ISSUE 164 SUMMER 2018/19

VICTORIAN BAR NEWS

Sharn Coombes on *Survivor*

Barristers who blog

Dogs at work

In search of wellbeing

164 Chief Justice Ferguson after her first year

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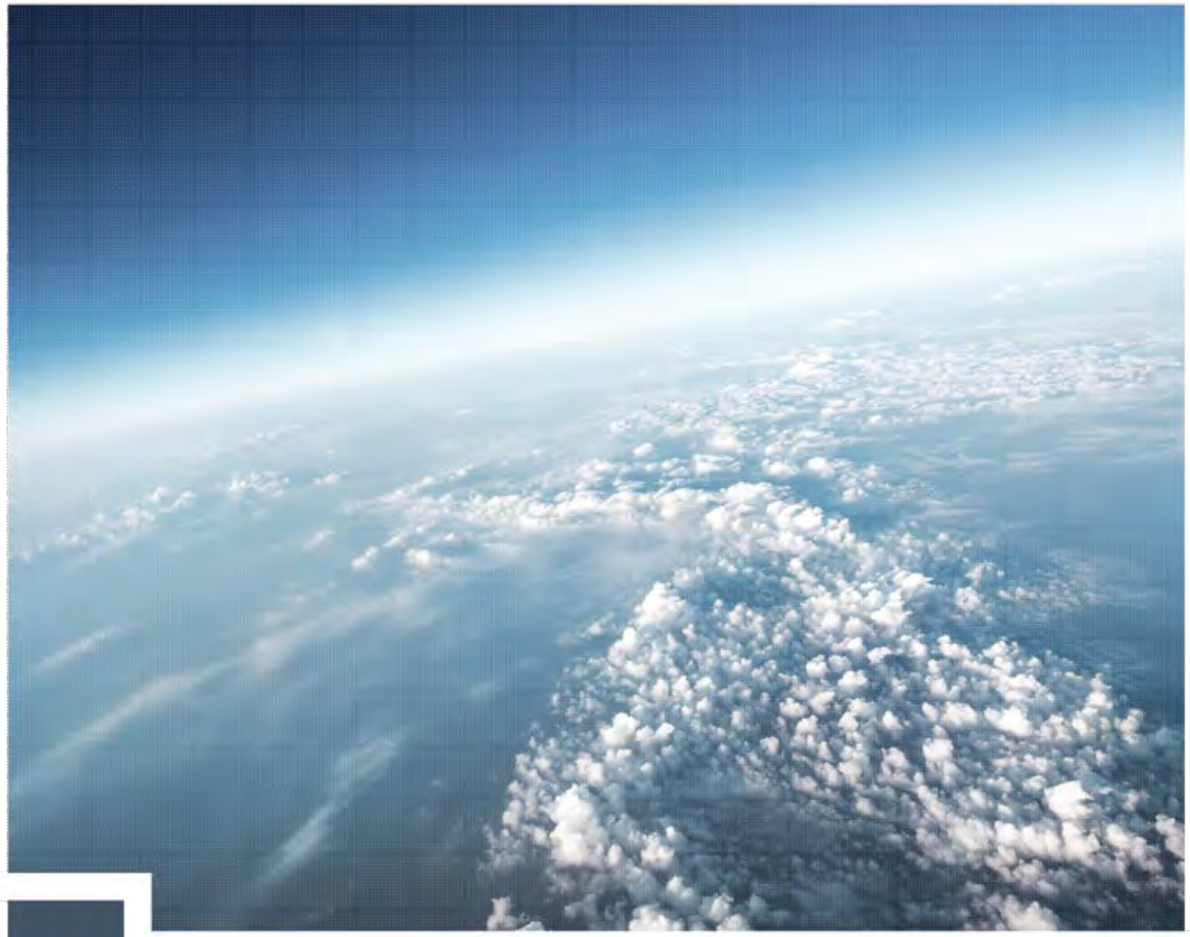

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ISSUE 164 SUMMER 2018/19
VICTORIAN BAR NEWS

18

34

42

94

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Editorial

Health and wellbeing: A kaleidoscope

NATALIE HICKEY, JUSTIN WHEELAHAN, ANNETTE CHARAK, EDITORS

That we have received so many wonderful contributions to this issue of *Bar News* from around the Bar is a testament to you, our readers, and to the strength of our Victorian Bar as a cohort. You were unafraid to share your stories, pastimes and letters (which we love receiving). Please keep them coming!

Work-life balance evokes a 24-hour day divided equally into sleep, work, and free time. Yet is this the life of a barrister? Our work can be all-consuming. Wellbeing for barristers may not, in fact, be the same as 'balance'. Our featured barristers plainly generate wellbeing. Yet their extra-curricular activities are driven by passion, some level of compulsion, and possibly a degree of obsession.

Take Monika Paszkiewicz, who explains why she foregoes Kirk's Wine Bar of a Friday evening to go Polish dancing. Or Mark McNamara, whose determination to read newspaper reports of every Warrnambool race meeting until the mid 1970s resulted in his remarkable book, *The 'Bool*. Or John Tesarsch, who swapped a career in Vienna as a cellist for a life at the Bar, but is now at risk of becoming a 'prolific' author.

For the editors of *Bar News,* the term 'wellbeing' presented a specific challenge: how do you spell it? Channelling our inner Julian Burnside, we resolved to find out. A compound term, options included 'one word', 'a space' or 'a hyphen'. The Oxford English Dictionary favours a hyphen. The Macquarie Dictionary uses 'one word'. We adopted the deemed Australian usage.

A 1926 edition of Webster's Dictionary proffered the context, "virtue is essential to the *well-being* of men". The "Changing Face of the Bar" exhibition shows how far we have come, particularly for those of us who are neither male nor virtuous, when contemplating the varied activities essential to the wellbeing of the contemporary barrister.

Issues that might crush wellbeing, such as judicial bullying, have in the past been a delicate topic. Chief Justice Anne Ferguson, in a special interview, has a strong message about judicial bullying in the wake of the Bar's health and wellbeing survey (separately reported on by Greg Ahern in this issue). She is unhesitating that a polite, courteous and respectful courtroom should be the norm, and that if something is happening where the barrister is not treated that way, she wants to know about it. On another note, her Honour refers to the importance of nature, and how spending time around trees can be a tonic for wellbeing.

Chief Magistrate Peter Lauritsen has been at the front-line of implementing health and wellbeing strategies in the Magistrates' Court after a tough year for Victorian magistrates. He refers to the need to

build resilience, and describes a range of initiatives for magistrates, including four annual voluntary wellbeing days. The enthusiasm of newly appointed magistrates is also clearly lifting spirits around the court. *Bar News* interviewed two of them, Magistrate Alanna Duffy, and Magistrate Mia Stylianou, about how they are finding the transition from advocate to decision-maker.

For Jennifer Batrouney, the key to wellbeing might be in spending more time with our four-legged friends. She is not alone in this. Barristers on Level 1, Owen Dixon West have become used to carrying around a miniature dachshund, Belinda, in her basket from room to room on occasional 'dog-minding days'.

Sharn Coombes contrasts her life as a crown prosecutor to being runner-up on the television show *Australian Survivor*. Sharn presents a case for taking a mental break from the strain of barrister's work. Sharn switched gears by sleeping on the ground exposed to the elements with little food for 50 days, competing with elite athletes to stay on an island, and found this 'fun'. She thinks our lives are over-complicated.

Moving to other issues, we have also interviewed some Victorian barristers who blog, along with the 'Secret Barrister' from the U.K., whose deconstruction of Bananarama's "Love in the First Degree" went viral.

Her Excellency Professor the Honourable Kate Warner answered some questions about the Victorian jury sentencing study. How jurors would sentence in actual cases, if given the chance (as opposed to what jurors think about soft sentences and law and order generally) might surprise you.

From the vault we have a great piece from Colin Lovitt about Justices of the Peace affording and denying natural justice, and a heart stopping Mabo moment from Bryan Keon-Cohen.

This year marked the centenary anniversary of Armistice Day. Thanks to the research of Bill Gillies and others, we can read about the members of our Bar who went to the Great War, but did not return. The trajectory of these gifted barristers' careers will sound familiar. It is poignant to pause on the contributions they could have made to the law if their lives had not been cut short. Murdoch Mackay, for example, won the Supreme Court prize in 1911, appeared in the High Court in 1915 just weeks before sailing for Gallipoli, but was killed by machine-gun fire in 1916, while leading his battalion on the ridge behind Pozières.

There is much more to discover. Enjoy the read, wherever you may be.

Best wishes,

Your Editors
Natalie, Justin and Annette
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PHOTO COURTESY OF NEIL PRIETO

VICTORIAN BAR NEWS EDITORIAL COMMITTEE (L-R STANDING): Sarah Harrison-Gordon, Tony Horan, Natalie Hickey, Brad Barr, Amanda Utt, Annette Charak. (L-R SEATED): Justin Wheelahan, Maree Norton, Campbell Thomson. (ABSENT): Catherine Pierce, Jesse Rudd, Georgie Coleman, Justin Hooper, Denise Bennett

Letters TO THE Editors

Judicial bullying is real and still takes place

For reasons of diplomacy there has been a disinclination to refer to judicial bullying for what it is, various euphemisms being preferred.

Footballers could racially vilify their opponents with impunity years ago. Times and expectations have changed and this applies to judicial officers too.

That most judges are courteous, patient and civil is good, but such qualities ought to be pre-requisites of judicial behaviour and should not warrant congratulation.

It beggars belief that in 2018, some judicial officers have reduced some practitioners to tears rendering them unable to continue. I am aware of this as I have on a number of occasions been approached by distressed young barristers recounting their experiences, seeking advice on how they should deal with the predicament. They have been yelled at, made to feel stupid, inadequate, and even useless.

Such conduct is unforgivable and must cease.

We are not judges' apprentices and they are not our masters. All judges are there because various governments have elevated them to their positions and rightly so. But that does not mean they are superior to us.

In criminal law, the area of my practice, prosecutors run their case as they deem fit, as do defence counsel.

A presiding judge or magistrate might have misgivings as to forensic decisions that are made by those who have carriage of the case, and that is their prerogative. However, so long as the hearing is being appropriately conducted within the confines of relevant rules of conduct and practice, it is not the role of a judicial officer to openly denigrate, belittle or admonish those who are merely doing their job to the best of their ability.

To be rude or hostile or even to chastise a practitioner like one might chastise a child is not acceptable. Let them think the practitioner foolhardy without communicating their obvious disdain in open court.

As night follows day, we will always be buoyed by what we perceive as a good 'draw' as opposed to being disheartened by what we perceive as not such a good 'draw'.

Those differing sentiments should only be caused by how well or badly we believe our arguments will fare before the judicial officer in question.

Our reaction should not be influenced by our fear that one person is likely to be fair and pleasant, whereas another will be intimidating, unpleasant and insulting.

We are members of a wonderful profession.

It requires little for our workplace to be so much better.

It is a behavioural change that is necessary and everything possible should be done to achieve an outcome in which practitioners are always treated with appropriate civility, respect and dignity.

Geoffrey Steward.

For members concerned about experiences of judicial bullying, please refer to the Judicial Conduct Policy page of the VicBar Website. It includes a link to the Bar's judicial conduct policy, to the Supreme Court's protocol on raising concerns about judicial conduct, and to the Bar's reporting form. See vicbar.com.au/public/about/governance/judicial-conduct-policy

Have your Say *Victorian Bar News* encourages letters to the Editors on topics ranging from the meaningful to the mundane. Write to the Editors at *Victorian Bar News*, Owen Dixon Chambers, 222 William Street, Melbourne, VIC 3000
or email *vbneditors@vicbar.com.au*

The Significance of Small Things

Thursday 6 September saw the opening of the "Changing Face of the Bar" pop-up collection in the Peter O'Callaghan QC Gallery. The collection features more than 700 fantastic photographic portraits of members of the Bar taken by Garth Oriander earlier this year.

As many of us have done over the last couple of months, I enthusiastically pored over the images, spotting friends and familiar faces amongst the many pictures, including my own.

The portraits are many and varied – there are men and women, the young and the old, children, pets, even a miniature storm trooper – people robed and unrobed, in cycling gear, with headphones and books, smiling, even laughing. And amongst those portraits I encountered something that I wasn't expecting to find – a sense of belonging.

When I first came to the Bar five years ago, since my first day walking into

chambers, and many days since, I walk the corridor from the William Street entrance down to the lifts at Owen Dixon West surrounded on both sides by the solemn portraits of judges and respected members of counsel that line the walls.

Walking amidst those images every day, I have not infrequently been struck by the following thought: where do I belong in this picture? I know from my conversations with others that I am not alone in feeling this way.

In the "Changing Face" exhibition, there are people for each of us to aspire to be, and aspire to be friends with. There is warmth, there is laughter, there is tenderness. There are people with whom I identify. The collection makes me think, "I belong here".

The portrait gallery is the first and the last thing that those of us with chambers in Owen Dixon see every day. We should never underestimate the significance of small things. A collection of portraits hanging on the wall is something that might seem a trivial concern. But it impacts upon people and their senses of self in a way that many may not realise.

My congratulations go to the Bar Council and the Arts and Collections Committee for this wonderful initiative. I for one hope that some of these portraits become a regular fixture in the Peter O'Callaghan QC Gallery, so that some of these friendly faces can continue to greet all of us as we make our way to chambers each day.

The "Changing Face" exhibition reflects that in 2018, we are indeed a diverse group of people at the Bar. If we wish to acknowledge that, and celebrate it, and encourage greater diversity, we need the "pop-up" to become the permanent. Change begets change. Small things can make a big difference.

Dr Kylie Weston-Scheuber

"Toe" whom it may concern...

A letter in response to suggested 'court room attire' (Red Bag Blue Bag, Victorian Bar News *#163)*

Dear Editors
As a woman who likes to cross-dress in court, with a bit of tie action (no cartoon characters), I appreciated the sartorial guidance and also agree that whilst dangerous to comment on specific women's dress it is a public duty to let people know that stockings CAN NOT BE WORN with open toe shoes. For myself I find the toe rather personal and would go so far as to suggest that naked toes in court are not acceptable.

Kind regards
Sarala M C Fitzgerald

CEO report

KATHERINE LORENZ

I begin by expressing my gratitude to the Bar Council for trusting me to serve as the CEO of the Victorian Bar. I am looking forward to working with the members, both individually and collectively, through the many committees and associations which flourish by the hard work of volunteers, who, with their energy and expertise, serve other members and pursue excellence at the Bar and for the profession more widely. I aim to meet as many of you as I can to better understand your priorities, professional interests and concerns.

Like many lawyers, my association with the Victorian Bar began through briefing barristers during my practice as a junior solicitor, and later, as a senior associate at Mallesons Stephen Jaques and Clayton Utz. I came to appreciate the valuable and unique skills of barristers, which are, in many respects, different from—but complementary to—those of solicitors. Over time, and particularly after leaving private practice and assuming general counsel and executive management roles, I relied on the expertise of counsel in many practice areas, covering medico-legal, commercial, tax, wills and trusts, and employment issues. My confidence in the expertise at the Victorian Bar grew and I expanded the way in which I briefed barristers beyond the traditional solicitor briefing model to direct briefing, which was a successful value proposition for me. I am keenly interested in working with the Victorian Bar Council to further promote direct briefing, through the Council's corporate direct briefing working group and the direct access working group.

On a personal level, I am impressed by the long-term commitment of the Bar Council to improving the working lives of its members. The Wellbeing at the Victorian Bar Survey and Report highlights this commitment and is a clear recognition that the health and wellbeing of members is integral to excellent legal practice. I look forward to working with the health and wellbeing committee and many of you, and to using the survey and report data, so that we can provide further services to support the physical and mental health of the membership.

My appointment comes at a time when the legal services market is undergoing dynamic change and will continue to experience significant disruption. I will be supporting the Bar Council to meet the challenges of the changing environment, including identifying opportunities to drive more work for our members and to showcase the excellence of the Bar's diverse membership.

Thank you to the many members who have already given up their time to meet with me and share their insights. I feel privileged and excited to be joining the Victorian Bar as the CEO. I look forward to updating members about the activities of the team in the Bar Office, whose passion for the Victorian Bar is evident in the high standard of work they produce. I would like to especially thank my predecessor, Sarah Fregon, for spending generous amounts of time with me to ensure a smooth handover.

1. Laurence Li 2. Gala Dinner, pre-dinner drinks, The China Club 3. Taming the lion: Wendy Harris QC, Dr Matt Collins QC and Paul Hayes QC 4. Morning tea break day 1: Simon Marks QC and Sashi Maharaj QC 5. Daniel McInerney, Jim Peters QC, His Honour Judge McNab 6. Speakers from session 1 'The Rise of the International Court': Sir Rupert Jackson PC, The Honourable Teresa Cheng GBS SC JP, The Honourable Justice Middleton, Wendy Harris QC, The Honourable Rimsky Yuen GBM SC JP.

AROUND Town

Wise Counsel: The 2018 Hong Kong International Commercial Law Conference

BY A STAFF REPORTER

On Friday 20 and Saturday 21 September, 135 barristers, members of the judiciary, solicitors and international delegates arrived in Hong Kong for the second edition of the Victorian Bar and CommBar's International Commercial Law Conference, which was jointly undertaken this time with the Hong Kong Bar Association.

The theme for the conference was 'Wise Counsel: Litigation and Arbitration in the Asia-Pacific Region'. As one of the major global centres for commercial arbitration and the gateway to mainland China, Hong Kong was the perfect destination, which resulted in a unique and memorable ICLC.

The event was prefaced by Typhoon Mangkhut, the strongest typhoon to hit Hong Kong in 35 years. Fortunately, Hong Kong saw no casualties, however, there was considerable damage to the city and especially the local flora, which was noticeable around the city.

The conference was staged against the magnificent backdrop of Victoria Harbour at the Four Seasons Hotel Hong Kong, which is conveniently located in the Central district and close to the Hong Kong legal precinct.

Following a most auspicious and insightful opening by Chief Justice Ma (Chief Justice of Hong Kong) and Michaela Browning (Australian Consul-General to Hong Kong and Macau), it was straight down to business with the first session "The Rise of the International Court", chaired by Wendy Harris QC. She was joined by a stellar panel of international legal minds: Justice Middleton (Federal Court of Australia), Teresa Cheng (Secretary for Justice for Hong Kong) and Sir Rupert Jackson (former Lord Justice of Appeal of the Court of Appeal of England and Wales). The session examined the recent rise of the international commercial courts globally, and China in particular. This has been the result of the creation of international commercial courts earlier this year in Xi'an and Shanghai, and Kazakhstan, with the development of the Astana International Financial Centre Court. The session also highlighted the neeed to narrow the procedural divide between common law and civil law jurisdictions and for both courts and lawyers to adopt a more international outlook in the resolution and determination of international commercial disputes.

The conference program was extensive, as it was substantive, and included a range of impressive speakers from the Victorian, Hong Kong and English Bars who spoke in the following bold, broad-ranging sessions:

- After the Apocalypse: Re-regulation of the Banking and Financial Services Industries
- Arbitration on the One Belt, One Road: Enforcement of Arbitral Awards in China
- International Arbitration in a Tri-Polar World
- Words without Borders: Defamation and the Internet
- Modern Case Management of Commercial Disputes
- Is Privacy Dead: Use and Misuse of Sensitive Data
- The Bottom Line: The Value to Clients and Tribunals and the Independent Bar

The platinum sponsor of the conference, EPIQ (a legal technology company) hosted the 'tech-breakfast' session on the morning of Day 2, which was chaired by Kieran Hickie and Amy Hando and covered topics which included e-hearings, electronic evidence presentation and document management. The session was innovative, informative and well attended, which in itself was a considerable feat – given that it was the morning after the Gala Dinner.

The Gala Dinner was held after the first day's conference program at the

PHOTOS COURTESY OF PAUL HAYES

China Club, at the top of the Old Bank of China building in the section that was once the private residence of the general manager of the Bank of China. Restored in 1991 by the late Sir David Tang, the China Club now serves as a private co-ed club, complete with bar, restaurant, astonishing contemporary art collection, and breathtaking views of Hong Kong and Kowloon through its art deco leadlight windows. Pre-dinner drinks were served in the library and on the terrace, which offered views of the magnificent Hong Kong city skyline, before guests sat down to a traditional Cantonese banquet, accompanied by excellent wines, while being entertained by 'The Faces of Hong Kong'. Reciprocal toasts were proposed by Dr Matt Collins QC and Raini Zambelli of the Victorian Bar and Phillip Dykes SC, President of the Hong Kong Bar.

At the conclusion of the second day, an end-of-conference drinks party was held to close the conference in the Harbour View Ballroom of the Four Seasons Hotel, which had been quickly transformed to take advantage of the 180-degree views of Victoria Harbour. A Southern Lion Eye dotting blessing ceremony was followed by the Southern Lion Dance and a five-person Kung Fu show. After closing remarks by our president, Dr Matt Collins QC, a Southern Lion joined the party to dance with guests, who were also treated to a spectacular Kung Fu demonstration.

Very special thanks are due to all of our speakers from the Victorian, Hong Kong and English Bars for their generosity, and to our keynote speakers: Teresa Cheng, Justice Poon, Justice Middleton, Judge Wilson, the Honourable Justice Riordan, Rimsky Yuen, Judge Marks, and Sir Rupert Jackson.

Finally, the conference would not have been possible without the efforts and commitment of our organising committee. The Victorian Bar, CommBar and the Hong Kong Bar Association once more extend thanks and gratitude to all committee members: Paul Hayes QC (Chair), Judge Marks, Judge Wilson, Rodney Garratt QC, Stewart Maiden QC, Astrid Haban-Beer, Georgia Douglas, Georgia Berlic, Kieran Hickie, Sarah Fregon, Amanda Utt and Sarah Harrison-Gordon.

1. Speakers from Session 8 'The Bottom Line- The Value to Clients and Tribunals of an Independent Bar': Audrey Eu SC, Liz Ruddle, Simon Marks QC, His Honour Judge Wilson QC, Robert Pang SC. 2. Daniel Nguyen and Astrid Haban-Beer 3. Speakers from Session 6 'Modern Case Management of Commercial Disputes': Claire Harris QC, Kim Rooney, The Honourable Justice Poon, His Honour Judge Wilson QC, The Honourable Justice Riordan, Owain Stone. 4. Morning Tea Break Day 1: Simon Marks QC and Sashi Maharaj QC 5. Speakers from Session 2 'After the Apocalypse – Re-regulation of the Banking and financial Industries': Astrid Haban-Bee, Rodney Garratt QC, Sashi Maharaj QC, Laurence Li and Philip Crutchfield QC.


The Hon Betty King and Ron Tait


The Hon Diana Bryant AO and Peter Jopling AM QC


Siobhàn Ryan


Brett Tait, The Hon Betty King, Ron Tait, Ross Nankivell


Ross Hyams and Rachel Chrapot


Kobi Lean and daughter

"She lived for the law"

Unveiling of the portrait of Francine McNiff. BY SIOBHÁN RYAN

On 23 August 2018, there was a gathering in the Peter O'Callaghan QC Gallery to unveil a portrait of Francine McNiff, which has been generously gifted to the Bar by the Hon Betty King QC.

Francine practised as a criminal barrister for 23 years from 1987 until illness prevented her continuing in 2010. She transferred to the List of Retired Counsel in 2014 and died in April 2015.

She was 32 years old when she was admitted to legal practice in 1980, after 10 years as an academic and policy-maker. In 1983, she was appointed as a stipendiary magistrate in the Children's Court. This was the State of Victoria's first appointment of a woman judicial officer. At the time, *The Age* newspaper's law reporter, Garry Sturgess, enthused that:

"Three of the most shunned attributes in judicial appointees – youth, femininity and reformist attitudes – have suddenly bobbed up in one person".

The Bar's portrait was painted from one of the photos taken for that article. Her red hair and green eyes are striking. Her mouth is pursed as if holding back one of those "reformist attitudes". She looks intense.

Francine McNiff is celebrated as a benefactor of Monash University (her alma mater and where she became a sub-dean) and the University of Melbourne (where she taught). Towards the end of her life, she established a Chair in Human Rights in the Law School and a Chair in Criminology in the Faculty of Arts as well as scholarships, in her parents' names, for doctoral research in medical jurisprudence: all at the University of Melbourne. This generosity was matched on her death by her bequest to Monash University, which has funded a Chair in Criminal Jurisprudence in the Law School and a scholarship to support PhD students studying criminology in the Faculty of Arts. That masterful equanimity is worth reflecting on: endowments to *both* Melbourne and Monash Universities with the gifts *split* between the Faculties of Law and Arts – and medical research getting a look in too.

We were pleased to have Kay Wilson and Kobi Leins, who are the current recipients of the 'James and Valerie McNiff Scholarship' for postgraduate research in medical jurisprudence, attend the unveiling. Also in attendance were Ron Tait and Brett Tait, Francine's great friends and the executors of her estate. It was fitting that these people, so important in her life and legacy, should be welcomed to Owen Dixon Chambers, the home of the Bar, where Francine spent most of her legal career.

Francine, who was known to drink copious cups of black tea with lemon and chain smoke menthol cigarettes during her trials, was also a technophobe, shunning mobile phones and emails. She famously penned her own death notice two years before her death and faxed it to Ron Tait. Mr Tait honoured her wishes and published it at the appropriate time. It read: "I have ceased to exist – Francine". The Victorian Bar's notice succinctly captured her life's purpose, stating: "She lived for the law".

Recent newspaper articles which reported the bequests to the universities all trumpeted McNiff's trailblazing appointment as Victoria's first woman judicial officer. But the depressing outcome of that tenure is never told. Her friend, Betty King "corrected the record" at the unveiling by letting it be known that when, three years later, the stipendiary magistrates' positions were up for renewal, only Francine McNiff's was not renewed.

It is noted that this is the second portrait donated by Betty King QC. In 2015, when the Gallery had been established for just a few months, she noted the absence of a portrait of the pioneering female criminal barrister, Lillian Lieder QC. She quietly arranged for Lillian's portrait to be painted posthumously and gifted it to the collection.

► Shivani Thamotherampillai
Bar Roll No 3430

My inspiration is the country of my origin, Sri Lanka, formerly known as Ceylon. I was born in Sri Lanka and migrated to Australia due to the imminent civil war in my homeland. I am holding a map from 1672 that graces my chambers. I hope that it will inspire young students and lawyers from ethnic backgrounds to venture to the Bar and to places they never dreamt they could be. I chose to robe and wear the wig because I wanted to preserve a piece of history as one day it may be a 'thing of the past'. I feel that the wig and robe mean that counsel present as equal before the courts regardless of their client's circumstance. How did I feel about having my photo taken? Proud, happy and grateful – but exhausted to the point of expiration as I had just delivered my closing address and received the verdict in what was an arduous rape trial in which I happened to be opposed to one of my best mates (who, incidentally, looks elated in her photo).

Jennifer Batrouney QC
Bar Roll No 2623

I did not originally bring the dogs in for a photo. I thought that "live" props would be frowned upon. However, when the photographer was taking my first photo I told him that I would have LIKED to have brought the dogs in and he insisted that I go home straight away and pick them up. The wig and the jabot were a last minute thought as well. Minnie looks very thoughtful in the jabot and Moose looks quite judicial (High Court material, I say) in his wig. The photo is a good representation of the dogs. Moose is the frontman, but Minnie is the brains behind the operation.

I think that the 'Changing face of the Bar' exhibition is so important as a means whereby both barristers and those we come into contact with can see us as more than "old men with grey hair" - the traditional Rumpole stereotype. I was so pleased to see so many different facets of those at the Bar.

OFF THE WALL....

"The Changing Face of the Bar" exhibition

BY SIOBHÁN RYAN

The evolution of the Victorian Barrister can be traced through three suites of work on display in the Peter O'Callaghan QC Gallery's temporary exhibition, "The Changing Face of the Bar". Well, not quite, but the exhibition does show different modes of representation which are characteristic of their times.

Exhib. A: "Members of the Melbourne Bar, 1937" – This was a series of drawings by Alan Reeve, who was born in New Zealand but travelled the world as a 'caricaturist-for-hire'. In 1935, Mr Reeves held an "Exhibition of Caricature Portraits of Prominent People" at Melbourne's new American Cocktail Bar in the Hotel Australia, where according to its own publicity, "Attractive Cocktail Parties with delicious savouries and bright music may be arranged" by consultation with the maître d'. In this 1937 commission, the profiles of 108 of the then 174 practising barristers are captured in ink. Their winged collars and wigs mark their profession. Their names are listed below (some names, such as Frederico, Winneke, Gillard, Woinaski, and O'Bryan, are familiar to us who know their descendants currently at the Bar or on the Bench more than 80 years later).

There is not a smile, nor a woman amongst them.

Exhib. B: "1984 – The Centenary of the Victorian Bar" – A series of group portraits were commissioned which commemorate the centenary of the Victorian Bar. The Bar, by then comprising 1,112 practising barristers, gathered in their chambers to be photographed in small groups dressed in their wigs and robes. The mood is formal. The feel of heavy drapes, Victorian antiques and Persian rugs laid on *de riguer* apricot carpet permeates the black and white film. Some of the women (there were 75 by then) wear jabots with dainty frills stitched around the borders, but statement earrings have been banished for the occasion. There is a palpable sense of camaraderie in these small groups. Shoulders touch; a few grins escape. It must have been fun. Of the members of 1984, 88 still actively practise today.

Exhib. C: "The Changing Face of the Bar" – 700 black and white photos were taken by photographer, Garth Oriander over a hectic fortnight, in which members of the Bar were invited to "Come as you are". And come they did. Tentatively at first, to Mr Oriander's pop-up studio in the Peter O'Callaghan QC Gallery where they were welcomed and sometimes cajoled into taking time out of their busy days to face the camera. As the organiser, Stephen Jurica, of the Arts & Collections Committee, observed:

"It takes a leap of faith and a bit of vulnerability to stand in front of the lens. But word began to get out and a few peeks at the progress we were making got the momentum going".

Oriander's cut-throat schedule turned out to be his secret weapon. Only a few minutes were allowed for each shoot and this spontaneity translates into the most vibrant shots. The "Come as you are" theme was born of expedience but took the shoot into unpredictable directions, as some barristers arrived with kids and dogs and props of all kinds, while others were captured on the run between conferences and court appearances.

This temporary exhibition was made possible with generous funding by BCL. It was officially opened on 7 August 2018 by the renowned photographer, Bill Henson whose portrait of the Hon Ken Hayne AC QC is a significant work in the Gallery's collection. The exhibition was on show until 7 December 2018.

The profiles below are 'snapshots' of some of the barristers behind the photos.

Justin Hooper
Bar Roll No 4696
I had come from listening to Neil Young live.... in conference. I was thinking that Neil makes it look easy. How did I feel having my photo taken? That I hadn't come far from how I felt in my first photo portrait at kindergarten. I asked the photographer to delete this shot because it captured me from the unflattering 'chin-neck' angle; this one would never have made the cut at kinder!

▲ Stephen Jurica Bar Roll No 4242
I was on route from chambers to Southern Cross station heading west to Ballarat. My bike is an Amsterdam-style cruiser. It's a bit like riding your armchair around town. I've been using it since I came to the Bar nine years ago. Sturdy and solid as a rock. A good pack horse for me and my briefs. What do I like about this image? This photo shows everyday me. Relaxed and enjoying myself. I'm a son of Croatian immigrants. I live in country Victoria. I feel proud to be part of this photo essay.

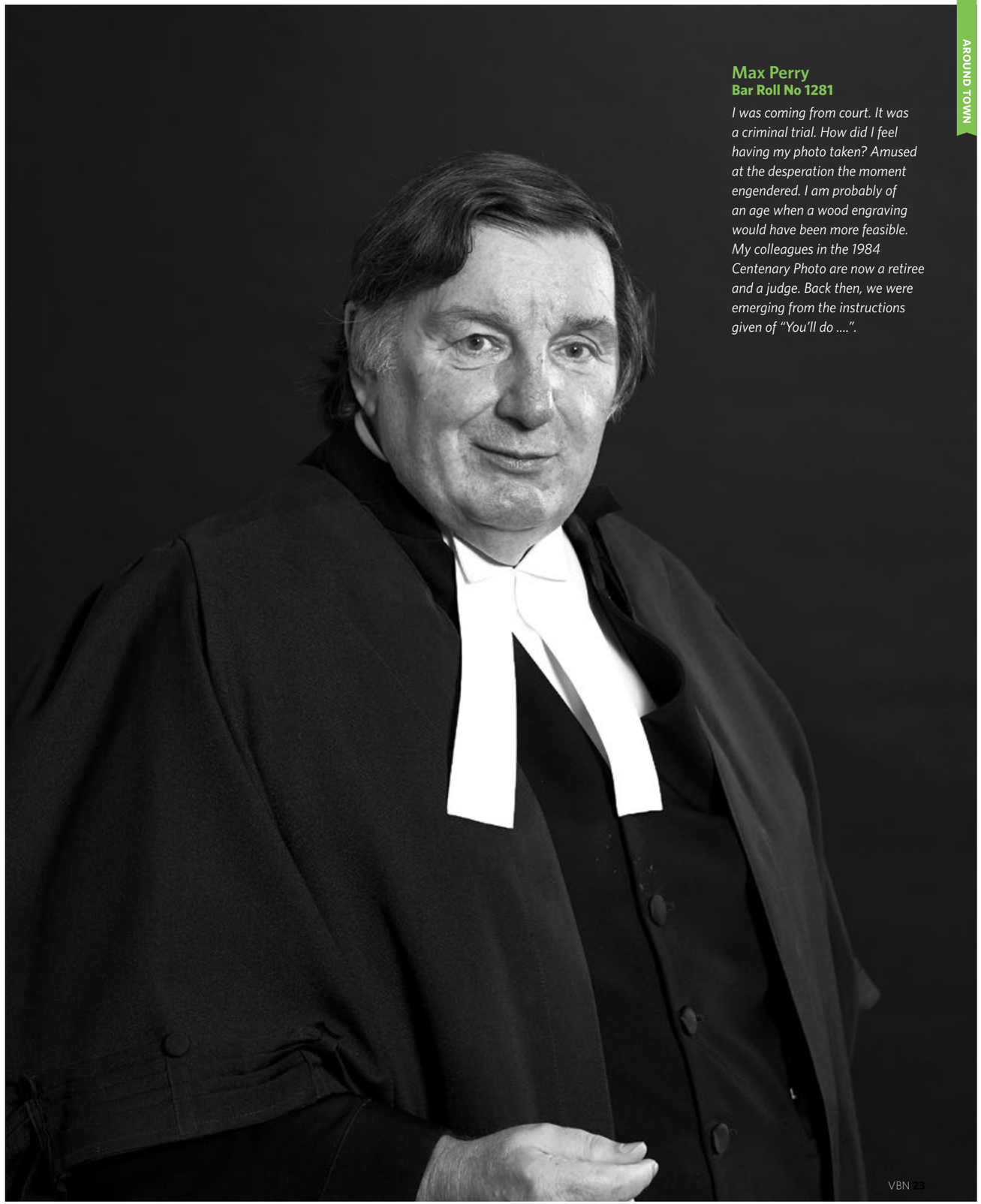
◄ Georgina Schoff QC Bar Roll No 2983
I was returning from Court when I was assailed by the irresistible Peter Jopling QC who was touting for subjects in the PO'C QC Gallery. I really dislike having my photograph taken, or rather, seeing myself in photographs, and so I was not at all keen. But I thought it was churlish to refuse completely, so I agreed to be shot from the back. Having now seen all the other photographs, which reveal so much about the individuals, I feel relieved that I took the defensive measure that I did!

◄Sam Hopper **Bar Roll No 3773**
Simone Bailey **Bar Roll No 4355**

Liz Ruddle (3827) dared me to get my kit off for the photo shoot. Also, I could not abide Melissa Marcus (4379) – the Life Saver – having the most talked about photo in the exhibition. Simone Bailey and I are great mates at the Bar. Simone is the Chairwoman of the Professional Boxing and Combat Sports Board and has had MILLIONS of fights, so she is a personal hero of mine. What do I like about this image? My abs (of course!) Oh, and Simone looks pretty good too. It was great fun. There is no such thing as bad publicity!

◄Charles Parkinson
Bar Roll No 4186

I had just finished the last day of a trial in the Federal Court before Beach J and came via the photo booth on my way back to chambers. I brought with me Charles Shaw, also counsel in that trial, to have his shot taken too. He was making some amusing comments, and I was laughing at them.



Max Perry
Bar Roll No 1281

I was coming from court. It was a criminal trial. How did I feel having my photo taken? Amused at the desperation the moment engendered. I am probably of an age when a wood engraving would have been more feasible. My colleagues in the 1984 Centenary Photo are now a retiree and a judge. Back then, we were emerging from the instructions given of "You'll do ….".

Richard Griffith Library (L-R) Ian Upjohn CSC QC, Dr Matt Collins QC, Laurie Atkinson, The Hon Justice Macaulay


The Hon Justice Macaulay

Richard Griffith Library joins the Law Library of Victoria

VBN

The Law Library of Victoria is the outcome of a visionary group, formed in 2011 by then Chief Justice, Marilyn Warren, to consider the future of the Supreme Court library. At the time, the Supreme Court library had lost its principal funding source: a fee paid by all lawyers admitted to practice in Victoria. The newly formed steering committee was urged to "think big" – and they did. They had a bold vision of a single library, serving the judiciary and the profession, across multiple sites. They recommended the creation of the Law Library of Victoria.

Now, the Law Library of Victoria includes the combined resources of the Supreme Court, the County Court, the Magistrates' Court and VCAT. The library is an integral resource for Victorian courts, as well as for the legal profession and the community. It has a strong focus on the availability of online resources.

It also has a contemporary outlook, evidenced by a Twitter account which promotes the breadth of the library's collection. For example, on Melbourne Cup Day this year, @LawLibraryVic tweeted a page of the 1918 Edition of the Argus, which 100 years ago had promised visitors "from all parts of the Commonwealth and from New Zealand" that they would enjoy "one of the greatest assemblages ever seen at Flemington".

On 1 July 2018, many of those who were part of the original steering committee were present to celebrate as the Richard Griffith Library became part of the Law Library of Victoria. The Victorian Bar's Richard Griffith Library has long provided services on a 24/7 basis to members of the Bar. Located on Level 1 Owen Dixon East, the Richard Griffith Library has recently experienced a refresh, moving adjacent to the Essoign Club.

As a result of this initiative, every member of the Victorian Bar now has access at any time of the day or night – from the Richard Griffith Library – to the same online resources that are available to members of the judiciary. The Law Library of Victoria, which includes the Supreme Court Library, offers services to members of the Victorian Bar. This is important to all barristers, but particularly to junior barristers who may find the cost of subscriptions a challenge.

Before Justice Macaulay of the Supreme Court formally launched the library, Bar Council President, Dr Matt Collins QC, paid tribute to all those involved in this major achievement. He acknowledged in particular Justice Macaulay, for his steady leadership from the first steering committee meeting almost seven years earlier, and Laurie Atkinson, Director of the Law Library of Victoria, whose clear vision for the library Matt described as "infectious".

Unimaginable to earlier generations of barristers, the Law Library of Victoria reflects an enormous stride forward for our Bar.

2018 Australian Arbitration Week, in Melbourne!

VBN

The Australian Arbitration week is the premier arbitration event held in Australia. It has been held annually since it originated with Sydney Arbitration week in 2013. This time, and for the first time, it was Melbourne's turn to host. Accordingly, in the week of 15 October 2018, distinguished guests and practitioners in the field of international arbitration from Australia and around the world descended on Melbourne to network with each other and share insights into latest developments in arbitration, particularly in the Asia-Pacific region.

The 6th International Commercial Arbitration Conference was held during the week. It was organised by the Business Law Section of the Law Council of Australia (BLS), the Australian Centre for International Commercial Arbitration (ACICA), and the Chartered Institute of Arbitrators (CIArb). Themed as *The Business of International Commercial Arbitration,* delegates listened to a strong and diverse range of speakers on, amongst other things, international developments in arbitration and jurisdictional issues.

Allan Myers AC QC was the special guest speaker at the CIArb Australia Annual Dinner held at No 35, Level 35, Sofitel Melbourne on Collins. Allan observed that we have an Australian brand capable of being more strongly promoted in international arbitration. He referred to our first-class judiciary which is pro arbitration, Australian cities with the finest facilities in the region to host arbitrations, and a reputation for the rule of law and anti-corruption. He further observed that our universities are in the top three in the region, producing some of the most qualified lawyers in the world, a matter particularly relevant given his role as Chancellor of the University of Melbourne. Allan concluded, "everything is in place to promote brand Australia", to which all present would undoubtedly agree.

Patrick Durkin (*Australian Financial Review*, Melbourne Bureau Chief), Allan Myers AC QC, Caroline Kenny QC, Tim L'Estrange (Partner, Jones Day) and Dr Matt Collins QC (President, Victorian Bar)

Matthew Blycha (HFW, Perth) and Fiona Cameron (Vic Bar)

Allan Myers AC QC delivering his address

Ron Salter (CIArb Fellow), The Hon Chief Justice James Allsop AO (Federal Court of Australia) who delivered the inaugural CIArb Australia Lecture, and Dr Vicky Priskich (Vic Bar)

PHOTOS COURTESY OF DAVID JOHNS

News AND Views

After the first year: An interview with Chief Justice Anne Ferguson, Supreme Court of Victoria

NATALIE HICKEY AND JUSTIN WHEELAHAN

At her welcome in October 2018, Chief Justice Ferguson said that, at that point in time, she did not yet have a complete answer to the question, what does it mean to be the Chief Justice of the Supreme Court of Victoria and what should a Chief Justice do?

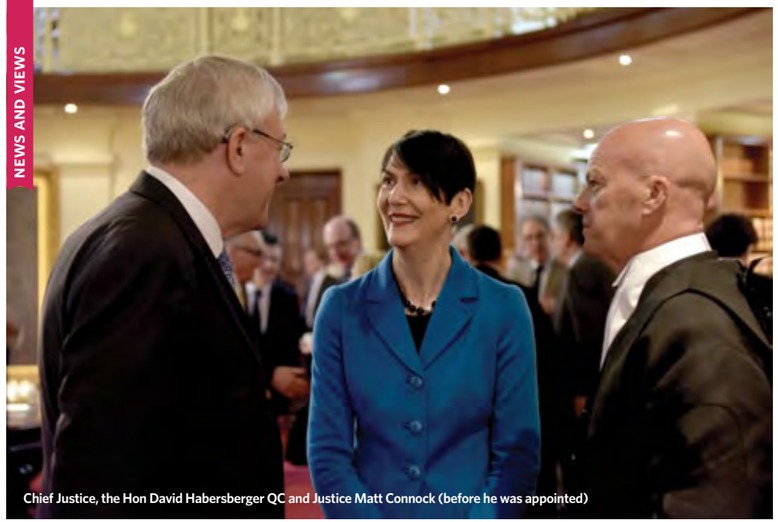
Twelve months on, with the sun streaming through the plane trees on a beautiful spring day, the Chief Justice is reflecting on her first year. She says it has been "at times exhilarating; always interesting". Over the past year nine new judges (a 20 per cent change to the total roster overall), a new DPP, a new chief crown prosecutor, and a new President of VCAT have been appointed. It is a different organisation, she says, simply by dint of new personnel. Her Honour asks, "How do you look at things? The same way, or a different way?". Change brings a fresh perspective, and an opportunity to challenge the prevailing view.

What type of person should be Chief Justice?

Chief Justice Ferguson was first appointed a Judge of the Trial Division of the Supreme Court in 2010. In 2014, she was made a Judge of the Court of Appeal. She is asked how these roles differ from being Chief Justice. She says that, as a judge, you focus on each case before you. As a trial judge, for instance, you might be outward looking to a certain extent. However, the office of Chief Justice includes other roles such as chairing the Courts Council (the governing body of Court Services Victoria), the Judicial Commission of Victoria, and the Judicial College of Victoria, which give a broader perspective.

Her Honour is firm that no 'type' of person should fulfil the role. She dismisses the suggestion that a person who assumes the role of Chief Justice should be either a great judge, a thought leader or a great administrator. Whilst she accepts that the Chief Justice needs a certain capability, her Honour regards the attributes of authenticity, transparency, and generosity of spirit as more important. She tries to value everybody, whether they be associates, registry staff or barristers. It's more about "personality style" rather than being "a good administrator," she says. On the question of administration, her Honour endeavours to work out where there are gaps, and then to get in people to help. Whilst her Honour may not be a 'team leader' in the corporate sense of the term, plainly, she does not regard being Chief Justice as a singular exercise.

PHOTOS COURTESY OF THE SUPREME COURT OF VICTORIA


Chief Justice, the Hon David Habersberger QC and Justice Matt Connock (before he was appointed)

What professional background has been helpful for the role of Chief Justice?

Her Honour says that her time as a partner at Allens before coming to the Bench had some benefit. However, from her Honour's perspective, "far and away" the most valuable and important influence was her time as a judge.

Her Honour regards her period on the Court of Appeal as a significant learning experience. "It helps you to understand both sides", she says. "You get to know colleagues you don't know well. You watch how others work." She refers to an example where she observed the techniques of a very experienced judge hearing a case with a litigant in person. That two-hour period watching how the other judge approached the matter, she says, taught her a great deal. The litigant in person lost, but left the court knowing a fair hearing had been given, and contacted the Registry subsequently to say so. As to the techniques her Honour learnt by observing the other judge, she said it came down to how matters were explained. She said it involved "simple things". This included breaking propositions down into short sentences. He also rephrased the issues, in respect of which she adds, "It was about getting the timing right".

What is her Honour's current priority as Chief Justice?

The Chief Justice may not be a list maker ("except at Christmas") but her priorities are clear. The user perspective is central to her Honour's vision. She recognises the need "to make the experience [for users] the best it can be in pretty awful circumstances". The starting point is to communicate what the court is doing and "why we are doing it". The recently relaunched Supreme Court website reflects the desire to improve the user experience.

There is also a forthcoming podcast series soon to be available on social media platforms. "We are excited by that", says her Honour. She adds, "The podcast series is us telling our story. It is not someone else telling it for us or interpreting it for us." Whilst reference is made to "the sounds of the court" and stories about the buildings and on sentencing, it is particularly interesting to learn that, for the podcast series, members of the community were approached for their views, including people in Bourke Street Mall.

Asked for the rationale behind the podcast series, the Chief Justice responds, "You don't get blind trust in institutions any more. Hopefully, it will help people understand". Her Honour appreciates the court is trying something new. "We are putting a toe in the water hoping it will deliver the outcome we want – more transparency and better understanding." However, if it doesn't work, she is sanguine about it. "We won't shy away from doing things differently", she says.

The concept of an adversarial court room – Is it time for a change?

How we treat each other has been the subject of significant scrutiny over the past 12 months. The #MeToo movement has gained unprecedented momentum as a social force. The institution of Parliament has grappled with allegations of bullying and intimidation in the wake of Malcolm Turnbull's removal as Prime Minister. More recently, and closer to home, the results of the Bar's Health and Wellbeing Survey suggest that 59 per cent of current Victorian Bar practising members have experienced judicial bullying at some point in their working lives.

Chief Justice Ferguson has been proactive in her response to the survey results. In a media release by the court, she noted that our courts are no different from any other workplace. The court should be a safe and respectful place to work. Bullying, discrimination and harassment will not be tolerated.

Her Honour is asked whether changing social norms are testing the fundamental nature of an adversarial system and how we must behave within it. It is evident from her response that she considers the premise unsound. "I think our court should always operate so that people are treated with kindness, courtesy and respect", she says. "Robust debate can be respectful. This was the case even 50 or 60 years ago. We do not need to 'adapt'."

The Chief Justice conveys the impression that she finds it difficult to envisage an occasion when aggression would be tolerable in the court room, particularly if initiated by judicial officers or members of the Bar. Her Honour refers, for instance, to the concept of cross-examination. She says, "The most effective cross-examination is one where the witness doesn't realise it, and has no idea how damaging [the evidence] is". She notes that such witnesses are often people who thank the cross examiner afterwards, unaware of the implications of what they have said. Such a cross-examination method is "good advocacy", she says.

The ethos of the Chief Justice is "around polite, courteous, respectful courtrooms". Her Honour is strong on this:

"If something is happening where the barrister is not treated that way, I want to know about it. The barrister may have felt affected. It may need a response. It may be that the judge overstepped the mark. Or it may truly be part of robust debate."

In relation to the statistics on judicial bullying from the health and wellbeing survey she notes that "there is not a lot I can do with that information other than provide judicial education in the absence of specific information". She concludes, "Unless I know about it, I can't address it. My aim is to prevent rather than remedy".

The Chief Justice considers education and discussion to be key preventative tools. In her role as chair of the Judicial College, her Honour is also taking practical steps to effect improvement. Events and education recently held or planned for the judiciary by the Judicial College in the next few months include sessions such as 'Facing up to bullying: the New Zealand experience' (an opportunity to learn from colleagues dealing with similar challenges), 'Judicial conduct: Ethics in an Age of Fear and Anger' (in which courtroom behaviours are put into a wider context), and 'Advanced Court Leadership: Roles and Responsibilities' (a workshop for senior judicial officers and court executives intended to reach a greater common understanding about leadership roles and responsibilities, and to define key values and behaviours in the leadership of Victorian courts).

Kaz Gurney, Chief Justice Ferguson and Patrick Cummins.

Chief Justice Ferguson, Patrick Cummins and Justice David Beach.

> "It is not unusual for someone not to recognise that what they are doing is bullying."

That said, her Honour notes that even with the best education, sometimes things can go awry. Other organisations have been experienced for a long time in dealing with bullying issues. Her Honour is not averse to learning from what other people have done. She refers to personal coaching as a common tool for helping correct behaviours of which the protagonist may be unaware. "It is not unusual for someone not to recognise that what they are doing is bullying", she says. "Whatever the discussion, it is a respectful discussion", she adds.

The Chief Justice has developed a protocol with the Victorian Bar for barristers to raise issues with her over conduct at the Supreme Court. There is a similar arrangement in place at the County Court. Her Honour commends the cooperative approach taken by Bar President, Matt Collins QC, and Deputy President, Wendy Harris QC, in developing the protocol. Her Honour says that there was a high level of collaboration, without people

adopting protective or defensive positions. "Everyone in the room was like-minded", she says. It becomes clear that the new Chief Justice's own personality style will set the tone for a courteous court.

As a practical solutions-oriented person, her Honour is hesitant about whether capturing information about the diverse characteristics of barristers (whether they concern gender or other attributes) is sufficiently useful to effect behavioural change. The Court is "just starting to see an increase" in relation to gender, her Honour observes. The Court is not presently capturing information about broader diversity, she adds. If doing this is valuable in terms of "positive improvement", then she may be inclined to consider this further.

How does the Chief Justice maintain work-life balance?

Her Honour's important influences are "family, friends, exercise, humour and trees". Her values, she says, stem from family. Reticent to open up about her personal life, it takes a few questions to explore the concept of 'trees'. She says, "There is a lot of research about getting out into nature". She tries to do this as much as possible, typically by going walking, often getting out of Melbourne to do so. One senses this is an important way for her Honour to wind down.

As for other interests, her Honour appears to have a mixed relationship with cooking. When time is short, she refers to cooking as "sustenance", but also refers to "creations when time permits". She refuses to name her favourite restaurant, saying, "You can't have the Chief Justice endorsing a restaurant! I will offend all my favourite restaurants!"

New admissions

The welcome to new members of the profession by the Chief Justice often stays in the memory of attendees, whether this be the new Australian lawyer, the person moving their admissions, and family and friends. Asked how her Honour crafts her message for this auspicious occasion, her Honour recalls that she thought carefully about what she wanted to say before her first ceremony as Chief Justice. Her Honour decided on the following message, which she has consistently conveyed since then:

"Know the facts and the law. Find mentors. Don't waste their time. Think about the problem rather than just the thought bubble. You don't get to where you are without people around you."

Her Honour also refers to the importance of family and on-the-job training. She notes the importance of being healthy and well. And she emphasises the importance of broad work beyond paid employment. As she says in relation to pro bono work, it's a way to give back capability.

These are lessons for life, not just for new lawyers. Chief Justice Ferguson herself appears to be applying those lessons well.

The Chief Justice on junior barristers and speaking roles

Chief Justice Ferguson has a firm view that, "If you think it's effective for one person to be speaking from the Bar table, think again". Her Honour regards it as far more effective for the task of senior counsel and junior counsel to be appropriately shared.

In August 2018, the Court of Appeal published a notice to the profession encouraging the active participation of junior counsel in cases where two counsel are briefed for a party. The notice concluded that senior counsel should feel no inhibition in dividing the appeal submissions between themselves and junior counsel or in asking junior counsel to make submissions in reply.

The notice was an initiative of President Maxwell in circumstances where junior counsel always used to do the reply, but the practice had largely ceased. The Court of Appeal is keen to see more junior counsel on their feet. Speaking as a former judge of the Court of Appeal, Chief Justice Ferguson observed, "The fear of standing up before three judges dissipates the more you practise".

Her Honour also provided practical examples of how the advocacy load can be shared at trial. Her Honour referred to a challenging Court of Appeal case in which senior counsel struggled to convey a difficult point. Her Honour could see that, whilst not quite tugging on her leader's robes, junior counsel was far more across the detail of the issue. Her Honour said that it was "incredibly frustrating" to see this from the Bench. She wanted to ask, "Would it be possible for Ms X to respond?".

The Chief Justice contrasted this scenario to a case in the trial division which was a reasonably lengthy trial. She could see how a good silk and a good junior worked well together. "It was a very collaborative approach", she said, further noting that the client lost nothing, counsel were impressive, and junior counsel had the benefit of the experience. She described the process as "very amenable".

The work was divided in that case as follows:

1. Junior counsel undertook the advocacy of evidence points. As her Honour observed, most of the time the fate of the case "won't live or die" on the outcome of these points.
2. Junior counsel took witnesses needed as part of the narrative, but who were not critical witnesses. Her Honour noted that junior counsel checked with senior counsel on one or two occasions during cross-examination, which she considered perfectly acceptable.
3. Closing submissions were divided between counsel.

PHOTOS OF SHARN COOMBES COURTESY OF NETWORK TEN. PHOTOGRAPHER: NIGEL WRIGHT

Life as a Crown Prosecutor versus life on *Survivor* – Sharn Coombes explains

VBN

Fresh from her success as runner-up of *Australian Survivor 2018 (Champions v Contenders)*, *Bar News* interviewed Sharn Coombes about the experience. Sharn was a crown prosecutor for the State of Victoria from 2015 to 2018. She has recently returned to the Bar where she practises primarily in criminal law, involving both prosecution and defence work.

Australian Survivor 2018 was filmed on an island in Fiji. The show featured Australian castaways, including Sharn, competing for a grand prize of $500,000 for 'the last person standing'. There were initially two teams of 12 people each: the Champions, of which Sharn was one, being contestants recognised for their work in given fields, and the Contenders, being contestants drawn from everyday life. Here Sharn reveals to *Bar News* what went on behind the scenes...

The source of Sharn's interest in *Survivor*

Back in 2000, when starting out at the Bar, an American television show came out called *Survivor*. I was curious about the concept, so I started watching the show. From that point on I was hooked. I watched many of the early US seasons, before work and family life took me away from watching for several years.

A few years ago, Network Ten launched the Australian version, and once again I was hooked. I was drawn to the idea of playing the game myself. When you consider this game, it is such a complex one. There are so many layers to it. There are physical demands, the survivalist aspect, and the mental and strategic components. On top of all that, there is the social game. To me, *Survivor* represents a microcosm of society, generally. I wanted to challenge myself on all of the levels that *Survivor* brings in the format of a game. And to have some fun with that!

Survivor reflected Sharn's interest in physical challenges

I had always found it important to balance my career with physical pursuits such as cycling, skiing and tackling marathons. I find that regular exercise is a great physical offset to the mental demands placed upon me given the nature of our work within the legal profession. Regular exercise creates an opportunity to be focused on a pursuit away from work. This in turns creates a balance in everyday life. If I do not have that balance, I am not as effective, or as energised as I can be to undertake the work that I do. I sleep better when I am exercising. I find that I have more mental clarity.

I started setting specific fitness goals, such as participating in various marathons and triathlons as a way of committing to my exercise regime, and also to fundraise for various charities. Once committed to an event, I know I have to be diligent in my training. It is prioritised so it can fit in with my work commitments.

It is very important to me to maintain a balance between work-life commitments, and exercise is the way I achieve that.

The timing worked

My appointment as a crown prosecutor concluded around the same time that I was due to start filming *Survivor*. The timing was perfect for me. That was one of the reasons I felt that I could take up the opportunity of going on the show. Had I been mid-appointment, I would not have taken up the opportunity so readily. I finished the game, which wrapped at the end of June, and came back to the Bar in July.

Life at the Bar suited the show!

All the experience I have gained at the Bar over the years, both defending and prosecuting, really helped me to assess the strengths and weaknesses of the other players throughout the game, and to find their vulnerabilities. I found it quite easy to perceive each player's character. Quickly I identified the players that were 'untrustworthy', or if the information that was coming back to me from other players was incorrect or false. Those skills most certainly helped me to advance through the game. This ultimately took me to the Final Two.

Voting off Russell Hantz

Russell Hantz was a former three-time contestant on the American Survivor series. As an example of being able to read people in the game, I was able to call Russell's bluff when he said he was going to play his immunity idol at the Champions first Tribal Council.

For readers who aren't *Survivor* fans, Tribal Council is the forum where the tribe votes out one member, to reduce the number of players. This gets you closer to the end game – where one person becomes the sole Survivor. An 'immunity idol' could be likened to an 'extra life' in a

Sharn Coombes demonstrating that the immunity challenges are anything but easy

computer game. It is an item that, if found within the game, can be used to protect your life in the game. At Tribal Council after the votes are cast for the tribe mates, but before the votes are revealed and read aloud, each player has their opportunity to play their hidden immunity idol to save themselves from the vote. If you don't play the idol, and you receive the most votes cast, then you are voted out and leave the game.

At Tribal Council early in the game, Russell revealed his hidden immunity idol to the tribe, claiming to us he was going to play it to save himself. This was to encourage the players to vote out someone else. He did this believing there would be minimum votes cast against him, enabling him to save his idol for another Tribal Council. He was sorely mistaken. When Russell ultimately decided not to play his idol, he discovered that players had put his name down anyway. And he was voted off.

Breaking up the Brian Lake and Monika Radulovic alliance

I was also able to read that (former AFL footballer) Brian Lake was far too calm before the Tribal Council where he might supposedly be voted out. This indicated to me that he had a hidden immunity idol to play. Therefore, I told the other tribe members to vote out (Miss Universe Australia 2015) Monika Radulovic instead. This broke up an alliance between Brian and Monika, leading to Monika being sent home.

Making it to the Final Two, and not winning

The Final Two are the two contestants remaining on the last day of the game. This is as far as you can get under your own steam in the game of *Survivor*. Former Olympic Gold medallist Shane Gould was the ultimate winner (winning 5 votes to 4), pleading her case successfully to the jury at the Final Tribal Council.

One single vote split Shane and myself. It could have gone easily either way. I do take some comfort in that, and the fact that I played a great game, breaking multiple records. At the end of the day, it is a game, and you have to accept defeat when it comes. In my mind, it only makes you stronger and more determined to continue to improve and learn.

In my view, Shane's ultimate success was largely due to the fact that the *Survivor* jury are dissimilar from the jury we are used to within the legal sense. That is, they are not an objective jury, but a subjective one. In this season of *Survivor*, the jury has been perceived as quite a bitter one. Given I am a competitive person, and I was out there playing to win, sure, it was difficult to accept the loss by one single vote. But even though it is a loss – I could not have come any closer to the title.

I kept an eye on my professional persona whilst on the show. I was very mindful about maintaining my reputation. I conducted myself in a way that I felt could facilitate that. I knew, of course, I would be subject to the narrative that the producers of the show ultimately designed, so there was an element of risk and trust involved.

I have built a solid practice over the past 18 years at the Bar, and those who know me also know that I routinely operate from a position of fairness and integrity. I tried to maintain that in *Survivor* as that was the easiest way to approach the game for me, to just be myself out there. I knew that I couldn't go out there and try to be a villain.

I did throw myself into the physical challenges. I am super competitive. I couldn't approach the physical component in any other way. They were a lot of fun.

What people have said to Sharn about her experience on *Survivor*

Generally, the overwhelming positive support is probably what has surprised and resonated with me the most.

I have had incredible positive support from the Bar, members of the judiciary, the Office of Public Prosecutions, and other lawyers generally, which has been amazing. I specifically recall one member of the Bar, just after the show had started, telling me that they had no idea that I had this other side to my personality, and was completely surprised that I would undertake such a thing, but that they loved watching me do so well out there on the beach.

I had been inundated with so many comments and conversations whilst the show was on air, and even now that it has finished. I have received support from lawyers I don't even know, in other jurisdictions, thanking me for putting lawyers in the spotlight in such a positive way.

My family and friends are all extremely proud. My husband and four kids are amazed at what I achieved in the game. I think they saw me in a different light from how I am at home, as the mum and wife.

Insights from the experience

One insight I have gained post-*Survivor* is that there is benefit in taking real breaks away from work. *Survivor* was for me the opportunity to pursue a passion that was outside my professional space, and to have some fun. It was completely different. It meant I could 'switch gears' and take a real mental break. It is important to put aside the cumulative effect that the mental strain can develop within us all, as barristers, given the nature of our work and workloads.

I think it's really important to recognise that in our profession it is essential that we don't 'lose' ourselves within it, as that is sometimes easy to do. It is important to maintain outside interests, and to find ways to fulfil the other parts of you. I find that by doing so, it makes me appreciate and enjoy my work more fully.

The other insight that I have gained is that our lives, generally speaking, are over-complicated. I went for 50 days sleeping on the ground, exposed to the elements, with little food and no access to any form of technology or news. It was a 'digital detox'.

This was a simple existence, and it was refreshing to be rid of the complexities of life. The less I had, the less I felt I needed. But I was happy.

We live in a modern society that is always busy, where we must be connected and contactable, with a heavy reliance on digital media. We need to be conscious of this. We need to find time and ways to 'check out' from this lifestyle. That might mean sitting on the beach for the day without your phone, taking a long walk, or making it a point to actually look out of the train window on the commute to and from work, instead of 'scrolling' on your phone. It's important to 'disconnect'.

After *Survivor* I am trying to simplify my life as much as is realistically possible. I am limiting my own and my family's own 'screen time'. I am aware and conscious of its intrusion upon the meaningful things in life, such as relationships and experiences.

Life at the Bar since Sharn's return

[Sharn's on-screen persona demonstrated resilience, sociability, and an ability to take on all comers. *VBN* asked her how this influenced her ability to win work.]

I have been receiving a very steady stream of work since my return to the Bar, so that is great. I think as barristers though, we all have this resilience and sociability within us. That is part of how we create longevity within our careers. We develop resilience. We are social, and we constantly meet people from every possible background. This helps us develop those skills of empathy. What a fantastic profession to be part of!

Summary

I loved my *Survivor* experience. It gave me the opportunity to challenge myself on so many levels. I learnt that I could sleep on a beach for 50 days, without my family and loved ones. I could go without home comforts, or indeed – a home!

I physically pushed myself out there. I outlasted a five-time Winter Olympian in a physical challenge, beating Lydia Lassila in the first individual immunity challenge, lasting nearly four-and-a-half hours standing on a pole.

I broke multiple *Survivor* records. I am now the Australian record holder for a female winning the most individual immunity challenges (having won four in total). I am the Australian record holder overall (tied with Brian Lake) for the most individual immunity challenges won. I have also tied the female International Survivor record, with the most individual immunity challenge wins at four.

I believe this is a great achievement given I was competing against professional athletes and Olympians. Not bad for your typical bookworm and member of the Victorian Bar! I have also made some incredible, lifelong friendships as a result of my experience, especially so with Lydia Lassila and (AFLW star) Moana Hope.

Overall, looking back, I can't describe my experience as anything less than amazing!

> "I outlasted a five-time Winter Olympian in a physical challenge, beating Lydia Lassila in the first individual immunity challenge, lasting nearly four-and-a-half hours standing on a pole."

NEWS AND VIEWS

PHOTOS OF SHARN COOMBES COURTESY OF NETWORK TEN. PHOTOGRAPHER: NIGEL WRIGHT

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The Jury Sentencing Study

How jurors would sentence is not what you might expect. Her Excellency Professor the Honourable Kate Warner AC, Governor of Tasmania explains. BY JUSTIN WHEELAHAN

Professor Warner is a preeminent sentencing expert. Her Excellency has a distinguished career as a legal academic, including as professor and dean of the Faculty of Law at the University of Tasmania, and as director of the Tasmanian Law Reform Institute. In the spirit of multi-tasking, Professor Warner has continued her research into sentencing whilst holding the office of Governor of Tasmania since 2014.

"Soft sentencing" is a topic of perennial interest to the press. In 2018, her Excellency delivered the Victoria Law Foundation Law Oration, 'Are Courts Soft on Crime? Lessons from the Victorian Jury Sentencing Study'. The Victorian jury sentencing study took a look at the differences between judges' and jurors' sentences. In the first stage of the study, jurors were asked to formulate their own sentence for the case they tried. In the second stage, jurors were asked to comment on the appropriateness of the judge's sentence.

Was a passing comment of the Hon Murray Gleeson AC in an article the inspiration for your jury sentencing project?

Yes. Murray Gleeson's 2005 article 'Out of Touch or Out of Reach'[1] suggested that the reactions of jurors to sentences imposed in cases they tried could be a useful practical test of whether there is some systemic failure of the sentencing process to meet the expectations of well-informed members of the public.

At the time, the Tasmanian Law Reform Institute (of which I was the director) was considering a reference from the government on sentencing. The terms of reference included requiring the institute to consider how community attitudes towards sentencing should be ascertained. It occurred to me that asking juries about sentencing would be one way to do this. As this concept had been suggested by the Chief Justice of the High Court, it was an idea that would be taken seriously.

Were jurors' sentences more lenient or more severe than sentencing judges in your study?

In both the Tasmanian and Victorian studies, jurors' sentences (which were suggested after verdict and before the sentence was imposed) were more likely to be more lenient than the sentences of judges. In the Victorian study, 62 per cent of the 918 jurors surveyed suggested a sentence that was more lenient when we compared the juror's suggested sentence with the judge's sentence.

Did jurors think that the sentences imposed by judges were appropriate?

After the judge had imposed sentence, we sent jurors the sentencing remarks and asked for their reaction – 87 per cent of jurors said the judge's sentence was appropriate, and 55 per cent said it was 'very appropriate'.

Was there a punitiveness gap between jurors' and judges' sentences for violent crime and sex offences?

On the basis of the Tasmanian results, we expected jurors would be less likely to be more lenient than the judge in the case of violent offences and sex offences. However, we found that this was not the case for violent offences – 71 per cent of jurors were more lenient. They were evenly divided between being more and less lenient for sex offences.

Jurors tended to be more severe in the case of child sexual assault where the victim was under the age of 12. For this category of sex offence, jurors were more severe in 63 per cent of cases. This punitiveness gap between judges and jurors was replicated in Stage 2, with only 36 per cent responding that the sentence for this type of sex offence was very appropriate.

R A Duff argues criminal punishment is an exercise in moral communication. Retribution expresses the community's censure of the offence as a deserved response for past wrongdoing.[2] Do courts face a legitimation crisis if their sentences are perceived to be out of sync with community norms?

This is a contentious point. Some academic commentators like Paul Robinson argue that a mismatch between public opinion and sentencing practice does undermine the legitimacy of the courts.[3] Others disagree, arguing that intense criticism of sentencing practice has not led to the collapse of the criminal justice system.[4] So, while there does not seem to be empirical support for the loss of legitimacy argument, it does seem plausible, as other commentators have suggested, that to ignore public views entirely could well lead to diminished confidence, less compliance and weaker penal censure.

PHOTOS COURTESY OF GOVERNMENT HOUSE TASMANIA

The study showed that jurors regarded date rape as a breach of trust, whereas courts restrict the application of this aggravating factor to other types of relationships. Are judges in any better position than jurors to identify a breach of trust?
Judges are of course in a better position than jurors to identify the legal ambit of a trust relationship for the purposes of this aggravating factor. In other words, they are in a better position to identify and apply the law. But this is not to say that there can't be a change in the law if a principled argument can be raised in favour of such a change.

Breach of trust is a factor that is aggravating because it suggests greater culpability or perhaps greater emotional harm to the victim. It could be cogently argued that in the context of date rape, an offender who rapes his date breaches the trust placed in him.

The jurors you surveyed tended to think that judges were generally out of touch, but that their individual judge was not. Can you explain the concept of the "availability heuristic"?
The availability heuristic is a mental shortcut that helps one make fast but sometimes incorrect assessments. So, an abstract question about sentencing severity is likely to reflect surface attitudes or emotions reflecting a fear of crime, a perception that violent crime is rising or out of control, and that increasing prison sentences will reduce crime.

By contrast, a question about the appropriate sentence in a particular case when the facts of the case are known to the respondent is likely to elicit a more considered response.

What is the difference between "system deterrence" and "marginal deterrence"?
Marginal deterrence refers to the deterrent effect of increased sentences, for example, the difference between a sentence of four years and one of six years.

System deterrence refers to the deterrent effect of the criminal justice system as a whole: criminal laws, police, the process of arrest, charge, trial, conviction and criminal punishment.

Without a criminal justice system, there would inevitably be more crime. So, the criminal justice system is a deterrent to crime.

General deterrence was the most important sentencing factor for judges, but the least for jurors, with one juror saying it would "only work if you put it on a billboard in Fed Square every morning." The Victorian Court of Appeal has also stated that deterrent sentences can only be effective if publicised.[5] Did jury opinion often align with judicial opinion in the study?
While judges do occasionally observe that deterrence is only effective if the penalties are publicised and known to potential offenders, their favourite sentencing purpose is general deterrence. Despite any reservations they may have about its effectiveness, they are constrained by appellate decisions to place weight on general deterrence as a sentencing purpose.

While general deterrence was jurors' most popular purpose in the context of drug offences, it was generally the least popular purpose. In general, judges' and jurors' purpose preferences were not well aligned in respect of marginal deterrence.

Is there any empirical evidence that longer sentences are more deterrent than shorter sentences?
No. It is generally agreed by criminologists that longer sentences are no more effective as a deterrent than shorter ones. Nor is there any evidence that capital punishment is more effective than life imprisonment or long determinate sentences.

> "The sentence in a homicide case is not intended to reflect the value of the human life lost. The value of the loss of a life can't be calculated in terms of a punishment for taking that life. They are incommensurables."

In, *R v Guode*,[6] the offender had lived an extraordinarily difficult life, and drove four of her children into a lake, drowning three. Two murders, and one attempted murder, occurred in the context of an infanticide – the Crown accepted that the balance of Akon Guode's mind was disturbed post-partum after the birth of her youngest child. She was sentenced to 26 years with a 20-year minimum. The *Herald Sun* ran an editorial "What price does our justice system put on a life? What value does it place on just punishment, deterrence and the need for public denunciation?"
The rhetorical question, "What price does our justice system put on a life?" suggests that the sentence imposed for a crime indicates the value the justice system places on life in a case of homicide. The fact that we have long had a crime of infanticide with a much lower maximum penalty than life shows that harm is not the only factor to be taken into account when a sentence is imposed. The same can be said using manslaughter and causing death by culpable driving as examples. These crimes attract lower maximum penalties than murder.

The sentence in a homicide case is not intended to reflect the value of the human life lost. The value of the loss of a life can't be calculated in terms of a punishment for taking that life. They are incommensurables. A punishment which corresponds in degree and kind to the offence could only be achieved if every loss of life was punished by taking the life of the perpetrator irrespective of the degree of culpability. Instead what is required is a meaningful response to the offending that is limited by what is proportionate to both harm caused and culpability.

What is the normative significance of public opinion?
This is a highly contested question. In my view, public opinion is relevant to sentencing but it should be informed public opinion and input should be indirect and controlled within a professionalised system.

Ronald Dworkin noted the acute problem of justifying judicial decisions in "hard cases", when no settled rule dictates a decision either way.[7] On appeal, Akon Guode's sentence was reduced to 18 years with a 14-year minimum.[8] Do hard cases make for inconsistent sentencing?
Hard cases can lead to inconsistency if mercy is relied upon rather than a sentencing factor backed by principle. However, mercy can be relevant more indirectly, such as in assessing culpability. An offender whose mental state diminishes capacity is regarded as less culpable. This was the situation in *Guode*. The Court decided that the sentencing judge had given insufficient weight to the evidence that the offender's moral culpability was significantly reduced by her mental disorder.

Mercy still plays a part in sentencing when exceptional circumstances exist. Your view is that from a normative perspective it is better to give weight to mitigating factors on the basis of a principle such as impact mitigation, because mercy can be applied inconsistently. Is impact mitigation mercy by another name?
That is a good point. However, I am not suggesting that in any case in which the impact of a sentence of imprisonment may be experienced as harsher by an offender, the sentence should be discounted. For example, I don't agree that it should be the case that a white-collar offender accustomed to a comfortable life should receive a sentencing discount because the impact of imprisonment is likely to be greater. It is up to the courts to work out when impact mitigation is appropriate.

VBN is grateful to her Excellency for responding to our questions about the Victorian jury sentencing study.

PHOTOS COURTESY OF GOVERNMENT HOUSE TASMANIA

1 (2005) 7 *Judicial Review* 241.

2 R A Duff, *Trials and Punishments* (Cambridge 1986) ch 8.

3 Paul Robinson 'The Proper Role of the Community in Determining Criminal Liability and Punishment' in J Ryberg and J Roberts eds, *Popular Punishment: On the Normative Significance of Public Opinion* (Oxford 2014) 54.

4 Jan de Keijser, 'Penal Theory and Public Opinion: The Deficiencies of Direct Engagement' in J Ryberg and J Roberts eds, *Popular Punishment: On the Normative Significance of Public Opinion* (Oxford 2014) 101.

5 *DPP v Russell* (2014) 44 VR 471.

6 [2017] VSC 285.

7 Dworkin, 'Hard Cases', *Harvard Law Review* (1975) 88 p. 1057.

8 [2018] VSCA 205.

The search for balance

How Chief Magistrate Mr Peter Lauritsen has responded to the most challenging of years.

JUSTIN WHEELAHAN AND NATALIE HICKEY

Less than a year ago, Chief Magistrate Peter Lauritsen, or 'The Chief' as he is affectionately known amongst his staff, was thrust into the role of advocate for magistrates' health and wellbeing. The Magistrates' Court of Victoria had faced two tragedies in less than a year. Magistrate Stephen Myall took his life in March 2018. This was only months after the death of Magistrate Jacinta Dwyer in October 2017. The press attention was very strong, shining a spotlight on the often thankless and difficult nature of the role.

Chief Magistrate Lauritsen was the sympathetic face of the court, speaking up for his colleagues, arranging amongst other things a wellbeing conference, convened by the Judicial College to obtain insights from all 120 magistrates, and securing significant public support and funding to ensure that change was not just promised, but delivered. This has included 18 new magistrates appointments, although most were already in train.

What are the continuing pressures? How is work-life balance being managed? What is the process for new magistrates to become familiar with their new professional life?

In addition to insights offered by the Chief Magistrate, new appointees Magistrate Alanna Duffy and Magistrate Mia Stylianou explain what they are looking for in the role, and how they are finding life at the court so far.

What are the continuing pressures?

Dealing with the elephant in the room, Chief Magistrate Lauritsen says:

> The problem with suicides generally is that, following a coronial inquest, you'll really not know why. It's reasonably rare, in my experience, to pinpoint any particular reasons. But nonetheless it is a basis upon which to accelerate questions of wellbeing. Because even though no one can say with any certainty that X is *the* cause, there is always the suspicion that X is *a* cause.

An arcane system facing the pressures of modernity poses a challenge in this context. His Honour says, "The pressures are plainly an aged and ancient infrastructure faced with modern circumstances, and a rapidly increasing work load."

For example, as Mr Lauritsen explains, the criminal mention system is a product of the 1980s. Fortunately, the court has been funded to introduce a new case management system. This will enable the court to have a paperless registry administration in 2021 and for the registry to concentrate on its work rather than chasing files.

More police, and more prisoners

More work for the court system emerged as an issue in 2013 following the murder of Jill Meagher. "The changes to parole suddenly created a lot more people who went back into remand," Mr Lauritsen explains.

> We were a symptom of that. A lot of people went back into custody at that time. Our infrastructure is very old fashioned. When a person on remand needs to appear physically in a court, he or she is generally brought to a nearby police station and held there until moved to a court room. Although the statewide police cell capacity has remained static, since 2013 there has been a massive increase in the remand population.

Police cells are well beyond their capacity. Mr Lauritsen says:

> The problem for a while was almost resolved until you had the disturbances at the Metropolitan Remand Centre in 2015 which overnight reduced its capacity from over 1,000 to about 500. It has taken the last three years to take the remand centre back to its pre-disturbance capacity.

A new audio-visual system has enabled prisoners to appear remotely from prison, and practitioners to communicate more easily with clients on remand on their devices, improving efficiencies.

Over the past four years, 3,100 new police members have been phased in. Mr Lauritsen acknowledges this has a deterrent effect "but we also know from experience, which we're beginning to see evidence of, that police will generate more work for the courts."

Changes to bail laws

The problem of more prisoners on remand has recently become more acute. Dramatic reforms to the *Bail Act* 1977 came into force in May and July this year, bringing in the largest changes to the state bail laws since the introduction of that Act. The two reverse onus provisions in the *Bail Act* were changed. The "exceptional circumstances" test for bail was extended to a broader category of scheduled offences, and the "show cause" test was replaced with the "show compelling reasons" test. This has been interpreted more stringently, resulting in more people on remand.

Self-represented litigants

Another pressure placed on the magistrates' workload is dealing with an increasing number of self-represented litigants since Legal Aid funding changes in 2013. This has caused longer trials, in particular, criminal trials.

As Chief Magistrate Lauritsen points out, when you have a litigant in person intending to plead guilty, there is a long list of things to explain: what the likely penalty might be, that there is a process whereby they can call character witnesses or produce a document, that they can take issue with the summary of the prosecution and why, and that the issue can ultimately be resolved by evidence. He says, "You've got to tell them all of that, and all of the ramifications. It may result in loss of licence, or being placed on the sex offender register. You're obliged to tell these people these things as a matter of law - even if they look at you blankly."

How is work life balance being managed?

Chief Magistrate Lauritsen notes he "grew up" with his fellow magistrates, and "one's always interested in one's colleagues". Understandably, his Honour has taken a particularly keen interest in colleagues' health and wellbeing of late. In 2017, the Magistrates' Court created a wellbeing committee. It is chaired by the Honourable Bernard Teague and otherwise comprises 24 magistrates. They have developed a strategic plan for magistrate welfare.

Wellbeing Days and Capped Lists

One of the initiatives implemented by the wellbeing committee is that each magistrate has one day a month in chambers to prepare reasons for reserved decisions, deal with VOCAT (Victims of Crime Assistance Tribunal) files, or undertake any other work (e.g. drafting submissions to government for the court). Unsurprisingly, this initiative has been well received.

Another initiative introduced has been four wellbeing days a year. The wellbeing days are voluntary, not mandatory. Chief Magistrate Lauritsen has encouraged magistrates to participate, telling them that, "these are aimed at building resilience". His Honour adds:

> They can go to a session with a trained psychologist. What's more they can go to the session and take the rest of the day to think about what they have learned. It's not to address a problem. If they've

PHOTO WITH PERMISSION OF THE MAGISTRATES COURT

"Another pressure placed on the magistrates' workload is dealing with an increasing number of self-represented litigants since Legal Aid funding changes in 2013."

> “Of the 18 new magistrates appointed to date this year, there were 500 applicants, of whom 59 were interviewed.”

got a problem, there is already an existing system where they can seek professional help via the court, or court services. It’s about building resilience. It’s not new, it has been piloted in the Coroner’s Court, the Childrens’ Court, and has been adopted in the County Court.

Changed Sitting Times

Chief Magistrate Lauritsen also issued a direction adjusting sitting times from 10am to 4pm. He notes, “Because of the pressure of work [magistrates] had increasingly started earlier at 9, 9.30, and [were] sitting beyond 4 to 5 and 6.” He has put a stop to this by formally delegating his power to the regional coordinating magistrates to create lists, so that they have the sole responsibility of capping the lists.

Mr Lauritsen also issued a practice direction that brought the cut off times when people could be brought in custody from a 2opm back to 2pm. In parallel with this, the Children’s Court issued a practice direction to bring the cut off time to hear urgent child protection matters back to 2.30pm across the State.

His Honour explains that this has created its own tension:

> On the one hand my judicial colleagues applaud it. On the other hand, they want to deliver justice as quickly as possible, especially, say, in country areas. When you’re coming to 3.30pm and you’ve still got a court room with a number of people in it who may have travelled a long way to attend court, it becomes very difficult for you to say goodbye at 4pm.

Thinking outside the box

In February 2017, the Melbourne Magistrates’ Court introduced the night court. A magistrate sits in night court seven days a week from 4pm until 9pm, dealing with bail and remand matters from the Melbourne metropolitan area.

The Chief has asked the wellbeing committee to consider introducing ‘sessions’ more broadly. He accepts this is a radical idea and is careful to make clear that he does not seek to implement it. But he wants the Committee “to take it into account in what we do in the future”. He observes that, understandably, there is some resistance from magistrates, just like practitioners and court users, from having matters listed of an evening.

By raising the idea of sessions on a broader basis than bail and remand matters, Chief Lauritsen is thinking laterally about potential ways to reduce the pressure on courts. He is looking beyond existing work practices to do this, and notes that sessions have not become part of the fabric of courts in the common law world.

There may be colleagues who want to work flexible hours. He asks:

> How do we, within an existing infrastructure, cope with an increased workload? How do we say our specialist family violence courts will deal with that workload?

The Chief is trying to come up with alternatives to asking the government to spend money on court houses and more court rooms, in a manner which does not unduly burden the magistracy.

What is the process for new magistrates to become familiar with their new professional life?

Of the 18 new magistrates appointed to date this year, there were 500 applicants, of whom 59 were interviewed.

Nine of the new appointments replaced magistrates who had resigned, retired, or reached the mandatory retirement age of 70. With the new appointments, women now make up 47 per cent of the magistracy.

Of the new magistrates, five were allocated to the Bail Remand Court, one was earmarked for the Assessment Referral Court (ARC), three for youth control orders in the Children’s Court, and two for the automatic number plate recognition scheme. The Chief wryly notes that, “supply may exceed demand” in dealing with this new recognition software, having witnessed its effectiveness in action recently at a demonstration by police at Hepburn Springs.

As to why there were so many applicants, and why they seek to join the magistracy, Chief Magistrate Lauritsen thinks that most of them, for personal or professional reasons, “thought the time was right for a judicial appointment.”

One person who agrees with this assessment is Magistrate Alanna Duffy. A barrister since 2004, she specialised mainly in employment and administrative law and was appointed a magistrate in October 2018. She told *Bar News*:

> I sought a judicial role because I was ready for a change after almost 15 years at the Bar. I never thought that I wanted to be a decision-maker (rather than an advocate) until two or three years ago, though I had spent a number of years doing voluntary work sitting on sporting tribunals. I sought some sessional appointments to test myself out. I was Chairperson of the Harness Racing Victoria Racing Appeals and Disciplinary Board and Deputy President of the Review Division of the Police Registration and Services Board. I found I enjoyed being on the other side of the bench and I think this experience has been invaluable in preparing me for my new role.

The induction process

Chief Magistrate Lauritsen explains that, “there is a transition from being an advocate to being a decision-maker”. That is why new magistrates go through an induction program. All start out at the Melbourne Magistrates’ Court. New magistrates share chambers with each other. It is easier for them to talk through issues. They start off observing for two or three weeks, irrespective of their litigation experience. The Chief notes, “They create their own atmosphere here, because that’s where they start.”

For those who may later be based in regional areas, they must still have nine to 12 months in Melbourne or suburban courts, which the Chief Magistrate regards as a “reasonable experience”. As someone who has spent time on circuit himself, his Honour notes that there are particular pressures on country magistrates. Travel time is one. A magistrate might be in Shepparton for three days a week, Wodonga for one day, and Wangaratta another day.

Ms Duffy considers that the induction program has been beneficial in providing her with practical support and training. She’s also found her new colleagues to be incredibly generous in providing advice and support, “much like the collegiate support at the Bar”. She says:

> The induction process has been a great opportunity to learn more about the court’s functions and observe my colleagues. The program includes structured sessions dealing with different aspects of the court’s operations and observing experienced magistrates in court in a range of different matters. We are also formally assigned a mentor.

The new magistrates are trained around the Court Link system, the Koori Court, the Drug Court, the Assessment and Referral List, and the Neighbourhood Justice Centre down at Collingwood. His Honour says that the induction program is tailored to start people off in the area of their strengths, and then work them into the areas they are less familiar with.

Starting out as a magistrate

For Magistrate Mia Stylianou, a short assignment to the Criminal Division of the Children’s Court immediately upon her appointment did not leave her without trepidation, even if she was placed there in recognition of the area being a potential strength. Appointed a magistrate in June 2018, Ms Stylianou was previously at the Victorian Bar for more than 10 years (with a former life as an associate public defender at Victoria Legal Aid). Her practice was almost exclusively in the adult criminal jurisdiction as a barrister.

Magistrate Stylianou says about her recent experience, “The seriousness and often complexity of the cases and the circumstances of the children that appear before this court has surprised me.” One of the first cases she heard and determined involved a young teenager who successfully ‘hacked’ into Apple, was subsequently blocked, but managed to re-permeate the Apple Corporation’s secure systems. She says, “the FBI became involved, the AFP, and the CDPP”.

Magistrate Stylianou concludes:

> At this stage, four months in, sitting on the Bench in the Children’s Court has been one of the most rewarding chapters of my career. It is often intense, but especially when the Bench is able to engage meaningfully with a young person, often in unexpected ways, such that progress is made, it is incredibly fulfilling.

Looking ahead

A new specialist Family Violence Court

The Magistrates’ Court will be opening its first specialist Family Violence Court in Shepparton, at the recommendation of the Royal Commission into family violence. Chief Magistrate Lauritsen says:

> The Royal Commission recommended 14 major venues over two years, and the government allocated funding for five venues. Shepparton will be our first, and then they will be rolled out to other locations starting with Heidelberg and Frankston.

The specialist family violence court is based on the American “one family. one judge” concept, and had its progenitor in the New York Supreme intergrated Domestic Violence Court. That court had a single jurisdiction and decided (without the assistance of government) that the same judge would hear all related cases pertaining to a single family where the underlying issue is domestic violence, increasing offender accountability, ensuring victim safety, integrating the delivery of social services, and eliminating inconsistent and conflicting judicial orders. His Honour notes, “It means that the decision-making is informed. It is, in a sense, an extreme form of docketing.” Clearly, he is looking forward to the improvements to the administration of justice that the new court will hopefully bring.

Despite the success of these innovations, with the Drug Court currently being expanded to Melbourne, his Honour laments the “postcode justice concept” – the fact that certain specialist courts are only available in certain metropolitan and regional areas, rather than across all venues in the State of Victoria.

More new appointments

There has been a spike in appointments this year, and there will be another spike in 2019, with the prospect of further new appointments in 2020. The State Government has announced further funding for new magistrates. In total, we can expect to see at least another 13 appointments in 2019, and at least another 10 in 2020.

Chief Magistrate Lauritsen says:

> Again, there will be an influx of smart, enthusiastic, energetic magistrates with the positive effect that their energy will bring. They are new, fresh people to reinforce the court.

Beyondblue.org.au has a range of excellent online ideas and tool kits for staying healthy, and to help combat symptoms of anxiety and depression. If you need help, please contact ***Lifeline 131 114; BeyondBlue 1300 224 636****.*

NEWS AND VIEWS

Where are the barristers who blog?

NATALIE HICKEY

Barristers who blog tend to know other barristers who blog. As someone who has her own legal blog (The Social Litigator), I thought it was time to look beyond the immediate circle of barristers I know who do similar things, and to find other barristers putting their opinions out there in the public domain. However, after significant online research, I found very few Victorian barristers who blog, beyond the people I already knew. This completely surprised me.

The names that kept coming up were not the tip of the iceberg. In fact, give or take a few people, they are basically 'it'. Women are under-represented; I could find only a handful of female Victorian barristers who blog, and that includes me. Planning and property barristers were over-represented. This may be attributed to the 'Greens List effect'. Michael Green and his team were given credit by a number of contributors to this article for convincing barristers on Greens List that blogging was a "necessary evil" or because they got "into our ears" (intended as a compliment!).

Some barristers were prolific, others less so. Most barristers blogged about the law.

Using 21st century parlance, I decided to "reach out" to a number of blogging barristers to test my initial conclusions.

Why so few blogging barristers?

Eliza Bergin blogs about planning and environment law as well as administrative and public law at elizambergin.wordpress.com. The lack of blogging barristers does not come as a surprise to her. She says:

> I am very new to the Bar but there appears to be a huge spectrum of comfort with technology among barristers. Some preach that laptops must never be opened in court. Others cross-examine witnesses from a screen shot on their iPad … instead of rifling through witness statements and exhibited documents to find that page.

Another barrister, who preferred to remain anonymous even though he has a very successful blog (we will call him 'John') says:

> In my view, few barristers blog because they feel uncomfortable about self-promotion. I feel uncomfortable about self-promotion. I am careful in blogs to report as objectively as possible about cases and their possible consequences. I never refer to myself and am careful in expressing opinions.

Sam Hopper, whose blog can be found at samhopperbarrister.com (with a depiction of his good self as part of the byline), is self-evidently less inclined to hide his light under a bushel. In his view, barristers may be reluctant to blog because:

> Some are shy. Some are worried about getting it wrong. For others it might not suit their practice area; if there are a small number of solicitors controlling most of the work, then working on individual relationships will probably be more productive.

How does a barrister blogger measure success?

For Eliza Bergin, the process is plainly central to the benefit she gains. "I have an occasional look at my blog statistics to see where readers are located and where referrals come from." she says. There is a huge amount of change in her field at the moment, so she finds value in the blog-writing process itself. "My target market is [my] clients but I accept that the only person who reads my blogs with any consistency is my mum", she says.

Justin Castelan, who started his blog called Defamation Watch in 2012, says:

> I have always had an interest in writing, media and defamation ... there appear to be many people affected these days by social media and online publication. I did it for a mixture of reasons – obviously self-promotion, but also to force myself to keep up to date with developments in the area.

Still, it's hard not to find pleasure in statistics. John's response suggests that the process is only part of the story. He says:

> Success is measured by the number of followers and how well I think I have described the significance of a decision and its implications.

He now has over 1,000 followers.

Sam Hopper takes an active approach to maximising exposure to his posts. He links his blog to other social media, like LinkedIn and Twitter.

For Stephen Warne, whose blog is called The Australian v Professional Liability Blog, there are unexpected joys:

> I am very pleased that my blog assists in access to justice in its little sphere. Many people without lawyers use it and correspond with me about it. I read a decision of VCAT recently, and I thought, 'Wow. Go you, unrepresented litigant; those arguments are not obvious but are spot on, I couldn't have argued it better myself.' Then I received a lovely letter by post from the retired lady in Clifton Hill who had taken her former lawyers to task, thanking me for a blogpost which she had used for the purposes of her submissions, providing a copy of them for my interest and a copy of the decision which I had already read.
>
> One thing that I have realised is that some people at least really value the assistance they receive from my blog, consuming it with gratitude but total silence over many years. Then they ring me and say, 'I love your blog, I've followed it for years and have wanted to find an opportunity to work with you and now I have a client who ...' So it's not just about raising profile, or demonstrating expertise. To my surprise it builds a rapport which makes people want to repay the favour by briefing me, and perhaps have a real-world relationship with someone they feel they have got to know online.

Colin Golvan QC has a blog at colingolvan.com.au. Much of it is unrelated to the law. He also appears to be the only barrister who has directly made money from the site (although barristers did report receiving briefs from clients wanting advice as a result of their blogs). Colin states:

> I have been writing for many years, some of it legal, mostly non-legal, in content. The blog has given me a chance to locate all of this work in one place. It has also meant that work published over some time has survived the ignominy of being 'out of print'.
>
> I use the content in talks, particularly on Indigenous copyright issues. I also use it to publish previously unpublished work in the newly democratised world of internet publishing.
>
> Most recently, to my absolute amazement, I received a payment from Copyright Agency Limited for the educational use of content on my blog – so there's an incentive for people thinking about blogging!
>
> I love the weekly play reports on Google Analytics, which lets me know I have a reader in Iraq or 20 readers in South Korea and that I am somehow connected with people who have very possibly made an entirely unintended connection with me, but for which I am most grateful and keen to report to Copyright Agency Limited in the hope of stimulating another rights payment.

Daniel Lorbeer, who is editor of CommBar Matters, offered a reminder that each contributor gets statistics on the number of people who click, print and share their post. He particularly complimented Albert Monichino QC, Stewart Maiden QC, Peter Heerey QC, Tom Cordiner QC and Alan Nash (the last three together) whom he regards as great contributors. He added that Peter, Tom and Alan's posts are written with a bit of levity, which he thinks is good.

Daniel observed that he often gets contributions from new readers, and then they drop off. There is plainly a challenge, he thinks, to keeping up the momentum.

That view was certainly shared by the contributors to this article. John says, "I have difficulty staying motivated and have not done a blog for many months. I suspect that one reason for the lack of motivation is that I am already well known in my area."

Eliza has a plan to help her stay motivated, drawing on her background as an athlete. "I have a marketing plan saved in my professional admin folder in Google Drive which includes a monthly calendar (as opposed to a training plan and race calendar). I update it every six months with upcoming presentations and identify blog months as I try to blog every two months. When I have an idea about a blog topic in the middle of the night, or there is some momentous change in the law, I decide when I will write about that topic and allocate it to a blog topic."

For Sam Hopper though, it is important not to get carried away by the need to blog all the time. He limits his writing to what he regards as interesting issues. Because there have been fewer interesting cases in his area this year, he has written less. "Uninteresting posts, in my view, de-value the whole blog", he says.

Justin Castelan had a good tip for bloggers starting out. Before he launched Defamation Watch, he spent a summer break setting up enough content before going live to make it appear that the site had been around a while. He acknowledged he has slowed down a bit in recent times, although he still tries to write about significant cases when he has time. He has recently updated the look and feel of the website, "primarily because my partner is in marketing and said she could not stand how old-fashioned it was looking!".

"If it would offend a judge or [VCAT] member, don't say it!."

Blogging and navigating ethics rules

Rule 77 of the *Barrister's Uniform Conduct Rules* prevents a barrister from publishing any material in a proceeding she is currently appearing in, with limited exceptions. Rule 76 prohibits a barrister from publishing or taking any step towards the publication of any material concerning any current or potential proceeding which, amongst other things, appears to or does express the opinion of the barrister on the merits of the current or potential proceeding or on any issue arising in the proceeding. The exception lies in the words, "other than in the course of genuine educational or academic discussion on matters of law".

This does not mean that to be educational, opinions should be expressed in turgid language. Speaking personally, the target market of my blog is anyone interested in topical legal issues. I expect my readers to understand what I have to say. The discipline of writing legal concepts for the layperson has, I think, helped my own drafting of legal submissions.

Justin Castelan has made it a rule that he will not write anything that he would not say in court. Given the nature of the area, he has always made particular effort only to write fair and accurate reports of judgments, referring to this as 'Defamation 101'.

Eliza Bergin doesn't write about cases that she is involved in on her blog, social media or on any media at all.

Sam Hopper suggests considering how a judge or VCAT member might react when reading a post. "If it would offend a judge or member – don't say it!", he recommends.

Being on social media can help others, but it can also help you

The last word deserves to go to Stephen Warne:

> I also put out calls for assistance on my twitter feed. It's not like I get flooded with answers every time, but one occasion was just glorious. I was defending a solicitor who was being prosecuted for writing his wife's name in the place reserved for her signature on a mortgage (without any indication, such as 'per pro' that he did so as agent) and then writing his own signature next to it as witness. He was authorised by his wife to enter into the transaction. I was just not entirely satisfied that this was (a) actually verboten [forbidden] or (b) so obviously verboten that it should sound in professional discipline. I put out an enquiry, and a reader in Dublin who had been associated with an Irish law reform paper on the nature of a signature (for the purposes of electronic transactions legislation) sent me a reference to a case in the Supreme Court of Ireland which suggested that a man in his own right may witness the signature of another which he has written on as agent, vindicating my general notion that the law is always out there. I remain in contact with that reader.

The Secret Barrister: A UK barrister blogger, with a difference

NATALIE HICKEY

The Secret Barrister is an anonymous junior barrister practising criminal law before the courts of England and Wales. In 2016 and 2017, the Secret Barrister was named Independent Blogger of the Year at the Editorial Intelligence Comment Awards. The author has the number of followers on Twitter that a Victorian barrister with a self-promotional bent can only dream of, being 160,000 at last count.

The Secret Barrister's blog aims to provide a fly-on-the-wall view of the criminal justice system and of life at the Criminal Bar in general.

What compels the Secret Barrister to write? As the author explains:

> We do a stunningly poor job of explaining to people what the law is, and why it matters. Too many of us are content to busy ourselves in our own work, safe in the knowledge that what we do is important, but without feeling the need to deconstruct for the man on the street why two wigged figures incanting Latin before an old man wearing a giant purple robe, and the obscured codes and rules governing this mediaeval ritual, has any relevance to their everyday life. [thesecretbarrister.com/why-i-write/]

The author's need for anonymity likely arises from the warts-and-all assessment of the legal system provided on the blog, finding expression in a recently published book called, *The Secret Barrister: Stories of the Law and How It's Broken*.

The book was commended in the House of Commons by the Shadow Leader of the House, Valerie Vaz, who said:

> I suggest that the Leader of the House and all members of the Government read the book by the Secret Barrister, who states: 'Walk into any court in the land, speak to any lawyer, ask any judge and you will be treated to uniform complaints of court deadlines being repeatedly missed, cases arriving underprepared, evidence lost, disclosures of evidence not being made, victims made to feel marginalised and millions of pounds of public money wasted'. (Business of the House, 22 March 2018, Hansard, London. 638; Column 395)

Earlier this year, The Secret Barrister 'went viral' for reasons wholly unrelated to the task of exposing less-than-flattering aspects of the UK criminal law system.

Apparently, the author was stuck on a stationary snow-stranded train with little to do. Thoughts turned to girl-power, the 1980s band Bananarama, and the 1988 Stock Aitken Waterman single, Love in the First Degree.

The Secret Barrister
@BarristerSecret Mar 2

♫And the judge and the jury, they all put the blame on me,
They wouldn't go for my story, they wouldn't hear my plea...
Only you can set me free, coz I'm guilty, guilty as a girl can be,
Come on baby, can't you see, I stand accuuuused of love in the first degree ♫

There are many legal inaccuracies and errors that Bananarama fall into here. I think it's important that we address them.

Then the analysis begins…

> "Bananarama confess - openly - that they are not only guilty, but guilty as a girl can be (by which they are presumably accepting a degree of culpability placing them at the top of the range of the highest category on the relevant Sentencing Guideline)."

Firstly, Bananarama erroneously assume that the judge AND the jury are judging the merits of the defence. This is simply not true. Judges in Crown Courts, even Courts of Love, are judges of law alone. The verdict is for the jury.

The ONLY way this would stand up to scrutiny is if the judge had ruled, as a matter of law, that a particular defence was not available, and directed the jury in such terms. Absent further detail, we cannot assume that this happened.

Secondly, the existence of a jury indicates that there is a contested trial to determine guilt. HOWEVER...

...Bananarama confess - openly - that they are not only guilty, but guilty as a girl can be (by which they are presumably accepting a degree of culpability placing them at the top of the range of the highest category on the relevant Sentencing Guideline).

In such circumstances, it is nonsensical for them to express surprise or complaint at the jury rejecting their "plea" (by which they presumably mean defence). They are to blame for admitting guilt in front of the jury and for wasting scarce court resources on a needless trial.

Before the knockout blow is delivered …

In any event, there are live criminal proceedings and Bananarama are imploring the key witness ("only you can set me free") to intervene to prevent the consequences of their admitted criminality. Bananarama are shamelessly attempting to pervert the course of justice.

In these circumstances, it is frankly unsurprising that, at the start of the song, Bananarama are "locked in a prison cell". The judge was clearly right to withhold bail given the substantial grounds for believing that Bananarama would interfere with witnesses if granted bail.

Concluding with …

In conclusion, nothing about this Bananarama trial sits right with me. While we must be calm and not jump to conclusions without knowing the full facts, I am deeply troubled that something has gone badly wrong. Or that Bananarama's legal research is not what it should be.

*[ENDS] Next Friday (assuming the trains are still not moving): "Was Meatloaf being incited to commit a criminal offence, and therefore well within his rights to refuse to do *that*?"*

Even secret barristers with more than 100,000 Twitter followers can have their own groupie moment. The Bananarama official Twitter account lauded the Secret Barrister thread with, "this is AMAZING!". SB then responded, "Thank you! (And in case it's not clear, I love you guys)".

How do we know that 'SB' is a genuine nickname for 'you know who'? The answer lies in a request for permission to publish the above thread in Bar News, which was done – in contemporary fashion – via a direct request on Twitter. The response was, "Feel free to republish the tweets, and my email address is thesecretbarrister@gmail.com. Speak soon, SB".

True it is, SB is a brave soul at the outer fringes of the blogging barrister. It does not follow that we should all put on an invisibility cloak and say 'what we really think' under the guise of anonymity. Such an approach is fraught with risk. For every Secret Barrister, there are 10 others more likely to find themselves exposed in embarrassing fashion. One must have nerves of steel to withstand the inevitable identity search.

Rather, the take-out is that our search for legal meaning need not be without humour. Social media offers new ways for lawyers to share in the joke.

The Victorian Bar's landmark health and wellbeing survey

GREG AHERN

On 29 May 2018, the Bar's first dedicated health and wellbeing survey was launched. In launching the survey, Wendy Harris QC (Senior Vice-President of the Bar Council) said that our health and wellbeing are critical to our success in doing our work and that the survey was seeking to "take the pulse" of the Bar to help us better understand and support the health and wellbeing of our members. Philip Corbett QC (Chair of the health and wellbeing committee), who also spoke at the launch, described the form of the survey, the types of questions to be asked of members and the long term goals that the committee and the Bar were seeking to achieve with the data from the survey.

The survey was a long-term project of the health and wellbeing committee and involved considerable planning and a submission to the Legal Services Board for funding. The survey was inspired by a similar health and wellbeing survey undertaken by the Bar of England and Wales in 2014 under the then chair of their health and wellbeing committee, Rachel Spearing. The results of that survey were reported in 2015. Rachel Spearing generously agreed to assist our committee to undertake and promote the survey and provided important guidance in formulating a communication strategy directed at promoting participation in the survey. Rachel's help was provided with the support of the Bar Council of the Bar of England and Wales.

The survey went "live" on 4 June 2018. The questions asked in the survey covered a broad range of topics directed at the quality of working life for members of our Bar. These topics included work environment and conditions, career opportunities, stress and work pressure, work and home life balance, influence over decisions that impact on work, relationships with colleagues, work security and enjoyment, work motivation and performance, overall work satisfaction and sense of achievement, mood, sleep, discrimination, sexual harassment and bullying (including judicial bullying).

Representatives of the committee (with input from the Bar office and the Bar Council) had worked with psychologists from the Quality of Working Life research group from the University of Portsmouth UK on the design of the survey. The University of Portsmouth was retained by the Bar (facilitated by Rachel Spearing) to provide this survey design assistance and to both carry out the survey and prepare a report and analysis of the survey results. Funding for the survey came from a grant obtained by the Bar from the Legal Services Board.

The survey closed on 2 July 2018. Following an active communications campaign and the support of the champions of the survey, some 856 valid responses were received (representing 40 per cent of the Bar). The results of the survey were summarised in a report prepared by the University of Portsmouth. The survey results were presented by Dr Matt Collins QC, the President of Bar Council, at an event held on 18 October 2018. Following the presentation of the survey results, Chief Justice Anne Ferguson spoke about the action that she had taken, in light of the survey results, regarding the topic of judicial bullying.

Those also attending the launch event at the Essoign included Justice Almond on behalf of the Supreme Court, the Legal Services Commissioner, Fiona McLeay, Sarah Fregon (Bar CEO), champions of the survey (being members of the Bar and clerks who had agreed to actively promote participation in the survey) and members of the health and wellbeing committee.

Before presenting the results of the survey, the president welcomed Justice Priest (the inaugural chair of the health and wellbeing committee more than a decade ago), Bernadette Healy (who provides counselling services for members of the Bar), former Supreme Court Justice Bernard Teague AO (now chair of the Wellbeing and the Law Foundation) and Cindy Penrose, chief executive officer of the Australian Bar Association. He also expressed his gratitude in having Chief Justice Ferguson present and noted that the judiciary and the Bar were at one on the importance of good physical and mental health, both for the judiciary and for counsel.

The president thanked everyone who participated in the survey, noting that there were about 2,100 practising members of the Bar and that 856 had responded to the survey. He said that this was a remarkable result, which had given the Bar a robust and reliable basis for assessing the pulse of the Victorian Bar. He also observed, by way of introduction, that the survey was in two broad parts. The first part dealt with wellbeing, which had three components: work-related quality of life, workplace wellbeing, and personal wellbeing. He then noted that there was a separate but interrelated part of the survey which looked at conduct that he said we all recognise as completely unacceptable in any workplace, including ours, being discrimination, harassment and workplace bullying.

As to the wellbeing part of the survey, the president noted the following positive results:

- 73 per cent of respondents were satisfied with the overall quality of their working lives;
- 79 per cent were satisfied with their jobs as a whole;
- 84 per cent agreed that they enjoy their work;
- 90 per cent agreed that they get a sense of achievement from doing their jobs; and
- 66 per cent agreed they felt good or content with life as a whole.

Matt Collins noted, however, that the survey results as to wellbeing also highlighted areas of concern as:

- 68 per cent of respondents reported experiencing stress at work;
- 33 per cent said they get the sleep they need every night; and
- 49 per cent were satisfied with their home-work interface.

As to these matters, Matt Collins said that the health and wellbeing committee had already reacted to the sleep issue by holding a seminar on that topic a few weeks ago and that the question of home-work interface would be a focus for the Bar Council. Overall on the matter of wellbeing, Matt said that the response to the wellbeing questions suggested that we had a workplace which was functional, provided support and where people were generally pretty happy.

As to the part of the survey that dealt with conduct, the president referred to the following results of the survey:

- 23 per cent of members said that they had experienced discrimination of some form over the past 12 months with the breakdown between female and male barristers being 36 per cent (female barristers) and 16 per cent (male barristers), where the discrimination reported was by and


Caroline Jenkins & Emma Swart


Philip Corbett QC


Geoffrey Dickson QC & Kaye McNaught


Wendy Harris QC


Richard Wilson and The Hon Justice Almond


Jayne Sandri, Amanda Utt, Daniel Nguyen and Travis McKay.

> “59 per cent of respondents overall said they had experienced judicial bullying over the course of their career.”

large gender discrimination and where about 60 per cent of those identified as being responsible for the reported discrimination were external to the Bar;

» 11 per cent of members said they had experienced sexual harassment in the past 12 months (being 16 per cent of female barristers and 2 per cent of male barristers), where the major form of sexual harassment was unwelcome sexual comments and where two-thirds of the persons identified as being responsible for the conduct were members of the Bar and the other third were persons external to the Bar;

» 26 per cent of members said that they had experienced workplace bullying in the past 12 months (being 37 per cent of female barristers and 20 per cent of male barristers), where two thirds of the persons identified as responsible for that conduct were external to the Bar and the other third were said to be other barristers (whether that be co-counsel or opposing counsel) or colleagues in chambers;

» 59 per cent of respondents overall said they had experienced judicial bullying over the course of their career, being 55 per cent of male barristers and 66 per cent of female barristers and where the areas of practice with the highest reported rates of judicial bullying were the family and child protection law areas and criminal law. The president referred to the statistic (set out in the bullet point directly above) that two thirds of those identified as being responsible for “workplace bullying” were external to the Bar and noted that those two thirds appeared to be made up by complaints concerning judicial officers.

As to the form that the judicial conduct took, the president said that there were 494 responses to that question, that the report divided judicial conduct into about 10 broad categories and that the most common form of conduct was denigration – a perception that counsel had been demeaned by something that had happened in the court room. Other categories included shouting, abuse and submissions not being listened to. The survey asked the question as to how a member’s quality of life could be improved and that the number one response by members related to judicial conduct.

On the matters of discrimination, sexual harassment and workplace bullying, the president referred to the policies that had been implemented by the Bar Council following last year’s State of the Bar report. The policies came into effect on 1 July 2018 and contain new grievance mechanisms (both formal and informal) for dealing with these kinds of complaints.

As to the judicial conduct survey results, the president said that the Bar Council had the previous week adopted a judicial conduct policy, an Australian first (and which is available for members to read on the Bar’s website). The president described the policy as being a statement by the Bar of our expectation of judicial officers, noting that judicial officers expect of the Bar the highest standards of professionalism, integrity, courtesy and civility and that the Bar is now saying, for the first time, that we expect the same high standards from the judicial officers before whom we appear. Matt Collins said that the policy contained a working definition of the judicial conduct that the Bar is entitled to and that it is about judicial officers not engaging in conduct that is denigrating, insulting or demeaning by reasonable standards while recognising the unique environment in which we carry out our work, which is uniquely combative in some senses, where the stakes are high and where judges work under incredible pressure and do an extraordinary job. The president said that it was not inappropriate for judges to ask us testing questions, to engage in robust discussions with us, to rule against us or to express frustration if they think we are wasting time and resources, but that there was a line and what the results were telling us is that that line is being crossed in circumstances where it is being under reported and that, until we saw the data, we did not know the extent to which people felt that this conduct was going on.

The president noted that the judicial conduct policy identified the mechanisms available to members who feel they have experienced or witnessed inappropriate judicial conduct. As to making a complaint, the policy identified the ability to make a complaint to the Judicial Commission of Victoria or to raise a complaint under protocols between the courts and the Bar. The president noted that Chief Justice Ferguson had already developed a protocol as regards the Supreme Court under which the President of Bar Council can raise matters with the Chief Justice regarding judicial conduct and commended Chief Justice Ferguson on her initiative in developing that protocol. He was confident that the heads of the other jurisdictions would adopt similar or identical protocols.

Matt Collins also announced that the Bar Council had appointed, as part of the judicial conduct policy, two judicial conduct advisers (Jack Rush RFD QC and Fiona McLeod SC). They would be available to provide barristers with guidance regarding concerns about judicial conduct and to give information about the options available to members under the new policy and protocols.

As to the survey results more generally, Matt Collins said that the Bar had secured funding from the Legal Services Board, for which he expressed thanks, for the development of a health and wellbeing resources portal.

Following Matt Collins’ presentation, Chief Justice Ferguson thanked the president for the opportunity to speak at that event. The Chief Justice said that she was standing there after having spoken with the head of jurisdiction of each of the Victorian courts and VCAT and that she was their representative at this event. Her Honour also noted that she had spoken with Chief Justice Allsop AO and that he would have been standing with her at this event but that he had a prior commitment. Chief Justice Ferguson said that she wanted the Bar to understand that all the heads of all the jurisdictions took the survey and the results of the survey seriously and that they were all committed to having healthy, safe and respectful workplaces at their courts.

The Chief Justice shared with those present at the event some of the steps that she had taken in relation to judicial conduct. Her Honour said that she had worked with the Judicial College to see if they could develop some bespoke education courses around judicial conduct. Her Honour also referred to an upcoming seminar with Chief Justice Elias (of the New Zealand Supreme Court), who was going to talk to judicial officers of the Victorian Supreme Court about the New Zealand experience with judicial conduct, as New Zealand has had a bit more experience on this topic through their own survey and Chief Justice Ferguson said she thought the Victorian Supreme Court could learn from the New Zealand experience. Her Honour also noted that there was a seminar in December 2018 for Supreme Court judicial officers in leadership positions and that a United States academic would be talking at that seminar on the topic of judicial bullying. Further seminars are planned for early next year.

Her Honour also spoke about the written protocol that she had developed recently. It formalised the informal arrangement or protocol under which the President of the Bar Council could raise matters of concern with the Chief Justice. The Chief Justice said that she was not sure how widely known the informal arrangement was. The idea of having a written protocol was to make it more transparent. Hopefully, the protocol will give the Bar a sense of security and safety knowing that they can safely confide in the president of the Bar, who will bring the matter to her or to any other head of jurisdiction, who can sensitively deal with the problem and do something about it. A copy of this protocol is available on the Bar’s website.

Chief Justice Ferguson congratulated Matt and the Bar Council for undertaking the survey and said that it had been a pleasure working with the president towards the goal of a healthy and safe work environment for all of us.

Following the presentation of the survey results, an email was sent to members regarding the survey results and informing members that a copy of the report prepared by the University of Portsmouth was available on the Bar’s website.

This report makes for very interesting reading and contains important insights into the quality of our working lives. I encourage all barristers to read the report in full.

In 2019, the work of the health and wellbeing committee will include the health and wellbeing portal project announced by Matt Collins (for which thanks is given to Doug Shirrefs and the Bar Office for their work in preparing the application to the Legal Services Board for funding of that project) and the promotion of further seminars to address areas of concern revealed by the survey results.

Greg Ahern is a member of the Health and Wellbeing Committee


Bernadette Healy and Philip Corbett QC


The Hon Bernard Teague AO & Dr Matt Collins QC

The Hon Chief Justice Ferguson and Dr Matt Collins QC

Timber Creek, courtesy of the estate of Mr A. Griffiths and Waringarri Aboriginal Arts.

COURTESY OF THE ESTATE OF THE ARTIST AND WARINGARRI ABORIGINAL ARTS

Navigating two systems of thought and law

The first sitting of the High Court in Darwin

LAURA HILLY

Between 4 and 6 September 2018, the High Court of Australia sat for the very first time in its 118-year history in the Northern Territory on Larrakia country in Darwin.

The occasion was marked with a ceremonial sitting by the High Court, where Chief Justice Kiefel canvassed some of the possible reasons for the conspicuous omission of Darwin from the High Court's circuit to date. Her Honour included the possibility that the fateful first and only circuit of the Supreme Court of South Australia to Palmerston in February 1875 may have informed an early reluctance to travel north – on this circuit, the judge, his associate and the Crown Prosecutor all perished on the return journey when their ship struck a reef during a cyclone!

The Chief Justice also noted the important contribution that cases emanating from the Northern Territory have made to the High Court's jurisprudence. Many of the cases that her Honour cited concern the Australian colonial-inherited legal system's ongoing navigation of its relationship with First Nations People and their legal systems. Mapping out the intersections between these two systems of thought and law is far from concluded. The occasion for the unprecedented circuit to the Northern Territory to hear the appeals in *Northern Territory of Australia v Griffiths* (D1-D3/2018) is but another example of that ongoing navigation.

Some 25 years after the common law's recognition of native title in *Mabo v Queensland (No 2)* and the passage of the *Native Title Act 1993 (Cth)*, the High Court has been asked to consider for the first time how compensation should be assessed for the extinguishment of native title. While it has been called upon on occasion to consider the operation of the Act on issues of recognition and extinguishment, it may be seen as remarkable that it has taken so long for such a fundamental yet complex question to make its way to the justices of the High Court. The decision of the trial judge, Justice Mansfield, that formed the basis for the ultimate appeal, was the first ever contested award for compensation for loss of native title under the Act.

The native title rights and interest in question in *Griffiths* are over an area of land 600km south-west of Darwin in the remote township of Timber Creek near the Western Australia border. This land is within the country (*yakpali*) of the Ngaliwurru and Nungali Peoples. What we call Timber Creek is also known as *Makalamayi*, a focal site of significance to the Ngaliwurru and Nungali Peoples at the juncture of Victoria River and Timber Creek.

A critical aspect includes the intangible effects of dispossession from country. As Justice Mansfield remarked:

> The issue before the court was how to quantify the essentially spiritual relationship which Aboriginal people, and particularly the Ngaliwurru-Nungali People, have with country and to translate the spiritual or religious hurt into compensation.

The enormity of the task before the High Court is readily apparent, especially bearing in mind the key finding of the trial judge that:

> The evidence was that for the Ngaliwurru-Nungali Peoples, ancestral spirits, the people, the country and everything that exists on it, are viewed as organic parts of one indissoluble whole and that the evidence of loss was significant and keenly felt. The evidence of the effects of those acts is particularly significant in circumstances where the acts took place some 30 years ago, and where the effects of those acts have ongoing present day repercussions.

More than 30 senior traditional owners (*yakpalmululu*) of this land travelled to Darwin for the High Court hearing, with two notable omissions. Mr Griffiths, and another leading figure in the claimant community, Mr Jones, had passed away before the hearing. However, Mr Griffith's understanding of country loomed large at the hearing, as it did before the Trial Judge (where he and Mr Jones gave evidence to Justice Mansfield on country) and the Full Court of the Federal Court below, as the High Court was taken to one of his paintings depicting the claim area at Timber Creek tendered as part of the evidence in the trial. It is reproduced with this article.

The painting rehearses country and its stories, and how the ancestral beings shaped the landscape and gave meaning to this other world. In the words of his daughter-in-law, Alana Hunt: "rendered in ochre by a man who knows this country more intimately than anyone, the painting depicts sites that hold cultural, ecological, and historical significance to him." When juxtaposed against other topographical maps in evidence tracing out the claim, this painting serves as a stark reminder of the ongoing project that cases like *Griffiths* present – "an attempt to bridge two systems of thought and law" – and the importance of this first sitting of the High Court of Australia in the Northern Territory.

At the time of writing the High Court is reserved in its judgment.

Counsel from the Victorian Bar, Sturt Glacken QC, Graeme Hill and Laura Hilly, appeared on behalf of the claim group instructed by the Northern Land Council.

1. Ceremonial - On the occasion of the First Sitting of the High Court of Australia at Darwin [2018] HCATrans 173 (4 September 2018).
2. *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900; (2016) 337 ALR 362.
3. One earlier compensation determination by consent had been made in *De Rose v State of South Australia* [2013] FCA 988 but without any judicial statement of guiding principle and the amount itself was not disclosed.
4. *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900; (2016) 337 ALR 362, 415 at [291].
5. *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900; (2016) 337 ALR 362, 415 at [363], and at [327] citing Blackburn J in *Milirrupum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167; [1972-72] ALR 65 where his Honour said in relation to the Yolngu clans of north-east Arnhem Land that "the fundamental truth about Aboriginal's relationship to the land is that whatever else it is, it is a religious relationship… there is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble hole."
6. *Northern Territory of Australia v Griffiths* [2017] FCAFC 106; (2017) 346 ALR 247.
7. Alana Hunt 'Beautiful (Un)justice' *UN Projects* (25 May 2017) accessible at unprojects.org.au/un-extended/dear-un/beautiful-injustice
8. Alana Hunt 'Beautiful (Un)justice' *UN Projects* (25 May 2017) accessible at unprojects.org.au/un-extended/dear-un/beautiful-injustice

Barristers who fought in the Great War

BILL GILLIES

L. Alfred Woolf (who returned home) and R. Victor Woolf (who did not)

The Memorial Board in the Supreme Court

As you walk into the Supreme Court from William Street, you will see the Supreme Court Memorial Board on your left, commemorating those who served in the Great War to fight for eternal peace. It used to dominate the entrance vestibule. Ironically, it now shares the vestibule with a security screening point designed to keep peace in an era of asymmetrical warfare.

Walk further into the Supreme Court Library and you will see a memorial plaque on the first pillar on the left for five barristers who "Fell in the Great War ….. Erected by their Fellow Members of the Bar of Victoria".

» Franc Samuel Carse
» Eric Winfield Connelly
» Mervyn Bournes Higgins
» Edward Norman Hodges
» Murdoch Nish Mackay

Franc Samuel Carse was called to the Bar in 1908. A highly regarded advocate, he appeared in *Melbourne v Howard Smith Company Limited* (1911) HCA 43, led by Sir Frederick Mann, who had served and been wounded with the Australian Light Horse in the Boer War. Mann's son James, a Rhodes and Vinerian Scholar, drowned after his ship was bombed in World War II.

Franc Carse appeared again in the High Court in *Whitton v Fawkner* (1915) 20 CLR 118 led by Sir Hayden Starke. That case was argued on 14, 17 and 18 May 1915 and by the time judgment was delivered on 11 June 1915, Carse had enlisted.

He was sent to Gallipoli, where he contracted typhoid, and was then invalided to England. He recovered and was sent to France as commander of a Howitzer battery. After suppressing a fire in an ammunition dump – a very dangerous task usually rewarded with a decoration – he was hit by a stray shell on 1 May 1917 and died.

Eric Winfield Connelly was from a prominent Bendigo legal family and was called to the Bar in 1911. He appeared in a number of reported cases, in particular *McKenna v Dent* (1912) VLR 150, in which Justice a'Beckett found that goods included money.

He too was sent to Gallipoli, where he was badly injured on the first day and was repatriated to Australia. He married in May 1916 and then returned to service. He was awarded a Distinguished Service Order for his actions at Messines Ridge, where he was badly gassed. He was mentioned in dispatches on 7 November 1917 and 8 November 1918 for his "gallant service and devotion to duty". He died of wounds on 9 September 1918 after being hit by a shell from a German airplane. His brother, Clive Connelly, a solicitor, was also wounded at Gallipoli and also returned to service, but was killed at Hill 60 on 28 August 1915.

Mervyn Bournes Higgins was educated in Melbourne and graduated from Melbourne University and with honours from Oxford University, where he was awarded a blue in the Oxford crew that defeated Cambridge in 1910. He returned to Australia and was called to the Bar in 1913. He was sent to Gallipoli and survived the murderous charges at the Nek, commemorated in Peter Weir's film, *Gallipoli*, where the director felt that the public would not believe there were four charges over the top and only showed three. At the last charge of the Light Horse at El Maghdaba on the Sinai Peninsula, he was advancing with his front line when he was shot and killed by a sniper. His father's grief never left him. His father's fellow High Court Justice Sir Frank Gavan Duffy lost a son Desmond, who, although on the memorial board, is not on the plaque as he was called to the Bar in Sydney.

Edward Norman Hodges was called to the Bar in 1912. He joined the British Army in 1915 and was awarded a Military Cross for action in Flanders. He died of pneumonia on 23 June 1918. His father, Sir Henry Hodges, was a Supreme Court Justice who was notified of his son's death while sitting in court, by the then Chief Justice, Sir William Irvine.

Murdoch Nish Mackay, a brilliant student, graduated with first-class honours and exhibitions from Melbourne and won the Supreme Court prize in 1911. He also completed an LLM by the time he was 20. He appeared in the High Court in *NSW v Commonwealth* (1915) 20 CLR 54 for the interveners. Shortly after that case, he enlisted and arrived at Gallipoli in September 1915, where he remained until all ANZAC troops had been withdrawn from the Gallipoli peninsula. He then departed for the Western Front.

On 4 August 1916, leading his battalion against a German position on the Ridge beyond Pozieres, he was killed by machine gun fire. His diary is kept in the Australian War Memorial.

Chief Justice Sir John Madden unveiled the memorial board in July 1917 by removing a Union Jack, well before the war had ended. Unsurprisingly, the board is incomplete.

Amongst those memorialised on the board who returned to make enormous contributions to the Bar and to the law are Sir Norman O'Bryan, Sir John Latham, Sir Charles Gavan Duffy, Wilbur Ham and Sir Eugene Gorman, just to name a few. Sir Wilfred Fullagar, Sir Arthur Dean, Sir Edmund Herring and Sir James Tait are some of the luminaries missing from the memorial board, as they had not yet been admitted to practice at the time they enlisted.

In a project co-ordinated by Joanne Boyd, Supreme Court archives and records manager, her staff Nicole Lithgow and Wendy Atkins, with some help from members of the Bar's World War I sub-committee, a biography for each name on the board has been created and can now be accessed on the Supreme Court site supremecourt.vic.gov.au/about-the-court/our-history/stories-from-the-memorial-board.

PHOTO COURTESY OF NEIL PRIETO

FX Heerey on the Western Front

PETER HEEREY

Remembrance Day this year marked the centenary of the conclusion of the First World War, a cataclysmic event which changed the world forever. Australia's population was less than five million. Over 400,000 enlisted, of whom more than 60,000 were killed and 156,000 wounded or taken prisoner.

My father, Francis Xavier (Frank) Heerey (1892–1964), served on the Western Front. He left diaries which cover part of his service and which have been deposited with the Australian War Memorial.

His diaries contain little of reflection or contemplation. Brief notes of YMCA concerts, card playing and just "loafing" are interspersed with references to heavy shelling by "Fritz" and the death of mates. One exception is on 19 September 1916 when he hears for the first time of his father's death: "received a great shock & felt pretty rotten".

Dad grew up in Beaconsfield, Tasmania. After finishing primary school at the Beaconsfield Convent, he worked in the gold mine – the same mine where miners were trapped underground a few years ago. He then went off to Western Australia and worked on the construction of the Trans-continental Railway. Somewhere there he picked up some telephonic skills. On enlistment in the AIF in Western Australia he put down his occupation as "telephone mechanic".

After training in Egypt (the second day in the diaries, 25 April 1916, is noted as "Anzac Day"), my father ended up on the Western Front with the Fourth Divisional Signals Company. He was issued with a bike (spelt "byke" in the diaries) and his work included collecting and transporting telephone gear.

In 2005, my wife Sally and I took our Birdy folding bikes and rode around the Western Front. The choice of this form of transport was based on Dad's experience. In a number of instances, Sally and I were able to follow the same route travelled by my father through the towns and villages noted in the diaries. It was a moving and unforgettable experience.

Crater at Lochnager

The cathedral of Notre Dame de Brebières was almost completely destroyed by German shelling, but the statue of the Virgin and the Christ-child somehow remained at a virtually horizontal angle. The legend was that as long as the statue remained, the Allies would win the war.

How a tribute to a relative killed in World War I led to a new friend

MURRAY MCINNIS

Killed in action. What does it mean? It doesn't tell you where the soldier was, what he was doing, how he was killed.

Recently, I visited Amiens and then paid my respects to my great-uncle Victor Woolf, a private who was "killed in action" at the age of 22 in France.

The Battle of Amiens (also known as the Third Battle of Picardy) was the opening phase of the Allied offensive which began on 8 August 1918, later known as the Hundred Days Offensive, that ultimately led to the end of World War I.

Allied forces advanced over 11 kilometres on the first day, one of the greatest advances of the war. It was considered a black day for the German Army. Victor Woolf died on the offensive's second day. His body is buried in the Rosieres Communal Extension Cemetery in France.

Amiens is situated near the Western Front (one can get the train there from Paris Nord station). From Amiens, it is about a 30-minute car drive to Rosieres.

Upon arrival at the Rosieres station, I found that, apart from a few cars, nobody was there. It was hot and the only person in sight was a barman opposite the station standing in the doorway of a bar.

I asked the young man to call a taxi to take me the 1.5 kilometres to the cemetery. The faded sign at the station had a taxi number to call but, as I did not speak French, I thought it best to ask the French barman to make the phone call. He obliged, but the taxi refused to come. So my new French friend offered to drive me to the cemetery in his private car, to wait for me and return to the station.

In thanks for this impressive gesture, I gave my French friend an Anzac badge which had on it miniature Australian and New Zealand flags. He was pleased to receive the badge.

I then realised that I would have four hours to wait in Rosieres before the next public transport was due to depart for Amiens. Whilst I was deciding how to spend this time, to my surprise, the young French man drove up to me in the deserted village street and offered to take me to Amiens. I cannot speak French and my new friend did not speak English, but somehow we managed to communicate.

I offered payment for the journey to Amiens, but my friend refused. My young French friend knew nothing about Australia or the sacrifice of Australian men in France during World War 1. He did not know that there was a cemetery just 1.5 kilometres from the bar in which he worked. His generosity and friendliness, however, remains priceless.

I still don't know what "killed in action" meant for my great uncle, nor do I even know the name of my French friend, but the experience was worthwhile.

Studio portrait of 3984 Private Victor Louis Herman (Vic) Woolf, 8th Battalion. A leatherworker of East Brunswick, Vic, he enlisted on 13 July 1915 and sailed with the 12th Reinforcements aboard HMAT Ceramic on 23 November 1915. He was killed in action, aged 22, on 9 August 1918 in France and is buried at Rosieres Communal Cemetery, France.

PHOTO COURTESY OF THE AUSTRALIAN WAR MEMORIAL COLLECTION.

> "I cannot speak French and my new friend did not speak English, but somehow we managed to communicate."

Jennifer Batrouney's dogs Moose (on left) and Minnie (on right) making themselves at home

This place is going to the dogs...

JENNIFER BATROUNEY

Working dogs have been part of the Australian outback ethos for generations. Whether on the back of the ute or under the bar at the pub, the working dog is part of the bush workplace. Likewise, as beautifully demonstrated in the *Wine Dogs* series of photo books, a winery is not worth its cellar door unless it has a (naughty but nice) "wine dog". Out in the paddocks, the "giant fluffy nannies" known as Maremma dogs protect livestock such as sheep and chickens from wild dogs and other predators. We are also familiar with sleigh dogs, hunting dogs and, of course, security dogs in airports and other venues.

The true heroes of the canine world might well be the search and rescue dogs who are so extensively used by first responders and in terrorism detection and disaster relief operations. One of the oldest search and rescue dog breeds is the St Bernard. Legend has it, they patrolled the treacherous Great Saint Bernard Pass in the Alps between Italy and Switzerland in pairs with a small keg of brandy fixed to their collars. One dog would stay with the fallen snow victim to keep them warm while the other would go back to the Monastery to seek help.

But things are changing and now many city workplaces have "gone to the dogs".

"Coop" is well known to the legal profession as the facility dog who calms witnesses while they give their evidence in traumatic assault cases. Coop has now been joined by Champ as part of Court Dogs Victoria, a not for profit organisation supported by the OPP. Julie Morrison from the OPP is, amongst other things, "Support Dog Program Coordinator" and was recently awarded a Churchill Fellowship to study court dog programs in the USA and Canada in 2019. Readers who wish to support Court Dogs Victoria can buy a fluffy Coop or Champ toy at courtdogsvictoria.org.au

Outside the legal profession, there are many other types of "working" dogs. Guide dogs are the most well-known, but there are also hearing dogs who will alert their hearing impaired owner if the doorbell or phone rings, or an alarm is sounding.

Assistance Dogs Australia is an organisation that trains dogs specialising in support for people with a physical disability, autism or Post Traumatic Stress Disorder (PTSD). It takes two years and $35,000 to train such a dog, which is provided free of charge to clients. For people with disabilities, dogs are trained to perform tasks such as opening and closing doors, wardrobes and fridges, as well as helping to carry or pick up shopping items. Autism service dogs provide companionship, support in reducing anxiety and improved sleep and stability. According to Assistance Dogs Australia, a PTSD service dog can:

> Master bespoke cues to help their owner overcome psychological trauma linked to specific situations, such as entering a room before the owner and turning on the lights so they don't have to enter a dark space; providing physical contact if their owner suffers a nightmare; and diverting their owner's attention to the dog, a technique known as 'anchoring', helping to bring their owner back to the present moment.

The Melbourne Law School is famous for its "Juris Dogtor" a.k.a. Riley, a support dog provided by Delta therapy dogs. Riley and dogs like him are part of the "Paws for Pressure" program, a huge hit in educational institutions around exam times when stress levels are high and a cuddle with a support dog can make all the difference. The versatility of the Delta therapy dogs is endless – they visit prisons, hospitals, palliative care units, aged care homes, mental health facilities and rehabilitation centres. The dogs are, in turn, supported by a veritable army of volunteers who provide their strictly vetted dogs to help others at various facilities around Australia. This wellness program is also being rolled out in private companies for the benefit of their staff.

Erin Hill with "Coop" (on left) and "Champ" (on right), both of whom love shaking hands.

The folk at Delta refer to the "pet effect" – the positive impact that pet ownership can have on our physical, social and psychological health.

It is time for me to confess that I have, on occasion, brought my giant mini Dachshunds (Moose and Minnie, pictured on the previous page) in to chambers. My fellow chambers mates have consented to their cute, licky, waggy presence in my chambers. As they are still young dogs, the "pet effect" in chambers is a bit distracting (chaotic really) but I live in hope that they will settle down to a routine of sleeping and taking me out for walks in the Flagstaff gardens.

> "I live in hope that they will settle down to a routine of sleeping and taking me out for walks in the Flagstaff gardens."

However, not everyone likes dogs. Some are allergic to them, some have a phobia and some (inexplicably) just do not like them. The RSPCA has published guidelines about taking your pet to work with helpful tips such as ensuring the office environment is safe for pets by tucking away cables and cords.

The BCL standard lease bans bikes and smoking but makes no mention of our four-legged friends. Let's hope that they maintain this enlightened attitude and let our chambers go to the dogs (if it suits everyone on the floor).

IMAGE PROVIDED BY LES PHOTOGRAPHY

BAR Lore

To the JAYS!

COLIN LOVITT

There's solicitors and barristers who charge outrageous fees;

Their affluence conveys – the message that 'crime pays'.

They introduce red herrings such as points of law and pleas!

I thwart their devious ways. I send 'em ..... to the Jays!

[from "The Magistrate" by John Coldrey, 1971 Victorian Bar Dining-In Night – with apologies to Koko, Gilbert and Sullivan]

Who were the Jays?

When I was a callow young man at the Bar, a system existed in the Magistrates' Courts, whereby petty crime – including traffic matters, street offences, low level theft and minor assaults – could be heard by a panel of justices of the peace. They might have been "JPs" when you wanted to make a bail application or have a statutory declaration witnessed, but when they physically sat on the Bench, they were known, affectionately or not, as "the Jays".

Some local magistrates (they were all male, of course) had a liking to sit on the Bench with one or two justices of the peace. His Worship would rule the roost and the JPs were there, from what I could see, largely for decoration, with the occasional tad of adoration.

The second division of a municipal court often comprised a panel of three 'Jays'. None generally had, or needed to have, any legal training. They were voluntary officers of the Court, unpaid and untutored. Sitting without any magisterial supervision, they were unobserved and uncontrolled. Small wonder that the legal profession resounded with legendary tales, some doubtlessly apocryphal, others hopefully true, about the judicial mayhem generated by these "unqualified meddlers" in the workings of the criminal law.

'Justice' before the Jays

The most famous example, and, I suspect, the most apocryphal, was the case where a barrister had made a submission of no-case-to-answer at the end of the prosecution case. The evidence, or lack of it, facilitated the barrister to rely on a legal argument that simply had no answer – he just *had* to win. The Jays listened courteously, if suspiciously, talked among themselves for a few seconds, then dismissed the application, stating that they were quite sure the accused was guilty. The exasperated defence counsel stammered out, "Well, we'll appeal!" The Jays went into another huddle. "Appeal dismissed!"

I had a similar experience when I defended a local teenage boy at Dromana Court for pulling down a girl's bikini top and pushing her, and her girl-friend, off the Rye pier. The local sergeant was a friend of the outraged parents of the first young lady. Two charges of offensive behaviour, plus one of indecent assault were the result.

As I cross-examined a giggling, apparently unaffected, teenager about her ordeal, the Chairman of the Justices interrupted, when I suggested she was not telling the truth about an aspect of her evidence. "Mr Lovitt, we are quite satisfied Miss ..... is telling the truth. After all, she has taken an oath to do so." I responded, "If that were the case, Your Worship, I would be out of a job". This was ignored.

After the two girls gave evidence, the sergeant, acting both as informant and prosecutor, called himself to the witness-box. He detailed his evidence. It included a short, unrecorded conversation with the defendant. My client had allegedly admitted pushing the girls into the water, but he did not admit to touching either's bathers. As he finished his evidence-in-chief, the prosecutor announced that that was his evidence. I was about to rise to cross-examine, when "their Worships" began talking amongst themselves. I sat and waited.

After about 20 seconds, the Chairman announced that they found the charges proven. I then drew the Court's attention to three unfortunate facts. First, I had not been given a chance to cross-examine the witness. Secondly, the prosecution had not closed their case. Thirdly, I had not been given a chance to state whether I was calling any evidence, let alone to call it.

> “When confronted by the Woolies security officer, she readily admitted stealing from both stores and produced the items taken.”

The Jays seemed unperturbed. However, a grim-faced prosecuting sergeant had no alternative but to support my application that the Justices would now need to disqualify themselves, having found my client guilty before the end of the case and worse, before giving my client a proper opportunity to defend himself.

A few months later, we did the case again. It was before the local sitting magistrate. A fair hearing, followed by a fair decision (and penalty), ensued.

Selecting Justices should be like picking a jury

I prefer a jury comprised of people who *don't* want to be there, people who are in awe of the task of sitting in judgment on their fellow man. By contrast, if one of their number, when drawn out of a box by the associate and whose name has just been called, smiles up at the solicitor or client as he or she files past the dock, then he or she *wants* to be selected. If they relish the idea, they will convict much more easily than if they are conscious of what a heavy burden comes with judging the facts.

Exactly the same consideration should apply to selecting Justices who are to sit in Court. I had a friend, a well-known car dealer, who kept telling me he wanted to become a Justice of the Peace. He made no bones about it, “I've always wanted to sit in judgement on my fellow man”. And I kept telling him that, for that very reason, he was the last person who should do so. Thankfully, he never did.

Ode to Joe

Believe it or not, I want to sing a song of praise about one panel of Justices, and in particular, a local Preston businessman, an Italian I knew only as ‘Joe’.

I don't know the exact date, because I was there for another client, so made no note. What I want to relate is a case in which I was not involved – that I simply watched. I said nothing.

Well, almost nothing.

The location was Preston Court. Back in about 1972, whilst the new courthouse was being built, the Preston Magistrates' Court sat temporarily in the Preston Town Hall. A large Council Chamber was used for the main court, and a much smaller room housed the second division. On this day, I had a short matter. I can't remember what it was, that's not important. We waited the entire morning to be called on, which was not unusual, and my matter was eventually sent out to the second division, before a panel of Jays, to commence straight after lunch.

When I got there shortly before 2pm, I was approached by the prosecutor, a local sergeant. He asked if I minded if a short case was listed before mine. “Shoplifting plea – should take no more than a few minutes.” I said I didn't mind, although I knew from my vast experience (I was two years at the Bar, so knew almost everything) that such predictions can often go belly up.

We entered the tiny courtroom. The Bench was at one end. The opposite wall was only a few metres away. A table (classifiable by the National Trust) served for the prosecutor and the lawyers. There were a few seats for everyone else. The clerk of courts sat in front of the Jays, at a Lilliputian table escaping any form of classification at all. I sat in a solitary chair to the left side of, and almost level with, the Bar table. I did this hoping the matter would take only a few minutes.

The case was called. It was a woman's name, and a diminutive elderly lady materialised from the doorway. Two charges of theft were read out. The offences were alleged to have occurred in High Street, Preston that very morning, and were constituted by the taking of clothing from Coles and Woolworths respectively. Both stores were virtually opposite the Town Hall. The stolen goods comprised children's garments, a few inexpensive items, valued only at a few dollars.

The Chairman of the Jays was a pleasant man – ‘Joe’. I had appeared before him, sitting with a couple of other Jays, once or twice before. As was then mandatory for all charges of theft, he explained to the lady, whom I will call ‘Mrs Smith’, that she could have the matter heard before a judge and jury if she wished. Mrs Smith looked alarmed at the thought of a judge and jury, and said she wanted the matter heard today. She consented to the Magistrates' Court hearing the charges. The clerk asked her how she pleaded, and she whispered, “guilty”.

The prosecutor provided a summary to the Court, informing the Jays that Mrs Smith had first stolen a couple of items, from memory a child's pair of shorts and socks, from Coles at about 11am, then a few minutes later, was seen taking similar items a few doors away at Woolworths. Her methods exhibited no shoplifting skills, guile or subtlety whatsoever. When confronted by the Woolies security officer, she readily admitted stealing from both stores and produced the items taken.

Joe and his colleagues conferred for a few seconds, then he announced, “You have pleaded guilty. We find the charges proved.” The prosecutor informed the Court that the lady had no prior convictions. I would have been shocked if she had.

Joe then demonstrated, at least to me, that he was an experienced and effective Chairman of the Jays. He said to Mrs Smith, “Is there anything you want to tell the Court?”. “No”, she whispered. But Joe persisted and asked her a series of questions. We learned she was 66 years old, married, her husband was about the same age, and still worked at the tannery up the road (you could often smell it in those days in High St, Preston, I'm afraid). Joe slowly established from her that her husband was at work that day. He had no idea about what had eventuated that morning or what was happening in Court at that very moment.

All of the information so far acquired was hard going, but it had to be done, and it was not all that unusual for an effective panel of Jays to learn this much about an unrepresented person pleading guilty.

Joe then showed he was a cut above the usual sitting Justice. He persisted. “Mrs Smith, you have never been in trouble before. Why did you take these things?” I was curious myself, and glad Joe was keen to find out. She said nothing. “Mrs Smith, we are very concerned to help you if we can. Can you please tell us why you did this?” Still no answer. “Mrs Smith, it makes it hard for us to work out what to do. Can you please help us?”

Most busy magistrates, let alone justices of the peace, would have given up before then. They would put her on a bond, adjourn the case for a few months, maybe a year, and then the matter would be struck out with no conviction recorded. A few I knew would have even imposed a conviction and fine, due to the lack of explanation. But Joe sensed something was amiss – and pressed on.

After a time, Mrs Smith said, very quietly, “If I told you, you wouldn't believe me.”

Joe gently encouraged her to tell him. He now addressed her as if nobody else was there. It was just the two of them. “I want to help you. Please don't be embarrassed. Help me to understand. What caused you to do this?”

Then, after a little more prodding, she said two things I'll never, ever forget.

“I wanted to give something back to the Children's Hospital. They have been so good to my granddaughter.”

As we were trying to digest what this meant, she explained it, ever so eloquently. “You see, she'll never grow up.”

I grappled mentally with what she had just said. I suppose we all did, all spectators to this lady's torment. Joe certainly was not going to ask her for any details of her granddaughter's condition. She did not need to say, or to be asked, any more about that. But I could almost hear the Chairman of the Jays thinking what enormous pressure the lady must have endured to compel her to act in a way that was a complete anathema to her. To steal, so as to facilitate a desperate gesture of gratitude to those who, under the stressed watch of this woman, were showing so much care and concern for the little girl.

The burning question was, what should the Court do? To do nothing would not help her. To insist that she tell her husband would be foolhardy and cruel. To put her on a bond with a condition that she seek out psychiatric guidance was an over-reaction. Also, if she had to steal these few dollars worth of kiddies' clothes, she could not likely afford psychiatrists, and certainly not without telling her husband. You could sense Joe's dilemma. I noticed he was not getting much help from the Jay on either side of him. Clearly, she needed to talk about her agony with someone; someone in whom she could confide; someone outside the family; someone who could deal with people under stress.

> “I grappled mentally with what she had just said. I suppose we all did, all spectators to this lady's torment.”

I leant forward towards the prosecutor, and whispered, in my normal – this time deliberate – stentorian fashion, “Does she have a GP?” Joe heard this, and looked after the rest. She was a woman, she was getting on in years; so, she had a doctor. Of course she did – she'd have had the same one for yonks!

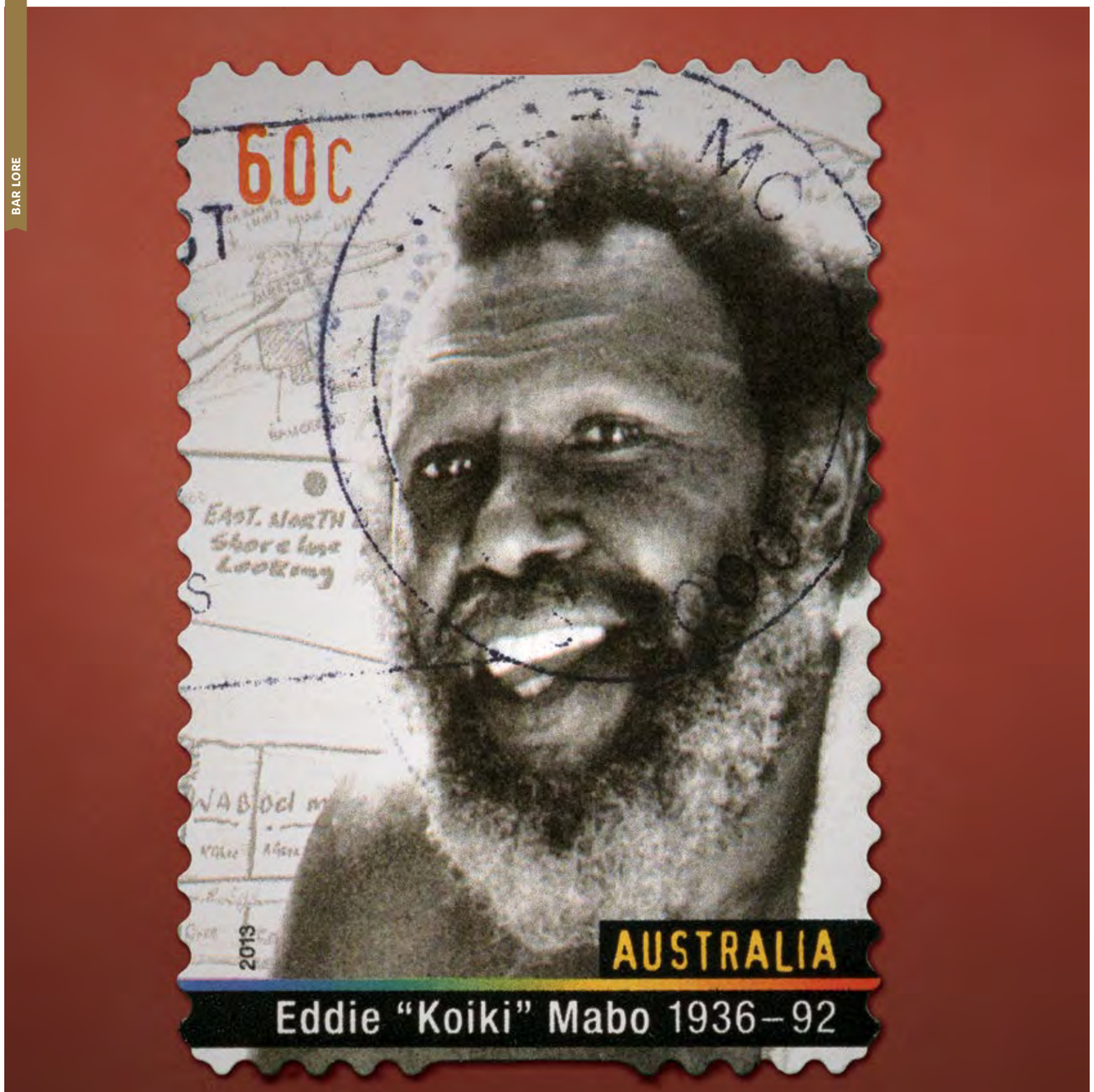
Without consulting his colleagues, Joe asked her whether she was prepared to talk with her GP about the whole story, of the strain she was under, her granddaughter, and what had happened that day. He told her that she did not have to do this, but that it was clear she needed to talk to someone about it, and who better than her family doctor? He gently extracted a promise from her that she would. He adjourned the case for three months, and told her that unless she re-offended, the charges would then be struck out. Suddenly, she was gone.

So, here's to you, Joe. You did your office, and the justice system as a whole, a great service. You persevered, handling a difficult situation with dignity, understanding and compassion. You were not “sitting in judgment on your fellow man”; you were facilitating justice taking place. This should be the primary aim of all who sit on the Bench.

For many years afterwards, I would occasionally tell this story to juries when I was delivering my final address and wanting to illustrate how intense pressure can sometimes cause people to do what they would not normally dream of doing. Trouble was, I had to actually utter what she said, and I invariably choked on those last few words.

Much easier typing it.

Colin Lovitt QC is a retired criminal barrister of 45 years standing at the Victorian Bar. He is the former Chair (twice) of the Criminal Bar Association and of the Essoign Club. Of his many high profile cases, he defended Mark “Chopper” Read on his one and only murder charge and obtained an acquittal. He also successfully defended Greg Domaszewicz when he was charged with the murder of Gippsland toddler Jaidyn Leskie who disappeared in June 1997. Colin was named a Legend of the Victorian Bar in 2012.



Memorable Mabo moments

BRYAN KEON-COHEN

Eddie Mabo featured on an Australian postage stamp circa 2013

PHOTO COURTESY OF CHRISD2015 (BIGSTOCK)

At the personal level, every counsel encounters them: a question from the bench, a witness implodes, an ominous silence, your leader goes AWOL! However, viewed objectively – e.g. by litigants or the presiding judge, let alone the public at large – whether such moments warrant recording, or were truly significant to the litigation, is another matter entirely. During the course of the *Mabo* litigation (1982-1992), I recall several such crises. Some of these, viewed from any perspective, were not merely memorable, but turned out to be critical. As former Chief Justice Michael Black has written regarding the *Dams Case*[1], not only the litigious but also the relevant socio-political context are both important when assessing these personal experiences.

As to the litigious context, *Mabo,* issued in the original jurisdiction of the High Court in May 1982, concerned five Murray Islanders seeking common law recognition of their traditional rights and interests in land and seas on and around Murray Island in the Eastern Torres Straits. *Mabo (No 1)*[2] reached the High Court when the applicants challenged a Queensland law enacted by the Bjelke-Petersen L-NCP government in April 1985. This law – *The Declaratory Act* – was one page long and was specifically designed to "kill off" the case. It stated, in short, that traditional rights to land, if any, then existing across the Torres Strait were thereby extinguished, retrospectively, without compensation, full stop.[3] Queensland immediately amended its defence to include this Act as a complete bar to the action.

Our clients were annoyed and their legal team was appalled. If this was good law, end of case. So, after much thought, we challenged this law on eleven grounds[4] including that it was in conflict with s 10 of the *Racial Discrimination Act 1975* (Cth) and thus, pursuant to the *Constitution* s 109, was invalid and inoperative to the extent of such inconsistency. A trial of facts only, remitted by order of Gibbs CJ in February 1986 to the Queensland Supreme Court and then underway before Moynihan J, was adjourned part-heard in April 1987 pending the outcome of this challenge.

Following the filing of a demurrer pleading, a substantial *Demurrer Book,* and written submissions (for the plaintiffs, 40 pages no less!)[5], a three-day hearing began before a Full Court of seven justices on 15 March 1988. Here, context again becomes important, especially two factors: first, the then raging national controversy over Aboriginal and Islander land rights; second, the changing judicial policies of the High Court, seen by some critics as unacceptable judicial "activism".[6]

The land-rights debate during the 1970s and 1980s included criticism and controversy surrounding the *Gove Case* 1971;[7] the Northern Territory *Land Rights Act* of 1976;[8] Bob Hawke's subsequently abandoned promise of national land rights legislation prior to the March 1983 election;[9] and Queensland's repressive laws and practices applying to Indigenous people.[10] In 1981-82, the Bjelke-Petersen government proposed Deeds of Grant in Trust to administer Islander communities with the de-gazettal of their reserves. These "DOGITS" were widely opposed.[11] Thus, Eddie Mabo and Fr Dave Passi gave instructions to commence a "test case" at a land rights conference at James Cook University in August 1981.[12]

As to the High Court, the "Mason Court" – Mason CJ, Dawson, Wilson, Toohey, Brennan, Dean, and Gaudron JJ – was barely a year old in March 1988 but its activist tendencies were becoming evident and, to some, controversial. On 5-6 February 1987, Gibbs CJ had retired, Sir Anthony Mason had succeeded him and Toohey and Gaudron JJ were both sworn in. With these appointments, a "gang of four" soon emerged as a solid majority favouring "just" outcomes – including, if necessary, reference to "fundamental values" and a willingness to re-think underlying principles – as against slavish adherence to precedent.[13] The "gang" was Mason CJ, Dean, Toohey and Gaudron JJ, sometimes joined by Brennan J. Given the ultimate close result in *Mabo (No 1)* these changes in personal and judicial philosophies proved crucial.[14] We counsel were well aware of the competing, and unstated, philosophies at play, as were our opponents.

Contributing to this developing reformist High Court at this time was the enactment of the *Australia Act 1986* (Cth), and complementary UK and State legislation, all of which commenced operation on 3 March 1986 – two-and-a-half years prior to delivery of the decision in *Mabo (No 1)*. These reforms removed the last vestiges of appeals from Australian courts to the Privy Council.[15] For the first time, the High Court became, in law, the ultimate authority in relation to interpreting the *Constitution* and stating the common law of and for Australia. One senses "the gang of four" relished this final, formal release from all colonial restraints.

In this atmosphere, day one of the hearing in *Mabo (No 1)* saw 20 or so spectators in the public galleries, plus a bevy of silks, "Soly-Gs"[16] and numerous nervous juniors in the very spacious No 1 court room. After appearances were taken and before my learned leader, Ron Castan QC,[17] could leap to his feet, Justice Brennan leaned forward. The transcript records:

> **Brennan J:** I have informed counsel appearing in this case that my son, Father Frank Brennan SJ, is an advisor to the Australian Catholic Bishops on matters relating to land rights and Aboriginal and Islander peoples, and that he is actively engaged in the ministry [sic] to these peoples. As this matter raises for consideration the question whether Islander people enjoy traditional rights with respect to land, not being rights arising under a statute, it is appropriate that the information I have given counsel should appear on the public record.[18]

> “One senses “the gang of four” relished this final, formal release from all colonial restraints.”

I froze. This was a complete surprise to me. My learned leader and/or our instructor, Greg McIntyre, in the rush and bustle of final preparation, had forgotten to inform me that “the team” had been forewarned of Brennan J’s intentions. I forgot to breathe, waiting for somebody to rise and argue that Brennan J suffered apparent bias and thus should disqualify himself. Whether such an application, if made, would succeed is, of course, another matter.[19]

Nobody, anywhere, moved a muscle. After hearing a thousand pins drop, the next noise I heard in that vast courtroom was the soothing voice of Mason CJ – “Yes Mr Castan” – whereupon Ron jumped to his feet at the central podium, anxious to get going before anyone had second, or third, thoughts.

> **Mr Castan:** If the court pleases, I hand copies of the summary of contentions [for the plaintiffs] to the Court…[20]

On 8 December 1988, the Court delivered its decision, in Canberra, in *Mabo(No 1)*. I attended to take judgment. Five judgments were handed down that morning. Brennan, Toohey and Gaudron JJ delivered a joint judgment. Mason CJ, Wilson, Dawson and Deane JJ delivered four separate judgments. The *RDA* point alone succeeded, by a majority of 4:3. Brennan, Toohey and Gaudron JJ, joined by Dean J, struck down the Queensland *Declaratory Act* as racially discriminatory while Mason CJ, Wilson and Dawson JJ dissented, on various grounds.[21]

Had Brennan J stood down due to apparent bias, the appeal would have been tied 3:3; the Chief Justice’s position, following normal practice, would have prevailed – when *Mabo* was lost, there and then. But with this result, the *Declaratory Act* was avoided and the relevant paragraph of Queensland’s defence was rendered futile and (eventually) struck out. The part-heard trial re-commenced in Brisbane on 2 May 1989 – day 17 – and continued until close of submissions on 6 September – day 67.

So, for me at least, here were three “thousand pins” moments in one: Justice Brennan’s announcement; the non-response of assembled counsel; and the final outcome, 4:3. There were others during this protracted litigation. But Brennan J’s “announcement” was, for me, an unforgettable “silence-in-court” experience.

1 *Commonwealth v Tasmania* (1983) 158 CLR 1; see M E J Black, “The Tasmanian Dam Case: an Advocate’s Memoir” (2015) 24(1) *Griffith Law Review 22.* Black QC led me in that case, intervening for the Tasmanian Wilderness Society.

2 *Mabo v Queensland & Commonwealth* (1988) 166 CLR 186 (hereafter “*Mabo (No 1)”*).

3 See *Queensland Coast Islands Declaratory Act 1985* (Qld) discussed at B A Keon-Cohen, *A Mabo Memoir: Islan Kustom to Native Title* (Zemvic Press, 2013) 90-95; 158-89, available from the author at bryankeoncohen.com.

4 All summarized at Ibid, Appendix 8, 479-83.

5 Ibid, 169. Queensland’s written submissions occupied 7 pp; the Commonwealth’s 2 pp; the Northern Territory, intervening, 4 pp. Ibid.

6 See, eg, S.E.K. Hulme, “Aspects of the High Court’s Handling of Mabo” (1993) 87 *Victorian Bar News* 29; and R Castan & B A Keon-Cohen, “Mabo and the High Court: A Reply to S E K Hulme QC (1993) *Victorian Bar News 47.* Just for the record: Ron Castan read with S E K Hulme; and my master, Geoffrey Gibson, read with one Daryl Dawson, later the sole dissentient in *Mabo (No 2)*. It’s a small legal world.

7 *Milirrpum v Nabalco* (1971) 17 FLR 14; see Hookey J, “The Gove Land Rights Case: A Judicial Dispensation for the taking of Aboriginal Lands in Australia” (1972) 5 *Federal Law Review* 85.

8 See *Aboriginal land Rights (Northern Territory) Act 1975* (Cwth) enacted per Constitution, s 122.

9 See G Foley, “How Bob Hawke killed land rights”, 28/2/2013, treatyrepublic.net/content/how-bob-hawke-killed-land-rights, accessed 18/11/2018.

10 Dubbed “Killoran’s law” after the long-serving Director of the Department of Aboriginal and Islander Affairs, Patrick Killoran. I cross-examined him for a day during the *Mabo* trial. See eg., G Nettheim, *Victims of the Law: Black Queenslanders Today* (Allen & Unwin, 1981).

11 See *A Mabo Memoir,* 39-42.

12 See *A Mabo Memoir,* 42-5. The Statement of Claim’s relief included seeking an injunction to prevent the de-gazettal of the Murray Island reserve. This aspect was later abandoned – as was the imposition of a Deed of Grant in Trust (DOGIT) to administer the de-gazettal of Murray Island reserves.

13 See generally J L Pierce, *Inside the Mason Court Revolution* (Carolina Academic Press, New York, 2006) 204.

14 See, eg, A Mason, “The Role of a Constitutional Court in a Federation” (1986) 16 *Federal Law Review* 1. Mason wrote: “The ever present danger is that “strict and complete legalism” [per Sir Owen Dixon] will be a cloak for undisclosed and unidentified policy values”. *Ibid,* 5. [parenthesis added].

15 See the *Privy Council (Limitation of Appeals) Act 1968* (Cwth) and *Privy Council (Appeals from the High Court) Act 1975* (Cwth). The 1986 Act removed a final right of appeal: from State courts in matters governed by State law.

16 Ie, Greg Davies, SG, QC, (Qld); Gavan Griffith SG QC (Cwlth); and David Bennett QC (Northern Territory, intervening).

17 As he then was, later AM QC. He died, suddenly and tragically, after abdominal surgery in 1999.

18 High Court, Transcript, 15/3/1988, p 3, accessible at National Library of Australia, Mabo Collection, MS 9518, at MC Vol 23/1; see *A Mabo Memoir,* 173.

19 In the *Yorta Yorta* native title claim, such an application against Merkel J hearing an appeal, in the Full Federal, Court, from Olney J’s dismissal of the claim, was made by Michael Wright QC, counsel for Victoria. That application succeeded on the basis that Merkel J, at the time, was involved with an Aboriginal charity. The court was re-constituted and the appeal was lost, 2:1, Black CJ dissenting. See *Yorta Yorta v Victoria* (2001) 110 FCR 244.

20 High Court, Transcript, 15/3/1988, p 3.

21 Wilson and Dawson JJ held the Queensland *Act* was not discriminatory; Mason CJ held that in the absence of any findings of fact it was not possible to decide the question. See *Mabo (No 1), passim*.

Back of the lift

In this Back of the lift section of the Victorian Bar News, *the Bar acknowledges the appointments, retirements, deaths and other honours of past and present members of our Bar.*

Back of the lift
Adjourned Sine Die

Federal Court

The Hon Richard Tracey AM RFD QC

Bar Roll No 1692

On 17 August 2018, a ceremonial sitting of the Full Federal Court was held to farewell Justice Richard Tracey after his 12 years' service as a judge of that court. The courtroom was overflowing with his Honour's colleagues, friends and family.

Justice Tracey was appointed to the Federal Court in 2006 after 24 years at the Bar (of those more than 14 years as a silk) and a 15-year academic career at the University of Melbourne. As a silk, his Honour had appeared in many well-known cases in the High Court, including the *Workchoices Case*, *Amcor v CFMEU*, *Yusuf*, *Jia* and *Teoh*. As a judge, he heard and determined a wide range of matters, most notably in the areas of industrial and administrative law, where his judgments have been particularly influential.

At the farewell, the Chief Justice described his Honour's judicial contributions in these areas as "mighty", while also observing that "... in everything you have done in this court, you did this work with strength, patience, good humour, and dutiful courage, [qualities] that mark you as a person".

On behalf of the Australian legal profession, the President of the Victorian Bar, Dr Matt Collins QC, spoke fondly of his Honour's career at the Bar, including as senior counsel assisting the Cole Royal Commission into the Building Industry. Dr Collins also reflected on his Honour's brush with the "fiery and volatile husband of a self-represented party", who, as is recorded in a judgment (*Marchesi v Apostolou* [2009] FCA 259 at [7]), "came on to the bench" and confronted him while the judgment was being delivered. This incident did not, however, faze the "wholly imperturbable and calm" judge. As the judgment goes on to record, the gentleman "was removed from the court. I asked that he be advised that he could return provided he undertook to be of good behaviour. He declined that offer and so the matter proceeded in his absence."

After the speeches, Justice Tracey thanked the speakers, his fellow judges, the registrars, his family and the court staff, including his associates (a number of whom are now at the Bar) and his wonderful executive assistant of 12 years, Mrs Wendy Dark.

In retirement, his Honour plans to remain an active contributor to the legal profession and legal education. He will continue to be a regular visitor to the Essoign Club.

JACK TRACEY

The Hon Justice Anthony North QC

Bar Roll No 1231

On 7 September 2018, Justice Tony North was farewelled at a ceremonial sitting of the Federal Court of Australia on the occasion of his retirement.

Justice Anthony Max North was appointed to the Federal Court of Australia and to the Industrial Relations Court of Australia in October 1995. At the time of his retirement, he was the last remaining Judge of the Industrial Relations Court of Australia.

The farewell was attended by numerous Judges of the Federal Court, the Chief Justice of the Supreme Court of the ACT, Justice Bennett representing the Family Court of Australia, Judges of the Court of Appeal and Supreme Court of Victoria, Judges of the Federal Circuit Court of Australia, the President of the Children's Court of Victoria, Judges of the County Court of Victoria and the Victorian Magistrates Court, as well as the Honourable Michael Black AC QC, the former Chief Justice of the Federal Court, and former Judges of the Federal Court and Supreme Court of Victoria.

Chief Justice Allsop addressed the sitting and spoke of his Honour's contributions, in particular, in the areas of native title, human rights and immigration, and industrial and employment law. He praised his Honour's skilful handling of the highly-charged litigation in the *Patricks* case and the *Tampa* case. The Chief Justice paid particular gratitude to Justice North for his contribution to the development of the Court's processes in dealing with native title claims, an area that was Justice North's passion.

An unusual and most impressive feature of the ceremonial sitting was the invitation extended to Senator Patrick Dodson to address the Court and to speak of Justice North's contribution in the area of native title law. Senator Dodson praised Justice North for his patience and sensitivity in dealing with the native title claimants, both in the way in which he conducted the hearing of the claims and in his personal dealings and communications with them.

The sitting was also addressed by Craig Rawson on behalf of the Commonwealth Attorney-General, expressing the Government's appreciation for Justice North's contribution to the work of the Court. On behalf of the Bar, Tony Neal QC and Herman Borenstein QC addressed the Court. Tony recounted anecdotes of Justice North's involvement in the area of native title. Herman spoke about Justice North's achievements in the area of industrial relations and workplace law including the very significant *Patricks* case.

Finally, David Manne from the Refugee and Immigration Legal Centre paid tribute to Justice North for his contribution in the area of refugee law, including in the *Tampa* case, and as President of the International Association of Refugee Law Judges for eight years.

Justice North responded, speaking of his time on the Court and the many people who had supported him at the Court. He concluded by paying a moving tribute to his late father, who had arrived in Australia in 1937 as a refugee from Nazi Germany and who had instilled in him a strong sense of injustice at the abuse of government power.

We wish him an enjoyable and satisfying retirement.

HERMAN BORENSTEIN QC

Supreme Court

The Hon Justice Robert Osborn QC

Bar Roll No 1148

A ceremonial sitting of the Supreme Court was held on 21 June 2018 to farewell his Honour, Justice Robert Osborn. It was a standing room only occasion attended by friends, family, colleagues and several current and former judges, including the former Chief Justice, Marilyn Warren AC QC.

The Solicitor-General addressed the Court, followed by Jim Delany QC on behalf of the Victorian Bar and, finally, the President of the Law Institute of Victoria.

Mr Delany referred to his Honour's practice at the Bar in what his Honour has come to describe as "public law cases", while reminding all present of his Honour's extensive skills across a vast terrain. This theme was developed by reference to the wide range of cases determined by his Honour following his appointment, with Mr Delany describing his honour as "a great judicial all-rounder".

Mr Delany described his Honour's years as a trial Judge as outstanding, both for the quality and timeliness of the decisions made and for the respectful manner in which his Honour treated all members of counsel and litigants in person, sometimes in trying circumstances.

No speech or article could hope to capture the totality of his Honour's contribution to different areas of the law.

Mr Delany referred to a number of significant trials presided over by his Honour in the Trial Division. Planning and environment is an area where his Honour has made a substantial contribution to the analysis of complex statutory regimes affecting land use, development and compulsory land acquisition. His Honour's consideration of the welfare of the Leadbeater's possum and the long-footed poteroo are examples of such cases.

The Solicitor-General focussed upon his Honour's notable career presiding over criminal trials. A reading of his Honour's case list in this division resembles a journey through the contents page of a criminal law text book, canvassing the full range of criminal defences.

Mr Delany described his Honour's nine years as head of the Common Law Division, as the marker for a period of significant growth in stature of the Court, inspiring judges to be part of the "can do" division which it has now become.

The Solicitor-General and Mr Delany both referred to the variety of matters his Honour has considered as a member of the Court of Appeal, including criminal appeals, liability for pollution and human rights matters.

His Honour was thanked for his administrative efforts, including his role in the construction and renovation of the city and regional courts, and reclaiming and reinvention of the paved courtyard available to all people visiting the courts in William Street.

On a personal level, his Honour was always generous with private catch-ups and advice over a cup of coffee in one of his favourite cafes. One often left these with a revitalised sense of purpose.

After all was said and done, his Honour revealed that the date of his farewell coincided with the winter solstice. This was fitting, his Honour told us, as from then every day would seem a little longer.

His Honour will take a well deserved break before returning to the court as a reserve judge. We thank him for his outstanding years of service to the legal profession and wish him well.

CHRIS TOWNSHEND QC

The Hon Lex Lasry AM QC

Bar Roll No 1065

It was not inevitable that Lex Lasry would find his place among the most influential figures at the Bar. *The Age* once described him as the judicial version of Hawthorn footballer Darren Jarman, who showed up at pre-season training with boredom and detachment, but whose genius shone through on the field. Lex was, by his own admission, a lousy student, "lazy and uninterested", who failed two of his four third-year subjects, prompting his professor to ask, "Do you really think the law is for you?"

It turns out that it was. Without question, Lex has been a hugely influential figure, in both law and the broader community. A private person of quiet and even temperament, self-described as a "republican cyclist", Lex is fearless, courageous, impeccably fair and compassionate, and sometimes controversial. He has always been prepared to take on hard and unpopular cases to defend causes he believes in, like that of Melbourne man Van Tuong Nguyen, who was caught carrying heroin during a four-hour stopover in Singapore. Lex joined the defence team for what turned out to be a three-year battle to save Nguyen from the gallows, though it was always obvious that he would hang.

"You could feel the futility," Lex grimly told *The Age*.

He loudly fought to save Andrew Chan and Myuran Sukumaran, two of the Bali Nine arrested for drug trafficking in 2005, who were executed ten years later. He also controversially championed David Hicks during his trial in Guantanamo Bay.

Standing before a gathering of young Melbourne lawyers, he once said that practising in criminal law made them human rights lawyers, whether they "like it or not".

Away from the bench, hammering his drumsticks, Lex led *The Lex Pistols* through 20 years of musical gigs. The Pistols hit their highpoint in 2014, with a benefit concert to raise funds for the Greste family's campaign to free Peter Greste from imprisonment in Egypt. For this commendable cause, Lex leveraged his contacts to bring together an extraordinary group of Australian musical legends, including Ross Wilson, Mark Seymour, Vika and Linda Bull, and the Rockwiz Orkestra. The event raised thousands of dollars and, like so many of Lex's public actions, sent a powerful message about the importance of the rule of law. A recording slipped into prison helped Peter get through some of his darkest periods, particularly the rousing finale of The Beatles' *I get by with a little help from my friends*.

Over his impressive career, Lex has maintained decency, humanity and compassion, fairness and strength. He combined these attributes with an unstinting passion to advance and uphold the rule of law and the best traditions of the Bar and Victorian judiciary.

It is an honour to know and respect this man of the highest quality.

JOHN CHAMPION AND PETER GRESTE

Silence all stand

Federal Court of Australia

The Hon Justice Michael Wheelahan

Bar Roll No 2554

On 3 October 2018, Michael Wheelahan QC was appointed a judge of the Federal Court of Australia, bringing to an end a remarkable career at the Bar.

His Honour was what is now called a mentor, but was then (perhaps more accurately) called a Master, to four readers. His readers can report the following from their time at the Great Man's knee: he was exceedingly generous with his time; he gave clear, even firm, instruction; he was never in doubt about what to do; and he had an encyclopaedic knowledge of the law. Overall, no readers ever had better assistance from their mentor.

His Honour's assistance was not limited to chambers matters. When one reader married a fellow barrister, Wheelahan J not only lent his antique Jaguar as the wedding car, but also acted as the driver, ensuring the bride was delivered safely to the altar.

Readers were not the only recipients of his Honour's assistance. His colleagues sought him out for advice in hard cases: when the Court was critical of counsel, when an opponent was being difficult, when the case was not going to plan. Some barristers carry that informal mantel, and it is a mark of exceptional talent and judgement. In that work, as in all his dealings,

unflinching, independent analysis was on display.

His Honour had a stellar career as a junior and took silk after a relatively short time. He flourished in the role of senior counsel, arguing literally hundreds of appeals. A regular feature of his Honour's advocacy was principled, legally innovative arguments. He was the silk of choice for statutory insurers, expert in interpreting statutes and navigating their interaction with the common law and the Constitution. He also practised in industrial law and tax. His Honour is understood to be the only member of the Common Law Bar Association to have argued a petroleum resources rent tax case. A significant part of his Honour's practice is best described simply as 'horrible problems': massive class actions; indefensible breaches of duty; recalcitrant insurers of major liabilities; unanticipated deaths leading to possibly unmeritorious payouts; over-large defamation awards for much-loved international movie stars, etc.

His Honour was also a huge presence in chambers, devoting many hours to its smooth operation. His obsession with electronic gee-wizzery meant his floor was serviced with an absurdly expensive coffee machine (which made indifferent coffee). He is already much missed, but his colleagues in chambers – and at the Bar generally – have never doubted that he would be an ornament to any Court to which he was appointed.

TIMOTHY MCEVOY
AND ANTHONY STRAHAN

Supreme court of Victoria

The Hon Justice Kevin Lyons

Bar Roll No 2990

Sometimes, after an event has occurred, it seems that it was inevitable. So it was with the appointment of Kevin Lyons as a judge to the Supreme Court of Victoria.

Kevin's background, intellect, capacity for hard work and personality make his appointment both fitting and deserved.

Kevin graduated from the University of Melbourne in law and arts. His legal career began at Galbally & O'Bryan, which provided a wide range of experience, including in chauffeuring 'Mr Frank' home after his long Friday lunches!

After three years at Galbally's, Kevin made his first foray to the Supreme Court as an Associate to Justice David Harper. Two years later, he came to the Bar and had the great good fortune to read with now Justice Hargrave. Kevin often worked as his junior prior to his appointment. In 2012, Kevin took silk. His extensive commercial practice involved all areas of commercial law and a number of high profile cases.

Kevin has a great capacity for hard work. Each of his cases were thoroughly considered and meticulously presented. He developed a love of brevity (saying nothing if he could swing it) and colour-coded post-it notes (whether to assist him or impress others!).

Kevin is a person of integrity who has always been keen to give back to the profession and the community. He was a member of the Legal Practice Committee and the Fidelity Fund Committee of the Legal Services Board of Victoria. He was a board member of the Victoria Law Foundation and chair of its Grants Committee. He also gave generously of his time to the Bar and was a long-standing member of the Ethics and Applications Review Committees of the Victorian Bar.

Kevin treats his colleagues, opponents and clients with respect and unfailing good humour. He has what some have described as a "hooting" laugh. And he can laugh at himself. Early on in his career, he was briefed for a number of contests at the Frankston Magistrates' Court. At about this time, Dr Ross Sundberg QC asked him what his area of practice was. After thinking for a while, he replied "Frankston"!

Drama is often described as having a narrative arc. Perhaps Kevin's arc is from Frankston, up the bay, all the way to the Supreme Court, where he will surely have a long and distinguished stay.

TIM SCOTTER

The Hon Justice Lesley Ann Taylor

Bar Roll No 3227

From Fremantle to 210 William Street is only 3,435 kms. However, her Honour took the long road: Canberra, Sierra Leone, Edinburgh, Oxford, Timor-Leste and Kyrgyzstan, before finally settling in the most liveable city in the world (or, at least more liveable than some of the places her Honour has resided).

Although it was the long road by distance, each of those places was part of the journey ending in her Honour's appointment to the Supreme Court of Victoria on 10 July 2018, an appointment that was, according to some, written in the stars.

Her Honour is loyal and a great friend to many, including her colleagues. Driven by her passionate commitment to education, she was always generous with her time and advice to junior counsel. Her Honour also contributed significantly to the development of the junior Bar, both formally and informally, including most recently as chair of the Criminal Bar Association, a position she held at the time of her appointment.

Her Honour also has quite a sense of humour. Although it may find less avenue for expression on the bench, it will doubtless find a voice in her Honour's chambers.

With her Honour on the Bench, the people of Victoria, both within and outside the legal profession, have the benefit of an intelligent, diligent and gifted lawyer.

Her Honour also comes to the role with vast experience of the best and worst of humanity. Despite—or maybe because of—that experience, her Honour was rightly regarded as a fair and fierce advocate. Although perhaps best known at the Bar for her work in Commonwealth prosecutions, including several long-running terrorism matters (most of which her Honour saw through to verdict), her Honour also had a strong defence practice.

It is her experience at both ends of the Bar table that makes us all confident that her Honour will achieve her stated goal of giving full meaning to the rule of law, the presumption of innocence, the burden and standard of proof, and fairness to all.

Her Honour's journey in the law continues. Who knows to where from William Street?

RAE SHARP

The Hon Justice Andrew Tinney

Bar Roll No 1833

Criminal trials are dynamic, unpredictable and demanding. No matter what challenge a trial presented to Andrew Tinney, the response would be "Isn't this the greatest job in the world?", a sentiment his juniors often did not share.

His Honour practised law for more than 35 years; of those more than 22 years at the Independent Bar. During his last 12 years as Crown Prosecutor, then Senior Crown Prosecutor, his Honour appeared almost exclusively in murder trials, with a recent cameo appearance in the Court of Appeal. His Honour was a formidable jury advocate and garnered the respect of all who had the privilege of witnessing his notorious final addresses.

His Honour was always available to other prosecutors, solicitors and members of the Bar to assist in whatever way he could. His Honour also took time to speak to members of the public watching court proceedings and school groups and in doing so shared his enthusiasm for "the greatest job". The respectful, courteous and kind way his Honour addressed all who came into contact with him went some way to making their experience of the criminal justice system palatable. This generosity of spirit translated into all aspects of his working life irrespective of the adversarial nature of the trial.

The pressure of a trial never appeared to unnerve his Honour. This relaxed manner terrified his juniors who were frequently left at the Bar table wondering if his Honour would arrive – which he always did with one minute to spare.

The only time one would see his Honour despondent or stressed was in anticipation of the Melbourne Football Club playing, or when reviewing their performance from the weekend. His Honour's devotion to the Club and passion for AFL, dominated conversations on Fridays and Mondays during the season. His Honour was always "guardedly pessimistic" when it came to the Demons' prospects.

The Supreme Court and the community will benefit from his Honour's sense of fairness and commitment to justice.

DIANA PIEKUSIS

The Hon Justice Steven James Moore

Bar Roll No 3211

They say that nice guys finish last. In that case, Justice Steven Moore must be the exception that proves the rule. His appointment to the Supreme Court of Victoria deprives the Bar of not only one of its acknowledged employment and industrial law "gurus", but also one of its most likeable, sincere and empathetic personalities.

He came to the Bar in 1998, following degrees in Law and Economics at Monash University (both with Honours), articles (and later employment as a solicitor) at Holding Redlich, and two years as legal officer at the Transport Workers' Union.

He read with Mordy Bromberg, now Justice Bromberg of the Federal Court of Australia, who describes him as one of his favourite juniors. He quickly built a practice in employment and industrial law. Perhaps unusually for that specialisation, he was alternately retained to act for both employees (and their representatives) and employers. He took silk in 2014.

Over the years, he appeared in various significant cases, including as junior for the State of Victoria and the Attorney-General for Victoria in the High Court case generally known as the *WorkChoices Case*. However, his appearance work was not restricted to courts, appearing also in the Royal Commission into Trade Union Governance and Corruption, and as lead counsel for the Shop, Distributive and Allied Employees' Association in the long-running *Penalty Rates Case* before a full bench of the Fair Work Commission.

His practice was an extremely busy one. However, he found the time to nurture and maintain strong relationships with his instructors and his Bar colleagues. He took an interest in people's lives outside the law, and displayed a warmth and ease of conversation which endeared him to all.

His reputed meticulousness and industry will be brought to bear on cases across the gamut of the Supreme Court's business. His ability to connect with and understand people at a human level will also no doubt be felt by those who appear before him and by those who read his judgments.

As in all these matters, the Bar's loss is the Court's gain. His Honour will surely enjoy a long and fulfilling career on the bench.

A F SOLOMON-BRIDGE

County Court of Victoria

His Honour Judge Michael Cahill

Bar Roll No 2565

Judge Michael Cahill has invested much of his career to helping others. His contribution to the legal profession

BACK OF THE LIFT

has been significant and a testament to his recent appointment as a Judge of the County Court.

His Honour completed his secondary schooling at Marcellin College before undertaking degrees in Law and Economics at Monash University.

Judge Cahill joined the Bar in 1990. With the ambition of pursuing a career in common law, it wasn't until he read with John Champion that he was exposed to 'a life of crime'. For more than 25 years at the Bar, Judge Cahill appeared in countless matters, both for the prosecution and the defence, and in several jurisdictions. He took silk in 2016.

His Honour has a passion for mentoring young lawyers and had four readers. His readers say he will make an excellent judge with his calm temperament, intelligence and care.

Judge Cahill's contribution to the legal profession extends beyond Australia's borders. He currently serves as the Chairman of the International Commission of Jurists (Vic), where he has worked hard to secure, for foreign advocates from countries with human rights challenges, an opportunity to observe the rule of law in operation in the Victorian legal system. He was Vice-Chair of the Victorian Criminal Bar Association from 2009-16. He has also taught advocacy workshops in Uganda, Bangladesh and the Pacific.

One of his Honour's legacies is the establishment of Brian Bourke Chambers – and the artwork that covers its walls. It was only after Brian Bourke's death earlier this year that his family made it clear how flattered he had been. It says much about his Honour, and Brian Bourke, that among Mr Bourke's pallbearers, he was the only lawyer. Among his interests outside the law is the Lex Pistols – the Bar's unofficial house band. He is the bass player and one of the three original members, alongside Justices John Champion and Lex Lasry.

Whilst he would prefer yellow robes – to be on brand with his beloved Richmond Football Club – there is no doubt his Honour will enjoy a long and fulfilling career on the bench.

GEORGINA CAHILL

Her Honour Judge Sarah Dawes

Bar Roll No 2828

Several institutions claim credit for her Honour's appointment to the County Court of Victoria. Her Honour studied at Monash University, where she made many friends, including Chris Townsend QC, who went on to read in the same Bar readers' course.

Her Honour served articles and became a solicitor at Galbally & O'Bryan. Galbally's, no doubt, see her Honour's elevation as further confirmation of its claim to be a cradle of the judiciary. Bernie Balmer, who also says he nurtures future judges, made her Honour his first employee solicitor. Crockett Chambers, where her Honour established a fine reputation as a criminal trial barrister, claims to be 'the judge factory'. Her Honour also joins many other barristers who have become judges or magistrates from Holmes List.

At Galbally & O'Bryan, her Honour instructed the late Bob Vernon and his junior Patrick Tehan in the Walsh Street murders trial. Her Honour and her university colleague, Susie Cameron, now a magistrate, were the only women lawyers in that fraught case.

Bernie Balmer then diverted her Honour from a potential career in women's fashion at Portmans with 18 months in the fiery furnace of summary advocacy. At various courts around town, her Honour had to deal with the question "Where's Bernie?" This was a bit like asking "Where's Wally?", the only difference being that Bernie was always in another picture at another court.

Her Honour read with Terry Forrest in 1993, who was reluctant to eject his previous reader, Peter Collins, as they shared a love of sports banter. Her Honour was forced to squeeze a third desk into a less than palatial room in Equity Chambers. Eventually, she and Peter moved into the room next door. She maintains a close friendship with Justice Forrest to this day.

Her Honour's first jury trial was a rape case in Bendigo. She defended her client successfully, the verdict being 'not guilty'. The judge's associate swiftly deflated any sense of her having a personal role in the outcome, with the words: "You did alright, Miss. But Bendigo juries don't convict on rape. There hasn't been a Bendigo rape conviction since the War."

Moving to Crockett Chambers, her Honour had a busy practice and was briefed to both defend and prosecute. Her Honour was opposed to Peter Kidd, now Chief Judge of the County Court, in a similar fact argument in the 2002 trial of Bandali Debs and Jason Roberts for the murders of policemen Gary Silk and Rodney Miller.

Dr Greg Lyons QC led her Honour in prosecuting the NAB futures fraud trial, which involved many millions of dollars and complex arguments about the meaning of dishonesty in the Commonwealth Criminal Code.

Her Honour was appointed a magistrate in 2006 and relished the opportunity to be proactive with young offenders and to find ways to deflect them from the criminal justice system. Her Honour managed the sex offences committal list and gained vast experience in family violence matters at Melbourne and Heidelberg. At the latter court, her Honour was falsely suspected of having left a tap running that flooded the complex in 2015. If that unfounded suspicion were true, her Honour would have a basis to claim responsibility for a $7 million upgrade that created massive improvements for court users.

Her Honour is married to the solicitor Martin Amad, whom she met when at Galbally's. Martin briefed her regularly but she had to put the brief together, do any necessary photocopying *and* find her own depositions! She also agreed to deliver briefs to other barristers and was annoyed to find their back sheets marked with higher fees than she was commanding.

Her Honour and Martin have three boys in secondary school and the four of them should all be very proud. The Bar wishes her Honour joy in her appointment.

CAMPBELL THOMSON

His Honour Judge Scott Johns

Bar Roll No 3602

There was universal jubilation in Gorman chambers in November 2017 when two of its most loved and admired members – Julian McMahon and Scott Johns – took silk.

Approximately one year later, his Honour Scott Johns was appointed to the bench as was one of Gorman Chambers' most prized recruits, his Honour David Sexton. Jubilation was again evident, but this time, the more self-indulgent members of chambers were struck by the realisation of the imminent loss of one of its finest.

His Honour joins a long list of barristers whose last chambers at the time of their appointment was Gorman Chambers, including their Honours Allen, Gamble, McKenna, Burchill, Leighfield and Zebrowski. Notwithstanding the excellence of all his predecessors, the appointment of his Honour is – to quote Bruce McAvaney – "special".

Before being appointed, his Honour had a criminal background replete with diversity and excellence. His Honour had worked at Victoria Legal Aid, the DPP, the Northern Australian Aboriginal Legal Service – now the Northern Australian Justice Agency – and had been a member of our Bar for over a decade.

Judge Johns spent the entirety of his career at the Bar in Gorman Chambers and read with one of its most revered members, Michael Rush. It is likely that in his latter years at the Bar, no-one other than their Honours Judge John Smallwood and Judge Michael O'Connell appeared in as many back-to-back murders for an accused as Judge Johns – the vast majority of those cases funded by VLA and no ticket to fiscal Utopia.

His Honour was a tenacious, yet calm, outstanding advocate, who routinely rendered an impossible defence, viable. In what may at first blush appear to be contrary to the venerable 'open door policy' of the Bar, when his Honour was in chambers, his door was often closed and when he was absent, it was always open.

This was not because of a reluctance from his Honour to answer questions from his colleagues, as his advice was regularly sought and he never hesitated to provide assistance, guidance and impeccable forensic judgement. Rather, so as to relieve tension, it was not uncommon for his Honour to close his door and either have recourse to YouTube and watch a famous Geelong victory or play a Rolling Stones 'LP' on his retro turntable, well before such a trait became *de rigeur*.

Those of us au fait with his Honour's interesting wardrobe hope that he will occasionally sit before 10am in order that it may be displayed in all its splendour. Of particular interest will be whether we will again see his chequered suit, which bore a strong resemblance to that worn by Happy Hammond as he followed the Geelong team on to the MCG before the start of the 1963 Grand Final.

During the longest welcome response since that of Judge Gamble, his Honour displayed many of the qualities that will make him a wonderful judge: humility, self-deprecation, kindness, wit and fundamental decency.

The love, admiration and pride he displayed for his family, his wife, Amber, and their adorable three young children was a delight to witness, as was the universal joy of those present at the appointment of a wonderful man and exceptional lawyer, incomparable in many respects.

We already miss him enormously, but an excellent court has become even better as a result of his appointment. We wish him every good fortune and are proud to have had him in our midst for many, but – somewhat selfishly – not enough, years.

GEOFFREY STEWARD,
ON BEHALF OF ALL OF HIS HONOUR'S
FRIENDS IN GORMAN CHAMBERS

His Honour Judge David Sexton

Bar Roll No 3761

As a barrister, David Sexton exuded calm and poise. It was present in everything he did: he was a gentleman in his dealings with solicitors; he was the model of collegiality at the Bar; and his court style was imbued with authenticity and measured reason.

David Sexton followed in the footsteps of his mentor, Julie Sutherland, and developed expertise in the field of sex offences. Whether defending those accused of such crimes, or acting for the State in post-sentence applications, he deployed his intellect and unmistakable brand of court craft with equal determination in every case.

He acted in many difficult trials, developing a reputation as a formidable trial advocate. He would develop case theories dealing with seemingly insurmountable pieces of evidence, and deploy them successfully before juries.

Within a few years of signing the roll, he was led by George Georgiou QC in the trial of the first man to be charged with the deliberate infection of persons with HIV. George Georgiou describes David Sexton's cross-examination of key witnesses as superb, showing all the hallmarks

BACK OF THE LIFT

of industry, judgement and skill for which he has become known.

Much later, the trial of an AFL footballer came with a maelstrom of media attention and daily reporting. David Sexton remained focused and true to form. He performed his trade mark meticulous preparation, weighing the potential value of introducing particular pieces of evidence with his keen strategic eye. He was unperturbed by the swirling headlines and potential front page print.

As a young man, his Honour was inspired to pursue a career in the law by television court room dramas. He was encouraged to attend law school by his mother. Upon his admission, he practised as a solicitor advocate at Saines and Partners in Ballarat. Later, he practised at Victoria Legal Aid.

Judge Sexton has made significant contributions to the development of advocates, both young and more experienced. He has donated much of his time and his expertise to advocacy training at the Bar and elsewhere. Many have benefited from the gentle and encouraging manner with which he recommends improvements to technique and performance.

The Court, the criminal justice system and broader society are now the beneficiaries of his Honour's depth of experience and the redeployment of his unique style of calm, measured reason to judicial decision-making. His Honour is sure to enjoy a fulfilling career on the bench, and we wish him the very best.

CAITLIN DWYER

Vale

Michael Connolly

Bar Roll No 1947

Michael Kevin Connolly was born on 25 January 1945. He was educated at Xavier College, where he played football and was the stroke of the second VIII; and at Monash University, where he received a Bachelor of Jurisprudence and a Bachelor of Laws. For a time, he continued to play football with the Old Xaverians.

Michael served articles with the late Des Doyle in the Melbourne office of Doyle & Kerr (now Pearce Webster Dugdales, incorporating Tolhurst Druce & Emmerson). He was admitted to practice in April 1971 and practised as a solicitor with Stewart & Sons in Echuca, with Lovell Langslow & Son in Castlemaine, and then for 11 years with H S W Lawson & Co in Castlemaine, where he was the litigation partner. Michael returned to Melbourne in 1983 to Ridgeway Clements as a specialist family law solicitor.

He came to the Bar in September 1984 and read with Bruce Walmsley (now QC). With his substantial experience in litigation, he quickly established a practice at the Bar in crime, commercial law and family law. He immediately joined the Family Law Bar Association and came to specialise in family and de facto relationships law, including trusts, property law and testators' family maintenance, both at trial and on appeal; and on circuit in Mildura and Bendigo. He was a member of several Bar working groups, in particular, responding to the Australian Law Reform Commission Inquiry into the Federal Civil Justice System and, prophetically, on the proposal to establish a federal magistracy. He was the Bar nominee on the Family Court Chief Justice's Future Directions Committee.

In May 2001, Michael was appointed a federal magistrate – the fifth federal magistrate in Melbourne (including the chief federal magistrate) and the last of the 16 initial appointments to what was then the Federal Magistrates Service and since April 2013, the Federal Circuit Court of Australia.

His Honour served with distinction for nearly 14 years to statutory retirement in January 2015, sitting in the areas of family law, de facto disputes, bankruptcy, trade practices, migration, administrative law, admiralty, copyright and human rights.

He became a nationally accredited mediator, returning to practise at the Bar in February 2015 – in family law and in commercial mediations in Victoria and Queensland.

VBN

Margaret Ley Mandelert

Bar Roll No 2068

Hundreds of mourners attended Maggie's funeral on 21 June 2018. It was a veritable *Who's Who* of the family law judiciary and legal profession as well as many family and friends. One senior barrister remarked to me that "Maggie was one out of the box. We will never meet anyone like her again in our lifetime."

I was privileged to have been Maggie's only reader. We shared chambers from 2002 and she continued to be my mentor and good friend. We would regularly discuss cases and life. She was extremely generous and loyal and would support me in whatever the problem was with a comforting "well Renata my dear … that just won't do". In 2016, we welcomed Alison Burt to share our chambers. Maggie and her husband John were hospitable to both of us and our families.

Maggie was irrepressible and indefatigable in all her pursuits. She prepared cases meticulously and fought for her clients equally passionately whether privately funded or legally aided. She was fearless. I often observed her forceful advocacy and skills and common sense approach.

Maggie knew how to enjoy life and maintain a work-life balance. Once a case was finished, she would call our clerk Paul Holmes, then her husband John, and then go home to John and her beloved dogs. On free days she would play piano, read, listen to music, go to the movies or galleries, catch up with family or friends, or just have a glass of wine. She was sociable and gregarious. She loved travelling and most years travelled to Europe to see friends and to attend theatre. In London, she would go to shows daily and stand by the stage door, often engaging with actors she admired and securing photos and autographs.

Maggie also had her 'missions' outside the legal arena. She was a woman of determination and action, whether it was taking on neighbours and the local council, the landlords of Owen Dixon Chambers or the Commonwealth Law Courts building managers.

Maggie was admitted to practice in 1966. She signed the Bar Roll in May 1986. She was a well-respected mediator and barrister. In 2008, the Family Law Barristers' Association awarded her 'The Survivor's Award' and one of her proudest moments was being named a Victorian Bar Legend in 2012. She was a great advocate for women in the law and a role model for those of us who followed.

Maggie continued to do appearances and mediations for 32 years and throughout her bouts of poor health. She did not give up. When I visited her in hospital just before she died, she confided that she may have to take it easy and stop taking on court work. She was waiting for a close friend to bring her a "decent bottle of red" as the wine in the hospital was not up to scratch. She was looking forward to going home and spending time with John, her family and friends, and of course her dogs. She was booked to go overseas again on one of her European sojourns, which sadly did not eventuate.

Maggie was loved by many and is sorely missed.

DR RENATA ALEXANDER

The Hon Joseph O'Shea QC

Bar Roll No 427

Joseph Raymond O'Shea was born on 4 April 1927. He was educated at St Patrick's College, East Melbourne, where he was a good student and a successful athlete; and at the University of Melbourne. He served long articles with John Mahony at Mahony, O'Brien & Duggan in Melbourne. He was admitted to practice in June 1949 and practised briefly as a solicitor with Joseph E Daily in Myrtleford, before signing the Bar Roll in August 1949. He read with W A ("Bill") Fazio, whose chambers were in Equity Chambers and, upon completion of his reading, his Honour also took chambers there – where he remained until his appointment to the County Court. The legendary annual Equity Chambers Christmas party, not uncommonly, extended to singing (in particular, of Irish ballads) and beer in Joe O'Shea's room.

His practice began in the Courts of Petty Sessions (now the Magistrates' Court), engaging with the arcane intricacies of the *Landlord & Tenant Act*; moved to the Licensing Court; and expanded to a broad general practice including common law, crime, matrimonial causes, workers compensation, wills and testators family maintenance. He appeared in all jurisdictions, including before the High Court, and a number of times before the Judicial Committee of the Privy Council in London. He had five readers and took silk in 1968.

His Honour was appointed to the County Court on 1 April 1969. He was the guest of honour at a Bar dinner shortly after his elevation to the bench; and his colleagues hung his portrait on the third floor of Equity Chambers.

Judge O'Shea served with distinction for a remarkable 30 years to statutory retirement in April 1999 – amongst the longest-serving judges in Australia in modern times – including as Acting Chief Judge.

His Honour sat predominantly in the criminal jurisdiction. He was also concurrently an arbitrator under the *Sale of Land Act*; chairman of the Liquor Control Commission of Victoria; and deputy president of the Industrial Appeals Court of Victoria (which heard appeals against decisions made by Wages Boards). His favourite circuit was the Bairnsdale circuit. His Honour was generous in sharing his experience and offering advice and counsel – in the Bar tradition, his door was always open to his fellow judges. After statutory retirement, his Honour became a reserve judge.

VBN

Richard Henry Searby AO QC

Bar Roll No 562

Dr Richard Henry Searby (born 1931, died 8 August 2018) was an Australian lawyer, company director and academic.

He practised at the Bar for some 34 years, of those more than 21 years as a Queen's Counsel, with a wide commercial and equity practice. His final court case was an *in camera* appearance regarding the application of the Victorian adoption law to IVF. He ceased practice as a barrister on 1 July 1993.

The obituaries published about Richard Searby since his death reflect the extraordinary breadth of his career and achievements. For the British press, it was his role as chairman of NewsCorp from 1977 to 1992 during a tumultuous time for which he received greatest recognition.

In 1983, Richard Searby reportedly accompanied Rupert Murdoch to the offices of *Stern* magazine in Germany to view the so-called "Hitler Diaries" and to negotiate their publication in the *Sunday Times*. The diaries were revealed as fake. It was Richard Searby who had inserted a clause obliging *Stern* to reimburse the $3 million-plus paid by Murdoch for the rights.

The 1986 Wapping dispute was when the *Times* titles were shifted to new print technology (from Gray's Inn Road and Fleet Street to Wapping) in the face of violent union opposition. Richard Searby was credited with bringing an end to the year-long dispute by citing a precedent from a 1926 Welsh coal mine strike in which, with no revenue coming in and closure threatened, the proprietor was judged entitled to refuse the wages of the

entire workforce and not to be liable for redundancy.

Richard Searby was educated first at home by his grandfather (a former headmaster of Essendon High School and later Melbourne High School), and then at Geelong Grammar School, where he was a school prefect. He attended the University of Melbourne for one year before leaving to study classics at Oxford University. He was awarded a BA Lit Hum (Hons) and an MA from Oxford University in 1954 (as well as a sports blue for tennis) and was then admitted to the Inner Temple.

Rupert Murdoch reportedly shared a study with Richard Searby at Geelong Grammar School, which is where they became friends, after which they attended Oxford University together.

On his return to Australia, from 1956 until 1959, Richard Searby was associate to Sir Owen Dixon, Chief Justice of the High Court of Australia.

He signed the Victorian Bar Roll on 31 July 1957 and read with John Young (later Chief Justice Sir John Young).

From 1961 until 1972, he was Independent Lecturer in Law relating to Executors and Trustees and a member of the Faculty of Law at the University of Melbourne, where he lectured Barry Jones, former Federal Labor Party politician and television quiz show 'Pick a Box' champion.

He had three readers and was appointed as a Queen's Counsel on 3 November 1971. Both concurrently with, and after, his practice at the Bar, Richard Searby was a company director and chairman of numerous Australian and international companies. In addition to his time as a director, and later chairman, of News Limited, he was also chairman of Equity Trustees for about 21 years (1980-2000).

In 2005, he was awarded an honorary Doctorate of Laws from Deakin University, where he was chancellor from 1997. He was awarded an Order of Australia in 2006 for his services to education, as a contributor to the programs of major cultural institutions, business and the law.

Richard Searby was married to Caroline McAdam, who died on 25 January 2014. He is survived by his three sons.

VBN

Peter Cahill

Bar Roll No 1019

Peter Cahill was born on 28 July 1946 and was educated at Xavier College and the University of Melbourne. He served long articles – completing the Law subjects required for admission to practice at the University of Melbourne – and was admitted to practice in August 1972.

He came directly to the Bar, signing the Bar Roll just nine days after he was admitted. He read with Frank Walsh (later QC; then a judge of the County Court; now retired – his Honour Frank Walsh AM QC).

After just a few years' practice in Melbourne, Peter was appointed Crown Counsel in Hong Kong. At the end of that contract, he returned to practice in Melbourne. But the spell of the Orient had taken hold and he soon returned to Hong Kong, again as Crown Counsel.

Peter was promoted to Senior Crown Counsel and, over the following seven or eight years, he headed the International Law Unit of the Prosecutions Division of the Hong Kong Department of Justice. He had the carriage of cases involving complex issues of mutual assistance, extradition and related matters. He was further promoted to, and retired at, the rank of Senior Assistant Crown Prosecutor.

In 1993, he was called to the Hong Kong Bar. He had a number of readers – and both his readers and juniors benefitted from his professional generosity. At the Independent Bar, he took both prosecution and defence work.

He was an avid traveller and a keen sailor; he had a share in a junk and sailed in her often.

In December 2006, Peter had the very great pleasure of moving the admission to practice in Victoria of his daughter Victoria. He himself continued practising until illness slowly overtook, and eventually overwhelmed, him. He was a gentle and kind man to the very end. He will be missed by his partner Amy, his daughter Victoria and grandchildren Chloe, Hunter and Mia, as well as his siblings and their families.

VBN

Jane Elizabeth Treleaven

Bar Roll No 3932

In her relatively short time at the Bar and in her all too brief life, Jane's contribution to others was outstanding.

Jane came to the Bar after working as a senior associate at both Russell Kennedy and Herbert Geer. She read with Joseph Tsalanidis. She soon established a formidable practice at the Bar.

I first met Jane in 2007 when her husband Michael asked me to work on a matter with her. I soon recognised Jane's talent as a quick-witted lawyer with a remarkable clarity of thought and expression. She was a warm, generous individual with a mischievous sense of humour and an infectious laugh, who cared deeply for her family, friends and colleagues. We quickly became close. She had many friends at the Bar, including her 'boys' on the 11th floor of Isaacs.

We worked on many cases together, including the long and difficult Victorian Bushfires Royal Commission and a High Court matter. She was highly regarded by leaders, opponents and the bench for her unflappable manner and her ability to hone in and navigate her way through difficult factual and legal issues. The Royal Commission placed enormous strain upon all involved, including legal teams, with the constant reminder of personal loss and tragedy. Jane's interest in wellness and resilience grew from these difficult experiences.

Jane recognised that she could follow her personal interests through service to the Bar. She joined the Barristers Animal Welfare Panel and was a prime mover in establishing the Climate Change & Environmental Law Panel. She was a Deputy Chair of the Indigenous Lawyers Committee involved in drafting the Bar Reconciliation Action Plan. She was First Assistant Convenor of the Women Barristers Association, Assistant Secretary of the Commercial Bar Association's Corporations & Securities Section and Assistant Honorary Secretary of the Bar Council.

In 2013 Jane was diagnosed with follicular lymphoma and by 2014 was profoundly unwell. Her time in treatment and in hospital set her on a remarkable and courageous journey of personal transformation. She stripped away inauthenticity and last year celebrated 10 years of marriage to her husband, Michael Main, surrounded by family and friends.

She fully intended to recover her health and to share her insights, her peace and her sense of gratitude with others. Jane was in India with Michael when she died.

FIONA MCLEOD SC

His Honour Judge John Hassett

Bar Roll No 934

John Hassett was one of the gang of four who set up the Criminal Bar Association in 1978 – with Frank Vincent, John Coldrey and Colin Lovitt. He was the inaugural treasurer, and later its secretary.

Lovitt recalls that John:

> Worked his butt off in that position, whilst serving as a permanent prosecutor for the Queen, for many years. He was a skilful, careful, and very effective secretary, and a pleasure to work with. He was a terrific bloke, a great friend.

John was made a life member of the CBA along with Michael Kelly, the CBA's inaugural chairman, in 1994-5.

Setting counsel's fees was a big issue in the late 1970s and early '80s. Indeed, it was a prime reason for the establishment of the CBA, as the new legal aid legislation was coming into force. John and Colin Lovitt wrote a lengthy report on fees in criminal cases, including a recommended scale of fees across jurisdictions. It was adopted by the Bar Council in 1980 and the various legal aid bodies followed suit: public solicitor for criminal trials, Victorian Legal Aid Committee, Australian Legal Aid Office, Aboriginal Legal Aid and other legal aid centres across the State. There had never been a scale before. And having one led to comparative harmony between the Bar and Legal Aid for the next decade or so.

John was delightful company, with a singularly self-deprecatory sense of humour. Lex Lasry was junior to John in a murder prosecution of three men for killing a former solicitor, Roger Wilson. The accused included the now infamous Christopher Dale Flannery. The morning John was to address the jury at the close of the Crown case, he rang Lex and told him that he was ill and would not be able to appear that day. "You will have to make the final address." Lex can tell you of his reaction. It turned out to be a joke, but for an hour or two Lex was 'shitting bricks!' Lex was and remained one of John's best mates at the Bar. After the verdict (not guilty), John quietly ventured, "I reckon I have managed to get a lot more blokes off as a prosecutor than I ever did as defence counsel".

When not prosecuting, John acted for the family of Great Train robber and escapee, Ronald Biggs, when he was found to be living in Australia. He was his solicitor and Lovitt thinks he met with him at a secret venue before Biggs fled the country to Brazil.

John was known for his impish sense of humour, which belied the deep, dry delivery of his voice, both on and off the bench – one of the best, most thoughtful, well-prepared, good-humoured, compassionate judges before whom to appear.

He was also a great family man, devoted to Val and his daughters.

Lovitt recalls, "John was a delightful guy and one of the best friends I had at the Bar. I was truly proud that he was my friend. He dined at my place on many occasions, and as a religious man, always insisted on saying grace. Our co-diners were often the other members of the CBA executive – Kelly, Phillips, Vincent, Woinarski – sinners all. He knew that I, the host, was an atheist, but that made no difference to him – and nor should it have!

"We sometimes went to the cricket together and were organised to go to a one-day final between Australia and New Zealand back in the 1980s. I had to bail out for some reason, and so was otherwise engaged, and remained unaware of the course of the game or the result – until I rang him and asked who won. He replied that we did, but he sounded shattered. He then described the underarm delivery by Greg Chappell's brother at the direction of captain Greg. At first, I found it hard to believe him. John thought that resorting to such tactics was totally against the 'spirit of cricket'. To him, it was a betrayal. He was that sort of man. And he was right."

John remained a great supporter of the CBA, well after his retirement as a tireless secretary and from the bench. He was a regular at our annual dinners, most recently last year, where he shared a laugh with long-term mates and showed his support for newcomers alike.

CRIMINAL BAR ASSOCIATION

John (Jack) Bernard Gaffney OAM

Bar Roll No 1450

John was born in Broken Hill, New South Wales, and was recruited to play league football in Melbourne for Fitzroy at the age of 17. He ended his playing career after 80 games but retained a strong interest in football. He subsequently became a member, and later Chairman of the AFL Tribunal. He enjoyed his time on the Tribunal and remained a member for many years.

He worked for the Victorian Crown Law Department from 1947

BACK OF THE LIFT

to 1967, in the Public Solicitor's Office, the Titles Office and the Local Government Department. He studied law part time and was admitted to practice in 1967.

Following his admission to practice he joined an established legal firm in Brunswick, which was renamed Le Grand, Randles, Gaffney & Co. John quickly developed a busy practice as a solicitor/advocate and appeared almost daily in the Magistrates' Court. He practised almost exclusively in criminal law. John had a down-to-earth manner and an easy rapport with clients and magistrates.

In 1977 John took up a part-time appointment as a member of the Melbourne Wholesale Fruit & Vegetable Trust. He resigned in 1982.

In 1978 John left practice in Brunswick to go to the Bar. In 1980 he became the part–time Chairman of the Land Valuation Board of Review.

John left the Bar to take up the position of Registrar of Criminal Appeals in the Supreme Court, becoming a Master and in latter years the Registrar of the Court of Appeal. He remained with the Court until retiring in 2001 at the age of 71. In retirement he worked as a mediator at the Legal Profession Tribunal.

Outside of work John was a proud husband, father and grandfather. He loved golf and played twice a week.

JOHN GAFFNEY

The Hon Ian Gray

Bar Roll No 454

The Honourable Ian (universally known as "Sam") Gray was born on 6 March 1926. He was educated at Melbourne Grammar School, where he played in the first XI and the first XVIII. After matriculating in 1943, he enlisted in the Royal Australian Naval Reserve. He trained at Flinders and was then posted to Darwin before joining HMAS Echuca and seeing service in the Pacific. He was promoted from Ordinary Seaman (Second Class) to Able Seaman.

Not discharged until 1946, his Honour then served long articles with the senior partner at Blake & Riggall (now Ashurst), Mr E W Outhwaite. For part of those five years, he shared a room with John Young (later Chief Justice Sir John Young), who was serving his articles with Alan Lobban. His Honour completed his long articles law subjects at the University of Melbourne. He later quipped that he was one of the few, in modern times, to have been appointed to the Supreme Court "without first acquiring either a law degree or a silken gown".

He was admitted to practice in December 1950 and came directly to the Bar, signing the Bar Roll in January 1951. He read with Douglas Little (later Sir Douglas Little of the Supreme Court). In more than 17 years at the Bar, he was regarded as a strong and fearless advocate in all jurisdictions, particularly in the broad common law field – he was in high demand in civil juries.

Sam Gray served as a judge of the County Court for more than nine years. He was also a deputy chairman of the Workers Compensation Board and of the Industrial Relations Court, and president of the Administrative Appeals Tribunal.

He served as a judge of the Supreme Court for more than 12 years and, for 11 years in retirement, he was a frequently sitting reserve judge of the Supreme Court of Victoria. He was also an acting judge of the Supreme Court of the Northern Territory – a remarkable total of 33 years as a judge and reserve judge.

Beyond the law, his Honour was a long-time chairman of the Australia Day Committee (Victoria), which advises the premier on the state-wide Australia Day celebrations. He played football and cricket with the Old Melburnians and captained the Victorian Bar cricket team. He was of a standard as a cricketer that, in his response at his County Court welcome, although perhaps in jest, he expressed disappointment at not having been selected for the Australian touring team to go to England. He also played golf, tennis and squash.

His Honour explored the world through bushwalking: New Zealand, South America and Kenya, where he climbed Mount Kilimanjaro. A noted after-dinner speaker, he proposed the toast to cricket at the centenary test dinner in Melbourne.

Sam Gray died on 10 October 2018 at the age of 92.

VBN

Erratum

It has come to the Editors' attention that there were two errors in Patrick Tehan's obituary of Brian Bourke published in the Victorian Bar News *#163: the date of Brian Bourke's death was 30 March 2018, not 31 March 2018, and the artist who painted his portrait is Karl Schott, not Karl Scott.*

Gonged!

2018 QUEEN'S BIRTHDAY AWARDS

Colin Golvan AM QC

The Hon Justice Stephen Estcourt AM

Professor Timothy Lindsey AO

OTHER APPOINTMENTS/AWARDS

Jennifer Batrouney QC – President, Australian Bar Association 2018-2019

Daniel Crennan QC – Deputy Chairperson – Enforcement, Australian Securities and Investments Commission

Liam Brown – Crown Counsel for Victoria

Fiona McLeod SC – Australian Women Lawyers – Lawyer of the Year

Request for Brian Bourke archive material for the State Library

Angela Nordlinger

Brian Bourke died on 30 March 2018, Good Friday, following a stroke on 17 March 2018, St Patrick's Day, as befitted his Irish Catholic identification. He left all his papers, 60 years of diaries, fee books, correspondence, interviews, transcriptions and much other material to the State Library of Victoria.

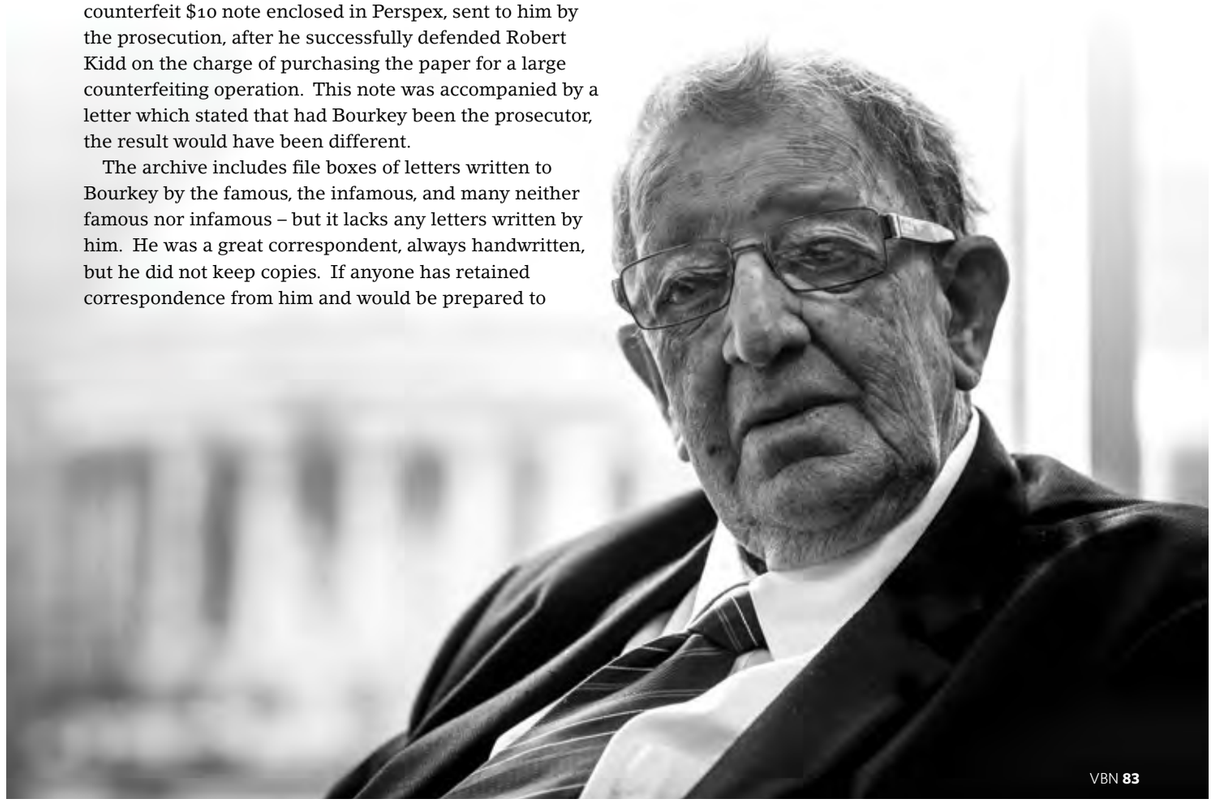
This archive is already a broad and eclectic collection. It includes the wig he wore for his 58 years at the Victorian Bar, retrieved in 1959 from a wastepaper basket at the Inns of Court in London, and the subject of some necessary rough repairs to hold it together. The first row of horsehair curls had lost their anchoring glue and thrust out at a right angle to his forehead, giving a distinctly punk look, on which no judge or magistrate ever commented. It was an integral part of Bourkey's rumpled Rumpole look. The archive also includes a counterfeit $10 note enclosed in Perspex, sent to him by the prosecution, after he successfully defended Robert Kidd on the charge of purchasing the paper for a large counterfeiting operation. This note was accompanied by a letter which stated that had Bourkey been the prosecutor, the result would have been different.

The archive includes file boxes of letters written to Bourkey by the famous, the infamous, and many neither famous nor infamous – but it lacks any letters written by him. He was a great correspondent, always handwritten, but he did not keep copies. If anyone has retained correspondence from him and would be prepared to contribute the original or a copy to Bourkey's archive, I will arrange collection, copying and/or scanning.

Any other material or photos that might assist in creating the source material for a complete history of Brian Bourke, would be welcomed and appreciated.

Bourkey gave written instructions to the State Library as to the administration of his archive. He specified a 10-year embargo to be administered by me in consultation with the library's manager of the manuscripts collection. At the end of the 10-year period, the embargo will be reviewed with the option of extending it for a further period, that period to be determined by me and the manuscripts manager. Bourkey's instructions specify that access requests, during the embargo period, will be assessed by the manager of the manuscripts collection and referred to me for a final decision.

I can be contacted at cookson@ozemail.com.au or on 0408 347 602.



Victorian Bar council
2018-2019

BACK ROW (L-R): Gabi Crafti, Sarah Keating, Elizabeth Ruddle, Daniel Nguyen, Meg O'Sullivan, Justin Hannebery SC, Erin Hill, Andrew Bell (Honorary Secretary), Nicole Papaleo, Emily Porter, Kathleen Foley, Nawaar Hassan
FRONT ROW (L-R): Stewart Maiden QC (Assistant Honorary Treasurer), Jacinta Forbes QC, Simon Marks QC (Junior Vice-President), Dr Matthew Collins QC (President), Wendy Harris QC (Senior Vice-President), Sam Hay (Honorary Treasurer), Paul Holdenson QC
ABSENT: Ian Freckelton QC, Áine Magee QC, Adrian Finanzio SC

Silks appointments
2018

On 29 November 2018, Chief Justice Ferguson appointed the following as Senior Counsel in and for the State of Victoria:

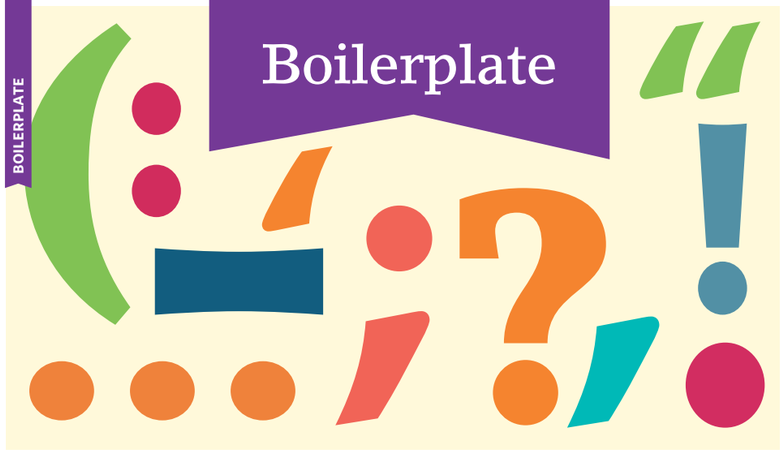
Raymond Gibson
Andrew Ingram
William Lye
Francis O'Loughlin
Peter Rozen
Andrew Palmer
David McAndrew
Colin Mandy
Richard Dalton

Elizabeth Brimer
Justin Hannebery
Tomo Boston
Jennifer Firkin
Diana Piekusis
Christopher Archibald
Dr Andrew Hanak
Fiona Forsyth
Anthony Strahan

Cam Truong
Dr Catherine Button
Frances Dalziel
Dr Michael Rush
Juliet Forsyth
Scott Smith
Eugene Wheelahan

Victorian Bar Readers
September 2018

BACK ROW Gregory Buchhorn, Anna O'Callaghan, David Foster, Carly Lloyd, Jonathan Manning, Claire Horan, Christopher Lum, Cameron Gauld, Timothy Bourbon, Jamie Grant, Timothy Gorton, Anthony Grant, Rowan Minson, Andrea De Souza, Emma Strugnell
MIDDLE ROW Rachel Chrapot, Stephanie Joosten, Natalie Kaye, Kathleen Crennan, Douglas Porteous, Alan Ford, Alexander Campbell, Lucy Dawson, Jordan Wright, Mark Sturges, Anthony Pyne, Steven Brnovic, Emma Poole, Jarrod Corbett, Neale Paterson, Vicki Bell, Chiara Bryan, Kate Stowell, Nina Massara
FRONT ROW Jacqui Katsivas, Alexander James-Martyn, Kestin Mildenhall, Veronica Holt, Shanta Martin, Fabian Brimfield, Ranitha Gnanarajah, Alexia Staker, Andreia Monteiro, Monika Pekevska, Emily Anderson, Jordan O'Toole



Boilerplate

A BIT ABOUT WORDS

Punctuation

JULIAN BURNSIDE

Punctuation holds only limited interest for most people, but it makes reading easier and it makes it easier to convey precisely the sense intended. It has been defined as "The practice, action, or system of inserting points or other small marks into texts, in order to aid interpretation; division of text into sentences, clauses, etc., by means of such marks."

Punctuation can be vital in understanding a sentence. Sir Roger Casement was tried for treason in 1916. The prosecution was brought under the Statute of Treasons (1351). Punctuation did not exist back then. The relevant provision was in Norman French, but its English translation reads:

> If a man do levy war against our said Lord the King in his realm or be adherent to the enemies of our Lord the King in his realm giving to them aid and comfort in the realm or elsewhere.

What Casement had done was done entirely outside England. The question of interpretation can be shortly stated: is it treason to adhere outside the realm to the King's enemies? In other words, do the words *or elsewhere* qualify only the words which immediately precede them, or do they qualify the entire phrase *be adherent to the enemies of our Lord the King in his realm giving to them aid and comfort in the realm*? The question was: if it had been punctuated, where would the comma have been? Casement was famously said to have been hanged by a comma.

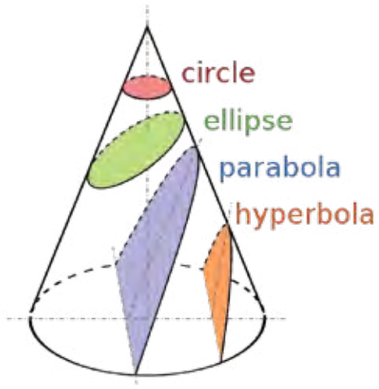
Punctuation can be important.

And there is a story about the House of Commons: one Honourable member had referred to another Honourable member as a liar. The Speaker ordered him to apologise. He said: "I called the Honourable gentleman a liar it is true and I am sorry for it. He may provide his own punctuation."

These days, there are commonly thought to be 12 punctuation marks, apart from spaces: full stop, comma, semicolon, colon, question mark, exclamation mark, dash (em dash, en dash), hyphen, brackets, apostrophe, and quotation marks. To this I would add the ellipsis.

The first and second editions of Fowler's *Modern English Usage* do not have an entry for *punctuation*, but rather an entry for *stops,* and a separate entry for *ellipsis*.

The Americans allow 13 punctuation marks: period (they do not call that terminal dot a *full stop*), comma, semicolon, colon, question mark, exclamation point, dash, hyphen, parentheses, brackets, braces, apostrophe, and quotation marks. A couple of these involve only the slightest distinctions, and one is a unique Americanism: where we say *open brackets* or *close brackets* the Americans say *paren* (short for *parentheses*). And we tend not to distinguish between (round brackets) and [square brackets]. For Americans and typesetters (these words are in parentheses), [whereas these words are in brackets] and {these words are in braces}.



Punctuation is useful, and tolerably well-understood, but one punctuation mark, the *ellipsis*, has an interesting history. The *ellipsis* is the little row of three dots which tell you that the sentence could go further, and that there is more than has been revealed. Confusingly, it sounds awfully like an *ellipse*, which is the slightly squashed form of a circle. In fact, they come from the same origins.

A conic section is the result of a plane intersecting a cone. In Euclidean geometry there are four conic sections: the parabola, the hyperbola, the circle and the ellipse.

BOILERPLATE

> "Sadly, the interrobang faded into obscurity before laptop computers became widespread."

Each of these is an important shape in Euclidean geometry. Which conic section you get depends on precisely how the plane intersects the cone: if it cuts at an angle which hits the base of the cone short of the centre, the result is a hyperbola. If it cuts at an angle which hits the base of the cone past the centre, the result is a parabola. If it cuts horizontally through the cone, the result is a circle; but if it cuts at an angle right through the cone, the result is an ellipse. The diagram opposite illustrates it well.

Incidentally, although the diagram does not illustrate it, if a plane cuts vertically down the axis, the resulting section is a triangle, but this is self-evident, trivial and not very useful.

So, the *ellipse* is the shape you get when a cone is cut off at an angle. And the *ellipsis* is a punctuation mark which shows that the sentence has been cut off before it was complete.

Not many people know what the row of dots is called, and most of those who know it is an *ellipsis* are probably unaware that they are reaching into Euclidean geometry when they use it.

The most commonly used punctuation marks are the full stop, the comma, the question mark and (although some don't like it) the exclamation mark.

Martin Speckter died on 14 February 1988. He was an advertising executive during the heyday of advertising and, in 1962, he recognised a gap in the available punctuation marks. Consider some of the extremes of print advertising:

» What the…??!!
» You can get that stain out!??
» What are you going to do with that?!
» Don't you agree that we need a new punctuation mark?!!

And so on, endlessly. They are all propositions in print which are, in form, questions but which are intended to be delivered with such intensity or enthusiasm that an exclamation mark is called for. And advertising is the field where intense, enthusiastic questions are common.

Speckter decided that a new punctuation mark was needed, which combined the functions of the question mark and the exclamation mark. The result was the interrobang, which looked like this: ‽

Most of us have notionally used an interrobang in conversation:

"What the…‽" makes perfect sense with an interrobang as punctuation.

For a time the interrobang interested enough people that it was set in various fonts (including Arial, Calibri, Courier, Helvetica and Palatino). Remington even released a typewriter which (for an added fee) included a key for the interrobang. Sadly, the interrobang faded into obscurity before laptop computers became widespread so, although computer fonts are almost endless, and incorporating a new punctuation mark is fairly straightforward, computer keyboards do not provide an interrobang, even though they provide parentheses, brackets and braces.

That said, if you are using MS Word on a PC, and choose the Wingdings 2 font, the tilde key gives you this: ‽

Fowler's 3rd edition treats the *ampersand* as a punctuation mark. It has an entry for punctuation, which refers the reader to entries on various punctuation marks, and to an entry on the *ampersand*. How can it do that‽ Unlike the interrobang, the ampersand is found on all modern keyboards, and looks like this: &. It is not found in Johnson's dictionary, because it was introduced into English in the early 19th century. It was widely used (and perhaps popularised) by Fowler, especially in his *Modern English Usage*, where it is used frequently in place of the word *and*. It is an aphetic form of *and* per se and. It is a nice irony that Fowler popularised the use of the ampersand, but did not treat it as a punctuation mark, but his 3rd edition (which is much less entertaining than the 1st and 2nd editions) appears to elevate the ampersand to the ranks of punctuation.

And what of marks like the tilde ~, the *diaresis* (two dots over the second in a pair of vowels, to indicate that they should be separately sounded: *Noël*)? The *diaresis* is often confused with, but should be distinguished from, the German *umlaut* (two very short strokes above *a*, *o* or *u* which alter the pronunciation of those letters exactly as if the letter is followed by an *e*). Along with the cedilla and the familiar accents found in French – *acute*, *grave*, *circumflex* – these are the *diacritics*: marks which change the way some letters are sounded.

But the *ampersand* does not perform the normal functions of a punctuation mark or of a diacritic. Neither does the ubiquitous at sign, @, or the hash sign, #, both of which marks are found on modern keyboards and have rocketed to prominence thanks to social media such as Twitter. The ampersand is also fairly common on Twitter, because it is one character in place of three. That can make a difference.

I don't often disagree with Fowler, but I have trouble thinking of the *ampersand* as a punctuation mark. And it is clearly not a *diacritic*. I would group it with @ and #, but we need a collective noun for them. Given their prominence on social media, how about *swishtags*?

All modern dictionaries have an entry for *ampersand*, but very few have an entry for *interrobang*: the OED does not have it; the New Oxford does not have it; Webster's first to third editions do not have it; the New Lexicon Webster's Encyclopedic Dictionary does not have it. But it is found in the Random House Dictionary of the English Language (2nd edition, 1966) and in the American Heritage Dictionary (4th edition, 2000), which is a relief, because I had begun to think I imagined it!

ILLUSTRATION BY GUY SHIELD

RED BAG BLUE BAG

How do I become confident in front of the camera?

BLUE BAG – a view from junior counsel

Dear Red Bag,

In the courtroom, I used to worry about clinging to the lectern, or projecting my voice sufficiently. Now, with the advent of live streaming services and the like, I have something new to worry about: my Potential TV Persona.

I need your help to identify my target audience, and my best camera angle. I think my left side has a warm, emotionally open quality to it, whereas my right side is more "serious barrister" but with a hint of double chin. I wish I could be referred to in *The Age* as "tall and tanned" (like a certain person representing a large financial institution) but am fearful I am more in line for, "round and plainly lacking in Vitamin D".

I'm also going to have to be on my game with quotable quotes that will go viral. What process do you recommend so I can generate a sound bite like "You would be the gold medalist if [name of important regulator] was handing out medals for [something super bad you have done]?"

Finally, I have a slightly iffy back story. This is a bit of a problem given I'm likely to be profiled at some point, of course.

Based on the above, do you believe I am (a) a lost cause, or (b) capable of going far with some professional help?

Sincerely,

Blue Bag.

RED BAG – a view from senior counsel

Dear Blue Bag,

Interesting you chose to write rather than Skype or FaceTime me with your query. I can only speculate that the reason for you choosing not to reveal your face is because: (a) you look like the elephant man; (b) you forgot your make-up bag; (c) you are the overly-ebullient relatively junior member of counsel who openly disgraced yourself recently at the List Dinner; or (d) all of the above.

So, what to do? Fear not my attention-seeking child, there is no such thing as a lost cause. As someone who is an avid watcher of television (*Q&A* on Monday nights on our ABC, catch-up episodes of *The Bold and the Beautiful* on TenPlay, *Dateline* on SBS, *Blokesworld* on 7mate and the *Personal Injury Law Show* on Channel 31, being amongst my faves), I feel as though I am more than qualified to opine on how you might develop your TV persona.

First, start small. Taking a brief to move an admission will get you a small cameo on the livestream of the ceremony on the Supreme Court website. However, when considering return for effort, there are probably better uses of your time as there is no scope for any individual flair, no close-ups and there remains the real risk that if you do it too often, you will be typecast, or worse still will be mistaken for a solicitor-advocate.

Second, consider standing around a high-profile trial, robed, ready and waiting. This will allow you to follow deliberately a famous litigant out of the front door of court. Here, there are a few tips and traps. Take the case of *Wilson v Bauer Media.* Given how close our beloved President and his junior were standing next to Rebel each day as they entered and left court, beware of charges of affray should you push a little too hard to get into shot.

"To build confidence in front of the camera, look no further than her Honour Judge Lisa Hannan of the County Court or our very own Royal Commissioner, The Hon Kenneth Hayne AC QC."

Third, to build confidence in front of the camera, look no further than her Honour Judge Lisa Hannan of the County Court or our very own Royal Commissioner, the Hon Kenneth Hayne AC QC.

A viewing of the Vimeo video teaser for Judge Hannan's podcast, 'A Day in the Life of a Judge' reveals her Honour's confidence, poise and gravitas in what are a series of very well-directed and polished pieces to camera. The footage of her Honour seems to have been produced by an outfit trading under the name or style of 'Rise Films', however the director remains unidentified. Assuming that her Honour would only work with the very best in the business, it would be fair to speculate that this very slick short film has been directed by someone of the ilk of Sofia Coppola or Peter Weir. The lyrical background music and contemporary backdrop (no law books) is a dead giveaway.

Overall for what is a poignant and delightful performance, (and I'm sure David and Margaret would wholeheartedly agree), I give her Honour 5 stars.

Commissioner Hayne is another good example of how to exude confidence and authority in front of the live camera. His Honour's elegant subtlety of expression in the form of a knowing tilt of the head, a long-lasting gaze, a glance over the glasses, or a quizzically raised eye-brow or two at theatrically appropriate times during live-streamed submissions and evidence at the Banking Royal Commission has brought him into the average Australian household in a way the High Court of Australia never could. I imagine these mannerisms (or 'Haynisms' as they are becoming known) are now repeatedly rehearsed in the playground by thousands of Australian children, in a similar way to Cyril Rioli's goal celebrations, or Samantha Stosur's two-handed cross-court backhand.

This is a win-win for everyone throughout the Commonwealth. It augers well for the future of the Australian Bench and Bar by encouraging legal as well as sporting role models. It also further elevates Commissioner Hayne's legacy beyond that of an outstanding High Court jurist and Royal Commissioner, to Australian cultural icon.

So, the take-away? Unless you have the unflappability of Gillies, the charisma of Doyle, or the wit of Ruskin, you are no different from the rest of us. You need all the help you can get, and television or online video is one good way to get noticed. This is half the battle in developing your practice. And when you find yourself in front of a camera, you can do no better than learning from Lisa and Ken. This is yet another medium each of them has well and truly mastered.

Don't worry too much about what you say, or don't say, because on film, a picture is worth a thousand words and actions speak louder than words!

Yours ever,
Red Bag.

PHOTOS COURTESY OF RISE FILMS AND HTTP://WEBSTREAMING.LAWINORDER.COM.AU/FSRC

SPORTS

The 2018 Frank Marrie Trophy

CAROLINE PATERSON

After 12 years in the wilderness, the Victorian Golfing Lawyers Society has returned from Sydney victorious, having beaten the NSW lawyers at NSW Golf Club to win back the Frank Marrie Trophy!

There were 24 players from each state. The NSW captain John Newnham gave our captain on the day, Tony Kenna, the option to score by total Stableford points per side, or by matches. Tony went with the latter. This was a master stroke.

In the end the Stableford scores of each team were dead even – 415 per side. BUT we won 6.5 matches to NSW's 5.5, and were declared the winners.

Tony Kenna and Peter Young, and Murray Lumley and John Taylor, were stars and were rewarded with prizes for the best team scores on the front and back nine. Julian McDonald had a nearest the pin.

VGLS Vice President James Syme received the trophy from John Newnham and spoke beautifully on our behalf and in President Norman O'Bryan's absence.

We were extremely fortunate with the weather. The skies were blue and the wind was average to low, according to the locals (although most of us found that it was a two-club strength wind and it was very challenging at times!). It is truly a majestic course.

On the Monday, 17 VGLS members had a warm up game at Concord Golf Club, which has recently been re-designed by Tom Doak. Once again, the weather gods smiled upon us. There had been a lot of rain in Sydney over the previous few weeks, so much so that on Sunday, Concord was completely closed. Thankfully, however, the course had drained sufficiently for us to be able to play. It was a bit spongey under foot in parts, but the course was beautiful and a lot of fun to play, and the staff looked after us well.

The VGLS continues to grow in numbers. We now have 115 members, and events planned over the summer at Yarra Yarra, Woodlands, and Royal Melbourne. The traditional Bar and Bench vs LIV golf day will be held at the new North course at Peninsula Kingswood Golf Club, which has undergone a massive redevelopment and is looking sensational.

On Monday, 12 November 2018, 27 players competed in a 4BBB Stableford teams competition at Yarra Yarra Golf Club. The course was in magnificent condition. There was a countback for the winning pair, with Peter Mackey and Peter Cahill, solicitors, beating out Julian McDonald and Ashley Brygel, solicitors. Both of those pairs had 42 points. The men's longest drive was, amazingly, a tie, between Julian McDonald and Stephen Gregory, whilst Cathy Fitzgibbon took the honours for the women. John Taylor won the nearest the pin.

The next events on the golf calendar are a twilight 9 holes and BBQ at Royal Melbourne on 22 January 2019, and on the first Tuesday after Easter (23 April 2019) the annual Bar and Bench versus Solicitors competition will be held on the stunning and challenging new North course of Peninsula Kingswood Country Golf Club. An interstate trip to Adelaide to play the SA lawyers is in the pipeline for the weekend commencing Friday, 3 May 2019, which will coincide with an AFL game at the Adelaide Oval on the Sunday for those interested, a winery tour and golf at Royal Adelaide and Kooyonga Golf Clubs. Anyone interested in joining is invited to contact Caroline Paterson, Hon Secretary, - carolinepaterson@vicbar.com.au or Norman O'Bryan AM SC, President on nobryan@melbchambers.com.au

Chris Arnold, Peter Young SC and Judge David Parsons at Concord

Secret Judge

Junior members of the Bar are encouraged to contact vbneditors@vicbar.com.au if you have an ethics question for our anonymous judge to answer.

Dear SJ,

Recently, I was in court when the iPad of my learned leader emitted a loud chiming sound at precisely noon. For somewhat inexplicable reasons, my learned leader sets his iPad to do this on the hour, but he[1] had forgotten to turn off this function prior to court. This is what happened in court:

> HIS HONOUR: There seems to be Big Ben suddenly in our courtroom
> LEARNED LEADER: Big Ben it is … chiming every single one of the 12. [In an apparent nod to the fact that the sound was going on and on.] Nothing I can do to stop it. I apologise, your Honour.
> HIS HONOUR: There is a water container there.

The iPad did not make its way into the water container, and the matter proceeded. But after court, my learned leader sought permission of his opponents to write to the judge directly (via the associate, of course) to apologise once again. He copied all counsel in.

Reflecting on this incident (which led to no complaint and everyone seemed perfectly comfortable with the arrangement), I find myself confused about when counsel may communicate directly with a judge's chambers. I had understood this was the solicitor's task. However, there are plainly exceptions to this rule, including when seeking to correct any misconceptions of disrespect. Do you have any golden rules for junior counsel about when it is acceptable to communicate directly with judge's chambers and, if so, how?

- Junior

Dear Junior,

You should be grateful that your learned leader chose Big Ben. Imagine if he had selected the ascending ring tone option in the novelty selection. No letter, no matter how grovelling, would ever permit him to cultivate or restore that carefully nurtured image most silks project, that of the urbane, sophisticated, maybe even cultured silk. Judges would break into uncontrollable laughter at the most inopportune of times when the unfortunate next appeared before them.

'Tech-savvy silks' are a misnomer who put juniors at risk

And what a risk that would have been for you, dear junior. You, as junior, would be forever associated with the event. How easy it would be, with only a sigh and a sideways look, for the blame to fall on you. Everyone knows it's the young barristers, the digital natives, born with portable electronic devices in their hands, who know how to work these things. Not the silks, who will tell you at any opportunity what it was like to study law when you had to go to a real library[2], look up an index[3] and climb ladders to retrieve dusty law reports[4], before handwriting[5] essays where legible handwriting was essential, and there was no autocorrect for spelling and grammar. Even if your leader had professed to be e-savvy, you would have seen that person thereafter, lamenting ineptitude with, or dislike of, electronic devices, and singing the praises of oh-so-clever e-connected juniors.

Out would have come those barristerial-status-symbols, the Mont Blanc pen, and the high gsm[6] paper (even though filling the pen with ink was tedious to the extreme).

The general rule is to copy in all counsel

I assume, as the letter of apology was copied to all counsel, it was typed.

Your leader was right to copy in all counsel, as I will explain shortly. Those who may need to apologise to a judge in future and wish to pen the note by hand, be warned. The self-flagellating tedium of making copies for all other counsel may dilute the sincerity you hoped would ooze from a handwritten note. But do not use that as an excuse for avoiding your penance.

It is a good idea to keep a copy for yourself. It is not that long ago that a handwritten thank you note, penned, it is said, with a Mont Blanc, was being scrutinised in an ICAC inquiry. The author, unfortunately, forgot he had penned the note, that he had received the bottle of Grange prompting the note, and that said bottle had been added to the parliamentary gift register. So, it may be said, the first and last time good manners ended a Premiership.

Do not redo your submissions or supplement them, without copying in the other parties. Whether you copy in the other parties or not, resist the urge to tell the court what you think. It may impact your practising ticket[7].

Who should write the letter?

If your instructing solicitor takes more than a passing interest in the case, and is from a universe where all correspondence must pass through a chain of command from lowly wage slave through to partner-with-authority-to-sign before it can be sent, then they should write the letter. Unless (the emergency exception) it really needs to be sent before said partner returns from her long weekend in Aspen.

For example, if you happen to be walking to court without a solicitor escort, and your leader, who is about to cross-examine the principal witness against you, slips over and breaks his or her leg, and you feel compelled to stay with him or her until the ambulance arrives although it will make you late for court, it would be acceptable for you to whip out your iPhone and email the associate and the other counsel to tell them you will be a little late. You could of course avoid the need to communicate by reassuring your leader the ambulance will arrive soon, go to court, and awe all in court with the brilliance of your cross-examination.

If, on the other hand (the minefield exception), your instructor is more the Dennis Denuto type, prudence, nay, self-preservation, demands you take on the responsibility.

If you feel an apology or other personal explanation is warranted (the confessional exception), you can follow your leader's lead. Remember, if you don't want to tell all other counsel, then you can't tell the judge. Don't think you can get around this by saying to the associate you have tried to make your NBF[8] during the case "Don't tell the judge, but…".

Remember too, once such a letter has been copied to counsel, even if they are scrupulous about treating it as a confidential communication between counsel, and never mention your name, you are likely to discover some more-or-less-accurate version has been entertaining the Essoign Club.

Yours,
SJ

1. This is a true story so it's a 'he' for this one.
2. A building in which hard copy printouts were stored.
3. An ancient, pre-Google search list, in which content references were sorted alphabetically, not thematically.
4. Hard copy printouts, stored chronologically.
5. A precursor to written assessment tasks.
6. Grams per Square Metre (the higher the GSM, the heavier the paper).
7. See for example, *Gullquist v Victorian Legal Services Commissioner* [2018] VSCA 259.
8. New best friend.

Dancing "Żywiecki" – dances from the Polish highlands, at the PolArt Festival in Melbourne, 2015.

Monika Paszkiewicz (right) and her sister Daniela.

Giving up Friday night drinks for Polish dancing

MONIKA PASZKIEWICZ

TOP LEFT PHOTO COURTESY OF EMILY DIMOZANTOS

On Friday evenings, you will generally find most barristers at Kirk's Wine Bar or some other suitably stocked location within the William/Lonsdale/Queen Street bubble, or at home. Not this barrister. Every Friday evening, I head to Flemington Community Centre which, for about four hours, is transformed into little Krakow and filled with the sounds of Polish folk music. Together with others of Polish heritage, I spend my Friday nights Polish dancing (not to be confused with the other, more exciting, form of pole dancing).

The Polish Song and Dance Ensemble "Polonez", of which I've been a member for over 10 years, performs dances from all regions of Poland. Picture something similar to the dancing you've seen at Oktoberfest (minus the slapping) or the Russian dancing from that scene in *Fiddler on the Roof*. The dances are all unique, as each region has its own traditional steps, costumes and music. Poland historically had approximately 50 regions, and costumes reflect the geography (including influences from bordering countries) and the climate of each particular region. Defining features of all dances, however, are brightly coloured costumes, girls with long plaits and red lipstick, boys showing off their tricks such as push ups, leaps or lifting the girls high above their heads, and high energy partner work.

So why do I give up my Friday night drinks for Polish dancing? The training can be arduous (a fact to which my many bruises and multiple hip surgeries will attest), the pay is woeful (read: non-existent) and it's never going to increase my coolness factor.

It does, however, give me incredible opportunities to perform. I dance every year at the Polish Festival @ Federation Square. This is held in November to celebrate Poland's Independence Day, attracting a crowd of approximately 50,000 each year. I also dance interstate at the PolArt Festival, a triennial festival held in a different capital city each time, which aims to promote Polish culture in Australia through dance, art, film and music. Most recently, our ensemble danced for the President of Poland, Andrzej Duda, on his first visit to Australia. We have performed at retirement homes (where we were treated like rock stars), multicultural festivals all over Victoria, formal balls and dances, and weddings.

Dance ensemble Polonez in "Łowicki" costume.

Dancing the Krakowiak at the PolArt Festival in Perth, 2012.

My whole family dances. My father and auntie were part of the original ensemble formed in 1965 by Poles who emigrated to Australia after World War II. It provided a communal activity for these immigrants and their children. I recall being handed a costume which already had 'M Paszkiewicz' on the label – apparently a 40-year old leftover from my auntie. Now I dance with my sister, my brother and my cousins. It is surprisingly fun. Our family is one of many in the group. It really is a family affair. It has also been the meeting place for numerous couples who are now happily married and whose children now dance in the group.

Dancing allows me to maintain a connection with my Polish heritage. With a surname like mine, you can't avoid the inevitable questions regarding its origins, so it's always helpful to know a thing or five about Poland. Statistics regarding the Polish soccer team and/or Robert Lewandowski (the Polish striker who plays for Bayern Munich) are also helpful.

What's more, I love the shocked look on people's faces when I tell them that I'm a Pole, dancing, barrister.

BOOK REVIEW

Jon Rhodes – *Cage of Ghosts*

KATE AUTY

Rhodes' book is one of the first I have ever seen which collects photos (old and contemporary) and the stories of highly significant Aboriginal rock art and ceremonial treescapes in the south-east of Australia.

It is a revelation about what survives; what was there – the 'ghosts'; and how our colonial culture has collected, or not collected, this iconography.

The first thing to be said is that it is a beautiful book. It is also very well referenced. Beyond that, *Cage of Ghosts* is engaging, inspiring, and unsettling.

The capital cities, Sydney, Canberra and, to a much lesser extent, Melbourne, are a major focus of the book, but Rhodes takes his readers to the regional settings too – specifically, to the carved trees on Collymongle Station in central west NSW and to the Bunjil Cave in central Victoria – places where many of us have never been.

The cityscape of Sydney will be forever changed for me as a result of reading this book.

Who knew, for instance, how many petroglyphs there are to find in Bondi, the golf course, the cliff tops, and the hinterland? The narrative about Lough, his specially contrived lantern, his linen map prints, and the mystery of their disappearance, is riveting. Lough spent his life not just finding the obvious (which is a task in its own right) but unearthing those petroglyphs which are so weather-worn as to require special examination. He alienated those who 'knew' by demonstrating that they didn't. Rhodes has provided maps, photos and a text of real sympathy. At least one of the 'chalked up' ghosts is photographed by Lough as forming the base of a walkway's hand rail. Until Lough outlined this large stone carving in chalk it was not discernible. Rhodes takes us to the efforts which have been made to preserve some of the carvings by councils using angle grinders!

Rhodes shows us that Canberra, a city not known for its personality, is a place of highly significant 'scar trees'. When we stopped knocking over trees to build suburbs we realised there was a whole substrata of Indigenous cultural iconography which describes the terrain in ways which make it a water-scape as well as a landscape. Canoe trees are found in parks and school yards, coolamon and shield trees are dotted around the streets and even found in one backyard. Sixteen have received heritage listings in the suburb of Wanniassa. I was so intrigued by these that, having read the chapter, I asked old Canberrans for their knowledge about the links between trees and watercourses, only to find a confused silence. The ghosting of ghosts. In respect of these cultural icons Rhodes' book invites interaction. The map he provides here (as elsewhere in the book) is clear and tractable. As a result of his invitation to engage, we set out to find these ghosts, and did. The finding took us into a culturally populated catchment and sparked an interest in how the trees were linked to the watercourses which are now also remnants, and 'caged' in their own way in concrete culverts.

Cage of Ghosts
by Jon Rhodes
2018

Before picking up Rhodes' book, who knew about the controversy which underpinned the mechanical harvesting and collection of the Collymongle ceremonial carved trees (NSW)? I can recall hearing about this from Aboriginal people in the 1980s and 1990s in Victoria but I was never aware of the extent of our collecting vandalism, the hurt it effected, and the cultural denuding – stripping – of the countryside it entailed. Upwards of 60 trees, situated in an area where there were three bora grounds, were, in varying stages, cut down to decorate the garden of the pastoralist, and to join 'collections' which have never been exposed to the public – the ostensible reason for the vandalism (my word, not Rhodes'). Trees not originally felled by the station owner, including at least one burial tree, were industrially hacked out of country, piled high on trays, and trucked through towns to then be distributed between the Victorian, South Australian, and Queensland museums on the basis of pre-ordered requirements. When members of the Aboriginal community, specifically, the Flick family, protested, their concerns were ignored, and when that same family was successful in establishing a local shelter for the carved trees which remained in the station garden, thieves stole two of the nine.

The Bunjil Cave narrative – that it was first noted by Howitt; then by others; that it was then deemed a fraud; and then rehabilitated – is a revelation in its own way about how we think and act about Aboriginal people's cultural connectedness in this country. I recall hearing non-Aboriginal relatives talking about how Von Guerard had painted the Aboriginal art work in Gariwerd (the Grampians). This observation reflected the views which were being paraded as fact in central Victoria. It took the dating of ochre to demonstrate the authenticity of this simple but highly charged art work. With his two dogs, Bunjil continues to be caged, to militate against the persistent threat of vandalism.

Rhodes' book *Cage of Ghosts* is a text for our times. It will become a classic, and it is a book that every lawyer interested in cultural connectivity and heritage protection should have on her bookshelf.

I picked up my copy at the National Library in Canberra and noted that it was self-published and that obtaining a copy requires a bit of sleuthing.

You will find your copy by going to the website at cageofghosts.com – I urge you to do so.

BOILERPLATE

Mark McNamara's history of Warrnambool racing: a remarkable obsession

NATALIE HICKEY

The 'Bool: The History of Racing in Warrnambool - from 1848
RRP $45 Available online at books.slatterymedia.com. Please also feel free to contact Mark McNamara directly, he is promising signed copies!

The saddling paddock was a hive of activity. It was crowded with bustling stewards and committeemen; anxious owners, trainers and jockeys; brawny-armed blacksmiths; and men who had backed their favourites to win large sums. One could enjoy a drink, admire the horses, and express an opinion as to which nag would win. There is after all no place where advice is so freely given, so readily accepted, and so quickly forgotten in the quest for the next winner if it proves to be incorrect, as on a racecourse.

Mark McNamara, concerning the 1893 Warrnambool carnival.

In the first week of May each year, all roads lead to the 'Bool. This is where the Warrnambool Racing Club hosts its annual racing carnival, specialising in jumps racing. With almost 140 years of history, the carnival is the jewel in the crown of Victorian country racing. For many years, the most successful trainer at the carnival (Darren Weir being a stalwart in recent years) was handed a 'trainer's bonus', being the keys to a luxury vehicle. Another of Australia's leading trainers, Gai Waterhouse, has fallen in love with the carnival. She has pithily dubbed it 'Schoolies for over fifties'.

Barrister Mark McNamara, who by day has a wide-ranging practice in commercial law, has now written the comprehensive history of this remarkable festival of racing, and of racing at Warrnambool more generally. *The 'Bool: The History of Racing in Warrnambool – from 1848* is quite a feat. Proud Warrnambool man and highly respected former chief steward Des Gleeson provides the foreword.

The book is a labour of love – the culmination of approximately 30 years of research and writing. Mark's very large collection of race books, dating back to 1902, proved a useful starting point. He then compiled a list of literally every race meeting ever held at Warrnambool, right back to the very first on 1 March 1848, nine months after the town's formation. Mark read one Melbourne newspaper report and one local newspaper report of every race meeting up to around the mid 1970s. For meetings after then, he 'restricted' his reading to reports of the May carnival. He says that the reports in *The Examiner* originally, and then *The Standard*, were amazingly detailed. They painted an extensive picture of the day, with all sorts of observations of racing and fashion.

Mark's dedication is exemplified by his determination to track down at the State Library a report of an 1866 race meeting where the newspaper reel was missing the relevant page. He asked to see the original newspaper and, sure enough, a librarian was able to produce the hard copy. By an amazing coincidence, he read that report 150 years to the very day after it was first published.

Reaching out across 170 years, the book illustrates that when it comes to racing at least, so little has changed. As was reported by *The Standard* on 30 April 1884, racing offers an escape from "monotony, caused by a routine of duty too seldom broken, that makes life miserable, that wrinkles the brow, that steals away the health, that dulls the intellect".

The 19th century 'Bool had entertainment aplenty for a town inundated with visitors during carnival week, in which all hotels were full. In lieu of the current trend of DJs on large sound stages, there were showmen with attractions, including a performing pig and monkey, and a talking greyhound. There were pugilists with names such as "Novice", the "Chicken" and the "Smasher". There was a merry-go-round, a Punch and Judy show and a snake charmer. And of course, there were bookmakers.

However, getting to the races at the 'Bool was far harder to do than today. The mode of transport was steamship. Rough weather sometimes meant the ship was delayed, even until after racing had finished. Occasionally, there were also tragic consequences. The precursor to the 1878 carnival is described vividly in the book:

> On her way to Warrnambool the steamer *Nelson* encountered a fierce storm off Cape Otway, during which Postman (who headed the weights in the Hurdle Race and was entered for the Grand National), Young Ebor and Lady Jocelyn were so badly battered in their boxes on the deck that they died. The ship's company made every effort to save the horses, including cutting mattresses up for slings and padding, but all to no avail. The passengers, no doubt mindful of the wreck of the *Loch Ard* only a couple of weeks earlier on that treacherous coast with the loss of all but two of the souls on board, were loud in their praises of the coolness and calm judgment of Captain Craig throughout the whole ordeal.

After almost three decades of research, Mark spent four years writing "fairly persistently". In those four years, he wrote at almost every available opportunity: on the tram or train, at night and on weekends. He

PHOTO CREDIT COLIN BULL

realised during this process that he had to broaden the research. The end result has benefited from this effort.

One example concerns the history of the Manifolds. The Edward Manifold Stakes is a race for three-year-old fillies instituted by the VRC in 1932, familiar to many who frequent Flemington. Less known is that the Manifolds were descendants of squatters who initially settled in the Western District. Thomas (1863-1895), Chester (1867-1918) and Edward (1868-1931) Manifold became particularly well known in racing circles.

Tom was killed at Melton in a fall while hunting, riding his horse Postscript. Chester, once declared the best amateur rider in Australia, was elected in 1901 as the first member for the Federal seat of Corangamite. Edward was elected to the VRC committee in 1896 and served continuously to his death. Despite the death of their older brother, the enthusiasm of Chester and Edward for a good jumper was not dulled. They twice won the Grand National Steeplechase: in 1896 (with Dungan) and in 1899 (with Mysore). That said, they did not always have winners. When Edward Manifold's horse ran last in an amateur race in 1908, *The Australasian* commented, in terms most racehorse owners will understand, that the "Messrs Manifold have owned some good horses, but they have also had a lot of bad ones".

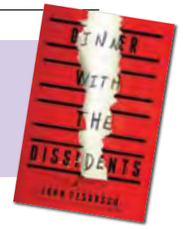
Mark does not think he will write another book, certainly of this magnitude. He says, "I don't have the same passion for anything else". It took an enormous amount of time in relation to something that has interested him his whole life.

Racing enthusiasts will love this book, as will social historians. It may be a history of racing, but it equally celebrates the vigor and ebullience with which Australians embrace their leisure. The passion for a bet, and for a good party, remains unchanged over time.

Local writer's Russian intrigue

RAY GIBSON

Dinner with the Dissidents
by John Tesarsch
RRP $29.99 310 pages
2018 Affirm Press



Melbourne barrister and author, John Tesarsch, is a man small of stature; however, his accomplishments are not. *Dinner with the Dissidents*, published in September of 2018, is his third novel, following *The Philanthropist* and *The Last Will and Testament of Henry Hoffman*.

It is a tribute to the Bar's diversity of talent that Tesarsch lives and works amongst us. Despite a long career in commercial law, he has a degree in music and was, for some time, living in Vienna where he pursued a career as a cellist.

It was perhaps that aspect of his life that gave him the confidence to write about a struggling and unsung writer, Leonid Krasnov, living in Moscow, in the pre-Gorbachev Brezhnev era. Leonid, who dreams of being a published author, arrives home one day at his frugal boarding house, where he shares a room with the "temperamental Petya and the boorish Kolya", to find a letter from the Lenin Press, one of Moscow's premier publishing houses. Leonid, who was well used to rejection letters, is not told his unsolicited manuscript will be published; rather, that it shows promise. A few problems with it prevent publication. He is invited to meet with the head of the publishing house to "explain these problems".

As the name of the publishing house might suggest, it, like many Soviet institutions at the time, is little more than an organ of the State and the KGB. With the prospect of publication dangled in front of him, Leonid is enticed into an ingenious scheme to infiltrate a dissident network whose most famous figure is the Nobel laureate, Alexander Solzhenitsyn.

Tesarsch sets up a thoughtful and intriguing plot early. The story structure works but is broken by a time shift to the present where Leonid, an older man, has moved to Australia and is working as a public servant – with a secret past – in Canberra. The bifurcation of the story invites a comparison with former barrister, Jock Serong's excellent *On the Java Ridge* where a Canberra sub-plot is interwoven with the story.

Tesarsch draws on what he knows to give the book a feel of authenticity. His protagonist works in a music shop; his love interest is an aspiring and talented cellist. Well-versed in the politics of the times (and writings of Solzhenitsyn), this ambitious story never feels contrived or out of touch.

Tesarch's familiarity with Russian literature is apparent. He captures the sombre and downbeat feel of some of the great Russian novels. The reader is drawn into the world of the central characters with the same abiding premonition that all will not end well that George Orwell achieves in his novels.

The characters are drawn with commendable skill and efficiency. Likewise, his writing is brisk and accessible.

Many modern novels achieve awards for their touted re-formulation of the traditional novel structure by sacrificing readability. Tesarsch shows that sound research, a good story and accomplished writing provide a rich experience for the reader.

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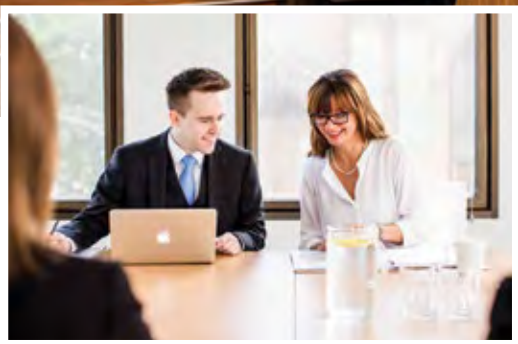

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