ISSUE 166 SUMMER 2019/20

VICTORIAN BAR NEWS

What is 'GOOD LEGAL WRITING'?

Lessons from the bench and elsewhere

Reflections on 'Advocates for Change'

Where we come from II

Who are our new Silks?

Plus: Our interview with the Chief Justice of the Family Court

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ISSUE 166 SUMMER 2019

VICTORIAN BAR NEWS

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ABSENT: Meg O'Sullivan, Tony Horan, Brad Barr, Haroon Hassan, Reiko Okazaki, Amanda Utt

The power of our community: telling stories, saying what we think, helping each other

NATALIE HICKEY, JUSTIN WHEELAHAN, ANNETTE CHARAK

A vibrant sense of community springs from the pages of *Bar News* Issue 166. There are interviews galore, more stories about where we came from, tales of sporting endeavours, legal tips, strongly expressed opinions, and experiences imparted. It calls to mind the expression, 'strength lies in differences, not similarities'. There is something powerful about a sense of inclusion which does not involve the deprivation of our individuality.

Equally powerful is our shared purpose: pursuing the administration of justice together. This is where our theme, 'Good Legal Writing' comes in. Written advocacy has become so important to legal practice in the last decade. Written submissions are included in many pre-trial timetables as a matter of course. Courts now frequently hear and determine 'on the papers' applications and appeals. Did the term 'on the papers' even exist 15 years ago? We asked Julian Burnside QC. He may not know exactly when it came into usage, but says the term rather speaks for itself.

This focuses the mind on what we should write. For some, the urge to channel our inner Margaret Atwood is joyful. For others, it is more desirable to prepare income tax statements in an airless room. Whatever the case, writing legal submissions can feel at times like wrestling a wild beast.

To help understand what makes persuasive written advocacy, we asked the decision makers. Sincere thanks to Chief Justice Ferguson, and to Justice Richards and Justice Lyons for their reflections. The article will tell you which Supreme Court judge has not yet reached the stage to enjoy 'any part of writing a judgment'.

Are there lessons from writing fiction which can help the legal writer? Jock Serong, former barrister and celebrated Australian author, suggests,

PHOTO COURTESY OF PETER BONGIORNO

'distillation'. If an idea has not been reduced to simple speech, he says, it's just a series of ideas and you haven't reduced it far enough.

We celebrate the launch of a Third Edition of *Jesting Pilate* in this issue. This expanded edition elucidates Sir Owen Dixon's standing, not only as a jurist, but as an exponent of clear legal writing. He also authored observations such as, 'A barrister enjoys life but for a short interval, the interval between the time when he is doing nothing and when he is doing nothing else'.

No feature on good legal writing would be complete without considering the last step to technical excellence: how to proofread. To do this effectively, and to help the brain to slow down, one idea is to start from the middle.

This issue, we have an unprecedent number of contributors from members of the judiciary. To devote the extra time to engage with us, deserves special mention.

Chief Justice Alstergren has been generous with his time in his interview with us. The responses are forthright. The result is a thoughtful and open contemplation of his Honour's period to date as the head of two jurisdictions, the Family Court and the Federal Circuit Court.

The Advocates for Change program, the brainchild of Justice Maxwell, President of the Court of Appeal, brought groups of barristers together to discuss ways in which barristers could support and advocate for women at the Bar. More than 18 months later, his Honour has reflected on, what he candidly admits, was an experimental process.

For those who thought only some form of declaratory relief was available under Victoria's *Charter of Human Rights and Responsibilities*, things have moved on. Justice Pamela Tate of the Court of Appeal shows how the Charter can furnish powerful remedies.

For history buffs, the spotlight is on the Eureka Treason Trials. Did you know that, back in the day, members of the Bar could moonlight as journalists? Consider the opportunity to fight for your client on two fronts: in court and in the press. This is a gripping tale of the protagonists, from the pending *History of the Bar* project.

As we head into the court vacation, are we placing too much pressure on ourselves to be happy? Dr Brock Bastion from the School of Pyschological Sciences at the University of Melbourne, suggests we lower our expectations. This follows fascinating research into the causes of depression in Western society.

Finally, we farewell retiring president of the Victorian Bar, Matt Collins AM QC who reflects on his two-terms and legacy. We wish him the very best, and a well-deserved rest. We also welcome Wendy Harris QC as the incoming president, who will no doubt feature in forthcoming issues.

None of the above could be possible without the efforts of the VBN Committee, our motivated and diligent collaborators. Please share your ideas with us too. We wish you well for the festive season.

The Editors

Letters TO THE Editors

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

Remembering Jack Winneke

The editor,

Pardon this rather long letter about Jack Winneke. I was sad to hear of his death.

By a strange coincidence his obituary appears in the same *Bar News* as the article about the 'c word'. In my experience Jack Winneke responded to the use of the 'c word' in just the right way.

This story comes from across the Nullabor and the Magistrates' Court at Esperance.

Sitting in the court there it was usually the case that Wednesday's list passed without incident. Most people were on their near-best behaviour on the first day of the circuit.

Following an uneventful Wednesday, litigants often relaxed overnight. Thursday was often a circus.

One particular Thursday, I was sitting with a blue rinse JP, mentoring her as was required. From the foyer we could hear a good deal of very loud swearing. The voice was a woman's. Sporadically and repeatedly we heard 'f--- off, f--- up and piss off'.

The JP did some squirming.

The police orderly at the door periodically got up from his seat, left the courtroom and returned. The swearing would stop and then it would start again.

A thin and hunted-looking young man entered the court with his vastly overweight solicitor advocate. They walked to the Bar table. Contemporaneously the swearing in the foyer stopped.

The lawyer started a submission for an adjournment, rather pompously talking about the 'researches he had undertaken' in the matter. The JP settled down.

Judge Carlin Welcome, County Court of Victoria, 3 October 2019

A Bench to delight US Supreme Court Justice Ruth Bader Ginsburg: Her Honour has famously said that there will be enough women on the US Supreme Court "When there are nine."

(L-R): Judge Dawes, Judge Cannon, Judge Hampel, Judge Lawson, Chief Judge Kidd, Judge Carlin, Judge Sexton, Judge Pullen, Judge Wilmoth, Judge Quin.
Inset (L-R): Judge Dawes, Judge Quin, Judge Cannon, Judge Pullen, Chief Judge Kidd, Judge Carlin, Judge Lawson, Judge Wilmoth, Judge Sexton, Judge Hampel.

PHOTO COURTESY OF LES O'ROURKE

At the back of the court a haunted youngish woman sidled in with three small children. They all sat directly next to the court orderly, right at the back, right near the door. The swearing in the foyer had stopped.

The lawyer droned on. The JP took copious notes. The children started clambering over their mother, grabbing her hair, pulling her coat, twisting the hem of her colourful cotton dress, jockeying for knee space.

The woman suddenly drew breath and yelled 'f---ing shut up'.

The orderly jumped up and grabbed the woman's arm. She shrugged him off and settled the three children. She remained seated. I watched with interest, motioning the orderly to sit down. The JP had stopped writing.

The yell worked: the children sat quietly for a few short moments.

The lawyer droned on. The accused kept glancing around at the woman and children. He was sitting on the edge of his seat.

The children got restive again. The woman cuffed them gently from time to time. They were around her neck, sliding off her knee, watching the orderly, and grabbing his arm as they shimmied to and fro.

Finally the woman, pushing, pulling and shoving a melee of children, YELLED—at the top of her voice—'pay attention to the c--- up the front'.

The whole court leapt to its feet.

The JP took an audible gulp of air and slid off her seat.

The lawyer actually stopped talking long enough for me to say - 'adjourned to next month's list, your client's bail is continued. Call the next matter'.

The woman and the children turned right and exited the court. I told the man to sign his bail at the counter in the foyer. He was running up the aisle, backwards, watching the bench. His lawyer followed at a waddle.

The story made it back to the headquarters court at Kalgoorlie before I did.

It also made its way across the Nullabor as I shared it with old colleagues at the Bar.

I am reliably informed that when Jack Winneke heard the story, he asked 'what did the magistrate do?' When he was told that I just adjourned the matter and bailed the accused I am also told he simply said 'good on her'.

I know he was a great advocate and judge but I think Jack Winneke was wasted in the superior courts ... we would have loved to have him in the people's courts, the place of poverty, pain and sometimes—humour—and humanity.

He was a good man.

Professor Kate Auty
Professorial Fellow University of Melbourne

The Irish legacy on our courts

Dear Editors,

The valuable advice by Red Bag about the Bar table in *VBN* Issue 165, Winter 2019, p. 84 arises in an interesting historical context.

We are used to a Bar table where instructing solicitors sit facing counsel and with their backs to the judge.

This arrangement, unique in Australia, follows the Irish practice. In the 19th century many of the judges in Victoria had Irish rather than English origins.

You will see the same setup in the Four Courts in Dublin today.

The direct lines of sight, judge to counsel, counsel to instructor, can work efficiently.

For example

Judge to counsel (somewhat testily): I don't seem to have the letter of 22 July.

Counsel to judge (obsequiously): My apologies your Honour.

Counsel to instructor: Where's that bloody letter?

Sincerely
The Hon Peter Heerey AM QC

Dear Editors,

Observed Morry Nightingale and wife Ruth seeking some solace from the rigours of the conference at the performance of Giselle at the St Petersburg Opera House.

Emperor Morry deigned to give the audience an imperial wave pre-performance from the Czar's box.

Such proved to be a highlight of the night for the "Emperor", who later decided to make a late night visit to the River Neva to see the drawbridges raised, only to be confronted by five gypsies looking for a target—in the subsequent melee, while Morry and Ruth were not hurt, the "Emperor" afterwards noticed he had lost his wallet.

Roving Reporter from the St Petersburg medico-legal conference: Judge McInerney.

Who is it taking the speccy?

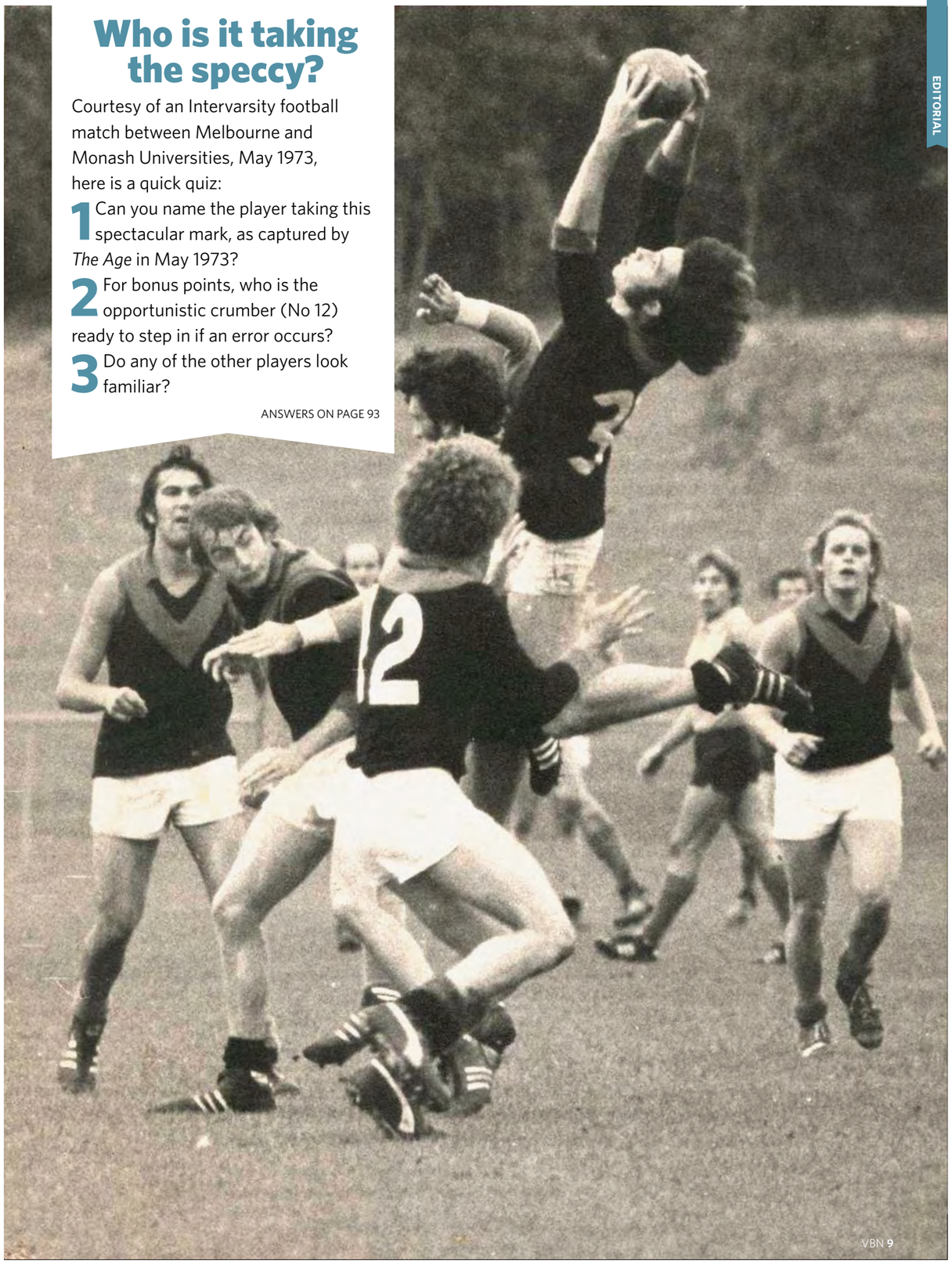
Courtesy of an Intervarsity football match between Melbourne and Monash Universities, May 1973, here is a quick quiz:

1 Can you name the player taking this spectacular mark, as captured by *The Age* in May 1973?

2 For bonus points, who is the opportunistic crumber (No 12) ready to step in if an error occurs?

3 Do any of the other players look familiar?

ANSWERS ON PAGE 93



PRESIDENT'S REPORT

Reflections of a two-term president

MATT COLLINS

The two-year term of Matt Collins AM QC as president of the Victorian Bar—the longest in some decades—has been amply documented in each edition of the Victorian Bar News *published during his term, his weekly messages in* In Brief *and the Bar's* Annual Report. *In this article,* VBN *asked Matt to reflect on his time at the helm.*

I did not set out with the intention of serving two terms as president. Rather, as my intimidatingly distinguished predecessors had done, and advised me to do, I attempted to hit the ground running, articulating at my first post-election Bar Council meeting my priorities for the year ahead. I wanted the Victorian Bar to be more outward-focused, raising its profile in the media and broader community as an authoritative repository of legal excellence. If we could position barristers in the eyes of the public and potential clients as pre-eminent providers of legal services, I thought, we would increase market share and work opportunities for all members. I wanted us to be more confident—projecting ourselves publicly, but also feeling increasingly comfortable internally, as a modern, accessible, engaged and diverse institution. I wanted to broaden the conversation about what it means to be a barrister in the 21st century, which I believe lies in maintaining a steadfast focus on the values that have always defined us—independence, excellence and leadership—while ensuring that we constantly seek to raise standards and welcome the best and brightest based on merit, not background. And I identified some particular projects that I wanted to see advanced: an overhaul of our internal policies, reform of the way we manage pro bono referrals, increased attention to health and wellbeing, a revamp of member communications, constitutional reform and improvements to governance, among others.

I returned to my chambers after that first meeting to find a BCL IT technician tinkering with my computer, activating the presidential e-mail account (PresidentBC@vicbar.com.au). Within seconds my inbox and calendar were unrecognisable. And so began what has been, for me, an unforgettable two-year experience; one I would not trade for anything.

Privileges of leadership

Perhaps the greatest privilege of being president is the connection you feel with the members of our Bar, with all their glorious idiosyncrasies. We have well over 2,100 practising members, not to mention our community of judicial and other official office holders, academics and retired members. We still function, in many ways, however, as if we were a much smaller institution. The division of roles between the Bar Office and the Bar Council is not well understood. And so, on most days, the president is contacted about all manner of issues, from concerns about whether the Bar is doing enough to recycle chambers rubbish, to split infinitives and hanging participles in CPD notices in the lifts, to the quality of catering at a Bar event. We are a college, proud of our open-door policy. I tried to make time for any member who wanted to see me, no matter what the issue. And in that way, I tried to understand the issues that matter to the whole of our membership. Most of the issues that came to my attention were far from trivial. I found it particularly rewarding to be able to assist members who were struggling, whether it be by a chat over a cup of tea, assisting them with an application for support from the Barristers' Benevolent Fund or in obtaining counselling, or escalating and resolving matters of concern to them.

Cohesion and collegiality

I was greatly influenced by the results of our largest ever demographic survey, the *State of the Bar*, released by Nous Group in March 2018, relatively early in my first term. I spent a lot of time reflecting on what the results meant for maintaining the cohesion of our college. The report showed that about half of our practising members are under 50 years of age. That cohort comes close to a 50:50 split between women and men and has been, as a generalisation, very supportive of efforts we have made to make the Bar more inclusive for women and people from culturally and linguistically diverse or LGBTI backgrounds—their criticisms were usually that we were not doing enough or moving too slowly. They embraced initiatives like the adoption of policies against, and improved grievance mechanisms to address, sexual harassment, discrimination and bullying, and our support for gender equitable briefing policies.

> "Our cohesion depends upon honouring the values that define and unite all of us."

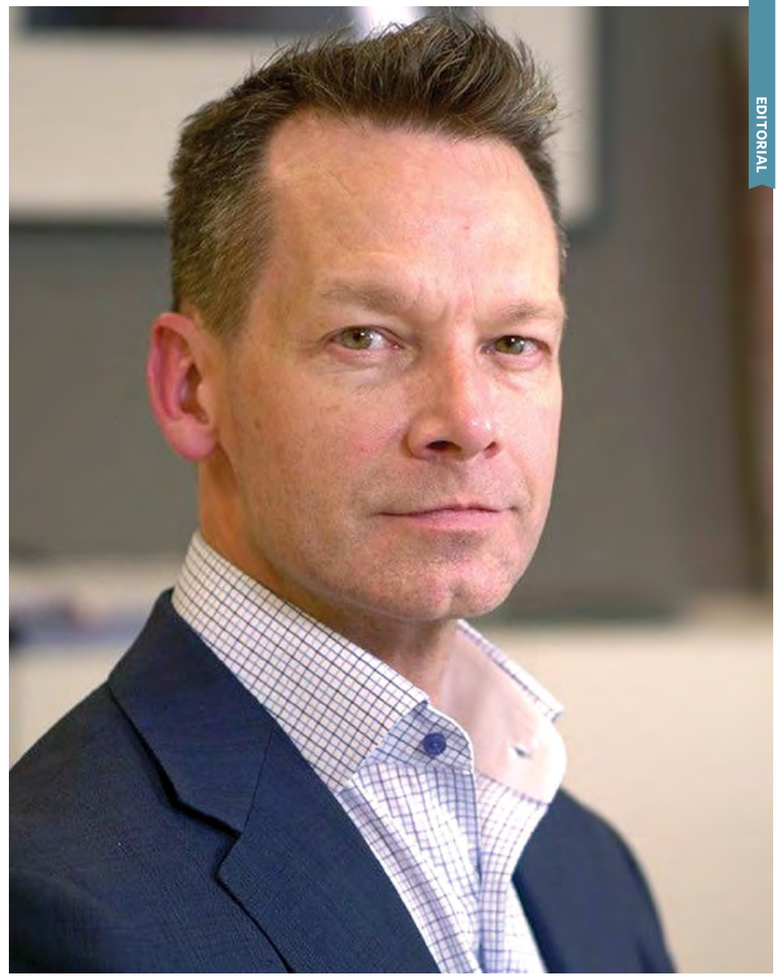


PHOTO COURTESY OF WAYNE HARLEY

The other half of our membership (which, by age, I will join next February) is over 50 years of age and overwhelmingly male. It is impossible to generalise about that cohort, other than to observe that our more senior members tend to feel a very deep and abiding connection to the Bar and its traditions. I tried to be a vocal champion of the Bar's historical legacy through, for instance, support for the Peter O'Callaghan QC portrait gallery, the Victorian Bar Legends program, BCL, the Essoign Club, our tradition of honouring members who pass away by the publication of obituaries, and speaking whenever possible at judicial welcomes and farewells (on my count, about 70 such events in the two years of my term).

I do not believe that demographic differences in our membership represent a schism. They do, however, point to the need to remember, always, that our cohesion depends upon honouring the values that define and unite all of us—which include our commitment to independence, legal excellence, the administration of and access to justice, and the rule of law. Those values are timeless, and change need—must—never be at their expense.

Challenges

The past two years have been a challenging period, in a number of ways, for the Victorian Bar. Most obviously, there were the revelations in late 2018 that a criminal law barrister who practised at our Bar between 1995 and 2008 had been used by Victoria Police as an informer, and had engaged in egregious breaches of her ethical obligations. Those revelations presented a serious challenge to all of our professional reputations. They demanded a decisive and very public response. They also presented us with an opportunity to review our internal disciplinary processes and strengthen our relationship with our regulator, the Legal Services Commissioner.

Then there was the challenge of responding to our *Wellbeing at the Victorian Bar* survey (University of Portsmouth, October 2018), which revealed, among other things, disturbing levels of bullying, particularly in the courtroom. We met that challenge by engaging constructively and collaboratively with heads of jurisdiction, starting with the Chief Justice, the Hon Anne Ferguson, and developing Australian-first judicial conduct policies and protocols, which have worked well in the year or so since their introduction and been copied in other jurisdictions.

Another memorable challenge was the constitutional reform process which culminated in mid-2019 at a special general meeting, at which more than 100 amendments to the Bar's constitution were approved. Two out of 16 special resolutions failed, despite my support for them. After the special general meeting, the Bar Council convened for a drink or two in the Essoign. Some Bar councillors were despondent about the failed resolutions. I, genuinely, was not. I reminded the council that we had prosecuted an incredibly ambitious program of reform, which had overwhelmingly succeeded. We had ignited passion among our membership, showing their

engagement with and commitment to the Bar, and democracy had prevailed. After a time, I went over to join a group of members who were celebrating their success in contributing to the defeat of one of the two failed resolutions that I had championed. I asked if I could join the group for a drink. We debated all manner of issues over the course of an hour or two. As the Essoign closed, a senior member of the group grasped my shoulder and suggested that I should think about standing for a third term as president. I left with a smile on my face—as advocates, we respect robust debate and discussion, and the things that unite us well and truly exceed any differences we might have from time to time.

There were many other time-consuming challenges in my time as president which, in order to safeguard the interests of the Bar, had to be managed sensitively and confidentially. Sometimes the best response to a crisis is to manage it without fanfare.

As the door closes behind me

It has been one of the great privileges of my professional life to serve as president of our remarkable Bar. In this article I have not touched on so many things I would like to say about the operations of Bar Council; the work done in the Bar Office; the commitment and work of our Bar associations and committees; the importance of BCL, the Barristers' Benevolent Fund, the Victorian Bar Foundation and others; integrating our library with the Law Library of Victoria; our involvement with the Law Council of Australia and the Australian Bar Association; our extraordinary readers' course and CPD program; and the privilege of engaging regularly with so many stakeholders who value and respect our Bar, including heads of state, heads of jurisdiction and judges, and first law officers and their shadows, among many others. I would have liked to dedicate an article to identifying the many, many people I need to thank—but I must single out my exceptional executive team, Wendy Harris QC, Simon Marks QC and Sam Hay SC; our past and present CEOs Sarah Fregon and Katherine Lorenz; and three dedicated executive assistants Denise Bennett, Liz Ingham and Liz Barr.

Serving a second term as president was an experiment. Surviving it at times was a test. Others can judge whether the experiment succeeded or failed. Continuity of leadership and the extended time frame within which to execute change did, however, enable us to deal with a large number of issues that had been in the too-hard basket for too long. I struggle to conjure up any regrets.

The greatest tribute I can pay to the Victorian Bar is to say that I leave my leadership role with a greater appreciation—and love—for the place than I had when I embarked upon it. That is, I think, no small accolade.

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CEO REPORT

The future is ours to build

KATHERINE LORENZ

Last month, the Victorian Bar put the finishing touches on its 2020-24 strategic plan. While the plan is more akin to a guiding architectural design than a detailed construction blueprint, the discussion at Bar Council did focus the mind on how to build a better organisation.

How does an organisation 135 years young maintain its relevance, stay vibrant and change with the times? The answer is the same as when the Victorian Bar was founded—by being member-focused. The strategic plan has been developed with the Bar's purpose at the core: to ensure the Bar and its members thrive, now and into the future. The new strategic plan aims to represent our members' interests and support their practices by fostering excellence and promoting their unique skills. From the legal skills of our counsel, to the collegial commitment to new initiatives, through to philanthropic endeavours in the community—what makes the Victorian Bar special is its membership. Our strategic plan captures the essence of where we want to go.

I joined the Victorian Bar as CEO just over a year ago. At the start, I was warned to expect the unexpected and it has certainly been an interesting year. My feet were barely under the desk when the Royal Commission into the Management of Police Informants was announced. And there have been a number of noisy topics to manage, but also many more wonderful initiatives, across the Bar. Some topics receive front page news, others are less conspicuous.

Space prohibits a deep discussion, but a few initiatives of note include:

» Member wellbeing—since the Bar's landmark *Wellbeing at the Victorian Bar* survey last October we have increased our focus on health and wellbeing with initiatives ranging from judicial conduct policies and

> “The Victorian Bar is and will always be member-focused. Anything less than this and we will lose sight of the collegiate nature of this great institution.”

more wellbeing-focused CPDs to expanding our health and counselling providers;

» Governance—we've reviewed and renewed our governance framework to strengthen our ability to function as an independent Bar;
» Corporate Counsel Engagement—a pilot program developed to increase understanding among in-house counsel of the ease and value of using barristers and see more legal work coming to the Bar;
» Victorian Bar Foundation's Student Achievement Awards—investing in the future of the Bar by recognising 15 of Hume City's brightest young legal minds with awards of $1000 from our Foundation and $500 from Hume City;
» Peter O'Callaghan Gallery—unveiling fabulous portraits recognising leaders of our profession which were able to be commissioned through the generosity of members and the broader legal community;
» Essoign Club survey—seeking members' views on potential improvements and increased involvement;
» RACV Club—a membership deal negotiated for our members at competitive prices.

The year ahead will see us continue to work in this important area of reframing corporate and general public understanding of what barristers provide.

Given the many programs and initiatives, challenges and opportunities, it is important from time to time throughout the year to step back and ask, “so why are we doing this?” and, “what principle is involved?”. In other words: “So how does this support our members?”

The Victorian Bar is and will always be member-focused. Anything less than this and we will lose sight of the collegiate nature of this great institution.

And if there is anything specific we can do to make the Vic Bar evolve, grow, thrive and connect with our members better than we are currently, please let me know. A copy of the Vic Bar 2020-24 strategic plan is available on our website.

1. Launch of Gallery Extension 2. Presentation of the Professional Standards Council Certificate 3. Visit from a member of the District Bar Association, Ludhiana, Punjab, India 4. Readers Ceremony and Dinner on 2 May 2019

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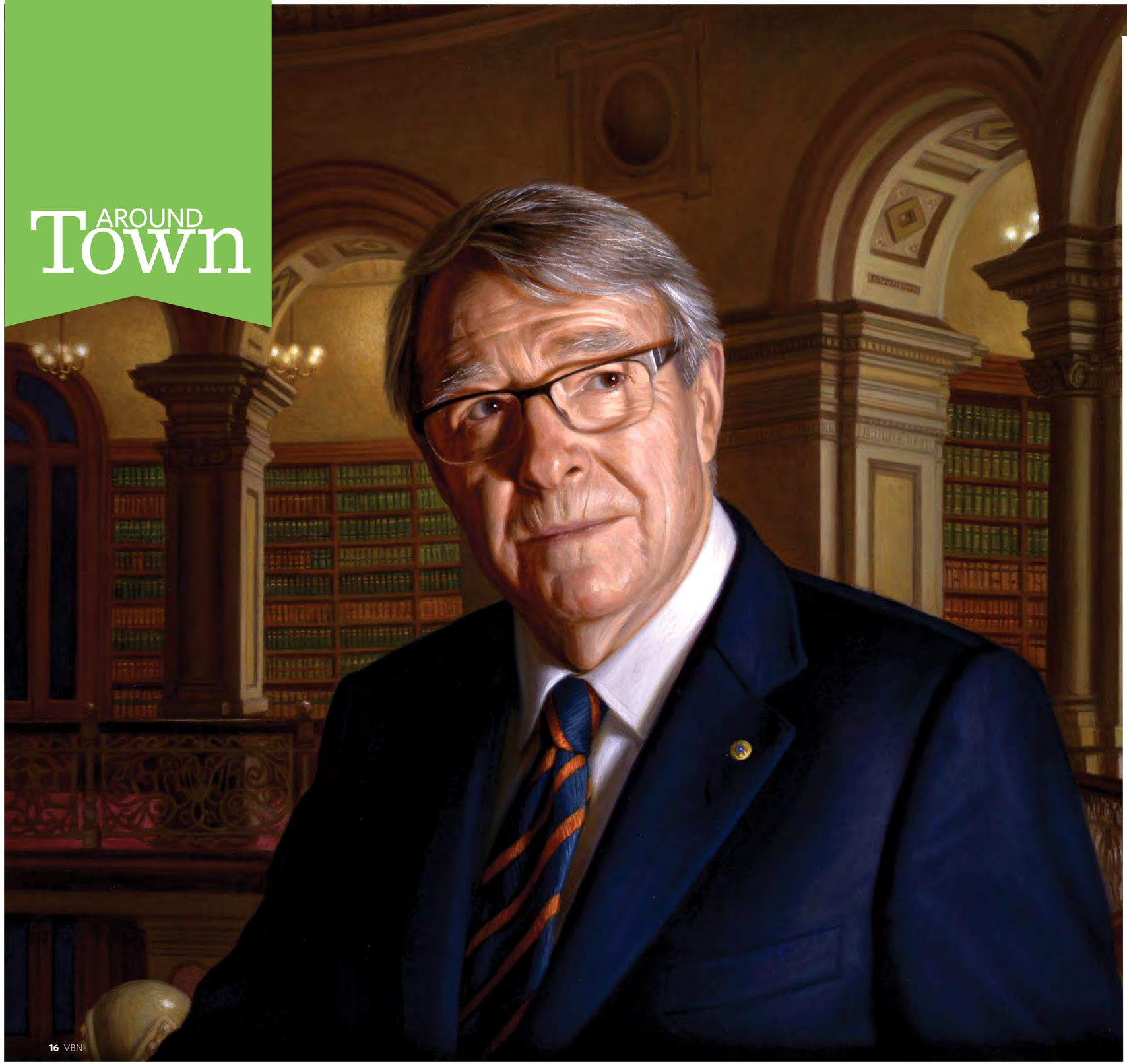

Stephen Charles AO QC: a princely portrait by Ralph Heimans AM

SIOBHÁN RYAN, ART & COLLECTIONS COMMITTEE

The Peter O'Callaghan QC Gallery Foundation's latest commission, unveiled on 2 September 2019, is an example of the magic released when two stars of their professions collaborate on a work. In this case, it was Stephen Charles AO QC sitting for a portrait by Ralph Heimans AM.

The former, a Supreme Court Prize winner who came straight to the Victorian Bar from law school in 1961, was the sought-after junior to the great barristers of that era: Oliver Gillard, Daryl Dawson, Ninian Stephen, S.E.K Hulme and Keith Aiken. He stayed at the Bar for 25 years until appointed to the Bench in 1986.

Stephen Charles' contribution to barristers was immense: decades of service on the Bar Council, including as chairman in 1985 and 1986; three years on the council of the Australian Bar Association, including a year as its president; service as the chairman of the Bar's ethics committee and the Bar readers' course committee. His contribution continued even whilst on the Bench, through his chairmanship of the committee that commissioned the landmark *Report on Equality of Opportunity for Women at the Victorian Bar* and his readers' course sessions, from which so many of us benefited. Since 2012, he has chaired the silks review committee, known as the preliminary evaluation committee.

Of course, Stephen Charles' influence goes beyond the Bar. He was a foundation judge of the Victorian Supreme Court of Appeal and his AO citation is "For distinguished service to the law and to the judiciary, particularly in the areas of commercial arbitration and mediation, to judicial administration, and to legal professional organisations." Lately, he has been an advocate (and often an agitator) for a national integrity commission. But it is Stephen's contribution to the Victorian Bar which warranted the foundation commissioning this portrait.

In his welcome address at the unveiling, the foundation chair, Peter Jopling AM QC, called Stephen Charles "A prince of our Bar". And, so he is. Appropriately then, the artist commissioned to paint him, Ralph Heimans AM, is internationally renowned for his paintings of royals. In 2013, Heimans painted Her Royal Highness Queen Elizabeth's diamond jubilee portrait, a majestic work which places her back in the Westminster Abby Coronation Theatre where she was crowned 60 years earlier. In 2017, he painted her consort, Prince Philip, the Duke of Edinburgh, on his retirement from public life at the age of 96. Here is another architecturally magnificent setting, this time in the Grand Corridor in Windsor Castle. Touchingly, at the end of the corridor is the Tapestry Room where Prince Philip's mother and maternal grandmother were both born.

Heimans' 2006 portrait of Princess Mary of Denmark is a much loved work. The portrait depicts the princess amongst the splendour of Fredericksburg Castle near Copenhagen, but reflected in the mirror is the

image of Constitution Dock, in her home town of Hobart. Twelve years later, in 2018, Heimans painted the Crown Prince Frederick of Denmark, in the same room. For this portrait, however, the image of Hobart in the mirror was replaced by the image of the Crown Princess and their four children.

Heimans has painted eminent Australians, among them Dame Quentin Bryce, Dame Elizabeth Murdoch and Paul Keating. More recently, he painted the distinguished Russian pianist and conductor laureate of the Sydney Symphony Orchestra, Vladimir Ashkenazy, whose connection with Australia began in 1969, when he toured as a young pianist.

But the work which resonates most with lawyers is Heimans' portrait of the Honourable Michael Kirby, painted in 1998, early in Heimans' career. In this work, Kirby shares the stage with six other judges dressed in the fur-trimmed, crimson robes of the New South Wales Supreme Court. They are the historical presidents of the Court of Appeal. Apart from Kirby, only the faces of the first and second presidents, Sir Gordon Wallace (1966–1970) and Sir Bernard Sugarman (1970–1972) are glimpsed. Kirby P (1984–1996) is represented as he is in life: in line, but out of step, and yet to don the heavy full-bottomed wig. His head turns toward the viewer with an attitude of interest, tinged with mild irritation. The portrait has the title, *Radical Restraint: A Portrait of Justice Michael Kirby.*

> "For this portrait however the image of Hobart in the mirror was replaced by the image of the Crown Princess and their four children"

For this portrait, artist and sitter found each other. The up-and-coming Heimans had heard Kirby speak at a portraiture prize opening in 1996 and was impressed. Kirby, meanwhile, had become acquainted with Heimans' work and wrote him an encouraging letter. Heimans responded by asking that the judge sit for a portrait. They remain mutual admirers and the Hon Michael Kirby is said to have been instrumental in securing the all-important commission of the Queen's diamond jubilee portrait.

The personal narrative element in Heimans' works discussed above is also present in the Bar's portrait of the Hon Stephen Charles AC QC. The work is situated in the library of the Victorian Supreme Court. The rows of red and green law reports are the familiar markings of the sitter's occupation, but hidden in this work is an antique clock-face, which is a Charles family heirloom. Finding it is an additional reward, which close scrutiny of this superb work will forever bring.

The Federal Government's treatment of Timor-Leste

THE HON STEPHEN CHARLES AO QC

The following is an extract from the 2019 Griffith Criminology Institute Biennial Tony Fitzgerald Lecture marking the 30th anniversary of the Fitzgerald Report, presented on Thursday 22 August 2019 by the Hon Stephen Charles AO QC in Brisbane. The lecture traced the evolution of anti-corruption bodies from Frank Costigan's Commission to state bodies investigating corruption in WA, NSW, Queensland and Victoria. During his oration, Stephen Charles spoke in favour of the introduction of a Commonwealth watchdog with 'real teeth' to combat corruption in the Federal Government and our security services. He used the exemplar of the closed proceedings against 'Witness K' to propound his thesis that a national integrity commission capable of combating corruption is essential.

Many politicians and some public servants have suggested that Canberra is "a pretty clean polity", that corruption is not a problem requiring the attention of a National Integrity Commission. If there is force in the argument that corruption follows money, power, and influence, there can be little doubt that Canberra is the repository of the greatest proportion of each in Australia. And Australia has presently no body in Canberra with the function or wherewithal to guard against and expose corruption in the federal area.

As to federal matters, I should mention the following. There is now proceeding in the Canberra Magistrates' Court a prosecution against an ASIS officer (Witness K) and a solicitor (Bernard Collaery), alleging they have infringed s 39 of the *Intelligence Services Act* 2001, by communicating information that relates to the performance by ASIS of its functions. This prosecution is proceeding in absolute secrecy, so absolute that the matter is not even listed in the court's daily record of proceedings. The events giving rise to the prosecution are believed to be the following, and all are on the public record. They are covered in Kim McGrath's book, *Crossing the Line*, first published in 2017, and recently

translated into Portuguese, and published in Lisbon. The facts are well known in Australia, and I have been writing of them since 2014.

Going back at least to the 1970s, there has been dispute between Australia, Portugal, Indonesia and Timor as to an appropriate maritime boundary between Timor and Australia, the point of the dispute being the allocation of revenues from various oil and gas fields in the Timor Sea. As it happens, the majority of these fields are closer to the foreshore of Timor-Leste than they are to Australia's.

On 30 August 1998, the people of East Timor voted 78 per cent in favour of independence. This was followed by the Indonesian military and militia launching into a devastating campaign of destruction. On 20 September, a United Nations peacekeeping force left for East Timor to quell the violence then occurring. East Timor was now an independent nation. Australian aid was therefore given to enable the new nation to set up governmental and other facilities. Talks continued from time to time between Australia and Timor-Leste on the question of the relevant maritime boundary. At one point, AusAID sent construction workers to assist with construction of the Palácio do Governo in Dili, the building in which the Timorese prime minister and cabinet held their meetings. ASIS operatives, posing as construction workers, placed surveillance devices in meeting rooms, which allowed ASIS to listen in to Timor-Leste's cabinet discussions, which included cabinet's deliberations as to Timor's negotiating position both as to the boundary and the future division of oil and gas revenues.

The allegation was, then, that the Australian Government obtained an enormous and hugely unfair advantage in the negotiations which followed. Anyone who has ever been involved in commercial negotiations will need no persuasion as to the advantage that comes from knowing the other side's negotiating position. Negotiating parties are expected to act with good faith. Australia's use of the information so obtained, obviously in bad faith, was a form of contractual fraud which would have entitled Timor-Leste to withdraw from any treaty with Australia acting in such a way. It resulted in Australia being able to achieve a favourable position in its negotiations with Timor-Leste, which it used to advantage both for itself and the Australian company Woodside.

> "The only possible reason for this flagrant departure from the principle of open justice is to hide from the Australian public the full tale...."

At some time after 2007, Witness K was prompted to complain to the inspector-general of intelligence about the legality of the bugging operation. The inspector-general is believed to have agreed that Witness K's evidence could be disclosed in any related legal proceedings. In 2013, the Timorese Government briefed Bernard Collaery to represent its interests in relation to the Sunrise dispute. In that year Timor-Leste took its case to the Permanent Court of Arbitration in The Hague, declaring that it wished to withdraw from existing treaty commitments with Australia, and citing the surveillance activity as evidence of Australia's bad faith in the conduct of negotiations leading to the treaty. It intended to call Witness K to support its argument in court.

Australia's immediate response was to cancel Witness K's passport. ASIO then raided Witness K's and Collaery's homes and Collaery's office. It seized large quantities of documents from Collaery's office, including a draft of Witness K's affidavit and Collaery's legal advice as to Timor-Leste's entitlements and its strategy in the court.

The actions of ASIS in bugging Timor-Leste's Cabinet rooms was an act of criminal trespass, its use of the eavesdropped information a fraud on the Timorese. To raid the offices and home of the Timor-Leste's solicitor was a breach of the UN Convention on Jurisdictional Immunities of States and their Property. In customary international law, States and their property are immune from the domestic jurisdiction of another country. The raid and confiscation also involved a flagrant invasion of legal professional privilege.

Assume these events had happened while court action was proceeding in Australia. The much larger, wealthier party decides it risks losing in the proceedings. So it raids the office of its opponent's solicitor, seizes its documents, including a draft affidavit of the principal witness and the legal advice of the solicitor, and then takes steps to prevent that witness getting to court. It would be difficult to imagine a more serious contempt of court, and those who conspired to orchestrate those actions would be gaoled for their contempt. When the matter came before the International Court of Justice, the opinions of the 17 judges and their shock and disgust at Australia's actions are immediately evident from their judgments.

Late last year the attorney-general gave his consent to the prosecution of Witness K and Bernard Collaery. There is no justification whatever for the prosecution to be proceeding in total secrecy. The facts of ASIS bugging, and ASIO raiding and confiscating are already well known and matters of wide public discussion. The only possible reason for this flagrant departure from the principle of open justice is to hide from the Australian public the full tale of mendacity, duplicity, fraud and criminal misbehaviour with which the Australian Government and its intelligence agencies have treated our near neighbour Timor-Leste. It would also be hard to think of a stronger case for the public interest demanding publication of the events for which Witness K and Bernard Collaery are now being prosecuted.

Junior Bar Conference 2019

VERONICA HOLT AND HADI MAZLOUM

On Friday 21 June, members of the junior Bar congregated in the Neil McPhee Room for the 2019 Junior Bar Conference. A jam packed Continuing Professional Development day ensued, where participants walked away with 6 CPD points. The conference commenced with breakfast with members of the Bar Council mingling with conference participants. The first session was a discussion between Dr Matthew Collins QC and the Commissioner of the Victorian Legal Services Board (VLSB), Ms Fiona McLeay. Ms McLeay reflected on the regulation of sexual harassment across the profession and on the VLSB's projects around promoting and raising awareness around wellbeing.

Following on from this session, Phillip Corbett QC, Roxanne Burd and psychologist Bri Hayllar, led a presentation and discussion on resilience, providing insightful, practical tips on how to protect wellbeing in professional and personal contexts. This session was followed by morning tea.

In the next seminar Dr Suzanne McNicol QC and Dr Ian Freckleton QC spoke about professional legal privilege; specifically, the difference between common law and Evidence Act privilege and how to avoid waiving privilege. Juliet Forsyth SC then presented on technology at the Bar, identifying useful apps for barristers and demonstrating how e-briefs can be used to maximise a barrister's efficiency.

This was followed by a networking lunch where several silks attended to meet conference participants. The next session was an evidence master class where participants split into different seminars based on their practice areas. Barristers Steward Bayles, Rosalind Avis and Zubin Menon ran the criminal law evidence seminar. Barristers Jennifer Batrouney QC, Kateena O'Gorman and Gareth Redenbach ran the commercial law evidence seminar and Dr Richard Ingleby ran the family law evidence seminar. These sessions were followed by afternoon tea.

Róisín Annesley QC then ran a session on common ethical dilemmas and shared some cautionary tales. The session concluded with some pointers on how these issues can be appropriately managed. The day finished with a short but sweet discussion by legalsuper, with some tips for barristers on managing their superannuation. Participants met for a last hurrah in the Essoign.

An event not to be missed in 2020!

1. Chistopher Lum, Nick Elias, Emma Poole, Daphne Foong 2. Nawaar Hassan 3. Kylie Weston-Scheuber, Julia Lucas 4. Daniel Briggs, Haroon Hassan, Jonathan Wilkinson, Evelyn Tadros 5. Daniel Nguyen, Judy Ma, Goran Nikolovski 6. Victoria Blidman, Jonathan Wilkison, Meg O'Sullivan

Victims of crime in the courtroom: guide for judicial officers launched

ANNETTE CHARAK

Judicial officers in Victoria now have access to Australia's first guide designed specifically to help them identify and respond to the needs and interests of victims of crime.

Developed by the Judicial College of Victoria, the guide is informed by therapeutic jurisprudence and a trauma-informed approach. It details what judicial officers and court staff can do to limit the potential for the court experience to re-traumatise a victim of crime, whilst still meeting the significant legal, institutional and professional demands of an adversarial system.

The official launch of the guide, held at the College on 1 August 2019, was attended by representatives of the victims of crime consultative committee, victim support agencies, the Criminal Bar, the Office of Public Prosecution and attendees from across the Victorian judiciary.

It goes without saying that the challenges the guide is intended to meet are considerable. In our adversarial criminal justice system, victims are not parties to proceedings. They have traditionally had no formal role beyond acting as prosecution witnesses when required. Engagement with the criminal justice system can have a profound effect on their wellbeing.

Understandably, the process has often been reported as traumatic for victims—some describe the process as more distressing than the crime itself. Thankfully, there have also been instances in which victims have felt safe and engaged, thus enabling post-traumatic growth.

The 40-page guide is the distillation of an enormous amount of data collected and refined over two years. It recognises the diverse needs and interests of victims of crime and addresses a wide range of matters that may be relevant for judicial officers. These include victims' cultural and linguistic differences, religious beliefs and practices, and disabilities. The guide also tackles the particular sensibilities of Aboriginal and Torres Strait Islander victims and LGBTI victims and the vulnerabilities of children and young people. It seeks to help judicial officers understand the dynamics of family violence and the acute emotions of family members where a crime has resulted in a loss of life.

Above: Judge David Sexton; John Cain, Solicitor for Public Prosecutions; Fiona McCormack, Victims of Crime Commissioner; Justice John Champion; Lucy, the OPP's support dog

In the context of sexual offences, where there is most likely to be a dispute about whether a person is a victim of crime, guidance is given about suitable terminology, acknowledging that the very status of 'victim' may be in dispute.

"I congratulate the Judicial College of Victoria on the production of such an excellent resource for judicial officers," said Fiona McCormack, Victims of Crime Commissioner. It's wonderful to see this kind of effort, particularly in the context of broader reform that is seeking to improve victim experience of the current justice system and reducing the potential for re-traumatisation."

Justice John Champion of the Supreme Court, who officially launched the guide, noted that "the guide provides an excellent exploration of the key challenges for the legal profession in responding to the needs and interests of victims. It clearly sets out a trauma-informed approach for prosecution, court staff and judicial officers."

At the launch, Justice Champion chaired a panel comprising Fiona McCormack, John Cain, the Solicitor for Public Prosecutions, and Judge David Sexton of the County Court, previously a criminal defence counsel. The panel discussion focused on one chapter of the guide: the key challenges for all parties involved where victims are appearing as witnesses.

The guide sagely recognises that victim participation in an adversarial system is a developing area and that no single approach will cater to all.

The guide is available online at https://www.judicialcollege.vic.edu.au/node/1318.

Launch of the Good Conduct Guide (second edition!)

JESSE RUDD

Rare is the Victorian barrister who doesn't have access to a well thumbed copy of the *Good Conduct Guide*, authored by Róisín Annesley QC. Concise and practically focused, the book has long stood as the go-to manual for navigating the ethical issues facing practising barristers since its publication in 2006.

However, with the introduction in 2015 of the *Legal Profession Uniform Law* in Victoria and New South Wales, it is fair to say the regulatory landscape for barristers has changed dramatically. Fortunately for all of us, Róisín has been hard at work in the intervening period updating the *Good Conduct Guide*. The second edition was officially launched at a ceremony in the Richard Griffith Library on 3 June 2019, where attendees were treated to an engaging speech by the eponymous author.

Róisín spoke of the diverse ethical issues that have come to her attention as a long standing member of the Bar's Ethics Committee, expressing hope that her work has assisted in the resolution of such issues. She explained that the second edition has the same aim as the first, namely, to give context to the Uniform Rules of Conduct, to remind barristers of their duties to the court and clients, and to provide practical guidance in matters of professional ethics and etiquette. Unlike the first edition, the second edition has a wider audience than Victoria by virtue of its treatment of the Uniform Law. Róisín has endeavoured to retain the thinking behind the former Victorian Rules where relevant, while recognising that the Uniform Rules are broader.

> "Unlike the first edition the second edition has a wider audience than Victoria by virtue of its treatment of the Uniform Law"

Finally, Róisín pointed out that the publication of the revised *Good Conduct Guide* has not been a solo effort. She thanked the executive and administrative staff of the Bar for their assistance and funding (a copy of the guide has been provided to all Bar members free of charge), her colleagues for assistance in editing, her family, the Ethics Committee, and all members of the Bar for their input and support over the years.


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1. Robert Stary, Justice Melinda Richards, James Dowsley and Georgina Connelly. 2. Julie Condon SC, John Kelly SC and Ashlee Cannon. 3. Justice Mordecai Bromberg, Felicity Broughton, Michele O'Neil and Fiona McLeod SC. 4. Paul Smallwood, Daniel Gurvich SC and Campbell Thomson. 5. Felicity Broughton, Michele O'Neil, Fiona McLeod SC and Ian Henderson in the panel discussion. 6. Guy Gilbert SC 7. Anthony Schultz, Guy Gilbert SC, Isabelle Skaburskis, Collin Andrew (ICJV Victorian Bar Fellow) and Sarah Porritt.

The International Commission of Jurists, 2019 Victoria dinner

CAMPBELL THOMSON

Tasmanian sparkling wine and a string quartet greeted guests at the annual fundraising dinner for the International Commission of Jurists, Victoria at the RACV Club. The dinner sold out. Judges, lawyers, law students and legal academics hobnobbed en masse before taking their seats.

ICJV Chair, Guy Gilbert SC, summarised the year: the community opening of the legal year in Waldron Hall, the international criminal law moot for law students in the Federal Court, hosting Collin Andrew as the ICJV Victorian Bar international fellow from Malaysia, submissions to the High Court in the *Minogue* case, submissions on proposed changes to Victorian contempt laws, and a seminar exploring the Victorian legal community response to the Medivac crisis.

The dinner's theme was the 40th anniversary of the UN Convention on the Elimination of Discrimination against Women. Ian Henderson, former ABC news reader, led a panel discussion with Michele O'Neil, ACTU president, Felicity Broughton, deputy chief magistrate and Fiona McLeod SC, International Bar Association diversity council member, on what had happened in relation to the rights of women since 1979.

Listeners enjoyed starters of goat cheese tart or scallops and main courses of blue-eye cod or lamb cutlets. ICJV president, Justice Bromberg, then interviewed Collin Andrew, who is counsel for UNHCR in Kuala Lumpur. Last year he won the release from detention of seven Rohingya children in a habeas corpus application in the High Court, which found their detention breached Article 22 of the UN Convention on the Rights of the Child. Collin hoped his time with the readers' course, with judges in the Federal and County Courts and with barristers in different areas of law will benefit him on his return to Kuala Lumpur.

Last year's ICJV Bar reader, Ranitha Gnanarajah, spoke by video from Sri Lanka about her human rights law work there, which includes briefing forensic pathologists to do DNA testing of remains in a mass grave near an army camp—a legacy of the civil war. Tragically, she hopes testing will discover her father who disappeared.

Artworks, dinner for four at Saxe restaurant, a suit/shirt/tie/pocket square package from TM Lewin, cases of wine and many other items sold by silent auction. The dinner was an entertaining success. Funds raised will sponsor the next ICJV Victorian Bar fellow.


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> "The dinner's theme was the 40th anniversary of the UN Convention on the Elimination of Discrimination against Women."


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Barristers v Solicitors football match

Sunday, 6 October 2019 – Sir Doug Nicholls Oval

DUGALD MCWILLIAMS

There is something about the football matches between the Barristers and Solicitors that brings out good weather. Although everyone was kitted out for a game of football, the scene at the Sir Doug Nicholls Oval in Thornbury was more suited to a day at the beach than a game of football: 25°C and a gentle westerly breeze. Forget football boots and mouthguards, the most important weapon in any footballer's arsenal on that day was the 50+ sunscreen.

This year's match had a new format: the teams would be mixed with men and women. In a heavy recruitment drive, the Bar managed to recruit some quality female footballing talent including Iona Miller, Jess Kay and Shenae de Carr, as well as current County Court associate and Collingwood VFL player, Lachie Howe (all 200cms and 100kgs of him). Lachie easily qualified for the Bar team, having just passed the Bar exam and intending to do the readers' course in March 2020.

Ben Maunder, Dugald McWilliams and his son, Max McWilliams

Asher Star and Dan Star QC

The Bar players were introduced to their coach, Phil Egan, former indigenous and 100-game champion at Richmond. Assisting Phil Egan was Mark Eustice, who had previously played for Essendon, Richmond and Sydney and who, after his life in football, had struggled with substance abuse and mental health issues. Mark, like some of the previous volunteer coaches Reclink organises to coach on days like these, is among the very people who benefit from the wonderful work that Reclink does. The venue was chosen especially for this event. Reclink, the principal organiser of the match, had committed to donating the proceeds raised by the event to an indigenous sporting initiative in Alice Springs. What better place to play this match than on the ground that bears the name of the first indigenous person to be knighted, the first to be appointed to vice-regal office and the first to be selected to play for Victoria in football: Sir Doug Nicholls.

> "Daniel Star shone, taking the ball about 45 metres out and running directly to goal. The words of his coach were still ringing in his ears: spectacular individual efforts. This prompted Dan to execute a beautiful blind turn (although there was no one to avoid) and belted the ball deep into the forward line"

The most telling battle was lost off the ground before the game had even started. Whilst the Bar's captain, Dugald McWilliams, had gone to great lengths to secure the services of Lachie Howe, because the Solicitors were short, the Bar team management (excluding McWilliams!) took it upon themselves to offer Howe's services to the Solicitors. This would have to rank as one of the greatest footballing travesties since Ron Barassi moved from Melbourne to Carlton in 1965.

However the Bar was not deterred. What we lacked in height and talent was amply catered for by our determination. Phil Egan primed the team with some choice pre-game inspirational words. He wasn't interested in teamwork. He wasn't interested in the one-percenters. The path to victory was through glorious individual efforts, through blind turns, players selling candy to their opponents, banana and checkside kicks, Dusty Martin fend offs and, the *pièce de résistance*: drop kicks. That was all the inspiration needed.

We were very strategic in our on-field set up. Mick McGrath was the Rock of Gibraltar in defence. He conceded happily that he was definitely not quick off the mark but knew how to punch. He was clearly born to be a fullback. Simon Fuller, one of the organisers of this great day, slotted in the back pocket to take on the resting Solicitor ruckman (not that the resting ruckman needed any rest because he was fitter than a greyhound on steroids and had an engine bigger than a V8 super car). Mick Dever, representing sponsor Dever's List, slotted in on the other back pocket.

The halfback line, the engine room taking the Bar from defence into attack, was Dugald McWilliams with Chris Edwards adding some height, together with Nick Goodenough.

In the forward line we boasted immense talent including Pat Gordon and Hayden Rattray. We also had a couple of rings-in. Marty Kennan had just got off a plane from New York and couldn't wait to get to the ground to help the Bar in another quest for glory. Ben Maunder was recruited under the liberally applied 'family member' rule and qualified because our captain is his uncle. Most importantly we had the first father/son combination on the field since Mordy Bromberg played with his son back in 2006 at the Western Oval when we were coached by Crackers Keenan. Daniel Star QC was immensely proud to be taking the field with his 15-year-old son, Asher. We also had plenty of run off the bench with that evergreen footballer, Pat O'Shannessy, warming the pine to give us a well-needed injection of run throughout the match.

The whistle blowers were led by Mark Gibson SC and did a fantastic job all day.

Another of our organisers, Pat O'Shannessy, gave us the obligatory safety briefing and reminded us that we all had to work the following day. Despite thinking that we were all still 19 years old (apart from Asher Star who is only 15!), it was important to maintain the spirit of the game.

After a stirring rendition of Advance Australia Fair, the Solicitors won the toss and kicked with the breeze to the eastern end.

The battle from the first bounce was frenetic. The all-female midfield from

both teams battled it out hard and the Solicitors got the first clearance. The wind played havoc throughout the day and in the first quarter the Solicitors put on 2 goals 5. Some inaccurate kicking from the Solicitors kept the Bar well in the match, with the Bar scoring 1.1 in the first.

There were some fantastic individual efforts. Simon Fuller's beautiful Dusty fend off sent one of the Solicitors' players flying. Marty Kennan got a tonne of the ball and kept us in the match.

In the second quarter we were kicking with the wind. Daniel Star shone, taking the ball about 45 metres out and running directly to goal. The words of his coach were still ringing in his ears: spectacular individual efforts. This prompted Dan to execute a beautiful blind turn (although there was no one to avoid) and belt the ball deep into the forward line.

The Solicitors got away from us a little in the second quarter, even though they were kicking into the wind. This was mostly attributable to Lachie Howe, one of the principal architects in our ultimate demise.

At half time, the direction from the coaching staff was to focus on our individual efforts. Phil was happy to have seen a number of Dusty fend offs and gave Dan Star a huge wrap for his blind turn, but he still wanted to see some banana kicks and was yet to see a drop kick.

The second half did not disappoint. Whilst the Solicitors continued to dominate in the midfield, the Bar team remained competitive. Beautiful hard inside work from Pat Gordon, Marty Kennan and Asher Star meant that we were often the first to clear the ball out of the stoppages. Mick McGrath was a tower of strength at fullback, belting the ball back in to play with a torpedo at most kick outs.

Chris Edwards pleased the coaches no end when he took a mark directly in front of goal. True to the directions of his coaches, he played on and kicked a beautiful checkside goal. To complete the picture, McWilliams took a mark in the middle of the field, played on and ran down the left wing and (somewhat miraculously) managed to pull off a left-footed drop kick which actually hit its target. The product was another goal for the Bar and McWilliams retreated to the halfback line to a barrage of cheers and high-fives from the coaching staff as he passed the bench.

The final whistle sounded and the Bar ended up on the wrong side of the ledger but nonetheless had a wonderful time. The best players were announced in the club rooms after the match: Lachie Howe for the solicitors (he'll be playing for the Bar next year!) and Marty Kennan for the Barristers.

Days such as this are not possible without a committed organising committee. Thank you very much to Hayden Legro from Legro Lawyers, all the Reclink staff and our three committed organisers from the Bar, Pat O'Shannessy, Simon Fuller and Matt Fisher.

Thank you also to the sponsors, Adviceline Lawyers, Zaparas Lawyers, Maurice Blackburn Lawyers, Green's List, Dever's List and Lennon's List. Needless to say we are looking at greater commitment next year from the remaining clerks. List A, Foley's, List G, Holmes List, Meldrum & Hyland, Howells' List, Svenson Barristers, Patterson's List, and Young's List, you are all on notice!

BACK ROW: Harrison Georgiou; John Morgan; Rob O'Neill; Alex Besson; James Teirney; Stephen Sharpley QC; Stephen Parmenter QC; Alex Schwarcz; Tom Evans. FRONT ROW: Mark Batrouney; Nick Tweedie SC; Andrew Denton; Judge Philip Burchardt; Carole Shanks.

Barristers take home the silverware at last!

JENNIFER BATROUNEY

The annual hockey match between Bar and Bench and the LIV was held in stormy conditions in Hawthorn on Thursday 17 October. Rob O'Neill captained an enthusiastic Bar side against a young and confident LIV side.

Judge Burchardt, a stalwart of the team, fronted the goals for the first part of the game and held the Law Institute at bay under heavy pressure, conceding one goal but saving numerous other opportunities, until he was rescued by late-arriving man-of-the-match Stephen Sharpley QC—a most formidable monster goalie.

John Morgan must have been causing trouble because someone tried to take him out (or did he fall?), leaving him sporting a bloodied knee and rueful smile. The lone female, Carole Shanks from Green's list, was a terrier with the ball and invaluable in the mid field.

The Bar's goals were scored by Stephen Parmenter QC and guest player Harrison Georgiou. Denton played with the freedom and pace that older members of the team lacked, while solid performances were put in by James Tierney and Nick Tweedie SC.

As the game wore on, the not-necessarily-fit barros were relieved that two young chaps (ring-ins you say?) had their back. Mark Batrouney and Alex Schwarcz tore up the field with the ease of those that are just a bit too young to actually be at the Bar. Not one, but two Batrouneys were on the field, with Mark on the opposite side to his brother James—now a legitimate solicitor after many years playing as a ring-in barrister. Proud Mum and Australian Bar President Jennifer Batrouney QC watched from the sidelines.

In the end, the sheer grit and determination of the Bar prevailed and we took away the cup after a narrow 2-1 victory.

Wary not to kill the collective golden goose, the Bar were careful to maintain good humour with the solicitors and enjoyed a few bevvies and a sausage after the game.

Thanks to the faithful umpires, Tony and Mark, and our loyal support crew, Trish Elliott and Richard Brear.

James and Mark Batrouney

News & Views

To prorogue or not to prorogue

BY PETER HEEREY AND DAVID FELDMAN

Earlier this year, Australians with a legal bent watched in fascination as the Queen prorogued the United Kingdom Parliament upon the advice of Prime Minister Boris Johnson, only for the UK Supreme Court to determine that the advice and length of prorogation was unlawful. Was the Supreme Court's decision correct? In the spirit of 'reasonable minds differ', two legal luminaries, the Hon Peter Heerey AM QC and Professor David Feldman, QC (Hon), FBA Emeritus Rouse Ball Professor of English Law and Emeritus Fellow of Downing College Cambridge University, reach opposite conclusions on this important question.

PETER HEEREY

A Rogue Prorogue

On 28 August 2019, the Queen ordered that the UK Parliament be prorogued from a date between 9 and 12 September until 14 October 2019.

On 24 September, an 11-member Bench of the UK Supreme Court held that the prorogation was "null and void and of no effect … [it was no more than] a blank piece of paper": *R (Miller) v The Prime Minister* [2019] UKSC 41.

In so holding, the Supreme Court reversed a unanimous decision of the Divisional Court constituted by the Lord Chief Justice of England and Wales, the Master of the Rolls and the President of the Queen's Bench Division: *R (Miller) v The Prime Minister* [2019] EWHC 2381. The equivalent Scottish intermediate court had come to the opposite conclusion: [2019] CSIH 49.

Prorogation

Prorogation is made by the Sovereign, formally on the advice of the Privy Council but in reality on the advice of the prime minister. It ends a session of Parliament and with it any uncompleted legislation.

The length of prorogation

There is no statutory provision governing the length of prorogation. Currently, it has usually been under ten days, but in the past much longer; on five occasions since 1980, there have been instances of prorogation for more than ten days, the longest being 21 days. Earlier in the 20th century, there were still longer periods: 17 August to 5 November 1901, 18 September to 27 October 1914 and a further prorogation to 11 November, 1 August to 28 October 1930.

In the recent case, the proposed prorogation was on its face for a period of up to 34 days but, as the Divisional Court noted, given the expected party conferences recess of approximately three weeks, the sitting days lost would be far fewer: one to three in the week commencing 9 September and four during the week commencing 7 October.

A submission to the prime minister by Nikki da Costa, the director of legislative affairs at 10 Downing Street, included the calculations just mentioned. Prime Minister Johnson's notes on the submission included the following (upper case and underlining in the original):

> As Nikki notes, it is OVER THE CONFERENCE SEASON so that the sitting days lost are actually few.

Judicial review of decisions made pursuant to the Royal Prerogative

Such decisions are not necessarily immune from judicial review. The question is not the source but the subject matter. The

essential question is not whether there is a political hue, as is often the case concerning individuals, but whether there is an absence of judicial or legal standards by which to assess the legality of the executive's decision or action.

The Divisional Court's conclusion

The Divisional Court concluded that the decisions of the prime minister that Parliament should be prorogued at the time and for the duration chosen were "inherently political in nature and there were no legal standards against which to judge their legitimacy." In summary, those considerations were:

- The need to prepare the government's legislation for the Queen's speech.
- Parliament would still have time before 31 October to debate Brexit and the government's withdrawal negotiations.
- A number of days within the period of prorogation would ordinarily be in recess for party conferences.
- The current parliamentary session had been the longest for the previous 40 years.
- Ms da Costa's advice was that it was increasingly difficult to fill parliamentary time with appropriate work. If new bills were introduced, either the existing session would have to continue for another four to six months or they would be introduced knowing they would fail at the end of the session.

Those considerations were spelt out in the da Costa submission. It does not appear to have been suggested in the litigation that they were inaccurate or not genuinely held assessments.

The Supreme Court's decision

One of the arguments by the appellants in the Supreme Court relied on what was said to be an improper motive of the prime minister in preserving the option of a no deal Brexit without obstruction by Parliament. But the court said it did not find it necessary to consider that ground because it raised "some different questions." However, the court had opened the doors to scrutiny of the reasons actually given. Perhaps it seemed to the members of the court a potentially embarrassing step too far. Nevertheless, the Supreme Court did not hesitate to plunge into the factual merits as a basis for concluding there was justiciability. In particular, it relied on a kind of reverse floodgates argument. The executive could prevent Parliament from exercising its legislative authority for as long as the executive pleased. To the obvious answer that, inter alia, the executive would need Parliament's approval of supply to run government services, the Supreme Court dismissed this as a practical constraint [which offered] "scant reassurance". Trying to run a government without legal authority to spend money would seem to be a problem more than "scant" ("limited, not large": *Macquarie Dictionary*).

As Emeritus Professor John Finnis AC QC points out in *The Unconstitutionality of the Supreme Court's Prorogation Judgment* (www.policyexchange.org.uk and *Quadrant* November 2019), the judgment undercuts the genuine sovereignty of Parliament by evading the statutory prohibition in article 9 of the *Bill of Rights* 1689, which provides that "Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament." The Supreme Court's contention that prorogation is not a "proceeding in Parliament" is highly semantic. For example, it contends that the prorogation is "not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end." Professor Finnis deals effectively with this at pages 7–8 of his article.

Conclusion

As a matter of logic and historical consistency, the decision of the Divisional Court is the more convincing. The Supreme Court does not dispute what the Divisional Court emphasised: the need to identify judicial or legal standards by which this particular exercise of the prerogative could be scrutinised by courts. The Supreme Court's only attempt to meet that criterion is the assertion that the prorogation was for too long—a ground which dissolves on factual analysis.

DAVID FELDMAN

A Legitimate Exercise of the Judicial Role

The UK Supreme Court's decision in *R (Miller) v The Prime Minister, Cherry and Others v Advocate General for Scotland* [2019] UKSC 41 concerned the legality of the prime minister's advice to the Queen. The advice was to order the prorogation of Parliament for a period of more than five weeks in the run-up to the UK's withdrawal from the European Union, then set for 31 October 2019. The court held that that advice was outside the scope of the prorogation prerogative because it "has the effect of frustrating or preventing, without reasonable justification, the [Parliament's] ability to carry out its constitutional functions… In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course." The Order in Council providing that Parliament was to be prorogued for that period was similarly unlawful.

The Government's case was that the prerogative power to prorogue had no legal limits, so there was no legal standard by which an exercise of the power could be reviewed; it was non-justiciable. Courts' dislike of claims to unlimited discretion was exacerbated by the prime minister's refusal to affirm on oath that the reason offered for the length of the prorogation—the need to prepare a Queen's speech—was true. This particular claim gave rise to a risk of arbitrary government, free of parliamentary scrutiny, because a prime minister who wants to evade ministerial responsibility to Parliament could simply recommend prorogation for an indefinite period (subject to any requirement for annual legislation on the armed forces and so on). It had been held as early as *The Case of Proclamations* (1611) Co Rep 74 that the Crown has only those prerogative powers which are allowed it by common law, that they have limits, and that the courts are responsible for ensuring that the Crown stays within them. No question of justiciability arose where the issue was the extent of a prerogative power, which the rule of law and separation of powers put squarely in the remit of courts, as distinct from a question "concerning the lawfulness of the exercise of a prerogative power within its lawful limits". The distinction between want of power and misuse of power thus retains significance in English law, notwithstanding claims that it was laid to rest by *Anisminic* in 1968.

While the outcome was novel, the court reasoned from settled constitutional principles: ministerial responsibility and parliamentary sovereignty. Unusually, however, the court treated the principles as legally enforceable limits on the prorogation power. Ministerial responsibility to Parliament is often used to justify not interfering in political decisions, but is now a fundamental principle capable of being enforced by courts. Implications of parliamentary sovereignty now include a court's duty to protect Parliament's ability to legislate against a prime minister if prorogation would threaten fundamental constitutional principles. Courts regularly reshape or reinterpret constitutions to cater for new exigencies. Continuity in the principles justifies novelty in the use to which they are put. This is a legitimate exercise of the judicial role, a job which judges have been doing for hundreds of years in many countries.

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This does not make it unproblematic. It poses questions as to how one decides which constitutional principles are judicially enforceable and when. This will no doubt be worked out in future cases. Limiting the scope of a power by reference to the effects of its purported use usefully avoided the need to deal with questions of justiciability in relation to the prime minister's motives, and was not novel (see, for example, *R (UNISON) v Lord Chancellor* [2017] UKSC 51, SC). Nevertheless, it requires courts to predict what the political effects of actions will be, and also, when setting the bounds of a power, to decide whether a purported exercise of it is justifiable. Parliament has to be prorogued periodically to end and start sessions, and short periods do not jeopardise constitutional principles. The proposed prorogation, however, was unusually long by modern standards and much longer than was necessary to prepare for a new session. No other reason or justification had been offered, and there was no evidence that the prime minister had discharged what the court held was a "constitutional responsibility…to have regard to all relevant interests, including the interests of Parliament". The exceptional circumstances made it easy for the court to decide that the prime minister had acted outside the scope of the prerogative, but future cases might not be as easy; having to predict the effect of a prorogation may make it hard to say whether it is lawful or not.

The Government argued that Article 9 of the Bill of Rights 1689 prevented the court from giving a remedy which would 'question proceedings in Parlyament', because the Commissioners' announcement of prorogation in the House of Lords on 9 September was, as Professor John Finnis has written, 'self-evidently a proceeding in Parliament'. The issue for the court, however, was the lawfulness of the prime minister's advice to prorogue Parliament and Her Majesty in Council's subsequent making of an Order. Neither of these steps was a proceeding in Parliament. Professor Finnis sees an analogy between prorogation and giving royal assent to Bills, which is regarded as a proceeding in Parliament, despite taking place elsewhere. But legislation necessarily involves the 'Queen in Parliament', whereas prorogation stops Parliament's non-legislative functions which occur without royal participation. The analogy between legislating and prorogation is tenuous. The court was correct to hold that Article 9 did not deprive the court of jurisdiction over decisions and acts relating to prorogation.

The UK's constitution depends on politicians exercising constitutional functions in good faith. When faith in that is undermined, both Parliament and the courts are prompted to take unusual steps to ensure that the executive may be effectively scrutinised at a time of crisis.

**Professor Feldman spoke with Justice Debbie Mortimer on the Limitations of Judicial Review on Tuesday 8 October 2019 at the Federal Court of Australia as a guest of Melbourne Law School's 'Judges in Conversation Series'. The conversation quickly turned to the* Miller *decision.*

Interview with the Honourable Chief Justice Alstergren

CARMELLA BEN-SIMON AND ANNETTE CHARAK

Chief Justice Alstergren's large corner chambers overlook Flagstaff Gardens. Closed glass doors reveal a balcony from which to enjoy the view, although his Honour says that he has never actually stepped onto the balcony, as he is too busy traversing the country trying to implement change to reduce the backlog of cases.

His Honour sits at the helm of two large courts, having been appointed Chief Judge of the Federal Circuit Court (FCC) in October 2017 and Chief Justice of the Family Court on 10 December 2018. Both courts have been plagued by delays. In December, it will be one year since his Honour became the head of both courts. VBN *caught up with him to find out what he has achieved as Chief Justice in his first 12 months and the ways in which he expects to reshape the two courts.*

Before his appointment, his Honour had been a member of the Victorian Bar since 1991 and Queen's Counsel since 2012. During this time, he served as the last "chairman" of the Bar Council and as president of the Australian Bar Association.

VBN: In the early 2000s, you were captain of the Australian bobsledding team and later Olympic coach of the women's team. Do you bring any of that experience to your new role?

CJ: One thing about bobsledding is that you start up a hill on a 1.5-kilometre track and you go down at 120km/hour with no brakes. I've always thought momentum is a great thing and I've brought that to my new role. The trick is to get others to come with you. As Paul Keating once said, "you have to be committed to achieve change."

VBN: It's a big job merging these two roles as head of two very large courts. What are the challenges?

CJ: The biggest challenge facing both courts is delay and backlogs that are unacceptable. In real terms, Australian families are spending far too much time in our court systems. This often leads to greater stress on families, especially children, as we are unable to hear important cases as quickly as we should. Also, in some cases, people are spending disproportionate amounts of money on fees compared to the assets they are fighting over. To combat these problems, we are required to look at the systems we have in place with our existing resources.

There are two different entities. That means two sets of rules, two sets of forms, and two sets of case management principles. The cases are managed in entirely different ways. There are even two different ways in which the courts identify risk.

However, as entities, the courts are in fact interdependent. Each relies upon the other; the FCC carries a great deal of the workload, allowing the Family Court to concentrate on the most complex cases. It is obvious that the rules, forms and case management principles need to be harmonised.

> “We will be asking the government for more registrars for the family law caseload and more judges particularly for migration.”

The best example of that is the Family Court, which began in 1975, and the FCC, which started hearing cases in 2000. Before 2000, the Family Court was doing 100 per cent of the family law work. By about 2005, the two courts were doing about 50 per cent each. That quickly grew to the FCC performing 88 per cent of the work. Regardless of the differences in complexity, the idea of having separate rules and separate forms for two courts that do the same kind of work is extraordinary. It leads to confusion, a waste of precious resources and duplication. So, it makes perfect sense to try and solve that issue with a single set of rules, forms and case management principles.

I've said from the outset that what is required, objectively, is the best set of rules—the most sensible, most efficient rules—for the litigants, professionals, and of course the courts. To achieve this, a working group was established. It was not appropriate that either the Deputy Chief Justice or I dominate the working group. I wanted a totally independent Chair, someone who had no bias from sitting on either court hearing family law cases. The Hon Dr Chris Jessup QC, who is a true leader of the Bar and of the Industrial Bar and was responsible for development of the Federal Court Rules, thankfully accepted the appointment. To provide the family law expertise, eight serving judges were asked to join the group, three from each court and two that have been on both courts. We also retained two excellent barristers from the Victorian Bar, Emma Poole and Chris Lum, to provide the drafting resources.

To put this challenging project into some perspective, the courts have not been able to come up with a unified set of rules in 19 years. But, by the end of November this year, in only eight months from starting, we will have the first draft and hopefully, early in the new year, we can put it to the judges for their input. We will then have meetings in every registry around Australia and invite the profession in for proper consultation. All going well, by May next year, we should have a new set of rules. The level of collaboration and co-operation already demonstrated by the judges on the working group has been excellent.

The second thing is we're looking at how best to manage the volume of cases coming in to both courts.

The dockets in the FCC are getting far too big despite our best efforts. Over 17,000 pending family law cases require judicial determination (virtually a year's worth of work). In migration, the filings over the past four years have grown by approximately 60 per cent. The backlog has already grown to over 10,000 pending migration cases and it looks like we will have more pending migration work in two years than family law cases.

We will be asking the government for more registrars for the family law caseload, and more judges, particularly for migration. This will be based on a proper business case. You can't case manage a migration case the same way as a family law matter. ADR is just not going to work in migration cases. Migration makes a much bigger demand on judge time. I'm not suggesting for a moment that judges are not also needed in family law, but in migration we do have to have more judges urgently.

What can we do with the existing resources? We've done a lot of tweaking with family law work, getting the older cases out of dockets and having blitz callovers, and that's working dramatically well. We called over 250 cases a few weeks ago in Brisbane; we settled half on the first two days. The ones that we did not settle have been listed for trial as early as possible. This has allowed us to deal with parenting cases, especially ones in which children are at risk, much more quickly.

We're able to look at how the resources in both courts complement each other, and to operate as a proper national court. We can deploy resources, either by video link or by moving judges, in a very short time period.

VBN: So, you don't have to reach an agreement with another head of jurisdiction?

CJ: I make decisions in consultation with the leadership teams in both courts. I've developed a corporate structure where I've got a leadership team of six instead of only one judge under me. In the FCC, I have judges in charge of various areas around the country. I've got a Deputy Chief Justice of the Family Court as well as the heads of case management in each registry. I rely on the leadership group to advise me and make recommendations about how we can implement changes between the courts.

VBN: How does harmonisation of the rules work when you've got migration and other areas?

CJ: At this stage, we are only going to harmonise the family law rules. The FCC Rules in relation to general federal law are already harmonised with the Federal Court Rules.

VBN: In Brisbane and Melbourne, during the blitz callover, barristers mediated pro bono. Do you have a view about the role of barristers doing pro bono work?

CJ: I do. In Melbourne we commenced callovers of cases in the FCC almost immediately after I took over. We had lists of barristers willing to conduct mediations and arbitrations (in property cases) with their fees and availability. Each had also agreed to assist the court on a pro bono basis if needed. The goodwill that the members of the Victorian Bar showed to litigants and the Court during those callovers was amazing and demonstrates why it is one of the leading Bars in the world. From the most junior to the most senior, Victorian Bar members were prepared to roll up their sleeves and work through cases that had been in the system for years. Almost 70 per cent of those cases settled. Having mediators at the court and the profession prepared to co-operate meant that we could say to litigants, "look, you're here anyway, you've paid all this money, you've got someone who's independent, they'll give you a hand." This meant that litigants had a dignified way out of the system. No one was forcing them to mediate. At the callovers, I've had litigants in person standing up in the body of the court and saying to me, "Thank you, this is the most positive thing I've seen in three years."

We, and here I include myself, are all very blessed to have the opportunity to help people in the most dire circumstances they face. Often people find themselves unrepresented, whether it's because they can't get legal aid, or they haven't got the funds, or they have used all their available funds. By providing pro bono assistance we have the great gift of being able to provide them with an opportunity to get out of the system, which is good for everybody.

Litigation, particularly in the family law courts, is so devastating emotionally to people, whether it's a property case or a parenting case or both. The science shows that the longer litigation goes on, the more detrimental it is to children and the mental health of people involved. People shouldn't necessarily be in this forum. Separating couples shouldn't necessarily have to go to a court, apart for a formal decree. Where people mediate in good faith early, they should and often do settle, rather than waiting two, three or four years. By that point they have paid disproportionate amounts of money in costs, having devastating effects upon children and litigants. They should be settling in six months.

> “The science shows that the longer litigation goes on the more detrimental it is to children and the mental health of people involved. People shouldn't necessarily be in this forum.”

So, we want to bring in a new set of case management principles, which require parties to come to the first return explaining what their case is, identifying what the issues are between them, and identifying what discovery or disclosure is needed. In a property case, they will be sent to alternative dispute resolution within a couple of months, before things have become too static or too entrenched.

We're going to introduce an audio-visual presentation for litigants to watch in the court. We'll use actors and we'll emphasise two things. One, this may not be the forum you need, there are other forums or indeed you can settle now, and once you start in the system, you can get out of it. Two, so often people forget about what is in the children's best interests, not in the parent's best interests.

VBN: You said that the blitz callovers in family law matters were very successful. Is that something we're going to see on a regular basis?

CJ: Absolutely. For example, we have far too many cases over two years old in the system. Every case in that category is currently being reviewed. Unless it is a highly complex parenting case that needs to remain

> “I’d also refute the allegation that somehow we’re putting children’s lives at risk. In fact we’re moving cases on more quickly where there is identification of risk.”

in the system for safety reasons, every case will be called over by June 2020. On an ongoing basis, we will be calling over cases at least twice a year in the major registries and in smaller registries as needed. I did it in Hobart recently. I’m doing it in Canberra now in both courts. In Melbourne, we’ve settled almost 70 per cent of cases called over. In Brisbane, almost half settled, and about the same in Adelaide. In Sydney, it was about 38-40 per cent.

VBN: You’ve also had a small claims pilot in Brisbane. What is that about?

CJ: That’s just starting now. We’re looking at property claims of smaller asset pools and running them differently. We have a specialist judge and registrars assisting parties, and we try to fast track them and get the formality out of it. It’s been very successful. We also piloted the Discrete Property List, where we’ve got a registrar handling, at first instance, all property matters. During the pilot phase, the registrar settled about 70 per cent. We have now rolled out the Discrete Property List in Brisbane and Sydney, and it will commence in Melbourne in January 2020.

VBN: What do you say to the criticism that there is pressure on parties to settle?

CJ: It’s absolute nonsense. You have cases where nothing’s happened for two years or a year-and-a-half, apart from solicitors writing letters to each other. There may not even be any applications. In the meantime, people’s lives are turned upside down. We give them an opportunity to come into the court. We ask them to consider what’s still in dispute. Would they like the opportunity to discuss their matter today and try to settle? If they’re resolute and say they don’t—they’ve had mediation before, and it hasn’t worked—we look at how quickly we can list it for trial. But in the main, people are taking the opportunity of saying “no I’ve had enough of this.” A lot of them have spent disproportionate amounts of money. Or parenting cases aren’t being heard as quickly as they should. Or circumstances have changed, and they want an opportunity to get out of it if they can. They might recognise that maybe this isn’t the right forum for them, and they can sort out their differences. Or there may be some miscommunication between them as to what’s really in issue. We haven’t ever said to people, and nor would we, “you have to settle.” If they’re unrepresented, we make sure they’ve got the duty lawyer’s advice. We’re very careful to give unrepresented litigants any opportunity to get any advice they can, and we give them pro bono mediators if we possibly can or a registrar at a conciliation conference. And we review any orders to make sure the parties haven’t made a mistake and that they’re totally happy with the orders.

I’d also refute the allegation that, somehow, we’re putting children’s lives at risk. In fact, we’re moving cases on more quickly where there is identification of risk. And with both the harmonisation of the rules and with the case management principles, we’re making sure that on the first piece of paper that any party issues in either court, they give us information about whether there’s a risk and what the risk is. We can then treat that information as is appropriate and apply additional resources if we must. Even if it happens during the litigation, we make sure that we put in place systems so that it is addressed very quickly. The difficulty is that sometimes we’re not told about risk.

VBN: There has been criticism from some in the media that the FCC judges do not have the training and experience to hear complex family law matters. Do you agree?

Absolutely not. It is both misleading and inappropriate for a small minority within the profession to make these claims. The FCC has highly capable, intelligent judges of great integrity and skill dealing with a variety of jurisdictions. The courts have also introduced new intensive induction processes and mentoring programs to ensure judges are given the skill and knowledge to deal with these areas. This of course includes family violence training, which is available to all judges and staff.

There are judges across Australia who have learnt new areas of the law whilst on the Bench, whether it be crime, taxation, common law or family law. They often become leaders in these new fields and some become appeal judges.

Family law is no different and the motivation for such comments is questionable.

VBN: Most cases should settle but there are some that can’t, for example, a relocation case.

CJ: We try to get cases on quickly if we know there is urgency, for example if the kids are about to go to a different school or they’re going to relocate or Christmas is in issue or whatever the factor might be. These callovers are allowing us to review these cases in situ. Sometimes things have happened that require a really urgent hearing, and if you can solve that particular issue, the rest of it falls away because people are then satisfied to be able to go on with their lives and can find an arrangement to do so. With anything we do, we give a return date within six months, so the case isn’t just sitting there. The profession seems to be very happy with it.

VBN: How are you using technology?

CJ: We still have paper files. For instance, in the Brisbane callovers, we wanted to do 250 cases in a week. We brought all the files down here so we could summarise them and prepare, then they went back up. That was all paper files, it wasn’t electronic. The orders are placed on the court record, but we must get someone to print them out and put them physically on the file. We’re working towards an electronic court system. We are testing an electronic court file in Townsville. We’re waiting to see how that goes. Anything to do with computers seems to take a lot longer than it should. I’m anticipating that we will have an electronic court filing system up and running soon, but it will probably take six months to roll out. That means that all the new files coming in will be electronic—but not the old files.

VBN: What about video link facilities and technology for witnesses?

CJ: The problem with having solicitors appear by phone is how many times the court is put on hold. It’s so inefficient. It becomes an inconvenience for the courts. But with parties in regional areas and parties where there is serious risk, we are looking at opportunities to use technology.

We also want to use information technology to explain to people what processes they must go through, whether it’s migration, family or otherwise. Obviously, e-filing is a big thing and we’ll have electronic court files. We might even look at actuarial tables to give people the opportunity of working out, if they can agree on what the contributions might be, what their settlement should be. It would be an indication. It’s used overseas and I think it’s a thing we can do to allow people to understand what outcome they can expect and what the outcome could be if they could agree on some of the facts.

VBN: You mention overseas, do you have any contact with heads of jurisdictions overseas?

CJ: I’ve established a very good relationship with the judge in charge of the family law section of the High Court in England and we’re in regular contact. We have quarterly meetings via Skype and we’re sharing information about managing the court and about innovations and decisions.

VBN: Do you do anything to support the mental health of judges today?

CJ: I’ve now established health and wellbeing committees in both courts. The chairs and the committee members are very good at doing health checks on judges. We’ve got professional relationships with physician services. If we need to see anybody, the court will obviously pay. We’re very active in mentoring: from other judges inside the courts, from superior court judges and from retired judges. There are always people in any organisation that require support.

We also want to make sure they are properly supported in relation to things like reserve judgments. A judge may be overworking. Because they’re such fine people, a lot of the judges take off their holidays and judgment writing time to hear more cases because they’re so worried about the litigants. Sometimes you have to say to them, “no you’ve actually got to take some time out.” So, I’ve now put a protocol in place in both courts. If they get to six months and they’ve got judgments outstanding, we start asking for an explanation and asking what we can do to support them. After nine months, we let them know that if the judgment is not delivered within a certain period, we’ll take them out of court until it’s finished. This is to ensure that people don’t get themselves in a situation, particularly in a high-volume court, where they get too far behind.

In Melbourne we’ve also got yoga classes for judges on a Wednesday, which are very popular.

VBN: You’ve brought in ideas about corporate leadership and corporate governance. What else do you bring that’s different from what your predecessors did?

CJ: I think I’ve brought an awareness of and approach from other jurisdictions. I also probably bring a bit of an energy to the whole thing as well as creating a lot of momentum. I’m looking at realistic ways that we can try and improve the system without being a bull in a china shop. I’m bringing in an energy of reform where I can look at things from a generic point of view. For instance, we’re bringing in real data; understanding the data, getting a proper data set that we can rely upon and make relevant measurable outcomes, and looking at the ramifications of what we’re doing. People say numbers aren’t important, but they are important in any modern society. Any modern court must have very good empirical data. We also must make sure we’ve got quality outcomes and are not over-labouring the judges. Improvements shouldn’t come at judges’ expense, particularly their mental health.

We must make sure that we have a proper business case for reforms, to ensure they will lead to a desirable outcome. We have to be able to measure the outcomes and we have to make sure that when we go to government and say we want more resources, we are able to say “here’s a business case for it, these are the efficiencies we’ve already put in place, and this is what you can expect out of the resources you give us.” It’s total accountability. Part of that is transparency. We have to make sure we’re very transparent about what we’re doing and about our results.

VBN: There’s going to be another inquiry, do you think that’s going to make any difference to your work?

CJ: We welcome any informed suggestions that will assist and any objective information about improving the system. However, regardless of legislation, regardless of any inquiry and regardless of politics, or what’s said by tabloid journalism, we will improve this system internally. We’re not going to wait for people to tell us things we already know.

WHAT IS **'GOOD LEGAL WRITING'?**

Lessons from the Bench

Mastering the art of modern advocacy—improving our written submissions

THE HON ANNE FERGUSON, THE HON MELINDA RICHARDS, THE HON KEVIN LYONS

Barristers are encouraged to improve the quality of their written submissions. But how to do this? Seminars can help. However, it is rare to receive feedback or tips from the very people we must persuade, being those we appear before.

To help guide us through the maze of what works, and what doesn't, we are delighted that Chief Justice Anne Ferguson, Justice Melinda Richards and Justice Kevin Lyons from the Supreme Court of Victoria have shared with readers some of their thoughts and insights.

Can you recall an occasion, when reading written submissions, when it struck you that the writer was particularly effective in their style or approach? What was it that struck you?

Chief Justice Ferguson: Good structure and clarity of expression always make for persuasive writing. The best written submissions nearly always have both.

Justice Richards: I recall reading the third of three sets of written submissions in a case where there were some unfamiliar concepts and a great deal of relevant case law. I had read the other submissions, both of which were reasonable, but which had lost me in lengthy discussion of the authorities, and had left me feeling confused. The third set of submissions was a breath of fresh air. The first page set out, clearly and succinctly, the propositions made by the party in support of the conclusion it urged me to reach. The balance of the submissions followed the structure set on the first page. The submissions were both concise and full of substance. They synthesised the principles to be drawn from the numerous authorities. There was no turgid waffle. In parts, they were really interesting. After reading them, I felt that I understood the issues that I had to resolve in order to decide the case, and what authorities I needed to read first. Happy judge.

Justice Lyons: On the eve of a busy directions day, I received short submissions (1½ pages) from counsel for the defendant setting out the four issues in dispute, what the defendant wanted and why. It was concise, focussed—and a great help.

Consider the types of things, when confronted with written submissions, which lead to an 'inner groan'? What would you like to see eradicated from written submissions, never to be seen again?

Chief Justice Ferguson: Submissions that spend time on weak arguments.

Justice Richards: I dislike a long excursion through the case law, unless (which is rare) it is necessary to the issues I have to decide. It is particularly aggravating if there are long slabs of text reproduced in the submissions, without a synthesis of the relevant principles.

Justice Lyons: Delete the (often pejorative) adverbs and adjectives.

Ken Hayne AC QC has been an advocate and proponent of Bryan Garner's method of framing arguments with 'issue statements' that take the form of major premise and a minor premise followed by a question. Are issue statements helpful?

Chief Justice Ferguson: Framing the issue as a question the judge has to answer is helpful. If you think about it, the approach by a barrister should be: what would help me if I was the judge? What would I want to know? Essentially that comes down to the question that the judge has to answer. So framing the question and the answer in written submissions is a good approach.

Justice Richards: I find a statement of issues to be enormously useful, both in running the trial and in writing my judgment. It is an effective way of 'sweeping the porch' of issues that have fallen by the wayside or have been agreed before trial. It is a touchstone for relevance throughout the trial. And it helps me to write a shorter judgment in less time.

It works best when counsel can agree the statement of issues close to the trial, and then structure their opening and their closing submissions to address the issues. When that hasn't happened—for example where there is a self-represented party—I will sometimes provide my own draft statement of issues and invite comment before finalising it and asking the parties to use it in their closing submissions.

Justice Lyons: I have had no experience with them. But I find statements of issues for trial invaluable: even if they require modification at trial or during the process of writing the judgment.

How can advocates write simply and clearly without detracting from the complexity of the law?

Chief Justice Ferguson: Often the law is not as complex as submissions suggest. One approach is to first outline a skeleton of the key principles and then elaborate on them to the extent necessary.

Justice Richards: Pay heed to George Orwell's rules from *Politics and the English Language*:

1. Never use a metaphor, simile, or other figure of speech which you are used to seeing in print.
2. Never use a long word where a short one will do.
3. If it is possible to cut a word out, always cut it out.
4. Never use the passive voice where you can use the active.
5. Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.
6. Break any of these rules, sooner than say anything outright barbarous.

I would add one more rule, which is to avoid using double (or triple) negatives if possible.

Applying these rules will help, as Orwell said, to cut out "all prefabricated phrases, needless repetitions, and humbug and vagueness generally".

Rules 2, 3 and 4 are particularly helpful in achieving clear and simple writing. It is hard to avoid breaking rule 5 in legal submissions, but it is always possible to use English rather than Latin.

Justice Lyons: Spend time formulating and identifying the key propositions of law you rely on based on your analysis of the relevant authorities. It will assist you in identifying the key factual findings you seek the court to make. It will assist the judge in understanding your case.

Now is your chance to tell barristers how they can improve their written submissions! If there is an insight you would like to impart not covered above, we would love to share it with our readers.

Chief Justice Ferguson: It is more difficult to write concise, tight submissions than a long, rambling dialogue. But the extra effort is worth it. Well-formulated, tightly written submissions are far more powerful. They are far more likely to persuade. The risk of your good points being lost in too much rhetoric is reduced.

> "Write plainly and directly about the issues that the judge has to decide. Concise, well thought out submissions are more effective (and welcome) than lengthy, rambling ones."

Justice Richards: Write plainly and directly about the issues that the judge has to decide. Concise, well thought out submissions are more effective (and welcome) than lengthy, rambling ones.

Justice Lyons: Be as short and concise as possible. See also 2 and 4 above.

And finally, on a personal note, is there an aspect of the process or construction of judicial writing which has surprised you (in a good way)? What do you most enjoy?

Chief Justice Ferguson: I have a very keen interest in good communication and the positive effects it can have. Writing is one of the most enjoyable aspects of my role. It gives me an opportunity to explain the decisions that I make. I only have one chance to do that. I don't have an opportunity to elaborate or add anything after my reasons are published. So I enjoy the challenge of thinking carefully about how I express myself and doing the best that I can to make my reasons clear. I enjoy writing summaries of judgments. And while the summaries are not a substitute for the full written reasons, summaries do give an opportunity to write for and engage with the broader community.

Justice Richards: Writing in order to understand and determine an issue is a different exercise from writing to advocate and persuade. I find that writing is often the best way to organise my thoughts on a complex issue. It is satisfying to find that the process of writing has unpicked a knotty problem and brought me to an answer.

Justice Lyons: I have not reached the stage where I could say I have 'enjoyed' any part of writing a judgment. Maybe enjoyment will come with time!

WHAT IS 'GOOD LEGAL WRITING'?

A Third Edition of Jesting Pilate

JUSTIN WHEELAHAN

Lord Wilberforce said, "There is no such thing as a substandard Dixon but from time to time there is Dixon at his superb best." Sir Ninian Stephen noted that Sir Owen's pellucid prose displayed "that same happy fluency of style, that felicity in the expression of deeply held conviction and all the civilised rationality of the man."

An issue of *VBN* devoted to good legal writing would be incomplete without mention of the launch of the third edition of *Jesting Pilate, and other papers and addresses by Sir Owen Dixon*, published by Federation Press, and launched on 24 July 2019 in the Supreme Court of Victoria Library.

It was Jim Merralls QC who originally saw the need for a new edition. After his passing, the Hon Susan Crennan AC and the Hon William Gummow AC assumed the task of editing. They have contributed, respectively, 'Sir Owen Dixon: The Communist Party Case, Then and Now'; and 'Sir Owen Dixon Today' to the Introduction titled 'The Standing of Sir Owen Dixon', which charts Sir Owen's career as a jurist, and his influence on the jurisprudence of the High Court.

As the editors state in the preface:

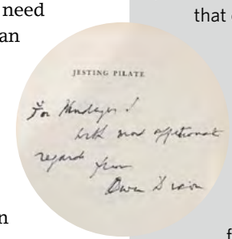
> The signature essay, "Jesting Pilate", written at the height of Dixon's powers, is full of his mature preoccupations: "If truth is an attribute which can be ascribed to a purely legal conclusion then it should be within our reach." As with the more complex version of this point in the Banking Case,[1] Dixon's severe and realistic qualifications look backwards to Roman law and to Bacon and forward to Foucault and Rawls. It is Dixon's characteristic restraint which guarantees the continuing vitality of his remarks, notwithstanding ever evolving conceptions of truth and justice.

Mrs Rosemary Merralls provided the editors with unpublished materials, diaries, and correspondence, which enlarged the editors' perspectives, and enabled them to add previously unpublished material. The third edition includes two articles from Jim Merralls, 'The Rt Hon Sir Owen Dixon, OM GCMG, 1886-1972', originally published in the ALJ, and 'The Library of Sir Owen Dixon'—which first appeared in Issue 160 of these pages.

At the launch, Justice Maxwell, the President of the Court of Appeal, introduced the Hon Susan Crennan AC and Professor Michael Crommelin, Zelman Cowen Professor of Law at Melbourne Law School, to launch the new edition. What follows is an extract from that speech.

I would like to remind those present—as I have been reminding myself—that the story of Sir Owen Dixon's judicial career really begins here, in this court and in this library. As many of you will know, Sir Owen's first experience of judicial life was as an acting judge of the Supreme Court of Victoria for a period of just under six months, commencing on 21 July 1926. Today being the 24th of July, that is just over 93 years ago.

As Phillip Ayres points out in his celebrated biography of Sir Owen, it was a remarkably productive period for Dixon A-J. Of the reported single judge decisions from that period, Dixon was responsible for 16, more than three times that of any other judge.



The first of two reported decisions was given on 2 August 1926, the hearing having taken place on 23 July (two days after he started). The 1926 volume of the Victorian Law Reports then includes two decisions from 9 August, one each from 11, 15, 16 and 25 August and two from 27 August! In no case had he reserved his decision for more than a few days. Such industry, such productivity, puts us all to shame!

And, as Ayres suggests, one need only dip into one or two of those judgments to recognise the unmistakable Dixon style. In one case, a question had arisen as to whether the phrase "business of a class usually carried on in a shop" was so vague and so uncertain of application as to make the relevant Council by-law bad for uncertainty. His Honour thought not:

> There are difficulties of definition familiar in other branches of law as to when particular instances come within some general conception in whatever language it may be expressed. It is no doubt unfortunate that general language and general expressions are resorted to, but it was not intended to impose upon the municipal authorities any greater degree of precision than is customary in the draftsmanship of ordinary legislation.[2]

Now it must be acknowledged that, at the end of this brief period, Dixon declined the offer of permanent appointment to the court, having (as he later put it) "made up my mind that I would never be a judge." We nevertheless claim some small part of the credit for the extraordinary career which followed.

1. *Bank of New South Wales v Commonwealth* (1949) 76 CLR 1 at 340.
2. *Gill v City of Prahran* [1926] VLR 410, 413.

INSET: A first edition of *Jesting Pilate* with the inscription "to Windeyer J with most affectionate regards from Owen Dixon"

INSCRIPTION IMAGE COURTESY OF FEDERATION PRESS.

Writing Tips For Barristers

An interview with Jock Serong

JUSTIN WHEELAHAN

Jock Serong practised as a barrister and solicitor between 1995 and 2013. He was a member of the Victorian Bar for six years, primarily in the areas of crime and native title. He took a sea change from the Melbourne Bar to Port Fairy, where he worked for a Warrnambool law firm. After moonlighting as a writer for *Surfing World* and founding *Great Ocean Quarterly* magazine, Jock traded his job in as a partner to write fiction full-time. His novels are published in Australia, France and Germany, and have received accolades in Australia, the US, and England. The working title for Jock's forthcoming historical novel is *Guncarriage*—a sequel to his most recent book *Preservation*, reviewed in our last issue. *VBN* took the opportunity to chat to Jock when he was back in town teaching writing at the Judicial College, about Lord Denning, back yard cricket, and weeding out the dross.

Lord Denning had a knack for opening lines, like, "In summertime, village cricket is a delight to everyone." (*Miller v Jackson* [1977] QB 966). What was your first line in *The Rules of Backyard Cricket*?
I had to look it up! There's quite a lot of thought in the editing stage about how to open the novel, set the right pace, reveal things in the right sequence, so often what I think is the opening line, has in fact wound up somewhere back in chapter eight. But the lines were:

> The broken white lines recede into the blackness as we hurtle forward. Do you remember this? I knew it in childhood; this feeling of the irretrievable past slipping away behind the car. These things, gone and unrecoverable.

The lines are a recollection of things I was thinking when I was ten and I broke my collarbone playing with the cousins at my grandfather's house. Sitting in the back of the car, looking out at the night sky feeling sorry for myself with my arm in a sling. I was a moody kid. I thought the world had come to an end.

Stendhal read a few pages of the French Civil Code each morning as a model of clarity when writing *The Charterhouse of Parma*. Did you read a few sections of Subdivision B of Division 8 of Part 2 of the *Migration Act* (1958) to get you going on *On the Java Ridge*?
I'd be more likely to read legislation as a way of getting to sleep at the end of a writing day...

I do have little routines to get going, though. My current one is watching the last five minutes of the Nick Cave doco, *Twenty Thousand Days on Earth*. It's concert footage of Cave playing Jubilee Street in the Sydney Opera House, overlaid with him narrating his thoughts about creativity. It's remarkably beautiful: his words, but also the edit, which builds with the music and interleaves images of Cave as a younger man: "All of our days are numbered. We cannot be idle. To act on a bad idea is better than to not act at all. Because the worth of the idea never becomes apparent until you do it."

There's an Elizabeth Gilbert interview with Tom Waits from about 2002 about his song writing methods. It's plain mad, and it's a reminder that it's okay, perhaps even necessary, to let go of rational thinking and let the wheels spin. David Foster Wallace's 2005 commencement address at Kenyon College, entitled *This is Water*, breaks my heart still. I must've read it a hundred times now.

Jim Raymond says you should draft your submissions like you are explaining the case to a neighbour over the back fence. How can barristers write clearly about legislation that's Byzantine in its complexity?
Distillation. Another way of thinking about Occam's Razor is that any idea worth its salt should be reducible to simple speech. If it's not, then it's a series of ideas and you haven't reduced far enough yet. But I think also Raymond might be making assumptions about his neighbour. What if the neighbour's really smart and you can be as florid as you want?

Walking's very helpful for this process. Or pulling weeds. Any light physical activity that has a rhythm to it. I think very often being at your desk is the worst environment of all, because what you're saying to your unconscious brain is 'let's do this the same way we did it yesterday, and the day before...' That's only going to reinforce the sticking points. You need to break habit, do something else, sneak up on the problem.

Ken Hayne AC QC has advocated for Bryan Garner's method of framing arguments with 'issue statements'. Do you plan out the structure of a novel beforehand, or does it evolve?
I've written five novels, and I think I've approached all five in differing ways.

Sometimes, yes, I've planned carefully. *Preservation* is an example of a very mapped-out story (and it's probably no coincidence that the novel is concerned with geography, as much as with people). With *Java Ridge* and *Backyard Cricket* I wrote towards the ending, not knowing what I'd find there. I suspect this is a point at which fiction writing departs from legal writing.

You're hardly going to write an advice, or a judgment, with mindset, well, let's just wander in here and see where the story takes us...

In your first novel, *Quota*, there is a great scene where the protagonist, a barrister, tells a sardonic supercilious magistrate what he really thinks about him, which leads to a contempt charge and disciplinary action. Was it cathartic to live vicariously through your characters and write what you could never say at the Bar?
It was—I suppose most advocates have felt that way at some stage or other, that overwhelming urge to just let fly. Clients, onlookers, even court reporters don't seem to grasp this; that there's an argument going on but it exists within a set of invisible parameters that have tensile strength, are built from experience, strategy, ethical rules, respect for the institution. There's a corollary to this: arguing with a loved one and they explode with "Aargh! Stop being such a lawyer!"

When I wrote that scene, I was still practising (as a lawyer, I mean. I'm still practising being a novelist.) I took some actual court transcript and copied the font and formatting (the numbered lines, courier typeface, caps lock across the top, etc.) and dropped my scene into it, then put it on an email, subject line "Did you hear about this?" I sent it to a few lawyer friends. When the replies came back along the lines of "OMG! Who was this?", I had a feeling the scene was about right.

The best advice you got from your editor was that you can cut vast amounts out of a story, and you're only going to improve it. Does the same principle apply to legal submissions?
Yes, but there's a limit. If you cut down to the bone, it makes reading harder, because all of those adjectives and adverbs, which appear otiose, in fact have a role in digestibility. They assist the reader in sliding between ideas, pausing for breath. At the level of language, we do actually need some lipids to keep our coats glossy. Nobody wants to live on pulses and steamed fish.

You can think of editing in two ways: either parsing the language word by word and line by line; or removing concepts, paragraph by paragraph. Obviously the latter is more efficient in terms of reducing word count, but it takes confidence to know you can safely ditch entire blocks of analysis.

I think we all know when we're reading legal writing that's as tight as a drum. The language inspires trust in the logic.

My memory of it—and bearing in mind I was no expert at all—was that reading submissions to a court was an excellent measure of whether you'd edited tightly enough. If I was on my feet and my eyes were frantically darting all over the document looking for the crucial set of words that would frame the idea, then that probably meant I hadn't pulled it together in the drafting.

> “It was—I suppose most advocates have felt that way at some stage or other, that overwhelming urge to just let fly.”

Which bears out the old notion that experience is what you get right after you needed it.

What was your advice to the judges at the Judicial College?
In no particular order:

- Think of drafting long works as a bell curve: the piece will get longer and longer as the ideas tumble out; it’ll briefly plateau as you take stock of what you’ve assembled, then it will begin to reduce.
- In any tough period of drafting there’s value in reading small bursts of something beautiful and unrelated before, or even during, the task. (Try some Australasian poets—Omar Sakr, Selina Tusitala Marsh, or a novella like Max Porter’s *Grief is the Thing With Feathers*).
- There’s value in having two screens: one shows a source document—the legislation, the transcript, the authority you’re citing—the other shows the document you’re writing. If you were doing the process longhand, this is what you’d be looking at: an open book and a pad of paper on the desk; so why not replicate that method? When we raise and drop windows in one screen, we’re putting a small barrier in the way.
- Never delete: cut text away and keep it in a “dump” document. It’s amazing how often you need it again.
- Resist the terror that editing down is costing you all sorts of gems. You’re revealing Atlantis by lowering the sea level. Or something.
- Write to convince yourself, not to defend yourself against criticism. Defensive writing is timid writing, whether it’s the Court of Appeal or Marieke Hardy you’re afraid of.
- Don’t isolate yourself: we should try to be as collaborative as musicians. Any idea that can survive a verbal wrestle with an agile colleague over a coffee is a worthy one.

If you could meet any fictional legal character, would it be Atticus Finch?
I think it’d be Eamon Redmond, the judge in Colm Toibin’s *The Heather Blazing*. Or David Wenham’s immortal Johnny Spiteri in *Gettin’ Square*.

Which Australian High Court judge is the best writer in your opinion?
I couldn’t answer this in contemporary terms, but I remember thinking *Mabo No.2* was a high-water mark, and not just because I love the subject matter. It felt to me like there was a massive conceptual challenge laid before the court, to do something that had few antecedents and enormous ramifications. It reads like people grappling with something ethereal, as much as legal, and forming a series of sharply different intellectual alliances and oppositions: two joint judgments, two lone hands in the majority and a robust dissent from Daryl Dawson. The thinking in each judgment seems to emanate from an entirely separate intellectual reaction, like it was a Rorschach test for their understandings of tenure.

I like contrarians, too—Lionel Murphy, and Michael Kirby because he would reliably tip the conventional thinking about the problem on its head, whether you agreed with him or not.

When Napoleon met Goethe he said, “There’s a real man!”. Do you feel more like a real man now you are writer?
Not in any bear-wrestling sense.

All writers are subject to a measure of imposter syndrome: any minute now they’re all going to find me out. I’m a pretender, a fraud, I got away with it for a while but the jig’s up, etc etc.

I feel like I’m living a little bit closer to my abilities: that’s about as high as I’d put it.

WHAT IS ‘GOOD LEGAL WRITING’?

The last step to technical excellence: how to proofread

ANNETTE CHARAK

People judge. They judge in all kinds of situations, including when reading our documents. Our readers—instructors, leaders, opposing counsel, judges—are sometimes forgiving, acknowledging how easily one can make a mistake and this misspelt word might just be a typo. Other times, they are less forgiving, particularly where the “mistakes” are numerous. As barristers, we are assumed to know the rules of grammar, usage and spelling, but some barristers admit—readily, or not so readily—that their knowledge of grammar is sketchy. And even with a thorough knowledge of grammar and usage, we make mistakes (for interesting neuro-psychological reasons that I will not explore here).

Getting the content of our documents right goes without saying. But what can you do to produce *technically* excellent written work? To begin with, allow yourself time to reread the document after a break. Even 15 minutes while you do something else can make a difference, as we tend to see what we expect to see, not necessarily what is there. Clear your head and return to your document and you might see a little more of what is actually on the page.

Read for sense separately from technical errors. Check headings separately from body text and check names, references and citations as a separate exercise.

Something that some professional editors abhor, but I find useful with long documents is to start rereading from the middle. The beginning is often polished, but attention can wander as you read on. Or read different sections in an ad hoc order. A variation on this is to read the sentences of your document in reverse order, from the last sentence to the first one. It will slow you down, but that will help you pick up things you’ve overlooked and your brain is refusing to register.

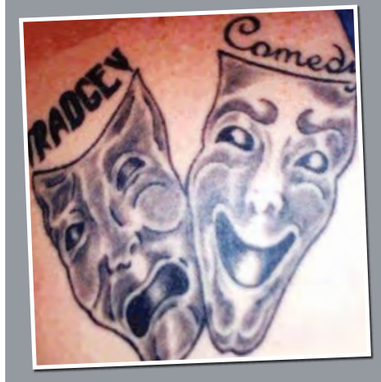
Read on paper rather than on screen and read out loud to pick up slips, like a missing word or a wrong tense or structure.

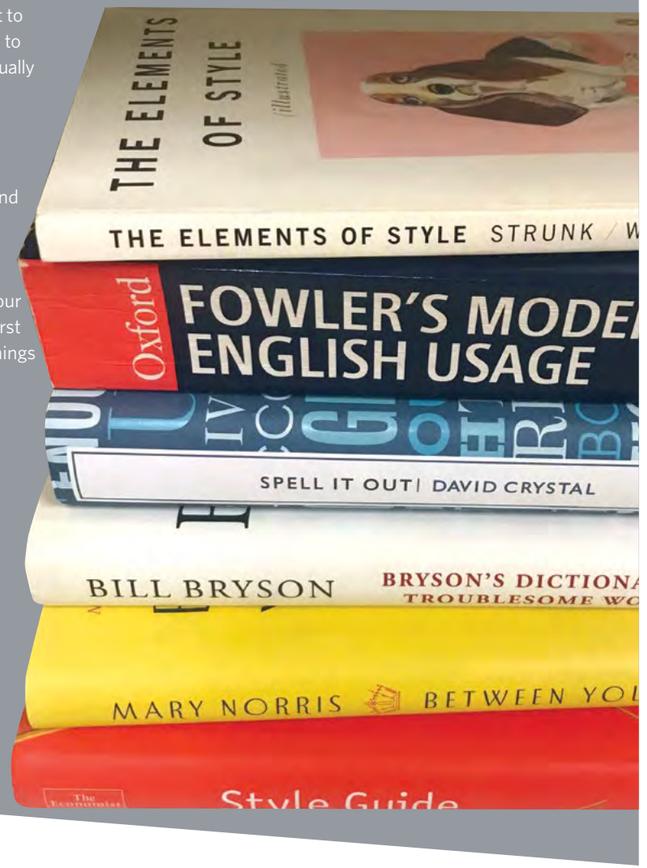
When writing something particularly complex or sensitive, try to have someone else read it to ‘test’ that your document does what you want it to do.

More generally, if you are even vaguely unsure of something, look it up online or revisit a grammar or usage text, such as the *Economist Style Guide or Fowler’s Modern English Usage*. For background or to shore up your punctuation skills, take some time with such delights as Mary (“Comma Queen”) Norris’s *Between You and Me* or Lynne Truss’s *Eats, Shoots and Leaves*.

None of this guarantees that you won’t make mistakes, but there’ll be fewer of them. And your readers might judge you well for it.

Annette Charak was an editor at Butterworths Law Books (now LexisNexis) for 10 years.





ABOVE: One reason why proof-reading is important: “Because failing to proofread can have tradegic tragic consequences” For more, see ‘69 excellent reasons why proofreading is important’ at Vappingo.com.

WHERE WE COME FROM II

VERONICA HOLT AND HAROON HASSAN

We are delighted that our stories of members of the Bar from diverse cultural and racial backgrounds has resonated so well. In Part II, we discover more about the family history of our Victorian barristers.

Charles Scerri QC

Charles Scerri QC is no stranger to sleep deprivation. It comes with the territory when you are father to 11 children and have (at last count) 18 grandchildren. It is, to put it mildly, an extraordinary achievement. Charles, in his typically humble way, showers praise on his loving wife Clare whom he met at Sunday school and married in 1973.

But Charles' story starts half a world away in Malta. He was the eldest of Richard and Josephine Scerri's six children. It was his parents' momentous decision to immigrate to Melbourne in 1954 that eventually led him to our Bar. It wasn't all plain sailing, indeed Charles recalls being sea-sick for all six weeks of the sea voyage from Malta. He was only three-and-a-half-years old at the time.

Richard and Josephine moved to Australia because of their desire to provide all their children with access to a better education and a better future. The Scerri family initially settled in Brunswick. Charles recalls that having relatives from Malta living close by made the transition to life in Australia much easier. Whilst Charles' memories of the early days in Australia are vague, he remembers that the major cultural difference for him was food. Family functions were a celebration of great food including traditional favourites, such as Maltese soup and ravioli.

Charles attended Saint Ambrose's primary school in Brunswick and later went on to St Bernard's where he completed his high school education. He says his decision to study law was influenced in part by his admiration of Raymond Burr's iconic television portrayal of 1960s TV lawyer Perry Mason and a love of debating.

Charles enrolled in law and commerce at the University of Melbourne. His very last law exam was on his 21st birthday. His first job was as an auditor. Whilst working full time, he completed his commerce degree and went on to complete a Master of Laws degree (with four children in tow by this stage).

Scerri Family, Anglesea, January 2018

He went on to work at Mallesons, where he was elevated to the partnership. He came to the Bar in 1986 leaving behind a successful career as a solicitor just as he and Clare were expecting their seventh child! He says he was motivated to go to the Bar because he wanted to run interesting cases and as a solicitor, he would sometimes only get to work on one trial per year.

Despite his enormously successful career in the law, of his 11 children only one (his daughter Catherine) has followed in his footsteps and studied law. She now works in the Philippines with Bahay Tuluyan (House of Welcome) an NGO which cares for and supports street kids. Catherine has two foster children whom she is seeking to adopt and Charles sincerely hopes they will all be able to travel to Australia to attend the Scerri Christmas celebrations.

At the wedding of Adrian and Shivaun, 2018

On diversity at the Bar and in the profession more broadly, Charles notes that in his personal and professional life he has hardly ever experienced any prejudice. Overwhelmingly, Charles considers that the legal profession has been accepting and supportive.

Lisa De Ferrari SC

Lisa De Ferrari SC once seriously considered pursuing a career as an architect. Instead of designing buildings, today you are far more likely to find her honing her craft in appeals and trials where she carefully constructs elegant arguments and robust submissions on behalf of her clients.

> It took me a while to find out what I wanted to do. How was I going to make a living? … When I told my parents that I was giving up my PhD studies in computer science and going to try law, my mother said, 'It's about time you did something practical'. Not sure what she would have thought about architecture.

Lisa's mother left Launceston in the 1960s and went travelling around the world, and on her travels in Italy she met Lisa's father. Lisa was born in Rome, to an Australian mother (of Scottish and Welsh background), and an Italian father (born, however, in Libya). During her childhood she travelled between Australia and Italy, spending periods of time in Tasmania with her extended family. She regarded Australia as her second home, at the time.

In her early 20s, Lisa moved to Australia on her own. She initially lived in Canberra and enrolled in computer science at the Australian National University. For a time, she considered a career in academia, enrolling in a PhD in computer science, but decided that it was not for her.

> A career as an academic was too abstract, I realised. I didn't want to just do research over many years and write peer-reviewed papers. I wanted to do something more immediately practical. A lot of my friends had studied law and some had gone on to practise, so I thought I would try it, study law, for a year and see if I liked it.

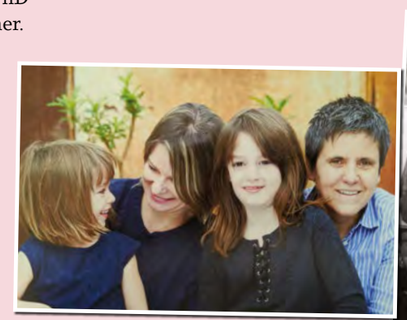
Lisa enrolled in law at the University of New South Wales. When she graduated, she worked in Sydney as a solicitor at Mallesons. She then moved back to Canberra to be an associate to the Honourable Justice McHugh of the High Court of Australia. At the Court she was exposed to interesting cases and had the opportunity to see great advocates in action. She then worked with the Australian Government Solicitor for a year, primarily doing advisory work.

Lisa was motivated to come to the Bar because she wanted to work in litigation as well as undertake advisory work. She decided to try it at the Bar for one year. She was called in 2002 and was appointed silk in 2017. It certainly seems to have been the right choice after all.

Lisa considers that the way she has structured and developed her practice has been influenced by her upbringing, mainly in Italy, and being an outsider.

> Not having grown up here, not having gone to school here, not having gone straight into law after high school, and my family background; all these factors have meant that I have been an outsider. Which has its advantages and disadvantages. There are barristers who have a linear career path, and then there are others, like myself, who choose a different pathway to the Bar. The way you form connections is different. But that is the good thing about the Bar.

Lisa says that she has been very fortunate to have been supported by many great barristers throughout her career.



ABOVE: Lisa and her family, Melbourne 2017.
RIGHT: Lisa (back, right) and her family, Rome, 1971

Reiko Okazaki

Reiko Okazaki was born in Akashi, in the west of Japan, near the city of Kobe. She studied her undergraduate law degree at Waseda University in Tokyo, Japan. Later, Reiko completed her Master of Laws at the University of California in Los Angeles in 2009 and was then admitted to practice at the New York Bar. Reiko then decided to come to Melbourne to establish her practice in Australia and so in 2012, Reiko left for Melbourne, travelling here on her own. She was 27 years old.

Reiko's decision to leave Japan was in part due to cultural perceptions about women.

> Women in Japan face unequal opportunities and widespread harassment in the workforce and society at large. The qualities necessary to practise my craft such as critical thinking and open communication are discouraged by my own culture, particularly in women.

Reiko's grandmother would often say to her that she walked and talked "wrong" because she stood up straight and spoke the truth.

> It was difficult for my grandmother to understand why I believe everyone deserves respect, or why I must work so far away in order to live an authentic existence. Perhaps I can never reconcile this; I feel all the more grateful to Australian society, the legal community and the Victorian Bar that has welcomed me.

Reiko notes that in Japan, deference to authority and prioritising the perfect façade means that problem solving in open court is considered one of the worst nightmares for an individual. Reiko hopes that her background and experiences prior to being called to the Victorian Bar make her more relatable to clients and instructors.

On diversity in the profession, Reiko has taught law subjects at Monash University for the past four years and notes that the student body is quite diverse. She has also often been approached by her students for career advice asking what it is like to be a young woman immigrant at the Bar. She is hopeful that more students from diverse backgrounds will follow her example and join the ranks of the Bar.

Reiko, at her graduation ceremony from Waseda University, 2008. INSET: Reiko, 1987

Rozeta Stoikovska SC

Rozeta Stoikovska SC was born in Bitola, North Macedonia, when it was part of the now former, Federal People's Republic of Yugoslavia. Rozeta immigrated to Melbourne in mid-1968 with her parents and younger twin sisters. She was nearly 10 years old and did not speak a word of English.

Rozeta and her sisters went to Footscray Primary School, on Geelong Road and walked together to school every day whilst her parents coped with life for the first time as factory workers. At primary school, Rozeta was one of a few migrant children. She recalls that not being able to speak English was challenging for her at the start. However, she remembers that her teacher would sometimes take her out of class to teach her and she was accompanied by another young migrant student from Greece—Mary. A lifelong friendship ensued between the two students.

For Rozeta, the biggest cultural difference between Australia and Macedonia was the language barrier and the fact that her teachers changed the spelling and pronunciation of her name. For much of Rozeta's primary and high school life, she accepted this. Later in high school Rozeta reclaimed her Macedonian name.

Rozeta went on to complete high school studies at Maribyrnong High School. Here, there were students from a diverse range of backgrounds because there was a migrant reception hostel close to the school. Midway through high school, Rozeta decided that she wanted to become a lawyer. Her decision was in part due to her experience acting as an interpreter for family friends:

> When people needed interpreters, I was relied upon. I was borrowed by friends of the family and used to interpret for them. In this role, I saw arrogant and discriminatory practices. This, combined with the stories my parents would come home with, stories from the factory floor where migrant workers had been discriminated against, particularly female workers, influenced my decision to practice law.

At a young age, Rozeta became aware of the existence of unfairness and decided that she could have an impact on this by becoming a lawyer. She was also motivated by a desire to have an independence her parents did not have. Moreover, her parents encouraged her and her sisters to obtain an education as the path to prosperity and importantly, dignity:

> I decided that law would be an area where I could determine my own fate. In my own young mind I imagined that law would give me the freedom to be my own boss. I thought it would give me independence and a voice.

Rozeta studied law at the University of Melbourne. She later worked as a solicitor for two years and came to the Bar in 1984. She believes she is the first Macedonian barrister in Victoria. Rozeta met her future husband during the readers' course in March 1984—also a member of our Bar—Ken MacFarlane. They have been married since 1987 and have two children, Natasha and Robert.

The new life, Rozeta and her twin sisters in Melbourne

Rozeta, with her husband Ken and children Reert and Natash, Melbourne, 2017

Rozeta and her family, in coats made by Rozeta's father, a master tailor, Macedonia, 1966

TOP: Karina and her father, Dhaka, 1988; MIDDLE: Karina and her mother, Donetsk, 1989; ABOVE: Karina and her family, Dhaka, 1997

Karina Popova

Family plays an important and significant part in Karina Popova's life. She draws on cultural influences from her father's Bangladeshi culture as well as her mother's Eastern European culture.

Karina Popova's parents met at medical school in Ukraine. Her mother is half-Russian and half-Ukrainian and her father is Bangladeshi. Karina was born in Donetsk, in the former USSR, which later became Donetsk Ukraine and, more recently, Donetsk People's Republic.

Karina lived in Donetsk until she was 10 years old and as a result was multilingual. Her first language was Russian and at school she learnt to speak Ukrainian. In her early childhood years, Karina spent some time with her family in Bangladesh and so she also spoke Bangla growing up. It wasn't until 1995, when Karina and her family immigrated to Auckland, New Zealand that she learnt to speak English.

Her parents left Ukraine because they wanted a better life for their children:

> My parents were concerned about the pervasive violence and corruption and what it would mean for me and my sister growing up. People were getting robbed in our local dog park. There were bodyguards outside of the local school. It was not a safe place. You had to bribe anyone and everyone to get anything done.

In 1999, Karina's family immigrated to Melbourne. When she arrived in Australia with her family, she immediately noted certain cultural differences including family, food and humour. She says:

> Cuisine is much more exciting in both Ukraine and Bangladesh. To this day, I find traditional Aussie food, that is, roast and three veg very bland. I think, how could you take such perfectly good ingredients and make them taste so unappealing.

In terms of attitude and humour, Karina found that there is a big difference between Australia and Ukraine, as well. Karina suspects she has inherited her mother's Eastern European dark sense of humour and sarcasm.

Karina's decision to study law and practise as a barrister was influenced greatly by her upbringing in Ukraine. Karina's extended family (on her mother's side) are all still in Ukraine. Of her motivation to study law and become a barrister she says:

> I wanted to be part of an impartial legal system, where people got a fair go and where the outcome didn't depend on bribes. To this day it influences the type of work I do pro bono. If I think there has been an abuse of power or an attempt at a cover up I am much more inclined to say 'yes' to a pro bono brief because I think it's that kind of work that keeps the legal system in the (mostly) good shape that it is now.

Karina notes that she has not encountered any challenges at the Bar because of her upbringing, but says that people often ask her at social functions: "But where are you really from?"

> If I say Ukraine, people seem confused because I'm not as fair skinned as most Ukrainians – and then I have to explain about my parents ... maybe from now on I can just direct them to this article!

Miguel Belmar

Miguel Belmar was born in Santiago, Chile. He moved to Australia with his family in September 1978. He was six years old at the time. He did not speak a word of English when he first arrived in Melbourne and his parents spoke very limited English. He grew up speaking Spanish at home and English at school.

Miguel has distinctive memories of the early days in Australia—which was so different to Chile. One of the most prominent memories is the first time Miguel visited a supermarket:

> We didn't have supermarkets where I grew up. We had weekly street stalls and a tiny corner store. I remember seeing my first supermarket full of food and being impressed.

His family initially settled in a migrant hostel in Springvale, which is now a retirement village. It briefly operated in the '90s as an immigration detention centre. Miguel remembers that there were families from all over the world staying at the hostel including many from South America and South East Asia. Miguel attended Springvale Primary with many of the children from the hostel. It was a culturally diverse upbringing. One of the first challenges for Miguel was being slotted into grade one, in a completely different environment, where all lessons were taught in English. After primary school, Miguel went on to secondary school, in Dandenong. It was during his high school years that Miguel started thinking about studying law. Miguel reflects:

> Children at my school were not encouraged to aim to study law. The school was doing well if you got into university. I started to develop this interest in law in high school and I think it was that personal drive which pushed me through my studies. I was also a nerdy kid and one of the things I was interested in was reading about politics. Many politicians had law degrees and I thought that the law must be empowering. I also enjoyed watching LA Law. There was a Latino lawyer in the show.

> "I was also a nerdy kid and one of the things I was interested in was reading about politics."

Miguel enrolled in a law degree at Monash University and aspired to come to the Bar. He enjoyed mooting at university and was attracted to the lifestyle of a barrister, specifically, the independence. Miguel was also conscious of living up to the opportunities provided to him by his parents' decision to move to Australia.

He says his resolve to join the Bar was strengthened when he read judgments and noted the names of the barristers appearing in those cases – many with non-Anglo surnames: he learned they were Jewish.

> For me, reading those appearances as a student, and speaking to Jewish mates at university made me realise that being culturally and linguistically diverse, was not a barrier to a career at the Bar.

He has still found that to be the case and has experienced only support from colleagues.

Miguel, outside his childhood home in Santiago, Chile, 2015

Miguel with his grandmother in Santiago, Chile, 1995

NEWS AND VIEWS

Advocates for Change: lessons from a consciousness-raising experience

The word 'consciousness' derives from the Latin *conscientia*. Until the early 17th century, consciousness was used in the sense of moral knowledge of right or wrong, what is today referred to as *conscience.* (Christof Koch, 2004)

Consciousness-raising, in the modern sense, has its origins with New York Radical Women, a 1960s women's liberation group in New York City. The concept involved regular meetings in people's homes. Women talked about the issues in their lives. Consciousness-raising quickly spread throughout the United States and beyond. Works, such as Carol Hanisch's famous essay, "The Personal is Political", ensured that consciousness-raising groups were not some form of psychological therapy. They represented a valid form of political action.

Fast forward several decades, and consciousness-raising has found a surprising new home.

A 2018 notice from the Law Institute of Victoria provides the context:

> Solicitors are to be invited to join Justice Chris Maxwell's gender equality campaign. The President of the Court of Appeal will write to individual solicitors and firms inviting them to join Advocates for Change to help achieve equity, including pay equity, in the legal profession. Justice Maxwell lit on the idea of starting Advocates for Change for barristers after becoming a Champion of Change in 2015. In that role, he has publicly encouraged equality within the profession and criticised sex discrimination. Justice Maxwell has convened two groups of male barristers—one comprising senior counsel, the other junior counsel. The groups started meeting a year ago to discuss ways in which they could support and advocate for women at the Bar. Both groups have heard from women barristers on their experiences of discrimination. Now, he would like to see men and women from the solicitor arm of the profession join the discussion, with a group starting in October.

Background

The Male Champions of Change, of which Justice Maxwell is a member, has received publicity over the past decade. As it should. When it began in 2010 with eight Australian leaders, the concept was a novelty. The Victorian group, established in 2015, has 24 members. At its heart is the idea that men in leadership positions should be made accountable for driving change on gender equality within their organisations. In other words, it's time that men "stepped up" to support the efforts which women have been making for decades.

A key feature of Champions of Change is accountability. Each year the group publishes a progress report. This outlines what members have worked on, naming the contributions of organisations. Progress requires lots of experiments, and lots of listening and learning. This is openly acknowledged in the annual report.

Justice Maxwell had already publicly supported and promoted the adoption of the Law Council of Australia's gender equitable briefing of barristers' policy. Establishing Advocates for Change was his own idea. The concept initially involved encouraging 15 senior and 15 junior members of the Victorian Bar to work together to advance the position of women at the Bar.

> "Justice Maxwell had already publicly supported and promoted … gender equitable briefing… Establishing Advocates for Change was his own idea."

So, how did Justice Maxwell find the experience?

"It was surprisingly successful", his Honour says. "It's a reflection of the quality of the participation. It succeeded way beyond what I'd hoped, due to the participation of both men and women. The Bar should be proud of what its members are doing …"

As to the origins of the project, "Through participating in Champions of Change I'd been learning a lot from the work being done by the leaders of companies. I wanted to see if this mutual learning could be replicated in discussions with barristers". After asking people for names, he invited the aforesaid 15 senior and 15 junior counsel. They all said yes. They were all men at that stage.

He recalls the first meeting clearly. It was the senior counsel group. The opening comments were positive. The seminal moment was when one participant said, "It's a terrific idea but I'm feeling uncomfortable being in a group of men. It's exclusionary. We don't know what women actually experience at the Bar." It was agreed that women should be invited to the next meeting.

His Honour refers to this as part of the learning experience. His initial male-only model for Advocates for Change was based on his experience with Male Champions of Change. Yet he realised swiftly the need for the group to hear about the day-to-day experiences of female barristers. The junior counsel group acknowledged the benefit of male-to-male accountability but soon followed the lead of the senior group by inviting women barristers to join.

Justice Maxwell then spoke to junior barrister Kathleen Foley. His Honour was familiar with Kathleen's own engagement in and advocacy of the CommBar equitable briefing initiative. Would she attend these meetings and bring other women? Justice Maxwell met with them in chambers in advance. They wanted to know what it was about, and what their involvement would be.

Kathleen says, "We didn't know what to expect or how the sharing of our experiences would be received. Nevertheless, we all spoke frankly about our lives as women barristers—the good, the bad and the ugly. I felt many of our male colleagues had their eyes opened to the different experiences of women at the Bar. I think the process is an important part of the work being done at the Bar to achieve greater equality between men and women."

Fifteen women in all attended the "Advocates for Change" meetings over the period 2017–18. They came from a mix of practice areas and seniority (although most were juniors). They spoke frankly of their own experiences, some commenting that this was the first time they had been able to do so in a safe environment.

It is, of course, important to respect the confidentiality of what was discussed during these sessions. It is equally plain that the candour of the female participants made attendees sit up and listen. Raw and unfiltered stories told first-hand had a powerful impact. Yet it was not all bad news. There were also warm and positive stories, including tales of great mentors and how they had helped.

Charles Scerri QC, who participated in the senior counsel program, says, "I work with women solicitors and barristers very often, and with six daughters, I thought that I was aware of gender issues. Only very rarely have I found resistance to the briefing of a woman junior. However, I was very surprised and disappointed at the prevalence of inequality experienced by women at the Bar. Some 'raw and unfiltered stories' certainly were shared. If we remain unaware of the gender inequality issue we will not address it. And it must be addressed because inequality is fundamentally unjust and has no place in our justice system. I think that the most important benefit of the Advocates of Change process was to raise awareness."

What were some action items?

Discussion in the groups focused on what an individual (male) barrister could do to make a difference. The free exchange of ideas and experiences was most instructive. For example, when one senior barrister said that he always kept a list of female junior counsel by the phone to facilitate recommendations to instructing solicitors, others said they would adopt the same practice.

At each meeting, individual barristers would report back on what they had done since the previous meeting. Thus, one barrister had made a point of recommending a female junior whenever he himself was unavailable; another had stepped in when he perceived that a female barrister was being spoken to inappropriately; a third said that he had made a welcoming phone call to a female barrister newly admitted to his list.

The process of reporting back reinforced both the collaborative nature of the exercise and the sense of accountability to each other.

The solicitors' program

His Honour is equally positive about his solicitors' Advocates for Change program. One group is made up of managing partners and other senior partners, the other of mid-level lawyers and senior associates. There has been a steady shift from talking about policies and procedures to sharing experiences and ideas in a frank and open way. The groups recently decided to continue meeting in 2020.

The experience overall

Asked to reflect on the overall experience, his Honour is very positive. "The goodwill has been overwhelming", he says. "Everyone who chooses to participate is committing to learn more, and to do more. The supportive nature of the environment encourages openness and creates a feeling of solidarity."

Justice Maxwell acknowledges his debt to his unofficial female focus group, who helped drive the agenda. "It simply would not have worked without them." After a period of time they asked him, "Where are we going with this?" He recalls being told, "We've done the show and tell".

So, after four meetings with each group (eight in total between them), he proposed that the meetings for barristers in late 2018 would be the last. The groups agreed. "We felt we had reached a level of awareness, and individual responsibility, where formal meetings were no longer required. I hope that there will continue to be a ripple effect as a result of the ongoing efforts of individual participants".

In the role of President, his Honour keeps a close eye on the Court of Appeal statistics. At the initiative of Justice Tate, the Court has for the past four years recorded appearances by gender. His Honour says, "The percentage of female counsel with speaking parts in the Court of Appeal remains stubbornly and dispiritingly low. This is especially true in civil appeals."

Practice Notes encouraging trial counsel to be briefed on appeal, and to share the advocacy burden between junior and senior counsel, have an eye on improving equivalent gender representation, as well as ensuring that junior counsel benefit from the experience of appellate advocacy.

Conclusion

It is unclear whether his Honour has been fully backgrounded in the history of 1960s consciousness-raising. Yet what the President set out to achieve, and did achieve, is precisely the "personal is political" philosophy underpinning the women's liberation movement.

Natalie Hickey

Turn that frown upside down? Why happiness may be overrated

NATALIE HICKEY AND MEG O'SULLIVAN

The Duchess of Sussex, Meghan Markle, recently said when promoting her documentary *Harry & Meghan: An African Journey*, "It's not enough to just survive something. That's not the point of life. You have got to thrive. You have got to feel happy." She said this when providing a rare glimpse into the challenges of royal life.

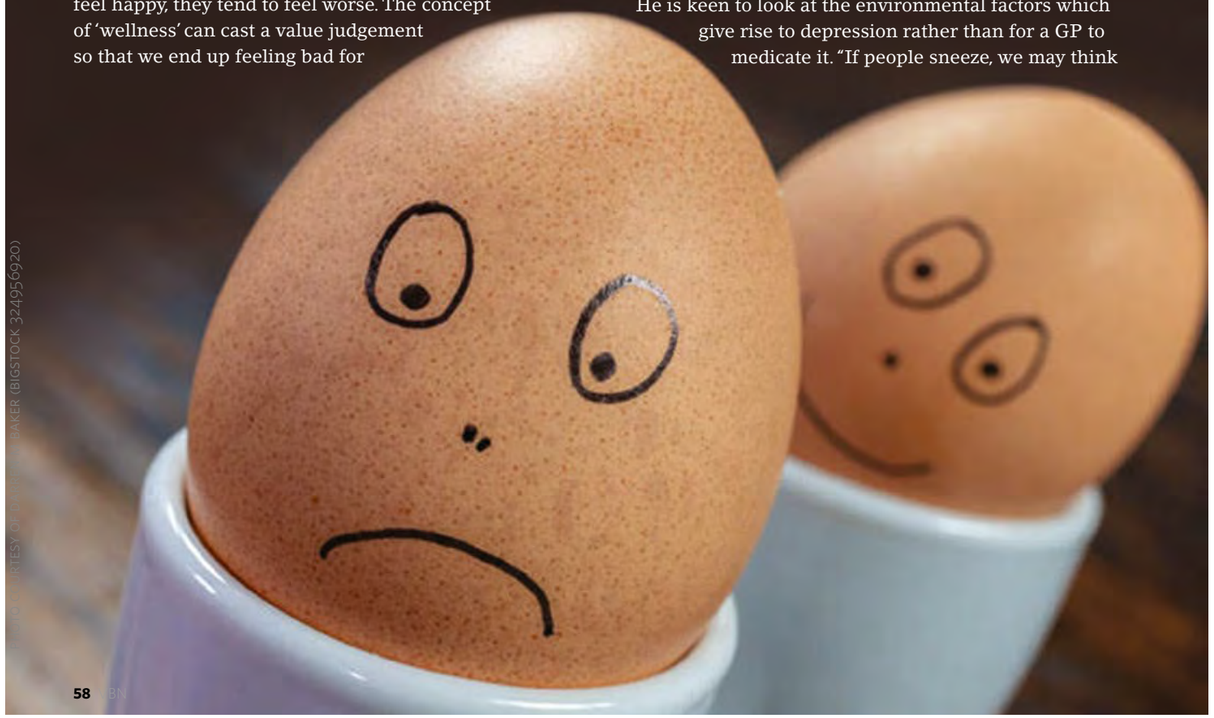
Dr Brock Bastion, an associate professor in the School of Psychological Sciences at the University of Melbourne, would likely take issue with this statement. His research on well-being has concluded that promoting happiness may have a downside. Valuing our painful and negative experiences in life may, in fact, provide a critical pathway to achieving a meaningful and well-lived life.

Brock says, "The problem with the happiness movement is that it says we shouldn't have negative feelings. The happiness movement does not accept negative feelings and being comfortable with them." He explains that a key aspect is the perception people have of how others view them. When people are *expected* to feel happy, they tend to feel worse. The concept of 'wellness' can cast a value judgement so that we end up feeling bad for ourselves because we don't feel well enough, Brock adds.

"What we know in psychology, is the concept of secondary disturbance", he says. "People walk through the door anxious about feeling anxious. A lot of panic is fear of having a panic attack. This leads to agoraphobia—people stay inside. The more you place a value over it, the more it makes you feel worse. The more you run away from it, the more extreme the reaction."

Depression is listed as the leading cause of disability worldwide. Yet, the research shows an interesting pattern. Depression is far more prevalent in Western cultures, such as the United States, Canada, France, Germany and New Zealand, than in Eastern cultures, such as Taiwan, Korea, Japan and China. Brock says this shows that depression is a modern health epidemic that is also culturally specific. People have reported the same level of negative emotions across these cultures, he explains. However, in the East, negative feelings have not translated as much into depression. He suggests that Western cultural values which prize happiness are playing a role in promoting the depression epidemic.

He is keen to look at the environmental factors which give rise to depression rather than for a GP to medicate it. "If people sneeze, we may think of pollen, not 'what's wrong with you'", he says.



COURTESY OF ANDREW BAKER (BIGSTOCK 324956920)

In a study, Brock and his research colleagues examined how 100 people responded to an experience of failure. They were asked to solve anagrams, some sets of which were solvable while others were not. In the case of participants who solved few anagrams (because they had been allocated the unsolvable ones), the researcher expressed some surprise and disappointment saying,
"I thought you may have gotten at least a few more but we'll move on to the next task".
Some participants dealt with this experience in a normal (bland) testing room. Others were in a testing room decorated with positivity slogans ('stay happy'), self-help books on happiness, and a photo of the researcher with friends enjoying themselves on holiday.

What was found? Participants who experienced failure in the happy room were three times more likely to ruminate on the cause of their failure, being the anagram task, than those in the bland room. The more these people ruminated, the more negative emotions they experienced.

Brock says, "My interest has been driven by a tendency [of people] to overvalue happiness and to fail to see some of the value in negative experiences". We have a negative side for a reason. He observes, "It's evolutionary; without it we might not survive". He adds, "We need painful experiences to be happy." For instance, "After a long day when you have a glass of wine, the euphoria is not there if it has been an easy day." He also refers to a runner's high, and the physical effort associated with this. "We know that effort creates value", he says. "If it's easy, we don't value it in the same way. If we fail to expose ourselves to the prospect of failure, we don't put ourselves to the test."

Brock prefers to focus on *meaning* rather than positivity. "Meaning is very important", he says. He contrasts hedonic well-being to the eudaimonic approach. The latter focuses on meaning and purpose including social connections. "Meaning often runs in opposite to happiness", he says. For example, he refers to the fact that parents will often report higher levels of meaning, but lower levels of happiness.

One gains the impression that Brock is not a fan of the wellness movement. He says that mindfulness, when one doesn't feel stressed and is in a calm state, is a good place to be. "But you don't find meaning", he says. "We find meaning when we push ourselves outside our boundaries of comfort, when we are experiencing life to its extremes". He notes that some of our most important social connections are those which come from negative emotions shared, not positive emotions. After all, some of our professional experiences may be all the sweeter because they come off a low period.

> "We find meaning when we push ourselves outside our boundaries of comfort, when we are experiencing life to its extremes."

Speaking of barristers, our workloads are notoriously high. Is that such a bad thing if we are getting satisfaction in our work? Brock responds that challenge necessarily involves adversity, work, and pain. This is known in psychology as 'the challenge / threat theory'. "So, when we are challenged by our work, we develop personal resources to cope with the work." However, he warns that, "when demand outweighs the resources to cope, performance goes down". He says, "As long as you are challenged—and positively engaged —then that's okay. But we need to still look after ourselves". Apparently, psychologists can track stress to a physiological level. They can track heart rate, pulse rate, and blood pressure. They can therefore see people shift from challenge to threat mode.

What tips can he recommend to barristers? "Keep your expectations low!", Brock says. "Most mental illness is driven by displaced emotion. There is no mandate that we have to be happy on Christmas Day. Social pressure gets ramped up. After Christmas our private patients ramp up", he says. Many family law barristers are likely to report similar outcomes.

What about if we are in the moment of feeling down? "Let it be", he says. "It will pass. The more willing you are to let the emotion be, it will pass". Brock also advises, "Let other people in. The sharing of negative emotions can be very valuable".

He personally finds exercise incredibly important. Whilst one may not find Brock in a yoga class, he says, "it is hard to think of anything else when exercising hard". He also recommends good nutrition. Whilst he cannot lay claim to have any expertise in the area, he values health, including healthy eating. Sleep is also important. "People come in for psychological practices, but if they are not eating well or exercising it is harder to assist", he says. "The shorter-term benefits make you feel better".

Accordingly, the next time someone seeks to empower us with "You've got this!" or some other positive slogan, the answer may lie in responding, "No, I don't!". There is something quite comforting about that.

Dr Brock Bastian is the author of The Other Side of Happiness *(2018). His work has been featured in* The Economist, The New Yorker, TIME, New Scientist, Scientific American, Harvard Business Review *and* The Huffington Post. *His innovative approach to research has been acknowledged with the Wegner Theoretical Innovation Prize. He has delivered popular talks, such as TEDx St Kilda.*

Students completing the SEC pilot program in December 2018

SEC committee member Sebastian Reid speaking at a local high school in 2018

Hands up: your Student Engagement Committee at work

AMANDA BURNNARD, ERIN HILL AND GERARD O'SHEA

Searching for a new year's resolution? The Student Engagement Committee is here to help. Read on for how you can make a difference in 2020.

What We Do

The Student Engagement Committee (SEC) was formed in 2011 with the objective of making the Victorian Bar an accessible and attractive career option for budding legal practitioners. Eight years on, the SEC continues to provide information and inspiration to students across Victoria.

> "I really enjoyed going around and viewing all the court cases and participating in a mock trial… The time I have spent with you will help me to make decisions about my future study and career options over the next few months and beyond" STUDENT TESTIMONIAL

Student Shadowing

Some years ago, the SEC began offering students the opportunity to spend time with barristers. In 2016, the SEC matched 53 students with barristers; by 2018, this number had grown to 163 students.

As student numbers increased, but the number of available barristers did not, the SEC adopted a different approach. As part of a pilot program in December 2018, tertiary and secondary students attended a multi-day structured program together. As well as shadowing barristers, the students toured chambers and attended sessions with the Supreme Court of Victoria and the Juries Commissioner.

The SEC ran a further pilot program for Victoria University students in late 2019. Instead of attending in one block, students shadowed barristers over several weeks, giving barrister volunteers and students increased flexibility. It was a great success.

In 2020, the SEC intends to focus on tertiary students, running similar programs with other universities. Students from culturally or linguistically diverse backgrounds will receive priority for placement in these programs.

An insight into life at the Bar

SEC members attend law school careers fairs and present at both universities and high schools, speaking directly to students about life at the Bar. The SEC contributes to law school careers publications as well, publishing the Victorian Bar's *Becoming a Barrister* booklet. In 2018, the SEC also contributed to the inaugural VicBar Open Day, welcoming university students to the Bar with presentations and panel discussions.

> "The experience was incredibly rewarding; there honestly was not a single minute I found unenjoyable. I learnt a lot, not only about law, but also about the work environment in general. I met a host of truly amazing people and just had a lot of fun overall." STUDENT TESTIMONIAL

The SEC has a strong online presence both at www.vicbar.com.au/students and on our *VicBar for Students* Facebook page.

Law Week: advocacy in action

The SEC also participates in Law Week, an annual event run by the Victoria Law Foundation. In 2018 and 2019, SEC members staged original live performances at the County Court to showcase the role of a barrister.

We Need You

The work of the SEC depends on the generosity and availability of VicBar members. We encourage all barristers to consider hosting a student in 2020 and beyond. The time commitment is as much or as little as you are able to give, and SEC members are on hand to assist if the barrister volunteer suddenly becomes unavailable.

www.vicbar.com.au "STUDENTS"

So, make this your new year's resolution for 2020: put up your hand to host a student and join us in our efforts to reach as many students as possible. Contact students@vicbar.com.au today to register your interest.

SEC committee member, Shaun Ginsbourg, writer and director of Law Week live performances.

PHOTO CREDIT: PHOTON (BIGSTOCK 310959226)

What remedies are available under the *Charter*?

THE HON JUSTICE PAMELA TATE, JUSTICE OF THE COURT OF APPEAL

When I have a conversation with a barrister that turns to Victoria's *Charter of Human Rights and Responsibilities*,[1] there is one question that is guaranteed to arise: what remedies are available under the *Charter*? Quite properly, barristers are seeking to protect their client's interests and are keen to know how the *Charter* might be used to support the relief the client needs. This is a response to that question.

Section 38(1) of the *Charter* imposes an obligation on public authorities to act compatibly with human rights and, in making a decision, to give proper consideration to human rights. A contravention of this obligation renders the conduct or decision unlawful. Under the *Charter* the following remedies have been granted, or sought but refused on the merits, for a breach of human rights by a public authority (that is, a breach of the obligation under s 38(1) of the *Charter*):

- Prohibitory injunctions;[2]
- Mandatory injunctions;[3]
- A permanent stay of a criminal prosecution;[4]
- Orders in the nature of certiorari quashing a decision;[5]
- Setting aside of orders made;[6]
- Exclusion of evidence;[7]
- Habeas corpus;[8]
- Declarations that decisions made were unlawful;[9] and
- Orders remitting decisions to be re-made according to law.[10]

In the *Barwon Prison Case*[11] the Court declared as unlawful decisions made by the Governor in Council that established a youth justice centre and remand centre at an adult maximum security prison, Barwon Prison. The Court also prohibited the Secretary to the Department of Justice and Regulation from detaining children at a place of detention that had been declared unlawful and directed the removal of one of the plaintiffs from Barwon Prison to a youth justice precinct.[12]

In *Castles v Secretary of the Department of Justice*[13] the plaintiff successfully sought declaratory relief against a refusal by the Secretary of the Department of Justice under the *Corrections Act 1986* (Vic) to enable a low-security prisoner to continue with in vitro fertilisation treatment, consistently with her right under the *Charter* as a person deprived of her liberty to be treated with humanity and with respect for her human dignity.[14] The court made a declaration that "IVF treatment for the plaintiff's infertility is both necessary for the preservation of the plaintiff's health and reasonable within the meaning of s 47(1)(f) of the *Corrections Act*".

In *Baker*[15] the applicant sought a permanent stay of a criminal prosecution on the ground that he had lost the opportunity to be dealt with by the Children's Court. He was a child at the time of the offending but an adult by the time he was charged. He alleged that the delay by the Director of Public Prosecutions to file criminal charges against him in the Children's Court before he became ineligible to be dealt with in that jurisdiction amounted to a breach of the right he had as a child to the protection of his best interests.[16]

In *Bare v IBAC*[17] the Court made a declaration that the decision of the Director of the Office of Police Integrity not to investigate Bare's allegation of mistreatment by police officers, but instead to refer the complaint to the police for internal investigation, was unlawful, of no force or effect, and contrary to s 38(1) of the *Charter*. In addition, it made an order in the nature of certiorari quashing the decision and "remitted [the matter] to the Independent Broad-based Anti-corruption Commission … for it to make a fresh decision in relation to the correct course for dealing with [Bare's] complaint, under s 58 of the *Independent Broad-based Anti-corruption Act* 2011".

Where a remedy has been refused it has not been on the basis that the remedy is not available for a breach.

There are also other paths to relief that do not rely upon a breach by a public authority.[18]

The *Charter* does not itself enumerate the remedies that are available.

This is in part because there is no *Charter*-specific cause of action. However, rights can be relied on in a legal proceeding in Victoria if another cause of action is also relied on. Section 39(1) of the *Charter* reads:

> If, otherwise than because of this Charter, a person may seek *any relief or remedy* in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek *that relief or remedy* on a ground of unlawfulness arising because of this Charter.[19]

The terms of s 39(1) are difficult and have given rise to multiple interpretations.[20] The need for another cause of action has been described as a 'piggy-back' requirement;[21] that is, reliance on the *Charter* is supplementary.[22] A litigant can rely on an independent cause of action if the same conduct gives rise to the *Charter* complaint. To succeed in litigation in respect of a human rights breach there is no requirement that the other cause of action be successful. It is arguable that there is no requirement that the other cause of action survive a strike-out application providing, of course, it is not merely a colourable attempt to attract jurisdiction. This issue has not yet arisen for determination.

> "The terms of s 39(1) are difficult and have given rise to multiple interpretations."

If you can seek a stay of proceedings at common law in respect of an act or decision of a public authority, then, if the circumstances also give rise to a breach of human rights, you can also seek a stay of proceedings by reason of that breach.[23] Similarly, if you can bring judicial review proceedings seeking to quash a decision of a government department, and obtain a mandatory injunction, then, in the event of a human rights breach, you can seek that same form of relief under the *Charter* regardless of whether the administrative law action succeeds. This is precisely what happened in the *Barwon Prison Case*.[24]

Section 39(3) expressly excludes an award of damages for a human rights breach. This stands in contrast to the remedies available under the United Kingdom's *Human Rights Act 1998* (UK). However, awards of damages made by the courts in the United Kingdom have been modest. They do not reflect awards in tort.[25] Awards are discretionary and are not to be made unless necessary to afford just satisfaction. They are often viewed as a remedy of last resort. Moreover, the United Kingdom Supreme Court recently reaffirmed that where damages are awarded this is not so much to compensate for losses but rather "to uphold minimum human rights standards and to vindicate those rights".[26]

There are many forms of relief available under the *Charter* that perform the primary purposes of: (1) bringing infringing conduct to an end; (2) vindicating rights by declaratory relief or by orders directing a public authority to take or refrain from taking action; and (3) seeking to ensure future compliance with human rights standards under law by deterring repetitions of unlawful conduct.

There is a great deal more that could be said about the remedies that are available for breaches of human rights under the *Charter*. Nevertheless, this summary might assist a busy barrister.

1. Section 1(1) of the *Charter of Human Rights and Responsibilities Act (2006)* provides: 'This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act'.
2. *Certain Children (by their Litigation Guardian Sister Marie Brigid Arthur) v Minister for Families and Children [No 2]* (2017) 52 VR 441, 594 [535(c)], 598 [550], 607 [584]–[586], 608 [588(b)(c)] (the *Barwon Prison Case*). Where I have described the effect of an order, or its exact terms are quoted, the source is the order made by the Court. The decision (published or unpublished) may not itself include the terms of the orders made.
3. *Barwon Prison Case* (2017) 52 VR 441, 594 [535(b)], 598 [550], 607 [585], 608 [588(b)(ii)]. See also *Slattery v Manningham CC (Human Rights)* [2014] VCAT 1442 where VCAT ordered the Manningham City Council to revoke a Proscribed Prohibited Person Declaration and directed it to

provide training on the *Charter* to its Councillors, Chief Executive Officer and Directors.

4. *Baker (a pseudonym) v DPP* [2017] VSCA 58 (*Baker*).

5. *Haigh v Ryan* [2018] VSC 474 [97]–[98]. The Court made an order "in the nature of certiorari … quashing the decision of the defendant … withholding four Tarot cards from the plaintiff for error of law on the face of the record, being the failure to comply with s 38(1) of the Charter in that proper consideration was not given to the human rights of the plaintiff under ss 14 and 15 of the Charter". The application for access to the Tarot cards was to be reconsidered in accordance with law.

6. *PBU v Mental Health Tribunal* [2018] VSC 564 [283]. The Court set aside the orders of VCAT, and the earlier orders of the Mental Health Tribunal, that two persons be subjected compulsorily to electroconvulsive treatment. See also *PJB v Melbourne Health (Patrick's Case*) (2011) 39 VR 373, 456 [374]–[375], where the Court set aside an order of VCAT made under the *Guardianship and Administration Act 1986* (Vic) to appoint an unlimited administrator over a disabled person's estate.

7. *DPP v Natale (Ruling)* [2018] VSC 339. The Court excluded evidence of admissions under s 138(1) of the *Evidence Act 2008* (Vic) on the ground that the evidence had been improperly and unlawfully obtained, including by reason of a breach of the *Charter*. The relevant paragraphs of the ruling are: [101] Under s 138(1), the defence has established that evidence of the admissions was improperly and unlawfully obtained. The prosecution has not established that the desirability [of admitting the evidence] outweighs the undesirability of admitting the evidence, especially having regard to the conduct of the police, which breached the right of the accused to an interpreter [under s 464D(1) of the *Crimes Act 1958* (Vic)], breached the obligation of police to obtain an interpreter and defer the questioning until one was present, and breached the obligation of police under the Charter to ensure that the accused received equal and effective protection against discrimination. [102] Evidence of the admissions will therefore be excluded.

8. *Antunovic v Dawson* (2010) 30 VR 355, 358 [4]. The Court ordered that the applicant be immediately released from a Community Care Unit.

9. *Burgess v Director of Housing [No 2]* [2015] VSC 70 [5]. The Court declared that a "decision of the First Defendant [the Director of Housing] to apply … for a warrant of possession … was unlawful by reason of s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)". See also *Minogue v Dougherty* [2017] VSC 724 [97] where the Court declared that the decision of a prison officer to return the plaintiff's mail to the sender unlawfully interfered with the plaintiff's right to receive correspondence uncensored by prison staff and in making the decision the officer failed to give proper consideration to the plaintiff's rights to privacy and freedom of expression under the *Charter*. See further *Bare v IBAC* (2015) 48 VR 129.

10. *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 683 [183]. The Court set aside orders of the County Court and remitted the matter, which involved two self-represented litigants, to a different judge for hearing and determination according to law. See also *Bare v IBAC* (2015) 48 VR 129.

11. (2017) 52 VR 441.

12. The relevant terms of the order were: "1. The two Orders in Council … being the decisions of the Governor in Council that established a youth justice centre and remand centre at the Grevillea Unit of Barwon Prison (Grevillea Precinct) as a remand centre and as a youth justice centre under s 478(a) and (c) of the *Children Youth and Families Act 2005* (CYF Act) respectively, were unlawful under s 38(1) of the *Charter of Human Rights and Responsibilities Act* (the Charter). 2. The Secretary is prohibited from detaining children at a place of detention that has been declared to be unlawful. 3. The transfer decision made … under s 484(1) of the CYF Act … to cause the removal of Marco Gillespie-Jones [a pseudonym] from Parkville to the Grevillea Precinct was unlawful under s 38(1) of the Charter. … 6. … the defendants by their employees, agents, delegates, or howsoever otherwise be, and are, restrained – (a) from detaining, or continuing to detain, at the Grevillea Precinct, any person in or deemed to be in, the Secretary's legal custody; (b) from detaining Marco Gillespie-Jones at the Grevillea Precinct, who must forthwith be removed to detention at either Parkville or Malmsbury Youth Justice Precincts".

13. (2010) 28 VR 141.

14. *Charter* s 22. The Court also ordered that the "Plaintiff has a right pursuant to s 47(1)(f) of the [*Corrections Act 1986* (Vic)] to such treatment while she is in the custody of the First Defendant, subject to the Plaintiff paying the costs of the treatment (including costs of medications, courier charges, blood tests and any extraordinary attendance of medical practitioners but excluding any escort or transport costs)".

15. [2017] VSCA 58.

16. *Charter* s 17(2).

17. (2015) 48 VR 129.

18. For example, see *Taha v Broadmeadows Magistrates' Court* [2011] VSC 642 (affirmed on appeal in *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1) where the Court quashed orders of a magistrate that each plaintiff be imprisoned pursuant to s 160 of the *Infringements Act 2006* (Vic) for failing to pay instalments on outstanding fines for traffic offences. The Court held that the magistrate misinterpreted s 160. See also *Nguyen v DPP* [2019] VSCA 20 [103]–[107]. See further *Cemino v Cannon* (2018) 56 VR 480, 524 [155] where the Court made orders in the nature of certiorari quashing a decision of a magistrate who refused an application by an Aboriginal person to transfer criminal proceedings to the Koori Court Division of the Magistrates' Court. The magistrate, not being a public authority, was not held to have acted in breach of s 38(1) of the *Charter* but to have committed "errors of law on the face of the record being the failure to properly exercise the discretion conferred by s 4F(2) of the *Magistrates Court Act 1989*, both in terms of the provision itself and the effect of s 6(2)(b) of the *Charter of Human Rights and Responsibilities 2006* on the exercise of the discretion". The effect of s 6(2)(b) related here to the right of the accused to equal and effective protection against discrimination in the context of court procedures, including through the use of the Koori Court as a special measure designed to protect against indirect discrimination on the basis of race.

19. Emphasis added.

20. There are two principal competing constructions of s 39(1): see *Bare v IBAC* (2015) 48 VR 129, 258–9 [394].

21. Dame Sian Elias, 'A Voyage Around Statutory Protection of Human Rights' (2014) 2 *Judicial College of Victoria Online Journal* 4, 14.

22. See *Bare v IBAC* (2015) 48 VR 129, 257 [392].

23. *Baker* [2017] VSCA 58.

24. In the *Barwon Prison Case* none of the administrative law grounds succeeded.

25. *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, 684 [19] (Lord Bingham).

26. *D v Commissioner of Police of the Metropolis* [2019] AC 196, 221 [64] (Lord Kerr with whom Baroness Hale and Lord Neuberger agreed, quoting from Lord Brown in *Van Colle v Chief Constable of the Hertfordshire Police* [2009] AC 225, 285 [138]).

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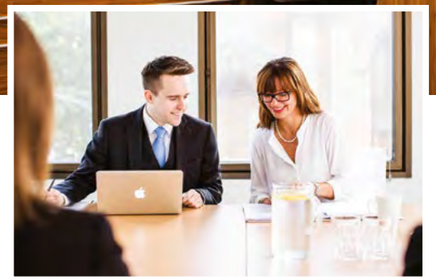

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Professional negligence claims at the Bar

LEGAL PRACTITIONERS' LIABILITY COMMITTEE

From time to time, barristers ask LPLC about the most common causes and areas of claims. As the compulsory professional indemnity insurer for Victorian barristers since 2005, we are well placed to answer the question.

While the incidence of claims against barristers is much lower than for solicitors, there are some regularly occurring themes in the claims profile for barristers that deserve risk attention from practising barristers.

Most risky area of practice

Commercial litigation has consistently been the most numerous (42 per cent) and costly area of claims for barristers. This is followed by personal injury litigation. We have also seen a slight increase in the family law area which is consistent with the claims against family law solicitors.

The errors that count

Mistakes most frequently arise around the settlement of litigation relating to either settlement regrets, no authority to settle, allegations of unfair pressure to settle or problems with release documentation.

Settlement regrets

Settlement regrets most often happen in personal injury litigation but also appear in commercial and family law litigation and frequently involve 'door of the court' settlements. Typically, the explanation for the recommendation to settle includes concerns about aspects of the client's credibility. These are legitimate concerns that an advocate needs to warn a client about, although ideally this would not happen for the first time at the door of the court, where a client may feel pressured into settlement with little time to consider the matter carefully.

No authority to settle

The common scenarios in 'no instructions to settle' allegations involve more than one client, typically a husband and wife or business partners, where one says later they didn't give instructions to settle. It is important to confirm instructions from all clients or confirm that one client has the authority to consent to settlement.

Whether instructions to settle were given will turn on the evidence. Where there is no written evidence of instructions, it becomes harder to defend. The best evidence will be the client's signature on the terms of settlement, or a copy of the draft orders to be handed to the court. 'Signing up' a client in this way is the best risk management to avoid allegations of breach of authority to settle.

Fig. 1 Number of Claims by Area of Law 2005-2019

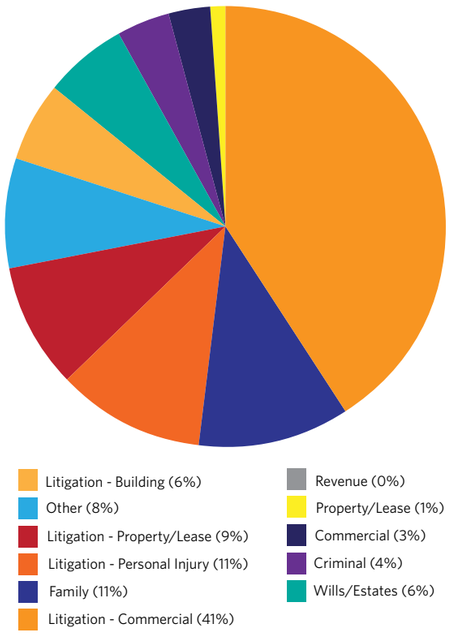
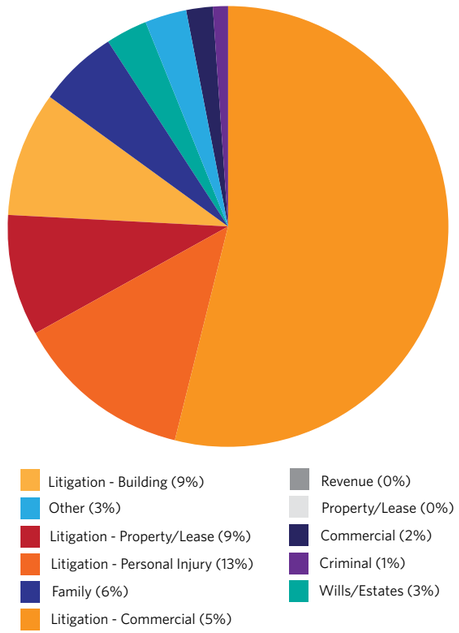
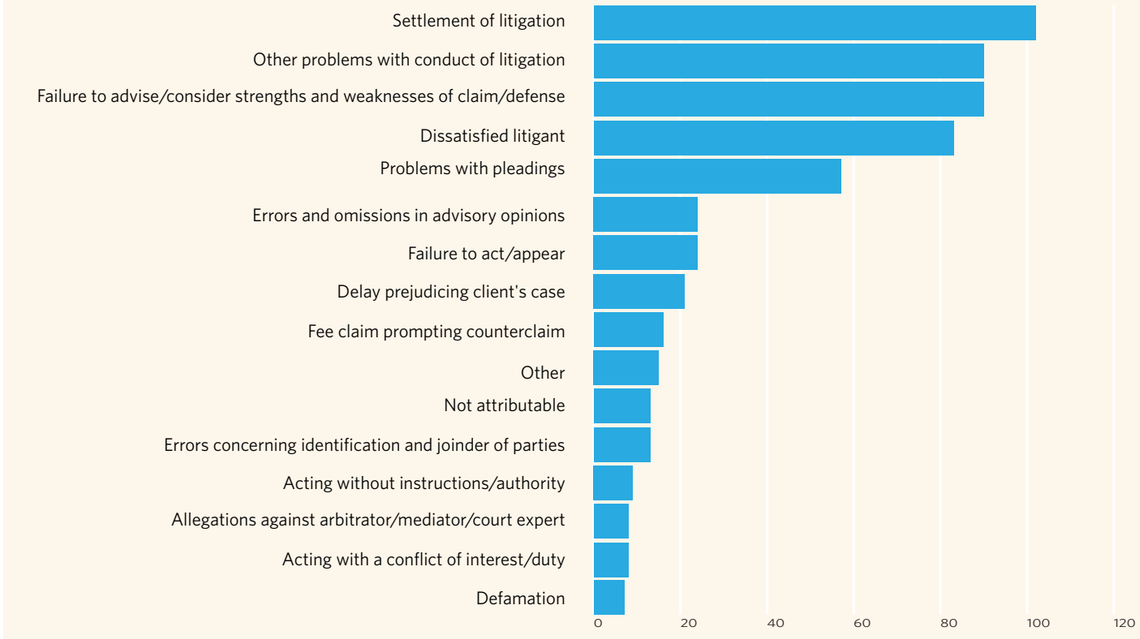


Fig. 2 Number of Claims by Area of Law 2005-2019





> "The best evidence will be the client's signature on the terms of settlement, or a copy of the draft orders to be handed to the court.."

Unfair pressure to settle

Clients often allege that a barrister pressured them to settle by:

- swearing at them
- intimidating them through raising one's voice, finger-pointing, talking over the client, or in one case, wig-throwing
- using legalese, instead of plain-English explanations
- behaving impatiently and rudely
- threatening to abandon them
- departing the settlement conference before it is finished.

These behaviours can leave a lasting impression on clients and fuel allegations of undue pressure and coercion.

In *Studer v Boettcher* [2000] NSWCA 263, the court accepted that it is appropriate for lawyers to put pressure on clients to do what is in the client's best interest. Persuasion is acceptable—even forceful persuasion—so long as it is devoid of self-interest. However, a lawyer is not entitled to coerce a client into a compromise, even if objectively it is in the client's best interests. Think carefully about the impact of your behaviour on the client.

Problems with releases

Sometimes there's a simple mistake in the drafting of the release so it doesn't accurately record the agreement reached or records it in a way that it is difficult to implement.

In some claims the release is either drafted too widely to prevent a future claim that the client intended to bring, or it is drafted too narrowly and does not eliminate a possible future claim.

Finally, the release sometimes does not deal with how the underlying proceeding is to be disposed of, leaving it open later for a party to pursue the matter further.

Late night or 'door of the court' settlements often contribute to these errors. Try and build in time to review settlement deeds with fresh eyes.

Stay vigilant

While many barristers will never face a professional indemnity claim, it is important for everyone to stay vigilant, particularly if you practise in the higher risk areas. Barristers of all seniority levels need to keep in mind the issues raised in this article when dealing with settlement to avoid becoming a professional indemnity statistic.

LPLC LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Free access to legal information - Are we taking a basic civil liberty for granted?

BY ANTHONY PERL AND RICHARD HUNTER*

As the Australasian Legal Information Institute (AustLII) approaches its 25th anniversary, readers may be surprised to learn that this ubiquitous legal resource is a not-for-profit organisation, dependent on regular donations to maintain its service. This raises questions about the value of free information. Do we take it for granted? What does AustLII need from us to maintain momentum?

In this digital age, the lines between information and knowledge are becoming increasingly blurred. The risk is undervaluing the vital role knowledge plays in ensuring our civil liberties. Access to and understanding the law is one of those foundational necessities to maintaining a civil society.

"Knowledge is power", is an often-quoted line attributed to Sir Francis Bacon. In more contemporary times, Nelson Mandela stated, "Education is the most powerful weapon which you can use to change the world." Bringing these two ideas together, in an editorial published in 2012 by then editor-in-chief of Deutsche Welle, Ute Schaeffer writes, "Knowledge is power, and education is the fundamental precondition for political development, democracy and social justice."


Meeting a need for free: From left, Andrew Mowbray, AustLII executive director Philip T. H. Chung and Graham Greenleaf

Picture: Chris Pavlich

Online portal beats a path to the law

AustLII is a shining light in the free access to law movement, writes **Bernard Lane**

'You should be able to access the law and you should be able to do it for free'

Andrew Mowbray, AustLII co-founder

Feature on AustLII in *The Australian*, November 9, 2005

Education is the dissemination of knowledge, which then empowers and promotes more effective participation in society. Knowledge is more than just information; it must include facts and skills acquired through experience. There are consequences for failing to value the difference between knowledge and information.

What of information about the law?

"Free access to the law is a human right. It is something we must never take for granted, especially where we value transparency and democracy." This was the underlying rationale that led to the creation of the Australasian Legal Information Institute (AustLII), says Founding Co-Director, Andrew Mowbray.

Prior to 1995, there was no generally available free access to case law or legislation in Australia. Government printers provided legislation for purchase and commercial publishers sold law reports. Lawyers relied on access to an adequately resourced law library, either located on their own premises or at a court, professional association or university library. For many new barristers or small firms, maintaining a library was an almost unaffordable cost.

For the general public, access to legal information was even more fraught. One had to purchase legislation from government bookshops, visit a state library and trust in the media to fairly and accurately report the outcome of court cases.

The advent of the World Wide Web in 1993 enabled the dissemination of content on a much broader scale. Legal academics with an interest in law and technology realised the possibilities for the publication of legal materials. In 1995, AustLII, under the co-direction of Graham Greenleaf and Andrew Mowbray, was developed as a joint facility of the Faculties of Law at the University of New South Wales and the University of Technology Sydney.

Mowbray explains, "From inception our intention in creating AustLII was to provide free access to the Australian public to the essential legal information needed for the rule of law and democracy to function effectively. In doing so, we believed we would also provide a service of great value to academic research, the legal profession, the business community and to courts and government as well."

Since that time, AustLII has grown to be the largest Australian provider of free access legal information online. The raw statistics tell a story of success:

- over 800 databases of Australasian legal information: legislation, case law, treaties, law reform reports, journal articles;
- over 2 million documents interconnected by over 80 million hypertext links;
- about 700,000 page accesses each day (230 million per year);
- among the top 1000 most accessed websites in Australia.

But these raw statistics mask a deeper way in which AustLII has changed the legal landscape in Australia. AustLII revolutionised access to justice and the rule of law, by making legal material freely available to anyone with an internet connection.

Newer generations of lawyers have been brought up on technology and on the ability to access and deliver free information to their mobile devices. They expect AustLII will be there with little thought of what is involved in making the information available. They do not consider who is paying for it.

There is an underlining current of a need for information to be freely available. However, where something is free, someone is always absorbing the cost, be it through a direct financial outlay or a voluntary labour force. The media sector tends either to adopt a user-pays subscription model, or politely to request a fee. Most media (outside of those paid for with taxpayer funding) are covered with advertising to subsidise costs.

AustLII has been providing free access to an ever-growing resource of reliable legal information for almost 25 years. About a decade ago, the AustLII Foundation Limited, a not-for-profit company limited by guarantee with charitable objectives, was established to sustain the operations and maintenance of AustLII's Australian databases, and to secure a long term funding base through donations from users.

It could be argued that the AustLII Foundation suffers from the 'Free Rider Problem', which is said to occur when those who benefit from resources, public goods, or services of a communal nature do not pay for them. Operating as a not-for-profit organisation, AustLII is reliant on donations to maintain and build its service.

Andrew Mowbray says of AustLII's funding model: "AustLII was created to 'free the law' in Australia from the various monopolies restricting it up to the mid-90s, and to innovate in the provision of legal information systems. We believed that it would be in the interests of institutional stakeholders to collaboratively support a free access model."

In Victoria, The Victorian Bar Association is an ISP provider for all barristers in Victoria. It has been for many years the largest single identifiable user of the AustLII service. AustLII identifies over 2 million 'hits' a year from the vicbar.com.au servers.

But yesterday's revolutionary innovation, particularly if it becomes as successful and ubiquitous as AustLII has become, can seem familiar and forgotten, assumed to be there and available, because it has always been there.

Is AustLII being taken for granted? Does that mean free access to the law is taken for granted? Does that mean our civil liberties are taken for granted?

So, who does pay for AustLII?

"AustLII asks all those who use its services to make an annual contribution that reflects the value they receive from it", says Philip Chung, AustLII's Executive Director. "We cover our costs but we don't really earn enough of a surplus to build a strategic reserve fund that will secure our existence in the long term."

The Victorian Bar makes a regular annual contribution. List A Barristers, Dever's List and Greens List also contribute. There are also generous donations from a number of individual barristers. But the truth is that the majority of users are not donating.


The AustLII frontpage, 1997

> "So, who does pay for AustLII?"

"Donations need to pay for the expectation that AustLII remains free. Our struggle is the expectation we will always be there, without truly valuing the depth of information provided. Imagine the challenges and costs of finding such a comprehensive alternative. It would place significant barriers on all citizens if they had to pay for access to a service that provided such comprehensive and integrated legal information resources," says Chung.

AustLII continues to plan strategically for its future. Its goal is to be recognised and accepted as critical national legal research infrastructure, providing comprehensive legal information, integrated through the use of cutting-edge information technology, enabling free and effective access to law for the community and supported by a secure and sustainable funding base.

"Imagine if we had the financial resources to achieve our ambitious goals," says Philip Chung. "We would be an Australian innovation the envy of lawyers around the world."

**Anthony Perl is an AustLII communications consultant and Richard Hunter is the AustLII development manager.*

BAR Lore

The Bar and the Eureka Treason Trials

DR PETER YULE AND DR GONZALES VILLANUEVA

*In late 2016 (*VBN *Issue 160), the commissioning of a new history of the Victorian Bar was announced, almost 50 years after the publication of* A Multitude Of Counsellors: A History of the Bar of Victoria *by Sir Arthur Dean. The author, Dr Peter Yule and his research assistant, Dr Gonzales Villanueva, have worked steadily on the project ever since, with publication anticipated for 2021. A taste of their vivid and rich writing is given in the extract below which recounts the trials of the alleged leaders of the Eureka Stockade revolt and their defence by six barristers, all newly arrived from the Bars of England and Ireland to the infant Victorian Bar. Against the odds, but decidedly with the tide of popular opinion, the accused were acquitted, and the barristers' reputations were made. However, for some of the barristers, their good fortune did not last.*

The discovery of gold in 1851 attracted immigrants to Victoria from around the world. Among them was young barrister Brice Bunny, who hoped to make a quick fortune on the goldfields before returning to the Bar in London. After many months of hard but unrewarded labour, Bunny's funds were running low and on 28 September 1853 he was admitted to the Victorian Bar, where he built a lucrative practice before becoming a County Court judge in 1873. Before 1851 only 13 barristers had been admitted in Melbourne, but Bunny was one of 67 English and Irish barristers who came to Victoria in the following five years. Only a handful tried their luck on the goldfields, with most seeing the Victorian Bar as a more fruitful field for advocacy than the crowded Bars of England and Ireland. The immigrant barristers brought with them the ethics and etiquette of the Bars of England and Ireland, and did much to shape the character of the Victorian Bar.

The etiquette of the Bar restricted the type of work barristers could engage in while waiting for briefs to arrive, or even while waiting to be admitted. It was completely unacceptable for a barrister to soil his hands with commerce. Journalism, however, was considered acceptable and many of the new arrivals worked for one of Melbourne's three daily newspapers, *The Argus, The Age,* or the *Melbourne Herald.* The most notable of these were Archibald Michie, Butler Cole Aspinall and George Higinbotham. Michie and Aspinall combined journalism with work at the Bar, but Higinbotham, while admitted to the Melbourne Bar, worked primarily as a journalist for most of the 1850s. Michie was a follower of John Stuart Mill and the 'philosophical radicals', and had sufficient funds when he arrived in Melbourne to buy the *Herald* to advance his political views, calling for a liberal constitution for Victoria, and for concessions to lessen discontent on the goldfields. The venture was a financial disaster and Michie was forced to sell the *Herald* in 1856.

George Higinbotham and Butler Cole Aspinall both shared Michie's liberal political views and Michie employed them both as journalists on the *Herald*, with Higinbotham being the goldfields' correspondent for several months leading up to the Eureka rebellion. When Michie sold the *Herald,* Higinbotham became editor of *The Argus,* resigning in 1859 after conflict with *The Argus's* increasingly conservative owners. Aspinall, like Higinbotham, had supported himself as a parliamentary reporter before his admission to the Bar in London in 1853. He came to Victoria in 1854 to be chief parliamentary reporter of *The Argus,* though he soon moved on to join Michie and Higinbotham at the *Herald.*

The best-known incident of the gold rush era was the skirmish at Eureka Stockade in December 1854 and its causes have been debated endlessly by historians. Was it the result of a mass movement of miners seeking democratic rights or a tax revolt by a small group who had not shared in the riches from gold? Whatever the origins of the conflict, after the event public opinion was decidedly on the side of the diggers. The press, largely under the influence of liberal barrister/journalists, condemned Governor Hotham and thousands rallied in Melbourne in the 'interests of liberty'. Despite this reaction, William Stawell, the attorney-general, charged 13 alleged leaders of the Eureka revolt with high treason.

The trials began before Chief Justice William a'Beckett on 22 February 1855. Stawell, and the acting Solicitor-General, Robert Molesworth, prosecuted for the Crown. Richard Ireland, Henry Chapman, Butler Cole Aspinall, Archibald Michie, Thomas Cope and Joseph Dunne, all recent arrivals from England or Ireland, appeared on behalf of the prisoners.

"The press, largely under the influence of liberal barrister/journalists, condemned Governor Hotham and thousands rallied in Melbourne in the 'interests of liberty'."

John Joseph, a 24-year-old African American, was tried first, with Chapman and Aspinall conducting his defence. Stawell set out the charges against him: making 'war against the Queen, with intent to subvert authority'; intending to 'injure the Queen and to force her to change her counsellors'; and attempting 'to compass and deprive the Queen of her authority in this colony'. The charges constituted high treason, for Stawell argued that 'conspiracy' and 'armed insurrection' were 'accompanied and preceded by overt acts which had a public object'.

For the prosecution, Trooper Henry Goodenough

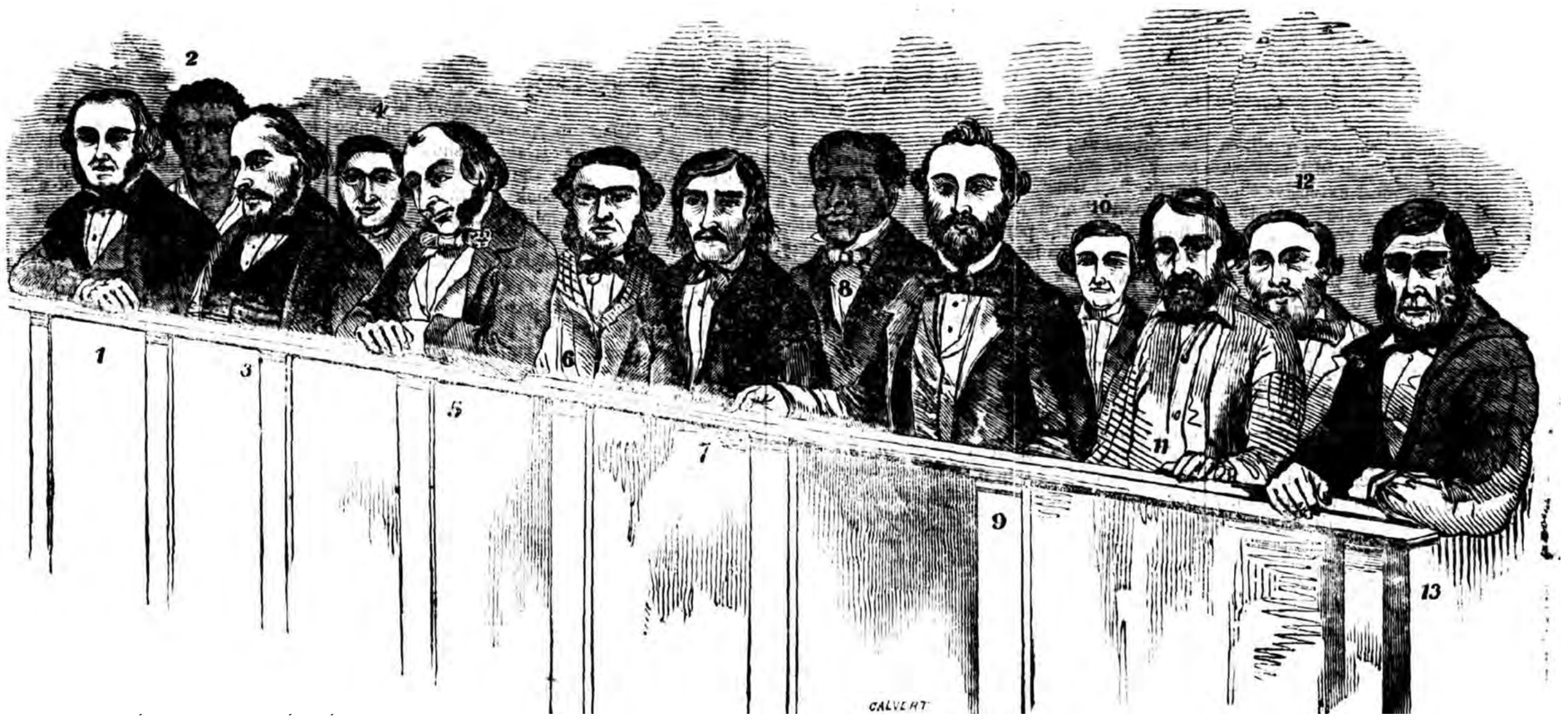


IMAGE COURTESY OF THE AGE

recalled a meeting at Ballarat, where those gathered vowed to 'take the law into their own hands' under the Southern Cross flag, and volunteers stepped forward to take up arms. Another trooper testified: 'I did not see any other black man' other 'than the prisoner'. A private of the 40th regiment claimed he saw Joseph, 'firing, and saw Captain Wise fall instantly'. Chapman objected that an individual bullet could not be sworn to, but this was countered by the Judge, who stated that the direction the gun was pointed was an important point.

On the second day of the trial, another private in the 40th regiment testified that he was a few yards from John Joseph when he saw him 'discharge one barrel of a double-barrelled gun' at Captain Wise. John Donnelly, also a private in the 40th, testified that he was 'sure the prisoner is the man' who discharged the weapon. Cross-examining, Chapman said: 'Recollect this is a serious question, affecting the life of the prisoner. He has a different skin to yours, but his life is at stake.' Donnelley maintained he was 'quite sure'. A sergeant in the 40th testified that diggers were being drilled and marching like soldiers. Under cross-examination, he said: 'I never saw a flag similar to the Southern Cross before the disturbance. There were plenty of flags flying about, but this was a very remarkable flag.'

Thomas Allen was called and cross-examined by Molesworth, the solicitor-general:

> What is your Christian name?
>
> Witness: Yes, that is the prisoner.
>
> What is your name?
>
> Witness: No, I have no pension at all.

The witness had fought at Waterloo and offered to sell his military skills to the diggers. The offer had been refused.

The defence did not call witnesses, but Chapman and Aspinall both addressed the jury on behalf of the prisoner. Chapman reminded them of the four charges and argued that none of those *intentions* had been proven. 'What was the character of the evidence, as to compassing or levying war, against the prisoner at the bar?' The Southern Cross flag resembled one used by the Anti-Transportation League, which Stawell himself had marched under; a different flag did not in and of itself constitute sedition; the public meetings were for the purposes of resisting the licence system; people

Butler Cole Aspinall

have a right to assemble, without arms, to 'resist the law'; licence burning concerned the individual, and was not a seditious act; the attack was a sudden, hostile engagement, 'just as a street riot is caused very often from the sudden meeting of two or three individuals, and the after joining of a crowd'; the Crown's witnesses were spies, and could not be trusted as they were deceptive by nature; the witnesses' testimonies could not be corroborated and their recollection of the substance of the speeches and the attack were inconsistent, vague, and incomplete; the prisoner was charged with high treason, not the murder of Captain Wise; there was some justification for the defence made by the parties inside the stockade, as the attacking troops did not state their business, read the Riot Act, or produce warrants; and that the men had the right to defend their house by force of arms, and that is all the incident amounted to. Chapman's speech was met with loud applause from the gallery.

In his address, Butler Cole Aspinall drew upon the prejudices around Joseph's race and class to argue the case was ridiculous:

> Gentlemen, there he is accused of an intention to subvert the British Constitution and depose Her Majesty, set up here as a sort of political Uncle Tom, and you must look upon him, I suppose, either as a stupid negro, a down south man, who had no conception of treason in his head, or … that he had some idea, that though a negro, in any British possession he was entitled to his liberties.

For the prosecution, Stawell argued the evidence was straightforward. The stockade was built for the explicit purpose of sedition and rebellion, and before the Riot Act could be read a volley was fired from the stockade. Six witnesses identified the prisoner as being there, four of them testified that the prisoner had fired a weapon, and one witness claimed the shot that killed Captain Wise came from the prisoner's gun. Though people have a right to assemble, said Stawell, they do not have the right to take up arms. They assembled with arms and erected a stockade with the object of levying war.

Justice a'Beckett summed up at great length to disabuse many 'erroneous principles' put forth by the defence about the law of high treason. He dismissed many of the defence's arguments: that those at the stockade could act in self-defence; that they were justified in committing such acts because of lawful licence hunting; and that colonial laws differed to the laws of Great Britain. A'Beckett regretted that these topics were introduced, for they had nothing to do with the case, but were 'exhibitions of neither good taste nor good law on the part of the counsel from whom they proceeded'. The question for the jury to determine was whether the prisoner was guilty of high treason. A'Beckett explained the legalities around assemblages, for the learned counsel had 'perverted' the subject. Treason was an 'inference from the other acts when proved', and anyone participating in insurrectionary assemblages with the intent of carrying out its objectives was guilty. Justice a'Beckett carefully described the evidence that demonstrated armed mobilisation, and stated that it did not matter if the prisoner fired the shot that killed Captain Wise; that he was present and bore arms 'would be quite sufficient'. There could be no doubt that Joseph was the man whom witnesses saw at the stockade. Having almost demanded a guilty verdict, Justice a'Beckett left the decision to the jury.

The jury took only 30 minutes to find the prisoner not guilty. *The Argus* reported a 'sudden burst of applause arose in the court when the verdict was declared', and *The Age* declared it was a 'complete defeat' for the government and 'the remaining cases are virtually decided'.

The government refused to change course and, one by one, the remaining prisoners were tried. John Manning was represented by Archibald Michie and Joseph Henry Dunne. Again, it took the jury just half an hour to acquit. Timothy Hayes, who was regarded as the ringleader, was next to go on trial, defended by Richard Ireland. Again, the jury returned a speedy acquittal, and Hayes was carried through the streets by a triumphant crowd.

On 21 March, Raffaello Carboni faced trial, defended by Ireland and Aspinall. In his memoirs, the flamboyant Carboni described Ireland as a strong, eloquent barrister, whose 'whole head and strong-built frame tell that he is ready to settle at once with anybody; either with the tongue or with the fist'. He had the ability to 'exercise a potent spell over a jury'. Carboni saw Aspinall as a benevolent gentleman and a scholar, though he made some eccentric observations of his courtroom behaviour:

> If now and then you fumble among papers, whilst addressing the jury, that is perhaps for fear it should be observed that you have no beard; in order that proper attention may be paid to your learning, which is that of a grey-headed man; and though it may be said, that the Eureka Stockade was hoggledy enough, yet your *pop, pop, pop,* was also doggledy.

Justice a'Beckett

Summing up, a'Beckett stated that Carboni's overt actions constituted treason and he hoped that the jury would not be influenced by previous verdicts. But again the jury returned a not guilty verdict. Carboni recalled, 'I was soon at the portal of the Supreme Court, a *free man*. I thought the people would have smothered me in their demonstrations of joy.'

Nine prisoners remained. The cases followed the same tired routine, with the same witnesses, and Stawell 'seemed exhausted and indisposed'. 'You are very hoarse', *The Age* crowed after the fifth acquittal, 'you are doing more in a week to bring the Government into contempt than *The Age* could do in a year.'

On Tuesday, 27 March, the remaining six prisoners were tried together, with Michie, Ireland, Cope, Dawson, Dunne, and Aspinall appearing for the defence. In his address to the jury, Michie said the trials had become 'weary, stale, flat, dull, and unprofitable'. The now all too familiar matters were raised throughout the trial. It took the jury seven minutes to find all the prisoners not guilty. The drama was over.

The treason trials were Stawell's biggest failure, although they did not ruin his career. On the other hand, the successful defence of the Eureka accused made the reputations of several members of the young Victorian Bar. Archibald Michie and Richard Ireland became the leaders of the Bar and were appointed Victoria's first QCs in 1863. Michie died a wealthy man but, although Ireland's income was huge, it never matched his expenditure and he died penniless in 1877. Henry Chapman combined his career at the Bar with politics until he was appointed a judge in New Zealand in 1864. A renowned wit, Butler Cole Aspinall rose to be a leader of the Bar, but drank himself to an early death. Joseph Dunne became a County Court judge but after three years returned to the Bar. His practice never recovered and in 1877 he died in a Fitzroy lodging house after drinking two bottles of brandy and a dozen pints of stout. Thomas Cope also became a County Court judge. He avoided the temptations of insobriety, but not of the turf, dying of bronchitis after catching a cold at Flemington in November 1891.

The Eureka treason trials gave liberal and progressive causes in Victoria a substantial boost, helping usher in a period of radical reforms such as universal male suffrage, the secret ballot and the Land Acts of the 1860s. From the perspective of the Victorian Bar, the successful defence of the Eureka accused gave the Bar far greater progressive credentials in the eyes of the public than were justified by the personal views of most barristers.

IMAGE COURTESY OF STATE LIBRARY OF VICTORIA COLLECTION (H29505).

BAR LORE

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

Family Court

The Hon Paul Joseph Cronin

Bar Roll No 3318

In early 2007, the late Noel Ackman QC introduced the recently appointed Justice Paul Cronin to a CPD seminar, describing his Honour's appointment as "an enlightened choice". Twelve years later, upon Justice Cronin's retirement from the Family Court of Australia, those words seemed something of an understatement.

From the moment he took office, Justice Cronin set the standard for conduct on the Bench. He heard argument before forming a view. He heard argument from both sides before forming a view. Even when he had read the papers in advance, his Honour understood that counsel (who had actually *met* the clients) sometimes had the advantage of a perspective which he lacked. As long as counsel could engage him in a polite Socratic dialogue, any well-prepared argument received a generous and appreciative audience. Where the argument necessitated debate on subject matter outside the *Family Law Act*—typically within the realm of equity, taxation or the *Corporations Act*—it was a good day in court for all concerned, or at least those who had done their homework.

He was sympathetic to the inherent difficulties that counsel who appeared before him routinely faced, having to work with affidavit material that did not bear their fingerprints. He also appreciated that counsel did not—in a jurisdiction beset by difficult personalities—have the prerogative to impose the wisdom of good advice upon clients or instructors who were utterly uninterested in hearing it.

His Honour never needed so much as to raise or sharpen his voice to impose his presence. He was above that. He could—and did—maintain a pleasant courtroom through intellect, a sophisticated knowledge of the law and force of personality.

His Honour's judgments were characterised by convenient, hip-pocket summaries of the relevant law followed by clear, unequivocal findings. He called a spade a spade and made orders accordingly. The result sometimes felt harsh, but no-one walked out of Justice Cronin's court feeling they had received anything less than a fair hearing. In return, he received so much more than court-room courtesy. He earned respect.

Off the Bench, his former associates speak of a judge who was always first into chambers in the morning, who maintained an open door policy, who took the time to debate different perspectives on a case, who went out of his way to mentor those who had the good fortune of working for him. It is said that he never passed up an opportunity to determine an ex parte application on an urgent listing. He sat in the duty list by choice. He was a judge who worked hard and brought the best out of others in doing so.

His presence on the court will be missed. With a great deal of thanks, we wish him the very best in his retirement.

JOHN WERNER

Silence All Stand

County Court of Victoria

His Honour Judge Arushan Pillay

Bar Roll No 3648

Judge Arushan Pillay was appointed to the County Court of Victoria on 16 August 2019 after practising as a barrister for 16 years.

His Honour spent his early life in South Africa and migrated with his mother to Launceston at the age of five. His Honour was educated in Launceston and graduated from the University of Tasmania in 1995. Like many young Tasmanian graduates in those pre-MONA days, his Honour moved to "the mainland", commencing his legal career in Victoria in 1996. His Honour worked as a solicitor until 2003 when he signed the Bar Roll.

Those who have come to know his Honour in his years at the Bar will know him as always immaculately presented but this has not always been the case. Before coming to the Bar, his Honour thought that it would be a good idea to cycle—on a mountain bike—from Melbourne to Sydney—in the middle of summer with little but the clothes that he had on him plus a map. Unfortunately for his Honour, the map only covered those sections of the road up to Victoria; New South Wales was unchartered territory.

Nevertheless, his Honour (together with Patrick Over, also a member of the Bar) took off in the middle of summer, wearing nothing but shorts and a t-shirt the front of which proclaimed, "Vegetarianism won't cost the Earth". Despite extreme weather, that t-shirt was worn every day on the journey up the Hume Highway and beyond. Fortunately, the journey was ultimately successful, and they made it to Sydney.

Perhaps, because of, or in spite of, this adventure, his Honour continued to ride his bike throughout his career at the Bar, giving rise to other mishaps, which included a broken collar bone at the corner of William and La Trobe Streets. Like any keen cyclist, the focus of his Honour's concern immediately post-accident was not for his health, but for the welfare of his bike.

Upon coming to the Bar in 2003, his Honour prospered and developed a diverse and thriving practice. He conducted the majority of his work in the areas of occupational health and safety, administrative law and personal injury. It is a testament to the esteem in which he has been held that he was briefed for both plaintiffs and defendants throughout his career.

His success was based on his meticulous preparation for each case, together with his unwavering integrity. His Honour's preparation was marked by an initial phase of extreme pessimism about the case he had to argue, which could be very alarming to first-time instructing solicitors, as he sought to understand all aspects of the case. His need to prepare included a protracted habit of role playing possible scenarios in the case, which could alarm not just first-time instructing solicitors.

His work on "both sides of the fence" is indicative of his Honour's conformity to the highest and best standards of the Bar. In his welcome speech, he expressed the personal difficulties involved in one day representing victims of industrial negligence and then soon after having to cross-examine a victim on behalf of an insurer defendant. Despite the difficulties, his Honour performed both tasks to his very high professional standards.

At the Bar, he gave lengthy service to the Bar's legal systems and pro bono committees. He was also a member of the race, ethnicity and cultural diversity working group at the Bar.

Despite his Honour's complete devotion to his work, he was able to take time off for virtually all school holidays to spend time with his family, including his two young sons. Further, and beyond the normal school holidays, his Honour found time during his career at the Bar to take two six-month breaks: in Seattle and in his wife's homeland, Macedonia.

The County Court will be better off with his appointment. His Honour is empathetic; all parties will feel as though their case has been listened to and dealt with according to justice and the law.

We wish him well in his time on the County Court Bench.

MATTHEW BROMLEY, PATRICK OVER, MIGUEL BELMAR

BACK OF THE LIFT

Her Honour Judge Rosemary Carlin

Bar Roll No 2603

I met Judge Rosemary Carlin nearly 30 years ago in the then offices of the Commonwealth Director of Public Prosecutions (CDPP) in Queen Street, Melbourne. Her office was bathed in the afternoon light and she could not see me as I watched her long and slender hand guide a red pen across the lines of print, occasionally pausing to underline a sentence or make a note in the margins. It was a vision of studied concentration, intelligence and elegance.

In 1983, her Honour graduated from the University of Melbourne with a Bachelor of Science majoring in biochemistry and Bachelor of Laws. It was not, however, patents and trademarks that captured her Honour's imagination but the practice of criminal law. She worked at the CDPP for six years, signed the Victorian Bar Roll in 1991, and was appointed an associate Crown Prosecutor in 1998, a Crown Prosecutor in 2000, and a Senior Crown Counsel in the Northern Territory in 2003, returning to the CDPP as an in-house counsel in 2005. Her honour was appointed a magistrate in 2008 and a coroner in 2014.

Her Honour's mind travels where the evidence leads her, picking her way through stony tracks until she has nailed the points of proof. She is undeterred by the bogs on the track; they present challenges that are to be conquered! Indeed, her conquering spirit was laid bare in her prosecution of the first trial to conviction under Commonwealth slavery legislation in 2005 while she was an in-house prosecutor at the CDPP. The case was overturned on appeal but then reinstated on a Crown appeal to the High Court, where it established the modern formulation of the offence of slavery in Australia.

As a magistrate and coroner, her Honour experienced the relentless demands of long lists and each day listened to the chorus of human suffering and misfortune. Whilst justice was blind in her court, her Honour's empathy and goodness of heart sometimes wept through her judicial blindfold. As a Judge of the County Court, justice is safe in her Honour's fair and slender hands.

DIANE PRESTON

Other appointments

Michael Whitton QC - appointment as Lord Chief Justice of the Kingdom of Tonga
The Hon Anthony North QC - chair of VLRC

Vale

Leo La Fontaine

Bar Roll No 2852

Leo La Fontaine was born on 7 April 1937. His father, Cliff, was an inspector of police at Wangaratta. Leo attended Parade College in East Melbourne, where he matriculated in 1954. He was admitted to practice in 1962 and worked in various roles at the Attorney-General's Department for 31 years, before coming to the Bar.

He commenced his career as a legal officer in the Crown Solicitor's Office (now the Victorian Government Solicitor's Office), returning to that office four times to undertake different roles, including a period as acting Assistant Victorian Government Solicitor in 1986-87.

Leo worked for the police department for two years from 1964 as a legal assistant, where he gained valuable experience in advocacy. He was the solicitor to the commissioner for corporate affairs (Vic) for 11 years from 1975, general counsel for the commissioner for corporate affairs for three years from 1987 and a delegate of the Australian Securities Commission in the early 1990s.

Leo came to the Bar in 1993, at the age of 56. He read with Philip Tribe and established a practice in administrative law (merits review), commercial law and criminal law. Leo retired in 2003.

One of the tributes to Leo in the newspaper caught my eye. It read, "Many memories. Parade College. Especially the Butch Maloney incident."

Well, what was the Butch Maloney incident? Apparently, Leo and Brother "Butch" Moloney didn't see eye to eye over the handing in of an assignment, as a consequence of which they found themselves rolling around wrestling on the ground with all students barracking for Leo. Leo was forever after a hero to his fellow students.

Leo was a club man for most of his life. He competed with considerable success at the Rosanna Golf Club. As for the Flemington Racing Club, they seldom started without him.

Leo died on Monday, 13 May 2019 at 82 years of age. He was a great character and will be sadly missed.

JOHN X SMITH

Stanley (Stan) Barclay Spittle

Bar Roll No 863

Stan Spittle was born at Skeleton Creek in Far North Queensland on 12 April 1941 and educated at Ballarat Grammar.

Stan completed his law degree at the University of Melbourne. While at university, he was a champion middle-distance runner. In 1963, he was awarded a Full Blue for Athletics by the university for outstanding individual sporting performance. Stan trained under renowned athletics coach Franz Stampfl and was the training mate of Ralph Doubell (who went on to win a gold medal at the 1968 Olympics in Mexico City for the 800 metres).

Stan completed his articles with Ellison Hewison & Whitehead and subsequently worked as a solicitor at Baird & McGregor in Ballarat.

Stan came to the Bar in 1969 and read with the late Frank Costigan QC. He developed a substantial and successful practice in workers' compensation and personal injuries.

From 2004 to 2011, Stan served as treasurer of the Compensation Bar Association.

Following his retirement in 2015, Stan participated in crews for the World Rowing Masters Championships. He won medals in Italy, Japan and Germany.

In 2015, Stan was named a Legend of the Victorian Bar. In both trial advocacy and athletics, he was always meticulous in his preparation. He is remembered for being a fierce and dedicated advocate for his clients, as well as being an accomplished sportsman. Stan Spittle died on Wednesday 17 July 2019, aged 78.

VBN

Fred Tinney

Bar Roll No 673

Frederick (Fred) Gordon Tinney, who died on 24 July 2019 aged 88 years of age, loved the law. In particular, he loved the Victorian Bar. He grew up in Ballarat but was educated at Geelong College, where he boarded, and then at the University of Melbourne, where he was a resident of Ormond College. He was admitted in 1954 and returned to Ballarat, where he became a partner of the firm Nevett, Glenn & Tinney.

Fred came to the Bar in 1962 and read with Jim Forrest. He was on Foley's List. He developed a substantial common law practice and also assisted in a number of Royal Commissions. He was appointed a prosecutor for the Queen in 1976 and was in chambers at Nubrik House with his good friends, including Alan Dixon. He was a robust and formidable opponent but was always scrupulously fair. He was forced to retire due to ill health in 1982.

Fred was a quiet, private and humble person. He had a very sharp brain and was an excellent lawyer. His four sons remember a man of great discipline. He would retreat into his study every week night other than Friday to spend hours dictating interrogatories and statements of claim onto what was then a new-fangled reel-to-reel tape recorder. Friday nights were entirely reserved for a family dinner each week.

Discipline intruded into the weekends. Part of that related to the Melbourne Football Club, into which all the children were indoctrinated and their mother converted. Weekly journeys to the MCG and suburban grounds to observe regular thrashings of the Demons were the norm. We would never sit under cover and would never leave before the final siren.

Sundays were part work, part play. Often we would go with our father on a view. He would visit road accident scenes connected to his cases to walk the layout and take photographs using a polaroid camera, whilst we would kick the footy. Then back home for the Sunday barbecue, where we often retreated into the garage cowering from the rain. Sunday picnic outings to exotic locations such as Frankston and Belgrave were also the norm. We are left with happy memories of long holidays in Ballarat or down at the beach, of such things as our father hammering in the poles for the beach windbreak, a windbreak which had hand-stitched into it in large letters the family name so that people could find us. Or of our father with a vast array of the equipment so essential for any pipe smoker. The pipe was—in that age—a more socially acceptable way of smoking, but plainly was not without risk.

Fred had a decent grasp of anatomy and had more than an inkling of the nature of the condition afflicting him in the course of his last murder trial in 1982. He was diagnosed with cancer of the larynx and had surgery to remove his larynx, a very sad operation indeed for a practising barrister at the height of his powers. He was only 51. He left the law and fashioned a new and different life. So abrupt and complete was his departure from the law that many in the profession thought he had died. In the mid-2000s at a Foley's List dinner, sons Andrew and Michael were approached by Jack Winneke, who, upon seeing our name tags, enquired, 'How long is it since your father died?' When informed that our father was alive and well, Jack was momentarily nonplussed and then, realising his mistake, said, 'I'm sorry boys, I thought you were Fred Tinney's sons.' We said we were. Jack was speechless. But his mistake was easy to understand.

Upon retirement, Fred and his wife Phyllis moved down to Queenscliff and lived between there and their house in Kew. Phyllis opened up an antique and cottage wares shop in the main street. Fred became the driving force around the house, using his renowned discipline to master the necessary domestic skills. He became a housekeeper and host extraordinaire. The grandchildren all remember Fred's special sandwiches and carefully curated lunches and great roast dinners. He became the cook, the gardener, even the local identity who would mow various widows' lawns and maintain—on a voluntary basis—the CFA garden. He had a deep love of music and books and developed a strong interest in film as well. He and Phyllis travelled overseas together. They had a variety of pets, including simultaneously a blue heeler, a miniature French poodle and two Siamese cats. An eclectic grouping.

Life beyond 1982 had many challenges but Fred never spoke of regret at the cutting off of his career. He just got on with life. He was incredibly stoic and knew how fortunate he was to have survived and to have known and loved his grandchildren. For as important as his work had been to him, he placed family well ahead of all other things.

Our father had the very good fortune of meeting our mother Phyllis when they were children in Ballarat. It was a great partnership and an enduring love. Their marriage spanned 64 years. Though his own health was in decline, Fred devoted the better part of the last decade of his life to providing loving care and support to Phyllis.

Fred was diagnosed with liver cancer in July 2019 and died within three weeks. He remained at home until just days before his death, cognitively intact and stoic until the end. He knew that his race was run and felt blessed to have had a bonus 37 years after the 1982 diagnosis. Fred peacefully slipped away to the strains of a Mozart piano concerto on the morning of 24 July. Later that same day, two of his sons presided over cases listed in their respective courts. Fred would have been pleased.

Fred is survived by his wife Phyllis and by his four sons.

THE HON JUSTICE ANDREW TINNEY
HIS HONOUR JUDGE MICHAEL TINNEY

The Hon Kevin John Mahony AM

Bar Roll No 779

Kevin Mahony (Master Mahony to so many) died on 28 July 2019, aged 77 years.

Kevin was born in Ballarat and educated at Marcellin College, Camberwell and the University of Melbourne. He was admitted to practice in 1964 and called to the Bar in 1966, where he read with the Hon Justice Ken Jenkinson.

I know I can speak for Kevin's other readers, Tom Gyorffy, Michael Shand and Jennifer Davies, in expressing thanks for our extraordinary good fortune in having such a learned mentor. Kevin was a lawyer's lawyer. A seemingly endless procession of barristers would come to his Chambers to seek his advice and borrow from his extensive library. He showed great generosity in the finest traditions of the Bar.

Kevin's meticulous attention to detail was legendary. Kevin's son, Ned, speaks of Kevin enjoying "the pleasantry of pedantry".

Kevin's brilliant mimicry often had us in stitches. He could do Gough Whitlam better than Gough, himself, as well as some of the most eccentric members of the legal profession. But his wit was never caustic and he was inclusive of others. Kevin was a bon vivant and shared his enthusiasm for fine wines generously. He was a serious sweet tooth, with a passion for chocolate. Darling Gabby would make his lunch. One day after he had been appointed as the Senior Master, the then Chief Justice, Sir John Young, asked if Kevin would have a chat over lunch in Sir John's Chambers. Kevin assured Sir John that there would be no need to cater for him as he would bring along a sandwich. Kevin took his lunch box up to join Sir John and, upon opening it, found that Gabby had packed his number one favourite —fairy bread! Kevin described it as one of those "minty-like" moments. I think he even offered some to Sir John, who looked bemused.

Only two months after Kevin was appointed in March 1983, Gabby and Kevin's beautiful, golden haired, blue-eyed daughter, Nellie, was diagnosed with a terrible cancer. Nellie died nine months later, at the age of five years and nine months. Their bonny boy, Ned, was still a toddler. The depth of their suffering and loss defies words. I do not know how Kevin managed to focus upon his new role. Nor do I know how Gabby continued to function in her demanding job as Principal of the Junior School of Penleigh and Essendon Grammar. What I do know is that Kevin and Gabby have always been an inspirational model of devotion and support to each other. Each of them lived in gratitude for the other's love. One young man, who worked at the Funds in Court Office, commented that, no matter what Kevin had on his plate, he always answered Gabby's calls "Hello, my love" and signed off with "God bless".

Throughout his illness, Kevin maintained his strong faith, stoicism and graciousness. He would respond to inquiries as to how he was faring with his customary humour: "Not out". It is trite to say that things became very, very tough. However, right up until he died, Kevin was kept comfortable in the dignity and familiarity of his own home, in the care and love of his nearest and dearest.

THE HON JUDGE FRAN HOGAN

In 1983, Kevin Mahony was appointed as the second ever Senior Master of the Supreme Court, a role in which he served until his retirement in 2012. He was appointed an Associate Justice of the Supreme Court when that office came into existence. In 2017 Kevin was appointed as a Member of the Order of Australia for significant service to the law and to the judiciary in Victoria, to education, and to professional legal bodies.

One of Kevin's great legacies is his stewardship of the Supreme Court Funds in Court Office which administers funds paid as compensation to people who are under 18 years old and/or have an intellectual or physical disability. Under Kevin's leadership, the funds in trust grew from $60m to $1.3b (now $1.855b).

Christopher Smale

Bar Roll No 2425

A profound love of the law and the Bar sums up the attitude of Chris Smale, who passed away on 10 June 2019, just a week after his 73rd birthday. Before coming to the Bar in September 1989, Chris had honed his administrative and legal skills in a wide variety of callings, which made it natural that he would enjoy a varied and multi-faceted practice.

Chris completed a B.A. at Monash University in 1970 and an LL.B.(Hons) at the University of Melbourne in 1975. After being admitted to practice in 1977, Chris remained in and around the Victorian Public Service. He was initially in the management services division of the Public Service Board, then held several legal officer positions, firstly with the Law Department and then with the Ministry of Economic Development until March 1983. In June 1983 he became chief adviser to the Hon Ian Cathie who was at the time Minister for Industry, Technology and Resources. He remained in that position with Ian Cathie on his elevation to Minister for Education and played a major role in the continuation of Bob Fordham's introduction and development of senior secondary education in Victoria with the introduction of the Victorian Certificate of Education (VCE). When Ian Cathie was replaced as Minister for Education in 1987, Chris took on the position of projects director in the portfolio policy coordination division of the Ministry of Education. There he was seconded to the Victorian Post-Secondary Education Commission, playing a leading role in the negotiations which preceded some of the more important higher education amalgamations and the creation of Victoria University.

On coming to the Bar in 1989, Chris threw himself into life at the Bar. His practice was wide, focussing on employment and industrial relations, building and construction law, administrative law and criminal law. Chris was the driving force behind setting up a collegiate group of barristers on level 7 of Douglas Menzies Chambers in 1995, which remained together and grew into a much bigger group on level 6 of Crockett Chambers. 7th DMC, as it became known, hosted European (mainly German and Italian) law students in their intern year and Chris became a natural mentor and father figure to many of them. On his many overseas trips, often associated with Bar conferences, he visited them and their families. On one of these trips he bought and commenced the renovation of a house in Finnish Lapland, which must have been one of the more unusual holiday houses owned by a member of the Victorian Bar.

Chris regarded one of his greatest achievements prior to coming to the Bar as his role in transforming Victorian life by reforming the liquor law and turning this State into a vibrant social mecca. At the Bar, he made the most of the reforms he had earlier created and threw himself into this aspect of life with gusto. He was into partying, hosting many such events at his home and playing a prominent role in organising celebratory events in chambers and even at the house north of the Arctic Circle. Through his membership of Rotary, he developed projects assisting children and their parents in Ben Tre Province, one of the poorest areas of Vietnam.

Even more than his love of the law and the Bar was Chris's love of his family: wife Suzanne, daughter Serena, son Lucas, granddaughter Sophie, son-in-law Michael and daughter-in-law Candace.

BRUCE SHAW

Bryan Maurice Dwyer

Bar Roll No 2524

Bryan was called to the Bar in 1990 where he read with Maurice Phipps QC (later Judge Phipps of the Federal Circuit Court) and, when Phipps took silk, with Murray McInnis (later judge of the Federal Magistrates Court). Bryan continued to practise at the Bar until 1997. He also remained committed to his successful academic career.

Bryan suffered from a significant childhood illness and as a result started primary education at the age of seven years.

He left secondary school in Year 10 and resumed studies at Taylors College to complete Years 11 and 12. He graduated in law at Melbourne University in 1959 and later obtained a master's degree from the University of Michigan. He worked in New York with a firm of attorneys which acted for one of the parties in the notable international case of *South West Africa, Ethiopia v South Africa, Second Phase*.

Bryan was a distinguished and learned academic. He taught property law, trusts and equity for many years at Monash University. He was admitted to practice in 1961 and became a lecturer in law and later a senior lecturer at Monash University from 1966 to 1977. He remained on the teaching staff at Monash University until 2009. According to a former colleague he was a "kind and generous staff member" and a former student said he was a "tough" but "good" lecturer.

Bryan co-authored a book with Joycey G Tooher entitled "Introduction to Property Law" (5th edition) published by Butterworths in 2008 and earlier editions with Gim Teh. That text provided an overview of the law in 14 chapters for students new to the subject and also served as a valuable summary for those readers with more knowledge. The 5th edition was substantially re-written to reflect the then recent developments in property law. The authors included a reference to statutory material and case law from all Australian jurisdictions and the United Kingdom.

Bryan is fondly remembered as a very diligent and knowledgeable reader. He was always prepared

to assist with research of a very high standard.

Bryan died on 31 July 2019 at the age of 85. He was a loving father and grandfather to two children, Paul and Samantha, daughter-in-law Catherine, and grandchildren Hana, Liam, Eleanor, Annabelle and William.

MAURICE PHIPPS QC
MURRAY MCINNIS

John Philbrick QC

Bar Roll No 1138

On Friday, 23 August 2019, John Denis ("Fearless") Philbrick passed away in Urgup, Turkey, aged 71.

John had battled serious illness for some time, characteristically refusing to yield to its limitations, and was intent on closing his tour on the beaches of southern Turkey before returning to spring in Melbourne. His death marks the passing of one of the common law Bar's most colourful advocates.

John studied at the University of Melbourne and resided at Ormond College. He enjoyed his student days; in addition to academic success, he won the 'Mr University' title. (The training involved beer drinking and pie eating and provides at least a partial explanation for John's transition from svelte schoolboy athlete to towering Rumpolean presence.)

John was admitted to practice in 1972. He worked as a solicitor in Gippsland before signing the Roll of counsel in 1975, after reading with the late David Willshire. Willshire was a laconic wit. He and another barrister were on circuit in Horsham when a solicitor lectured them about what a great barrister John was. Willshire was heard to say, "There is nothing more boring than a solicitor telling you how great another barrister is."

In his early years at the Bar, John had a flourishing general practice. Over time, he specialised in the common law and developed an enormous personal injury practice, enjoying the confidence of his many instructing solicitors. John took silk in 2007 and retired in 2016.

John lived his cases. He loved to discuss them with colleagues on a daily basis and in excruciating detail. He had the unique ability to see the funny side of even the most dire of circumstance and he frequently recounted tales from the courts in which he was centre stage either as hero, villain or the butt of the joke. He recalled a jury trial before Byrne J, where he and Peter Galbally arrived late when the court was already in session. Both Philbrick and Galbally made their way to an already crowded Bar table and Galbally rose to make a joint apology stating that "us big ships turn slowly".

John's easy manner masked a fierce determination. He was a courageous advocate and a considered tactician. He was meticulous in his case preparation. He planned his contests and took great delight in bringing his plans to fruition. In court, his preparation and communication skills came to the fore. He was a concise cross-examiner and his addresses to juries were always direct, pithy and—in contrast to many—refreshingly short. John was a fierce but fair opponent with a keen sense of humour.

John's exploits on circuit are legendary, although the details are generally not fit for publication. Suffice to say John was a dominant figure in Gippsland for many years. During his long association with the Gippsland circuit, he fought many cases and forged many lasting friendships. He was a fine exemplar of the circuit maxim "strive mightily in court, but eat and drink as friends".

John's chambers were adorned with photographic records of his many interests and achievements in a host of activities outside the law. He was a keen junior footballer, an avid skier, a mountaineer and a world-renowned fly fisher (creator of the eponymous 'Philbrick nymph'). These pastimes provided him with the opportunity to travel to many exotic locations and engage in great adventures, often in the company of his friends. He also spent much time trout fishing in Tasmania.

In his retirement John spent many months traveling overseas with his wife, Jean Dunn.

John is survived by Jean, his children Andre and Penny and their mother Christine, and his grandchildren.

PAUL O'DWYER, PHILLIP COISH & NEIL RATTRAY

Joan Rose Dwyer OAM

Bar Roll No 1377

Joan was born on 16 May 1940. She was educated at Presbyterian Ladies' College, Melbourne. She matriculated in 1956, at the age of 16, and began studying law and arts at Melbourne University in 1957. Upon graduation, the dean of the law school, Professor Cowen, employed Joan as his research assistant and as a tutor at the university. Joan was admitted to practice in 1962 after serving articles at Lander & Rogers.

Shortly after admission, she travelled to the United Kingdom where, in 1962, her first employer was Farrer & Co, whose clients included the Queen and other members of the Royal family. Whilst living in the United Kingdom with her husband, John Dwyer QC, and their daughters Bridget and Tessa in the 1970s, she qualified for admission as a solicitor on her first attempt, receiving an admission certificate signed by none other than Lord Denning, Master of the Rolls.

Prior to signing the Bar Roll, Joan worked for Oakley Thompson, Galbally & O'Brien, Whiting & Byrne, Flood Permezel, Patricia Clancy & Associates and AW Foster. She was also a part-time tutor at Monash University in 1969 and later a senior teaching fellow at Melbourne University.

In 1978, Joan came to the Bar and read with Ron Meldrum QC. She developed a broad general practice with appearances in the Magistrates' Court, Children's Court, Family Court and in building contract cases in the Supreme Court. Not long after joining the Bar, Joan was appointed as a part-time chairman of the Social Security Appeals Tribunal. In 1981, Joan was appointed the chairman of the Equal Opportunity Board.

In 1984, Joan became a senior member of the Commonwealth Administrative Appeals Tribunal, where she served for 21 years. During that time, she travelled to all Australian States and Territories. Whilst her decisions were subject to a number of appeals, in her 21 years of service only two appeals were upheld. Upon retirement from that tribunal, she was appointed a member of the Aboriginal Housing Board of Victoria and the Mental Health Review Board, where she sat until 2016.

Joan was an avid skier and equestrian and continued to ride with much pleasure until her 70s. She had many interests in community affairs and was closely involved with her daughters and grandchildren.

The greatest tribute to Joan's memory was the outstanding number of people who attended the celebration of her life.

RONALD MELDRUM QC

Wallace Gervase Meehan

Bar Roll No 2284

Wallace Meehan was admitted to practice in 1973. He was employed for 15 years as a legal officer in the Crown Solicitor's Office (now the Victorian Government Solicitor's Office).

While still a solicitor, Wallace appeared for the prosecution in Magistrates' Courts all over Victoria. He prosecuted summary offences under the *Health Act* and *Fisheries Act*, to name just two. This was valuable experience for him after he was called to the Bar in 1988. He read with Jeremy Rapke QC. As a barrister, Wallace also became well versed in s 92 of the Australian Constitution.

Wallace practised as a barrister until 2004. He died on 12 September 2019 at the age of 82 years.

VBN

Peter Fox QC

Bar Roll No 3076

This October, as for more than 20 years past, Melbourne University Law School conducted its illustrious LLM course in project finance law. As always, students from every corner of the globe gathered for lectures by leading Victorian practitioners in this arcane area. For the first time, the course proceeded without its co-coordinator: Peter Fox died on the weekend before.

This course, as with the indelible impression that Fox left on all who worked with him, will bear his influence long into the future and stand as a testament to his qualities. It drew on every part of his unique character and legal experience, notable for its distinctive, cyclical rhythm. His life was an unusual mixture of loyal friendships, public competencies, private challenges, peripatetic movements, and consistent achievements.

Peter Fox (no middle name) was born in Port Moresby in July 1950, the middle of five children. He spent his early childhood in PNG and moved with his mother and siblings to Melbourne for school.

At the University of Melbourne, he was a serious law student, but a student nonetheless: so, repairing to the pub, imbibed while reading texts from cover to cover (reputedly then, if not later, *Byles on Bills of Exchange*). He graduated LLB Hons in 1973, with the prize for constitutional law. He completed articles at Ellison Hewison & Whitehead. On admission to practice in 1975, he was also admitted in the Supreme Court of Papua New Guinea and argued a case in the PNG District Court on that visit. Fittingly, as a solicitor, he acted for the Ok Tedi copper and gold mine, which long underpinned PNG's economy.

In 1976, as Law Council of Australia overseas service fellow, Fox spent a year with the Monetary Authority of Singapore, learning the mysteries of central banking while working on the taxation of international banks and the creation of an Asian dollar bond market. For UN agencies, he produced a comparative legal analysis of PNG's Bougainville copper project and an Indonesian project. On the side, he taught at the University of Singapore, one of many such contributions to learning.

On his return in mid-1977, Fox joined Mallesons, Melbourne's leading banking and finance firm. He was a natural in that work. By 1981, he was promoted to partner, with Geoffrey Nettle and Charles Scerri.

BACK OF THE LIFT

The early 1980s was a transition point in Australian legal and commercial history, with billion-dollar multi-currency syndicated loan facilities for resources and corporate purposes; the quality and experience of lawyers at firms like Mallesons and Allens convinced international lead managers that their loans could be governed by Australian law and not the law of England or New York. In 1983, no loan was more remarkable than that documented by a Fox-led team, acting in exhausted relays through 36 hours from approval to signing, which funded the 49 per cent owned Elders IXL to make an unsolicited takeover of its major shareholder (Carlton & United Breweries), launching the reputation of one John Elliott and his band of lieutenants, and the 'Fosterisation' of the world.

In 1985, Fox broke new ground, opening a Mallesons office in Sydney, sundering—as between the two largest legal markets—the old capital city club of firms who acted interstate only through longstanding agents. The efforts of Fox and his few colleagues rearranged the legal landscape, stimulating the creation of Mallesons Stephen Jaques and other national law firms.

In Sydney, Fox gave up alcohol (cigarettes followed much later) and, in a whirlwind, met and married Anne Casey, an American. Given leave of absence to follow his heart, he moved to New York, working at Sullivan & Cromwell throughout 1987 and passing the New York Bar exam. He returned to Melbourne in mid-1988, in the heady days when banking syndicates relied entirely on the borrower's 'negative pledge' to protect their priority for repayment. The whistle was blown when Fox briefed SEK Hulme QC, Ray Finkelstein QC and John Karkar QC with Garratt and Anastassiou to persuade Justice Barry Beach to appoint protective receivers to the Bond Brewing companies on Friday 29 December 1989.

In a typically vulpine turn, in November 1992, Fox joined the World Bank in Washington DC, as counsel, and Georgetown University Law Center, as adjunct professor. From March 1994 to June 1996, he ran MSJ's New York office.

In September 1996, only 20 years late, Fox came to the Victorian Bar. He read with Will Houghton and Charles Scerri.

At the Bar, Fox had a strong advisory practice. As an advocate, he appeared often and successfully in stamp duty and state revenue cases. His standing was attested by the representation of the Tax Bar and Bench at his funeral. He also appeared in regulatory and banking cases: early, he was an unannounced junior for the MUA in the Patricks / Waterfront litigation; he was junior in *Capricorn Diamonds*, the last of the post-takeover greenmail cases, over a stake in the Argyle Diamond mine, a neat conclusion after working on its financing 20 years earlier. His longest trial, 105 sitting days in the Supreme Court of Queensland, as the circle of life would have it, was the final throes of the winding down of Foster's Elders Finance (*Emanuel Management v Foster's*). In another notable saga, he was junior to Garde QC in the Palais / St Kilda Triangle cases (*Bradto*), across multiple hearings and jurisdictions over four years.

In 2009-11, alongside his practice, he served as a consultant to the United Nations special rapporteur on business and human rights in developing the 'Ruggie Principles' (UN Guiding Principles on Business and Human Rights).

Fox took silk in 2014. In addition to longstanding community voluntary work and membership of the Bar's community choir, he served on many Bar Committees, including for seven years on the Health & Wellbeing Committee, and on the Law Council Business and Human Rights Committee.

Once the smokes went, Fox had only two 'vices' in his years at the Bar: he doted on his daughters with Anne (Sara and Amy); and he never found a legal text or law report series that he was not ready to own. He tried to manage his bibliomania creatively—deferring purchase of a new book until it was relevant to a case, but with wide interests and a wide range of practice, that was often. Having acquired NHM Forsyth's State and New Zealand reports, he eventually passed title to colleagues in Joan Rosanove Chambers on his return to level 18 of Owen Dixon West, but he owned a set of US Supreme Court reports to the end.

Peter Fox knew his law, deeply. He knew how and why the law had evolved in a particular way. He knew—better than many—the underlying rationales for typical clauses of debentures, mortgages and guarantees. He drafted directly and elegantly, in a clear and clipped left-handed script. He embraced the concept of plain English drafting. (But it had to be done properly, without sacrificing meaning and the precision of established terminology.)

For all that he had often kept the hours of an insomniac, arriving no earlier than noon (when not in court) and working until the small hours, Peter Fox was the epitome of good manners and of consideration for others. He guided junior lawyers with kindness, practical insights, and wise advice; at the Bar, he mentored Catherine Button, James Moss and Marian Clarkin Hardy.

Foxy had a profound influence on many. He was a natural, generous and patient teacher. His instructions for legal practice were simple, if in some respects traditional: one should always put on one's coat when meeting with the senior partner, senior counsel or client; one never spoke ill of a client or an instructor. While you need to understand the commercial context of the matter at hand, you do not trim your advice.

Above all, was his lesson for litigating: when, on a sticky point, the other side's case seems the stronger, you have to keep analysing it, until, by out-thinking your opponent, you find the compelling answer.

For the last two years, Fox had been quietly and uncomplainingly enduring oesophageal cancer. He had radical surgery, and returned to practice, his interest in the law, his daughters and life undimmed. Mid-year, he was diagnosed with secondary cancer in the liver; his decline was swift.

Peter Fox was complex and compelling: sociable but private, simultaneously an insider and an outsider, traditional but not conventional, deeply loyal, a gifted and learned friend, a professional. It was my privilege to have known him and worked for him, and then with him, throughout my career. His many friends, admirers all, mourn his death.

PETER WILLIS

The Hon Richard Ross Sinclair Tracey AM RFD QC

Bar Roll No 1692

Richard Tracey was a man of conspicuous honesty and integrity, devoted to his family, dedicated to duty and community service, kindly disposed towards everyone, good-humoured always, completely unflappable, and generous to a fault. He was great company. He was a great colleague. He was a great and steadfast friend.

There was no cunning or guile about him. Despite his extraordinary aptitude for the law and for adjudication, his tireless work ethic and his highly disciplined organisational skills, and even though at times he was a strong tip for the High Court, he was not ambitious for advancement. He was a humble and modest man.

Richard started adjudicating early in life. He was a football umpire at Melbourne High School, and he umpired in the Victorian Amateurs for many years. He was pretty good. He umpired four grand finals in the Amateurs.

Richard studied law at Melbourne University on a Commonwealth scholarship, residing at Newman College. Richard was the first, and perhaps the only, Protestant president of the Newman College Students' Club. But he soon got the hang of the Irish Catholic thing. Once, for Lent, he gave up beer and took up Guinness instead.

Richard graduated LLB with Honours in 1969. He then served for two years as associate to Sir Richard Eggleston, a judge of the Commonwealth Industrial Court and the ACT Supreme Court. After that, he began to teach at the Melbourne Law School and as a resident tutor at Newman College.

Richard became a senior lecturer at Melbourne and served as sub-dean. He completed a Master of Laws degree at Melbourne in 1974. In 1979, he became a teaching fellow at the University of Illinois and completed another Master of Laws degree there. In the same year he co-authored *General Principles of Administrative Law*, which became a leading text on the subject and ran to four editions.

Richard, while still a teacher, scholar and academic administrator, was also a partner in a law firm and appeared as a solicitor advocate at a high level. At the same time, he was a part-time presiding member of the Social Security Appeals Tribunal where he heard over 1,000 appeals.

Richard joined the Victorian Bar in 1982 while still a full-time academic. He read with Graeme Uren. In 1986, Richard finally left the Melbourne Law School for full-time practice at the Victorian Bar. He practised initially from Equity Chambers, as did I. They were not fashionable or expensive chambers—in fact they were as cheap as chips—but they had a significant history and each of us in turn got a good start there.

Afterwards, Richard moved to the seventh floor of Owen Dixon Chambers West where, for the best part of 20 years, he shared a suite of rooms and a secretary with David Beach, now Justice Beach of the Victorian Court of Appeal. They became firm friends.

Richard was run off his feet with work as junior counsel—so much so that he was elevated to the Inner Bar in what may have been record time in 1991, after only nine years at the Bar, and only five of them in full-time practice as a barrister. All this notwithstanding a bout of serious ill health in the late 1980s that Richard fought off without missing a beat at work and without making a single complaint.

As senior counsel, Richard became an outstanding leader of the Bar with a vast practice, especially in administrative law, industrial law and military law. He appeared in courts and tribunals across the length and breadth of this country.

I had the great good fortune to be briefed with Richard frequently in administrative law matters. He was a joy and an inspiration to work with. Sometimes we were briefed on opposite sides. As an opponent, he was the best and the fairest.

In 1994, Richard established—as founding editor—the *Australian Journal of Administrative Law*. He served as its general editor for 11 years until 2005. He also served for periods as a reporter and editor of the Victorian Reports and as editor of the Federal Law Reports.

Between 1997 and 2000, both Richard and I were part-time Commonwealth Human Rights and Equal Opportunity Commissioners. Richard was much better at it than I was. He guided the parties to settlement in every one of his cases. All of mine ran to verdict.

For many years, Richard was senior counsel of choice for both Commonwealth and State governments in administrative law matters, regardless of the political stripe of the government. He was a firm adherent to the cab rank rule and he often appeared against government parties as well. A notable example was *Teoh* in the High Court in 1995, which raised an important question concerning the

relationship between international law and Australian law, and in which Richard's client was, of course, successful.

Highlights of Richard's industrial law practice were many. Between 2001 and 2003, Richard was senior counsel assisting the Cole Royal Commission into the building and construction industry. And in 2005, Richard had the rare distinction as a barrister of winning two High Court appeals on the one day, both industrial law matters.

Richard was appointed to the Federal Court in 2006. On one notable day in 2012, decisions of Justice Tracey were upheld by no less than 10 judges—by five judges of the Federal Court in *Jones* (on military disciplinary proceedings) and by five judges of the High Court in *Barclay* (on discrimination in employment). In *Barclay*, Justice Heydon described Justice Tracey as possessing "great learning" in the relevant fields of law, and referred to Richard's written judgment as "impeccable".

Richard sat as a judge of the Federal Court until he reached the statutory retirement age of 70 in August 2018. At Richard's farewell, Chief Justice Allsop remarked that Richard had done great work at the court, and, in particular, that he had contributed mightily to the court's work in administrative law, migration law and industrial law, each being a critical area of the court's jurisdiction and each being essential to the economic and social fabric of this country. The Chief Justice observed that cases in these areas illustrated the capacity of those who held power to affect individuals through the exercise of that power. It was this, the Chief Justice said, that Richard had always understood.

After Richard's retirement from the Federal Court, it was planned that he would serve as adjunct professor of military law at the ANU Law School and as judge-in-residence at Melbourne Law School. However, those plans were overtaken by his appointment in December 2018 as Chair of the Royal Commission into Aged Care Quality and Safety.

Richard threw himself into the work of the Royal Commission, travelling widely and hearing from numerous witnesses. Even after his diagnosis with terminal cancer two months ago, and even while undergoing treatment for it in the USA, Richard continued with his work as commissioner, making major contributions to the commission's forthcoming interim report.

As most of you know, Richard was on his way back to Australia when he passed away in the USA on 11 October 2019. News of his passing first reached Melbourne late in the evening of Saturday, 12 October (Melbourne time). As soon as 9.15 on the Monday morning, a multitude of Richard's friends and colleagues had assembled to hear tributes to him at a special sitting of the Royal Commission in Melbourne.

At that special sitting, Commissioner Pagone, Commissioner Briggs and counsel assisting all spoke movingly of Richard's leadership of the Royal Commission. Commissioner Briggs said of Richard: "He was experienced. He was wise. He was admired. He knew the law like the back of his hand."

On the same day, the federal ministers responsible for the Royal Commission issued a joint statement acknowledging Richard's "professionalism, compassion and leadership". And the Law Council published a statement describing Richard as a "man of the highest integrity" and referring to "the important and enduring legacy of Justice Tracey to Australia's legal community".

As my colleague Justice Tim Ginnane has said, Richard Tracey was a jurist of truly national significance.

Richard's door was always open. His help was always freely given. He was always calm and measured. His judgement was always sound.

Justice David Beach has said that there could be no better test for a lawyer faced with a difficult issue than to ask: "What would Richard Tracey do?"

We who knew Richard, and admired him so much, will continue to ask ourselves that question, whenever the need arises.

May he rest in peace.

This eulogy was delivered by the Hon Justice Tony Cavanough at St Patrick's Cathedral, Melbourne on 24 October 2019 after a eulogy by Victorian Bar member Jack Tracey, dealing with his father's early life, family life, career in the reserve forces and in military justice, character, personality and Christian faith.

BACK OF THE LIFT

Victorian Bar Readers

September 2019

BACK ROW: Johann Ollquist, Eva Weiss, Katherine Wangmann, Vivienne Jones, Kylie Jeans, Mitchell Brogden, Nicole Menegas, Sonari Fernando, Luke McPhie, Nicholas Mutton, Ryan Hartshorne, James Eley, David Mence, Geoffrey Smith, Bonnie Renou.

MIDDLE ROW: Aylah Lohman, Karan Raghavan, Ryan Kornhauser, Ella Delany, Jacqui Hession, Rebecca Koralyo, Bethany East, Ganesh Jegatheesan, Paul Annabell, Christopher Hibbard, Joel Tito, Kathy Karadimas, Timothy Harvey, Thomas Crouch, Morgana Brady, Joel Phillips, Charles Morshead, Benjamin House, Martin Radzaj, Angelo Bartzis, Nina Massara

FRONT ROW: Matthew Gledhill, Rutendo Muchinguri, Toni Stokes, Daye Gang, Holly Jager, Kay Chan, Tahlia Ferrari, Karen Mak, Justin Lipinski, Therese Borger, Mihal Greener, Amanda Ila, Lauren Burke, Sally Buckley

Victorian Bar Council
2019-2020

Standing L-R: Reegan Grayson Morison, Gabi Crafti (Assistant Honorary Treasurer), Daniel Nguyen, Dr Suzanne McNicol QC, Justin Hannebery QC, Raini Zambelli, Adrian Finanzio SC, Helen Rofe QC, Meg O'Sullivan, Sarah Keating, Dr Ian Freckelton QC
Seated L-R: Rabea Khan, Katherine Brazenor (Honorary Secretary), Kathleen Foley, Simon Marks QC (Senior Vice-President), Wendy Harris QC (President), Sam Hay (Junior Vice-President), Stewart Maiden (Honorary Treasurer), Minal Vohra SC, Paul Holdenson QC
Absent: Liz Ruddle, Emily Porter

MONUMENTAL

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EXPOSURE

ARCH-VILLAIN

BACK ROW: Patrick O'Shannessy SC, Robert Craig SC, Renee Enbom SC, Oren Bigos SC and Sam Hay SC MIDDLE ROW: Richard Knowles SC, Ian McDonald SC, Matthew C Harvey SC, Nicholas De Young SC and Chris Young SC FRONT ROW: Marylyn Smallwood SC, Georgina Costello SC, Charles Shaw SC, Marita Foley SC, Malcolm Harding SC and Jeremy Slattery SC

New Silks Q&A

When you ask the 2019 cohort of new Silks trivial questions, and receive responses like, 'Pavlova. Totally bogan but strangely irresistible', you know you are onto something. For more of what you ought to know, and never needed to know, see below.

Ian McDonald SC

What would your 16-year-old self say about your appointment? I have seen the Promised Land!
Who is the first person you told when you found out the news? Trouble and strife.
How have you celebrated (or plan to celebrate) the occasion? Significant inroad into the wine mountain.
Most memorable junior brief? They were all memorable.
How have you managed to look after your work/life balance in the past 12 months? I haven't managed that yet; work in progress.
If you were lost on a desert island with one unlimited item to eat, what would it be? Mogadon.
Guilty/unfashionable pleasure? Not telling John Dever what I am doing that day.
At the beginning of 2019, could you have used "prorogue" in a sentence? Still can't.
Who would you cast to play you in a movie, and why? Harrison Ford: got better as he got older.

Patrick O'Shannessy SC

What would your 16-year-old self say about your appointment? So far so good……
Who is the first person you told when you found out the news? My wife
How have you celebrated (or plan to celebrate) the occasion? Enthusiastically.
How have you managed to look after your work/life balance in the past 12 months? Reasonably well compared to the previous 27 years at the bar.
If you were lost on a desert island with one unlimited item to eat, what would it be? Wine

At the beginning of 2019, could you have used "prorogue" in a sentence? Yes, although not necessarily correctly.
Who would you cast to play you in a movie, and why? My son Xavier because he is a very fine actor.

Matthew Harvey SC

What would your 16-year-old self say about your appointment? Frankly, I wouldn't have had a clue. I might have asked whether taking silk had something to do with horse racing or haute couture (although I wouldn't have known that expression when I was 16 either).
Who is the first person you told when you found out the news? The first person I told was Ian Horak, who gave me a hug. Wracked with guilt, I then rang my wife.
How have you celebrated (or plan to celebrate) the occasion? On the day: lunch with some of my 15ODCW buddies and dinner out with my wife and kids. Some champagne was enjoyed.
Most memorable junior brief? A trial in the Federal Court, in which my expert witness, under cross examination, recanted everything in his expert report, except his name and address. And I wouldn't have cared if he had done that too.
How have you managed to look after your work/life balance in the past 12 months? I'm almost always home in time for dinner (although I will work at night). I work at the dining table during the weekends (never in chambers, if I can help it). Apart from that, plenty of time chilling out at home, cooking, drinking coffee etc with my family.
Favourite book/podcast/film of the year? Favourite book of all time: *The Master and Margarita* by Mikhail Bulgakov. Favourite book this year: *Ransom* by David Malouf. Favourite podcast: "Life and Crimes" by Andrew Rule. Favourite TV series: "Russian Doll" and "The Kominsky Method".
If you were lost on a desert island with one unlimited item to eat, what would it be? It would have to be Tim Tams but not the dodgy knockoffs that Santamaria offers me.
Guilty/unfashionable pleasure? A Viennese shortbread from Tony (at Dominos).
Who would you cast to play you in a movie, and why? Danny Devito. Because then people would say: "Gosh, you're much taller than I thought."

Charles Shaw SC

What would your 16-year-old self say about your appointment? "How did Phil Solomon get it so long before you?"
Who is the first person you told when you found out the news? I rang my wife, who did not take my call, so I rang my brother, who did not take my call, so I rang my mother, who also did not take my call. Eventually my wife called me back.
How have you celebrated (or plan to celebrate) the occasion? Dinners with family – Di Stasio with the adults and Tuckshop Takeaway with the children.
Most memorable junior brief? *Commissioner of State Revenue v Uniqema* – for the privilege of working with the late Brian Shaw; *Myer Pty Ltd v Ellery Land Pty Ltd; Alston v Cormack Foundation*.
How have you managed to look after your work/life balance in the past 12 months? By punctuating my work with lunch with Tim North.
Favourite book/podcast/film of the year? Book—*Sapiens*—I felt clever just carrying it around. Film—*Never Look Away*—devastating but beautiful.
If you were lost on a desert island with one unlimited item to eat, what would it be? Hamburgers.
Guilty/unfashionable pleasure? Most of my pleasures are guilty and unfashionable, but I love watching TV.
At the beginning of 2019, could you have used "prorogue" in a sentence? Yes – but I'm a politics geek.
Who would you cast to play you in a movie, and why? Richard Burton for the voice or Peter Capaldi for the language.

Marita Foley SC

What would your 16-year-old self say about your appointment? I have no idea what you are talking about. Sounds cool though. Do you get a new outfit?
Most memorable junior brief? Anything involving dogs and prosecutions. One involved having a dog called 'Buddha' put down. Quite a confronting case for someone who loves animals—and one which I blame for subsequent bad karma!
How have you managed to look after your work/life balance in the past 12 months? See answer to question regarding unfashionable pleasures!
Favourite book/podcast/film of the year? *Resident Dog*. A book about dogs in their architect designed homes.
If you were lost on a desert island with one unlimited item to eat, what would it be? Pavlova. Totally bogan but strangely irresistible.
Guilty/unfashionable pleasure? So many unfashionable past times—so little time! Tap dancing (badly), costume making (particularly for kids—you can never have enough sparkle!), kids parties, knitting, growing dahlias, dog photography and baking.
At the beginning of 2019, could you have used "prorogue" in a sentence? No. But I am mad for the word now. Happy to run with anything that involves a rogue.
Who would you cast to play you in a movie, and why? Someone small who alternates between socially inept and raucous. Magda Szubanski?

Jeremy Slattery SC

What would your 16-year-old self say about your appointment? What's a QC?
Who is the first person you told when you found out the news? My wife.
How have you celebrated (or plan to celebrate) the occasion? Lunch with the family, drinks with my colleagues in chambers, dinner with the parents.
Most memorable junior brief? A confidential information case against Demi Moore—unsurprisingly, it settled the night before she had to get on a plane and come to Australia to give evidence.
How have you managed to look after your work/life balance in the past 12 months? I invoke the privilege against self-incrimination—I cannot give away my trade secrets!
Favourite book/podcast/film of the year? *Boy Swallows Universe*.
If you were lost on a desert island with one unlimited item to eat, what would it be? Mangoes.
Guilty/unfashionable pleasure? Bundaberg rum and coke … now I really have incriminated myself!
At the beginning of 2019, could you have used "prorogue" in a sentence? I'm sorry, I don't understand the question.
Who would you cast to play you in a movie, and why? A young Bryan Brown. Australian acting royalty!

Malcolm Harding SC

What would your 16-year-old self say about your appointment? Think differently now about what you have in mind to do with your life.
Who is the first person you told when you found out the news? My mother, mainly because I found out the news on the way to work and she was the only one who was answering the phone.
How have you celebrated (or plan to celebrate) the occasion? I have celebrated to some extent and have a plan to celebrate some more.
Most memorable junior brief? This is a difficult one because there are a few. The one that often stands out in my mind, mainly because of the way it ended, is a case that I did for the firefighters union in the Fair Work Commission. As my leader and I left the courtroom on the last day we found ourselves walking through an honour guard of firefighters positioned on either side of us, yelling and cheering. Better still, we later learned that the case was won.
How have you managed to look after your work/life balance in the past 12 months? By doing what I could not to work on weekends.
Favourite book/podcast/film of the year? For this year, *The Passage Of Love* by Alex Miller. I love most books written by Alex Miller, but my favourite remains *The Ancestor Game*.
If you were lost on a desert island with one unlimited item to eat, what would it be? Croissants. I love 'em.
Guilty/unfashionable pleasure? Not sure I have a guilty pleasure. I did have a pleasure that at one time could have been described as unfashionable. It was vinyl. However, now records are back and cool.
At the beginning of 2019, could you have used "prorogue" in a sentence? I might have if I had thought of a way of putting it into a sentence. It's a great word.
Who would you cast to play you in a movie, and why? Ewan McGregor. I select him because he looks better than me and he has a great accent. I would be more than happy for him to play me with that accent.

Oren Bigos SC

What would your 16-year-old self say about your appointment? 'Honour the Work'… (my school motto).
Who is the first person you told when you found out the news? My wife.
How have you celebrated (or plan to celebrate) the occasion? With family and friends.
Most memorable junior brief? Saving the disabled Mrs Evans' home from repossession by her ex-husband's lenders.
How have you managed to look after your work/life balance in the past 12 months? After my kids' weekend sporting commitments, the working week in chambers seems relaxing…
Favourite book/podcast/film of the year? *East West Street* by Philippe Sands.
If you were lost on a desert island with one unlimited item to eat, what would it be? Lindt dark chocolate.
At the beginning of 2019, could you have used "prorogue" in a sentence? Probably not, though I have a vague recollection of hearing Melissa Castan using it in a sentence during constitutional law tutorials.
Who would you cast to play you in a movie, and why? Sacha Baron Cohen (sans hair…).

Richard Knowles SC

What would your 16-year-old self say about your appointment? I never thought that you were going to become a lawyer!
Who is the first person you told when you found out the news? My wife, Catherine.
How have you celebrated (or plan to celebrate) the occasion? Chambers function and dinner with family.
How have you managed to look after your work/life balance in the past 12 months? Probably not as well as I should have.
Favourite book/podcast/film of the year? It isn't a book, podcast or film, but I thought that the TV series *Fleabag* was very good.
If you were lost on a desert island with one unlimited item to eat, what would it be? If it's a dessert island, something savoury for main course.
Guilty/unfashionable pleasure? Hmmm, where to begin? The occasional deep dive into 1970s country music?

BACK OF THE LIFT

At the beginning of 2019, could you have used "prorogue" in a sentence? Insofar as I am not necessarily "anti-rogue", sure.
Who would you cast to play you in a movie, and why? Meryl Streep? She brings a lot to any role, doesn't she?

Anne Hassan SC

What would your 16-year-old self say about your appointment? Law wasn't really on the radar as a profession when I was 16 years old. I think if my 16-year-old self had been told by my older self that "we" had taken silk, she would have been deeply mystified.
Who is the first person you told when you found out the news? I attempted to tell my partner, but he didn't answer his phone, so my mother was the first person I told. She too was deeply mystified by what I was saying, but eventually worked out that something good had happened.
Most memorable junior brief? A junior brief to Gavin Silbert QC in the retrial of Donna Fitchett, a woman who murdered both her sons.
How have you managed to look after your work/life balance in the past 12 months? I think alcohol is involved.
Favourite book/podcast/film of the year? *Once Upon a time in Hollywood*. I am not a huge Tarantino fan but this was a masterpiece of entertainment—funny, but with melancholy undertones. It's worth the price of a ticket just to hear Jose Feliciano's exquisite rendition of "California Dreaming". As with all Tarantino films you will go out and buy the soundtrack.
If you were lost on a desert island with one unlimited item to eat, what would it be? Hot chips. Where is this island?
At the beginning of 2019, could you have used "prorogue" in a sentence? I can't say I used the word "prorogue" in 2019 and I can't say I'll be using it in 2020 either.
Who would you cast to play you in a movie, and why? A great from the Hollywood golden age—Vivien Leigh, because she's Vivien Leigh. Or maybe Bette Davis for the attitude.

Georgina Costello SC

What would your 16-year-old self say about your appointment? "Now you can be David Curtain" (My 44-year-old self would answer "In your dreams").
Who is the first person you told when you found out the news? My husband, Paul Ross (wise to keep your spouse well informed, particularly if he is a divorce lawyer).
How have you celebrated (or plan to celebrate) the occasion? Drinks with friends.
Most memorable junior brief? Any time I worked with Gina Schoff QC.
How have you managed to look after your work/life balance in the past 12 months? Rollerblading with my kids at Caribbean Rollerama.
Favourite book/podcast/film of the year? *Born a Crime* by Trevor Noah, who weaponises humour against bigotry. *The Year of Living Danishly* by Helen Russell, an inspiring account of Danish lifestyle.
If you were lost on a desert island with one unlimited item to eat, what would it be? The muffins at Earl Canteen.
At the beginning of 2019, could you have used "prorogue" in a sentence? To my daughters, "When you grow up, you may be pro rogue but you shouldn't marry him".
Who would you cast to play you in a movie, and why? Reece Witherspoon, because I would like to meet her and because she once played a blonde lawyer...

Renee Enbom SC

What would your 16-year-old self say about your appointment? How did that happen?
Who is the first person you told when you found out the news? My eight-year-old daughter, Eliza. I was dropping her off at school when I received the news. I don't think she understood but I think she will remember the moment.
How have you celebrated (or plan to celebrate) the occasion? Drinks with lots of lawyers and a garden pool party with those people who are allowed to see me in bathers.
Most memorable junior brief? I can't pick one. I will never forget 2017. Matt Collins QC and I ran two hard-fought and long trials, one after the other. The first was for *The Australian* newspaper and the second was Rebel Wilson's case. Our clients won and both got indemnity costs. That was satisfying after an enormous amount of work and pressure. Life-long friendships were made. Other favourites are Trinity Hairgate with Fink and the Essendon doping case with Jeff Gleeson QC.
How have you managed to look after your work/life balance in the past 12 months? I booked flights out of Melbourne as soon as I could see an opportunity and took my family away.
Favourite book/podcast/film of the year? Christine Nixon's biography. After my first conference with her, my instructors sent me a copy to read. I'm glad they did.
If you were lost on a desert island with one unlimited item to eat, what would it be? Mangoes. They are good to eat and can also be used as a moisturizer.
Guilty/unfashionable pleasure? I like to use pen and paper and a hardcopy diary. Apparently that is uncool.
At the beginning of 2019, could you have used "prorogue" in a sentence? No.
Who would you cast to play you in a movie, and why? Certain people involved in the Commission have identified someone who they consider should play me in a mini-series. I don't know who it is but I suspect that it is not the person I would cast.

Sam Hay SC

Who is the first person you told when you found out the news? Two of my readers, who were standing in the room when the email came in.
How have you celebrated (or plan to celebrate) the occasion? In the usual way: dining and drinking.
Most memorable junior brief? A very large oppression dispute that started in the Supreme Court and ended up in the Family Court. On my team was Cliff Pannam QC, Martin Bartfeld QC, Minal Vohra (now SC) and Nicole Papaleo. It was great fun.
How have you managed to look after your work/life balance in the past 12 months? Poorly.
Favourite book/podcast/film of the year? The Sam Harris podcast called "Making Sense".
If you were lost on a desert island with one unlimited item to eat, what would it be? Roast chicken.
Guilty/unfashionable pleasure? Many (and I'm not telling you any of them).
At the beginning of 2019, could you have used "prorogue" in a sentence? Yes.

Christopher Young SC

What would your 16-year-old self say about your appointment? But if I'm going to be a lawyer, why I am doing all these maths and science subjects?
Who is the first person you told when you found out the news? My wife, by text message, because she was at a school concert and couldn't speak.
How have you celebrated (or plan to celebrate) the occasion? I celebrated on the day with dinner with my wife. I might celebrate in the future by buying a new sailing dinghy (please don't tell my wife).
Most memorable junior brief? Philip Morris v Australia—appearing with a London silk, instructed by a Washington firm, for a Swiss client, under a Hong Kong-Australia bilateral investment treaty, in Singapore.
How have you managed to look after your work/life balance in the past 12 months? By taking my youngest to childcare in the mornings and starting to train for a marathon.
Favourite book/podcast/film of the year? Book: *Berta Isla* by Javier Marias. Podcast: Revisionist History.
If you were lost on a desert island with one unlimited item to eat, what would it be? Valrhona 66 per cent
Guilty/unfashionable pleasure? Listening to '80s pop music during long runs.

Robert Craig SC

What would your 16-year-old self say about your appointment? What happened to the professional sports career?
Who is the first person you told when you found out the news? My wife.
How have you celebrated (or plan to celebrate) the occasion? My floor colleagues and readers gathered for a few celebratory drinks on the day of the announcement and my wife and kids organised champagne and chocolate cake.
Most memorable junior brief? I was lucky enough to appear against the Fiji Government in the High Court of Fiji on a number of occasions. Preparing whilst looking out over Suva Harbour was pretty tough, although walking to court in robes with 100 per cent humidity was a mistake….
How have you managed to look after your work/life balance in the past 12 months? Ah—this old chestnut! I have three young kids, so "life" tends to ensure work is balanced.
Favourite book/podcast/film of the year? Chernobyl—the HBO mini-series. Depressing content but the science and social/political reaction of the Soviet community were fascinating.
If you were lost on a desert island with one unlimited item to eat, what would it be? Biltong—a good source of protein and is seems indestructible in most conditions.
Guilty/unfashionable pleasure? Political biographies.
At the beginning of 2019, could you have used "prorogue" in a sentence? No—certainly one thing I have learned from Boris Johnson.
Who would you cast to play you in a movie, and why? Matthew Rhys—he is playing Perry Mason in the new HBO series and may be prepared to transition into the less glamorous world of commercial law.

Who is it taking the speccy? (p9)

Taking the specky is Terry Forrest (better known as the Hon Justice Forrest of our Court of Appeal)

Crumber: Chris Maxwell (better known as the Hon Justice Maxwell, President of the Court of Appeal); Second from the left: Jack Batten of Counsel. Intervarsity football match between Melbourne and Monash Universities, May 1973.

BACK OF THE LIFT

Boilerplate

A BIT ABOUT WORDS

High Crimes and Misdemeanors

JULIAN BURNSIDE

It is impossible (well, difficult) to be alive today and not be aware of Donald Trump. And if you are aware of him, it is difficult to overlook the fact that his conduct as President of the USA is (to say the least) unorthodox. So unorthodox that the US House of Representatives has begun an official impeachment enquiry. In American law, the articles of impeachment are formulated by the lower house, for trial in the upper house. A President is not removed from office except by a two thirds vote in the Senate.

It all starts with the US Constitution.

The American Constitution was the result of the Declaration of Independence in 1776. The first draft was prepared in 1787, and it was ratified in 1788 after Congress voted to transmit the document to the 13 states for ratification. By 21 June 1788, it had been ratified by the minimum number of nine states required under Article VII. The first 10 amendments to the Constitution were adopted in 1789. They are collectively referred to as the Bill of Rights: they reflect the English Bill of Rights of 1689—a century earlier—and a couple of additional protections drawn from Magna Carta as interpreted by Sir Edward Coke.

Section 4 of Article II of the Constitution provides:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors

There is a continuing debate about what is meant by "high Crimes and Misdemeanors".

Nowadays *misdemeanour* is generally a reference to a relatively minor offence. The *OED* gives the current meaning of the word in the law as "One of a class of indictable offences which were formerly regarded as less heinous than those called felonies…" and the *Macquarie* defines it as "a less serious crime". *The English Dictionary* (1742) by N. Bailey defines *misdemeanour* as "an offence or fault" whereas Johnson (1755) defines it as "Offence; ill behaviour; something less than an atrocious crime". *Webster's International Dictionary* (1902) defines *misdemeanor* (no *u*) as "(Law) a crime less than a felony" and adds a note quoting from Blackstone:

> "As a rule, in the old English law, offences capitally punishable were *felonies*, all other indictable offences were *misdemeanors*. In common usage the word crime is employed to denote offences of the deeper and more atrocious dye, while small faults and omissions of less consequence are comprised under the gentler name of *misdemeanors*."

(Even though Blackstone spelt the word *misdemeanours* with a *u*, *Webster* drops it in the quotation.) *The American Heritage Dictionary* adopts a definition, consistent with *Webster*: "(Law) an offence less serious than a felony". In England, the distinction between a felony and a misdemeanour were abolished by the Criminal Law Act of 1967.

It is to be noted that many dictionaries still distinguish between the ordinary meaning of *misdemeanour* and the meaning at law. The *OED*, for example, defines *misdemeanour* as follows:

> 1. Evil behaviour, misconduct. *Now rare.*
>
> 2a An instance of this; a misdeed, offence.
>
> b Law. One of a class of indictable offences which were formerly regarded as less heinous than those called felonies; high misdemeanour

The New Oxford English Dictionary (1998) defines misdemeanour as "a minor wrongdoing" and adds "Law a non-indictable offence, regarded in US (and formerly in the UK) as less serious than a felony". (It is interesting to see the silent nod to the Criminal Law Act of 1967 which abolished the distinction between a felony and a misdemeanour).

Johnson does not make such a clear distinction between ordinary usage and legal usage, when he defines it as "Offence; ill behaviour; something less than an atrocious crime".

Given the way the words are printed in the US Constitution ("…high Crimes and Misdemeanors…) it is possible that the adjective *high* was intended to qualify both nouns (*Crimes* and *Misdemeanors*). That would raise the question: what is a *high misdemeanour*? The OED definition of *misdemeanour* (quoted above) defines it, in part, as *high misdemeanour*. The phrase "high crimes and misdemeanors" as one of the criteria for removing public officials who abuse their office was suggested by George Mason of Virginia. Before Mason's suggestion, other phrases had been suggested, including *high misdemeanor, maladministration,* and *other crime*. George Mason was a delegate to the Constitutional Convention of 1787. (He was one of the three delegates who refused to sign the Constitution.) So, it seems that we do not have to unpick the idea of *high misdemeanour*.

This becomes clearer, when you consider that, at the Constitutional Convention, Edmund Randolph (a lawyer from Virginia) said impeachment should be reserved for those who "misbehave." Charles Pinckney (from South Carolina) said, it should be reserved "for those who behave amiss, or betray their public trust." These both seem to fit within the contemporary understanding of *misdemeanor*.

The phrase *high Crimes and Misdemeanours* was used often enough in England to remove officials. Since 1386, the English Parliament had used the term *high crimes and misdemeanours* as the ground on which officials of the Crown could be impeached. The allegation was used to remove from office officials accused of widely varying acts (not all of them criminal offences) such as misappropriating government funds, appointing unfit subordinates, not prosecuting cases, not spending money allocated by Parliament, promoting themselves ahead of more deserving candidates, threatening a grand jury, disobeying an order from Parliament, arresting a man to keep him from running for Parliament, losing a ship by neglecting to moor it, helping suppress petitions to the King to call a Parliament, granting warrants without cause, and bribery. The common feature of these accusations was that the official had abused the power of their office and was unfit to serve.

Section 4 of Article II provides that an official can be removed from office on "…impeachment for, and Conviction of…" (Treason, Bribery, or other high Crimes and Misdemeanors). The impeachment investigation is a matter for the House of Representatives; conviction is a matter for the Senate. The House of Representatives in USA has begun impeachment proceedings against only 19 officials—one U.S. senator, four presidents (including Trump), one cabinet member, and 13 federal judges. It is notorious that three presidents have been impeached by the lower house, but they have been spared conviction in the Senate. Andrew Johnson was impeached by the House of Representatives in 1868, but not convicted in the Senate. Richard Nixon was impeached, but resigned when the Watergate tapes surfaced. On 27 July 1974, the House Judiciary Committee passed three articles of impeachment charging Nixon with obstruction of justice, abuse of power, and contempt of Congress. He resigned on 8 August 1974, before the Senate could hear the case against him. And Bill Clinton was impeached by the House of Representatives in 1999, but not convicted in the Senate (there were 50 votes against him, where 67 votes were needed for a conviction).

> "Given the way the words are printed in the US Constitution … it is possible that the adjective high was intended to qualify both nouns (*Crimes* and *Misdemeanors*). That would raise the question: what is a *high misdemeanour*?"

The misdeeds of Nixon and Clinton are well-remembered by most people. Johnson was President much longer ago: he was Lincoln's Vice-President and took office after Lincoln was assassinated in 1865; he was in favour of slavery. The House voted to impeach him in February 1868, three days after he sacked his secretary of war, Edwin M. Stanton, contrary to the provisions of the Tenure of Office Act.

Which raises the question what *impeach* means. According to the OED *impeach* originally meant "To impede, hinder, prevent", with supporting quotes from 1380 to 1690. Closer to the mark, it is also defined as meaning "To challenge, call in question, cast an imputation upon, attack; to discredit, disparage" with supporting quotes up to 1888, with the earliest from Shakespeare Midsummer Night's Dream:

> "You do impeach your modesty too much To leave the City, and commit yourself into the hands of one that loves you not." (1590).

Impeach is also defined as meaning "To bring a charge or accusation against; to accuse of, charge with", supported by quotations from 1380 (Wyclif) to 1840 (Dickens).

If the House of Representatives resolves that Donald Trump has engaged in *high crimes* or *misdemeanors*, it will impeach him accordingly, but he will not be removed from office unless the Senate convicts him (by a two-thirds majority) of any of the articles of impeachment resolved by the lower house.

Conviction in the Senate is where raw politics saved Johnson and Clinton. Johnson avoided conviction in the Senate by just one vote. Clinton survived conviction by 17 votes. Trump may get a similar result, given the power of the Republicans in the Senate, even though his erroneous ways have been far more egregious than those of Johnson or Clinton.

It would be the great irony of our times that a President, who has tormented the English language as much as George W Bush did, should finally raise the greatest challenge for English: the meaning of the key phrase in section 4 of Article II of the Constitution.

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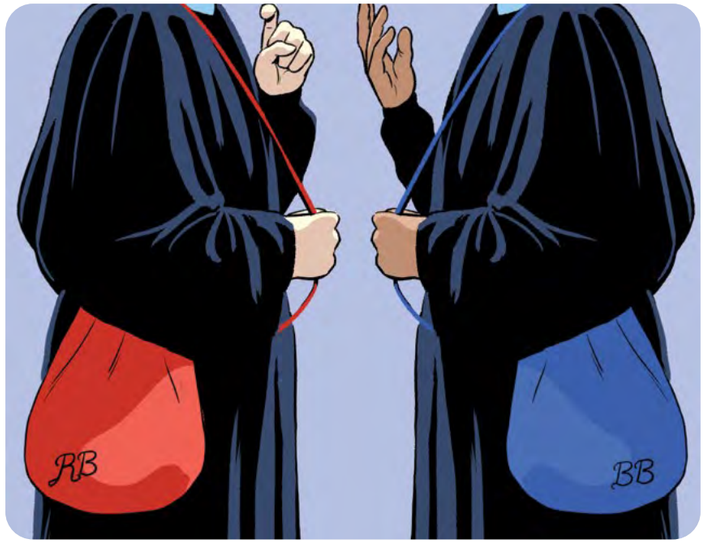


RED BAG, BLUE BAG

The Summer Court Vacation: What to do?

For aspirational juniors yearning for the tips and tricks that may one day elevate them to senior counsel status, submit your questions to vbneditors@vicbar.com.au for our anonymous silk to answer.

Dear Red Bag,

As an upwardly mobile young barrister, I would like your advice about where best I should go on holiday.

I should let you know that I may have the taste for Mykonos or Marrakesh, but not necessarily the budget. I would also appreciate your input about how best to 'bump into' a learned senior, instructor or member of the judiciary 'by accident', when on vacation.

Do you have any winning methods to recommend?

Yours,

Blue Bag.

Dear Blue Bag,

I see you are learning. And getting it. That's right, ability has never been a pre-requisite to success at the Victorian Bar. It is people that make the world go round!

So, what better opportunity to advance one's career than to accidentally on purpose bump into one of your senior or judicial colleagues over a pistachio gelato in Sorrento, or an Aperol Spritz at the Australian Open, or indeed further away. Those social connections made away from the routine hustle and bustle of William Street can form a very solid foundation for a rewarding career at the Bar or eventually on the Bench.

So, where to begin? The answer to this question funnily enough is also a question: Where do you really want to go and how far would you like to travel?

If you are a commercial lawyer, then you will be already well-advanced in the development of your 'soft skills' (in and out of court) as no doubt you will have lunched regularly with the great and the good at Movida Aqui and will have attended the biennial CommBar overseas conferences. However to rise to the heights of this area of practice you need to be prepared to go far and make a significant financial investment at the same time. So, skiing in Europe perhaps or maybe surfing in Noosa? Rumour has it that Zürs and Lech (favoured by a glamorous silken couple and a particularly sporty Chief Justice) and Cortina D'Ampezzo (which attracts loads of silks and judges who flock there for the annual CPE Conference to enjoy a spot of tax-deductible skiing and dining while fulfilling their annual CPD points quota) are the places to ski and après ski—the potential for making a positive impression with your slope-side style (always skiing and never, ever, boarding) while holding your quarry captive on a ski lift is endless. Just look how well it worked out for… Well yes, there are many names which might come to mind. On the other hand, if you are not so sporty and are more of the commercial nerdy type, then Noosa is for you. Fear not, you don't need to wax up the long board and surf. For the Victorian Bar's favourite summer playground, Noosa is not about surfing—it is about looking sophisticated in your tailored shorts and espadrilles sipping a latte in Hastings Street around 11am, while vacantly contemplating where you might dine that evening and which establishment has the best wine list. Think the lunchtime rush at L'Osteria in Little Bourke Street and there you have it—opportunities for self-advancement galore!

The stakes rise though, if you harbor a desire for a career at the common law Bar. This requires a significant capital investment—in Blairgowrie or Fairhaven! While you might get away with renting a lovely little place in the tea tree somewhere in your early years, sooner or later you are going to need to acquire your own little shack with agapanthus along the driveway to fully fit into the scene. The Blairgowrie Yacht Squadron and the Sorrento Couta Boat Club are chocka-block full of silks and partners of major law firms at cocktail hour and better still most of these career beacons of hope are looking for crew! A marvellous chance to impress if I may say so—on-board you can demonstrate that you can remain calm while getting yelled at, can follow directions without question and share the load—just like what happens in court! The other side of the bay requires a much more robust constitution as amongst the judges and silks who summer in the Surf Coast shire. Despite there being no off-shoot of the Flower Drum in this locale, lunch is the main summer sport. Enough said.

Practising in the public/admin law domain requires a much more nuanced approach to nurturing relationships with the leaders of this branch of the profession. Come January, these creatures tend to swap the panniers of their commuter bikes for hiking boots. They disappear trekking into the wilderness which makes them elusive. You might try and contrive a chance meeting on a hiking trail somewhere, but that would only result in a reasonably strong inference of stalking and lead to the possibility of you being dragged into the Corryong Magistrates Court to respond to an intervention order. Perhaps the better way to curry favour with your senior colleagues in this area is to go solo yourself and embark on a bit of 'voluntourism', in say Vietnam, or Sri Lanka. Perhaps join in on a project building a school or involving environmental restoration, and then post your holiday snaps on Facebook or Instagram, after you have befriended the public/admin law gurus online. Such a shameless signalling of virtue is bound to accelerate your career at the public law Bar, or otherwise improve your prospects for election to the Moreland or Darebin Councils.

Finally, criminal law and family law. The sad fact is that many criminal and family barristers during January can be found in the courts in and around Melbourne. Crime does not stop, and certainly does not pay when it comes to practising in this area of the law. The fact that so much criminal work is legally aided and that legal aid rates are so appallingly low is a blight on both sides of the political divide and is something in respect of which the entire Bar must agitate in the interests of proper reform of the criminal justice system. It should be unacceptable to all of us that such important work is not properly funded and that our brothers and sisters working in the criminal justice system, under considerable personal pressure, are not being properly compensated for their efforts—not so that they can 'live the dream', but just so that many of our colleagues can live a comfortable life by ordinary community standards. It is in the criminal Bar's interests, the court's interests and the overall community's interests for the criminal justice system to operate in a way which is economically sustainable for all involved. So too the family law system.

So Blue Bag, whatever you get up to this summer vacation, might I leave you with the words of Dickens, 'No space of regret can make amends for one life's opportunity misused' and 'it is a fair, even-handed, noble adjustment of things, that while there is infection in disease and sorrow, there is nothing in the world so irresistibly contagious as laughter and good humour'.

And I so advise.

Merry Christmas to you and yours my learned friend and may I wish you a happy new year full of love, compassion, laughter and prosperity.

Yours ever,
Red Bag.

BOILERPLATE

> "However to rise to the heights of commercial law you need to be prepared to go far and make a significant financial investment at the same time. So, skiing in Europe perhaps or maybe surfing in Noosa?"

Then and now - chambers with views

CAMPBELL THOMSON IN CONVERSATION WITH PHILIP DUNN QC AND DION FAHEY

There have always been rumours that some chambers were bugged. Imagine the tall tales and true on tape in some dusty archive if that were the case. When generations of barristers pass through one room, the legends expand: X never lost a trial, Y made it with an associate on the Banco Court bench and Z made the best martini at the Bar.

In 1982, some barristers established Aickin Chambers on the 27th floor, 200 Queen Street. On one side was the commercial set with Castan, Finkelstein, Goldberg, Merkel, Pannam and Middleton. On the other side was the criminal set with Dunn, Farris, Galbally, Grant, Howard, Leckie, Marin, Morrish, Parsons, Richter, Rozenes and Walker. Finkelstein negotiated the lease on behalf of BCL. He insisted on a clause allowing him to smoke. The floor was known as Golan Heights.

Philip Dunn QC was in room 2704. Dion Fahey is there now. *Bar News* interviewed them, admiring the afternoon sun making gold a view that stretches from north to south through east from Carlton Gardens to St Patricks Cathedral, from the Dandenongs to the MCG, to Government House and the Botanic Gardens. Recent ugly towers intrude.

According to Phil, all chambers must have a conversation piece so solicitors remember them. It could be Richter's chair that was sat in by Samuel Johnson. Phil has a Georgian bookcase that once held volumes in an English mansion. It just fitted along the west wall.

Dion now has a painting on that wall with Robin saying to Batman: *Hey Batman, I don't think the Judge is buying what we* – Batman slaps Robin and responds – *Don't ever doubt meeeeeeee!!!* On his desk is a 1939 Imperial typewriter. A collection of Japanese whiskies occupies a shelf.

Phil recalled clients who walked through this door: *Alan Bond was in a spot of bother about a Van Gogh painting,* ***The Irises****. He came in to see me and said he'd had a stroke a little while ago. I said, "my father just had a stroke. He has a terrible short term memory. Are you sure you're OK?" I had to take a phone call and Bondy went out for 10 minutes. He came back in and said, "my name's Alan Bond, I've got a conference with you." "You've just seen me," I said!*

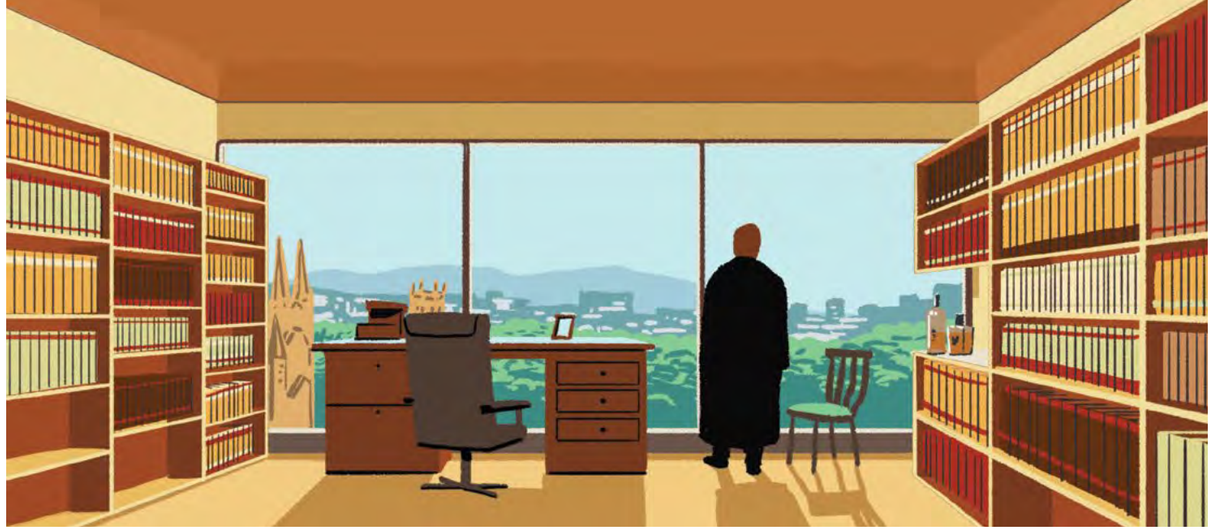
I got Tim Watson-Munroe to have a look at him. Tim said Bondy couldn't run a milk bar, his mind is so full of holes. The following week, Bondy negotiated a multi-million dollar deal involving interlocking companies with holdings in oil, boats, islands, you name it. He made a tidy packet on it …

I tried to ask Dion about his cases for various plaintiffs and defendants. He was warming up when Phil remembered 'the Munster', Graham Kinniburgh, coming to see him in the wake of the Great Bookie Robbery and then Carmen Lawrence when she was on trial for perjury in Perth. Dion let the raconteur roll on …

My first wife came up to get her passport out of my desk and tell me she was leaving. I was in a trial before George Hampel. I couldn't go on. Terry Forrest took over, bless his cotton socks. I was sitting here at 9pm wondering where to go when the cleaner walked in, saw me looking down and offered me a joint! Then the Red Baron, Robert Richter, put me up for a couple of months and he bought the house next door for me to stay in. What an amazing place the Bar is!

Lights flickered on all over the city as dusk descended. Phil drew breath. We had a glass of fizz.

Truly, the walls hold stories. There is room for many more.



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BOILERPLATE

The stage versus the cage – the sanctity of life, as seen by others

HADI MAZLOUM

Theatre is a mirror, a sharp reflection of society – Yasmina Reza

Thespians were graced with a staging of Stephen Sondheim's *Sweeney Todd* at Her Majesty's Theatre in late June this year. Anthony Warlow and Gina Riley headed a talented cast to take the audience through this often haunting yet thrilling musical, made grand by a highly skilled orchestra. The performance was a delight and despite some odd direction choices and a few dropped lyrics and musical imperfections (on the part of the cast), I left feeling as I always do when I am fortunate enough to be in the audience of a Sondheim show: happy.

The story is that of Benjamin Barker, a barber who adopts the alias Sweeney Todd after spending years exiled to Botany Bay. He is smuggled back to London on a boat by a young, handsome sailor named Antony.

His crime is brazenly described as 'foolishness' by Nellie Lovett—the proprietor of a moribund pie shop situated beneath the room where Todd had operated his barber business—who has lusted after Todd since before his swift banishment to the Antipodes. Todd was foolish because he did not notice that his wife, Lucy, was herself lusted after by Judge Turpin, the 'pious vulture of the law' that sentenced Todd to life on drummed up charges so as to have unimpeded access to Lucy. With Todd out of the picture, Judge Turpin proceeds to rape Lucy leading her to poison herself. Johanna, Todd and Lucy's daughter, is adopted by the judge and kept as his ward. Upon being told by Mrs Lovett that Lucy had poisoned herself, Todd assumes that she is dead.

Todd resumes his vocation as a barber in the room above Lovett's shop vowing to exact his revenge on the judge (and Bedel Bamford who helped orchestrate the injustice of Todd's story). In the meantime, Antony falls in love with Johanna and plots to steal her from the jail that Judge Turpin has created for her by way of a locked room in his house (and later an asylum). Upon discovering this, Judge Turpin decides that he must marry Johanna himself to 'protect her from the evils of this world'. Todd expands his targets to include all of the affluent men of London after he is blackmailed by another barber, Pierelli, who recognises him from times past, leading Todd to kill Pierelli with one of his razors. 'A bright idea pops into the head' of Mrs Lovett encouraging Todd to slit the throats of his patrons while purporting to shave their necks so that Mrs Lovett can grind their bodies and turn them into meat pies.

In the second act, everything is going to plan. Mrs Lovett, with the help of a young boy named Toby who had served Pierelli before his untimely death, remarks that business is doing well and they are ensuring that Todd's victims are 'strangers and such like wot won't be missed' so as not to raise any suspicion. When Todd slits their throats, a contraption that he has fashioned with the chair on which his patrons sit, allows him to drop them through the ground straight to the basement where they are ground into minced meat by Mrs Lovett and otherwise burned in the furnace.

Bedel Bamford is tasked with investigating the stench coming out of Mrs Lovett's chimney upon becoming aware of it due to a crazed beggar woman spreading word of the 'mischief' and what she describes as a 'city on fire'. This all culminates in a large commotion where Antony rescues Johanna from the asylum. While she is hiding in Todd's barber shop, Todd slits the throats of Bedel Bamford, Judge Turpin and the beggar woman and almost kills Johanna who is dressed as a man. Todd hears Mrs Lovett's screams in the basement. He rushes to help her. At this moment, he realises that the beggar woman is in fact his wife Lucy, who he has just murdered. Furious at Mrs Lovett for not telling him that Lucy was still alive, he tells her that 'life is for the alive my dear' and throws her into the furnace. Toby then slits the throat of Todd who dies while holding his beloved Lucy in his arms. She was virtuous, he was naïve. The end.

If you are unfamiliar with Sweeney Todd, you will have no doubt surmised that it is a dark musical. Sondheim cleverly incorporates humour and wit so as to temper the gory details with an undercurrent of comedy. Using this reprieve as a shield, the audience deeply empathises with Todd's plight and are left egging him on to exact the revenge that he seeks. The writing is so gripping, and Todd's character so captivating, that the other men killed along the way are seen as mere collateral and are afforded very little sympathy even if they represent a subset of the intelligentsia with which we identify. At curtain close, the audience is left deeply sad that their hero, Todd, has died. They applaud vigorously because that is how it is done.

The audience readily sympathises with the smugglers, murderers and the falsely imprisoned in this story through the prism of fiction and musical theatre. But if the story is told slightly differently such as the one that follows (which is not a musical and not by Stephen Sondheim), it might well be met with a marked apathy.

Omar* and Mariam first meet in 2012 while living in Iran. They fall in love and are engaged to be married. Mariam is with child. She is virtuous and he is naïve. In September 2013, refusing life in a Hadean environment, they travel to Indonesia. There, a handsome young sailor named Soetomo smuggles them by boat towards Australia. Omar and Mariam long for a better life in a country about which they have only heard good things. Suddenly, the boat carrying them is intercepted by authorities and before long, Omar and Mariam find themselves separated and each forced into an island jail. Having been detained with no charge and with no prospect of a trial, the only crime we can accuse them of is foolishness.

The pious vulture of the law is the man responsible for creating these island jails. He refuses to offer Omar and Mariam asylum. A minority of the audience show contempt towards him for this decision only to be later accused of being un-Australian. The rest of the audience shrugs off his behaviour.

He deploys his bedels to roam the perimeters maintaining order and ensuring the indefinite detention of Omar and Mariam and those around them. 'I am protecting Australians from the evils of this world', he is heard saying on the evening news one day.

A bright idea pops into the head of a jailer, William, who rapes Mariam in her bedroom which he enters under the pretence of delivering her clean towels and sheets. When Miriam screams and complains, nobody listens. She self-harms in protest by swallowing razor blades; nobody cares.

Omar discovers what has happened to Mariam and douses himself with petrol and sets himself on fire. Another bedel, Henry, rushes with water in an attempt to put out the flames. He succeeds in doing so but Omar is not provided with the appropriate medical attention in time and he dies a few days later.

Layla, Omar and Mariam's child, five years old at the time this happened to her parents, sews her lips together. Bedel Charles happens upon this mischievous act and says to her, 'at least I won't have to hear you cry anymore'.

The final scene sees a group of people walking through a gate. There is a sign atop the gate that reads, "Welcome to Australia". The audience then sees that it is not Australia at all, but a big black hole into which they fall to their imminent death. Life is for the alive my dear, and Omar and Mariam were, for all intents and purposes, dead soon after leaving Indonesia.

The audience applauds. 'This is how it's done,' an older gentleman says to a young girl sitting next to him. The audience exits. They will have forgotten what they saw shortly thereafter, despite the fact they have witnessed a story about actual humans, even if they are 'strangers and such like wot won't be missed', suffering because of our action—or inaction, as the case may be.

* All names have been changed. Facts are extracted from actual stories.

Anthony Warlow and Gina Riley in *Sweeney Todd The Musical*

IMAGE COURTESY OF BEN FON/THE LIFE LIKE THEATRE COMPANY

BOILERPLATE

PRACTICAL LAW: TIPS FOR THE DAY TO DAY

Taxing matters: judgments and settlements

MICHAEL BEARMAN[1]

Twenty years ago, I presented a paper with John de Wijn QC entitled *CGT, GST and Proceeds of Litigation*. Ten years later, Daniel McInerney and I presented an update for the Tax Bar Association. Thereafter, I presented further updates every three years or so. Over the years, an important theme emerged: too many barristers pay too little attention to the taxation consequences for their clients arising from their matters until far too late. In other words, please do not call me to the following effect (especially at 4.30pm on a Friday): "I am [insert name] of [insert list]. I am in a mediation that has been running for [insert time]. My client is about to sign terms and I am concerned because the other side insists that my client provide a tax invoice. If I explain to you what the case is about, can you please tell me if my client will be liable to GST?" If you do call me in such circumstances, take notice that (a) the volume of my response may damage (i) your hearing, (ii) your phone, or (iii) both, and (b) unless you are a maritime law specialist, you will probably involuntarily add to your vocabulary.

I responded to similar effect when I was asked to provide an accurate, concise and—above all—entertaining statement of the law on this topic in 1000 words, or less. Since I am unable to do so, here are some thoughts, in no particular order:

1. Because you are a family lawyer does not mean that you can disregard taxation. First, only capital gains directly related to a breakdown of a marriage are disregarded and, even then, only in limited circumstances: *Income Tax Assessment Act 1997* (Cth)[2], s 118-75.[3] Secondly, the CGT relief otherwise available to spouses, related trusts,[4] and companies,[5] operates only to defer tax by way of roll-over (if you do not know what that means, look it up). Finally, there are no exemptions from income tax, including upon trust distributions[6] and deemed dividends under Div 7A[7] of the *Income Tax Assessment Act 1936* (Cth).[8]
2. Ditto for personal injury lawyers. It is true that any capital gains tax otherwise imposed upon compensation or damages for any wrong, injury or illness suffered personally is "disregarded",[9] but that won't help your client if an amount is taxable as income.
3. Settlements in commercial cases do *not* become tax-free just because they are structured as unapportioned lump sums. Yes, really! It is a recent development from 20 September 1985.[10]
4. Nor do settlements of commercial disputes become tax free by the parties allocating compensation for "pain and suffering". That is especially so if pain and suffering are not heads of damage arising from the cause of action alleged. You know who you are.
5. Subject to the GAAR[11] (a future topic, if the editors will still publish me), a settlement properly structured as an unapportioned lump sum will be on capital account.[12] Where a party (not being a company) thereby makes a capital gain, the gain may be discounted by half. But that is only if the subject cause of action was more than 12 months old. You may thereby be conflicted between giving correct advice (to delay) and breaching a statutory duty (not to delay).[13]
6. Your advocates' immunity does not extend to settlements.[14] Hence, if you did not consider taxation in settling a case but should have, you may suffer unpleasant consequences, including (although not limited)[15] to paying the LPLC its excess from your own pocket: *ignorantia legis neminem excusat*.[16]
7. GST can be really hard. C'mon, please!!

1. Michael has over 30 years' experience as a tax lawyer. He recently ran a shipping case in New South Wales, and learned a lot of interesting new words. Many of his close friends are family lawyers.
2. Yes, the legislation has changed since you studied at uni. There have been two income tax assessments acts for over 20 years now.
3. The section applies only to capital gains and losses made by CGT Event C2 (s 104-25), which operates when ownership of an intangible ends in a way there described.
4. Yes, I know family lawyers generally do not need to care what a trust is or how it works.
5. Ditto for companies.
6. Ha!
7. Although deemed dividends arising because of a family law obligation may be franked: s 109RC of Div. 7A.
8. Yes. That's the Act you remember from uni.
9. *Income Tax Assessment Act 1997*, s 118-37(1)(a)(ii); and if anyone knows what s 118-37(1)(a)(i) means, please let me know.
10. In all seriousness, claims and settlements concerning underlying assets acquired before 20 September 1985 should be handled particularly carefully lest an otherwise CGT-free status be lost.
11. "General Anti-avoidance Rules"; see *Income Tax Assessment Act 1936*, Pt IVA (of which everyone knows but only the High Court understands).
12. *McLaurin v Federal Commissioner of Taxation* (1961) 104 CLR 381; *Allsop v Federal Commissioner of Taxation* (1965) 113 CLR 341.
13. *Civil Procedure Act 2010* (Vic), s 19; c.f. s 13(1) (whatever it means).
14. *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, p. 24 [46].
15. E.g., you might be cross-examined by me.
16. *Black's Law Dictionary*, 5th Ed (1979), West Publ Co, p 673; alternatively, use Google.

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