes and procedures.

Without wanting to pre-empt the findings of the Working Party, it seems to me that a new board and tribunal structure would need to embody certain key features.

First, I believe that there is very real scope for the amalgamation of a variety of disparate tribunals into a single umbrella tribunal, sitting in a number of divisions. This would offer not only advantages of co-location and resource sharing, but would also facilitate co-ordinated internal administration and supervision by the relevant tribunal hierarchy.

Second, rationalisation of procedure is required. I have in mind a statute embodying a common procedural regime, which would apply across the range of matters within the diverse jurisdictions of the various existing boards and tribunals. Of course, the extensive amalgamation of tribunals to which I have just referred would render the creation of such a common regime much easier. I concede, of course, that different tribunals or tribunal divisions would need to retain a degree of procedural flexibility in line with the different types of matters which come before them.

Without wanting to pre-empt the findings of the Working Party, it seems to me that a new board and tribunal structure would need to embody certain key features.

Third, consistent and transparent procedures for the appointment and removal of tribunal members are highly desirable. Any system for the appointment and removal of tribunal members should be both principled and capable of engendering confidence in the public at large. Coupled with this is the need to ensure that the potential for influence (or perceived influence) over members by the executive arm of government is minimised.

A final feature would be the preservation of judicial review and a consistent appellate process.

I stress that the views expressed here are my own, not those of the Government, and that I am eagerly awaiting the report of the Working Party. Once the Government has considered the recommendations of the Working Party, I would anticipate that legislation will be introduced sometime in 1995 to deliver an efficient, streamlined board and tribunal system in line with the Government's election commitment.

A NEW APPROACH TO THE COURTS

I now turn to the courts. In this context, I wish to address a number of matters, including some major new Government initiatives.

The first relates to self-governance.

SELF-GOVERNANCE FOR THE COURTS

Self-governance for courts, as a concept, is nothing new. The High Court of Australia has had administrative independence from the federal ad-

ministration — including the power to acquire interests in land — for many years. Other federal courts were accorded a similar status in 1990. The South Australian courts enjoy administrative independence as a collective of Magistrates' Courts, District Court and Supreme Court.

In Victoria we still have a curious mix in which the responsibility for administration is shared between the courts and a division of the Justice Department, with all non-judicial officers being employees of the Department, but with the courts largely responsible for their own administrative arrangements within the parameters of budget allocations.

With the co-operation of all interested parties, the Government proposes to come to a new arrangement by the end of 1995 that will give the courts the formal responsibility for their own governance. Such an arrangement could, of course, take many forms, and I will not pretend that I have at this stage a comprehensive idea of what some of the details of the arrangement will be. Much of this needs to be discussed with those who have a principal interest in the matter.

I can nevertheless say that I see as an end result of the process an arrangement that reduces the responsibility of the Department of Justice for the courts to matters of key administrative policy only. The courts will be appropriated a budget line within the Department's budget that will enable them to carry on their functions in an autonomous way.

Independent administration and management does not mean that the courts would not have to account, in a constitutionally appropriate way, for their operations. The courts, like all other areas of the public sector, will be accountable for the efficiency and effectiveness of the management of their affairs. Although in their *judicial* capacity the courts are accountable solely through the processes of judicial review, the exercise of their *administrative and managerial* capacities will be accounted for, so far as is consistent with their constitutional status, through the executive, to Parliament.

In making a claim on the moneys provided by the public the administration of the judicial arm will be in a similar position to other administrative organs of government. The public will be entitled to expect a full accounting of how, to what purpose, how effectively and how efficiently the money is proposed to be spent.

RESTRUCTURE OF EXECUTIVE RESPONSIBILITY

The second matter which I wish to raise concerns a restructuring of executive responsibility within the courts.

The Government proposes to explore the making of changes to the way in which, under the various Acts that provide for the Supreme Court, the County Court and the Magistrates' Court, the affairs of the courts are at present managed. Although there are some specific administrative duties that are the responsibility of the respective chief judicial officers, or of masters reporting to those officers, the governance of the courts is, on the whole, left to the councils of judges or magistrates.

If there is to be a greater degree of autonomy vested in the courts, it must be considered whether the management of the courts should be left in the care of the respective councils. Put simply, it is difficult to see how one can reasonably expect to have 30, 50 or 100 people participating in the management of a business — the business of running courts.

The Government proposes to explore the making of changes to the way in which, under the various Acts that provide for the Supreme Court, the County Court and the Magistrates' Court, the affairs of the courts are at present managed.

I am aware that in the case of the High Court of Australia, management is not delegated to the Chief Justice as the chief executive officer. That responsibility is assumed by the whole court. But there the number of judges is limited. When a larger council is involved there needs to be made the clear distinction between management and ownership, as is always done in business. This was recognised by the federal Parliament when it made the Chief Justices of the Federal and Family Courts and the President of the Administrative Appeals Tribunal responsible for managing the administrative affairs of their entities.

It is, of course, necessary that there be a clear distinction between administrative management and management of matters that are of a judicial nature, for example, the rules of the courts. Responsibility for administrative matters should be given to specific individuals in the judiciary as part of the autonomy process. It would be logical these responsibilities be confided in the chief judicial officers, or judicial officers may share or be delegated this responsibility.

A COURT OF APPEAL DIVISION OF THE SUPREME COURT

I would now like to turn the focus of my lecture to what is, without doubt, the most significant structural change to our judicial system for many years.

It gives me great pleasure to announce that Cabinet has today approved, in principle, a proposal to divide the Supreme Court of Victoria into two divisions, namely:

- a Court of Appeal; and
- a Trial Division.

It is proposed that the Court of Appeal division will replace the Full Court of the Supreme Court as the general appellate court of Victoria. It is proposed that it will exercise similar jurisdiction to that currently exercised by the Full Court, including jurisdiction over both civil and criminal appeals. The Trial Division, on the other hand, will be empowered to hear and determine all matters, civil and criminal, which do not fall within the jurisdiction of the Court of Appeal.

Developments in New South Wales, and more recently Queensland, show that a permanent appellate court is successful in contributing to the expeditious and efficient handling of appellate work. A Court of Appeal of permanent membership was established in New South Wales in 1956, as a division of the Supreme Court. Permanent membership has permitted the introduction of innovative procedures to provide for the expeditious resolution of urgent matters and efficient case flow management practices during periods of significant increases in appellate work.

Improved management of appellate work in New South Wales has raised the standing of the Supreme Court and, indirectly, the legal system generally, not only in the eyes of the general community but, just as important, in the eyes of the business community.

As the current President of the New South Wales' Court of Appeal has stated:

"Any community which seeks to attract and hold commercial business must provide an efficient court system, including an efficient appellate system, to solve the disputes of business. That much is self-evident."

A Court of Appeal of permanent membership was recently established in Queensland in 1991 as a division of the Supreme Court. Early experience of the court indicates that it will operate successfully to ensure that appellate work is carried out efficiently and expeditiously.

These developments, and the significant improvements they have brought to their respective judicial systems, have prompted a review of our judicial structure. The reforms to the legal profession, of which I have spoken already, though extremely significant, are but one part of the reform of our legal system. To provide Victoria with a first-class legal system, the Government believes it is necessary to reform not only the legal profession but also the structures and procedures of the courts and tribunals.

One must not forget that it was envisaged initially that the existing Full Court would be an *ad hoc* appellate court, to be convened only when the need arose and when first instance work permitted. Such a structure is ill suited to contemporary demands, notwithstanding the heroic efforts of the judges of the court to overcome its structural deficiencies. It has to be accepted that it is no longer a feature of our judicial system that appellate work is irregular and limited in nature. On the contrary, appellate work is now a permanent feature of our judicial system and encompasses numerous matters reflecting significant and comprehensive changes in the law.

A survey of the business of the Full Court establishes that it is increasingly being called upon to consider urgent matters of significant commercial and community importance. For example, there now exists a wide variety of interlocutory orders previously not in existence, the review of which falls within the jurisdiction of the Full Court. Such orders are, of course, an addition to the increasing number of new causes of action, whether established by statute or developments in the common law, which are falling within the jurisdiction of the Full Court.

It is of the utmost importance to the community that Victoria be equipped with an appellate forum in which such matters can be resolved efficiently and expeditiously. In this connection, I need hardly stress the well-documented fact that our society is increasingly becoming more litigious and the consequences that this is having on the flow of judicial business.

It has become apparent to the Government that the structure of the Full Court is such that it is not equipped to deal as effectively and efficiently with its increasing workload as is desirable, and that the judges of the court cannot be expected indefinitely to labour under the burden of inadequate legislative structures.

To take the matter one step further, it is apparent to the Government, and, I might add, to many members of the legal community that the problems with the operation of the Full Court are directly related to one particular aspect of its structure, namely, its attribute of changing membership. Not only are members often required to prepare appellate judgments upon resuming the hearing of first instance matters, thus contributing to delay, but the absence of permanent members makes it difficult to regularly and consistently monitor the operation of the appellate jurisdiction.

It is furthermore practically difficult for a court

of a large, varying membership to agree to and implement innovative procedures required to resolve problems that may arise in the operation of the court. This is evidenced by the difficulty the Full Court has had, despite all its efforts, in facilitating the expeditious hearing of urgent applications, a matter of concern not only to the general but also to the business community.

I might add that recent initiatives by the court have sought to address problems arising from the operation of the Full Court, in order to ensure the expeditious and efficient flow of business. The Chief Justice has sought to maintain at least three members of the Supreme Court on the Full Court on a semi-permanent basis in an attempt to provide some degree of permanency to the appellate jurisdiction, and thereby alleviate some of the problems it was encountering.

However, the initiative of the Chief Justice regarding semi-permanent members remains a remedial measure and does not address the fundamental problems facing the Full Court. It is simply not fair to expect the judges to overcome, by a nip here and a tuck there, faults in the legislative design of Victoria's appellate structures. As I have sought to emphasise throughout, it is the *structural problems* of the Full Court that need to be addressed, and which are, in fact, being addressed by the proposal to create a permanent Court of Appeal division of the Supreme Court.

The creation of a permanent Court of Appeal division is premised upon the appointment of candidates of the highest judicial calibre, who are especially suited to appellate work. It is proposed that the Court of Appeal division will be comprised of such members who will exercise only appellate jurisdiction. In contrast to the present structure of the Full Court, members comprising the Trial Division will generally *not* exercise appellate jurisdiction, although opportunity for members of the Trial Division to sit on appeals will be retained.

Membership of the Court of Appeal will consist primarily of the newly-appointed President of the Court of Appeal, the Chief Justice and other Judges of Appeal. Naturally, the Chief Justice will remain the most senior member of the Supreme Court, and will have precedence over the President. The President will, however, be directly responsible for the composition and operation of the Court of Appeal.

Under the proposed reforms, the efficient exercise of the appellate jurisdiction will be considerably enhanced. Permanent membership will lead to a higher degree of consistency amongst appellate decisions. Coupled with this, the Court of Appeal will also provide a means for the systematic development of legal principle. By providing for a permanent appellate structure, the Court of Appeal will be in a sound position to achieve significantly superior case flow management to that of an appellate court of varying composition. It will also enable the implementation of more efficient procedures for allocating appeals amongst its appellate judges.

Under the proposed reforms, the efficient exercise of the appellate jurisdiction will be considerably enhanced. Permanent membership will lead to a higher degree of consistency amongst appellate decisions.

I should now comment briefly on the proposed Trial Division of the Supreme Court. It is proposed that the Trial Division will consist of the Chief Justice, and other judges of the court, but excluding the President of the Court of Appeal and the Judges of Appeal. As I mentioned earlier, the judges comprising the Trial Division will be empowered to hear and determine all matters, civil and criminal, which do not fall within the jurisdiction of the proposed Court of Appeal division.

By effecting a division of jurisdiction in this way, it is envisaged that the judges comprising the Trial Division will be better positioned to monitor the operation of that Division, and to thereby ensure that it continues to deal with the matters coming before it efficiently and expeditiously.

The Government believes that by dividing the Supreme Court into a Court of Appeal and a Trial Division, our judicial system will be significantly improved and that Victoria will be at the forefront of the Australian States in providing a first-class legal system. Naturally, detailed consultation upon the exact form of the proposal will take place with the judiciary and the legal profession.

CONCLUSION

I am well aware of the fundamental rule of public speaking that a long speech requires a short conclusion. I will not re-hash what I have already said, or seek to give you a pithy summary. The matters which I have raised are, I trust, sufficiently varied and of sufficient interest to afford food for thought and discussion.

May I say once again how delighted I am to have had the opportunity to give this inaugural lecture on law reform, and how pleased I am that such a lecture will be a permanent part of the legal culture of Victoria.

THE FAMILY LAW BAR ASSOCIATION GOES BOTANICAL

THE FIRST DAY OF SPRING THIS YEAR WAS spent by the Family Law Bar Association at its annual dinner at *The Botanical.*

There were, however, a number of differences from dinners of years past. Those who attended surely missed:

- the aggressively masculine confines of the Savage Club;
- the very limited menu choices of previous dinners;
- speeches from international sportsmen with highly idiosyncratic views;
- a long speech from Paul Guest Q.C.;
- an impromptu speech from Billy Pinner;
- a rousing address from Frederico J.;
- a piano recital from Mushin J.;
- the presence of Elizabeth Davis;
- a be-kilted bag-pipe-toting Ian Duffy;
- a highly amusing performance from Rohan Hoult;
- less amusing but more impromptu performances by various members of the Association;
- a number of members of the Court who are normally regular attendees but on this occasion unfortunately unable to attend.

On the other hand, those 60 or so members who attended had the benefit of:

- the attendance of Wilczek, Kay and Brown JJ.;
- a full house of Judicial Registrars;
- a sizable proportion of Registrars;

Barbara Phelan and Heather Gordon check out the guest list

Members and Registrars

Clive Rosen and Graham Robertson

Judith Lord instructing Graeme Thompson on organisation

Noel Ackman and Margaret Mandelert

Olivia Nikov and Mary Abriola

- a short speech from Guest Q.C.;
- fine food;
- excellent wine;
- the highly successful organisation of the Committee and especially Judith Lord;
- the attendance of Bill Pinner upon each table in turn — some people will go to enormous lengths to secure nine main courses;
- a great night enjoyed by all who attended.

The accompanying photographs are commended to you. There are a number of other photographs of the evening, the negatives of which may be acquired by submission to the Editors of a large brown envelope filled with used, unmarked high-denomination notes.

NEW LAW COURTS BUILDING FOR MELBOURNE

AFTER MANY YEARS OF UNCERTAINTY, Melbourne is finally to get a Commonwealth Law Courts building which will consolidate four national courts under one roof.

As late as September last year the Federal Government had rejected the idea but in May Attorney-General Michael Lavarch announced a complex valued at $109 million.

The site — on the corner of William and La Trobe Streets and overlooking the Flagstaff Gardens — is already owned by the Commonwealth as is the old High Court building in Little Bourke Street now occupied by the Federal Court.

Last year Commonwealth Law Court Buildings were opened in Perth and Brisbane.

The new building is due for completion in 1999 and will bring together the High, Federal, Family and Industrial Relations Courts under one roof.

The courts currently lease premises at a variety of locations.

The site is on a major tram route and a short walk from the Flagstaff underground station.

Federal Court Chief Justice Michael Black said his court proposed that the new building should allow for maximum use of natural light and views of the Flagstaff Gardens.

"There is a general view that the building should provide a dignified but nonetheless comfortable atmosphere.

"The aim is to create an environment which is both physically and psychologically attractive to litigants, witnesses, practitioners and court personnel."

He said the design would be sensitive to the needs of the disabled, parents and their children, litigants, witnesses and practitioners.

Provision would be made for a cafeteria, witness waiting rooms, mediation rooms for practitioners, wheelchair access, and child minding for litigants and witnesses.

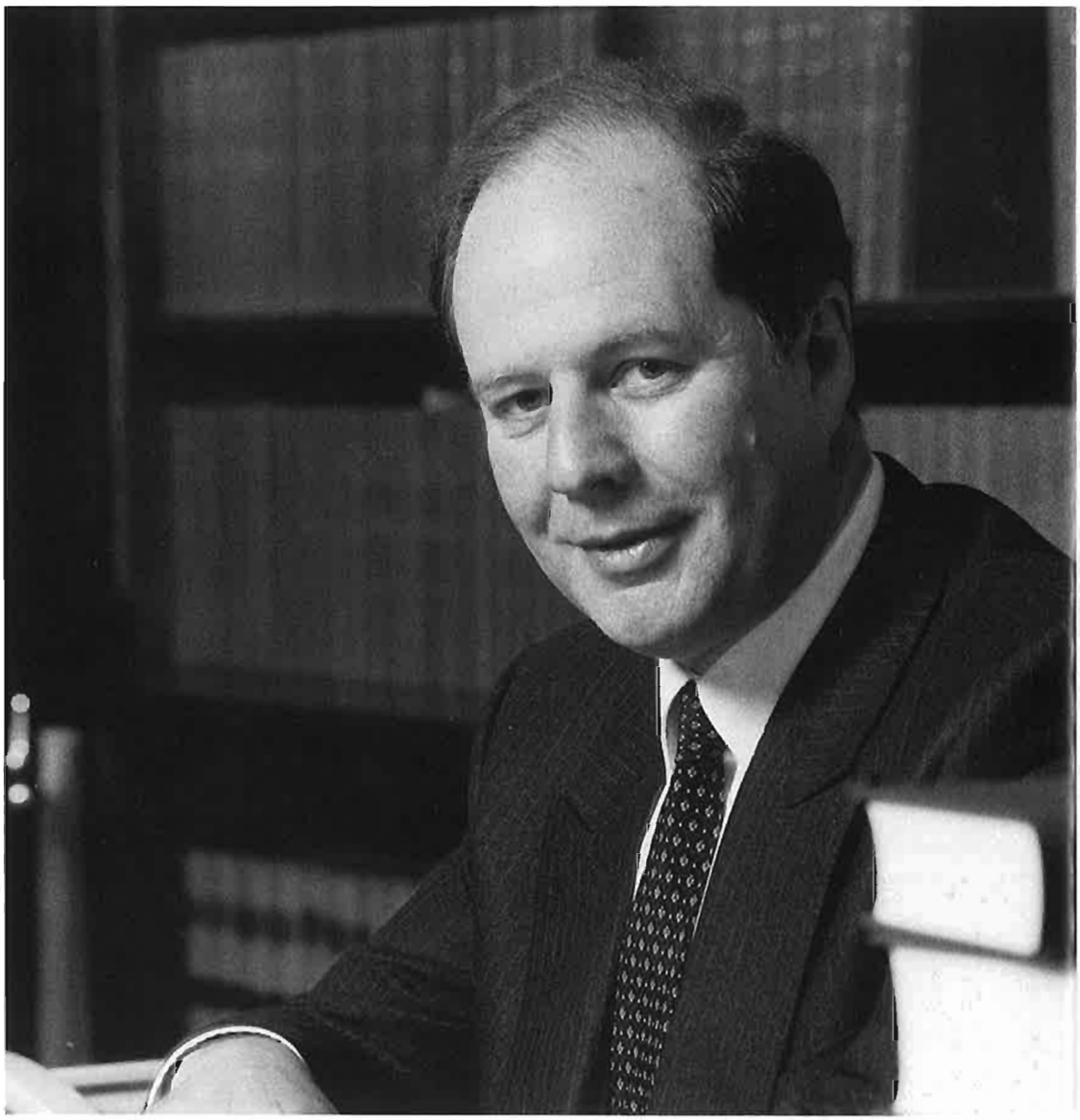
It would be designed to take advantage of developments in information technology such as electronic filing and video-conferencing.

The Federal Court will occupy 16 court and hearing rooms in the new building.

WELCOMES

MR. JUSTICE MANDIE

MR. JUSTICE MANDIE WAS SWORN IN AS A judge of the Supreme Court of Victoria on 10 May 1994. His Honour was born in Melbourne on 25 September 1942. He attended Wesley College and matriculated in 1959 obtaining first-class honours in French, Latin, Economics and Modern History. In 1960 he enrolled in a combined Arts/Law course and graduated in 1965 with first-class honours. His



Mr Justice Mandie

Honour also won the Supreme Court Prize. In March 1965 Mr. Justice Mandie signed articles of clerkship with Mr. Lloyd of Russell Kennedy & Cook. He was admitted to practice as a barrister and solicitor of the Supreme Court of Victoria on 2 May 1966. Following his admission to practice Mr. Justice Mandie enrolled in the Master of Laws course at the Yale Law School. He graduated with that degree in 1967.

Having practised for a short while as a solicitor, His Honour signed the Roll of Counsel on 27 March 1969. He read with Peter Brusey. From 1969 to 1973 His Honour was a lecturer in Constitutional Law at the Council of Legal Education and from 1972 to 1975 he was the independent lecturer in Procedure at the University of Melbourne.

His Honour served two terms on the Bar Council, the first from 1974 to 1979 and the second from 1982 to 1984. He was also a member of the Ethics Committee from 1977 to 1984. His Honour had two readers, John Gibson and Jennifer Davies. He became one of Her Majesty's Counsel in 1983.

At the time of his appointment His Honour was undoubtedly one of the most admired advocates at the Victorian Bar. His ability to get to the core of an issue, to see the essence of a problem regardless of its complexities, is unparalleled. As an advocate, His Honour was renowned for his ruthless economy with language. In a proceeding a few years ago before the Supreme Court of New South Wales, the court was presented with long and exhaustive evidence and submissions about the proper construction of a trust deed from a dazzling array of silks over some days. The Bar table was littered with books, arch-lever folders and miscellaneous documents. Mandie Q.C.'s submissions lasted one hour. The only document which he had before him was the deed itself, with two "post-it" stickers applied at the crucial location!

His Honour has a detailed and extensive knowledge of computers and their inner workings. He is a serious gardener and often relaxes in the luxuriant growth of his large garden. His Honour is a francophile and dotes on his poodle, Francois Mitterand (known as "Mitty"). He is also a bibliophile and, aside from the law, reads philosophy, amongst other things, with a passion.

At His Honour's Welcome on 12 May 1994 the Chairman of the Bar Council told the following story:

"As a barrister, you were once in fact criticised for your solicitor's work. Your mother was called up for jury service in a murder trial before Sir John Starke. Your mother asked to be excused. Sir John asked, why. She replied, "I am against capital punishment". "So am I, madam," replied Sir John. "It was abolished two years ago." [Your mother] then upbraided Your Honour for sending her to court not properly briefed."

His Honour is married to Marilyn and has two daughters, one of whom plays in the band "Nude Rain".

At his welcome His Honour recalled the words of his oath of office which re-emphasised the task before him:

"To do equal justice to the poor and the rich, and discharge the duties of my office according to law and to the best of my knowledge and ability, without fear, favour or affection".

The Bar wishes His Honour a long and successful career.

JUDGE STEWART CAMPBELL

STEWART CAMPBELL WAS BORN ON 14 December 1939 in Western Australia, where his father, Edward Francis Campbell, and his mother, Rose, were both teachers. Shortly after his birth his father went into the army, which he made his career, obtaining the rank of Brigadier.

His Honour was educated at Mordialloc High School and then at Wesley College, where he qualified to matriculate in 1957. At Wesley His Honour was an officer in the cadet corps, and during 1957 he was captain of the college hockey team and won a sports award. The school records show that the hockey team during that year had a bumper season and was able to treat most matches as practice games. This, it is recorded, is largely due to the skilful and enthusiastic honorary coach, His Honour's father.

Judge Campbell enrolled in the law course at the University of Melbourne in 1958 and graduated as a Bachelor of Laws on 7 March 1962. It was no doubt a reflection of his father's eminence in the field of psychology which resulted in him including in his LL.B. course Psychology 1 and Psychology 2A.

During his law course His Honour found time to serve as an associate for three months in 1960–61 to the then Chief Justice of Papua New Guinea, Sir Alan Mann. During this time he travelled the highlands of New Guinea, where the Chief Justice presided over a number of murder trials.

Shortly after graduation he entered into articles of clerkship with Mr. Arthur Pearce of Messrs. Pearce & Webster. Arthur Pearce brought him into the Old Collegians' hockey team, and he was there-

Judge Campbell

fore required, as part of articles, to play this game. In fact, all articled clerks at Pearce & Webster in those days had to conform by playing hockey with Arthur Pearce. Arthur Pearce therefore had at his command a whole team of articled clerks, ex-articled clerks and current employee solicitors, thus it hardly needs to be said he was able to dominate the field play.

His Honour was admitted as a barrister and solicitor of the Supreme Court on 1 April 1963. Following admission he went to England to continue his studies at London University. It will come as no surprise to those who know him well that, during his studies in England he supported himself from his earnings as a salesman of Bibles for the British and Foreign Bible Society. For the purpose of selling these Bibles he travelled all over the country in a little three-wheeled van. Accommodation in manses, vicarages and rectories was free, unless you take into account the obligation thus cast upon His Honour to attend evensong seven nights a week.

In November 1966 he graduated as a Master of Laws in Company Law, Criminology and International Law at University College, London University. At the same time His Honour qualified for the

Diploma of International and Comparative Air Law at the London Institute of World Affairs.

On 10 November 1967 he signed the Roll of Counsel and read with the late Ivor Greenwood in Room 12 on the 10th floor of Owen Dixon Chambers. He became tenant of the room when Greenwood became a Senator and has remained its tenant ever since. He has thus spent the whole of his 27 years at the Bar practising in personal injury and common law generally, both in Melbourne and on circuit.

It was on circuit at Warrnambool that His Honour won his red bag. Apparently after dining quietly with his leader Meldrum of senior counsel, they were both returning on foot to their lodgings when it became apparent to His Honour that his learned leader was, as the Irish tactfully put it, tired and unwell. This was the result of the long case in which he was leading Judge Campbell. As fortune would have it he came upon an abandoned or at least a strayed supermarket trolley. It may be that Meldrum was marginally less stable cargo than the Bibles to which His Honour became accustomed in his youth; what happened was that His Honour offered to push Meldrum the rest of the way in that conveyance and that offer was accepted with Meldrum's usual aplomb. The trip did not, as it happened, continue without further incident. For some reason the trolley got out of control. His Honour's duty was clear, and he discharged it. Seeing his leader's fall was imminent, he hurled himself to the ground beneath him, ensuring a soft landing. In gratitude for his thoughtfulness, courage and embonpoint, Meldrum gave him a well-deserved red bag.

At the Bar His Honour's enthusiasm for hockey continued and he was for some years a member of the Bar's Bar No. 1 hockey team in which His Honour has been described as a solid defender.

A few years ago His Honour appeared as part of an illustrious Bar table at the inquest into the Warrnambool bush fires. The proceedings were tended by an Irish ex-army reservist who acted as a sort of tipstaff. He took a liking to His Honour and decided one day to play a trick upon him. When His Honour was making a submission in relation to a fire incident, a glass had been placed by the reservist directly in front of him. His Honour reached down for the glass expecting to be able to rehydrate himself, but the reservist had filled the glass with gin. His Honour began to drink, and then spluttered, saying, "Someone has put a Micky Finn in this," an objection only rarely taken at the Bar table.

During his years at the Bar His Honour had five readers, Ian Miller, John Hockley, Sue Winneke, Tony Meaghan and Margaret Mandelert.

His Honour has interests outside the law, the most notable of which is yachting. He owns, or partly owns, two yachts. He is noted for his conviviality.

News of His Honour's elevation has been received, indeed, with mixed feelings. His elevation is approved and applauded but his loss to the Bar is bemoaned. Who, it is asked, will replace him? Who, indeed.

The Bar congratulates His Honour upon his appointment and wishes him success and satisfaction in his new office.

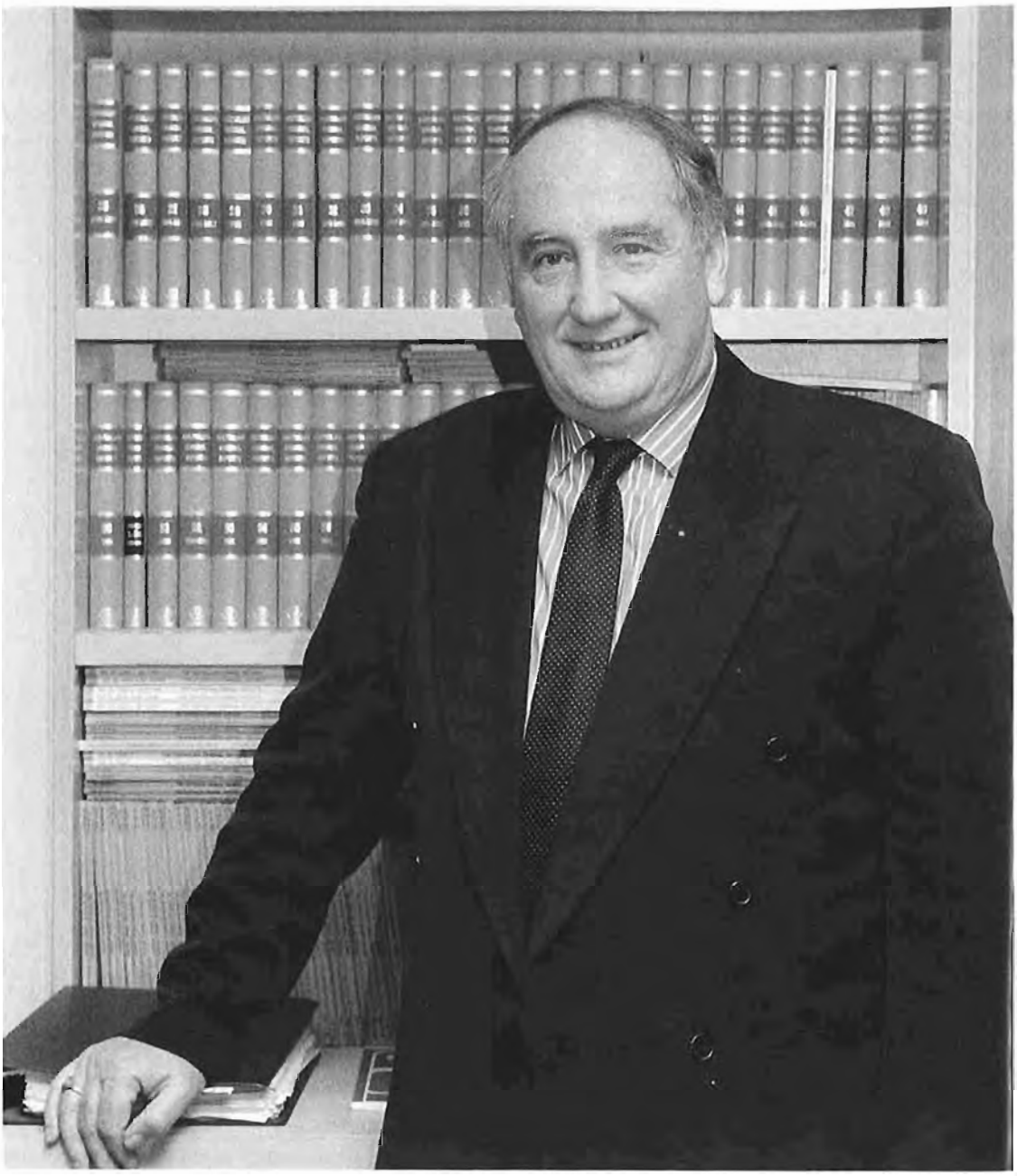
JUDGE DAVID MORROW

DAVID MORROW WAS EDUCATED AT Melbourne High School, where he was also an Air Cadet and a distinguished oarsman in the coxless pairs. He went on to the University of Melbourne. Whilst pursuing his law course he joined the Melbourne University Air Squadron, and in 1961 was commissioned as a pilot officer in the R.A.A.F General Reserve.

After graduating in March 1965 His Honour was articled to John Henry Trotter of the firm of J.H. Trotter & Co. During his period of articles a Volkswagen beetle owned jointly with His Honour's brother John was damaged whilst parked at the Carnegie shopping centre. Fortunately the number of the offending car was noted by a shopkeeper before it drove away. Next day His Honour consulted with his principal, Mr. Trotter, who expressed strong disapproval of the offending driver's behaviour, and advised immediate institution of proceedings. First, however, Mr. Trotter pointed out, it would be necessary to ascertain the identity of the offending vehicle from the Motor Registration Branch. His Honour then indicated that this step had already been taken and he had ascertained it was in fact Mrs. Trotter's car. Thus, even at that early stage of his career, His Honour demonstrated a rare ability to achieve through appropriate strategies a very good settlement.

After working with J.H. Trotter & Co. as a solicitor employee, His Honour proceeded overseas where amongst other employment he worked as in-house legal advisor to a Canadian trustee company.

Returning to Australia early in 1969 His Honour promptly signed the Bar Roll and read in the cham-



Judge Morrow

bers of Charles Francis. His master had long hoped for the perfect reader — a barrister with all the legal knowledge and skills of Sir Owen Dixon, but one so devoid of personality as to be without any work of his own for many years to come. At a time when readers could accept briefs from the moment of signing the Bar Roll, as "the perfect reader" His Honour proved somewhat of a disappointment. He immediately developed a busy practice, whilst his master sat in his chambers (so he claims) gloomily doing His Honour's paperwork. In such time as His Honour could spare from his already busy practice, however, he did prove to be a most congenial pupil.

In his early years at the Bar His Honour practised predominantly in the personal injury field, family law and crime. But over the years his busy practice blossomed further to include superannua-

tion, commercial and insurance law, administrative law and testator's family maintenance. At a time when the Bar has become increasingly specialised, His Honour may well have been one of the last outstanding general practitioners. He was always practical, full of common sense, unflappable and unfailingly courteous, but beneath it all very tough on his client's behalf.

His Honour has been described as completely at home by a camp fire drinking vintage port from an empty Vegemite jar. He has also travelled extensively in Russia, South America, all provinces of Canada and more than 30 States of the United States.

His Honour's unflappability was certainly tested on the occasion when as counsel he was invited by Chief Judge Waldron to inspect the County Court Annexe at 471 Little Bourke Street some years ago. The witness box seemed extravagantly large and the jury box so small as to be almost beyond belief. As an experienced practitioner the Chief Judge sought His Honour's view on the court design. "It will make for speedy trials," His Honour sweetly opined. "We'll be able to call all our witnesses at once," and added the interrogatory "and to what bright public service architect do we owe this?" The Chief Judge had to reply somewhat sheepishly "Me". When, shortly afterwards, the civil jury courts were first established at 471 Little Bourke Street His Honour is reputed to have coined for that venue the appropriate name "Whiplash Valley".

During his time at the Bar His Honour had five readers, Colin Moyle, Evan Smith, Elizabeth Harbour, Dan O'Dwyer and Luke Barker, to whom he proved an excellent master, one who continued to provide wise counsel long after their reading days were completed.

In 1970 His Honour was appointed to the R.A.A.F. Legal Reserve and promoted to Flight Lieutenant. Much time and effort were devoted to his duties as a legal officer in the R.A.A.F. His Honour proved to be an excellent officer, rising to the rank of Wing-Commander. The diversity of His Honour's legal experience no doubt stood him in good stead when as an R.A.A.F. Judge Advocate he was deputed the task of presiding over a court martial in which a female drill instructor was charged with sexual harassment as a result of dalliance with a male airman the night before his graduation.

In 1985 His Honour was awarded the Reserve Forces Decoration and in 1993 His Honour won the much coveted Helsham award, presented annually to the most outstanding legal officer of the year. During his last seven years at the Bar he acted as advisor on Military Law to the Bar Law Reform Committee.

At the time of his appointment to the Bench, His Honour was currently a Judge Advocate and a defence force magistrate. As such His Honour has already demonstrated those judicial qualities which augur well for this present appointment.

Out of court His Honour always proved a most congenial companion and became a very popular member of the Bar. In addition he displayed a diversity of interests outside the law. Earlier in his career His Honour was a keen skier gracing the slopes of Falls Creek, and only on inclement days reluctantly seeking the safety and solace of the Bar. More latterly His Honour's love of the outdoors has taken him in a four-wheel drive to most parts of Australia, covering the continent from south to north and from east to west. His Honour has been described as completely at home by a camp fire drinking vintage port from an empty Vegemite jar. He has also travelled extensively in Russia, South America, all provinces of Canada and more than 30 States of the United States.

His Honour's interests include the somewhat unusual hobby of collecting and restoring miniature model soldiers, a hobby in which he displays considerable dextrous skill and significant artistic talent.

At his very well-attended welcome His Honour made a memorable speech in which abundant wit was seasoned by occasional sardonic reflection. The Bar warmly welcomes His Honour confident that he will dispense justice with courtesy, common sense, and good humour.

JUDGE McINERNEY

MICHAEL GERARD McINERNEY WAS sworn in as a judge of the County Court of Victoria on 21 June 1994. His Honour was born on 7 December 1947. His secondary education was initially at St. Bedes College, Mentone and then at Parade College where he attended from 1962 to 1966. With His Honour, Parade College has produced seven judges. They included the late Sir Norman O'Bryan, the late Judges O'Driscoll, Gorman and Franich, and current Judges Jones and Russell Lewis.

His Honour enrolled in the law course at the University of Melbourne in 1967 and graduated in March 1972. He commenced articles of clerkship with the late Frank Curtain of the firm C.A. Curtain & Sons. On 1 March1977, His Honour was admitted to practice as a barrister and solicitor of the Supreme Court of Victoria before embarking for overseas where he worked as a solicitor. Upon his return to Melbourne in 1977, His Honour began reading in the chambers of John Walker, now Walker Q.C. He signed the Bar Roll on 5 September 1977.

His Honour initially took chambers on the 8th

Judge McInerney

Floor of Four Courts Chambers, before moving to the 12th Floor of Latham Chambers when those Chambers were first occupied in 1979.

His Honour was the first secretary of the Essoign Club, a position which he held for some years, and until his appointment to the Bench was the Vice-Chairman of the Club. Indeed, His Honour was instrumental in the establishment of the Club, he worked tirelessly in drafting the Rules and Constitution of the Club, and played a very large part in the successful application by the Club for a liquor licence.

His Honour served as a member of the Bar Council between 1986–87 and from 1993 until the time of his appointment to the Bench. He was a very active member in the affairs of the Bar Council and gave freely of his time in an endeavour to assist all members of the Bar.

At the Bar, His Honour's practice was a diverse one. He practised in many areas of the common law and criminal law, but in recent years his practice was predominantly centred around liquor licensing law. His Honour appeared in most, if not all, of the important cases in that jurisdiction and used his unparalleled knowledge of licensed premises and their operation to great advantage. One of His Honour's great attributes has been his ability to establish a great rapport with a wide variety of people. Solicitor and lay clients have often remarked upon that rapport and upon His Honour's great communication skills. This attribute enabled His Honour, whilst at the Bar, to quickly recognise the interests of his clients and to fight unstintingly on their behalf. His Honour commanded great loyalty and respect from both instructing solicitors and from fellow members of Counsel.

His Honour has also been somewhat of an opportunist. In his early days at the Bar, His Honour was regularly inaccurately thought to be related to the late Sir Murray McInerney. On many occasions, when asked by either senior colleagues, magistrates or even sometimes judges "How's your father?" His Honour would reply with complete truthfulness "He's fine, thank you".

His Honour always fought hard to uphold the principle espoused by the late Judge O'Driscoll who once declared, "The Licensing Court is not a Court of morals". Nowhere has His Honour's determination to uphold that principle been more evident than in His Honour's defence of such establishments as the Cadillac Bar, the Roxy Night-Club and Santa Fe Gold, particularly in recent times with the emergence of "table-top entertainment".

His Honour is particularly devoted to his wife, Ros, and three sons, Julian, Nicholas and Tom.

At his welcome, His Honour concluded:

"I look forward to being a judge. I accepted the position because I certainly wanted to be a judge. I intend to work hard at it, and I intend to provide the profession and litigants who appear before me with respect and, hopefully, justice."

The Bar has no doubt that His Honour will be successful in those stated ambitions and wishes him a long and successful judicial career.

JUDGE RIZKALLA

ON 4 AUGUST 1994 MARGARET RIZKALLA was welcomed as a judge of the County Court. Her Honour was born on 23 January 1953 at Broken Hill, New South Wales. She was educated at St. Joseph College, Broken Hill and St. Brigid's College, Horsham. In 1971 Her Honour commenced the Law course at the University of Melbourne. She completed her degree in 1974 with honours in five subjects. Her Honour then commenced a post-graduate course at Leo Cussen in March 1976 which she completed on 15 October. Her Honour is the first graduate of Leo Cussen Institute to be appointed to the Bench. Her Honour was admitted as a barrister and solicitor of the Supreme Court on 1 November 1976 and signed the Bar Roll on 9 December 1976. Her Honour read with David Byrne, now Justice Byrne of the Supreme Court. At the Bar Her Honour had a busy practice in Children's, Magistrates', County, Supreme and Family Courts. Her Honour concentrated on Family Law and Criminal Law. In 1985 she became a part-time referee of the Small Claims Tribunal and the Residential Tenancies Tribunal. On 9 September 1985 Her Honour was appointed as a stipendiary magistrate. Her Honour was both the first woman and the youngest person ever appointed to the office. It is interesting to note that it is 126 years since a member of the Victorian Magistry (or former member) has been appointed to the County Court bench. Only Charles Prendergast Hackett in 1868 and Her Honour have achieved that transition.

In 1987 Her Honour became Chairman of the Police Disciplinary Board. Two-and-a-half years after her appointment as a magistrate, Her Honour took the position as President of the Equal Opportunity Board. In May 1988 Her Honour became Deputy President of the Administrative Appeals Tribunal and upon that appointment resigned as a magistrate. Her work as President to the Equal Opportunity Board has had a significant effect in many aspects of community life. For example, in *Ross* v. *University of Melbourne* Her Honour estab-

Judge Rizkalla

lished the right of women to work in the "light weights room" with men. In the *Brunswick swimming pool case* Her Honour ensured the rights of men to swim with women. In *Byam* v. *City of Preston* Her Honour's decision resulted in the installation of a lift in the town hall to enable a physically disadvantaged councillor to attend Council meetings. Her Honour's finding that scratch tickets discriminated against some sections of the community was upheld by the High Court.

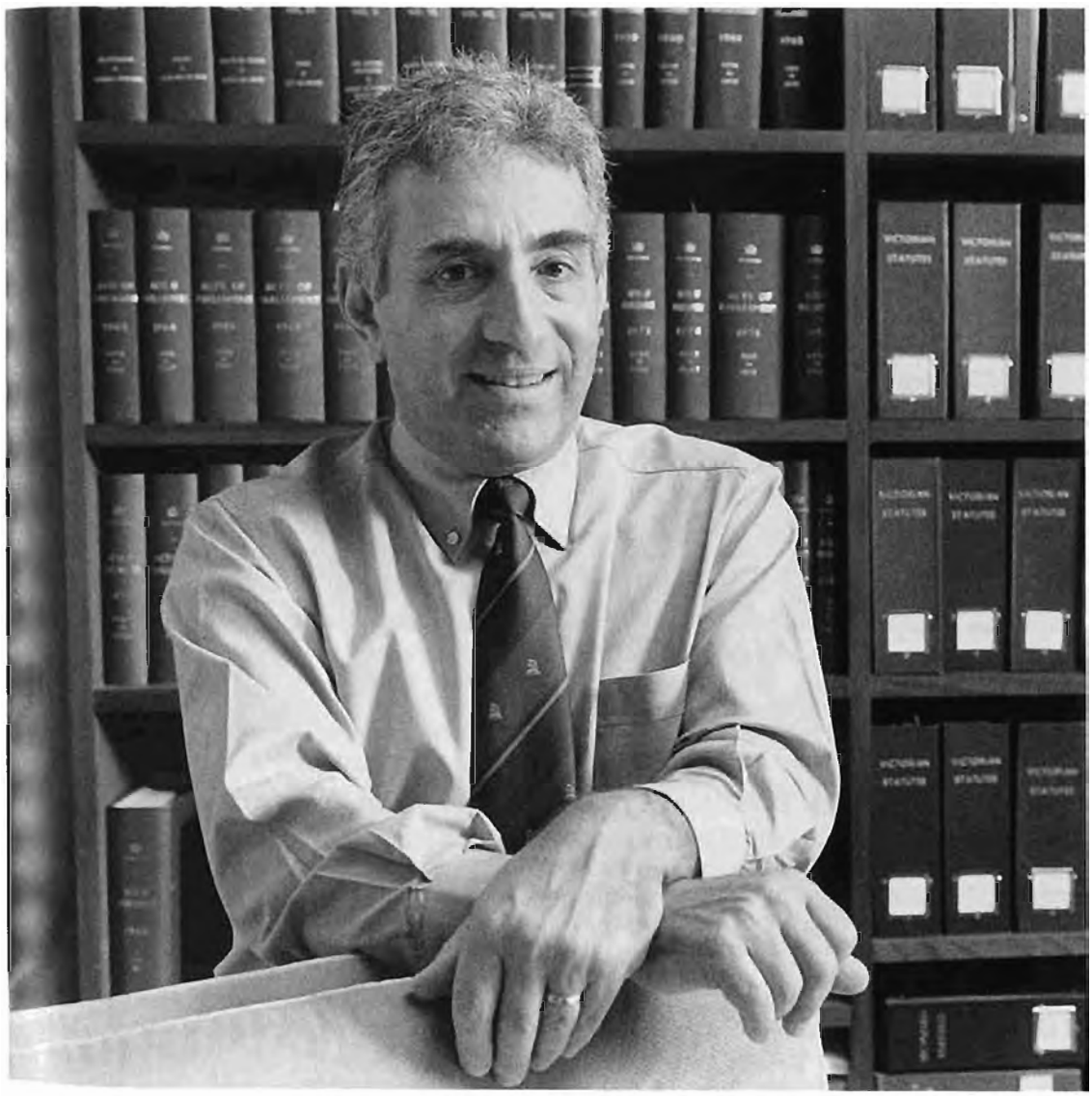
Her Honour was also active in the position as Deputy President of the Administrative Appeals Tribunal. Her Honour's experience as a referee on the Small Claims Tribunal and Residential Tenancies Tribunal as a magistrate, Chairwoman of the Police Disciplinary Board, President of the Equal Opportunity Board and a very active President of the Administrative Appeals Tribunal ensures she comes to the Bench with a breadth of experience in the exercise of judicial function matched by few. The Victorian Bar congratulates Her Honour on her appointment and welcomes her to the Bench of the County Court.

JUDGE WODAK

THERE WAS A STRONG MEDICAL CONNECtion in the His Honour's family. His Honour's mother practised as a G.P. in Port Melbourne for many years and his brothers Alex and Jack are both specialists. Tom studied law at the University of Melbourne in company with Mandie J. and Ron Sackville Q.C. His interests were hockey and cricket and he persists in playing the former, at Veterans' level, notwithstanding the pleas of his team mates to hang up the stick.

In the law he practised for 12 years as a solicitor before coming to the Bar in 1974 where he read with Ian Abraham. He set up Chambers in Four Courts and in 1979 moved to Latham Chambers where over the next 14 years he succeeded in scaring off many of the co-tenants in his suite until just two of the original six remained. You can tell by this that Wodak is a man who does not suffer fools gladly. Latham Chambers is sorry to see Wodak go as his presence has added an interesting dimension to professional life.

During his years at the Bar Wodak was well-known for his meticulous preparation and devotion to the cause in hand. Generally known as a defendant's representative and for a parsimonious attitude to damages he was a formidable opponent. Prior to



Judge Wodak

his appointment Wodak was at the zenith of the Junior Bar and was involved in most major common law actions. Those who led him have always remarked upon the degree of assistance they obtained and upon his diligence.

There is no doubt that His Honour will remain a formidable practitioner on the Bench and in the conduct of his court will exude that degree of bonhomie for which he is remembered.

It is recommended to all junior practitioners that they test the new judge out with a bit of light humour at the outset. It is guaranteed that His Honour will respond in an unforgettable manner unless there has been an incredible judicial metamorphosis.

The Bench has gained an able practitioner who will be a credit to our system of justice.

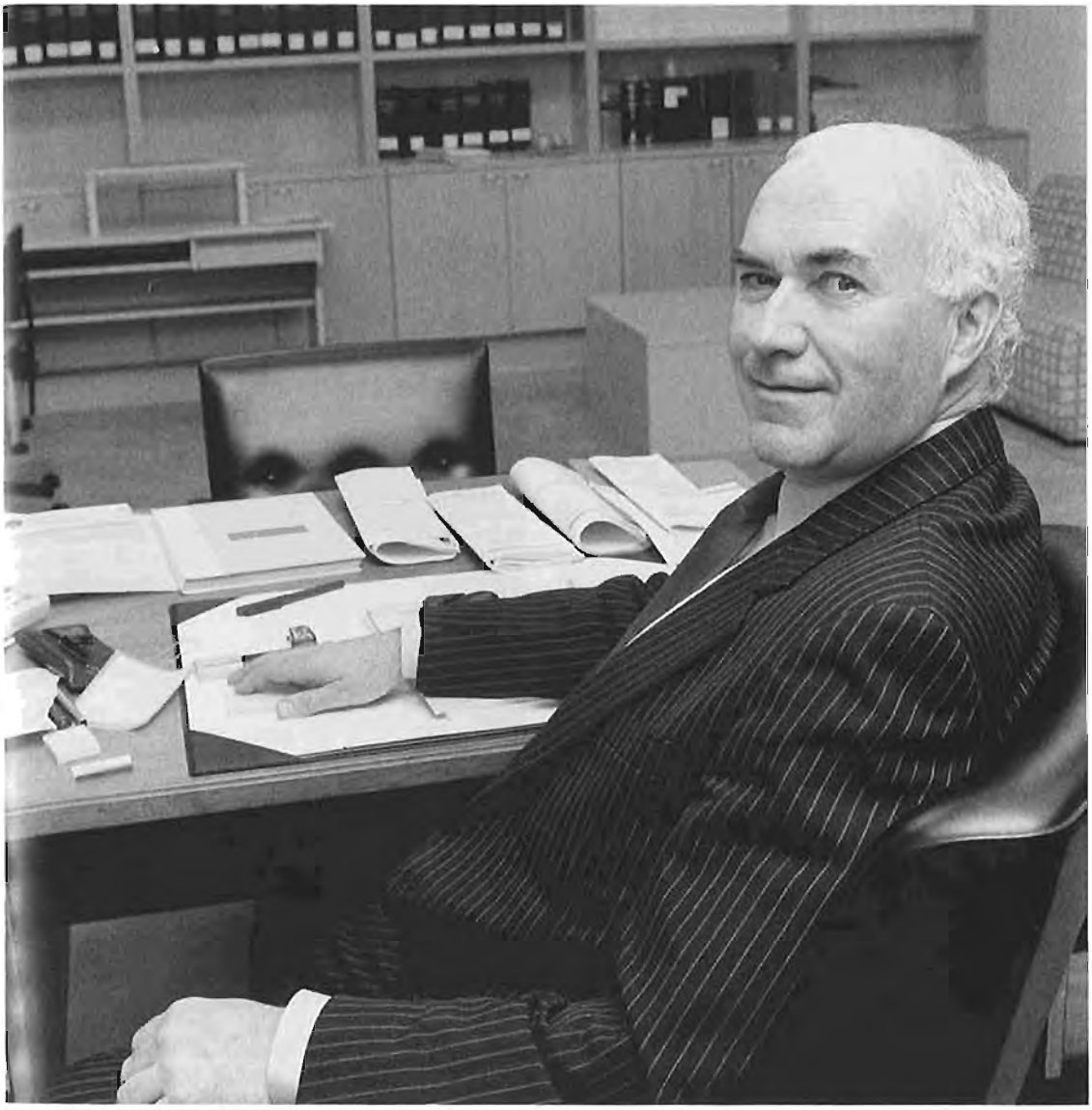
JUDGE SHELTON

FRANCIS JULIAN SHELTON IS AGED 52. HE was educated at St. Patrick's College, East Melbourne where he was dux of the school in his final year. He attended the University of Melbourne, graduating with a Bachelor of Arts in 1963 (majoring in Latin and Mathematics) and a Bachelor of Laws in 1964.

Prior to His Honour's elevation to the Bench he spent the whole of his professional life with one firm in its various manifestations. He joined Ellison Hewison & Whitehead (now Minter Ellison Morris Fletcher) as an articled clerk in 1965. He was admitted to practice in 1966. Within four years His Honour was a partner of the firm — about the same time, rumour has it, that it took him to get his driver's licence.

His Honour practised in the construction area and was involved in many major development projects in Victoria. From that grew a special interest in arbitration and mediation. He held numerous prestigious positions including National President of the Institute of Arbitrators (Australia), Vice-President of the Australian Centre for International Commercial Arbitration, an Associate of the Chartered Institute of Arbitrators (London) and Foundation President of Public Interest Law Clearing House Victoria. His Honour arbitrated a number of major disputes both in Australia and overseas. He was much sought after as a mediator.

His Honour has been a prolific author publishing extensively in professional journals on various topics including arbitration, mediation, construc-



Judge Shelton

tion contracts and professional conduct and ethics. He was commissioned to co-author the chapter on commercial arbitration in the Law Book Company's *Laws of Australia.*

In a busy professional career His Honour has had time to follow interests outside the law. He is a passionate supporter of Collingwood. A once-in-a-lifetime opportunity to see Collingwood win the flag was lost when he found himself on sabbatical in Italy in October 1990. His Honour is a past-president and life member of the Debaters' Association of Victoria. He is a member of the Council of Genazzano College.

His Honour acquired an extensive legal family when he married Anne Riordan — herself the winner of the Anna Brennan Prize for top female law student in her year. They have five children the eldest of whom is studying Arts/Law at the University of Melbourne.

His Honour's elevation is a sad loss to his former partners who will miss his wisdom, courtesy, patience and humour which made him a most successful chairman of partners' meetings. Those qualities together with his background in arbitration and mediation make him eminently suited to his new role.

On behalf of His Honour's many friends and colleagues the Bar welcomes his appointment to the Bench and wishes him a long and successful career.

OBITUARY

Harold George Ogden A.O., Q.C.

I SHALL REFER TO THE LATE HAROLD George Ogden A.O., Q.C. as "Harry". This was the name by which he was universally known to and addressed by his brothers and sisters in the law and which he would have preferred.

Harry was born in Williamstown, Victoria in 1916 and educated at Melboume High School and the University of Melbourne, graduating in law in time to be admitted by the Supreme Court of Victoria in 1940.

Like many other young men of that time, his ambition was to become part of the law of this State but, along with those young men, he answered the call to protect the very existence of this country. He enlisted in the Australian military forces in 1940, and served in those forces until his discharge in 1946 with the rank of Lieutenant.

On his discharge he did articles with Arthur Secomb of Arthur Secomb & Co., solicitors of Footscray. The late Arthur Secomb was a fine man and an exceptional advocate in suburban magistrates' work. Harry spoke with affection of the influence of those articles upon him.

In 1947 his delayed entry into the law really commenced when he signed the Bar Roll and he practised at the Bar until his appointment to the County Court in 1972.

Harry was a natural in his chosen profession. He was a complete common lawyer. The common law trial process came naturally to him — its procedures, evidential issues, tactics. In addition, his practice covered all jurisdictions comfortably as was common at that time.

But as time went on it was also natural that his practice would concentrate largely on the traditional common law areas — the criminal law and civil juries.

The Victorian Bar was busy in the post-war 1940s and 1950s. In addition Harry had exceptional talent which gave him an eminence and which led to him to take silk 16 years later in 1963. The extent of his talent and success is to be measured, I think, by the circumstance that many have reckoned this to have been a golden age of the Bar in Victoria — it was a time of great common lawyers at their height and at the height of the common law in this State.

Harold Ogden, A.O., Q.C.

In later years he used to reminisce about many aspects of his early years at the Bar. In particular, he related that his early career was greatly enhanced, particularly financially, because in the late 1940s he, with an army of other barristers, was briefed to "devil" for the private banks in the looming Bank Nationalisation case — at the princely sum of 10 guineas per day.

Later, and no doubt partly as a consequence of this, he had an extensive practice in section 92 cases — at a time during the 1950s and 1960s when section 92 seemed likely to develop into a separate

legal industry, parallel with the rest of the law in Australia.

My association with him began at about the time he took silk in 1963. I, as a junior, commenced to share chambers with Harry and with the late Nubert Stabey on the north-east corner of the 2nd floor of Owen Dixon Chambers and with that continued until Harry was appointed to the County Court in 1972, to be followed by Nubert Stabey later the same year.

During that time I had the privilege of being junior to Harry in a number of criminal and civil trials. The rules for Harry's juniors were simple:

A. be there at all times;
B. know what the case was about;
C. otherwise keep out of the way.

Nor was the position of junior to Harry Ogden one for the faint-hearted during negotiations. He carefully assessed his brief and what he regarded as the likely outcome. Harry almost invariably acted for plaintiffs, some of whose cases at times might be thought to have had some elements of speculation about them.

However, Harry carried on negotiations with opposing counsel in a brisk, some would almost say a brusque, manner. When an offer did not accord with his assessment, it was rejected with few words and without a backward step. Fortunately, his judgment was rarely wrong — due to his ability to objectively assess his client's interests and his well-placed confidence in his ability to conduct the case in the best possible light.

I might add that during that time I also had the experience of acting for Harry in some private litigation. It was a learning experience — he was no malleable client.

But it was not simply as an outstanding advocate and later judge that Harry's contributions to the law in Victoria will be remembered. In a sense it may be thought his most lasting contributions lay in the areas to which I will now refer.

The Leo Cussen Institute for Continuing Legal Education was established by an Act of Parliament in 1972 with the objects of providing continuing legal education and conducting courses of training in the law. Harry was elected the first Chairman of the Institute in April 1972, and served for seven consecutive terms until February 1987 — a total of 15 years.

But Harry's involvement in legal education preceded the establishment of the Leo Cussen Institute. As Chairman of the provisional Board of the Continuing Legal Education Board he had urged the then Attorney-General of Victoria, Mr. George Reid, to pass legislation incorporating the Leo Cussen Institute. The Institute, which took over the functions of the Board, was named in honour of Sir Leo Cussen, referred to by Sir Owen Dixon as "the greatest of all judges".

The establishment of the Leo Cussen Institute and its predecessor, the Continuing Legal Education Board, was the culmination of a long process of consultation with the legal profession. Harry took part in two pilot courses for articled clerks in 1964 and 1965 as course leader for Civil Procedure and, as a result of the success of those courses, a Special Committee comprising representatives of the Bench, the Bar, the Law Institute and the Universities recommended in April 1967 that a post-graduate practical training school be established to meet the perceived inadequacies of the system of articles of clerkship. Harry was a member of that Committee as a representative of the Victorian Bar Council.

I had the privilege of being junior to Harry in a number of criminal and civil trials. The rules for Harry's juniors were simple:
A. be there at all times;
B. know what the case was about;
C. otherwise keep out of the way.

At the time of his retirement as Chairman of the Institute he had been involved in the field of legal education for over twenty years. His work for legal education in this State was recognised in 1989 by his appointment as an officer of the Order of Australia. Harry was a very modest person but he was especially proud of this Australian award and wore the lapel badge of the Order on every possible occasion.

Even after his retirement from direct involvement with the Institute he continued to maintain close association with those who had passed through its doors, being the patron of the Leo Cussen Institute Graduate Association.

On a wider field, but again demonstrative of his interest in society, he was a Foundation Member, past Vice-President, member of the Executive and honorary life member of the Australian Asian Association and also a member of the Australian Sri Lankan Association. He was influenced in joining

the former of those associations partly through the Colombo plan and partly through the persuasion of Lord Casey. He was actively involved in those organisations long before association with Asia became as established as it has developed to be in more recent times.

In 1972 Harry was appointed to the County Court and he remained a judge of that court until his retirement in 1988. It is sometimes suggested that a person changes upon appointment to a court. Whether or not that is so as a generality it clearly was not so of Harry. He was a consummate judge, who transferred his natural mastery of the common law from the Bar to the bench. He was equally at ease in civil or criminal jurisdiction.

The current debates about affirmative action and the importance of victims in the criminal law were no novelty to him. He remained very conscious of those issues throughout his career and was unafraid to reflect them in the sentences which he considered to be appropriate.

He greatly enjoyed his career as a judge of the County Court and retired with regret. Except in relation to one matter, I never heard him openly criticise the enormous legislative changes or appeal rulings which occurred during his years in office, although he did on occasions in private permit the occasional sceptical comment.

The exception to which I refer was the well-known contempt proceeding. Harry referred to it often and did so in terms of disagreement, not because the decision affected his feelings of status or importance as a judge but because he felt it reflected upon the dignitas of the courts as public institutions.

In 1984 Harry was seriously ill, and concerns were held for his life. It was doubtful whether he would return to office. However, he showed remarkable fortitude and determination during that distressing period and to everybody's pleasure returned to the court in excellent health. Indeed, I saw him at lunch the week before his death; his health and spirits were excellent.

After retirement from the court and because he was in excellent health and had retained his full intellectual vigour, he continued active in many areas. In particular, he occupied the position from 1989 of part-time advocate instructor (or moot master) at the University of Melbourne. He devoted great energy to this and also to the equivalent position as part of his continuing support to the Leo Cussen Institute as an instructor in its practical training course. In both spheres, the students continually expressed their indebtedness to him. His mastery of procedures, together with his kind but firm instructions and directions, had a great influence.

Finally I shall intrude a personal note of reminiscence for myself and two others.

For thirty years John Monohan, Bernie Convery (Harry's associate) and myself have lunched together each Friday at the Golden Age in King Street. Harry was the junior member of this group, joining us on a regular basis about 12 years ago.

He was a most generous, genial and loyal companion. In addition, he had the most unusual quality in that he was the almost reasonable Collingwood supporter.

This was no dilettante group; this was a serious group, with intense discussions about the important events of the day — football, races and any other sporting event in any part of the globe that week. It also embraced legal rumour and trivia, occasional social comment, and a pinch of politics.

Harry usually indulged us, allowing us to express what might otherwise be thought to be extravagant views, but invariably he brought the subject in question — the fate of the Ashes, Gary Ablett, the next election, the judge to be appointed next week — to an end with a brief, decisive, and usually sceptical comment. He was mostly right.

More importantly, he was a most generous, genial and loyal companion. In addition, he had the most unusual quality in that he was the almost reasonable Collingwood supporter. We shall miss him.

Harry greatly enjoyed the law. He had natural flair for it. He derived great personal and professional satisfaction from his practice of it over many years. But he contributed more to it than he derived — by his professional practice of the law, whether as advocate or judge, as a major contributor to the education and future of the lawyers in this State, by his contributions to the wider Victorian society — and finally by his friendship.

John Fogarty

GOVERNORSHIP IN AUSTRALIA TODAY

A paper presented by The Honourable Richard E. McGarvie, Governor of Victoria, to the Senior Executive Chapter Luncheon of the Australian Institute of Management in Melbourne on 8 September 1993 and revised for publication.

THE COMMONWEALTH OF AUSTRALIA IS A federation consisting of six States each with its own system of government and a separate Commonwealth system of government for the whole federation. The State and Commonwealth systems are similar, all being based upon that of the United Kingdom. Thus the State of Victoria has a Governor who acts as head of state and is appointed by the Queen; a Parliament consisting of an upper House (Legislative Council) and a lower House (Legislative Assembly); a Government or Cabinet comprised of the Premier and other Ministers who are drawn from both Houses but have the confidence and support of the majority of the Legislative Assembly; a judiciary; and a public service, for each department of which a Minister is politically responsible to Parliament. In the Commonwealth system the Governor-General corresponds to the Governor of a State and the Prime Minister to the Premier. The Commonwealth Constitution gives the Commonwealth powers over specific subjects including foreign affairs, defence and international and interstate trade: powers not allocated to the Commonwealth are exercised by the States.

The Commonwealth Constitution binds the States but most of a State's constitution is contained in State Acts which can be altered by State Parliament or, if a State Act requires, by a State referendum. Except, at the request of all State Parliaments, the Commonwealth Parliament can not alter the constitutions of the States. The Commonwealth Constitution can be altered by a referendum of all Australian voters and the opinion is widely held that such a referendum could alter any parts of State constitutions although there are different opinions on this.

CHANGE

The current debate whether to change from the Queen as head of the Commonwealth of Australia and each State to each having an Australian as republican head of state reveals that many on both sides lack knowledge of what a Governor now does in Australia. I do not take sides as to whether a monarchical or republican head of state is preferable.

I speak of the Victorian Governorship, the one with which I am most familiar. While there are differences of emphasis it is a fairly typical example of what is done by Governors and the Governor-General today. All have similar powers, restraints and potentials.

I mention some features of the present system worth preserving whether Victoria remains monarchical or becomes republican while retaining its broadly Westminster system.

There have been great changes in recent decades. Governors are conscious that the continued effectiveness of the Governorship depends on the satisfaction of community needs and expectations of that office. In order to continue to comply with those basic needs and expectations constant adaptations of style and method in response to evolving community changes are necessary. Since 1974 Victorian Governors have been drawn from this community.

Important constitutional changes were made by the *Australia Acts* 1986 passed at the request of all State Parliaments by the Commonwealth Parliament and the Parliament of the United Kingdom. Once, the Queen had important powers of over-riding the Governor, which in practice meant the British Government had those over-riding powers. The Governor in actual practice then represented the Queen and the interests of the British Government. Now the Governor acts entirely independently of the Queen and the British Government. The Governor acts on the advice of the Victorian Premier or Executive Council.

Although the Monarch now has no direct influence, Queen Elizabeth II is the outstanding exponent of the way the constitutional powers and functions of head of state should be exercised in a modern Westminster system. Her example is an invaluable guide for Governors.

DEMOCRACY

Whatever may have been the position in earlier times, the objective of today's Governors is clear. As I said in my inaugural speech in April 1992:

"The most important responsibility of the Governor is to facilitate the working of the Parliamentary democracy of this State".

The Governor is guardian for the whole community of the constitution of a democracy. In 1992 the decision of the High Court in the *Political Advertising case* was based on the premise that the system of government provided by the Commonwealth Constitution is that of a representative democracy. The same can be said of the Victorian Constitution.

It is the Governor's responsibility to facilitate the working of the democratic system and to encourage the attitudes necessary to make it work.

A good democracy depends both on a suitable system and suitable community attitudes. A satisfactory system of elections, Parliament, government and courts is needed. It is also necessary for the great majority of people to have confidence in their community and its democracy, a respect for others and their rights and interests, and a readiness to accept and comply with their responsibilities and with the decisions of the decision-making organs of the democratic system just mentioned.

It is the Governor's responsibility to facilitate the working of the democratic system and to encourage the attitudes necessary to make it work.

ATTRIBUTES

Because it is the function of the Governor to counsel Ministers, on rare occasions to act as constitutional umpire, and to encourage community cohesion, it is important that a Governor should be respected and obviously impartial and apolitical.

There is advantage in a Governor being appointed towards the end of a career. At that stage the person has had time to build the reputation, display the qualities and acquire the knowledge and experience desirable for a Governor.

Our system, which has the basic features of a Westminster system, vests a great deal of power in the Governor. There are constitutional laws and conventions to ensure that those powers are exercised in accordance with the will of the electorate expressed by the election of the majority in the Legislative Assembly of the Victorian Parliament. In all but the most exceptional circumstances the power of the Governor is exercised as advised by the Premier or by the Executive Council where usually four Ministers represent the Government. The Premier and the Ministers of the Government, of course, have the confidence and support of the majority in the Legislative Assembly.

It is essential to the operation of our system as a democracy that the Governor's powers be exercised almost always in accordance with the advice of the Executive Council where that is specified by law, or the advice of the Premier in other cases. The mode of appointment and the setting within which a Governor is placed should ingrain this necessity in a Governor's mind and give every encouragement to comply with it. There should be every discouragement against the temptation to act as a power rival to the Premier and Government whose responsibility it is to govern.

APPOINTMENT

The Victorian Premier, not the Government, chooses who is to be Governor and the Queen makes the appointment on the Premier's advice. Although a Governor usually arranges to serve for a period of five years, the period which gives full pension entitlement and exceeds the four years' life of one Parliament, the appointment is "at pleasure". The Premier could decide at any time to have the Governor dismissed and convention would require the Queen to do so. In Australia during the last 75 years no Governor has been dismissed before the end of the arranged period.

Within the Westminster system, a procedure where the Governor is chosen by the Premier and appointed on the Premier's advice by a respected office-holder or public body has advantages over alternative methods.

If the person to act as constitutional head of state, such as a Governor, had to be elected by the electorate, the campaign would require expensive and sophisticated organisation. Few but the most wealthy could stand without the support of a political party. A Governor so elected would not be regarded as apolitical and impartial. Moreover, the elected Governor would be regarded both as having a mandate and as owing obligation to the political party, which would bring pressure on him or her to achieve political results through political activism in competition with the Premier.

Many suitable persons with attributes appropriate for a Governor would be reluctant at their stage of life to court the attacks likely to be made on their character during an election or to risk crowning a successful career with electoral rejection.

A process which required a candidate for Governor to be proposed by the Premier and endorsed by

"The Governor is custodian of Government House, Melbourne, a symbol of statehood of outstanding grace, beauty and utility".

a simple or higher majority of both Houses or of a joint sitting of Parliament also carries difficulties.

A parliamentary hearing in which the candidate would be interrogated in much the same way as proposed appointees to the Supreme Court of the United States would be likely to develop. The Opposition would endeavour to show the Premier's nominee unworthy. It could be an effective political tactic for the Opposition to withhold votes necessary for endorsement so as to create the impression the Premier was incapable of proposing a person fit to receive parliamentary endorsement. The process itself would tend to identify the nominee in the public eye with the Premier's party. A person with a good career and reputation asked to agree to be nominated would not welcome running

that gauntlet. If a person holding high office were refused parliamentary endorsement some would then question the person's fitness to hold the high office.

Theoretically Parliament could reach consensus upon a candidate chosen by the Premier after consultation with all parties and interests. Reality reminds that Parliaments in Australia, perhaps because of their relatively small number of members, have not shown themselves even capable of reaching consensus on a suitable Speaker.

An accommodation might be reached in which the major parties on either side of politics agreed to take turns in having their candidate endorsed unopposed.

Would a system of election by the electorate or of endorsement by Parliament be likely to produce suitable Governors? Would people such as those who in the past served as Governor or Governor-General with satisfaction to the community be prepared to be candidates under either system? Or would those systems be likely to produce an entirely different type of person?

It is suggested that there is great merit in the system which has evolved here that the Governor is chosen by the Premier alone. The Premier is aware that he or she alone has to bear the responsibility for, and the judgment of, both the community and history upon the quality of the person selected. Alexander Hamilton made the telling observation that it is human nature to wish to be remembered by posterity and that "love of fame is the noblest passion of the ruling mind".

Suggesting merit in that aspect of the system does not favour either the monarchic or the republican concept of head of state. Within a monarchical system the Governor could continue to be chosen by the Premier and appointed by the Queen. Within a republican system the Governor could be chosen by the Premier and appointed on the Premier's advice by a body of highly-respected persons bound in the same way by the same conventions as the Queen now is. A Constitutional Council of three former Governors, Governors-General or judges could make the appointment: say a Council headed by a former Governor with a former Governor-General and former Chief Justice as the other members.

Under a republic the Constitutional Council could have the power to dismiss the Governor and be bound to exercise the power on the advice of the Premier in accordance with the same conventions as now bind the Queen. It could be provided that such dismissal be no more justiciable by the courts than a dismissal by the Queen would be now.

The Queen's only remaining powers today are to appoint or dismiss the Governor on the advice of the Victorian Premier and the right, if physically present in Victoria, to exercise on the Premier's advice her powers which have not been conferred on the Governor by legislation. If the power to appoint or dismiss the Governor on the Premier's advice were transferred to a Constitutional Council created under the Victorian Constitution; the Governor became the constitutional head of the State of Victoria instead of being the representative of that head; and the Queen's right to exercise powers when actually in Victoria were ended, Victoria would have a republican form of government.

Should the power to dismiss the Governor at any time remain or should the Governor have a guaranteed term subject to removal only for misconduct or incapacity or on some other basis? I suggest the present system creates a sophisticated and flexible balance between Premier and Governor which a guaranteed term for the Governor would upset. At present a Governor who, without exceptional justifying circumstances, refused to act on the advice of the Premier or Executive Council would be aware of the likelihood of being dismissed with public approval.

A system requiring parliamentary endorsement for appointment of a Governor would be expected to provide for dismissal by Parliament. If a Governor were to be elected by the electorate, it would be logical for the electorate to have the power of dismissal. In either way dismissal would be likely to be protracted and cumbersome. In practice a Governor would often be virtually irremovable. The present Westminster system has a capacity to act quickly. The observation that a week is a long time in politics would have particular piquancy if a Governor was actively abusing his or her position and could only be removed by a slow process if at all.

A Governor is conscious that he or she has not been elected by the electorate or endorsed by Parliament but has been selected by a Premier past or present. This discourages the Governor from developing the self-image of having a mandate which would justify competing in power with the Premier.

Both the Governor and the Premier have the power to dismiss the other or have the other dismissed. Yet each knows full well the damnation which dismissal would earn from the community and from history unless the one who dismissed, or brought about the dismissal of, the other could show that it was entirely justified. In practice this almost always confines dismissal to circumstances where it is entirely justified. A Premier or Governor whose conduct accords with community expectations virtually never has cause to fear dismissal. In human affairs the attainment of that balance is quite an achievement. An understanding of it depends on an understanding of political realities rather than legal provisions. Ultimately democracy depends on people, politics and practical procedures, not on precepts in pieces of paper.

It might be asked, if the Premier is the one who has the decision to appoint or dismiss a Governor, why have the appointment or dismissal done by the Queen or the Constitutional Council? Why not let the Premier appoint and dismiss?

While the Queen is bound, and a Constitutional Council would be bound, by convention ultimately to act in accordance with the Premier's advice, passive compliance would not be required. Whenever the Queen or a Governor is bound by law or convention to act in accordance with the advice of the Premier or the Executive Council there is a right to counsel against the course advised. Traditionally it is called the right to be consulted, to encourage and to warn. The Constitutional Council would also have that right. It would follow that if the Premier advised that an unsuitable person be appointed the Queen or Constitutional Council would be expected to counsel against it.

Appointment by an apolitical personage or body standing high in community respect tends to confer on the appointee an aura which facilitates performance of the functions of head of state.

With regard to dismissal, the right of the person or body with the actual power of dismissal to counsel the Premier is also important. Counselling is usually taken seriously by a Premier or other Minister. The person or body would not have to act immediately on the Premier's advice to dismiss but could take a few days to obtain necessary information, make inquiries and consider whether to counsel against the course advised. The Governor's views could be sought. One way or another, the Premier's colleagues would be likely to learn of the Premier's advice. If that happened and the advice to dismiss was unjustified, the political process would be likely to lead to the advice being reversed within those few days.

GOVERNOR-GENERAL

The Governor is not only entirely independent of the Queen but entirely independent of the Governor-General. In relation to Governors, the Governor-General is the first among equals, but that is as far as it goes.

PARLIAMENT

The Governor, on the advice of the Premier, dissolves the Legislative Assembly and brings about a general election, issues writs directing the Electoral Commissioner to conduct elections and return the writs to the Governor endorsed with the names of those elected, summons and opens Parliament, delivering a speech written by the Premier, and sends to the Legislative Assembly the formal message which is necessary to originate a Bill for the spending of any part of the Consolidated Fund. Because the Governor acts on the advice of the Premier in sending such a message, no Bill for spending money in the Consolidated Fund can be initiated without the Premier's approval.

A Bill passed by both Houses of the Victorian Parliament does not become law until it receives from the Governor the royal assent.

The Senate, the upper House of the Commonwealth Parliament, is treated as the States' House and the Governor, on the advice of the Victorian Executive Council, issues the writ for the election of Victorian Senators in a federal election.

GOVERNMENT

The Governor commissions the leader who has the confidence of the majority in the Legislative Assembly to form the Government. The Governor appoints and swears in that person as Premier and the other members of Parliament nominated by that person as the other Ministers of the Government. Sometimes it is not self-evident which leader has the confidence of the majority and the Governor has to investigate and decide.

The Governor, on the advice of the Premier, may pardon a person for a crime, direct the release of a person serving a term of imprisonment or being kept in custody during the Governor's pleasure, or remit a fine.

As a check to ensure that no money is drawn from the Consolidated Fund except that which has been appropriated by Parliament or is otherwise legally available, the Constitution provides that a warrant signed by the Governor is necessary for money to be drawn. In signing such warrants the Governor ordinarily relies on the certificate of the Auditor-General.

GOVERNOR IN COUNCIL

Acts of Parliament delegate many powers to be exercised by the Governor in Council. In practice that delegates the decisions upon the exercise of the powers to the Government or its Ministers. The order or other action which in law effectively exercises the powers is that of the Governor. The Governor makes the order or takes the other action, such as making a proclamation, "in Council". That means that it is done in accordance with the advice of the Executive Council, consisting of at least two, and usually four, Ministers.

The Governor presides at meetings of Executive Council. On average about sixty recommendations by individual Ministers for action by the Governor in Council go before each meeting. Of these only the most important, about 10 per cent, have the endorsement of Cabinet: the rest go forward on the responsibility of the individual Minister.

Acts of Parliament confer on the Governor in Council powers to take executive action, such as appointing judges or department heads; legislative action, such as making regulations; or quasi-judicial action, such as deciding town planning appeals

called in by the Minister. Hundreds of such powers are conferred on the Governor in Council by Victorian Acts.

It is in respect of these powers exercised as Governor in Council that the Governor most frequently exercises the constitutional right to offer counsel to Ministers of the Government.

Executive Council usually meets at 10 a.m. on Tuesdays. On the previous Thursday departments deliver to the Clerk of the Executive Council the recommendations and papers which explain what the Governor in Council is being asked to do and why. The Clerk is well versed in the principles of good government and when delivering the papers to the Governor on Friday afternoon identifies any recommendations that appear to require particular attention.

On the Monday the Governor examines all the papers bearing in mind the right to offer counsel to Ministers in an appropriate case. The Governor's main concern is not with issues of political policy. Broadly, they have been determined by the election of the Government majority.

The concern is to ensure that the powers of the Governor in Council are exercised regularly so as to be constitutional, valid and effective, in compliance with any principles of natural justice or procedural fairness which apply and in accordance with the appropriate practices and conventions of good government.

This is the last check on the work of the Public Service in a process which is often not the subject of other outside surveillance. The pressures upon busy Ministers often give them no time to check that a recommended action consistent with policy will be regular in the ways mentioned. All in government can be tempted to take short cuts, to seek to conceal earlier errors or to regard the end as justifying the means. The knowledge that there will be a last check, of itself, has a salutary effect.

The Governor does not investigate the recommendations and supporting papers in great depth. It is seldom necessary to do more than look at the papers and the statutory provisions on which a recommendation relies. It is not necessary to form a view on difficult constitutional questions. Attention is concentrated on those items where, on mere examination, the information provided seems inadequate or there appears to be a serious risk of irregularity. Usually if a difficulty arises the Governor consults the Official Secretary of the Office of the Governor who has long experience of the practice of Governors and who is sworn as a Clerk of the Executive Council.

If inadequate information is provided, the Governor may defer action until sufficient information is provided and considered.

If the Governor is of the view that the above principles require action to be taken to avoid irregularity there are several courses open. The Clerk may be asked to speak to a departmental officer and that may be all that is necessary. The Governor may offer counsel directly to the recommending Minister, who may alter or withdraw the recommendation. The Governor may counsel the Ministers present at the Executive Council meeting.

If the Governor does counsel Ministers that what is proposed would not be regular, experience of two Governments shows that if Ministers are persuaded of that they will almost invariably take steps to ensure that what is done is properly done.

Because counselling is confidential to Governor and Minister, a Minister who is persuaded to change a recommendation loses no face by doing so. Being confidential few people know it takes place. Counselling Ministers is one of the Governor's most important functions.

The Governor has real potential for influence over the conscience of governmental affairs.

Acts of Parliament confer on the Governor in Council powers to take executive action . . . It is in respect of these powers exercised as Governor in Council that the Governor most frequently exercises the constitutional right to offer counsel to Ministers of the Government.

Ultimately, in all but the most exceptional circumstances, the Governor acts upon each recommendation in accordance with the advice given by the Ministers at the Executive Council meeting. That advice is usually to do what the recommending Minister finally recommends.

The processes of Governor in Council enhance the effective operation of Cabinet. The Clerk in examining the recommendations and papers checks that the recommendations comply with Cabinet requirements. All Ministers know that their recommendations which have not gone to Cabinet will be seen by four Ministers at Executive Council, including at least two senior Ministers. This tends to produce conformity with Cabinet policies.

Concerns have been expressed that the strong

party system renders a Government's accountability to Parliament relatively ineffective; and that modern systems of organisation and tenure place Public Service leaders in a less secure position than before to offer strong and unwelcome advice to Ministers. That emphasises the importance of the Governor in Council fulfilling the contemporary potential so well expounded by Sir Paul Hasluck in his Queale Memorial Lecture, *The Office of Governor-General*, MUP, 1979.

ARTICULATED ACTION

Under the articulated system which involves the Government deciding on action and the Governor taking the action, the Governor has real influence and the Government lacks absolute power. It is good for a Government or Minister to know that the chosen course of action will need to be explained to the Governor who may question it and counsel against it. It is good for a Governor to know that his or her influence grows from persuasion, not power or mandate, and that counselling carries greater weight if it comes from one acting obviously impartially and apolitically.

RESERVE POWER

The Governor has a small residue of discretionary power, called the reserve power. It can be exercised in extraordinary or emergency circumstances without, or contrary to, ministerial advice in order to prevent the democratic system from stalling or from being abused. An occasion for its exercise seldom occurs. A circumstance would occur if a Premier having lost an election refused to resign and to advise the Governor to call upon the Leader of the Opposition to form a Government. There, in order to prevent democracy from stalling and being abused, the Governor would ordinarily, without, or contrary to, the advice of that Premier, dismiss the Premier and commission the Leader of the Opposition to form a Government.

The reserve power relates to the appointment or dismissal of a Premier or the dissolution or refusal to dissolve the Legislative Assembly. It appears that a Governor would also be entitled, as a last resort, to decline to act in accordance with ministerial advice to do something clearly illegal, whether as Governor in Council or in signing a warrant for the withdrawal of money from the Consolidated Fund.

Because there is infinite variety in the ways a democratic system may be brought to stalling point or may be abused, it would be very difficult to set out all the circumstances in which the reserve power may be exercised or to do other than provide the Governor with the existing limited discretion to deal with such a situation if it arises.

Provisions which limit the circumstances in which the democratic system can be stalled or abused may be useful. Thus some constitutions prevent Parliament from being stalled by an upper house refusal of supply.

It is a cardinal principle that a Governor should never "ambush" a Premier — should never exercise the reserve power without having given the Premier adequate warning that it may be exercised.

The practical effect of eliminating altogether the Governor's reserve power would be to transfer to the Premier at the time — who may be the one stalling or abusing the democratic process — the discretion the Governor now has.

It is important that the person performing the functions of head of state be seen to emphasise that the things that bind the community are stronger than the things that divide.

COMMUNITY ATTITUDES

The community places the Governor in a position with many opportunities to encourage the attitudes of mind essential to a successful democracy and other attitudes which are in the community interest.

The office of Governor should be seen as a symbol of unity strengthening social cohesion and all citizens should be able to feel an empathy and secure relationship with the occupant of that office. In our democracy where Government and Opposition are properly in continuous competition for the support of the electorate, it is important that the person performing the functions of head of state be seen to emphasise that the things that bind the community are stronger than the things that divide.

Acting on behalf of the community, encouragement, appreciation and gratitude are expressed to those whose voluntary work enhances the quality of community life, those who excel in occupations, arts or sports, the brave, or those who give other commendable community service. Support and encouragement are given to community organisations

which support, encourage or organise those activities.

The Governor and Governor's wife do these things by what they say in their speeches, by presenting awards and honours, by their visits and by invitations to Government House. With organisations they become patrons, receive the calls of leaders, attend or open functions or new premises and invite members to Government House.

They also act to encourage and express sympathy to those who suffer disadvantage or disability and those who care for them. This includes the unemployed and those with physical or mental disabilities.

Any decision whether or not to make change should only be made by a well-informed community after due consideration. The present system, based on Westminster principles and developed in Australia to suit this community, has substantial though often subtle strengths.

ADMINISTRATION

The Office of the Governor is, within the *Public Sector Management Act* 1992, an Administrative Office with the Official Secretary acting as its Department Head and responsible for its general conduct and management. The Office is related to the Department of the Premier and Cabinet and the Official Secretary is responsible to the Premier. However, it is universally accepted that the predominant responsibility of the Official Secretary is to the Governor as head of the Executive. The working relationship between the Governor and Official Secretary is comparable to that between a Minister and Department Head.

The Governor has a substantial administrative function in the area of the overall policy of the Office of the Governor and spends a good deal of time working in the study or conferring with senior staff.

HEAD OF STATE

The Governor, having the functions of head of state, and the Governor's wife commonly meet on arrival heads of state of an overseas country or of one of its states, provinces or prefectures and receive, entertain or accommodate them at Government House.

Ambassadors of countries overseas and their spouses on their first visit to Victoria are invited to lunch with leading Victorian citizens who share an interest with the overseas guests or their country.

At the request of the Premier, the Governor and Governor's wife may travel overseas representing Victoria to strengthen the ties of friendship or cultural or other relations.

On official formal occasions of importance to the spirit, feelings or traditions of the community, the Governor often speaks. Thus, the Governor delivers the Anzac Day address at the Shrine of Remembrance in Melbourne at the conclusion of the march.

CUSTODIAN OF GOVERNMENT HOUSE

The Governor is custodian of Government House, Melbourne, a symbol of statehood of outstanding grace, beauty and utility.

The Office of the Governor, which has about 30 administrative and service staff, is located there. It is also a reception centre, a place of accommodation for overseas heads of state and others, and the home of the Governor and his wife.

In addition to guests being invited to meals and receptions being held there, Government House is on occasions made available to the community in other ways. On Open Day in 1992 22,000 people saw through it. The Ballroom, State Hall, State Drawing Room, and grounds of Government House are put to use for community advantage. There are receptions for people and organisations deserving well of the community. Awards and honours are presented. Each year the grounds are made available to four voluntary and community-based organisations to conduct functions to assist in raising their funds and profiles.

CONCLUSION

What I have written is not designed either to support or to resist change in the characteristics or functions of the constitutional head of state. Any decision whether or not to make change should only be made by a well-informed community after due consideration. The present system, based on Westminster principles and developed in Australia to suit this community, has substantial though often subtle strengths. They are evident in the relations of a Governor with Parliament, Premier, Government, Executive Council, the democratic system and the community. They should not be lightly discarded. Any changed system should be one likely to continue those strengths in the real world of practical politics.

BAR NEWS INTERVIEWS JUDICIAL REGISTRARS NIKAKIS AND RAMSDEN

JUDICIAL REGISTRAR CON NIKAKIS WAS appointed on 18 December 1989 (*vide*: (1990) 72 Vic B.N. 15). **Judicial Registrar Jon Ramsden** was appointed on 28 April 1992 (*vide*: (1992) 81 Vic B.N. 27). Family Law practitioners will be well aware it is extremely unusual to meet both Judicial Registrars in the same juridiction on the same day. *Bar News* had to avail itself of the opportunity of the Family Law Bar Association Annual Dinner in order to obtain this interview.

Bar News: Each of you had been in practice for in excess of 20 years prior to your appointment. It must have been quite a shock to your system to take on the appointment. What was the most significant feature for each of you of your transition from Counsel to Judicial Registrar?

Judicial Registrar Nikakis: I think isolation. I can't say that life is lonely but there is not the sort of social activity that existed at the Bar.

Judicial Registrar Ramsden: I suppose adjusting to the fact that you are no longer required to commit yourself to the cause of a client which required not only a change of outlook but also involved a loss of personal contact in the conduct of a case.

Bar News: What about demands on your time? Have they changed?

Judicial Registrar Nikakis: Yes! Significantly! The great change is more time each evening. I can now read for my own satisfaction and I read more widely. I am no longer required to prepare briefs as I used to. That is a big difference.

Bar News: What about judgments? Do they take the same sort of time?

Judicial Registrar Nikakis: As a Judicial Registrar, sitting mostly in the Duty List, most of the judgments have to be *ex tempore. W*orking on a judgement at home is the exception with me rather than the rule.

Judicial Registrar Ramsden: Yes, exactly. Your time is more regular. One doesn't have the last-minute brief that you had to trouble yourself about at night. I think that has, in my case, improved my quality of sleep, amongst other quality of life issues. Which is not to say the hours are strictly court hours but more regular working hours. There is not quite the same sense of panic one experienced from time to time in life at the Bar.

Bar News: I suppose you do not get the "4.30 special" anymore?

Judicial Registrar Ramsden: You can be a candidate for the 2.15a.m. telephone call when rostered on duty for the after-hours service.

Bar News: The afterhours special application — has that happened very often?

Judicial Registrar Nikakis: I must say that I have been spared. I have had to attend to an urgent matter after hours on only one occasion. I think that the Registrars do an absolutely magnificent job in filtering applications after hours.

Judicial Registrar Ramsden: Yes I think there is no doubt that is right. They are the ones who have to screen all the inquiries that come in at unpleasant hours and they only pass on the matters that really do seem to require judicial assistance. So it is not a frequent occurrence. So perhaps 2.15 a.m. was an embellishment of the norm.

Bar News: What about weekends?

Judicial Registrar Ramsden: I think that you are more at risk at weekends, possibly, because of the overholding of access. The chance of being called upon is probably greater at the weekend. It certainly hasn't happened to me frequently, I must say. More than once but probably only on three or four occasions in total, I suspect.

Bar News: You have been Judicial Registrars obviously for different periods of time. Have you noticed any changes in the role over your respective tenures?

Judicial Registrar Ramsden: I'll defer to seniority.

Judicial Registrar Nikakis: There has certainly been a change in the four years that I have been in the position. The point is, of course, Registrars conduct directions hearings. The effect of that is that the Judicial Duty List of the Judicial Registrar has, I think, become more complex than it was when I first started. The list may be not as big as it once was but it can be really quite difficult and relatively demanding. Each of us sits at both Dandenong and

Melbourne. My experience is that the Dandenong Judicial Duty List is not quite as demanding as the Melbourne Duty List. The Melbourne Duty List verges on being a "killer" — I don't think that is too much of an exaggeration.

Judicial Registrar Ramsden: Oppressive.

Judicial Registrar Nikakis: Certainly oppressive. *Very* demanding.

Bar News: It seems to me that, over the last few years, there has been a change in the complexity of matters that find their way to the Judicial Duty List . . .

Judicial Registrar Nikakis: Yes.

Bar News: . . . and all of them seem to be urgent.

Judicial Registrar Nikakis: That is one of the demanding aspects of the position. As Jon said, the Judicial Duty List is an oppressive one. Because of that, one has to occasionally look for the "soft underbelly" of an argument and draw attention to it. Sometimes practitioners, perhaps, don't quite appreciate the Bench pointing such matters out to them. It is essential, in order to address all matters in the list.

Bar News: It must be difficult to balance the need to get through your work with the time that more complex matters demand?

Judicial Registrar Nikakis: Yes. Yes.

Bar News: Does that trouble you from time to time?

Judicial Registrar Nikakis: The court constantly reviews procedures and, as you are aware, there is now a back-up judge assigned to the Duty List from time to time. I refer to that as an example.

Judicial Registrar Ramsden: I agree that in Melbourne the potentiality for judicial assistance is there, depending on the demands of the other Registries for assistance from the Judges of our Registry, whereas at Dandenong, of course, the norm is to have only one judge, and a Judicial Registrar, so the likelihood of somebody being able to assist is not so good.

Bar News: It still seems to me, though, that there must be days when you just haven't got enough time, whether or not you have the assistance, to cope with the matters you have there . . .

Judicial Registrar Nikakis: Oh yes.

Bar News: . . . with the sort of time you would like to give them.

Judicial Registrar Nikakis: Yes, yes, that is so.

Bar News: There does not seem to be a solution to the balance?

Judicial Registrar Ramsden: Another aspect, of course, is that you can only get through the volume of work, if the cases are dealt with "on the papers", as it is said, but there are clearly cases where a factual dispute needs to be determined before you can make an appropriate adjustment. If you are going to take evidence in the Duty List then we are not going to shift the workload at all. That poses a potential problem I must say.

Bar News: Has your perception of counsel, and other practitioners appearing in the Family Court, changed as you have made the transition from counsel to Judicial Registrar?

Judicial Registrar Ramsden: Counsel in general, or individual members of counsel?

Bar News: I think it would be safer to say "Counsel in general".

Judicial Registrar Ramsden: There are certainly occasions, I must say, when particularly after a busy day I feel that perhaps I haven't been assisted to the extent that I would have wished but then I am reminded, I think it was in the musical comedy *Damn Yankees* — but I wouldn't be held to this — where a gentleman comments in song, "Why can't they be more like we were, perfect in every way? What's the matter with kids today?" I ask myself therefore whether my recollection of the performance of Counsel when I was in practice, including my own performance, is entirely accurate.

Bar News: It is said that practitioners in certain jurisdictions are far more aggressive than practitioners in Victoria, whether they be counsel or solicitors. Is that a fair comment?

Judicial Registrar Nikakis: When we travel interstate we see members of other Bars. I am of the view that the quality of members of the Victorian Bar is really excellent. It compares very favourably

with anywhere else. As to practitioners in other states being more aggressive, I think that is so in some instances. Mind you I don't know that a "kick in the head" approach is always appropriate in Family Law.

Judicial Registrar Ramsden: I must say that I do not disagree with what Con has said about the performance of counsel and the quality of the Victorian Bar generally.

Bar News: There is probably no argument that the more experienced barristers who appear before you are of good quality. What do you say of those who are at the other end of the continuum?

Judicial Registrar Nikakis: I think one should endeavour to show some understanding, perhaps tempered with gentle prodding.

Judicial Registrar Ramsden: It may not only be a matter of experience of counsel but rather judgment and sensitivity, I think, which in this jurisdiction can be valuable tools.

Bar News: And what about the litigant in person?

Judicial Registrar Nikakis: There are some "cranks" — and I put those to one side. Particularly in children's matters, it becomes necessary to investigate the matter hopefully not in an inquisitorial manner. I try to make eye contact with the litigant in person. I try to communicate with him or her and try to explain court procedures. I find that, by and large, people are receptive to that approach. I find that my work is made more difficult when people are not represented. Most, I find, are sensible people and some are not quite so sensible. They are all emotionally involved and for that reason you have to make allowance.

Judicial Registrar Ramsden: It gets particularly difficult when both parties are unrepresented. Then the likelihood is that they will engage in a personal war and of course they are not necessarily very au fait with court procedure. In such cases I sometimes wonder whether you shouldn't be clothed in the garb of the ring announcer at a boxing fight, with black tie and dinner jacket, because it seems to be you are required to referee a contest as much as to adjudicate upon the matter. It is a human management problem as much as a judicial problem, I think.

Bar News: Are the opportunities for interaction between the Bar and the Bench here different or the same as in other jurisdictions?

Judicial Registrar Ramsden: I doubt that I would know.

Judicial Registrar Nikakis: I don't know. I have been in this jurisdiction exclusively for too long now for me to be able to assess that. I can say this, that with practitioners who I know to be experienced in the jurisdiction there is much co-operation I think flowing from the Bar table to the Bench and it is all very helpful. I couldn't compare with other jurisdictions.

Bar News: Are you able to make comparisons between those jurisdictions where there is a separate Bar and where there is not?

Judicial Registrar Nikakis: I have had in Canberra and in Adelaide practitioners appear before me who are as competent and as good as any barrister in Melbourne.

Judicial Registrar Ramsden: Yes, that is my experience. In the two weeks that I sat in Adelaide earlier this year I certainly had no cause to be concerned about the competence or courtesy of the practitioners.

Bar News: Do you see any changes developing in the role of Judicial Registrar?

Judicial Registrar Nikakis: The work seems somehow to have become more sophisticated. Cases have become more difficult and arguments have become more complex. That seems to have been the trend — exactly why I do not know. I'd expect that development to continue.

Bar News: Is it because, as the court develops, it develops ground rules and so, in certain relatively simple matters, the results are foreshadowed by the fact that people know where they are going to go?

Judicial Registrar Nikakis: I have always believed that courts of law reflect the community, reflect the society. We live in a society which is becoming increasingly more complex and I think

we just reflect that. Perhaps that is an over simplistic sort of answer to your question.

Bar News: There seems to be a concentration these days on child abuse matters more than there has been in the past?

Judicial Registrar Ramsden: The frequency of those sorts of complaints is, unhappily, all the greater these days. I suppose a most recent development is the increase in the number of applications for the appointment of separate representatives for children in the light of the guidelines published in the Full Court case in *Re K* earlier this year.

Judicial Registrar Nikakis: Yes.

Judicial Registrar Ramsden: I suppose that is an interesting development in the practice of law in this jurisdiction.

Bar News: It is almost a means by which the parties are trying to supplant the court by saying "well, if we have a separate representative appointed the separate representative might, in some way, mediate or arbitrate between the parties or put forward something that is acceptable to them".

Judicial Registrar Ramsden: Yes, I sense that this is the agenda on occasions. I recently had a matter where it did not seem to be that it was in the interests of the child or, indeed, for the furtherance of the matter for the court to make the appointment. I sensed that the parties were really looking for somebody to assist them to resolve the matter and I think that raises an interesting question as to whether it is appropriate to make an order in those circumstances.

Judicial Registrar Nikakis: What it does do, of course, is to give the children a separate voice and that is important. There are some places, of course, where in every case concerning the welfare of children, such appointments are made automatically. That is the position in New Zealand and, from something I have read recently, in France. In France, they have found it very helpful in resolving problems concerning children. The important thing is, I think, it gives children a seperate voice.

Judicial Registrar Ramsden: I think that Justice Kirby had something to say, recently, on the subject of the rights of school children.

Judicial Registrar Nikakis: That's right.

Judicial Registrar Ramsden: So the affirmation of children's rights is a very current topic.

Bar News: Quite often, it is that the question before the court turns out to be "what view has the child expressed?" and it may well be that a separate representative may be able to bring that before the court more quickly, or to the parties anyway.

Judicial Registrar Nikakis: I suspect that the separate representative will be of more assistance later on in a defended list rather than in a Duty List, although even in the Duty List I have found a separate representative very helpful particularly when parties have had confidential counselling. A separate representative can be of great assistance at that stage.

Bar News: Returning to the situation earlier, where the parties were looking to the appointment of a separate representative to give them some guidance it might be a situation where, if the facilities were there, to refer the parties into instant mediation. A mediator may be able to do what some parties or their practitioners would like a separate representative to do. You could make that a precondition to separate representation at an early stage?

Judicial Registrar Nikakis: I suppose that is a possibility.

Bar News: I see it as a precondition to the appointment, or the consideration of appointment, of a separate representative that the parties have mediation.

Judicial Registrar Nikakis: I think studies have shown that mediation is not the appropriate way to go in all cases — there are certain conditions that have to be satisfied before you can get to mediation. One of the matters that has to be taken into account, if you are considering mediation, is the relationship between the parties. If, for example, you have a real bully of a husband and a very meek wife, mediation is not indicated.

Bar News: Do you see that Judicial Registrars are going to have to do more Duty List work or less Duty List Work and more Short Defended work?

Judicial Registrar Nikakis: It depends very much upon the Registry. For my part, the ideal thing, of course, would be a nice evenly-balanced mix but one doesn't always get that.

Judicial Registrar Ramsden: The impact of the simplified procedures may well produce a difference in the balance of the workload. My impression is, without understanding exactly how it is all going to work out, that we may be relieved of some interlocutory work. So, perhaps we will be free to do more trial work. I must say that that would be welcome. That is certainly an aspect of work in Dandenong, which I think is most agreeable, that one does have the opportunity to have a break from Duty List work on Thursdays and Fridays and undertake some trial work. A change of pace if nothing else.

Bar News: What tips do you have for counsel appearing before you, perhaps in the Judicial Duty List?

Judicial Registrar Nikakis: At the call-over, to state what the issue is and how long the hearing is going to take and, at the commencement of the hearing, to remind me of what the issue is. To open the matter, I suppose, with expedition. I do not know that I can say much more.

Judicial Registrar Ramsden: I must say, one thing that I regard as a positive improvement would be if counsel, who generally do — without question

— an exceptionally fine job, would not present what purported to be minutes of consent orders at five to one, or maybe even later — closer to the luncheon adjournment — which include an order for the appointment of a separate representative as if that were a matter merely for the parties. I sense that there is either a misunderstanding on the part of some as to what are strictly matters of consent or alternatively some misunderstanding of my bodily needs which certainly include the need for sustenance.

Bar News: I suppose the same thing happens at five minutes past four as well?

Judicial Registrar Ramsden: It is a problem that has been encountered at that time, but more commonly shortly prior to lunch, for reasons that I have never understood.

Bar News: Perhaps there should be a rule that no consent matters will be dealt with after ten minutes to one or be commenced after ten minutes to one?

Judicial Registrar Ramsden: That may be unnecessarily restrictive.

Bar News: There seems to be a lot of pressure on counsel, from one member of counsel to another, to get that agreement so that they can be dealt with before one o'clock?

Judicial Registrar Nikakis: I am always conscious of the fact that often there are some very "nice" moments in negotiations when negotiating a compromise. I haven't forgotten what it was like out in the corridors. I suspect that often the tactics of the morning's work all fall into place at about ten to one when the last Ts are being crossed. I try to make allowance for that but it is, I agree, a bit of a pest when people turn up just before one o'clock with minutes — it doesn't make life all that easy.

Bar News: I suppose there is also the problem with consent with sending parties away for a lunch break?

Judicial Registrar Ramsden: The agreement may not hold?

Bar News: Yes.

Judicial Registrar Ramsden: Yes that is certainly a factor I am mindful of.

Bar News: Getting back to tips for practitioners: it seems to me that, more often than not, the first question you ask after you have been told what the matter is about is "what exactly do you want?"

Judicial Registrar Nikakis: Yes. Yes. I suppose I throw my mind back to what I learned in my early days of appearing in a Magistrates' Court, which was a busy court. It just made good sense to be able to stand up and tell the magistrate what the case was about very quickly, tell him what I was after.

Bar News: Can I ask just one more question: are you still enjoying, each of you, being Judicial Registrar?

Judicial Registrar Nikakis: For me it is one of the finest things that has happened to me: yes I am enjoying it. For me it came at precisely the right time in my professional development. It is interesting, it is challenging and it is stimulating. You can't ask for more than that.

Judicial Registrar Ramsden: Yes, I am certainly enjoying it wholeheartedly.

Bar News: Thank you.

LEGAL EDUCATION IN THE SCHOOL SYSTEM

A paper delivered by the Honourable Mr. Justice Kent of the Supreme Court of Vanuatu, at the Vanuatu Secondary Teachers' Annual Conference.

"UPON THE EDUCATION OF THE PEOPLE the future of this country depends."

When I opened this conference, I emphasised the important role that you have as teachers. This role has been long recognised, although many would be prepared to criticise the teachers of our community and their role in society. The opening sentence of this session is not mine. It was spoken by Benjamin Disraeli, in the House of Commons on 15 June 1874. It was as true for Britain then as it is true for Vanuatu today.

In the education of the people, proper decisions must be made both as to what is taught and as to how it is taught. You, the teachers, must be involved in deciding both of these things.

Before the statement above Disraeli observed, in 1863, "Colonies do not cease to be colonies because they are independent".

Vanuatu's true independence depends upon the education of the people and a throwing off of reliance upon the outside world. This is the challenge of the educators. Your challenge. To state these things does not mean that there is nothing to be learned from the outside. Quite the contrary. Many skills cannot be learned without the observation of and contribution from experienced people of other countries. However, do not sell yourselves short and believe that you must be subservient to the views of outsiders. In the world around you, too often form has taken over and substance has been neglected. Be confident in your own ideas and beliefs and pursue them.

CURRENT PROBLEMS

Lack of understanding of the legal process and the judicial system.

LEGAL SYSTEM

British-based. French influence is limited. As far as court cases are concerned, the system that has been adopted is known as the adversary system. The Continental systems are known as Inquisitorial systems. Our system depends upon the parties being able to properly prepare and present their cases. This involves gathering together the evidence needed to prove the case or to challenge the case presented against them. It usually involves witnesses and will also involve the production in court of exhibits. These may consist of actual objects, photographs or documents.

COMMUNITY UNDERSTANDING OF THE LEGAL SYSTEM

Virtually non-existent as a consequence of the failure of those involved in the law and the failure of the pre-Independence administrators and the post-Independence authorities to make any attempt to inform the community. In just the last few months there has commenced an effort to correct this. It will involve co-operation between a number of different sectors of the community. For example, we have commenced by involving the court, the Public Prosecutor, the Public Solicitor, the police force and local Chiefs in the project. It began recently in Tanna.

Why nothing as been done until this time is impossible for me to understand. Unfortunately, it is perhaps typical of colonial attitudes which in part are motivated by the desire of some to make their continued presence in someone else's country necessary. I told you in opening this conference that my role is, in part, to endeavour to make my continued presence unnecessary. That is not because I do not have a great affection for this country and its people, quite the opposite.

I hope that the schools will be able to play an important role in answering the needs which I will describe.

THE NEED TO UNDERSTAND THE NATURE AND SUBSTANCE OF THE LAW

It was obvious from a very early stage that there was little community understanding of the nature and the content of the law. Let me give you two examples.

1. The Tanna Case.

Some years ago, an infant girl was swapped for an older girl. The older girl went to become the wife of a young man in a nearby village. The infant replaced that girl in the family from whom the older girl had come. She was raised by a man and a woman as if she was their daughter. It was her belief, as she grew, that she was in fact their daughter, their other children her sisters.

When she was probably in her mid teens, she was told by the woman she regarded as her mother that she had in fact been swapped and that she was to marry a male of their family. This, she was told, was proper in custom. The difficulty was, that there was only one surviving male, the man she regarded as her father. He, it was claimed, in custom, was entitled to three wives. The girl was to become his second wife.

Everyone believes that they are right. They do not recognise the fact that the court is an independent body, there to resolve disputes between citizens.

In the evening, shortly before Christmas, she was taken to the man's bed. He there had sexual intercourse with her. The girl did not wish to and she struggled, resisted and cried, but she was unable to prevent him from raping her. This was repeated on the following two nights. The fourth night was Christmas Eve.

The girl, by then frightened, distraught, before nightfall, took a sharpened stick and a piece of cloth to a tall tree. She climbed to a high branch, blindfolded herself with the cloth and threw herself, headfirst, toward the stick, trying to pierce her head with the stick. She missed the stick and was found unconscious beneath the tree.

The man, who was then charged with three counts of rape, had no idea that what he had done was against the law. He had never heard of the law. From the point of view of the girl and from the point of view of an informed community, the crime was as bad an example of rape and its effects upon the victim as one could imagine. From the point of view of the accused he had done nothing wrong. The situation in this case and like cases is like a sporting event, where the referees decide to change the rules after the game has started and fail to tell the players. The need to inform the public is obvious.

2. In the course of a training program for Island Court Justices, a number of chiefs were required to judge cases, prepared and presented before them. One case was a charge of the theft of a kilogram of rice from a Co-operative store. The Justices heard the evidence, retired to consider the sentence and returned and ordered that the defendant give one kilogram of rice to the store within one month. This decision failed to recognise that theft is an offence against society, not merely a civil wrong as between two citizens. It demonstrated again the need for more teaching of the rules.

THE NEED TO UNDERSTAND THE NATURE OF THE JUDICIAL SYSTEM

Many people believe that they only need to go to the court and explain things to the clerks there and they will take care of their problems. Everyone believes that they are right. They do not recognise the fact that the court is an independent body, there to resolve disputes between citizens. I think that there needs to be community education in this regard and I think that in the long term, the best way of achieving this is by teaching the principles to the young, in the schools.

THE NEED FOR LAWYERS

No matter how much understanding of the concept of the law the citizens have, laws become increasingly complex and there is a need for specialist training. Napoleon thought that it was otherwise and there are those who think that he was correct. I am not sure that this is so but I am not here to debate the merits of one legal system over another. Many think that it is lawyers who make the law complex for their own purposes. I have not yet met a lawyer who does not wish to have the law made simpler. It is just very difficult to do.

Here in Santo, until recently there was not even one lawyer, permanently based. Currently there is one, an employee of the Public Solicitor's Office. She is overworked and under-resourced. People's rights are, in my view, virtually non-existent unless there is a strong, independent and skilled legal profession, which can take on cases for the people, so as to ensure that their rights can be enforced. The courts cannot take this role on if they are to remain the independent arbiters of disputes.

PROPOSAL

I think that the ultimate objective should be the establishment of formal classes in Legal Studies. This could be, perhaps, a two or three-year course of study, commencing at either Year 10 or 11. Such a course may not be seen as a high priority presently. For the present, I think the introduction of the

topic on a less formal basis would be desirable. In fact, even with the introduction of a formal course of study, I believe that the basic concepts of the law should be taught to all students at an earlier level. It perhaps should be dealt with at both primary and secondary levels.

I suggest that such a course could involve judges, magistrates, lawyers and the police in coming into the schools for instructional sessions. It could also involve school visits to the courts and the police stations and perhaps the prisons.

The content of such a programme could cover a study of aspects of the Constitution as the source of the law of Vanuatu, study of the nature of the law and the legal process, a study of basic principles of criminal law and particular crimes and finally a study of basic civil law including contract and civil wrongs, which are known in the law as torts.

In addition, there could be included in specialist courses some aspects of legal teaching. The question of business law has been rated as one possibility and I believe that this is certainly something which should be followed up.

I woud like to see this proposal followed up and I would be happy to hear from anyone interested in conducting such a programme. For those of you who are in Port Vila, you could contact me at the court here or, alternatively, contact the Chief Registrar in Port Vila, Mr. Justice Downing. At this stage, we would be able to put together a short programme, which could be build upon for the future, with cooperation between the schools and the judiciary.

THE BAR — A PATHWAY OR A BARRIER TO JUSTICE?

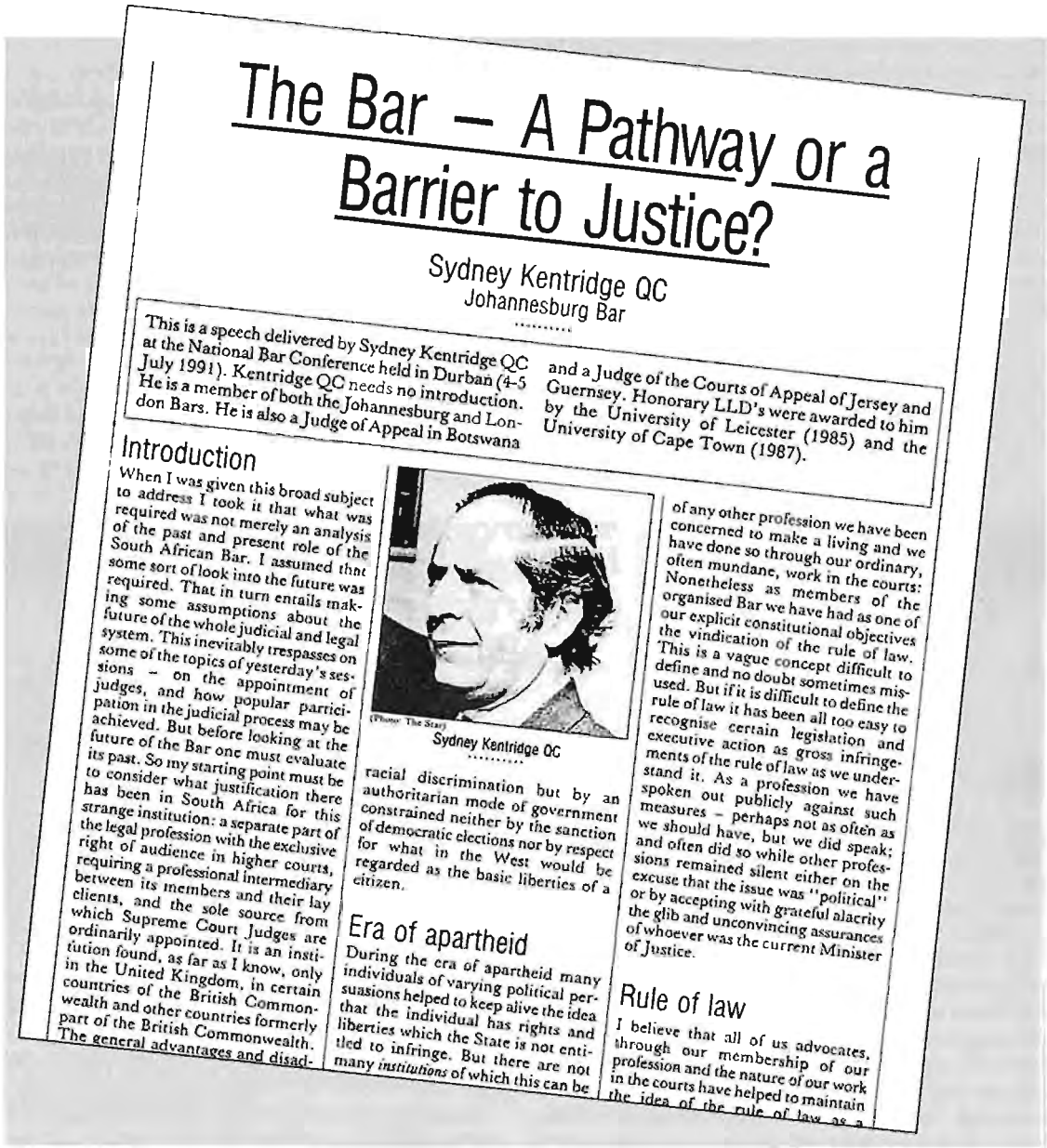
A speech delivered by Sydney Kentridge Q.C. at the National Bar Conference held in Durban (4–5 July 1991).

WHEN I WAS GIVEN THIS BROAD SUBJECT to address I took it that what was required was not merely an analysis of the past and present role of the South African Bar. I assumed that some sort of look into the future was required. That in turn entails making some assumptions about the future of the whole judicial and legal system. This inevitably trespasses on some of the topics of yesterday's sessions — on the appointment of judges, and how popular participation in the judicial process may be achieved. But before looking at the future of the Bar one must evaluate its past. So my starting point must be to consider what justification there has been in South Africa for this strange institution: a separate part of the legal profession with the exclusive right of audience in higher courts, requiring a professional intermediary between its members and their lay clients, and the sole source from which Supreme Court judges are ordinarily appointed. It is an institution found, as far as I know, only in the United Kingdom, in certain countries of the British Commonwealth and other countries formerly part of the British Commonwealth. The general advantages and disadvantages of the system have been debated time and again — cost, convenience, specialisation. It is unnecessary to repeat them. But on an occasion like this a more specific and stringent test is possible. The one which I would propound is, how has the South African Bar performed during the 40 years of apartheid from which we now seem to be emerging — a period marked not merely by institutionalised and compulsory racial discrimination but by an authoritarian mode of government constrained neither by the sanction of democratic elections nor by respect for what in the West would be regarded as the basic liberties of a citizen.

ERA OF APARTHEID

During the era of apartheid many individuals of varying political persuasions helped to keep alive the idea that the individual has rights and liberties which the State is not entitled to infringe. But there are not many *institutions* of which this can be said. At present I can think of only four: the English language universities, the English language press, the Supreme Court and the Bar. Among these, I join together the Supreme Court and the Bar for reasons which I shall try to develop. In consequence a discussion of the Bar must entail a discussion of the Bench.

At the outset I disavow any suggestion that the Bar is a profession of crusaders for justice. Like members of any other profession we have been concerned to make a living and we have done so through our ordinary, often mundane, work in the courts: nonetheless as members of the organised



The Bar – A Pathway or a Barrier to Justice?

Sydney Kentridge QC
Johannesburg Bar

This is a speech delivered by Sydney Kentridge QC at the National Bar Conference held in Durban (4-5 July 1991). Kentridge QC needs no introduction. He is a member of both the Johannesburg and London Bars. He is also a Judge of Appeal in Botswana and a Judge of the Courts of Appeal of Jersey and Guernsey. Honorary LLD's were awarded to him by the University of Leicester (1985) and the University of Cape Town (1987).

Introduction

When I was given this broad subject to address I took it that what was required was not merely an analysis of the past and present role of the South African Bar. I assumed that some sort of look into the future was required. That in turn entails making some assumptions about the future of the whole judicial and legal system. This inevitably trespasses on some of the topics of yesterday's sessions – on the appointment of judges, and how popular participation in the judicial process may be achieved. But before looking at the future of the Bar one must evaluate its past. So my starting point must be to consider what justification there has been in South Africa for this strange institution: a separate part of the legal profession with the exclusive right of audience in higher courts, requiring a professional intermediary between its members and their lay clients, and the sole source from which Supreme Court Judges are ordinarily appointed. It is an institution found, as far as I know, only in the United Kingdom, in certain countries of the British Commonwealth and other countries formerly part of the British Commonwealth. The general advantages and disad-

(Photo: The Star)

Sydney Kentridge QC

racial discrimination but by an authoritarian mode of government constrained neither by the sanction of democratic elections nor by respect for what in the West would be regarded as the basic liberties of a citizen.

Era of apartheid

During the era of apartheid many individuals of varying political persuasions helped to keep alive the idea that the individual has rights and liberties which the State is not entitled to infringe. But there are not many *institutions* of which this can be of any other profession we have been concerned to make a living and we have done so through our ordinary, often mundane, work in the courts: Nonetheless as members of the organised Bar we have had as one of our explicit constitutional objectives the vindication of the rule of law. This is a vague concept difficult to define and no doubt sometimes misused. But if it is difficult to define the rule of law it has been all too easy to recognise certain legislation and executive action as gross infringements of the rule of law as we understand it. As a profession we have spoken out publicly against such measures – perhaps not as often as we should have, but we did speak; and often did so while other professions remained silent either on the excuse that the issue was "political" or by accepting with grateful alacrity the glib and unconvincing assurances of whoever was the current Minister of Justice.

Rule of law

I believe that all of us advocates, through our membership of our profession and the nature of our work in the courts have helped to maintain the idea of the rule of law as a

Bar we have had as one of our explicit constitutional objectives the vindication of the rule of law. This is a vague concept difficult to define and no doubt sometimes misused. But if it is difficult to define the rule of law it has been all too easy to recognise certain legislation and executive action as gross infringements of the rule of law as we understand it. As a profession we have spoken out publicly against such measures — perhaps not as often as we should have, but we did speak; and often did so while other professions remained silent either on the excuse that the issue was "political" by accepting with grateful alacrity the glib and unconvincing assurances of whoever was the current Minister of justice.

RULE OF LAW

I believe that all of us advocates, through our membership of our profession and the nature of our work in the courts, have helped to maintain the idea of the rule of law as a counter-balance to naked executive power. The rule of law I believe is upheld not only in great cases or in political cases, but in the day-to-day work of lawyers for the defence in every kind of case. During the particular period I am speaking of, cases often arose of a political nature; that is to say, cases where some individual came into conflict with the political objectives of the State and found himself consequently in either a criminal or a civil court. In these cases there were nearly always (I am sorry that I cannot say always)

members of the Bar available to act for them, however unpleasant this task sometimes seemed. And at times it was very unpleasant indeed. It is worth thinking back to the series of prosecutions of members or former members of the African National Congress during the 1960s, where the venue chosen by the prosecution was frequently a distant (and unfriendly) village with which the accused had no connection and which was far from any centre of the practising Bar. I can think of many members of the Bar, some of whom are now on the Bench, who spent day after day in Magistrates' Courts in such places doing their best in a hostile environment both in and out of court. They did this not because they were nobler than other people but because the long tradition of the Bar required them to do so. This is not true only of the apartheid era. During the years from 1939–1945 there were always members of the Bar prepared to defend persons accused on serious charges arising from opposition to the wartime government. The tradition goes back even further. In cases of treason and murder arising from the 1922 Miners' Strike on the Witwatersrand, C.F. Stallard K.C., then the leader of the Johannesburg Bar, not only ensured that counsel were available to undertake *pro Deo* defences but undertook some of them himself.

CAB-RANK RULE

Regrettably, there were times especially in the 1950s and 1960s when, in contrast to the advocates' profession, there were few attorneys prepared to take on political cases. Why this contrast? Again, not because by nature we are morally superior to our colleagues of the Side-Bar. It was because we were independent practitioners, members of a profession which inculcates into its members certain standards of objectivity and of public duty. The South African Bar, like the English Bar, requires its members to observe the so called Cab-Rank rule. This rule requires that a member of the Bar should be prepared to accept at a reasonable fee any brief in a court in which he ordinarily appears. As the rule is expressed in the Code of Conduct of the English Bar he must do so:

"irrespective of (i) the party on whose behalf he is briefed or instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character, reputation, cause, conduct, guilt or innocence of that party".

Sceptics have said that this rule is easy enough to evade — the offered fee, if any, may not be deemed reasonable, the counsel concerned may have a prior engagement. Nonetheless it requires that an advocate should not refuse to act for a client because that client is unpopular or regarded as socially or politically undesirable. This rule has real content. It is not a general rule of the legal profession. It is a rule of the Bar. Again, this is not because the attorneys' profession is a less honourable one than ours. The conditions of attorneys' practices are such that they cannot apply such a rule. Their relationship with clients has to be closer than that of advocates and it is often a continuing one. They are entitled and indeed obliged to have regard to the views of their partners and to the effect that a particular case may have on their practices. I can illustrate this by an example which came to my attention some years ago. A firm of standing and repute was approached by a correspondent to take an important case for an individual against the government of a newly independent homeland. This individual claimed on reasonable grounds that he had been unjustly and unlawfully treated by that government. There was no problem of fees. Yet the attorneys declined to act. They said frankly that they were not prepared to take the case because they were hoping to have the new government as a client and did not want to alienate it by taking a case against it. Whatever we may think of their conduct those attorneys had broken no rule of their profession. By contrast it would have been impossible for an advocate to refuse a brief on that ground. He would have found himself before the disciplinary committee of his Bar Council.

The rule of law I believe is upheld not only in great cases or in political cases, but in the day-to-day work of lawyers for the defence in every kind of case.

INDEPENDENCE OF ADVOCATE

This brings me naturally to the two closely related aspects of the Bar as a profession. The first is the independence of the advocate. He is a sole practitioner, and his professional ethos requires him to maintain his independence. He will not take instructions which might compromise his duty of frankness to the court before which he appears. The way it is put in the Code of Conduct of the English Bar is this:

"A practising Barrister has an overriding duty to the Court to ensure in the public interest that the proper and efficient administration of justice is achieved: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court".

It provides also that:

"a practising Barrister must not:
(a) permit his absolute independence, integrity and freedom from external pressures to be compromised; . . .
(c) compromise his professional standards in order to please his clients, the Court or a third party".

These principles also govern the conduct of the South African Bar. Perhaps they are not always easy to live up to but that is the standard which we set for ourselves, and which members of the Bar have often enough reached.

SPECIALISED SKILL

The second aspect of the Bar's work is its specialised skill in advocacy. I believe that the South African advocates have done their professional work well. They have not only done a good professional job for their clients but they have also given to the courts that assistance which the courts are entitled to expect from those who practise before them. I do not mean to say that every advocate is an Upington, a MacKeurtan or a Maisels. But the regular and exclusive practice of advocacy brings with it a level of competence invaluable not only to the client but to the court. It is these two factors — of independence and professional experience in the higher courts — which explain why the Senior Bar is the natural source of Supreme Court judges. It is only those who have practised for long years in the Supreme Court, who have long experience of how cases are won and lost in court — who in a word, understand law in practice — who are fully qualified to take their places on the Supreme Court Bench. Many attorneys and academics whom I know personally or through their writings are superb lawyers — what they cannot match is the sharpening of forensic skills which comes from the constant debate which takes place between advocates and the Bench, and the practical knowledge of what happens on the floor of a court. This is not true of all countries. Canada and the U.S. have managed it differently. But I have no doubt that it is true of England and true of South Africa. Above all, it is the professional tradition of independence and objectivity which qualifies. Is this exaggerated? In this case comparisons are not odious, but necessary. Let us consider first the Magistracy. I would not disparage the magistrates. They bear the heaviest load of judicial work in this country. But their lack of experience in advocacy at the higher level, and above all the lack of independence which flows from their position as part of the civil service and from their inevitable background as public prosecutors, explains why they have never won the respect which has been accorded to the Supreme Court. These factors also disqualify them from appointment to what is not merely a higher judiciary but an independent judiciary. It has been to the credit of successive governments in this country that they have resisted what has been said to be strong pressure within the civil service for the promotion of magistrates to the Supreme Court.

What other comparison may be ventured? Over the many years that I have been in the profession a number of judges have been appointed to the Supreme Court from outside the practising Bar. Some have been in government service and some have been in truth attorneys who were appointed after a brief and nominal qualifying sojourn at the Bar. These appointments from outside the Bar have varied from the merely disastrous to the utterly calamitous with, in fairness, one exception, and one only. I refer of course to the late Mr. Justice D.H. Botha.

POLITICAL APPOINTMENTS

You may say that some of the appointments from the Bar have been pretty disastrous too. That is undoubtedly true. There have been too many cases of political appointments to the Bench, that is to say appointments motivated by political or racial favouritism or by the hope, sometimes fulfilled (although not nearly as often as the government would have wished), that the incumbent when on the Bench would give full support to the policies of the government. It was in pursuit of that policy that in 1956 the government packed the Appellate Division by increasing its numbers from six to eleven, making up the numbers with judges whose qualifications for promotion had hitherto escaped the profession — a step from which that court took many years to recover. But from which indeed it has recovered. That policy has also led to certain individual judges having had far too close a relationship with the executive branch of government — fortunately only in isolated instances but still an unedifying and dangerous precedent. But the fact remains that the South African Supreme Court as a whole has retained an independent court which in not a few cases has provided some protection against the excesses of the executive. If the Supreme Court has sometimes disappointed its admirers, it has just as frequently surprised its detractors. As an observer of the judicial process in South Africa over forty years, I have no doubt that the independence of the Bench stems from the independence of the Bar. Each reinforces the other. One can hardly bear to contemplate what our legal system would have come to but for the convention of appointments from the ranks of Senior Counsel. If one looks at past and present the question which forms the title of this address has only one answer.

The Bar has been not only a pathway to justice but at times the only pathway.

THE FUTURE

But what now? Will the South Africa of the future need a separate Bar? As I hope I have shown it is the independent Bar, inseparable from the independent Bench, which is the protection of the citizen against the state. Unless, under the new constitution which is coming, the government does not seek to extend its own powers, to have its own way at the expense of the ordinary citizen — unless that is it proves to be unlike every other government in the world — the separate Bar will be needed as much in the future as it is now.

But of course that is a simplistic answer. It doesn't go to the real question, *viz*, will a separate Bar and a Bench composed of former members of that Bar be seen as a restriction on the development of a more "representative" legal and judicial system? That question cannot be avoided. There are comparatively few black advocates. There are no black judges. In the past that was a matter of government policy. In any event, it was presumably not morally or politically possible for black advocates to accept appointments which would have entailed giving effect to discriminatory laws.

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I have referred to calls for a more representative Bench. The term is not my own. It is dangerous if taken literally. But pluralism on the Bench, as explained by Madam Justice Arbour and Professor Asmal yesterday — the presence of judges of varied backgrounds and origins — is plainly essential if the courts are to win the confidence of the majority of the population. If the courts do not win that confidence, less pleasant alternatives will evolve such as people's courts. This phenomenon has, to a lawyer particularly, been unpleasant and alarming. But as Mr. Justice Kriegler has recently pointed out, these courts have arisen from a feeling of alienation from the ordinary legal processes of the country. In the judge's striking phrase, blacks have felt that they were "deserted by law".

The need to bring blacks into the judicial system is widely recognised. Many have written and spoken on that subject. But when one asks "how?" and where from if not the Bar, the answers are not very clear. A writer in the Bar journal *Consultus* referring to the "imbalance" of white male judges, stated simply "Appointments from outside the ranks of advocates will have to be made". He does not say where the candidates are to be found. The Working Document of the ANC Constitutional Committee on a Bill of Rights for South Africa includes the following article:

"14(7) Without interfering with its independence, and with a view to ensuring that justice is manifestly seen to be done in a non-racial way and that the wisdom, experi-

ence and judicial skills of all South Africans are represented on the bench, the judiciary shall be transformed in such a way as to consist of men and women drawn from all sectors of South African society".

This is an excellent and heartening statement of principle. But how is one to bring about that transformation?

RIGHTS OF AUDIENCE FOR ATTORNEYS IN SUPREME COURT

Another writer, in the *South African Journal of Human Rights*, said that "candidates with suitable potential for appointment could be found amongst the attorneys' profession and at the university law schools". He adds (in his own words "even more controversially") that "candidates for the Bench — particularly black candidates — may be found among the Magistrates". Perhaps I am not sufficiently closely in touch with recent developments in the Magistracy, or the legal profession generally, to be able to comment on that suggestion. In the absence of evidence I remain sceptical. Apart from the thought that good black legal academics will be desperately needed at law schools one asks what is this "suitable potential for appointment"? Without experience of advocacy in the higher courts what is it that makes them suitable? In the long term at least surely the solution is to strengthen the black membership to the Bar by active recruitment in the universities, by awarding bursaries according to need and merit and by ensuring adequate pupillages.

What of the short term? There are already a few black senior counsel well qualified for the Supreme Court Bench, and there will be more within the next three or four years. The recent fundamental legislative changes have, one hopes, made it possible for them to accept appointments. Yet it must be conceded that the Bar is not an easy profession for a newcomer. It is particularly difficult for a black newcomer who must look for his briefs not to the public but to attorneys. If the object is to give black lawyers the opportunity and experience of advocacy at all levels then, it seems to me to be inevitable that rights of audience in the Supreme Court will have to be extended to some attorneys. I do not believe that the exclusive right of audience in the higher courts is vital to the continued existence of an independent Bar. Solicitors have full rights of audience in Ireland, New Zealand, some Australian States and, closer to home, Zimbabwe, as well as in other British Commonwealth territories. This relaxation of the Bar's monopoly has now been accepted in the United Kingdom. However, the solicitor advocate who wishes to appear in the High Court in England will have to obtain a special advocacy qualification achieved either by a period of practice in contested cases in the lower courts or by a special course of training, followed by a test. Moreover — and this has been insisted on notwithstanding some opposition from the solicitors' branch of the profession — a solicitor who wants to

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practise as an advocate in the High Court must undertake to abide by the Cab-Rank rule.

BLACKS IN SUPREME COURT

A similar set of rules in this country should help to bring numbers of black practitioners into Supreme Court practice within a reasonably short time. Rights of audience for attorneys in this country as elsewhere may have some adverse effect at first on standards of Supreme Court advocacy. But in the countries which I have mentioned separate Bars continue to exist — as happened in Natal in the earlier years of this century. In New Zealand for example, experienced practitioners with advocacy experience may at a certain stage leave their partnership firms and go into practice as barristers. As barristers they may take silk and become eligible for appointment to the Bench. In South Africa too there is no reason why the independent Bar should not continue to exist, and to play the same valuable part in the legal process as it has in the past. It will attract able practitioners of all races with a taste for advocacy, not necessarily immediately they have left university but after some experience as attorneys or, perhaps, in academic law. Far from being a hindrance to justice, it will be one of the guarantees of justice. It is a real protection for every citizen that there is a body of independent and able advocates ready to defend them in the court. And if the independence of the judiciary is to be preserved the Bar should in general continue to be the main if not the only source from which judges are selected.

My final comment is this. We have had forty years of apartheid — a word which is a euphemism not only for discrimination but for gross injustice and cruelty. To think that we can close the door on that era without having to pay some price for it is simply obtuse.

This prospect may turn out to be unreal. Perhaps those with the political power will not be content even temporarily with three or four black judges and a handful of black magistrates. Perhaps the urgent and understandable desire to redress the racial imbalance in the judiciary and indeed in the whole legal process will lead to appointments from outside the Bar of lawyers of insufficient experience of the right sort. This would be unfortunate but it may not be avoidable. We may debate the options, but perhaps it will not fall to us to make the choice. On the unpalatable prospect of lowered standards of Bench and Bar I offer some final observations, which may or may not be comforting.

First, while we should strive for excellence with all our might we should remember that no system can be devised which will produce only good judges, good lawyers, and satisfied litigants.

Secondly, this is not a new problem. In 1948, after Dr. Malan's government first came to power, the Minister of Justice, Mr C.R. Swart, considered that, given the relative numbers of the two sections of the white population, there were too few Afrikaners on the Bench. According to his own account given in Parliament, he set about redressing the balance. In appointments to the Supreme Court he gave preference to Afrikaans-speaking advocates. This affected the provinces in different ways. Natal was largely unaffected. In the Cape Province there were a number of well-qualified Afrikaans-speaking silks at the Bar. In the Transvaal at that time, as it so happened, there were very few of the requisite seniority either in Pretoria or Johannesburg. A number of advocates were pushed into silk and their appointment to the Bench swiftly followed. Mr. Swart said that his purpose had been achieved without damage to the Bench. In the Transvaal few who knew the Bench as it had been up to that time would have agreed. There was a perceptible decline in the standard of the Transvaal Provincial Division, and inevitably, in the standards of its Bar. Unhappy as this made many of us, we must acknowledge that nonetheless the Bench has survived and its independence has been maintained. It no longer matters whether a judge is English or Afrikaans-speaking: that factor is irrelevant to the judge's judicial philosophy. A new government in South Africa may be tempted to follow an analogous policy to Mr. Swart's. If so, the damage, as in the past, may be mitigated if appointments continue to be made as far as possible from the Bar; and if there is a drop in standards we should not assume it will be permanent.

FINAL COMMENT

My final comment is this. We have had forty years of apartheid — a word which is a euphemism not only for discrimination but for gross injustice and cruelty. To think that we can close the door on that era without having to pay some price for it is simply obtuse.

For the Bar, the task is to ensure that its traditions and its standards are not lost, but contribute to the building of a truly just society.

THE REOPENING OF THE ESSOIGN CLUB

THE CLOSURE OF THE ESSOIGN CLUB WAS front-page news in the *Age* newspaper. The Bar looked forward to a front page article concerning its long-awaited reopening. As incorrectly reported the Essoign Club had not closed down forever. It has re-emerged like a butterfly from its cocoon. Unfortunately the re-opening only rated a mention on page 5 of the *Age*.

On Wednesday, 3 August free drinks were provided to all and sundry for an hour. The Club was packed. Members of the Workers' Compensation Bar could not remember the last time they had got a free drink in the Essoign Club. This was just a prelude to the official luncheon opening.

The interior designer of the club, Dani Blanden, with her husband

Curtain racks accompany new Judge

The cook, the chef and the manager

On Thursday, 4 August 1994 the doors flew open for lunch. Those who entered the premises would find it completely different. The last lingering vestiges of 1970s taste were gone. Instead there is a revamped bar. New ongoing blue carpet. Designer wooden blinds have replaced the nostalgic green net curtains. There is a purple column in the middle of the room complete with copies of the *Times* newspaper. There is a ledge complete with stools facing one of the walls. Presumably one can enter the Club, survey the crowd and, having decided that there is nobody worthwhile with whom to luncheon, then take one's plate and sit upon the stool reading the *Times*.

The place was packed with over ninety barristers and judges. It was great to see the place alive again.

There is a new manager, Jane Menesdorffer. She comes with a fresh outlook and much experience in

the food industry. The lunch menu is much different to the past.

I was honoured to join a table of judges and Master Patkin. I lunched with Judge Curtain and many others. The chicken pie with vegetables was indeed excellent. It was light and the vegetables were rather different to the previous regime. The cost was only $6. Hopefully this will attract many more to attend.

There was much discussion concerning the changes. Many Q.C.s have been very generous and have given their own funds towards the renovations. A list of those who have contributed can be obtained from Hartog Berkeley.

New decor, new staff

The new staff coped admirably with the large crowd. The wine list is still excellent and house wines are being sold at $3 a glass. The whole range of wines has been revamped.

The emphasis appears to be on a more modern style of food, although there are still the excellent Club-like dishes such as osso bucco, corned silverside and stuffed chicken breasts.

Notable persons present included His Honour Judge McInerney, a former Vice-President of the Club and a driving force behind the changes. Michael Adams Q.C. was also seen holding court without his dog. The Chairman had booked a romantic table with her husband together with Costigan Q.C. Berkeley had organised large tables of those Q.C.s who had contributed towards the costs. Very generously he had invited these folk as his guests. All seemed to be enjoying themselves immensely.

Bookings have continued to be high. However, the future of the Essoign Club lies in the hands of the Bar. It is vital that younger members of the Bar support the Club. It was notable that at both the

Bar News *cartoonist meets Francis on stools*

The Crennans having an intimate lunch plus Costigan

De Koning and Shatin pick up from where they left off

I'm Rex Patkin and you're not!

A table of silk who gave

Jane Menesdorffer

drinks and the opening lunch the familiar faces of old supporters were present. Some way must be found to make the junior members of the Bar feel comfortable in attending. Certainly the prices should provide no barrier as was previously the case. One can hope that the revitalised committee will organise events and functions to attract the middle and junior members of the Bar and increase the hard-core users of the Club.

A typical lunch menu is as follows:

Soup of the day	$4.00
Chicken pie with salad or vegetables	$6.00
Vegetarian lasagna and salad	$6.00
Osso bucco	$9.50
Layered vegetable pie	$5.50
Corned silverside with vegetables (carrots, parsnips, mashed potato)	$9.50
Stuffed chicken breast (stuffed with risotto)	$9.50
Cold larder (salads)	$4.00
Essoign potatoes and sour cream	$2.50
Apple crumble	$4.50
Cakes	$4.00
Cheese plate	$4.50

The Bar needs its own Club and it needs the support of more members of the Bar in order to survive. The *Age* newspaper rejoiced in the closure of this Club. It was seen as a sign of failure and the demise of the Bar. The Bar should not allow this situation to arise again.

May the Essoign Club continue to succeed.

Paul D. Elliott

MORE HELPFUL ADVICE

WE HAVE BEEN TOLD BY ONE IN A position to know that last year saw the first decline in active members of the Bar for many a year. More people left last year than joined. We at *Bar News* feel there is some causal connection here between the advice offered to newcomers in the Spring editions for the last two years and the negative growth rate of the Bar. Those readers who believe this to be a good thing are most welcome to deposit tokens of their appreciation with Briefless's clerk — preferably used and of small denominations and, even more preferable — lots of 'em. Those readers persuaded that this is not a good thing are invited to vent their spleen on the editors (on extensions 7417 and 7730).

BEWDY, NORM

Mr. Geschke, who retired on 29 February, said that in 13 years as Ombudsman no Minister had "sought to unfairly influence my decision".

Lawyers, however, used "balances of probability, fantasies (and) oddball dictionary meanings" to justify some indefensible situations. "My view (is) that a barrister's opinion does not have the scientific basis or the reliability of a Melbourne weather report. . ."

The Melbourne *Age,* 18 May 1994

THE LAWYER AS INSTRUMENT FOR CHANGE

"No one was injured in the [bomb] blasts, but the FBI conducted an intensive investigation, and seven men were eventually charged with the bombings. At their trials, the seven were represented by John Blue Hill, an extremely skilled attorney and yet another member of Montgomery's most prestigious political family, and all were acquitted. Finally, however, the bombings and related incidents subsided — a consequence, some would say, more of the size of Hill's legal fees than the FBI's diligence."

Yarbrough, *Judge Frank Johnson and Human Rights in Alabama* (1981) 57

THE RICH ARE DIFFERENT (AND HOW THEY GOT THAT WAY)

When Carl Icahn, carrying a briefcase, and his uncle, Melvin Schnall, carrying an umbrella, go to a restaurant together, Schnall takes Icahn's briefcase so that they don't have to leave more than one tip to the checkroom attendant.

Bruck, *The Predator's Ball* (1988) 189

IN LEAN TIMES IT MAY BE NECESSARY TO MAKE WORK

Sir William [Owen] was always intent on preventing any waste of public time by undue prolongation of evidence or argument. "How long will the next case take?" he once asked. The counsel engaged agreed that three days would be required. His Honour thought the time stated excessive, and asked, "Do you mean that it will take three days or that it may be made to last for that time?"

Blacket, *May it Please Your Honour* (1927) 52–53

An incompetent attorney can delay a trial for years or months. A competent attorney can delay even longer.

Attorney-General of California, Evelle Younger quoted in the *Los Angeles Times* (3 March 1977)

It isn't the bad lawyers who are screwing up the justice system in this country — it's the good lawyers. If you have two competent lawyers on opposite sides, a trial that should take three days could easily last six months.

American humorist Art Buchwald

HELPING OUT YOUR INSTRUCTOR

Sir Julian Salomons was an adept in the matter of fees. He was cross-eyed, and once when a solicitor brought him a brief marked thirty guineas he read the figures with a painful squint and said, "You make extraordinary fives, Mr. Blank," and at once changed the three to a proper five.

Piddington, *Worshipful Masters* (1929) 208

A PERSUASIVE SPEAKER

He was good at raising money. His personality was attractive and he was a compelling speaker. Years later he laughingly described one cocktail party that he attended after already having "one too many scotches". Deciding that "it would do more damage not to show up," [Thurgood] Marshall began his solicitation, "Those of you who don't drink

probably suspect that I am drunk; those of you who do drink are certain of it." The event was successful, and Marshall later said that his "only regret was that he was too drunk to remember whatever was so persuasive". What made him persuasive, though, was the ability he demonstrated as an appellate advocate. A "suave and confident" speaker, Marshall spoke "extemporaneously," getting to the heart of the issue he was talking about and making a compelling case in terms his audience, whether judges or potential donors, could immediately appreciate.

Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961* (1994) 312–313

Ladies' Days were reserved by a few members of the faculty as occasions for the women in their class to perform like circus animals. Only women were called on.

LAW SCHOOL TEACHES ONE TO THINK LIKE A "LAWYER"

In the winter of 1944 Enrico [Fermi] went to Site Y [Los Alamos] on a business trip. One Sunday morning Emilio Segre and Hans Bethe, a German-born physicist, suggested a skiing trip. A question arose. Should Emilio or Hans waste precious petrol allowance and drive their cars, or could they take the military car at Enrico's disposal during his stay? This car was to be used for strictly business purposes, and a skiing excursion could be hardly called business, as Enrico conceded.

"It is not business for you, and therefore you should not take the car," clarified lawyer Baudino [the bodyguard assigned to Fermi], who was anxious not to miss the trip. "But should you decide to go, it would be my business to accompany you. Hence I can take the car."

The story does not say what car they drove in the end. Anyhow, they went. Baudino must have blamed himself for having encouraged the expedition: by the end of the day he was so completely exhausted that Fermi had to carry his gun. An Illinois boy out on his first mountain experience was no match for Bethe, Segre and Fermi, who had tramped the snow of the Alps [in their youth].

Laura Fermi, *Atoms in the Family* (1955) 230

YOU'RE A BETTER MAN THAN I AM, FRANK MCALLERY!

Cross-examined by Doug Milne Q.C., for Mr. Rogers, Ms Wentworth denied her evidence was motivated by hatred and rejected propositions she was dishonest, unladylike and uncouth.

The court heard Ms Wentworth had about six cases before the High Court, eight cases in the Court of Appeal and ten to twelve cases before the Supreme Court.

Mr. Milne: "It would be a fair description of you . . . that you are a habitual litigant?"

Ms Wentworth: "No. Not at all."

She denied she had made accusations of impropriety against "many, many people." "I have only taken action against 18 people," she said. The hearing continues today.

Fife-Yeomans and Glascott, "Wentworth seeks damages in rape claim," *The Australian* (15 June 1994) p.3.

TAKE THAT, SEXIST PIG

Ladies' Days were reserved by a few members of the faculty as occasions for the women in their class to perform like circus animals. Only women were called on. "All the women were made to look very smart," recalls Hope Eastman, a member of the class of 1967. "The professor would gently guide the women through the Socratic analysis, the point being — 'If these dumb women can do it, how come you gentlemen can't?'" In the mid-1960s, according to Carolyn Clark, class of 1968, Ladies' Day met a sudden death in the classroom of property professor Barton Leach, who had been the tradition's greatest enthusiast. [*Quaere*. How traditional can a practice be when it only came into being after women were first admitted to the Harvard Law School in 1950? Eds.] Leach had asked the eight women in his class, including Clark to recite a case in which the chattel in question was ladies' underwear. They had prepared themselves ahead of time and each came to class dressed in black, wearing horn-rims and carrying a briefcase. After making their presentation from the front of the classroom, the women opened their briefcases and showered a red-faced Leach with a cascade of frilly lingerie. The professor called off Ladies' Day for good.

Abramson and Franklin, *Where they are Now: The Story of the Women of Harvard Law 1974* (1986) 11

By contributing to women's political mobilization, to the success of new [political] candidates, and to governmental attention to policy issues of special interest to women, [Justice Clarence] Thomas's critical judicial nomination advanced in [Carol] Mueller's words, "[t]he dream of the suf-

fragists and the nightmare of the political bosses". Those political leaders and candidates who felt threatened by the emergence of women as competitors for political power found themselves scrambling for ways to react to these new developments. In one of the more dim-witted reactions to the success of female candidates in 1992, the former chairman of the Pennsylvania Democratic Party remarked that the women candidates "seemed to be saying, 'Here, I've got breasts. Vote for me.'" Claire Sargent, the female candidate for US Senate in Arizona who was running against incumbent Republican John McCain, fired back by saying, "Some of our opponents say we're running on a slogan of 'I've got breasts. Vote for me.' Well, I think it's about time we voted for senators with breasts . . . After all, we've been voting for boobs long enough."

Smith, *Critical Judicial Nominations and Political Change: The Impact of Clarence Thomas* (1993) 140–141

For instance, [Barbara] Billauer recounted a case in which a male attorney threw a fit over her request for documents. "It's OK," she told him, "you've got PMS. It happens to all of us."

Podgers, "Talking (back) to a Sexist," 80 *ABA Journal* 119 (April 1994)

NEVER COMMIT YOURSELF TO PAPER

The value of privacy that [Charles] Fried favoured, as a law clerk to Justice Harlan and as a young scholar, was embraced by the Supreme Court in its landmark decision about abortion, *Roe v. Wade*. Among his Harvard colleagues, Fried applauded this ruling and defended it from attack by others then on the faculty, including his colleague John Hart Ely. To Fried's fortune as a prospect for political appointment [as Solicitor General] in the Reagan Administration, he did not emphasise his support for *Roe* v. *Wade* in print. One of his lawschool colleagues said, "Right before he went to Washington, we were together and someone asked him flat out: 'Does the Administration know your position on abortion?' He smiled and said, 'Well, I've never written it down.'"

Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (1987) 13

DEMOLISHING YOUR OPPONENT'S EXPERT

David [Buchanan], turning over the pages of a book he took from the table, began by mildly asking: "Tell me, Doctor, have ye ever read aboot cases like this in *Brown on Gunshot Wounds*?"

The witness hesitated and then replied: "*Brown on Gunshot Wounds*? No, I cannot say that I know the book."

"What!" exclaimed David fiercely, "have ye no heard of the book?"

"No, Mr. Buchanan," was the reply, "I can't say that I ever have."

"Then I'll no ask ye another question," said David, and turning to the jury, he added with the deepest indignation, "A doctor that has never heard of *Brown on Gunshot Wounds*!"

Then, turning to his [instructing solicitor], he hoarsely whispered, "Take the book out of court and lose it, for if Martin calls for it I'll be damnably done".

His whole defence was that the jury could not, as "rarshional men," convict on the evidence of a doctor who had never heard of this great medical work; and there was an acquittal.

Blacket, *May it Please Your Honour* (1927) 21–22

Do you believe that? You've got two lawyers and fourteen senators in the room, and only one of them is lying?

CHOOSING YOUR LAWYER

The narrator is Simon Rifkind:

"But we finally convinced [Justice William Douglas] that the matter was serious and that he needed counsel. If possible, we thought his attorney should be a young man, in his forties or fifties, preferably a Republican and a WASP. That's how I got elected." (Rifkind was sixty-eight years old, a Democrat and a Jew. He was also a former federal judge, was a senior partner in the powerful New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison, and was generally acknowledged to be one of the toughest and shrewdest attorneys in the country.) [Also, along with singer Paul Robeson, Rifkind had been a classmate of Douglas at Columbia Law School in the 1920s.]

Simon, *Independent Journey: The Life of William O. Douglas* (1980) 407

TELL 'EM HOW IT IS WHEN YOU ADDRESS THE BENCH

As always, careful thought went into the selection of the lawyer who would conclude the NAACP's argument before the Supreme Court. It would not be Houston; there was no telling what he would say once he was caught up in the argument. In another case Houston had been interrupted by Mr. Justice James C McReynolds. "I don't understand your point," McReynolds told Houston.

Without missing a beat Houston replied, "You've never been a Negro".

Ware, *William Hastie: Grace under Pressure* (1984) 188

FOLLOW YOUR DADDY'S ADVICE

Be prepared, be sharp, be careful and use the King's English well. And you can forget all the other rules unless you remember one more: Get paid.

Robert Nix, quoted on the occasion of his son Robert Nix Jr being sworn in as Chief Justice of Pennsylvania

You've got to guard against speaking more clearly than you think.

His father's reaction to Howard Baker Jr's first court appearance as an advocate

He also gave fatherly advice when his children confronted professional dilemmas. When Hugo Jr lost a particularly hard case in the Supreme Court of North Carolina, Black wrote to him: "You had a hard case, one in which the court was not likely to feel much sympathy for your client. . . . . It's all in the year's work. . . It is time to go into Court but I just wanted you to know that you are not the only lawyer who has ever been disappointed at the dumbness of judges."

Ball and Cooper, *Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution* (1992) 31

JUSTICE IS A LADY

Justice has been described as a lady who has been subject to so many miscarriages as to cast serious reflections upon her virtue.

Prosser, *The Judicial Humorist* (1952)

NEVER OVERCHARGE YOUR CLIENT

David Henderson's early experiences in the law were not materially different from those of most young lawyers. Finally, he was retained in an estate which involved large interests. The future Congressional Speaker was very "hard up," and was seriously thinking of asking the heirs to pay his bill, which he had never rendered. He was meditating whether to charge them $200 or $300, when one of the heirs, representing them all, stepped into Henderson's office and, taking out a roll of $500 bills, said, "Mr. Henderson, I want to pay your bill."

At the same time he began laying down $500 bills until he had $2,500 before the astonished young lawyer. With a glance at Henderson, the heir asked, "Is that enough?" The young lawyer, with that self-possession that was always with him throughout his career, calmly said: "Peel off another one, and we'll call it square".

from the *Green Bag* magazine

ETHICS

Another example of counsel's resource in an emergency was that of a young barrister who afterwards became a famous King's Bench Judge and was raised to the peerage. He was called before his Benchers to explain his conduct in taking a fee of less than £1 3s 6d, the minimum fee a member of the Bar may accept, namely a fee of 13s 6d.

Appearing before his Benchers, the young man pleaded that he was not guilty, adding: "and in my view, far from having committed any offence lowering to the dignity of my profession, I have carried out the highest traditions of the Bar in taking every penny my client possessed".

Bowker, *Behind the Bar* (1947) 52

A SOFT BENCH

New York Judge Bruce Wright is popularly known as "Turn `em loose Bruce" because of his perceived leniency towards those accused of crimes.

74(2) *Judicature* 58 (June-July 1990)

LAWYER IS IRISH FOR "LIAR"

As we watched Judge Clarence Thomas's Supreme Court confirmation hearings, all of the commentators said the same thing: "One of these people in the room is lying." Do you believe that? You've got two lawyers and fourteen senators in the room, and only one of them is lying?

Jay Leno

CONCISE ELOQUENCE

A distinguished Oxford don had a particular way of snubbing clever young undergraduates. He would invite the student to accompany him on a long walk, leaving it to his companion to start the conversation. After a lengthy silence the embarrassed student would usually make some banal remark, and would immediately be crushed by the don's reply.

The undergraduate F.E. Smith, aware of the don's tactics, set off for the walk with his own plan of action carefully worked out. The two men walked in complete silence for more than an hour, and for once it was the don's turn to feel embarrassed. "They tell me," he was finally compelled to utter, "they tell me you're clever, Smith. Are you?"

"Yes," replied Smith.

No further word was exchanged until the men returned to the college. "Goodbye, Sir," said Smith, "I've so much enjoyed our talk."

Morris, *The Oxford Book of Oxford* (1979) 291

To be Continued

Brian Briefless

VERBATIM

Supreme Court of Victoria

Coram: Tadgell, Ormiston & Coldrey JJ.
City of South Melbourne v. *Roger Hallam, Minister for Local Government & Anor.*
3 March 1994
Garde Q.C. with Hammond for Plaintiff,
Graham Q.C., S.-G. with Osborn for Defendants

Graham Q.C.: "As to Question 1 in the Statement of Claim ['Was it the intention of Parliament to repeal, alter or vary Part IIA of the Constitution Act, 1975, when it passed the Bill, alternatively the Act?'], we say that the Court should answer it 'No' alternatively 'Yes'".
Hammond (interjecting): "Or even, 'Perhaps'?"

County Court of Victoria

Coram: Judge G.D. Lewis
Delkoussis v. *VWA*
Ellis and Stiffe for the Plaintiff
N. Rattray for the Defendant

Ellis appearing for a worker who had worked for the Herald & Weekly Times manoeuvring rolls of paper.
Ellis: My client had a most unusual occupation Your Honour, one I haven't encountered before, he was a Reel Mounter.
HH: I suppose it all depends on how you spell "reel".

Federal Court of Australia

Coram: Heerey J.
Trade Practices Commission v. *Ampol Petroleum (Pty.) Limited*
11 August 1994

Mr. O'Callaghan: But it is a different thing, we say, if the position arises where there is no obligations of confidentiality, no conditions imposed upon the provision of the document, and the witness would be a witness amenable to be called by the subpoenarer.
His Honour: Well, that is a dreadful word, Mr.O'Callaghan. There must be some better word than that.
Mr. O'Callaghan: I think there must be; by the person issuing the subpoena. Subpoena, I know, is a word, but I always give my learned friend, Mr. Crennan, one chance to be a pedant, Your Honour.
Mr. Crennan: And I invariably take it.
His Honour: Objection to such a word is not pedantry, Mr. O'Callaghan.

Extract from recent record of interview of alleged sneak thief

If you want to, you can talk to someone else again?
Yes.
Do you want to do that?
No, I don't.
All right then. Do you wish to have a cigarette or coffee or anything at the moment?
No, I wish to light a cigarette.
Cigarette, all right?
I'd like a coffee, if it's possible.
You want a coffee?
Yes.
All right. Got to find the lighter now? Bear with me, while I look for the lighter. It was here a minute ago, have you got the lighter on you?
Shit, sorry.
That's all right. You've had the lighter in ya your pocket all the time. Good on yah. All right then. Do you want the coffee now, or after we finish this bit, it's up to you?
No, I'll finish this bit first.

Double jeopardy? Extract from [1994] 1 V.R. 577

At some point the applicant obtained a knife from his car and attacked the deceased with it, finally plunging the knife into him some five or six times with the result that the deceased received one or more fatal blows from which he died.

County Court of Victoria

Mr. Rapke: The second thing is, could I have Your Honour's leave to, during the trial, place a computer on the Bar table; it's a laptop computer?
His Honour: I don't think it will trouble me. Does it trouble anybody else?
Counsel: No.
His Honour: It will be quiet? It won't make noises and things like that?
Mr. Rapke: No, it's not a barrister.

Melbourne Magistrates' Court

Police v. *John Dorman Elliott*
6 September 1994

Hammond cross-examining an investigating police witness:

"According to your statement, you say you have been employed by the SFO, which is the Serious Fraud Office, since March 1990? . . . That's correct.

"Now, in fact, the Serious Fraud Office itself was created as a Department of State on 7 September 1989, wasn't it? . . . Yes.

"Just one question, one last question, you are from the Serious Fraud Office? . . .Yes.

"Is there an office — the not so Serious Fraud Office?"

Federal Court of Australia

2 September 1994
Angelatos & Ors v. *National Australia Bank Limited*
Coram: Sweeney J.
J.Tsalanidis for Applicants
P.Almond for Respondent

Directions Hearing. Almond seeking further and better particulars of Amended Statement of Claim dealing with foreign currency loans before filing the Respondent's Defence. Tsalanidis contending that the existing particulars were detailed and extensive.

Tsalanidis: I refer Your Honour to 0.12 r.5(3) of the Federal Court Rules. May I take your Honour to a number of authorities in support of the proposition that as a general rule particulars should not be ordered before the filing of a Defence.

Sweeney J.: There is no need to take me to any cases as every case turns on its own facts where pleadings are concerned.

Tsalanidis: Yes Your Honour, however, the general rule is . . .

Sweeney J.: What embarrassment or prejudice would you suffer if you gave further and better particulars now?

Tsalanidis: Well, Your Honour, the Applicants should be entitled to first see the colour of the Respondent's Defence and furthermore . . .

Sweeney J.: Mr. Tsalanidis, unless you stop I am going to come down to the Bar table and wrestle with you!

Tsalanidis: I hear what Your Honour says clearly.

Sweeney J.: With regard to the expression "I hear what your Honour says", may I commend to you and to the Bar as a whole the recent article in the *Australian Law Journal.*

Tsalanidis: Thank you Your Honour.

NOTE: (1994) 68 A.L.J. at p.554:

A recent informal survey has revealed in Sydney the words "I hear what Your Honour is saying" make more judges see red than any other. The reasons are not always the same, but often centre on the impression that the speaker is saying that what the judge has just uttered is quite irrelevant.

Federal Court of Australia

G.E.C. Alsthom Australia Ltd. v. *City of Sunshine*
22 August 1994
An expert witness Dr. Van Den Broek is being examined in chief by E.W. Gillard Q.C.

Dr. Van Den Broek: I have used a certain equation which requires a half life. By half life I mean the period in which half the carbon decomposes to produce land fill gas, over the period, and I have taken nine years which is based on measurement and statistical analysis of the work we have done at our Lucas Heights land fill over the last four years and we developed a gas profile which seems to fit that particular half life fairly well.

Gillard Q.C.: And so do we understand it, what is a full life, is that . . . ?

Dr. Van Den Broek; What's a full life?

Gillard Q.C.: May be 18 years?

Dr. Van Den Broek; No. No it's not.

Gillard Q.C.: I knew I would put my foot in it.

From the "Drover's Dog" column of the W.A. Law Society's journal *Brief* (June 1994).

Conversation in crowded Central Law Courts (Perth) elevator:

A *(in loud voice)*: "Anyway, the Judge said he disagreed with me — he obviously doesn't know who I am".

B *(crusty senior barrister)*: "Yes . . . and, who are you?"

Senate Select Committee on Superannuation, 13 July 1994

Esser appearing before the Committee on behalf of the National Racehorse Owners' Association.

Chairman: I think it is very important that, when Parliament is looking at legislation affecting particular industries, occupations et cetera, that there is input at that stage. It is a lot easier to get it changed before the legislation passes the Parliament than it is once it has been passed.

Esser: Are you saying that, of all people in Australia, the National Racehorse Owners' Association

ought to know it is easier to close the stable door before the horse bolts?
Chairman: Yes I speak from the voice of experience . . . "

Melbourne Magistrates' Court Mention List

6 September 1994
Coram: Y Popovic M
6 September 1994
Police v. *Nicholson*

Her Worship *(to Defendant)*: "Do you wish to plead guilty?"
Defendant: "I don't wish to plead guilty but I am going to."

Family Court at Melbourne

26 July 1994
Coram: The Family Court Main Reception Desk

Litigant: Could you tell me which Court I am in?
Court Officer: What sort of matter is it?
Litigant: A Family Court matter.
Court Officer: What sort of Family Court matter is it?
Litigant: A Family Law matter.
Court Officer: What is the name of the matter?
Litigant: McNab and McNab.
Court Officer: [Having scanned list of cases twice] I cannot find that matter. Have you changed your name?
Litigant: No.
Court Officer: I cannot find any matter of McNab
Litigant: [Frustratedly] That isn't my name. Those are my solicitors.

Litigant then retired from vicinity of the reception desk.

Our place in the world

A member of counsel in August this year arranged to meet with his client at 8.15 a.m. in his chambers at 525 Lonsdale Street. 8.15 came and went but no client arrived. At 9.15 a.m. he contacted his instructors. They located the client at home. The client had returned home not being able to locate 525 Lonsdale Street, Dandenong.

Divide and conquer?

We print below without comment an extract from p.48 of *The Action for Breach of Confidence in Australia* by James Kearney:

"An account of profits is most useful where there is a single source of income from using the information such as in the *Argyll* case where the husband sold the information to a newspaper. It would be easy to make him account to his wife for the profit so made had she elected to do so. The same would apply to single product manufacturers such as in *Peter Pan Manufacturing Corp.* v. *Corsets Silhouette Ltd.* where both parties specialised in the manufacture of brassieres, so as a result there was little difficulty in lifting and separating the small range of products of the defendant in order to account for his profits made in relation to only one or two products."

When judges fall out?

Law List Friday, 2 September 1994
County Court Causes
Curtain P/L v. *J. Coldrey & Anor.* (Priority)

SUPPORT YOUR OWN FORENSIC SCIENCE LABORATORY

The financial difficulties facing the Victoria Police Force and the concern of the DPP to ensure that adequate educational facilities are made available to budding forensic experts are highlighted by the following extract from the transcript in *R.* v. *Socic* (Byrne J., 28 October 1993, unreported) in which application was made for a confiscation order in respect of the boots and jacket worn by the offender at the time of committing the offence.
Mr. Morgan-Payler: I have a draft order under section 5 of the *Crimes (Confiscation of Profits) Act* in respect of the pair of boots, the cream jacket, and some fired and unfired cartridges. It seems, that the boots — and perhaps the jacket also — are the real problem. Section 7 sets out the grounds for the application and section 7(l)(a) says, "If the court is satisfied . . . [reads] . . . order".
His Honour: We are talking about?
Mr. Morgan-Payler: We are talking about boots and the jacket.
His Honour: They are the problem?
Mr. Morgan-Payler: Yes.
Mr. Guest: The boots and the jacket.
His Honour: Are they boots that he may wear while he is in prison? He gets an issue, I imagine?
Mr. Morgan-Payler: He does.
His Honour: I have myself seen prisoners who seem to be wearing their own footwear.
Mr. Morgan-Payler: He does have another pair of boots, Your Honour, and they have been returned to him.
His Honour: Is there any particular reason why I should deprive him of the pair of boots?
Mr. Morgan-Payler: These are the boots that were worn on the night and the particular reason is that they — I don't know how familiar Your Honour is with the depositions. They were the boots worn on the night. There have been a number of casts made

and examination made of the boots, and quite an elaborate amount of evidence was prepared for the trial. I am instructed that those at the Forensic Science Laboratory are anxious to retain them for the purpose of training. They are the boots that were used in connection with the commission of this offence. However, it is also submitted that Your Honour has a discretion in this regard.

His Honour: The fact that they may be used for training purposes is a very worthwhile activity; but if it is thought to be desirable for the purposes of the education of police officers, why not give him a fresh pair of boots?

Mr. Morgan-Payler: I understand that is not acceptable, Your Honour.

His Honour: I will not make an order depriving him of the boots. That seems to me to be an indignity that I would not wish to impose upon Mr. Socic just because it might be useful for the educative process.

Mr. Morgan-Payler: As Your Honour pleases.

His Honour: However, if, as I have indicated, the need of the Victoria Police for that educational material is such that they would desire to have the boots, well then, they can buy them from him or give him a fresh pair of boots.

ST BRIGETTE'S CONVENT — REPORT ON WORK EXPERIENCE 1994

INTRODUCTION

It all started in first term when Sister Bernadette asked me what I wanted to do when I left school. I had always assumed that I would become a teaching nun like Sister Bernadette. It came as quite a shock when she suggested I ought to look at other possibilities. I thought long and hard and could not come up with anything. "If I can't become a teacher like you, I could always settle down and have a large family. I am sure I would enjoy that. My mother seems to be happy," I told Sister Bernadette the next day. She seemed quite disappointed. "You really ought to think about a real job," she said. I promised to go away and think about it. I went off and looked in the careers room. I waited for inspiration and it never came. My parents couldn't help me. My mother thought that I would either enter a convent or marry and have a large family. Dad ruled out going into the family licensed grocery business because that was saved up for my brother.

So back to Sister Bernadette I went. "What are you good at?" she asked. "Oh, I am pretty good at netball, I am getting good marks in History and English," is all I could come up with. She then suggested that I could consider becoming a lawyer as I was not a bad debater. "But I don't know anything about lawyers," I protested. "They only deal with filthy rotten criminals anyway," I added.

As I hadn't made any plans for work experience she suggested I do it with a lawyer to find out what they do. So I looked up the careers guide which suggested I write to the Law Institute and the Victorian Bar. I did. Many weeks later a fellow rang my home and left a message with my mother. She wasn't very impressed by me receiving telephone call from boys she didn't know and more particularly those whose families she couldn't check out. "Who's this Mr Barrister you've been talking to behind my back?" she yelled at me. "It's OK, Mum," I said, "I think he is the lawyer that Sister Bernadette wanted me to see." "Why Are you seeing a lawyer? Are you in trouble? Why haven't I been told? How come you and the school are keeping secrets from me?" After Dad got home and she had calmed down a bit I tried to

explain. I think she understood it a little bit. "What good will it do you being a lawyer? Good girls don't become lawyers! No daughter of mine is going to do anything like that!" she yelled again. She then decided that my Dad would have to ring Sister Bernadette and sort it all out. I knew it would be OK if Dad sorted it out because he can be quite a softy.

A couple of days later he told my mother who told me that it would be OK for me to ring the barrister back. "Dad says that the school said that you had to do work experience and it was too late to organise anything and some lawyers are alright."

I rang the barrister back. He didn't seem very interested. He said he had people with him. I didn't know what that meant. Anyway, he told me to be in just before 9 a.m. on my first Monday "and we will see what we will see". He gave me his office address and we left it at that. I rang him back a week before I started: "What should I wear?" He again didn't seem too interested. "Anything but jeans or sneakers and definitely no chewing gum!"

On the Friday afternoon before I was to start he rang me to say that plans had to be changed. I was instantly relieved. I really wasn't looking forward to it. "Oh that's OK." I said. "Instead of coming into my chambers I'll collect you on the way to court. You live in the South-Eastern suburbs, don't you?" When I told him I did he went on to say that we would be going to Dandenong on Monday. I had never been to Dandenong before so I thought it might be a bit more interesting that I had expected.

When I told my mother she got really upset. "No daughter of mine is going to be picked up by a strange man and taken to the country. Your Dad'll see to that." "But I can't change anything Mum. It's the weekend and I cannot find his name in the telephone book. He'll come here anyway." She did raise it with Dad and he told her that he was sure it would be alright and anyway it couldn't be changed. My mother remained quite upset.

On the Monday morning my mother was up early at 5 a.m. slamming cupboard doors, storming around the house and generally carrying on. I got up early and was ready well before 8.30 when our doorbell went. "I'll come out with you," said my mother. "No, it's OK," I said. She went to the window. "He got a nice car but I'll come out anyway." She did and she checked him out thoroughly. She told him to drive carefully and to look after her daughter. She waited outside until we turned the corner out of our street.

I don't think he was impressed although he seemed more bemused than angry. He seemed older than I had imagined. He wasn't a good driver. So my work experience had started.

DAY 1

He told me we were going to the Family Court. He asked me if I knew what the Family Court did. I mumbled that I didn't really. So he told me. I didn't understand very much of what he said. It was very complicated and he didn't explain things too well. He told me it was an interim custody matter. I asked him what that was. He didn't explain that very well.

We got to Dandenong. It was a real grotty place. We then went to the court. It seemed to be in a slightly better part of Dandenong. We met the client. I didn't really like him. He ranted and raved about his wife. He said some really nasty things about her. I am sure people really don't behave like that. I am sure she didn't sleep with two different men like he said. No one does that.

The barrister then told me we "had to book in". We went and saw a nice lady in a blue coat. She asked the barrister lots of questions. He had to keep looking in his file for the answers. "Who's that girl with you? You know she can't go into court." He explained that I was doing work experience and asked her to see if the Regis ... (I am not sure what he said) would give permission. It must have been OK because we went into court and he suggested I sit in the back row with all of the other "work experience kids". He thought I should stay there for the next hour or so. I did. He disappeared, saying something about being "sent upstairs". Two hours later he returned and said it had to be adjourned and we were now free to go into town.

This is me helping the Barrister

He suggested that, if I could hold off, lunch in the city would be better than in Dandenong. He then rang someone on his mobile and they agreed to "meet at that Jap place".

He asked if I liked Japanese food. I didn't want to say I had never had any so I said that I didn't mind it "all that much". "That's good then," he said, "we'll take in a bit of Japanese."

He drove into the city like a bat out of heck. We got in about 1.15 p.m. and went straight from the car to a place called "Hanabishi". He suggested I have a "lunch box" but without "any raw fish". I was glad because I didn't think I could handle raw fish. The food was quite nice. I managed to eat almost all of it but I was very full. The two barristers spent the whole of lunch time telling each other how good they were. I didn't understand much of what they were saying about their cases.

We left after 3 p.m. They had had a lot of wine. I didn't. He than introduced me to his Clerk. He tried to explain what his Clerk does but I didn't really understand. Then we went to his office which he called "Chambers" although he only had one room. He then went and made some coffee. After he had had a cup of coffee he introduced me to the other barristers on his floor. They all seemed very different. More about them later.

I couldn't stay much longer that day as my mother had arranged for my brother's girlfriend to pick me up and take me home and she was arriving at 4.15 p.m. The barrister had a "conference" starting soon after but suggested I read the file — he called it a "brief" — for the next day. It was another Family Court matter. This time at Melbourne. It was about access. His client had been accused of doing naughty things. I didn't read those. They turned my stomach. "This isn't going too well," I thought.

DAY 2

Off we went to the Family Court. It was very busy. I didn't like the barrister's client. The things he had done were really terrible. He said none of them were true. Why would his wife

lie? Why would she say he had done all those things if he hadn't? His children wouldn't lie to the social workers either, would they? I know the barrister did say that children can be made to agree to all sorts of things by properly-loaded questions but I wasn't too sure.

It was much like the day before. I sat for a long time in the Reggies Court. I couldn't hear much of what was going on and what I could hear I couldn't follow. There seemed to be lots of adjournments and conferences organised.

The barrister came in about 11.30 a.m. and said "We are on before the judge. Come along." We then went to another court. My barrister and this lovely lady barrister then argued for a long time — or it seemed a long time — before this judge as to whether there should be access for the next four weeks. The judge said there shouldn't as it was only four weeks and he had to look after the children's welfare. The client was very unhappy. The barrister tried to suggest that he had expected that all along. There was a lot of discussion about counselling, affidavits, witnesses and so on.

It was almost lunch time. The barrister suggested I go along. "It's Italian. You'll like it. Everyone likes Italian." So we went to this large noisy Italian place called Bocconchino's. There was the same barrister from the day before and two others. I didn't know how to tell them I wasn't very hungry. After all, when I got home the previous day my mother had put on a big dinner because she thought I would need it after "going to that funny place Dandenong and being with that strange man". She told me she would have another nice meal for me again.

One barrister asked for the biggest meal they had. The waitress seemed to know him and offered him what she called "your usual" — it seemed to be two meals rolled into one. He didn't speak much once his meal arrived because he was too busy eating.

My barrister had "marinara". It looked enormous but had lots of strange things all over it. I didn't really know what to have. Nothing on the menu sounded familiar. The nice waitress suggested I have "knocky". They insisted I have something to drink. The waitress said they didn't have coke or lemonade but suggested a special Italian soft drink. It was quite nice. The food looked lumpy with a strange green sauce. I didn't like the taste much. I had a few pieces and said I wasn't really all that hungry. They didn't believe me, I think.

The conversation was much the same as the day before except there were three of them trying to talk at once instead of two.

We got back about 3.30 p.m. I had arranged for my brother's girl friend to pick me up at 5 p.m. So I was able to stay a bit longer. The barrister said he didn't do family law all the time but had another one the next day. When he suggested I might like a change I was greatly relieved. He made some inquiries with someone else on the floor whom he said was a crime specialist. He introduced me to Donald who said he was awfully busy but if I came in at 9 a.m. the next morning he would tell me all about his matter and then I could go to the County Court with him. I didn't want to ask what the County Court was. We then had a conference with a man who said he had been wrongly sacked. I felt very sorry for him because he said he had been picked upon by his boss. I thought the barrister was a bit hard when he said, after the man had left, that he had probably brought it on himself by constantly telling his boss how to do things better. I would of thought that his boss would appreciate such advice. I am sure my Dad would.

DAY 3

At 9 a.m. we went to see Donald. He was a bit on edge. He said "I can't see you now. Can't you see I am busy? Come back at 10.15." I returned at 10.15. He had another work experience student. We went straight off to court. His client pleaded guilty. I thought the things said by the Police about him were pretty bad. Then Donald said all these things about him which made

him appear not so bad. Then the judge sent him to gaol for five years. Donald asked us: "What do you think about the result? Was I good? How do you think I went? Do you think the judge was influenced by me? Was I good? I was, wasn't I?" Neither of us knew the answer to that question.

My barrister was still at court when we got back just before lunch. I waited until 1 p.m. and went and had lunch with Patricia who is in my class and who was also doing work experience in the same building. We had a nice chicken sandwich at Myer and agreed not to talk about work experience. It was the best part of the week so far. I was able to eat my mother's dinner that night without feeling like I was going to burst. I spent the afternoon reading women's magazines belonging to a secretary. The barrister did not get back until 4.30 p.m. and then had to dash out to a Parent-Teacher night.

DAY 4

My barrister was not in court. "Paperwork day," he said without any joy. I asked if he had any work I could do for him. He said that he didn't except for updating his Family Law Service. He explained how to do it. I didn't understand him. I then followed the instructions that came with the new pages. I understood them. I do not think barristers explain things very well. That filled in two hours. I asked all the secretaries if they had anything I could do to help them. I ended up doing the dishes. That filled in another hour.

Paperwork day for the barrister appeared to consist of spending a lot of time on the telephone, a fair bit of time chatting to his colleagues, a number of trips down to his Clerk, a visit to his bank, a bit of shopping and a lot of opening and closing of his "briefs". He did a little bit of talking into his tape recorder but I doubt he did more than fifteen minutes in all.

He then suggested I join him for lunch. I think barristers must eat out every day. No wonder I never saw a skinny barrister. I lied. Well it wasn't really a lie, just a bit of a fib. I told him I had to go out and buy a present. He seemed very happy to accept my excuse. He said he may be a bit late back from lunch. I left at 4.30 and he hadn't come back. He didn't look too fit the next day.

DAY 5

He said that I might be bored going with him to court that day and asked if I would like to go to the Supreme Court. I didn't know what that meant so I agreed. He introduced me to one of his neighbours whom he said was a Q.C. He never did tell me what a Q.C. was. From what the Q.C. told me I think it means someone very important, who does very difficult cases involving large amounts of money and a great deal of law. I am sure it was right. We went across the road. The Q.C. wore a wig and robes with a funny thing dangling off the back. He had somebody to carry his books who also had robes but no dangly thing. There was only one barrister on the other side. He had no one to carry his books. It was all very theatrical, I thought. There was a lot of talking. I did not understand any of it. The judge, who also wore strange robes, seemed very bored. It got close to lunch time. There was some talk of Friday lunch — it seemed an in-joke. The judge then "reserved his decision". The Q.C. and his bag carrier went off to lunch. My barrister did not get back before lunch but turned up about 2.30 p.m. We then had a chat about what had gone on during the week. I didn't want to tell him that I didn't understand very much, that I didn't think much about people who use barristers and that I would burst if I ate as much as he did.

CONCLUSION

The $25 I got at the end of this week was almost the best thing about it. The worst was having to agree with my mother that being a lawyer was not for me. She was also right that they mixed with the very strangest of people. I am glad that I had to promise not to pass on any of the things that I heard because some of them would singe your ears.

When I told Sister Bernadette that I didn't ever want to be a lawyer she didn't seem all that surprised. She almost seemed to smile. I still don't know what she meant when she said "Mary, at least you've seen the other side of life".

It is good to be back at school with my friends and teachers. They all seem to be so normal.

When I think about it, I still don't know all that much about barristers. I know they are different to solicitors — they all kept telling me that — but I do not know in what ways they are different except all the barristers thought they were better. Barristers seem to eat a lot of large long lunches. The lunches have to be long because they have so much to tell each other about themselves. They are probably large because most of them say they don't get much at home. Their clients don't seem to be very nice people either — certainly not the sort of people I am used to dealing with. The things their clients do are quite terrible — I do not know how any decent person can agree to have such people as their clients.

I am glad I have decided not to be a lawyer. I think I would be happier sticking to my original plans. My mother and father are happy that I have given away this most silly of notions.

GETTING TO YES

WHAT MIGHT ROGER FISHER AND Conflict Management Australia mean to the Bar? The answer seems to be not much, having regard to the Bar's surprising lack of response to "Getting to Yes".

"Getting to Yes" was a negotiation workshop conducted in Melbourne earlier this year by Conflict Management Group, a Harvard University organisation, and Conflict Management Australasia, the new Melbourne centre for conflict resolution. Professor Roger Fisher of Harvard University was the star turn.

The "Getting to Yes" workshop concentrated on the analysis and development of negotiating skills. With the exception of Henry Jolson Q.C. (an instructor), the Victorian Bar was conspicuous by its absence.

And is Roger a star? The answer is yes. He devised the script on which current mediation and negotiation teaching and practice are based. He has taught that script for over twenty years at Harvard Law School. He has practised it for even longer through involvement at the highest levels in international dispute resolution. He advised the Iranian and United States Governments in negotiations for release of the American hostages in 1981. He programmed the Camp David negotiations between Egypt and Israel. More recently he separately advised the South African Government and the African National Congress on how to negotiate with each other about the transition of power in South Africa.

On a practical note, Conflict Management Australasia operates a brilliant set-up for mediation at its centre at 500 Collins Street. The facilities are excellent and really do work, particularly for medium to large-scale caucus-style mediations. They can be hired at reasonable daily rates which were recently publicised. Ken Marks (Q.C.) is chairman of the Centre in his new life as a private mediator. For further information about the Centre, or the Bar's own facilities, speak to any member of the Victorian Bar Dispute Resolution Committee (chairman, Phipps Q.C.).

J.R.P. Lewisohn

LUNCH

READERS OF *BAR NEWS* ARE UNdoubtedly blithely unaware of the lengths to which members of its Editorial Board will go to produce material of interest to its readers. For years they have to prepared to be the straight persons for members of various Benches to sharpen their wits upon — all in the name of Verbatim. Similarly, they have forced themselves to attend various Bar functions in order to ensure that they are written up. Some members are even prepared to stand in front of a photographer to ensure human interest for the next issue.

However, the biggest sacrifice is the endless search undertaken to find restaurants that are a little different, a little off the beaten track and a little out of the ordinary. At great cost to waistlines and significant risks to matrimonial harmony members of the Editorial Board have maintained this ceaseless search. They have even quietly worn the slings and arrows of those colleagues who garrulously maintain that all they are on about is a good feed.

Notwithstanding the many disappointments experienced, all in the interests of our readers, we thought we would give it another try. So putting aside our frantic practices for a short while we wandered off to Bank Place. It was a cool winter's day sufficiently dull to deter even the Mitre Tavern clientele from dining/drinking alfresco.

We arrived at No. 4 Bank Place a little nervously. The lone billboard advertised "Roubles Russian Restaurant". We girded our loins and proceeded down the stairs into yet another quiet restaurant. Like all of the other places tested for our discerning readership it was uncrowded. In fact, as our hearts sank to our mouths we calculated, fairly quickly, that we were the only diners then present. By the end of lunch we were still the only diners in attendance. Hardly encouraged, we chose to persevere and on this occasion we were well rewarded for our bravery.

Whilst we waited for Matthew to bring the menu and wine list we used the opportunity to exchange tales of our respective trips to Russia whilst listening to unambiguously Russian music and noting the Russian artefacts displayed around the medium-sized room. Our past experiences of Russian cuisine gave us ambivalent expectations. The menu however was quite promising.

From a choice of three hot and four cold starters we both opted for the "Borscht Soup". At $6 a bowl for "Olga's finest recipe" we felt we could not go wrong. What arrived were two large steaming bowls of tasty, vegetable and meat-laden soup that

was quite unlike anything similarly entitled that either of us had previously experienced. It was quite excellent as was the fresh dark rye bread and Schwob's light rye that also came out in copious quantities. It was almost disappointing as our Russian experiences had led us to expect stale thick carroway-laden heavy medium-brown slabs of bread.

There were eight main courses to choose from ranging in price between $11 and $14.50. The "market fresh fish" was Rock Ling which Matthew suggested was worth a try. The special of the day enthusiastically endorsed was the Beef Stroganoff, described to us as tender fillet steak prepared in the traditional way with onions, mushrooms, sour cream etc. Being of independent and experimental frames of mind and, of course, fully aware of our duty to our readers, we spurned the highly recommended specials and respectively chose the veal and the duckling dishes.

The "Veal Steak Pozharsky" was described as minced white veal steak served with a lemon and mushroom sauce. It was very tasty. The "Duckling Caucasus Style" was presented as "duck cooked slowly, served with a walnut, beetroot and red wine sauce". It too was excellent. Both dishes were accompanied by fresh green beans, baked potatoes, red cabbage and carrot strips. Each would have been a colourful dish except that the sauces were not exactly exciting to look at. They tasted a lot better than they looked.

There are many sacrifices that your Editorial Board is willing to make but desserts was not one of them. As interesting as the choice of six looked — including Strawberries Romanoff, Blinis (of course), a cheese platter and a fruit platter — we stuck to our guns and went straight onto coffee. It was freshly and especially brewed and came with rather tasty miniature bitter almond cornets.

The wine list was moderately priced and contained a reasonable list of Australian and Russian wines. We did try a glass of Crimean "Red Wine". It was reminiscent of thin young port. It wasn't to our taste.

Unless you want a crowded, noisy, popular, eatery which serves highly predictable food we suggest you give Roubles a try.

This was not the first occasion we had dined in somewhat solitary splendour. Looking for the exotic two of the Board's number intrepidly entered a large Indian restaurant in an anonymous lane within cooee of the GPO advertising a surprisingly cheap banquet. The restaurant was dimly lit, the decorations were profuse and the white linen covered tables many. The clientele was sparse. In fact, the only clientele were your brave reporters. They were hardly inspired but in the interests of their readership they stayed on.

The banquet came and went and unremarkable it was. Suffice to say that nothing about it sticks in the mind. Of greater impact was the couple of public servants who came in to negotiate a booking for lunch the following payday. They appeared practised and adept negotiators and were well on the way to obtaining a substantial discount on the al-

ready low advertised banquet rate. Discussions foundered when the restaurateur had the gall to enquire about a deposit for the proposed table of "20 give or take". Because of the high standards expected by our readers and the failure of memory there is little further to say of that restaurant.

Undaunted, a few weeks later the same two reporters decided to try Indian tucker again. This time it was to a well-known city restaurant they went. It too was large, festooned with decorations and replete with lavishly set tables. They were reassured, on this occasion, to find a nearby table occupied by other customers. At least they were saved that oppressive, sinking, doubting feeling that one encounters when sitting at the sole occupied table in a large restaurant. What was more encouraging was that the two gentlemen at the other table were apparently discerning, well-dressed, eager-looking young men.

When the manager came out to serve them they most graciously asked a series of questions about the restaurant and his ownership of same. They even asked if he was so-and-so, the well-known owner of same. Upon being met with a positive response they proceeded to gleefully serve him with a Magistrates' Court complaint. With admirable aplomb the recipient of such weighty documents informed them that he would place it with all of the others of similar nature. They hastened to leave and he, apparently untouched, proceeded to take our order.

The food was fairly unmemorable, enlivened only by the later appearance of Ian Duffy, *sans* bagpipes, who had popped in for an acclimatising Tandoori preparatory to some cricket tour of the Indian sub-continent. We do not know of the outcome of the various Magistrates' Court complaints or Ian Duffy's tour. We do know that the restaurant has since relocated. We are unaware of its current form or Ian's for that matter.

Undeterred we wandered up Little Bourke Street, still in search of something different. So it was that we wandered a couple of times into "The Midnight Sun". As far as moderately priced unbusy Scandanavian food is concerned it is well worth a visit although it didn't reach the heights of, say, Roubles.

Roubles Russian Restaurant
4 Bank Place, Melbourne (670 1047).

Graham Devries and Anor

A BIT ABOUT WORDS

ALL LIVING LANGUAGES CHANGE. THE rate of change is variable between languages and within particular languages. Italian changed much less between the 14th and 20th century than English did during the same period. 14th Century Italian is readily understood by an intelligent Italian speaker; Chaucer is virtually impenetrable to most English speakers.

Different registers of language show different degrees of volatility. Informal registers (especially slang) are much more volatile than more formal registers, the language of law, for example.

It is at the boundary between formal and informal registers that change causes most confusion and irritation. Use of colloquialisms in court or in polite society is a risky activity. Even so, some colloquialisms pass into accepted use, whilst others remain outside the bounds of formal registers. *Fax* has made the transition; *mobile* (as a noun, for mobile phone) has not made the transition, but is likely to. (Note that *phone* has so completely moved into proper use that *'phone* or *telephone* seem affected or overly formal).

Slang is an interesting object of study precisely because it is so volatile. It offers a speeded-up view of the processes of language change.

Perhaps not surprisingly, some slang expressions gain wide currency for a time, and then disappear. When encountered afterwards, they date the speaker or writer as effectively as fossils in a cliff face. *Flapper*, *23 skidoo*, *zounds*, *dinky-di* and *zoot suit* all carry with them a sense of another time and place.

Australian English was once very rich in slang. It is less so now. In part, this is a result of inventiveness being overtaken by laziness. *Shit* and *fuck* alone or in compound expressions, now effectively dominate slang speech. Each is now used as virtually every part of speech other than particle and preposition. Unfortunate: they are losing their edge.

In part, the growing poverty of Australian slang may be due to TV, which represents an increasing component of the verbal input of most people. TV undoubtedly uses a narrow and safe vocabulary. Baker (*The Australian Language*, 1945) complained that ". . . the American talkie is exerting the worst possible influence on Australian speech".

The world's most durable slang expression is *OK*. It was coined in 1839 and is now universally used and understood. Australia has coined some pretty durable slang expressions. *Mate*, *furphy*, *come in spinner*, and *Buckley's chance* for example. Whether or not a slang expression survives or fades is a chancy business. Consider the following:

afto (1945) — afternoon (now *arvo)*

(Prince) Alberts (1945) — foot rags worn by swagmen or tramps

tinarse/tinny (1918) — unusually lucky (now *arsey)*

boko (?1945) — blind in one eye

borak (1845) — taunting words

have the bot (1941) — to be ill, especially gastric disorder

tie up a dog (1937) — drink at a pub on credit (hence *the dogs are barking* meant the publican wanted payment forthwith)

bumper (1916) — cigarette end

gooly, brinnie (1941) — a stone or pebble (now, or until recently, *yonnie*)

trey (1859) — threepenny piece

zac (1898) — sixpenny piece

deener (1839) — one shilling

frog/quid — one pound note.

These were once in common use. The second edition of the *Oxford English Dictionary* (1989) identifies 852 words or expressions (from *abo* to *ziff)* as Australian slang — many of them no longer current. Baker, in 1945, asserted that there were about 7,000 Australian slang and colloquial expressions. In *The Drum* (1959) he lists 1,258 slang expressions. (How many now recognise, let alone use, the slang expression *drum*?)

In 1942, Jim Donald wrote in *Truth* an example of then current slang:

"I'm dropping briefs at the fight and someone drums me there's two Jacks on my hammer. I palm the briefs and front 'em and I'm a quick jerry they ain't coppers. When I tail 'em and sight 'em buyin' their ducats for the brawl, I know I'm sweet — Jacks never pay for anything."

Nothing if not dated!

By contrast, consider the following:

. . . *black stump* (1826)

bush (1826)

billy (1839)

yacker (1888); *yakker (1948)*; *yakka* (1968)

nick off (1896)

bludge (1919)

bot (1919) (in the sense of borrowing)

woop woop (1926)

pissed (1929)

put your bib in (1959)

big note (1959).

I'll make a billy of tea, OK? uses two slang words, both first recorded in 1839. It would *pass muster* (1627) without comment. But if you say *maleesh* (1919) to a *reffo* (1945), he may understand but your Australian audience is unlikely to.

It was Michael Pearce who prompted me to write something about slang. He sent me a cutting from the *New York Times* (24 June 1994) which uses the recent Australianism *sledging*. Pearce pointed out that the expression has gained currency in sporting circles in the U.K. and U.S.A. It is not recognised in *OED2* (1989). Certainly it has spread beyond sports in Australian usage. It has the merit of being concise, self-explanatory, and applicable to a favourite Australian practice. It will probably survive.

It seems to me that those are the three essential conditions of the survival of a slang expression. Social change is probably the main influence in the life cycle of slang words. The move from the bush to the city has stripped away the context and purpose of hundreds of once-common expressions. The conditions of war produced many expressions which survived only in the memory of diggers once taken to a civilian setting:

Anzac button — a nail used in place of a button

branding paddock — parade ground

camel dung — Egyptian cigarette

cream puff — shell burst

pongo — soldier (rank and file)

rissole king — army cook

shining stars — commissioned officer

souvy — to steal

throw a seven — die

throw six and a half — almost die

treacle miner — a person who brags about his position in civilian life.

The depressions of the 1890s and 1930s produced slang which ceased to have much relevance when prosperity returned. It has not revived during the depression of the 1990s, perhaps because the *dole* (1905) had replaced *susso* (1930s); the *Salvos* (1896) distribute shoes to those who would otherwise have been *toe-raggers* (1896); the *rabbit-o* (1908) now has a stall at the Victoria Market.

Two major exceptions are *swagman* and *matilda* (swag) which emerged in the 1890s, but were immortalised by Banjo Paterson in 1917. Equivalent expressions from the same time, but now forgotten, include *bender, drummer, scowbanker, scullbanker, sundodger* and *coiler* (for swagman); and *bundle, curse, shiralee, turkey,* and *donkey* (for swag).

I mentioned the *furphy* earlier. Its origins are widely known. John Furphy of Shepparton made the cast-iron water carts which carried water to the troops at Gallipoli. One of the carts can still be seen in Shepparton, and the foundry still operates there.

Because the water cart was a natural gathering point, and because it moved regularly from place to place, so it became the agency by which news was

spread. Since the news was often unreliable, the name *furphy* was attached to any false rumour. (A parallel construction is found in *scuttlebutt* — originally, the scuttle-butt was a cask of water on board a ship, where sailors drew their drinking water.)What is less well-known is an odd linguistic coincidence behind *furphy*. There had been several earlier slang expressions for false rumours or exaggerated stories, among them *mulga wire*, *bush wire* and *Tom Collins*. The last was for the author of *Such is Life* (1903) whose eponymous hero's exploits stretched credulity. *Tom Collins* also wrote far-fetched stories for the *Bulletin* during the 1890s. *Tom Collins* was a pseudonym for Joseph Furphy — brother of John, at whose foundry he worked for some years during the 1880s. So the Furphy brothers between them managed to give our language two slang expressions for the same idea.

Julian Burnside

MOUTHPIECE

Have You Ever Had One of Those Days?

HAVE YOU EVER HAD ONE OF THOSE days? It starts off with you being dragged out of a very deep sleep by a loud jangling alarm. Then you discover you have a dull, throbbing headache and a slightly sore throat. Next thing you know the shower suddenly becomes a scalding experience. A short, sharp exchange with your other half leads to you ascertaining that they have put on the washing machine based on the assumption that the time being what it was you should have been out of the shower by then. Relations at the breakfast table are decidedly tense and not helped by the fact that the children have declared war on each other, again.

So it is with a decided sense of relief you depart the house only to find your vehicle has a flat tyre. With skills born of much experience of tyre changing you get the spare on in near record time spurred on no doubt by the thought of an earlier than usual conference. A quick wash of the hands, another terse exchange of pleasantries with your other half and you are off into the peak hour traffic you may have avoided but for the punctured tyre.

It goes without saying that every traffic light is red; at every other intersection there is a driver turning right (even where the "no right turn" light is as prominent as the nose on one's face); you get caught behind a pair of trams just at the point where a couple of cars have chosen to ignore the Clearway signs; and, of course there is more traffic than usual.

Somewhat later than usual you find yourself within sight of your usual car park but, surprise! surprise! there is a queue only previously matched on a public transport strike day. It moves ever so slowly and well after your patience has run out you get to its head. "Sorry sir, there are no spots left today. There has been much greater demand than usual. Try our other park around the corner." You do. You know there will be spare spots because it is twice as expensive as any other car park in the vicinity. You haven't any time left to shop around. There are indeed spots available but only after you have queued forever — or so it seemed — and then on the top floor, out in the open. To get to the top floor is an exercise in itself. There are a half dozen cars ahead of you, each crawling along, each stopping and starting with the optimistic but highly unrealistic belief that there will be a vacant unreserved spot on a lower floor. There isn't but each spot is repeatedly and minutely inspected. It seems that each of the drivers in front of you has to consider at length the implications of the word "reserved".

After what appears to be an eternity you make it into the second last car parking spot. You get out. The heavens open and in a matter of moments you are drenched. Your umbrella isn't there — you've left it in chambers.

With indecent haste you gather all your bits and pieces together. Of course, your briefcase had sprung open unaided, tipped forward and spewed all its contents under the driver's seat. By now you are 20 minutes late for the conference and you barely have time to get to Chambers, collect the brief, pack your loose leaf reporter and get across to court. You rush for the lift. It closes in your face. The next lift comes along, after an eternity, and it is full of people from the next floor down who have given up waiting for a downwards travelling eleva-

tor. Another long wait later and an empty lift arrives. Needless to say it stops at every floor and only on half the floors is there anyone boarding it. Those who have called for the lift have given up and either walked down the stairs or taken an upwards-bound lift.

You arrive at the ground floor and rush out into the cold, wet, drizzly Melbourne winter and catch your foot in a bit of disrepaired footpath. You twist your ankle but fortunately don't fall over completely. The first good thing to happen all day. But, as if to compensate, you drop your briefcase into the nearest puddle, drowning it and splashing mud all over your lower legs.

Your rush through the Clerk's office is interrupted by the Clerk wishing to discuss with you the sudden cancellation of tomorrow's high-paying junior brief. Then it is into the lobby of Owen Dixon Chambers West. Unsurprisingly there is a large, restless crowd the members of which are bleating, yet again, about the lousy lift service. The first lift arrives. Three-quarters of the crowd get in ahead of you and it is full. The next lift arrives and yet get in. The door starts to close, and it re-opens and somebody else gets in. This exercise is repeated four more times. Each person who gets in presses the button for a floor below yours. The lift, making a sound like a Sydney train trying to exit a railway station, slowly but inexorably closes its doors. It seems to take an eternity, especially as it hesitates midway through the process.

The lift slowly makes its way to the 17th floor, stopping at all stations on the way. If that was not bad enough, on at least two occasions you are further held up as people stick their head in to inquire as to whether the lift is going down. Having eventually arrived at the 17th floor, with your blood pressure levels dangerously high, you rush around to your Chambers with humble apologies on the very tip of your tongue. Your client is not there. Neither is your brief because the client was supposed to bring it in with him. You ring your instructor. His switchboard is engaged. Three more calls later and you get through. Your instructor is not in. He is at court. "No I don't know which court." "No, they don't have a mobile phone. I'll put you through to their Secretary . . . I am sorry, she is engaged. Will you wait?" "Yes, I'll tell her it is urgent." Another eternity later and you get through. She promises to ring you on your mobile if and when she has attempted to contact the client.

You start to pack your case for court. Bloody hell!! The colleague who borrowed your loose-leaf service last week hasn't returned it yet. Whilst resolving never to lend anything to anyone again you ring them. They don't answer. Their clerk takes for ever to pick up the phone. It is not known whey they are. "They should be in Chambers by now." You haven't time to make arrangements to extricate your services from their Chambers even if that is where it is — which is uncertain.

By then, it seems like it is the end of the day. It isn't. You have two minutes to get across to court. The 400 metre hurdles begins. At the first hurdle, the lift takes its time to arrive. At the second hurdle, it stops at every second floor. At the third hurdle, the quicker back door is locked and you have to detour through the main door. At the fourth hurdle, there is only one lift available at court and it is on goods only operation and tied up by some removalists. It isn't long by that day's standards when another lift arrives. It only stops once on the way to your floor. Hopes grow that the colour of your day is beginning to change.

You start to pack your case for court. Bloody hell!! The colleague who borrowed your loose-leaf service last week hasn't returned it yet.

It is not to be. The Registrar for the first time in your memory has arrived on time and you have missed not only the opportunity to enter an appearance but at the calling-over of the matters to be stood down and/or transferred. Your try to enter an appearance during the remainder of the call-over and the Clerk gives you a loud and public dressing down. The Registrar glares at you. Your matter is number 26 in the list and it is eventually arrived at. Further embarrassment as the Registrar takes you to task for not having an appearance entered prior to the call-over. Worse still the Registrar feigns ignorance of your name. Even worse still, your opponent, whoever they may be, has not yet arrived and/or not yet entered an appearance. In those circumstances the Registrar is not inclined to transfer it to the judge and will only stand it down. You pop outside and ring your instructor's secretary. She has located the client. The client was at home thinking it was on the next day. Your client is on their way in and will be there in "about three quarters of an hour". You curse inwardly and then decide you need a calming restorative caffeine fix. You park your briefcase at the back of the court and are about to head for the lifts when your opponent arrives — not only are they breathless but it is the very last person you wanted to be opposed to. You know the

sort — bombastic, long-winded, tunnel-visioned, head-kicker, totally lacking in either a sense of humour or a sense of proportion, never been known to agree on anything including the time of day. They immediately launch into you with both barrels blazing. Amidst all the bombast and bluster you ascertain that they were delayed because they had decided it was appropriate to book the clients in for counselling "Your client is required at the information session. It started 30 minutes ago. The appointment with the counsellor is at 11.30 a.m." Ultimately, with your ears still ringing from the onslaught, and whilst your opponent pauses to draw breath, you explain that your client is still *en route*. That elicits another outburst. Eventually you convince your opponent to have the matter mentioned so that it can be transferred to the judge as the issues are ones that only the judge can deal with.

After a fair wait whilst the Registrar very slowly (or so it appears anyway) works through the consent matters your matter is next to be mentioned. You miss out because the Registrar has to leave the Bench at that moment. Whatever the reason for the Registrar's absence it is a long absence. As no one knew how long the break would be you cannot afford time even to acquire a take-away cup of caffeine.

Upon the Registrar's return you are both soundly criticised for failing to be present earlier in the call over. The Registrar ultimately agrees to transfer the matter. The Registrar's reluctance is tempered by the observation — not quite gleeful — that the judge will not appreciate a late transfer especially on a "day as busy as this".

By then, it is almost time for the judge's mid-morning call-over. You rush down — still without brief or client — and just make it to the call-over. Of course, your matter is not initially called over. You rise to mention it as a matter just transferred. The judge is somewhat less than amused. You then get a snappy description of the judge's list with a concluding observation that you are at the end of a list that will not be completed that day, in the context that there will be no other judicial assistance available either!

You head for the lifts with a view to obtaining your long awaited and very much needed coffee — now double expresso instead of cappuccino. As you arrive at the lifts a breathless individual steps out looking flushed and harassed and carrying an envelope looking suspiciously like one containing a brief. It does not take you long to ascertain that it is your client. You want the brief, you want to read it and you want to pack them off for the last ten minutes of the information session. They want to tell you why they hadn't turned up (and *inter alia*, why it was your instructor's fault); what the matter is all about; why their ex-spouse is the worst person in the world; and, generally speaking, their life story. You finally get them off to counselling. They are hardly in the right frame of mind, having become even more irritable and frustrated at your apparent lack of interest in hearing out the vital things they had to tell you.

With a big sigh you turn to go off for coffee and your opponent materialises at your side. "Why don't we go off for a cup of coffee whilst we await the return of our clients? Perhaps we can sort out a few things." It is the last thing you want to do. You know nothing will be achieved over coffee except for an exacerbation of your headache. You have no choice, however, and off for coffee you go. Your brief remains unread and you really do not know much about the matter. The coffee is purchased, you can't find a smoke-free corner and your opponent proves your worst fears to be well founded. Once more your ears ring, your head pounds and your blood pressure rises. You are saved only by the appearance of your client. Small mercy that, as your client's previous ill-humour is magnified by the things said in counselling.

You try to read the brief whilst your client rabbits on oblivious of your need to concentrate on the task. Given what has transpired earlier in the day, you decide it would be unwise to send the client off for long enough for you to read the brief in detail. Hence you manage a brief perusal of the brief. It is sufficient for you to ascertain that half of it is missing, including the affidavits that must be filed and served that day. It is, however, 12.55 p.m. and you manage to slip into court just as the judge adjourns everything over to 2.15 p.m. including the part-heard matter which still has the best part of the rest of the day in it.

You manage to get hold of your instructor's switchboard just before it closes for lunch — at least something's going your way at last — but you have just missed your instructor's secretary and no one else knows anything about the matter. "However [your instructor] is on their way back in from court and will ring you straight away."

The last thing you feel like is lunch so you head back to Chambers via the Clerk's office. There are two messages — one from your other half and the other, even more ominously, is from the bank. You ring the bank to be told that a cheque you have written has been presented but will not be honoured as you have insufficient funds. It is a pay day so you ask the bank to hold off any action until you ascertain how much you are getting in that day. Your Clerk's accounts person is *en route* from the accounts office to the Clerk's office so you have to wait awhile to speak with them. You ring home. It is a frosty reception you get. It appears that you left home with both sets of keys for the car. You are then subjected to a somewhat unfriendly description of the steps taken to get the children to school — late and unhappy as it were — and to collect

them "unless you can get away in time to pick them up". Of course you can't. This does not appear to go down too well. You haven't enough cash to pay for a taxi to deliver the keys home and courier services aren't sufficiently reliable. That conversation ends less than satisfactorily.

The next conversation is equally unrewarding — nothing has been paid in that day. You ring the bank and ask them to stall until the next day so "I can fix it up". Rather frostily, and with barely concealed threats about next time, the bank agrees. You terminate that conversation without a clue as to how you are going to fix it up the next day.

By that stage it is almost time to return to court and your instructor still hasn't rung back. You leave Chambers, lock your door and the telephone rings. You hurriedly reopen the door and lunge for the telephone as it rings off. Your switch does not know who it was as they had rung in directly. You assume it was your instructor and ring them only to be met with their recorded message inviting you to ring back after 2 p.m. It is 2.05 p.m.

You rush back to court. Various events conspire to get you there at 2.17 p.m. The judge has returned at 2.15pm precisely. The judge sees you rush in late, midway through the afternoon call-over. You are greeted with a rather frosty glare. Your matter is the last to be called over. It is still highly unlikely to get a guernsey that day.

You ring your instructor. Your frame of mind is not conducive to a pleasant chat and the conversation very quickly goes off the rails. It is decided that the missing documents will be couriered in immediately Your instructor does not run to a fax and in any case you would have difficulty relying on faxed documents especially given the less than accommodating manner of your opponent. Of course, your instructor is out in the sticks and even the most efficient of couriers will not get there much before 3.30 p.m.

Your client then buttonholes you and insists on some of the time they have purchased albeit with shrunken Legal Aid dollars. You are not very far into the conversation when it is apparent that your client's instructions are untenable, your client is not minded to listen to a word you have to say, your client is less than enamoured by their legal practitioner and storm clouds are quickly gathering over your dealings. Soon the storm breaks and you are almost sacked at about the same time you almost withdraw from the matter. You ring your instructor, who is somewhat perturbed about the way things have developed, especially as it is not perceived that they may have contributed to the tensions. Your instructor settles your client down and then you. It takes a very lengthy call on your mobile telephone at your cost.

You take further instructions and then try to ring home to try and improve matters. Your battery chooses at that moment to lose its charge. You then discover that your spare battery is flat as you forgot to recharge it the night before.

Time passes ever so slowly and eventually the clock creeps to 4.15 p.m. The judge is still doing the pre-lunch matter. You go in to have your matter stood over to the next day — at least that will make up in part for the cancellation of tomorrow's matter. The call-over of the unreached matters begins with the somewhat sad news that no matters will be stood over to the next day as it is a "Regional Conference" and no judicial time will be available except for the most pressing, urgent matters, of which yours is not one. It is to be adjourned two days hence. That is not convenient as you are part-heard that day and will have to hand back a brief if it is the day after that. The dilemma is solved for you when your opponent and the judge seemingly conspire, and at least agree, to adjourn it over to the day you are already part-heard (at Ferntree Gully what is more!).

The one consolation is that you and your client can part ways at that stage. The worst thing is that Legal Aid will not pay you for a "not reached" matter!

You rush off to a conference that had been scheduled to start fifteen minutes earlier. You get held up in the Clerk's office to discuss a fee that had been mistakenly credited to you the week before. It was a large payment too!

You get upstairs to your Chambers. No client. You eventually get through to your instructors. "Sorry, didn't you get the message at the beginning of last week? The matter settled. Sorry, no brief fee."

You go to make yourself a consoling cup of coffee. The coffee has run out. You head downstairs. Domino's have just shut down their machine. You purchase an unsatisfying mineral water. You head back to sit it out to 5.30 p.m.

5.30 p.m comes and goes and no brief materialises for the next day. You have no paperwork to fill in the day either. You can't even afford to go shopping and the way things are it wouldn't be advisable to plan on a day at home.

You trudge off to your car. At least you have an umbrella with you. It is so windy that your umbrella is useless. You get drenched again. You accept that phlegmatically and wonder what else will go wrong. You find out soon enough for in your early morning haste you had left your lights on and your battery is as flat as the tyre you changed a long long long ten hours earlier.

If this were an American film I would have you wake up at that moment relieved that it had been only a wicked nightmare. Unfortunately, as hard as you pinch yourself you are not dreaming. Worse still, the next day does not augur well either.

COMPETITION

— a triple dead heat

QUESTION:

DWYER v. *VILLA MARIA SOCIETY FOR THE BLIND*

County Court of Victoria MC 933313
25 March 1994.
Before Master Patkin.
S.A. Glacken for the Plaintiff
J.D. Hammond for the Defendant

APPLICATION FOR ANSWERS TO interrogatories Day 5.

Hammond: (Taking the Master to the Pleadings) "I should start at the beginning which is, as was said in the "Sound of Music" a very good place to start.

Master: I think it was said at the Mad Hatter's Tea party in "Alice in Wonderland," Mr. Hammond.

Glacken: I think the Master is right.

Hammond: I don't think it was, but if it was said in that it was also said in the "Sound of Music" in the song "Do Re Me" (sings) "Let's start at the very beginning . . ."

Was the Master right? Who said what in Alice in Wonderland?

A bottle of Essoign Claret for the neatest correct entry.

THE WINNING ANSWERS:

This is my entry for the competition at page 99 of the current *Bar News*.

First, the Master was right.

The relevant exchange at the Tea Party is as follows:

Mad Hatter:
"Would you like a little more tea?"
Alice:
"Well, I haven't had any yet so I can't very well take more."
March Hare:
"Ah, you mean you can't very well take less!"
Mad Hatter:
Yes, can always take more than nothing."
Alice:
"But I only meant that. . ."
Mad Hatter:
"And now my dear, something seems to be troubling you. Won't you tell us all about it?"
March Hare:
"Start at the beginning!"
Mad Hatter:
"Yes, yes and when you come to the end, stop!"
Alice:
"Well it all started when I was sitting on a river bank". . .etc, etc.

John F. Perry

Dear Sirs,

At last, after looking at numerous editions of the *Victorian Bar News* over the last 20 years, I find something of interest. Your competition in the winter issue is a competition that I can relate to. You ask whether the Master was right? Calling in doubt what the Master says concerns me as much, if not more, than you or your readers may appreciate. If the Master is wrong in his Court your readers may advise the clients to appeal the decision, alternatively, the barristers may ignore the matter. I do not know how often your readers ignore my father's statements of the law in Court. So your reader's clients are protected. However if the Master is wrong in relating fairy stories then my children and his

grandchildren suffer. They cannot appeal the decision, and they do not ignore his stories, for they are the only two persons in the world who idolize him. Of course Alice in Wonderland is a fairy story, but then my father informs me that his Court also hears cases that do not exist.

To drown my concern that my children are being misinformed by your Master I therefore aim to win the prize in your competition. I therefore attach to this letter the neatest correct entry.

I must say that on discussing the matter with my father he admits that he is wrong. The statement made by Mr. Hammond of Counsel does come from *The Sound of Music.* However my father argues leniency for any admonishment for his error. He points out to me that the first witness was the Hatter. Not in my father's Court, but in Alice in Wonderland.

When the Hatter arrived in Court he came in with a teacup in one hand and a piece of bread-and-butter in the other. "I beg your pardon, your Majesty," he began, "for bringing these in; but I hadn't quite finished my tea when I was sent for."

"You ought to have finished," said the King.

My father argues that the tea party had not finished, as the Hatter said, "it's always tea-time." Thus these statements, although made in Court, were still made at the Mad Hatter's tea party. To prove this my father says that while giving evidence the Hatter says to the Queen, "I'd rather finish my tea"; and in his confusion he also bites a large piece out of his tea cup. Later he drops his tea cup. Thus my father argues, what more proof could there be that these statements were made at the Mad Hatter's tea party.

I am a little confused. But my father points out that the King did not challenge the Mad Hatter's assertion that he had not finished yet, and I must admit the Mad Hatter was still drinking tea and what else does one do at a tea party?

Yours Sincerely,
Ruth Patkin Trytell.

The Master, my father, is wrong.

The White Rabbit,
As Herald in a Court,
Constituted by The King of Hearts,
In a case against the Knave of Hearts for stealing tarts,
Was asked by the King to read a set of verses on a document.

The White Rabbit said,
"Where shall I begin,
please your Majesty?"
"Begin at the beginning," the King said gravely,
"and go on till you come to the end:
then stop."

Alas, the master is wrong. The Mad Hatter's tea party, whilst full of literary gems, including "Twinkle Little Bat, How I wonder what you're at. Up above the world so high, like a tea-tray in the sky..." and some wonderful puns on murdering time and beating time, contains no such phrase as the Master referred to.

(And although there are touches of madness in the practice court on occasion, they are unlikely to be related to the mercury-induced madness of the Mad Hatter, nor the male-hormonal madness of the March Hare.)

However, the trial of the Knave of Hearts (a well-conducted judicial affair if ever there was one) contains the immortal direction from the bench (the King of Hearts):

"Begin at the beginning," the King said, very gravely, "and go on till you come to the end: then stop."

One of the few pieces of sense in a trial which concludes with the Queen of Hearts yelling "no — sentence first — verdict afterwards!"

Ah, if only law was so simple!

(I am indebted to the Martin Gardner edition of *Alice's Adventures in Wonderland — The Annotated Alice* — for side comments. Anyone with an interest in language and punning should read a copy.)

Carolyn Sparke

THE NEXT COMPETITION

The competition in this issue is to supply an ending to the Mouthpiece article on page 89-91. First, second and third prizes will be an invitation to join the Editorial Board for drinks and snacks at the launch of the Summer edition of this magazine.

"THE HANGING OF BARNARD'S PARROT"

FRIDAY, 19 AUGUST SAW THE CHAMpagne flowing freely and the conversation no less so at the chambers of John Lewisohn, 5th floor West. A not-too humble gathering to witness the hanging of a pair of parrots — a fine addition to the artistic merit of the chambers' walls.

Having had the picture framed, the time had come for it to be hung.

But of course, one can't be hung without first being tried, so an esteemed gathering was present — Derham and Arthur prosecuting and Kaye Q.C. and a vanished junior (they say he took the fees and scarpered) defending. Hansen J. presiding.

Lewisohn opened proceedings by explaining that, although identified by Barnard Q.C., as "his" parrot, there was a real question of identification in this trial, as there are no less than four genus (genii?) of "Barnard's parrot". Derham, prosecuting, didn't bother about legal niceties, but simply slammed the "hook-nosed pirate of the bush" whose greatest crime was to look like Barnard Q.C.

Barnard, a parrot and the hanging Judge

Derham pleads . . .

Hansen J. hangs the bird

Kaye Q.C. made a valiant attempt at a no-case submission, interrupted wherever possible and generally earned his champagne well in defence of the bird.

Hansen J., having heard the eloquent submissions of counsel, opined that he couldn't understand a thing being said, and stated that "he had trouble associating anything attractive with Barnard Q.C.".

"Bias from the Bench" we wondered? Unlikely, as he went on to refer to Barnard's interest in things horticultural. (Interrupted only by Derham's interjection of "is that horticultural or whores . . . ?")

His Honour wondered if in fact "the portrait was a likeness of Barnard Q.C. as a young man" and ordered that the parrot be hung.

Hung it duly was, to the further directive from the Bench that "we should now start drinking heavily".

Those of us still sober enough to listen were impressed with the depth of genuine horticultural knowledge displayed by Barnard Q.C. A good time was had by all.

Carolyn Sparke

CENTRE FOR LEGAL EDUCATION MEDIA RELEASES

WHERE DO ALL THE LAW GRADUATES GO?

VERY LITTLE IS KNOWN ABOUT WHERE people who qualify in law in Australian universities end up. We imagine that the vast majority become practising lawyers and, whilst this is no doubt largely true, we have almost no firm nation-wide data.

Most law graduates nowadays have a combined degree — the law degree is combined with some other discipline. It would be wrong to imagine that law is necessarily their first priority for a career. We do know that a number do not go on to practical training, either in articles or in a practical training course. Even amongst those who are admitted, we know that a proportion do not go onto employment in the private legal profession.

To rectify this, the Centre for Legal Education in Sydney will be commencing over the next few years a nation-wide study of the career destinations of law graduates. Those who entered the private legal profession will be relatively easy to trace, but a major focus of the project will be on those who either never seek admission or, having sought admission, do not work in the private legal profession.

The information obtained will be of value to government, the university law schools, the professional bodies and the practical training courses.

As a start to this project, the Centre for Legal Education has reviewed data obtained by the Australian Bureau of Statistics as part of its five-yearly censuses throughout Australia. Reports on the careers of legally-qualified people were completed by the Department of Employment, Education and Training after the 1981 and 1986 censuses. However, a decision was made not to prepare a similar report based on the 1991 census.

The Centre for Legal Education took up the challenge to prepare this report, and has now published it. At the same time it has examined the trends which are evident over the ten-year period from 1981 to 1991. This report is now available from the Centre for Legal Education at a cost of $5. The Centre's address is G.P.O. Box 232 Sydney, N.S.W. 2001 (fax: (02) 221 6280l).

In brief the report records that less than two-thirds of the almost 37,000 people holding qualifications in law in Australia were actually working as lawyers at the time of the 1991 Census. The largest proportion of legally-qualified people who were working as lawyers peaked at 63% in the period two to five years after qualifying. Of those with legal qualifications, just under 30% were women.

Between 1981 and 1991 there was an increase of 63% in the number of people in Australia with a qualification in law. In the same period the number of people employed as lawyers grew by 71%. The population of Australia in the same period increased by only 12.5%.

However during this period no more than 65% of those with legal qualifications have been employed as lawyers (as defined by the Australian Bureau of Statistics).

Further work by the Centre for Legal Education will look at the proportion of people working as lawyers, and also the particular sorts of work in which they are engaged.

LAW DEANS ON ATTACK ON LEGAL EDUCATION FUNDING

AUSTRALIAN LAW DEANS HAVE GONE ON the offensive in regard to the level of funding provided to legal education. The Committee of Australian Law Deans commissioned the Centre for Legal Education to prepare a report on the proper cost of quality legal education.

The report, which has just been released, surveys what is now expected of Australia's law schools by the legal profession, by the universities, by government and by the law schools themselves. The type of law programme which is expected differs markedly from the way law was taught several decades ago.

The report delineates the elements which should make up that programme. It then presents a way to cost each of the elements, and thus calculate the total cost of a quality law programme.

It does not argue by comparing law with other

disciplines. Rather, it starts with what is expected of the law schools and converts that ultimately to dollars.

An interesting and innovative aspect of the report is a computer-based model which law deans and others can use to calculate the cost of their programmes, and identify possible variations which could be made, working within existing funding constraints or possible future funding levels. As Ralph Simmonds, the convenor of the Committee of Australian Law Deans, said, the document is about helping Australian law schools achieve their various visions of themselves, and in working effectively towards getting the resources needed to realise the vision chosen by each school.

The report is available from the Centre for Legal Education at $24, including postage. The Centre's address is G.P.O. Box 232 Sydney, N.S.W. 2001, tel: (02) 221 3699, fax: (02) 221 6280.

LAW STUDENTS WITH ASIAN LANGUAGE SKILLS ON REGISTER

A REGISTER HAS BEEN COMPILED OF LAW students with language skills in Khmer (Cambodian), Lao and Vietnamese. This is an initiative of the Australia-Indochina Legal Co-operation Committee, an advisory committee to the Commonwealth Attorney-General, Canberra.

The register has been co-ordinated by the Centre for Legal Education, based in Sydney. It contains the usual details of the students' academic records so far, and their written and spoken language skills.

Where appropriate, the student's access to a computer which will print in the appropriate language's script is included.

These law students will be the future lawyers in the countries of the Indochina sub-region.

Any lawyer who would like access to this register should contact Mr. Robert Watson, Research Officer, AILEC Secretariat, Attorney-General's Department, National Circuit, Barton, A.C.T., 2600; tel: (06) 250 6787, fax: (06) 250 5929.

The students in the register are available now for translation work and in other ways that lawyers might find useful in legal work involving Cambodia, Lao PDR and Vietnam.

FAVOURITE ANECDOTES

BAR NEWS HAS DECIDED TO INTRODUCE A new feature, "Favourite Anecdotes". Each and every member of the Bar is encouraged to make his or her favourite legal anecdote available for publication in *Bar News*.

The first entry is by Hartog Berkeley and is derived from *The Reminiscences of Sir Henry Hawkins, Baron Brampton* published by Edward Akroyd in 1904.

Platt was an advocate of a different stamp. He also was kind, and in every way worthy of grateful remembrance. He loved to amuse especially the junior Bar, and more particularly in court. He was a good natural punster, and endowed with a lively wit. The circuit was never dull when Platt was present; his geniality enlivened the despondent, and he seemed to 'let himself go' for the pleasure it afforded to our younger members, of whom I was the youngest.

Bar News has decided to introduce a new feature, "Favourite Anecdotes". Each and every member of the Bar is encouraged to make his or her favourite legal anecdote available for publication in *Bar News*.

But there was one trait in Platt's character as an advocate that Judges always profess to disapprove of — he loved popular applause, and his singularly bold and curious mode of cross-examination sometimes brought him both rebuke and hearty laughter from the most austere of Judges.

He dealt with a witness as though the witness was putty, moulding him into any grotesque form that suited his humour. No evidence could preserve its original shape after Platt had done with it. He had a coaxing manner, so much so that a witness would often be led to say what he never intended,

and what afterwards he could not believe he had uttered. His manner was original, and he turned at times a stream of humour on to the unhappy individual in the witness-box, much to his discomfort.

Thesiger, who was his constant opponent, was sometimes irritated with Platt's manner, and on the occasion I am about to mention fairly lost his temper.

This was my first appearance on circuit, and my first lesson from a great advocate in the art of caricature.

It was in an action for nuisance before Tindal, Chief Justice of the Common Pleas, at Croydon Assizes.

Thesiger was for the plaintiff, who complained of a nuisance caused by the bad smells that emanated from a certain tank on the defendant's premises, and called a very respectable but ignorant labouring man to prove his case.

The witness gave a description of the tank, not picturesque, but doubtless true, and into this tank all kinds of refuse seem to have been thrown, so that the vilest of foul stenches were emitted.

Platt began his cross-examination of poor Hodge by asking in his most coaxing manner to describe the character and nature of the various stenches. Had Hodge been scientific, or if he had had a little common-sense, he would have simply answered '*bad* character and *ill*-nature,' but he improved on this simplicity and said: 'Some on 'em smells summat *like paint*.' This was quite sufficient for Platt.

'Come, now,' said he, 'that's a very sensible answer. You are aware, as a man of undoubted intelligence, that there are various colours of paint. Had this smell any *particular colour*, think you?'

'Wall, I dunnow, sir.'

'Don't answer hurriedly; take your time. We only want to get at the truth. Now, what colour do you say this smell belonged to?'

'Wall, I don't raightly know, sir.'

'I see. But what do you say to *yellow?* Had it a yellow smell, think you?'

'Wall, sir, I doan't think ur wus yaller, nuther. No, sir, not quite yaller; I think it was moore of a blue like.'

'A blue smell. We all know a blue smell when we see it.'

Of course, I need not say the laughter was going on in peals, much to Platt's delight. Tindal was simply in an ecstasy, but did all he could to suppress his enjoyment of the scene.

Then Platt resumed:

'You think it was more of a blue smell like? Now, let me ask you, there are many kinds of blue smells, from the smell of a Blue Peter, which is salt, to that of the sky, which depends upon the weather. Was it dark, or —'

'A kind of sky-blue, sir.'

'More like your scarf?'

Up went Hodge's hand to see if he could feel the colour.

'Yes,' said he, 'that's more like —'

'Zummut like your scarf?'

'Yes, sir.'

Then he was asked as to a variety of solids and liquids; and the man shook his head, intimating that he could go a deuce of a way, but that there were bounds even to human knowledge.

Then Platt questioned him on less abstruse topics, and to all of his questions he kept answering

'Yes, my lord.'

'Were fish remnants,' asked Platt, 'sometimes thrown into this reservoir of filth, such as old cods' heads with goggle eyes?'

'Yes, my lord.'

'Rari nantes in gurgite vasto?'

'Yes, my lord.'

Thesiger could stand it no longer. He had been writhing while the court had been roaring with laughter, which all the ushers in the universe, supported by all the javelin-men in the kingdom, could not suppress.

'My lord, my lord, there must be some limit even to cross-examination by my friend. Does your lordship think it is fair to suggest a classical quotation to a respectable but illiterate labourer?'

Tindal, who could not keep his countenance — and no man who witnessed the scene could — said: 'It all depends, Mr Thesiger, whether this man understands Latin.' Whereupon Platt immediately turned to the witness and said:

'Now, my man, attend: *Rari nantes in gurgite vasto.* You understand that, do you not?'

'Yes, my lord,' answered the witness, stroking his chin.

Tindal, trying all he could to suppress his laughter, said:

'Mr. Thesiger, the witness says he understands the quotation, and, as you have no evidence to the contrary, I do not see how I can help you.' Of course, there was a renewal of the general laughter, but Thesiger, in his reply, turned it on Platt.

This was my first appearance on circuit, and my first lesson from a great advocate in the art of caricature.

HARDY BARRISTERS WIN AGAIN

TOUR DE NOUVELLE-CALEDONIE — AOM FRENCH AIRLINES

Deuxième étape

Sean Hardy vainqueur d'une course de dupes

Avocat de son état et membre du... VCC sur le Tour, Sean Hardy a remporté dimanche matin une deuxième étape de dupes qui a vu Jérôme Bonnace parvenir à conserver sa première place au général alors que pour quelques sérieux prétendants à la victoire finale les espoirs semblent bien compromis.

Sean Hardy avec Emmanuel Pillet dans sa roue, dans la montée de la côte Blanche

L'arrivée victorieuse de l'Australien Sean Hardy sur l'Anse-Vata

Lorsqu'on a vu tôt le matin les drapeaux des sponsors "tendus comme une ligne à tazar" sur le front de mer, on s'est dit que les coureurs n'auront pas la partie facile lors de cette seconde étape disputée sur huit grands circuits de l'Anse-Vata. Et de fait, le vent a beaucoup contrarié la progression des coureurs dès la sortie du Faubourg Blanchot.

Dans ce cas, réaliser une moyenne de 43,714 km/heure relève de l'exploit pour le futur vainqueur. Même si Hardy est resté loin des 46,764 km signés l'an passé par "TGV" Gary Anderson qui a fait mieux d'un peu plus d'une minute à chaque tour. Le vent a aussi provoqué les gros dégâts au sein d'un peloton réduit à cinquante-huit membres après l'abandon de Daniel Pandélé la veille au Mont-Dore.

Au terme d'un premier tour bouclé en 18mn03s, pratiquement personne ne manquait encore à l'appel. Malgré plusieurs cassures lorsque la route s'élevait quelque peu, qui ont contraint les lâchés à chasser énergiquement pour revenir. Sur l'une de ces cassures, onze hommes parvenaient à se faire la belle.

Terrible bras de fer

Il y avait là Christian Pierron, Marc Rousseau, Ludovic Greschi, Sean Hardy, Stephen Gottschling, Stéphane Piriac, Erwin Bollen, Dominique Péré, Murray Spencer, Allan Iacoune et Emmanuel Pillet qui après avoir réussi à creuser un bon trou, voyaient le peloton revenir sur leurs fermement décidé à le défendre jusqu'au bout. Lorsqu'il a vu Matthew Goold démarrer au Vallon du Gaz, il ne s'est pas posé de question, sautant immédiatement dans sa roue. Il était imité par Jean-Michel Chemin et Alexander Kastenhuber qui ont senti le bon coup à jouer.

S'engageait alors un terrible bras de fer. Et si Greschi et Hardy ne s'étaient pas laissés sciemment décrocher pour ramener leur leader, on peut se demander si la jonction aurait pu se faire. Pendant un long moment, les quatre hommes ne sont pas parvenus à combler le petit trou qui les séparait de la tête de la course. La poursuite aura tout de même duré un tour complet.

Dès lors, la course était jouée, d'autant plus que derrière c'était la débandade. Les écarts prenant des proportions inquiétantes, nombreux étaient ceux qui ont voulu tenter leurs chances en solitaire ou par petits groupes, au lieu de s'entendre pour engager la chasse.

Deuxième abandon

On a vu ainsi Christophe Bibens, Rudy Lefèvre et Alexandre Dubois venir

Il faut dire que les deux hommes ne constituaient pas un véritable danger pour les premiers du classement général, ayant terminé à plus de dix et six minutes au Mont-Dore. Leur avance n'allait jamais atteindre la minute, les favoris semblant contrôler parfaitement la situation. Ce qui ne les empêchait pas d'accroître leur avance sur un peloton qui avait volé, entre-temps, en éclats.

Les grands battus étaient principalement Jean-Marie Rivière, Chris Jenner et Sylvio Esposito, relégués à un peu plus de cinq minutes. Mais il y avait plus malheureux qu'eux puisque Nicolas Chauvière a cédé 13mn30s à la suite d'une crevaison survenue dans le deuxième tour.

A deux kilomètres de l'arrivée, Hardy plaçait un puissant démarrage dans la montée de la côte de la Grande Muraille. Pillet était incapable de répondre à cette attaque et était battu de 7s sur la ligne.

Le sprint du groupe de treize était remporté par Péré devant Bonnace qui partira encore revêtu du jaune ce matin pour une troisième étape devant conduire les cinquante-sept rescapés jusqu'à La Foa. Un deuxième

BILL GILLARD Q.C. ANSWERS ALL YOUR CRICKET QUESTIONS

This Month's Question:

Which of the following cricketers is "the odd man out"?

Sir Leonard Hutton (Eng.)
Sir Donald Bradman (Aust.)
Sir Frank Worrell (West Indies)
Sir Garfield Sobers (West Indies)
Sir Richard Hadlee (N.Z.)
Sir F.S. Jackson (Eng.)
Sir T.C. O'Brien (Eng.)
Sir Leary (later Lord) Constantine (West Indies)
Mr. Bill Gillard Q.C. (Brighton)

Answer:

Sir Richard Hadlee — he is the only New Zealander.

Paul,

I don't know if you are still collecting sports Snippets for the *Bar News*, but here is a bit of trivia.

I played for Collingwood Reserves as Full Forward in the early 1970s and my son Ben was called up to play for Collingwood Reserves on the Queen's Birthday at the MCG. He is in again tomorrow for the Magpies. He has been starring for the Western Jets in the VSFL under-18s and the AFL clubs can call on boys when injuries deplete their senior list of 42 players. He also played a couple of Reserves games for Richmond in May when they needed an U/18 player.

Regards,
John Jordan

A FAIRY TALE (CONTINUED)

NOW GATHER AROUND ME MY DEARS whilst I tell you more about the poor VicBees. Since we last talked about the VicBees they appear to have gone into self-destruct mode. Perhaps we ought to call them the VicLemmings.

Last time I told you about the orgy of decision-making that the VicBees had indulged in. I think I was premature. Yes, they did decide that they were to be allowed to be allocated fields within which to forage directly by the owners of those fields rather than through the auspices of SolBees. It seemed like a good idea because if they didn't make that decision themselves the GovBees would make it for them and probably make a lot of other decisions for them. However, having made the decision, the decision-making VicBees decided (yes, my dears, *another* decision) to put it to a vote of all VicBees. Many VicBees thought it was a momentous matter and one requiring a vote of all VicBees for it was often the complaint of those VicBees given to complaining that momentous matters should be put to a vote of everyone rather than the duly-elected decision-making VicBees. So the matter having but put to a vote, only about half the VicBees voted. Whatever the reason — whether it be that they didn't understand the question, they thought they were voting in a Constitutional Referendum or they genuinely harboured self-destructive views — those that voted said no to the proposal and by a reasonable margin.

It didn't matter though. The decision-makers decided (*another* decision) to stick by their original decision. Makes one wonder, again, about the capacity of VicBees collectively to make any important decisions.

The decision-makers also put to the VicBees collectively their decision to retain ClerkerBees as an essential element in the organisation of their colonies. This too was an important matter. This too was a matter where a large percentage of VicBees chose not to vote and those that voted chose to overturn the decision of the decision-makers. This too was a matter where the decision-makers (making yet another decision) decided to stick by their original decision. No one seemed to care too much about the nonsense that the whole process of VicBee decision-making had become.

But there is more, as one famous TVBee keeps saying: there is the perennial problem about the future of the great big pink hive. Last time I told you that they had decided to sell the land under the hive to the MoneyBees who own the hive. It did seem such a good idea at the time. But like other good ideas for the VicBees its time had not yet come and the decision is being reconsidered. At least the VicBees remain consistent in the application of their decision-making process, if indeed a process it can be called!

Of course, it might well be that many VicBees are so distraught about the continued shrinkage or non-existence of their fields or so concerned to concentrate on their short-term survival that they have neither the time nor the inclination to worry about their own long-term survival or the future of their occupation. Perhaps that merely reflects the society within which the VicBees operate — after all their GovBees are well known for not looking further forward than a few years. If it indeed is true that a community gets the GovBees it deserves then it may be true that VicBees by concentrating on the here and now over tomorrow are no different to every other Bee. If they do ignore their future and thus disappear never to be seen again who, in the words of one very famous USBee, will we have to kick (or to weave tales about)?

We must look on the brighter side. There is some movement in the removal of the mess of rusty pipes surrounding the hive next to the pink hive. The smoko huts I told you about last time are getting plenty of use and lots and lots of bits and pieces of metal have started to accumulate on the roof of that hive. No pipes have gone yet but the VicBees are constantly reassured that that will soon happen. Perhaps that last bit of rusty pipe will go on the day that the last VicBee vacates the big pink hive. Still all the pipes surrounding the new building over the road from the pink hive have gone and soon the VicBees will be fluttering in and out of that building busily gathering small amounts of honey. At least, a few lucky VicBees will be doing that.

It seems too, that the GovBees may be diverting some of their attention away from VicBees and NSWBees and other Bees and turning their attention to GasBees, SECVBees and the like. Perhaps they think that there is more at stake taking in the bigger concerns but then again that would be logical, and logic is not the strong suit of GovBees is it?

As we leave VicBees for another night we leave them pondering whom they will elect as their decision-makers for the next year. It is always a difficult task for VicBees — so many VicBees want to be decision-makers and there are so few positions. Sometimes, one wonders why anyone would want to be a VicBee decision-maker. If they make decisions their decisions are criticised as being wrong and undemocratic, especially if it is not put to VicBees as a whole to vote upon. If they put it to VicBees as a whole they are criticised because they ask the wrong question (allegedly) or the question is incomprehensible to some VicBees. Whether or not they get the question right an insufficient number of VicBees vote to make the exercise worthwhile and those that do vote, vote against the decision of the decision-makers on principle. Very few, if any VicBees, appear to want to concentrate on the issue immediately at hand when there are less important peripheral issues to turn their minds to. Even then the few VicBees who vote appear to be split evenly on each issue as they understand those issues so the exercise becomes even more fruitless and so it is left to the decision-makers to decide, unhelped by the views of their constituency. Inevitably, the decision-makers decide to stick by their original decision and are then criticised for ignoring the views of the majority even though the majority appears to have no clear view of what they want about anything.

VicBees must be masochists because not only do they want to remain VicBees in a wholly unsympathetic climate but they covet in their large numbers the wholly thankless role of VicBee decision-maker.

Time has flown again and I have run out of things to tell you about VicBees. Perhaps there will be more to say next time. Sleep well my dears and we will talk again soon of the VicBees.

(to be continued)

LAWYER'S BOOKSHELF

Equity: Doctrines & Remedies

Meagher, Gummow & Lehane
Butterworths
3rd ed., 1992,
pp. cxxvi and 960
Price: $99

THE LATEST EDITION OF THIS GREAT textbook is both a delight and a disappointment. All of its connoisseurs' favourite features are still there: the strong and clear statements of general principle, the ruthless logic that cuts its way through equitable morasses and the ascerbic comments about those equity judges who fall short of the mark. The book continues to rail cogently against "the fusion fallacy" (pp. 46–7) and other dragons of error. It still dismisses "many 'liberal' (i.e. woolly-minded) judges" (p. 541), makes constant attacks on Lord Denning (e.g. pp. 66 and 651) and opines that the equity decisions of the New Zealand Court of Appeal can no longer be worthy of "serious consideration" (p. 888).

Yet it is marred by minor errors. For example, the discussion about the granting of Lord Cairns Act common law damages for breaches of equitable obligations (p. 640) proceeds in apparent ignorance of the new Victorian *Supreme Court Act* 1986 s.38, or the U.K. *Supreme Court Act* 1981 s.50, both of which change the law on the point. It may seem ungracious to criticise a work of such considerable scholarship for shortcomings like that. Yet it is a legal textbook, and people rely on it for accurate statements of the law. Sorry to say, the present edition must be used with caution. Secondly, the book should be kept up to the high standards which it has set itself.

None of those things, of course, affects the tremendous authority of the work as an exposition of general principle. It is the first place to go if you want to understand a difficult area of equity with which you are unfamiliar. It would be a brave lawyer who expressed an opinion about any of the areas covered by it without seeing what it said on the point.

I hope there will be a fourth edition of this Australian legal classic, which has an admiring readership (including the present reviewer) both here and overseas. I hope also that that edition will be brought more thoroughly and accurately up-to-date.

Michael Gronow

Expert Evidence

Ian Freckelton and Hugh Selby (editors)
The Law Book Company Limited, 1993
Four volumes, loose-leaf

THIS NEW FOUR-VOLUME LOOSE-LEAF service on expert evidence had its genesis six years ago in the observation by Ian Freckelton and Hugh Selby that the task of finding an expert witness, obtaining a suitable technical report from him or her, and then examining and cross-examining expert witnesses was unnecessarily difficult.

The result, with the assistance of seventy specialist contributors and the assistance of their publishers, is a new work which covers a very wide range of matters relating to expert evidence, and the expert witness, from a comprehensive discussion of relevant law and practice, through specialised parts dealing with such diverse subjects as the investigation of human remains, forensic medicine and psychiatry, forensic science generally, crime scene photography, and forensic accounting, with much else besides.

The law and practice part of the service is a major textbook in its own right, with the added advantage of being incorporated into a loose-leaf format with a twice-yearly updating service. Law and practice covers, as may be expected, issues such as a technical discussion of the rules of expert evidence, along with a great many practical matters, such as advice on how to encourage experts to mould their language for court purposes, the use of court-appointed experts and assessors, and the remuneration of experts.

The technical, expert parts of the service should prove to be of particular value to lawyers. One taken literally at random, namely that dealing with the prosaic subject of paint, illustrates the strengths of the work of Freckelton and Selby's expert contributors. This part of the work is only 22 pages in length. Within that brief compass the reader is taken, in clear English, through an appreciation of the forensic relevance of paint at a crime or accident scene, and on to an account of the composition of paint, and methods for its examination, to a

number of case histories, traps for the unwary, and comment on the interpretation of paint evidence.

Such technical parts of the work should prove to be helpful to lawyers in a number of ways. At one level they provide a general introduction to a subject matter, suggesting whether specific expert assistance may be relevant to a case. For cases where it has been decided that an expert is relevant, the text has been written in a form such that the reader would be able to bring himself or herself up to a basic general understanding of the subject matter, and of its potential usefulness, before an initial interview with a proposed expert, thus saving both parties much time. Finally, as a case develops, the text should prove to be a very useful continuing reference work in relation to questions arising on matters of detail.

This work amply satisfies the objectives which its editors set for it, and occupies a very helpful and useful niche in the field of law and information in relation to the expert and his or her evidence.

Fergus Farrow