ISSUE 168 SUMMER 2020/21

VICTORIAN BAR NEWS

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When video conferencing goes in unexpected directions

Vignettes from our History of the Bar

QC to KC
What happens to silks on the Queen's demise?

More Lockdown Stories

COVID *Normal*

Plus: Juries: lessons from *Pell*, *Chamberlain* and elsewhere

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Editorial

A rich tapestry of content

NATALIE HICKEY, JUSTIN WHEELAHAN, ANNETTE CHARAK

We hoped the June issue of Bar News would be a one-off collectors' item documenting life under lockdown. But after short-lived freedom, we found ourselves confined to home again. This spurred an explosion of creativity from barristers. You contributed prose, satire and poetry—making this a bumper issue. Thank you! With such a rich tapestry of content, we have loosely grouped these eclectic contributions into broad themes.

There are more stories of lockdown. Humour has been an important weapon against stress, anxiety, and cabin fever. When the year started, who would have thought our year-end issue would feature stories about unwanted surprises during online hearings and presentations, the effect of no haircuts, and life in hotel quarantine?

There are also more serious reflections on the justice system. Andrew Kirkham QC has provided an insider's retrospective on *Chamberlain*, and Gavin Silbert QC has furnished us with his analysis of the *Pell* decision. Elliot Perlman had first-hand experience as a juror when a student. He was shocked at the disconnection between theory and reality, before he turned his hand to writing fiction. Associate Professor Jacqui Horan rounds out the discussion with a view on what courtroom justice might look like in future.

Contemplation about court craft is inevitable given changes to work practices in 2020. COVID was the catalyst for a centrifugal shift from in-person hearings to online advocacy from home. On this front, Kylie Weston-Scheuber tackles the theme of the COVID workplace and gender from the angle of bullying and harassment, while Louise Milligan provides an insight into what we look like as a profession from the witness box.

To mark the appointment to the High Court of one of our own, we have published an opinion of (the then) Simon Steward QC and Eddy Gisonda answering that question you always wanted to know the answer to but were too afraid to ask: what happens to QCs when the Queen dies? We also profile another of our own at the outset of her career, Daye Gang, who took out this year's IBA young lawyer of the year award for her work on North Korea.

We celebrate the vast array of talent amongst our members, past and present, with a piece about The History of the Victorian Bar project starting from our Bar's origins in the 1830s, profiles of early members, contributions from our September readers and a new cohort of silks, and tributes in the Back of the Lift section.

We address current developments around perennial issues of interest to the profession: greater access to justice, legislative change, mediation and arbitration, cost orders and forensic evidence.

Our sincere thanks to the VBN committee, contributors, Bar Office, and Guy Shield who, once again, has done a fantastic job making our magazine look good. Guy drew on his own family mayhem to illustrate our June issue cover. If Guy's December cover is anything to go by, there is cause for optimism in 2021. If one thing has been learnt this year, it is that whatever next year throws at us, the Victorian Bar will confront it with resilience, flexibility and good humour.

Please tell us your thoughts, your ideas, submit stories, give us photos, and we will do our best to publish them. Contact us at vbneditors@vicbar.com.au.

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

Our defining image of 2020?

As **Joel Silver** observed, "Who'd have thought a photo of a barrister in pyjama pants would be the defining image of our Bar in 2020? This belongs in Bar News". Reaction to Lionel's attire, which he posted during lockdown, was overwhelmingly positive. Comments included, "I should have noticed the Smurfs. Brilliant, just brilliant". One opponent wrote, "Shall remember this pose when you and I are crossing swords!". Another commented, "Love it … a great reminder not to take ourselves too seriously and to laugh … great to de-stress". Thanks Lionel!

PHOTO REPRODUCED WITH PERMISSION

Courage and caring

I am often puzzled by the perceived need to engage in metaphorical judicial genuflecting, whether it be in or out of court.

I recall an occasion when I was being led by the peerless Colin Lovitt QC in a Supreme Court trial. The trial judge 'cracked' what on any reading of it was a lame joke. As counsel and their instructors feigned an amused reaction, chortling as they did so, Lovitt looked up to the judge and said, "That's not funny." Bless him.

The ramifications of COVID-19 have been complex. Understanding and compassion in circles in which neither were expected has been gratefully received. Conversely, in some circles in which one could reasonably expect such empathy, it has been lacking.

Most judicial officers have been very cognisant of the devastating effects of COVID-19. They have done all in their power to help militate the emotional, psychological and financial 'bleeding' of those so deleteriously affected by its ravages.

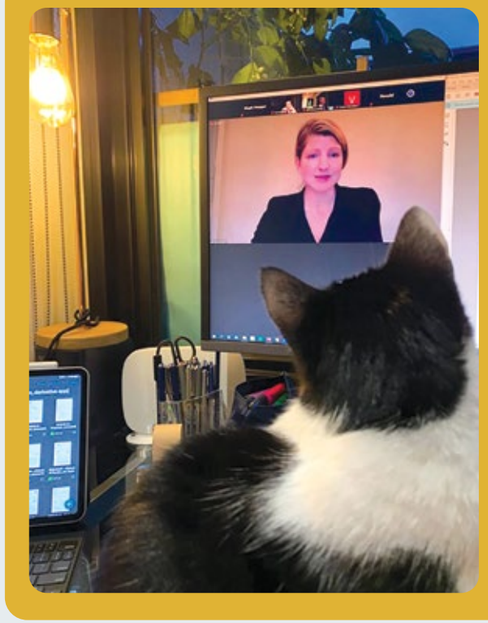
Others have not demonstrated such care. On one occasion, innocuous and harmless humour was dealt with in a heavy-handed manner.

Sadly, in order to keep the peace, the organisation that published that ditty was pressured into proffering an apology that ought never have been forthcoming.

Far more happily, I had the good fortune to happen upon a County Court judge in the street last week. I was more than surprised when he said, "I've been thinking about you."

I was struck by his humility and decency when he also said, "I feel guilty having a job."

Geoffrey Steward.



Puss on mute

Here is a little snap of Steph Hooper's kitten Frankie learning about voidable transactions during our CPD on 26 August forming part of the CommBar Insolvency Seminar Series.

I was pleased to learn I had at least one captive audience member!

Raini Zambelli

BAR COUNCIL ELECTION 2020

NATALIE HICKEY

The process leading up to the Bar Council election this year was conducted primarily during lockdown. Each Friday, many members became accustomed to receiving emails debating a range of issues.

By November 2020, a group of existing and aspiring members of Bar Council had coalesced around a 'Vote for Change' ticket. The level of co-ordination by a group ticket contrasted to typical electioneering by individual barristers for the Council's 21 board seats.

In the end, there was a record field of more than 60 candidates, no mean feat given that almost everyone was working from home. The election also attracted a high voter turnout. Approximately 70 per cent of those eligible to vote did so, suggesting strong engagement with the issues.

Before 2020, campaigning appears to have been typically conducted on a sotto voce basis. This year therefore deserves comment. Previously, much of the lobbying took place behind closed doors. At its highest, associations would circulate brief bios of members running for election. In these short profiles, candidates politely affirmed common ideals, in a bid to garner support.

In 2020, the approach was more overt. Members of Vote for Change set out their case, as did other candidates, by email and other means. The candidate bios circulated by associations also took on a stronger tone than in previous years. A number of candidates took their case to social media. One candidate promoted his candidacy on LinkedIn by way of a cartoon, an admirable first!

The profound impact of the coronavirus pandemic and lockdown on the practices of many barristers, was not far from the minds of most candidates.

It remains to be seen whether this year was a 'once off'. The debate and vigour of the election process may have been emblematic of the exceptional circumstances of a pandemic. Or it may represent a permanent shift to a more dynamic electioneering process.

The Vote for Change ticket won all of the seats on Bar Council. After the election, office bearers were duly appointed.

Paul Holdenson QC
Christopher Blanden QC (President)
Simon Marks QC*
Dr Ian Freckelton QC
Ms Mary Anne Hartley QC (Honorary Treasurer)
Dr Suzanne (Sue) McNicol AM QC
Ms Róisín Annesley QC (Senior Vice President)
Ms Helen Rofe QC (Junior Vice President)
Mr Paul Hayes QC
Mr Eugene Wheelahan QC
Mr Darryl Burnett
Mr Paul Kounnas
Mr Benjamin Murphy
Ms Robyn Sweet (Assist. Hon Treasurer)
Ms Amy Wood
Mr Ben Jellis
Ms Nawaar Hassan
Mr Nicholas Phillpott
Mrs Roshena Campbell
Miss Lana Collaris
Mr Lachlan Molesworth

*Simon Marks QC resigned from the Bar Council shortly after the election, leading to a casual vacancy to be filled by a by-election.

AROUND Home

SURPRISE!

When video conferencing goes in unexpected directions

Sure, lockdown was the pits. However, without lockdown and the strange, brave new world of online presentations and court appearances, could we have had these anecdotes to share? We think not.

Matthew Peckham

I was before Justice Mortimer in the Federal Court, appearing by Microsoft Teams on behalf of the commonwealth minister for the environment, making submissions for a substantial agreed civil penalty. It was all very serious. The contravening company's officers were also in attendance, albeit with their cameras switched off, appearing on screen as minimised blocks of initials.

About 10 minutes in, one of the minimised blocks suddenly expanded into a picture of a very large ship, appearing alongside the judge and counsel (myself for the minister, and Eliza Bergin for the respondent).

Here is the transcript, with my comments inserted in **<brackets>**:

HER HONOUR: I think those are the only terms, yes. All right. All right, I will incorporate that, thank you. The—well while we're on that issue about the respondent volunteering to dispose of the remaining cylinders, there does seem to me to be a—this may or may not be something that matters, but at one point in the joint submissions I think there's a submission that it would have cost the department $80,000...

<Large ship appears on screen>

HER HONOUR: Well hello, we've just had some frigate join us.

<Frigate disappears>

MR PECKHAM: Well we're in a new world, your Honour.

HER HONOUR: Yes, I know. And it's just as well things like that happen to stop us from falling into deep depression about current circumstances.

MR PECKHAM: Yes.

HER HONOUR: That picture is welcome to come back again, if somebody would like to—

<Frigate reappears, and remains for the rest of the hearing. Both counsel studiously refrain from mentioning it.>

Melissa Marcus

In the first lockdown I was asked by a former instructor to be a guest speaker at a defamation talk conducted via Zoom. There were to be three presenters. I was to speak last. There were just over 100 attendees joining via Zoom, all clients of the firm involved.

The talk commenced and the familiar screen shot appeared before me, full of little squares with people's faces, or for those who chose to turn off their cameras, initials representing their names.

Then came person X. This person had omitted to switch off his camera. This was unfortunate, as person X was completing his morning shower routine. Person X first appeared on the screen walking into a room, topless, having come out of the shower.

Melissa during her presentation as person X completes his ablutions

We watched in horror as person X proceeded to dry off and tussle up his hair within the confines of what appeared to be a walk-in wardrobe.

Then, all Zoom participants took a trip to person X's bathroom. Person X set up the iPad on the bathroom bench while he completed his post shower routine. I was on screen trying to keep a straight face, as if I had failed to notice that person X was now rubbing moisturiser all over his face, neck and bare chest. I was also trying to keep a straight face as person X then took out his hair dryer to blow dry his hair on his head, chest and elsewhere. The chat function on Zoom was going crazy with comments by attendees.

Note to self: If I ever chair a talk via Zoom—ask everyone to turn off their cameras.

Who wore it best? Lockdown locks during Stage 4 restrictions

Natalie Hickey

Melbourne's Stage 4 coronavirus restrictions from August until late October 2020 meant that hairdressers were closed for months. The ABC News suggested that, 'Your next trim might be a do-it-yourself job'. Some braved this concept; others did not.

In the latter part of this phase, when people were at their most hirsute, Sydney-based Fairfax journalist Michaela Whitbourn weighed in on Twitter.

Michaela Whitbourn @MWhitbourn
There is a Victorian barrister who is sporting a really lustrous mane of hair at the moment (think boy band-worthy) and it had not occurred to me until now that this is a coronavirus thing - but of course it is! No hair cuts!

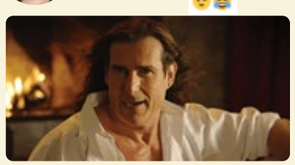
The comment was about Matt Collins QC.

Matt Collins QC @drmattcollins
Thanks for not going with "ageing" boy-band Michaela...and yes, if Stage 4 in Melbourne doesn't end soon my hair could get its own postcode...

Michaela Whitbourn
You look freakishly youthful, Matt. I feel the hair should stay.

People wondered if, 'boy band-worthy' meant he looked like 'Fabio'.

Lucy Sunman
Or that's his cover story 😉😂



So, what did Matt look like during this period? Let's check it out.

vicpridecentre • Follow

Matt with his husband Leonard Vary

Matt also co-presented a CPD presentation on defamation law reform for members of the Bar and their guests on 15 October 2020.

Matt presenting the VicBar CPD

On Michaela's Twitter thread though, a new entrant appeared for the title of 'longest lockdown locks.'

Thomas Anderson @iosonoilmatrix
Replying to @MWhitbourn
If you're not referring to Michael Rivette then the baton for most illustrious mane south of the border might now have been passed!

Michaela Whitbourn
I am not but maybe I need to check out his locks before making a ruling.

Thomas Anderson I look forward to reading the ratio decidendi! You'd better draft it to be bangs on and not clip it short otherwise I'm bobbing upstairs to appeal to the full bench of Toni, Guy, Stefan JJ which will no doubt, create quite a buzz. Sorry for all the curly legal parlux.

Michael was approached for comment. He shared two pictures. The first was early in lockdown when he was about to go into a Zoom conference.

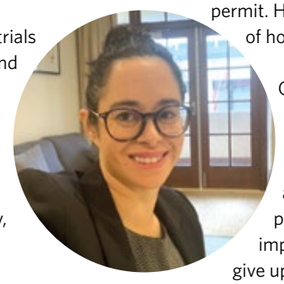
Lengthy indeed. The second was just before he got his hair cut. He describes himself as looking "like a mad man…as lockdown continues and continues and continues". (He took this one for fun to send to his family.). He says that, fortunately, since then he has had a haircut.

As Michael concludes, 'did Matt really stand a chance?!?!?'. No, he didn't Michael. You win! (And thanks for sharing something to help us laugh. It was a pretty tough experience for most of us).

Hotel quarantine in the interests of justice

ASTRID HABAN-BEER

As 2020 criminal trials succumbed to pandemic-induced adjournments, I settled into the other 'to-do' lists: advice work, preparation, committee and board work. Sure, there were online court appearances, even contested matters, but the reality is that a jury trial has a distinctive pace. Arguably, when there are jury trials running, the whole profession feels energised and enlivened—even if one's individual practice is nowhere near a jury. The absence of jury trials affected the whole profession, not to mention the clients—especially those in custody, many who felt that their value and significance as humans slid down the scale of priority. In reality, we were not all in this together.

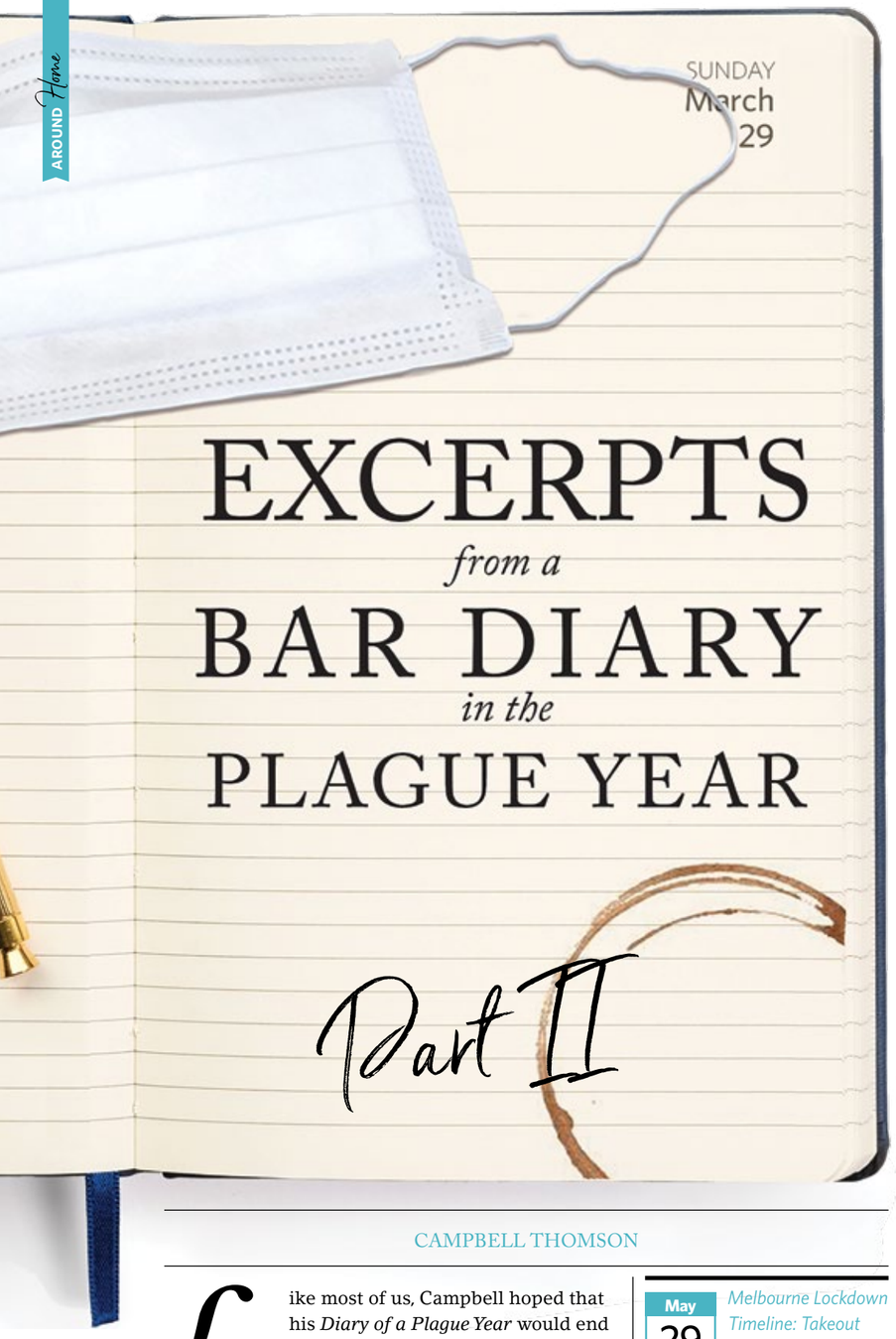


The ACT Supreme Court began re-listing its adjourned jury trials in about May 2020. I held a brief in an attempted murder trial in Canberra, but had no faith in the likelihood of being able to get there for the September 2020 listing. However, I had established a rapport with the client and solicitor, run some pre-trial arguments, and I was determined to run this trial, if at all possible.

Possible happened, and after much correspondence, ACT Health issued me with an essential worker border permit. However, this meant a daunting two weeks of hotel quarantine.

As it turned out, hotel quarantine at the Quest Canberra was a great environment in which to do trial prep. I had a kitchen and a balcony, so the small but important comforts of fresh air and cooking were available. I was able to focus without the distractions of home procrastination although, sadly, I missed some important life events at home. The things barristers give up for trials!

I definitely relied on my phone-a-friend panel for advice from afar during the trial. Thanks to John Saunders, Liz Ruddle, Andrew Sim and Kylie Weston-Scheuber, all who were happy to listen and debrief about complex issues.



EXCERPTS *from a* BAR DIARY *in the* PLAGUE YEAR

Part II

CAMPBELL THOMSON

Like most of us, Campbell hoped that his *Diary of a Plague Year* would end with its publication in *VBN* June 2020. Alas, it was not to be. He has been a member of the Victorian Bar for 28 years specialising in criminal law, native title and environmental law. For the second half of the year, Campbell drew on his reserves, and his passion for good wine …

May 29 *Melbourne Lockdown Timeline: Takeout only; unrestricted exercise permitted; home gatherings a maximum of 5; shopping—essentials only (Lasts for 19 days)*

08[00] hours. Zoom breakfast with the

lucky few. In late '90s we worked for blackfella legal aid in Darwin. Normally Friday breakfast at Mario's in Brunswick St. Chris Howse used to quote Henry V's speech at Agincourt before we set off to Wadeye, Gunbalanya, Maningrida, Yirrkala, Tiwi or Groote Eylandt. The lists were long. Few pleaded guilty. Mandatory sentencing meant gaol for the third theft of a Mars Bar. So, "we few, we lucky few…" sallied forth. Howse now runs the civil practice at a community legal centre. Conidi is a Supreme Court costing master, Boyce a senior crown prosecutor, while Batten & I battle away in County Court trials. We still get a kick out of the old war stories. Violin practice at Batten's place. We raise our voices. Boyce's dog bounds up to look out the window. Not much to see these days but good to chew the fat.

June 5 *Melbourne Lockdown Timeline: Restaurants, bars and cafes open with restrictions; unrestricted exercise permitted; home gatherings a maximum of 10; shopping—essentials only (Lasts for 18 days)*

10[30] hours. WebEx plea before Judge Lyon for young man. Acted for his father years ago. Dad was dirt poor from Anatolia but became a successful cabinet maker before stabbing a man for honour's sake. The son's a gun with computerised carpentry machines. He aims to take over. Dad threatens to sell out after heated arguments. Son sees his life disappear, becomes morbidly depressed. Goes to the factory, destroys machinery with a forklift. Phones best friend for help. Friend ridicules him. Goes to friend's place with knife. They argue. Stabs friend to chest. Friend lucky to survive. Son is 21, no priors, only he can work the complex equipment. Business will fail if he's inside much longer. These Oedipal crimes wouldn't have happened but for acute depression. Gets long stretch. Broken family.

June 13 10[10] hours. Covid numbers down. Daughter's birthday. With old friends in Daylesford so she can dine with mates. Daylesford farmers' market chockas with tourists ignoring social distancing. Hike round waterfall out of town. Feels like special blackfella place but no signs. Later cook duck dish from Gascony for hosts with 2015 Santenay. After dinner round fire dissect our plays at the Pram etc. Greg jokes about when we were tied to a pillar in the Melbourne Uni underground car park as Prometheus in King's *Prometheus Bound*.

June 15 14[30] hours. Opposed to Boyce in interlocutory appeal. Is indictment bad for patent & latent duplicity? Priest JA asks Boyce why they should not grant the appeal. All cues from the court indicate will get up. Afterwards, Boyce agrees should succeed.

June 17 13[00] hours. As convener of Famous 5 Minus 1, organise lunch at Di Stasio Citta. Ronnie splits restaurant in two for social distancing. We face Treasury Gardens or video behind bar of Reko Rennie cruising back of Bourke in camouflaged 70s Roller. Tehan & I use the table hand sanitiser. He studies menu, I the wine list. Boyce & Croucher arrive. Imagine the absent Lachie Carter in Blues jumper telling Themis, Goddess of Justice, next High Court appointee must have criminal trial experience. Linguini with Truffles, Vitello Tonnato & Parmesan crumbed Lamb Cutlets with Chianti Classico. It will be five months before we can lunch again.

July 02 10[00] hours. Partner hears VCAT planning case from desk at home. New VCAT hardware & software not performing. Threatens to resign. Try to fix. No help at all. Techs in King St sort it.

12[15] hours. Drive to Garry Sommerfeld's studio. Garry an old mate who's NGV head of photography. Photoshopping Julian Burnside portrait that Arts Committee commissioned. Three images of him in home study in one frame. Works well, needs subtle adjustment.

20[00] hours. Zoom poetry group. Normally gather in someone's house. Plug Michael Farrell's new book, *Family Trees*. He reads the whimsical *Andre Gide and the Honey Sandwich & While my Verandah Gently Weeps*. Lucky to have Corey Wakeling, who's teaching in Kobe, Japan & Toby Fitch from Sydney, online. Toby has taught at Sydney Uni for years. They're sacking their casual lecturers. Line Toby up for pro bono advice with barrister who does unfair dismissal work but not optimistic.

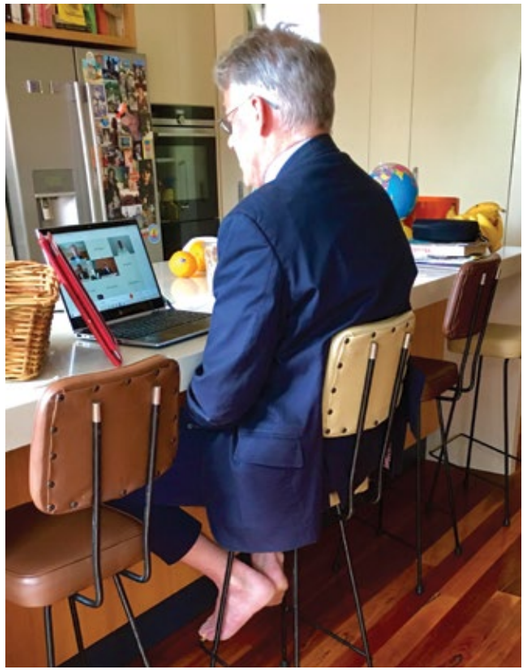
July 6 *Melbourne Lockdown Timeline: Victorian Premier Daniel Andrews announced a lockdown of metropolitan Melbourne as the state recorded its largest daily increase in COVID-19 cases since the start of the pandemic. This was ahead of the looming NSW-Victoria border closure.*

July 9 *Melbourne Lockdown Timeline: From midnight, back to takeout only; unrestricted exercise permitted but people unable to leave or enter restricted areas of Metropolitan Melbourne; no visitors at home; shopping—essentials only, no new holiday travel … amongst other things (Lasts for 24 days)*

17[00] hours. Line up three half-bottles of wine sent from club for online wine tasting. Sommelier welcomes 50 members on Zoom. Please raise hand for questions. Like primary school. Swirl and sniff Domaine Laroche Saint Martin Chablis 2015. Instantly in the Obediencerie cellars in Chablis leaning on barrel, reaching for oysters. Rich saline & citrus flavours flood palate. Next, the Boscarelli Vino Nobile de Montepulciano 2016. Violet & anise perfumes whisk us to a hill south of Siena on Umbrian border. Clonakilla O'Riada Shiraz 2017 with strawberries & roses drops us in paddock outside Canberra. Proust's madeliene transported him to his aunt's bedroom in Combray. Wine takes you to Europe despite the plague.

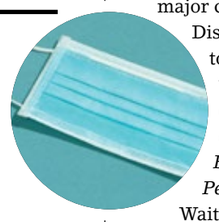
20[00] hours. Chambers Zoom drinks. Our law student secretaries arrange trivia night with Kaboom: tap one of four options on the App. No hope with three AFL questions but come from behind with general knowledge, e.g. who composed *Rite of Spring*? Pipped at post by reader who's quicker on buzzer. Good plague fun.

July 13 19[15] hours. Noah's Ark Zoom board meeting. Major provider of services to disabled children with $20 million turnover but NDIS doesn't fit kids. Our family centred



practice involves key worker visits. With visits out, switch to online service. What about poor families with no internet access? CEO great in crisis. Jobkeeper helps balance books. Concerns re mental health of staff & clients. Can we survive the double whammy of NDIS and the plague?

July 19 *Melbourne Lockdown Timeline: Following a concerning increase in coronavirus cases, face coverings are now mandatory in Metropolitan Melbourne and Mitchell Shire*



July 23 1300 hours. Interview Professor Marcia Langton for International Commission of Jurists Webinar series. She leads consultations about indigenous voice to parliament after government's rejection of Uluru Statement. We've known each other since native title days. Run through timeline since Wave Hill walk-off in struggle for indigenous rights. Two steps forward, two steps back. Marcia worked with Rio Tinto to encourage indigenous employment. Now outraged by their blasting of ancient sites in WA. When will governments discard paternalism & accept that indigenous people must determine their own futures?

August 2 *Melbourne Lockdown Timeline: Victoria has introduced a curfew from 8pm to 5am each night, and Stage 4 restrictions for Melbourne. Premer Daniel Andrews and Chief Health Officer Brett Sutton introduced the new set of rules to rein in coronavirus infections, which have spread disastrously over the past month. Exercise limited to one hour per day, within 5 km of home. (Lasts for 42 days.)*

August 5 1220 hours. Pick up takeaway dinner from Cutler & Co in Gertrude Street. Long queue of masked restaurant-deprived Fitzrovians. Cardboard box full of containers with preparation instructions.

1910 hours. The Bouillabaisse turns out wonderfully with Tavel Rose. After Rhubarb Tart watch episode of *The Bureau*, the French mini-series about spying on ISIS & the Russians. Endearing major character dies. Distraught. What to turn to when *The Bureau* ends? Have done *Fauda*, *Babylon Berlin*, *Peaky Blinders*… Wait for the new Trent Dalton and Richard Flanagan novels?

August 12 1000 hours. Court of Appeal rules on interlocutory appeal. Does not even grant leave to appeal. Can't believe it. Boyce abashed. Is it a High Court point?

August 17 1330 hours. Steve Anger is counsel for co-accused in interlocutory appeal. We walk round Princes Park with his bouncy Nepalese Mountain dog, not the smartest thing on four legs. Discuss case tactics & will we ever get on, plight of criminal bar, coping strategies, how our kids are faring: my emergency doctor son in hotel quarantine orders takeaway from top restaurants & plays online poker with his mates.

September 4 0715 hours. Scroll through Facebook. Friend posts video of two indigenous girls about 9 or 10 in Nowa Nowa singing *I am, you are, we are Australian* with halting gestures. Their voices crack a little. By the last verse, tears pour down my face. Doubt they would have six months ago.

1840 hours. Paul Grabowsky airs his weekly improvisation on Bosendorfer piano with his red setter ambling past. His recitals a highlight for friends as are regular jazz guitar solos by old mate John Ryrie. What a boon is music in lockdown.

September 14 *Melbourne Lockdown Timeline: a singles social bubble of one other person is introduced, otherwise no visitors; exercise limit increased to 2 hours per day; curfew is decreased by … 1 hour (9pm–5am). (Lasts for 15 days)*

September 16 1600 hours. ICJ Zoom meeting about co-ordinating push for bail law reform with like-minded agencies as numbers of women and indigenous people on remand rise. Big ask with the law & order platforms of major parties. Might escalating prison populations at risk of COVID lead to change?

1930 hours. Melbourne Uni Rugby Club Zoom meeting about the season that wasn't & what the future holds. Non-contact training for a collision sport can't work. Even touch rugby is out. Women's rugby one bright spot with numbers up following success of national 7s team. Ages since first pulled on the Black & Blue in '75.

2030 hours. Late joining chambers Zoom drinks. Mourn the AFL grand final going to Brisbane & likelihood no crowds for spring racing. Our civil lawyers seem busy. Banter about whether Trump can retain power. Pessimistic Fatmir predicts voter suppression in key states gives him an edge. Some Trump memes are priceless. Colleagues' droll humour boosts morale.

September 23 1600 hours. Zoom meeting with instructing solicitors from EDO NSW about strategies to get an injunction to halt rainforest logging in NW PNG. Debate whether expansive rights in PNG constitution will be upheld by Supreme Court given Malaysian logging corporation bribes. Decide to ask Finkelstein for advice.

September 29 *Melbourne Lockdown Timeline: outdoor gatherings, of a kind, are re-introduced: 5 people from 2 households only (Lasts for 27 days)*

October 7 1100 hours. WebEx Bail Application before Justice Coghlan after failing twice before magistrate. Prosecution concede exceptional circumstances given likely three-year delay between arrest & trial. Can they prove client an unacceptable risk of reoffending on bail? Call client in custody. He's taken advice to shave beard, don long sleeved shirt. Sheds tears saying how tough it is on his missus with four kids. Calls impressive prospective employer. Judge grants bail. Lectures client: his future is in his hands. Wonder if he can handle freedom in these times.

October 18 *Melbourne Lockdown Timeline: Hairdressers reopen. Covid-19 cases are low. From 700 per day, the rolling 14-day average in Metropolitan Melbourne is down to 7.2. Travel increased up to 25 km from home.*

October 22 1215 hours. Cycle to *Barbers of Brunswick* for much needed haircut. Cosimo, barber for 30 years, scarpered to Surfers & won't be back. Sit waiting with two masked young men. Am offered hipster beer or whisky. Water please. Answer emails on phone for 20 minutes. Madeline, masked and aproned, guides me to barber's chair. Show her my head shot from March for guidance. We chat. She's from Bendigo, now in Pascoe Vale. Fourth day at work after anxious months on Jobkeeper. Finds out I was wine writer in previous life. Asks for tips. Promise to email. Leave satisfied, no longer an aging hippie with a mullet.

October 26 0930 hours. Drive to chambers, get masked & robed and walk to County Court. Carmody J ordered me & client to appear to pre-record a witness in South Australia who didn't front for committal or trial when first listed. Lonsdale Street deserted. Eight court staff in foyer. Their only customer. Masked guard asks for Bar ID. Record presence photographing a screen. Fill in name & phone number & tick box on App to confirm well. Waved on without bag going through machine.

1025 hours. Client in dock with two security officers in full PPE kit. Prosecutor appears by WebEx. Says witness has done a runner. Judge comes on bench. Link breaks down between court & prosecutor I explain to judge about witness. Judge leaves bench. Twenty minutes later, link restored. Prosecutor says police think witness back on drugs. Reckon he's dodging: he's the crook, not my client. Case adjourned to 28 January 2021. Judge grants costs certificate. What a waste of time & money.

On 27 October 2020, lockdown restrictions started to ease. The size of gatherings increased. Restaurants and bars started to open. Since lockdown restrictions began on 26 March 2020, the total stay at home order until this date was 168 days or 24 weeks.

A 'Readers' DIGEST PART II

TEMPLE SAVILLE, HADI MAZLOUM AND VERONICA HOLT

On 22 October 2020, 32 readers (virtually) signed the Roll of Counsel, having completed the two-month readers' course entirely online. No doubt, as you will all recall, coming to the Bar is both an exciting and challenging endeavour, even more so given COVID-19. In this context, *Victorian Bar News* members, Temple, Hadi and Veronica reached out to the readers, asking them to share some information about themselves so that the Bar can get to know our newest members. In this *Readers' Digest Part 2*, we introduce you to some of the September 2020 readers.

Paul Jeffreys

Highlight of the course?
Seeing the joy on the faces of the new readers and their families during the Bar Roll signing ceremony.
What are your areas of practice?
All areas of commercial and public law, with particular interests in taxation and migration.
Why did you decide to become a barrister?
To pursue a long-term career that is interesting, challenging and rewarding, and one through which I can meet and assist a wide range of people.

Amel Masinovic

What are your areas of practice?
My main areas of practice are administrative law and commercial law.
What are your interests and hobbies (outside of the law)?
I like to keep myself busy with weightlifting, worldbuilding and wandering. I have been weightlifting since I first joined a gym while I was at Monash University. It helps keep me disciplined, releases stress and has improved my confidence. Worldbuilding refers to the development of a fictional world through writing, art and other media. I have been writing about my particular fictional universe for years now and often use it for tabletop roleplaying games such as Dungeons and Dragons. I enjoy wandering around urban landscapes.

What are you looking forward to most at the Bar once COVID-19 restrictions are eased?
I am looking forward to making the most of the Bar's open door policy and meeting my new colleagues and competitors. It has been strange to get through the readers' course without meeting the entire cohort in person.

Gemma Cafarella

How would you describe this readers' course in one word?
Can I have a phrase? If so: "you're on mute".
Highlight of the course?
I loved Tim Goodwin's session on diversity and inclusion at the Bar. He shared a lot of his own story and that really encouraged us to open up to each other as readers about some of our own diverse life experiences.
Why did you decide to become a barrister?
I worked as an associate public defender in VLA Chambers for two years and I loved it so much that it encouraged me to take the Bar exam. Being trusted to present someone's case in court is an incredible privilege.

Tanya Kamil

Highlight of the course?
The highlight of the course was orientation day. It was wonderful seeing so many smiling and welcoming faces before we knew what the next few months had in store for us. Trial boot camp. Not so many smiling faces were seen until the signing ceremony!
Favourite session in the course not directly related to your intended area of practice?
My favourite session was called 'Taxation and the Barrister' delivered by Tony Pagone QC and Eugene Wheelahan QC. I have never been more convinced about setting up an accurate log book, right financial structures and good banking habits. I left the session wanting to lecture my family about their taxes and to find an accountant!
What are you looking forward to most in joining the Bar?
What I most look forward to is working with other barristers on cases and in different areas of the law. I am also very much looking forward to soon meeting in person all the new friends I have made!

Simon P Thomas

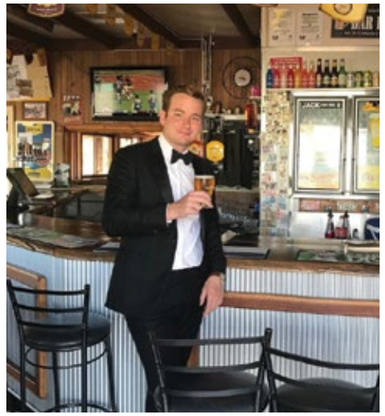
What are your areas of practice?
Crime, quasi-crime, public/admin, international.
What are you looking forward to most in joining the Bar?
Being part of a community that really cares about doing the work well and for the right reasons.
If you could describe yourself in three words, what would they be?
Keen as mustard.

Julian Murphy

How would you describe this readers' course in one word?
"Your-mic-is-muted".
Did the course meet your expectations?
Yes, except for the dress code. Initial expectations relating to a formal dress code were (thankfully) lowered when various presenters (including judges) appeared in polar-fleece, hoodies and other casual attire.
Were you able to develop friendships/ relationships with the course being conducted online?
Surprisingly yes, and I felt like I also got to know a few fellow readers' cats, who would occasionally wander across their keyboards in front of the camera.

Todd Allen

How would you describe this readers' course in one word?
Zoom.
Why did you decide to become a barrister?
Mainly for the wig but also for the challenge, the independence and the opportunities to be on my feet in court.
What are your areas of practice?
Most of my experience is in construction and property but I hope to build a broad commercial practice at the bar.



Melanie Albarella

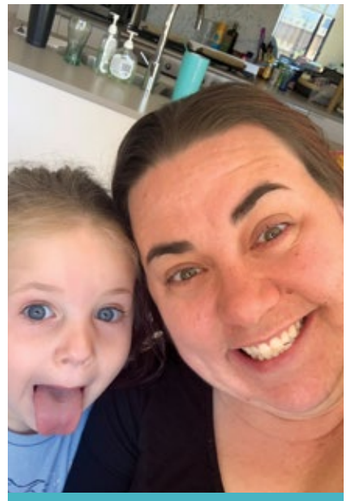
Highlight of the course?
Being exposed to several exceptional presenters (judges, silks, junior barristers).
What are you looking forward to most, at the bar, once COVID-19 restrictions are eased?
Being in the city and able to get the most of the "open door policy" that people speak of.
Why did you decide to become a barrister?
I enjoy the art of advocacy, the flexibility of it and making a real difference.

Alexander Marcou

Lowlight of the course?
Experiencing my one technical difficulty in the whole course during the Bar Roll signing ceremony. And I only had one line… "Thank you".
Did the course meet your expectations?
Having been a vocal critic of CPD sessions as a solicitor, I have to say that the course far exceeded my expectations. I felt that I learned a great deal about the practical aspects of advocacy, in a very short time. I am very grateful to all of our presenters for volunteering their time for the sheer love of it.
What are your interests and hobbies (outside of the law)?
I am not sure that 'interests' is the right word. More like 'obsessions'. Before COVID-19 struck, I spent a lot of my time training in Olympic-style weightlifting. At the moment, I practise yoga and meditation. More recently, I have been working on a creative writing project and composing short piano tunes. I have an unhealthy interest in personality tests. And of course, I love a good dance.

Nick Kotzman

How would you describe this readers' course in one word? Singular.
Were you able to develop friendships/ relationships with the course being conducted online?
Despite everything, our cohort developed a great rapport and got to know each other (and each other's cats, dogs, turtles and children) on a level not ordinarily facilitated by the course.
What are your areas of practice?
I aim to develop a commercial practice with a focus on competition and consumer law.



Heather Anderson

How would you describe this readers' course in one word?
Rollercoaster!
What, if anything, did you find difficult about doing the readers' course online?
Missing out on developing in-person friendships and doing the course whilst home-schooling, having no day-care and a noisy husband at home!
What are your interests and hobbies (outside of the law)?
I love travelling to new places, decorating cakes and watching F1—in person preferably!

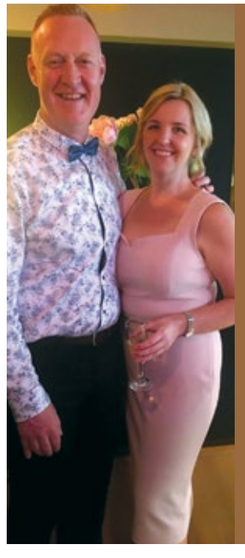
Angus Macaskill

How has your relationship with your mentor developed during COVID-19?
My mentor, Roslyn Kaye, has been really supportive and has checked in with me regularly during the readers' course. I worked with Roslyn on several cases during my time as a solicitor, and have enjoyed discussing some of my learnings and challenges with her during the readers' course, and hearing her perspective on them as an established barrister.
What are you looking forward to most, at the bar, once COVID-19 restrictions are eased?
I am looking forward to getting into chambers and experiencing some of the collegiality that the Victorian Bar is well known for.
What are your areas of practice?
My background as a solicitor includes common law, professional indemnity, class actions, insurance, statutory compensation (WorkCover) and some commercial litigation. I hope to build on my experience of class actions and large scale litigation, whilst at the same time consolidating my personal injuries experience by taking on plaintiff work (my background as a solicitor having been on the defendant/insurer side).


Tessa Meyrick, second from right

Tessa Meyrick

What are your areas of practice?
I practise in commercial, regulatory and public law, including in constitutional and judicial review matters. I've come to the Bar from the public law team at the Victorian Government Solicitor's Office, and before that was a senior associate in the commercial litigation group at Allens.
Why did you decide to become a barrister?
Because barristers get to do the juicy stuff! I love the creativity of legal practice and coming to the Bar seemed like the natural next step.
What are your interests and hobbies (outside of the law)?
Together with three friends, I run a community choir in Melbourne's inner west, which keeps me pretty busy when I'm not working or parenting. We've managed to keep rehearsing despite not being able to sing together in person since March.



Fiona Martin

What are you looking forward to most, at the bar, once COVID-19 restrictions are eased?
Not sitting in front of a computer screen for a court appearance and getting back into a physical court room… with shoes on this time.
What, if anything, did you find difficult about doing the readers' course online?
Having to adapt to living in front of a screen and missing face-to-face interaction. It's hard sitting in front of a screen all day so I really struggled with that, but it meant that our group was able to complete the course and it all worked out well, so I don't complain.
What are your interests and hobbies (outside of the law)?
I enjoy home renos and I'm constantly up to something around the house. I also love the water and swim a lot. And if all else fails, you'll find me glued to a wine glass somewhere.

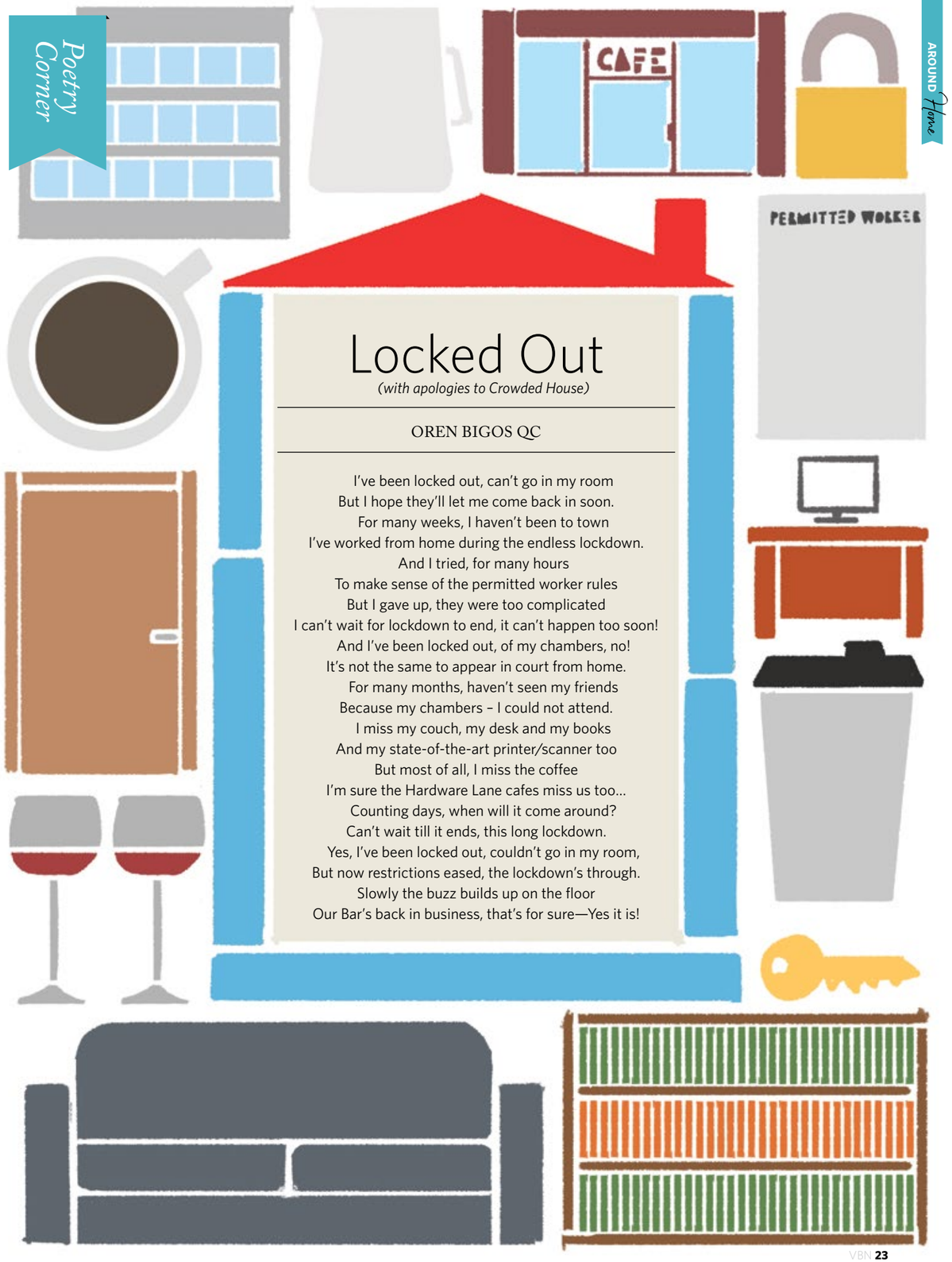
Rhiannon Malone

Why did you decide to become a barrister?
My primary reason for deciding to become a barrister (at the age of 11) was "so I can wear that fancy wig and funny gown". The reasons for my journey to the Bar have developed in seriousness since those days; however, I never imagined practising in commercial litigation/insolvency when I was at university. Suffice to say that the moment I went to Ludlows to purchase my wig and robes and saw my reflection, I couldn't help but feel proud for making that 11-year-old little girl's dreams come true.
Favourite session in the course not directly related to your intended area of practice?
I loved the "critical software for barristers" session with Emyrs Nekvapil, or King Emyrs as we dubbed him after that session. I'm not the best with technology but he presented in such an open manner that I felt far less intimidated about getting my head out of the sand.
If you could describe yourself in three words, what would they be?
Determined, loyal and honest.

Harry Hill-Smith

How would you describe this readers' course in one word?
Housebound.
Why did you decide to become a barrister?
I loved mooting when I was at law school and this was then reinforced by getting into a real courtroom as an associate to Justice McLeish.
What are your areas of practice?
Any brief I can get.

Poetry Corner



Locked Out

(with apologies to Crowded House)

ORENBIGOS QC

I've been locked out, can't go in my room
But I hope they'll let me come back in soon.
For many weeks, I haven't been to town
I've worked from home during the endless lockdown.
And I tried, for many hours
To make sense of the permitted worker rules
But I gave up, they were too complicated
I can't wait for lockdown to end, it can't happen too soon!
And I've been locked out, of my chambers, no!
It's not the same to appear in court from home.
For many months, haven't seen my friends
Because my chambers – I could not attend.
I miss my couch, my desk and my books
And my state-of-the-art printer/scanner too
But most of all, I miss the coffee
I'm sure the Hardware Lane cafes miss us too...
Counting days, when will it come around?
Can't wait till it ends, this long lockdown.
Yes, I've been locked out, couldn't go in my room,
But now restrictions eased, the lockdown's through.
Slowly the buzz builds up on the floor
Our Bar's back in business, that's for sure—Yes it is!

IBA OUTSTANDING YOUNG LAWYER OF THE YEAR

ONE OF OUR OWN

JULIAN MCMAHON

"As the oldest child of a single mother, a migrant woman working very hard to put food on the table for her children, I certainly felt obliged to seize any chance at education which came my way." Daye's long list of academic awards is testament to that. In the same week that Kamala Harris was telling her amazing life story, raised by a single immigrant mum, I was listening to Daye Gang, a young barrister in Gorman Chambers.

The International Bar Association (IBA), founded in 1947, is the global voice of the legal profession. Each year, the IBA awards the prize of "Outstanding Young Lawyer of the Year" to one lawyer in the world who is under 35 years of age. The 2020 winner is Daye Gang. She is the first Korean and first Australian to win the prize. It is an outstanding achievement, born of hard work and courage. I have persuaded Daye to let me tell something of her story.

In 2013, the United Nations Human Rights Council established the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (DPRK) (North Korea). It was mandated to investigate the grave violations of human rights in the DPRK. Australia's Michael Kirby was appointed as Chair. The ground breaking report found that the main security agencies were perpetrating crimes against humanity with impunity, including summary executions and other extrajudicial killings, enforced disappearances, torture, prolonged arbitrary detention, rape and sexual violence of comparable gravity.

The Commission found that either the International Criminal Court or an ad hoc international tribunal must be given jurisdiction to address the ongoing commission of crimes against humanity perpetrated in the DPRK, so that those most responsible could be prosecuted.

Daye's work on North Korea springs from those recommendations. Daye says the Kirby report led to the establishment of a UN field office in Seoul and enabled NGOs to win funding to investigate international crimes.

Daye has been working on a number of reports. She was legal consultant for the Citizens' Alliance for North Korean Human Rights report, investigating whether the mass movement of ethnic Koreans from Japan to North Korea between 1959 and 1984 was actually a North Korean intelligence operation of forced displacement and enslavement of almost 100,000 Koreans. The report is part of the overall project to build cases for prosecution.

The report identifies, for example, that harsh low status work was done by many of these displaced former residents of Japan. This 'status' has been passed down to their children and grandchildren, who are bonded by intergenerational slavery to labour and are disappeared if they become inconvenient. They are completely restricted from changing residence or job, or attaining higher education.

The Kirby Commission of Inquiry also pointed to prosecutors and judges within North Korea as perpetrators of crimes against humanity. However, North Korean legal information is not readily available in English. Daye is bridging this gap by translating all North Korean laws into English for public use.

"One of Daye's ambitions is to visit the small town where her family comes from now in the territory of the DPRK."

In March 2016, Daye was accepted into the PhD program in the Michael Kirby Centre for Public Health and Human Rights at Monash University. Her research is on restorative justice for sexual and family violence. The plan is to help design programs and evidence-based policies for victims of systemic human rights abuses, including victims in the DPRK.

One of Daye's ambitions is to visit the small town where her family comes from, now in the territory of the DPRK. She has previously written: "I want to locate and meet my relatives, on both sides of my family, who have been lost to us… I want to be able to look my relatives and my people in the eye and tell them I fought for them with the privileges that were given to me because I was educated in the West, in the English language, and in law."

In her advocacy work, Daye has already done some hard yards, speaking to key groups in Washington, Brussels, and Geneva. Yet here in Melbourne walking out of Gorman Chambers—which houses 34 female criminal law barristers—she has found herself mistaken at court for the interpreter or the AFM, and like many young women in the law, receiving unwanted advances. Our progress is real, but disjointed.

Daye read with Rohan Lawrence, and her senior mentor is Claire Harris QC. She has been mentored by justices at the Family Court where she was an associate. It was ICJ (Victoria), who years ago sponsored her to a Canberra conference where she met colleagues who opened doors to much of her work.

** For those looking for some enjoyable reading on Korea, the author recommends Han Kang's* Human Acts, *and Kyung–Sook Shin's* The Girl Who Wrote Loneliness, *which give deep insights into South Korean life, especially for women in the last few decades.*

News & Views

AN INTERVIEW WITH ELLIOT PERLMAN

JUSTIN WHEELAHAN AND CARMELLA BEN-SIMON

While the law may have slept in Elliot Perlman, it has not been dead. Before proceeding with this interview Elliot was anxious to make a disclaimer that he was not holding himself out as having any expertise in law, nor fraudulently passing himself off as a practising barrister, a rare admission for someone still technically a barrister.

Elliot fought the law, and fiction won: he completed his articles, worked as a solicitor for a few years, and then as an associate to Justice Geoffrey Eames at the Supreme Court of Victoria, during which he wrote his first novel, *Three Dollars*. "Given the old middle-class parental adage, 'Don't look to the arts for an income'," he says, "ironically it was on the strength of an advance for *Three Dollars,* that I got the momentary, fleeting, mirage of the financial security necessary to take the terrifying risk of coming to the bar." Elliot enjoyed practising as a barrister, but was incrementally drawn to fiction like a moth to the flame. He went on a book tour to the UK, and then moved to New York for nine years—making it difficult to take cases at the Melbourne Bar. While Elliot remains on the Bar Roll (as he describes it, "a threadbare security blanket"), he has not taken a brief for 18 years.

The law appears to have given Elliot plenty of material to work with as a writer, though. He has been writing since school, and not being a religious person, Elliot took great comfort in the arts in difficult times. He wrote in secret at university because "while it might have been socially acceptable to tell your friends you couldn't meet them for a coffee or a drink because you were going to band practice, it never seemed socially acceptable to tell friends 'I can't meet you because I've got to get home and perfect a paragraph.'"

When asked if legal training helped his writing, he says, "it didn't help me stylistically *per se*, although I still use words like *per se*—so probably it's crept in there, but it did teach me to look at both sides. *Seven Types of Ambiguity* [a novel told in seven parts by seven characters] is an example. You have characters sometimes doing appalling things, but how does the character in question feel about that? He doesn't feel it's appalling. I had to embody the character and make a case for each character's point of view. Legal training was very good for that. Shakespeare too, who although not a lawyer, never gives a character a bad line. Every character gets a certain respect, just as our clients are meant to." Elliot also pays attention to his characters with a just and loving gaze directed upon their independent reality in his novels.

His latest book, *Maybe The Horse Will Talk*, is about Maserov, a second year lawyer at the Collins Street-based, Freely Savage Carter Blanche. Maserov, recently separated from his wife and their two children, hates his job as a battery hen solicitor in a large corporate law firm. Maserov, whose boss, Mike Crispin 'Crispy' Hamilton, has a Stalinesque management style, is terrified of losing his job, the job he hates, but has to keep in order to have a hope of paying off the family home he is no longer living in.

When Hamilton lets slip to Maserov that the firm will be letting go of him at the end of the year, Maserov decides that the only way he can keep his job is to audaciously approach Malcolm Torrent, the CEO of Torrent Industries, Freely Savage's biggest client, and secure an unauthorised secondment by promising something almost impossible. The high wire act requires resolving four sexual harassment claims brought by former employees against senior managers—within a year. The book gets its title from Maserov retelling his own predicament to his children through a fairy tale in which a court jester falls out of favour with the king, who stays his execution for a year by promising to teach the king's prized horse to talk.

Elliot presciently chose the theme of sexual harassment for *The Horse* back in 2012, long before the #metoo movement that exploded in 2015 and has continued to have local fallout on institutions like AMP, the Federal Government and even the High Court in 2020. "It seemed obvious. Sexual harassment and corruption have always been there. You could see it. I could see it as a baby lawyer and naively was shocked by it. Reform seemed to be window dressing. When I talk to lawyers of my generation, and also to younger lawyers to whom I tell how it was in my day, they quietly admit, almost in a whisper, 'It's the same'. Then you'd hear these shocking stories, shocking in the sense that they are terrible, but not in the sense they are surprising. There are certain things about lawyers. We are a self-selecting group who have demonstrated capacity for hard work, intellectual rigour, an ability to apply rules dexterously to a multiplicity of circumstances, and with luck—sometimes a certain intellectual courage. But society requires something more from individual practitioners. Lawyers are expected to have a certain moral and ethical integrity that asymptotes towards that expected of the judiciary. There are numerous examples throughout history of lawyers exhibiting tremendous moral courage in their professional and their personal lives. Those people play a vital role in the functioning of a healthy democratic society."

Inside the jury room

One trigger for writing his second novel *Seven Types of Ambiguity*—which has a criminal trial at its centre—was Elliot's experience, first while a law student as foreperson on a jury, and then later as an associate at the Supreme Court. The late Professor Louis Waller permitted Elliot, still a student at the time he was on a jury, to record Professor Waller's Evidence lectures in absentia on the condition that Elliot told him what went on in the jury room.

Elliot says, "I found the experience of deliberating with 11 other people who couldn't get out of it, who had never demonstrated in their whole lives any capacity to assess evidence dispassionately, both fascinating and frightening. You could see people were forming opinions about the guilt or non-guilt of the accused based on extraneous or irrelevant information. During a break, one juror was trying to pick up the 12.15 at Morphettville on his pocket transistor radio and was willing to vote a particular way to increase his chances of hearing it. Practising lawyers seldom get the opportunity to see that. The public would like to think that juries decide things on the basis of forensic evidence: blood stains, fingerprints, DNA samples. The profession would like to think it's on the basis of a rational and critical analysis of the arguments and all the evidence adduced. The 12.15 at Morphettville isn't really meant to enter into it."

PHOTO COURTESY OF DAVID COOK

"But lawyers per se are not self-selecting with respect to rigorous moral or ethical integrity. Lawyers can behave, professionally within their practice and in their interaction with each other, as unethically as any other human being. We're kidding ourselves if we pretend otherwise."

The book features graphic accounts of brutal sexual assault, as well as tender but awkward consensual encounters between Maserov and his co-worker, Jessica in Human Resources, whom he befriends. Elliot explains after writing *The Street Sweeper*, a novel about the Holocaust and the Civil Rights movement, which required six visits to Auschwitz for research, he did not want to write something dark, and put off writing the sexual assault scenes. "But I realised that obviously if you are going to deal with toxic workplaces you need to deal with sexual harassment. If you're going to deal with sexual harassment you need to be upfront about it and be shocking—not so much for women—but for that cohort of men that knows intellectually that these things go on, but since they aren't perpetrators themselves, they don't have an emotional sense of it. I wanted to shock the male reader into thinking this is what it is, it's as bad as this. It's a male problem. Women suffer, but it's a male problem. It's not about sex at all but the arbitrary and shocking abuse of power. Maserov is appalled by it. Maserov is a good guy, but he treats it forensically, at least initially—like just another problem you have to solve."

Like the work of Graham Greene and Raymond Carver, *The Horse* has a strong moral centre and sense of compassion. I ask Elliot if he is a moralist of sorts. "I'd have to cop to that. I do it reluctantly. I want people to be able to escape from their lives with my books and not be lectured to, but historically I can see that all my books are animated by social issues and political issues, by those moments in our lives where the personal meets the political".

Elliot's most recent children's book *Catvinkle and the Missing Tulips*, also

> "I wanted to shock the male reader into thinking this is what it is it's as bad as this. It's a male problem."

has a moral purpose and a legal theme about impartiality and justice, even a trial of sorts. Catvinkle, a somewhat self-centred cat, is asked to defend two sheep wrongly accused of eating tulips. The sheep are easy targets because whenever the matter of the missing tulips is discussed in front of them, they do tend to look very sheepish. Elliot wrote the first book in the series, *The Adventures of Catvinkle*, out of a sense of anger and impotence about a growing tolerance of intolerance, conspiracy theories, and anti-science. Not knowing where to start, Elliot started with children, and stories about social inclusion, anti-bullying, and anti-xenophobia illustrated by animals that were not threatening to parents or teachers. Elliot's aim was to write books that amuse and entertain adults with in-jokes, allusions, and irony, while at the same time embedding ethical concepts in a gripping and nuanced story for the children, so that reading would be a better shared experience.

Despite the confronting subject matter of *The Horse*, unlike some of Elliot's darker books like *The Street Sweeper*, *The Horse* is for the most part hilariously funny. The humour is immediately recognisable as Jewish, like a cross between Franz Kafka and Danny Katz. For example, when an out-of-work solicitor sets himself up as a life coach to a small-time hoodlum habitué of his local pub, he ends the session advising him not to lose his temper or use his fists or his feet on the way home, adding, "If you do have to defend yourself, try sarcasm. It's scalding but leaves no injury that can be picked up by X-ray, CT scan or any other imaging device. And it's not illegal. Not yet, anyway."

I ask Elliot why the humour is instantly recognisable as Jewish. "Jewish humour is a tried and tested defence mechanism that's traditionally helped Jews cope with a sense of their precariousness, a precariousness which derives from their history as a vulnerable minority everywhere. The fears and anxieties that are inherent in Jewish humour are felt ultimately by everybody, irrespective of religion or ethnicity, and that's why it's appreciated so widely. Everybody knows these feelings. It's just that, for historical reasons, Jews feel them first and more intensely."

There is much local colour in *The Horse* for Melburnians: a Degreaves Espresso Bar, a hipster infested Grosvenor hotel in St Kilda, a secret price fixing meeting at Romeo Lane, a Torrent manager's wife waiting for her Cayenne E-Hybrid to be serviced in Surrey Hills. Elliot was hoping an Australian film or TV production company might be interested in the book, but the calls weren't coming in.

Then, early one morning, lifting one son out of his child car seat in the kinder car park, he got a text: "Hi Elliot. Call me when you wake up. We want to buy the Horse". The text was from the President of Paramount Television in the US, who want to turn *The Horse* into a series, but move it to a generic US city like Chicago. They have asked Elliot to write and executive produce it working with an experienced Hollywood showrunner, and to "Tell it in your voice. We want to buy your voice"—so a hint of Melbourne may find its way into the series yet.

Elliot explains how television has changed with streaming services like Amazon Prime, Netflix and Apple TV. "You don't need 20 minutes with breaks and artificial cliff hangers where you are not allowed to offend people. When I failed to hide my surprise that they wanted me to adapt the novel, Paramount explained that the author of a novel with what they described as a 'distinctive' voice is more in demand in the age of streaming services." Elliot can finally let go of the Bar as his transitional object.

Elliot Perlman's *Maybe the Horse Will Talk* and *Catvinkle & the Missing Tulips* are available now.

R v CHAMBERLAIN
A RETROSPECTIVE

The JURY TRIALS

Lindy and Michael Chamberlain walking into the Darwin Supreme Court

Andrew Kirkham*

On 17 August 1980, Azaria Chamberlain, then aged 9½ weeks, was attacked and killed by a wild dingo in the vicinity of the camping ground at Ayers Rock. On 29 October 1982, following two inquests in 1981 and 1982, Mrs Chamberlain was convicted of the murder of her baby daughter, Azaria, and Mr Chamberlain was convicted of being an accessory after the fact of such alleged murder in the Supreme Court Darwin. The Chamberlains' appeal, heard by the High Court in 1983–1984, was unsuccessful, the court being split 3:2. A royal commission into the Chamberlains' convictions presided over by Justice Morling in 1986–1987 exonerated the Chamberlains, and their convictions were ultimately set aside.

In 2012, some 30 years after the Chamberlains' convictions, a Northern Territory coroner found that Azaria Chamberlain had been killed by a wild dingo, and apologised to the Chamberlains for what they had been through. Michael Chamberlain died on 9 January 2017 still without an apology from the Northern Territory government for the miscarriage of justice which so adversely affected all of the Chamberlain family.

At the time of Azaria's death, dingo attacks on humans were common in the area of the Ayers Rock camping ground. Several young children had

been bitten in July–August 1980. On 16 August, a young boy and a young girl were separately attacked by dingos. On other occasions, dingos had pulled a cushion from under a woman's head whilst she was sleeping, and on another occasion, dingos had pulled a sleeping bag from a woman's feet. On an earlier occasion, a child had been pulled from a car by a dingo holding the child's head in its jaws.

The Ayers Rock park ranger had, before Azaria's death, written to the Northern Territory government predicting future dingo attacks at Ayers Rock as a consequence of the local dingos having lost their fear of humans. His letter stated that children and babies were possible prey. He sought both permission and ammunition in order to cull these dingos.

At 8pm on 17 August 1980, Mr and Mrs Chamberlain and their children Azaria and Aidan, then aged six, were located at a barbecue area in the Ayers Rock camping ground, approximately 20 to 25 metres west of their tent and car, which were located next to each other to the east of the barbecue area. The Chamberlains' other son, Reagan, then aged four, was asleep in the Chamberlains' tent. All witnesses at the barbecue area observed that at this time Mrs Chamberlain showed no sign of any emotional distress or upset and presented as a loving mother.

Mrs Chamberlain left the barbecue area in order to put Aidan and Azaria to bed. Her evidence at trial was that she put the child in a bassinet and tucked blankets around her. Because Aidan stated that he was still hungry, she obtained a can of baked beans and returned to the barbecue with Aidan after a time estimated by witnesses of about 5 to 10 minutes. On her return to the barbecue, Mrs Chamberlain, according to witnesses, appeared composed and showed no sign of emotional upset. No person present saw any sign of blood on her person or clothing.

It was in these circumstances that the Crown ultimately alleged that Mrs Chamberlain, without any apparent motive:

» entered the tent and put on a pair of tracksuit pants;
» left Aidan in or near the tent, which meant that he was located close to the car, which was parked next to the tent. [Why Mrs Chamberlain would take Aidan to the tent if she intended to kill Azaria remained unexplained.];
» took Azaria into the car, seating herself in the front passenger seat and holding the child;

> "The Ayers Rock park ranger had before Azaria's death written to the Northern Territory government predicting future dingo attacks at Ayers Rock as a consequence of the local dingos having lost their fear of humans."

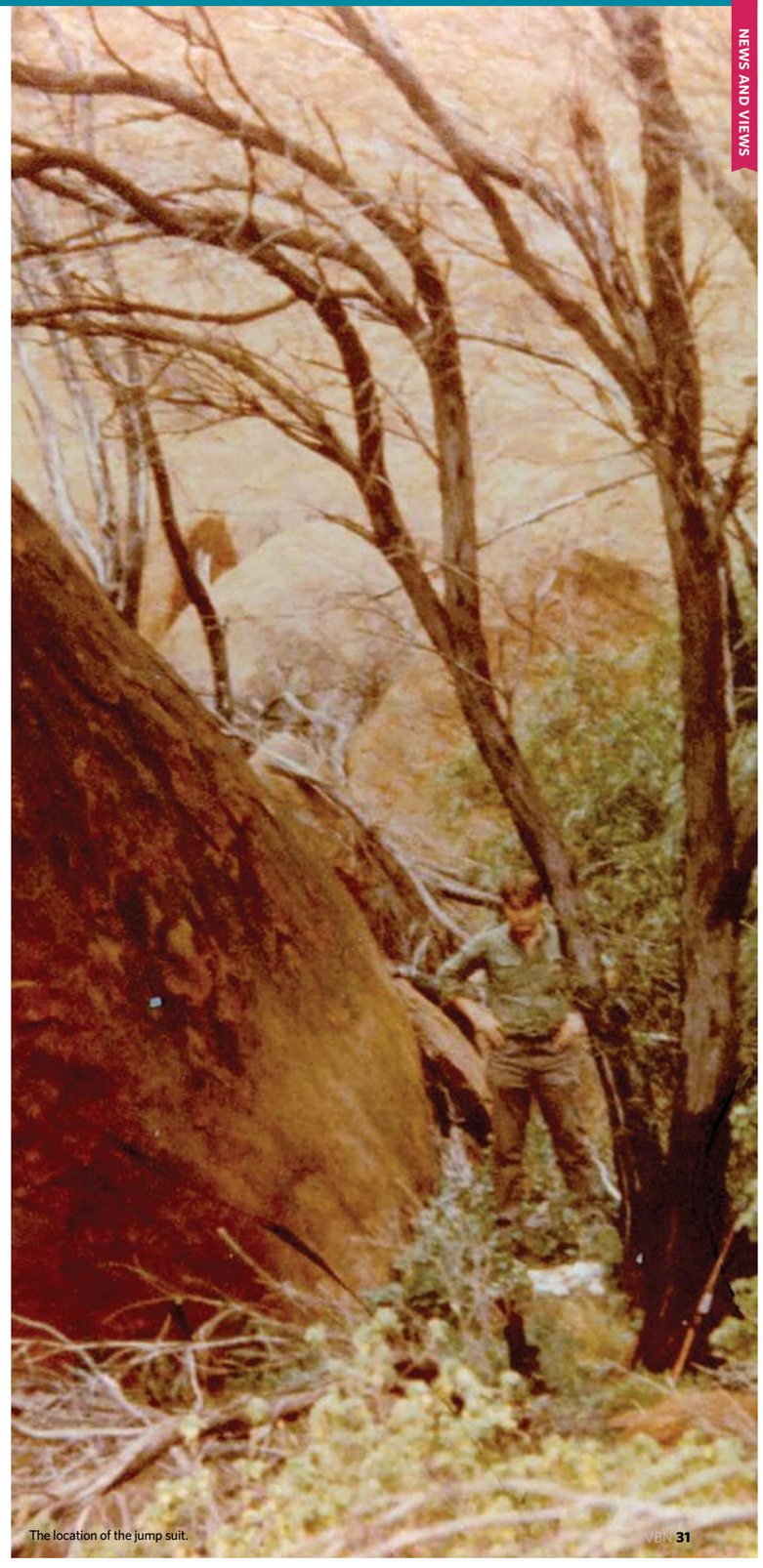
» cut the child's throat possibly with a pair of scissors. [The prosecution did not lead evidence that a search of the Chamberlains' car by police on 1 October 1980 indicated there were no cutting implements in the car. Scissors were located in the car one year later on 19 September 1981, but the royal commission found no evidence to indicate there were any scissors in the car "that night", i.e. the night of Azaria's death.];
» waited for the child to die. [Depending on the injury to the child this may have taken up to 20 minutes if what was severed was a jugular vein or two-to-three minutes if there was a severance of the child's carotid artery. There was no evidence the child had cried out at this time. Stains on the left hinge of the passenger seat and the floor beneath, thought to be Azaria's blood, were discounted as such by the royal commissioner. He ultimately found that if there was any blood in the car, it was minimal and was not the child's blood. An appropriately qualified scientist exhaustively testing the entire car in 1986 was unable to detect blood in the car];
» placed the child's body in a camera bag located in the car and cleaned the blood from the car. [If, as the Crown alleged, the blood in the car had come from an arterial spray this would have been a significant task.];
» returned to the tent with blood on her hands and tracksuit pants. [No witness recalled Mrs Chamberlain wearing tracksuit pants that night, although she herself claimed she put them on later in the night in the course of searching for the child.];
» removed her tracksuit pants and washed her hands. [The royal commissioner was later to find that, on the whole of the evidence, any marks on the tracksuit pants were not bloodstains.];
» returned to the barbecue composed and with no signs of blood on her clothes. [This absence of blood would have been unlikely if there had been an arterial blood spray from the child as alleged by the Crown.]; and
» subsequently buried the child's body in the general area of the camping ground. [There was no evidence of either of the Chamberlains doing anything like this, and no evidence of any shovels or digging instruments being seen in or around their tent or car.]

Later, after Mrs Chamberlain and her husband had joined the search for their child, Mr Chamberlain drove the Ayers Rock nurse, Mrs Elston, to a motel where he and Mrs Chamberlain were to spend the night. Mrs Elston saw no signs of blood in or around the area in which she was seated, i.e., the front passenger seat, she smelt no blood and gave no evidence after the event of blood on her clothing. No signs of blood were located in the carpet in front of the seat in which Mrs Chamberlain was alleged to have killed her child.

Two persons, including the ranger at Ayers Rock, engaged in the search for the child. Both of them, experienced in tracking, observed dingo tracks proceeding from the vicinity of the Chamberlains' tent and continuing to the sand dunes east of the campsite and beyond. They observed in the area between the tracks a drag mark and also indentations in the sand apparently caused by an object being laid down. The indentations displayed a pattern which was described by witnesses as a knitted jumper or woven fabric. Mr Roff, the park ranger, gave evidence that the object causing the drag mark appeared to have been quite heavy and that there were three areas where it had apparently been put down. He asserted that this evidence was consistent with a dingo dragging the child and putting her down on occasions so that her clothing left a weave pattern in the sand.

At the trial, evidence was given by witnesses that a dingo had been seen in the area of the Chamberlains' tent that night and, further, that about 10 minutes before the child disappeared, the growl of a dingo was heard in the vicinity of the Chamberlains' tent. None of this evidence was contested by the Crown.

While this evidence might be seen to run counter to the Crown's allegations, there was one other piece of evidence which appeared to put Mrs Chamberlain's innocence beyond doubt. Shortly after she returned to the barbecue, a Mrs Lowe as well as Mr Chamberlain and Aidan heard the child cry out from the Chamberlain's tent. Mrs Lowe said the cry definitely came from the tent and that she was positive it was the cry of a small baby and not of a child. She said the cry was loud and sharp and seemed to stop suddenly. Mrs Chamberlain, on the suggestion of her husband, walked towards the tent and, when about five yards away, called out words to the effect "that dog's got my baby". Clearly, if the cry was that of



The location of the jump suit.

NEWS AND VIEWS

Azaria, then the Crown case could not succeed because it occurred at a time when according to the Crown she had been killed some time before. As Deane J stated in the High Court appeal "unless Mrs Lowe's clear and definite evidence that she heard the cry of a baby is rejected as mistaken, the Crown's case against the Chamberlains must fail". He noted that the Crown did not seek to impugn Mrs Lowe's credibility but simply suggested that she may have been mistaken.

Murphy J, the other of the two dissenting High Court justices, listed several issues which he considered militated against the Crown case. These were the complete absence of any motive for Mrs Chamberlain to have killed the child, the fact that the child's body was never found, the absence of any identified murder weapon, the fact that there was no admission of guilt from either of the Chamberlains, that the murder by a mother of her baby was contrary to nature [the evidence was that Mrs Chamberlain was not suffering any post-natal depression], the extremely limited opportunity Mrs Chamberlain had to commit the crime and the undisputed fact that both of the Chamberlains were of good character. On the lay evidence, it was apparent that the Chamberlains were innocent of all charges.

The Crown, however, relied heavily on forensic evidence in support of the charges. It needs to be understood when reviewing the Crown's evidence of alleged bloodstains in the Chamberlains' car that the car was forensically tested a year after the alleged murder during which it had been exposed to hot weather in Mount Isa where it was located. Scientists agreed that this would have the effect of denaturing any bloodstains, i.e., any bloodstains would undergo biological changes, which were likely to affect the reaction of blood to the various tests.

Testing was carried out by a forensic biologist Mrs Kuhl, employed by the Health Commission of New South Wales. Almost no residue was left after her testing so that the defence may test the same materials. Gels used in some of those tests requiring a subjective interpretation as to whether they revealed the presence of foetal haemoglobin were destroyed by Mrs Kuhl before the trial and after the second inquest. This was despite the fact that her file was headed "Alleged suspicious death of Azaria Chamberlain", and the clear foreseeability of the Chamberlains being charged with criminal offences. This meant that the original gel could not be subjectively assessed by experts called for the defence, who had to rely on a photograph of the gel.

Mrs Kuhl's work notes obtained during her cross-examination in the second inquest were provided by the defence to two experts in biological science: Professor Boettcher and Professor Nairn. Both were distinguished and undoubtably expert in this field. They gave evidence based partly on Mrs Kuhl's work notes and partly on their own experiments that the antisera used to test the bloodstains for the presence of foetal haemoglobin was not mono specific for that purpose. The antisera was supposed to contain antibodies which would react only with the antigens of the gamma chains of haemoglobin molecules. Adult haemoglobin contains four molecular chains: two alpha chains and two beta chains. Foetal haemoglobin contains two alpha chains and two gamma chains. The blood of a newborn child contains both foetal haemoglobin and adult haemoglobin in the proportion of about 75% to 25%. Accordingly if the antisera was not mono specific and not reacting only to the molecules in the gamma chain, but rather, reacting to molecules in the alpha chain, the result is useless because both adult and foetal haemoglobin contain alpha chains.

Professor Boettcher noted that it appeared from Mrs Kuhl's notes that she observed a more positive reaction by the antisera to test samples than to cord blood, i.e., blood taken from an umbilical cord used as a control. This is the reverse of what would be expected if the test sample was of Azaria's blood since cord blood is richer in foetal haemoglobin than is the blood of a baby of Azaria's age. Further, the notes indicated that Mrs Kuhl observed a more positive reaction with the antisera than with antisera which was supposed to react to any haemoglobin adult or foetal. Again this was the reverse of what would be expected since Azaria's blood would have contained more adult than foetal haemoglobin. Mrs Kuhl also did not engage in control tests using aged samples. The royal commissioner thought this indicated a lack of awareness of the dangers posed by denatured blood. Mrs Kuhl also failed to use adult blood in control tests, i.e., testing the antisera on known adult and foetal haemoglobin to ensure a reaction was valid for that particular antisera.

Four of the five High Court judges considered that, in view of the conflicting expert evidence on the issue, a finding that stains in the car were foetal blood could not safely be made. Only Justice Murphy raised the issue of how it could be known whether the jury in fact relied on the Crown's evidence that there was foetal blood in the car. He noted that the jury's [adverse] view of the exculpatory evidence may well have been taken in light of their acceptance of the scientific evidence led by the prosecution in relation to foetal haemoglobin as being reliable. If the jury did find, based on the Crown evidence, that stains in the car were foetal blood, a finding which four of the five judges of the High Court said could not safely be made,

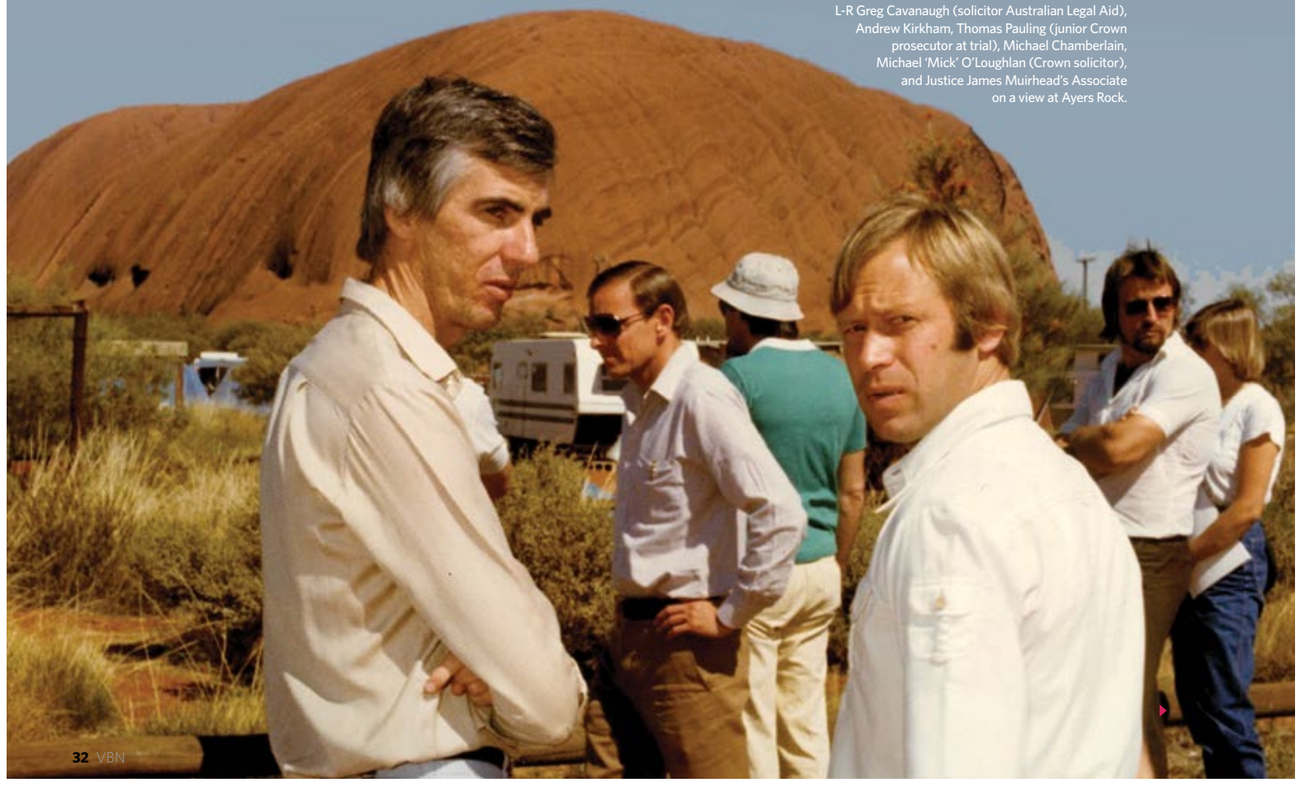
The jump suit in situ

Justice Murphy considered that it was irresistible that they should then disbelieve Mrs Chamberlain and the other evidence pointing to her innocence. He concluded that it was impossible to know whether the inadmissible evidence was relied on and the extent to which it coloured the jury's views on other issues. He stated that once it was accepted that it was unsafe to conclude that there was foetal blood in the car, the conviction of Mrs Chamberlain was unsafe.

The Crown also relied on expert evidence from a hair expert that there was no dingo hair found in the tent, and relied further on the evidence of a textiles expert that the damage to the jumpsuit which had been found was caused by a cutting instrument and not by a dingo's dentition. Unfortunately for the Chamberlains, both of those experts reversed their evidence in the Royal Commissions hearings in light of other tests and other methodologies. Certainly in the trial, the defence led evidence from an odontologist that the cuts in the jumpsuit could have been caused by a dingo's dentition and his evidence, backed up by other world experts, was ultimately accepted by the royal commission.

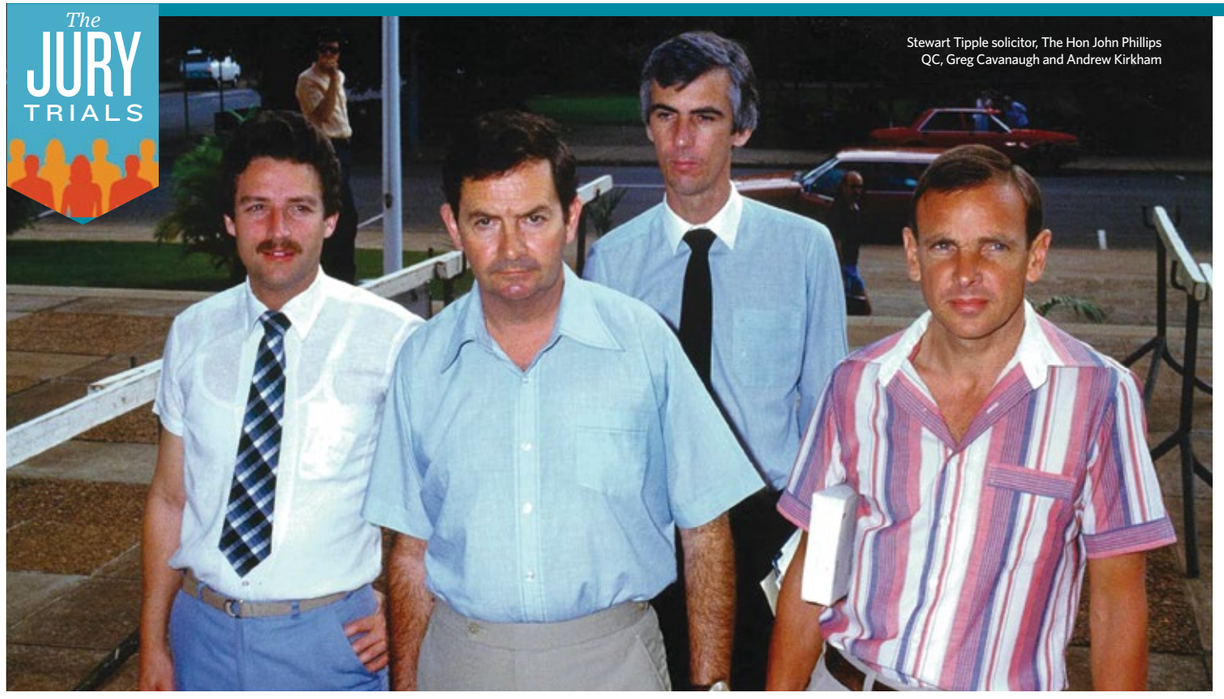
The Crown further relied on the evidence of a UK witness, Professor Cameron, who professed to see the imprint of a small adult hand in blood on the jumpsuit. Ultimately he relied on a photograph of the jumpsuit and failed to understand that what he thought was blood on that garment was in fact soil. No other forensic witness and none of the five High Court judges could see the imprint of a hand that he claimed to see. Professor Cameron had a chequered career in the UK—a fact which was used by the defence in cross-examination—after having been advised of his former forensic mistakes by a prisoner in Wormwood Scrubs who had been convicted on Professor Cameron's evidence. The royal commissioner was ultimately very critical of the evidence of Professor Cameron and Mrs Kuhl.

Prominent in the evidence led by the Crown was that marks on the glovebox of the Chamberlains' car appeared to exhibit a spray pattern asserted to be consistent with an arterial blood spray landing on the glovebox when the child's throat was cut. Unfortunately those asserting the same did not have a microscope of sufficient intensity to discover that the alleged blood spray was in fact covered by Duco and was a sound deadening compound put into the car at the time of its manufacture. The defence put into evidence the glovebox of an identical car to that owned by the Chamberlains which displayed a similar spray pattern. Although information had been sought from the manufacturer as to the cause of the pattern, no information was able to be provided. It took a scientist many months of work following the trial to determine that the spray pattern was a rubber



L-R Greg Cavanaugh (solicitor Australian Legal Aid), Andrew Kirkham, Thomas Pauling (junior Crown prosecutor at trial), Michael Chamberlain, Michael 'Mick' O'Loughlan (Crown solicitor), and Justice James Muirhead's Associate on a view at Ayers Rock.

NEWS AND VIEWS



Stewart Tipple solicitor, The Hon John Phillips QC, Greg Cavanaugh and Andrew Kirkham

compound applied to the underside of the car during manufacture and making its way onto the glovebox through a small pinhole.

The royal commissioner considered that the fact that Mrs Kuhl could have obtained a reaction to her testing that indicated that the spray was blood cast doubt on the efficacy of her testing generally and the accuracy of her other results. He found that she failed to carry out essential pre-use testing of antisera and failed to use necessary controls with known foetal haemoglobin, which indicated to him that she lacked the considerable experience required to enable her to plan, and to carry out complex and difficult testing procedures—at least without careful guidance from a more experienced biologist.

Another odontologist called by the Crown in relation to marks in the child's blankets asserted that they were made by a blade. He did this without checking the signs of damage with a microscope. When a textiles expert examined the damage using an electron microscope, he found that the damage was caused by insects, and the larvae were still in situ.

Another Crown witness, a doctor, asserted that a dingo could not encompass the child's head in its jaws. Shown a photograph by the defence, with a dingo encompassing the head of a doll the size of the child, he conceded that he may have been incorrect in his evidence.

Questioned as to why if a dingo was involved there was no dingo saliva on the jumpsuit, Mrs Chamberlain responded that it may be because the child was wearing a matinee jacket at that time. She went on to describe the matinee jacket in detail, including the fact that it had a lemon thread woven through its collar. This evidence was derided by the Crown, which in its address to the jury described her evidence of dingo involvement as "a calculated and fanciful lie". It was only in 1986 after an English tourist fell from Ayers Rock and died and was partly eaten by dingos that a police investigation of the accident site revealed the presence of a matinee jacket found some 160 metres from where the child's jumpsuit had been found five years before. It was largely covered by earth and exactly as described by Mrs Chamberlain in her evidence, including having a lemon thread through the collar. Within a day or two, she was released from jail, with a promise that she would not be jailed again.

The Chamberlains might have expected sympathy on the loss of their loved child. Instead they received from the media and others hostility, disbelief and an entrenched attitude that they were guilty. Media scepticism and criticism of the Chamberlains and their version of events played a very significant role in creating a hostile pre-trial atmosphere and a pre-trial presumption of their guilt, as was indicated by a juror interviewed in the recent Channel 7 program entitled "The Lindy Tapes". Both parents were derided and criticised for not acting as their critics thought that they themselves would act if their child had been taken and killed. How shallow and lacking in perception. More recently the media created an adverse pre-trial atmosphere in the case of *R v Pell*.

The police and authorities were not detached and objective in the way they went about their task of building a case for the purpose of convicting the Chamberlains.

The first inquest was set aside in secret on the application of the Crown. In the second inquest, in which I commenced to act for the Chamberlains, they were called first as witnesses without having any idea of the huge amount of forensic evidence then held by the Crown to be presented after they had given their evidence. Our protests to the Crown and to the presiding magistrate about the unfairness of this, and its impact on the right of the Chamberlains to decline to answer questions in the event they had sought to do so, were rejected. In addition, cross-examining forensic experts after receiving their report shortly before they gave evidence was extremely difficult. However, the trial judge, who was at all times concerned to ensure the Chamberlains received a fair trial, thought that what was done was so unfair to the Chamberlains that he prevented the Crown from using their inquest evidence. In addition, counsel assisting the royal commission subsequently put on record his view that, in adopting this procedure in the second inquest, the Crown had accorded a very significant unfairness to the Chamberlains.

The prosecution of the Chamberlains in the circumstances led to a shocking miscarriage of justice, caused by sloppy investigations and a lack of objectivity on the part of the police who, instead of objectively assessing the evidence, focused on obtaining evidence to support their entrenched belief that Mrs and Mr Chamberlain were guilty of murder and being an accessory after the fact of murder, respectively. Evidence called by the Crown in support of their prosecution of the Chamberlains was in so many instances grievously flawed.

The royal commissioner found that:

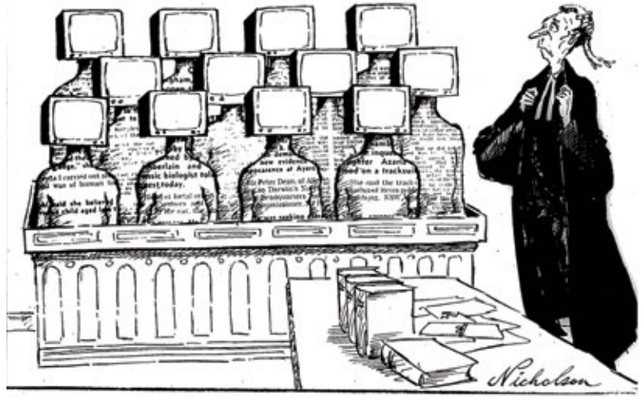
> with the benefit of hindsight it could be seen that some experts who gave evidence at the trial were over-confident of their ability to form reliable opinions on matters that lay on the outer margins of their fields of expertise. Some of their opinions were based on unreliable or inadequate data. It was not until more research work had been done after the trial that some of these opinions were found to be of doubtful validity or wrong. Other evidence was given at the trial by experts who did not have the experience, facilities or resources necessary to enable them to express reliable opinions on some of the novel and complex scientific issues which arose for consideration. It was necessary for much more research to be done on these matters to determine whether the opinions expressed at the trial were open to doubt.

The Northern Territory government abolished capital punishment in 1973.

Epilogue

Many people who hurried to jump on this forensic bandwagon were damaged by the experience. Some professional reputations were damaged. Others who were simply caught up in the investigations and trial were adversely affected when their evidence was not accepted. Some were adversely affected by being exposed to intense publicity.

In an essay written 20 years after Azaria's disappearance, John Bryson, author of *Evil Angels* (a leading book about the case), wrote:



Peter Nicholson's cartoon that appeared in *The Age* the day after verdict.

"Among the band of campsite witnesses, the incidents of marriage break up, alcoholism and psychiatric injury is high."

Among the band of campsite witnesses, the incidents of marriage break up, alcoholism and psychiatric injury is high. Many feel that if they had somehow given their evidence better, or been more alert, or less trusting of the authorities, the Chamberlains may have been acquitted.

They are far more heroic than they see themselves. In no other case, ever, has a band of prosecution witnesses joined together in a national road show, travelling from city to city, to protest against an unjust decision. They helped prompt the Morling Inquiry and vindicate the Chamberlains—and we owe them our gratitude.

**These notes were used by Andrew Kirkham AM RFD QC on 9 September 2020 in a webinar presentation on the trial of Lindy and Michael Chamberlain in the Northern Territory, 13 September–29 October 1982. The trial transcript was in excess of 3,300 pages. The High Court judgment was 121 pages. The subsequent royal commission report was 379 pages. Nevertheless, this brief outline provides an overview of what was one of Australia's notable criminal trials, which—in the view of the author, who appeared with John Phillips AO QC deceased for the Chamberlains—miscarried badly.*

Pell v The Queen

[2020] 94 ALJR 394

GAVIN SILBERT

George Pell was convicted of one charge of sexual penetration of a child under 16 years and four charges of committing an act of indecency with or in the presence of a child under the age of 16 years when serving as Catholic Archbishop of Melbourne. The first four charges were alleged to have occurred on either 15th or 22nd December 1990 and the fifth at least a month later all following Sunday solemn Mass at St. Patrick's Cathedral.

The complainants were two cathedral choirboys "A" and "B". The prosecution case was wholly dependent upon the truthfulness and reliability of A's evidence, B having died. A had not made his first complaint until 2005 and B had denied being assaulted prior to his death. The convictions resulted from a second County Court trial the first jury having been unable to agree on its verdicts.

The applicant was given leave to appeal to the Court of Appeal on a single ground which contended that the verdicts were unreasonable and could not be supported by the evidence. The prosecution led evidence from a number of "opportunity" witnesses as to the applicant's movements following the conclusion of Sunday solemn Mass which was inconsistent with A's account. The majority, Ferguson CJ and Maxwell P, concluded that this evidence did not compel the jury to entertain a reasonable doubt as to the applicant's guilt; Weinberg JA, in dissent, concluded that it did. The critical question was the effect of the opportunity witnesses' evidence on the otherwise accepted evidence of witness A, which was conceded to be credible and reliable. The determinative answer was that this evidence was led by the Crown as part of its ethical duty to lead all relevant evidence, favourable or unfavourable, and was unchallenged.

The applicant sought special leave on the grounds, first, that the majority erred in finding that the applicant had to establish that the offending was impossible to raise the necessary doubt and, second, that the majority erred in finding that the evidence of the opportunity witnesses failed to compel a reasonable doubt.

In a unanimous decision by a bench of seven the High Court granted special leave, heard and allowed the appeal instanter, quashed the convictions and entered verdicts of acquittal.

The judgment of the High Court proceeded on the entirely orthodox approach laid down in *M v The Queen* (1994) 181 CLR 487 and *Libke v The Queen* (2007) 230 CLR 559 and which had been misapplied by the majority of the Court of Appeal, namely whether the appellate court thinks "that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty". In other words, whether the appellate court considers "it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must* as distinct from *might* have entertained a doubt about the appellant's guilt."

The High Court emphasised that such a case always proceeds on the assumption that the complainant's evidence is credible and reliable and that the appellate court must examine the record to see whether, notwithstanding that assessment, the court is satisfied that the jury acting rationally ought nonetheless to have entertained a reasonable doubt. The Court of Appeal majority's decision was a solecism in the application of long-established principle.

The evidence of Monsignor Portelli as to the applicant's routine movements after the Mass, although buttressed by other evidence, was unchallenged, together with evidence that the

applicant was never unaccompanied within the Cathedral, also unchallenged. This should have raised a question of reasonable doubt in the minds of the jury and been identified by the Court of Appeal majority. Additionally, the forensic disadvantage arising from a delay of 20 years was required by the *Jury Directions Act 2015* (Vic) to be used in favour of the applicant rather than to his disadvantage as applied by the majority.

There is little by way of general principle that can be taken from the High Court judgment. The compounding improbabilities identified by Weinberg JA in dissent arising from the unchallenged evidence of the opportunity witnesses should have led the jury to entertain a reasonable doubt as to the applicant's guilt. The failure of the Crown to challenge this evidence was fatal to its case.

The rule in *Browne v Dunn* (1893) 6 R 67 required the prosecution, before seeking to ask the jury to reject the evidence of the opportunity witnesses, to challenge them in the witness box; this was not done.

The established practice of the Court of Appeal to view the video recorded evidence of witnesses on such appeals was undesirable and unnecessary for an appellate court to make an independent assessment of the evidence. The High Court stated that an appeal court should only view such videos in exceptional circumstances and where there is a specific need. An appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of witnesses where that assessment is dependent on the evaluation of the evidence of the witness in the witness box. Judges of appeal do not perform the same function in the same way as the jury or with the same advantages that the jury enjoys. All such appeals proceed on the premise that the complainant was assessed by the jury to be credible and reliable.

The case attracted wide media interest for obvious reasons. By the time of the trial the applicant had attained the rank of Cardinal and was Australia's most senior Catholic. He was the most senior Catholic cleric ever to have been convicted of such crimes here or elsewhere. The applicant enjoyed a controversial public reputation. The public attention assured wide public discussion and much public controversy amongst his proponents and opponents. Publications including books fuelled the public discord.

Certain sections of the media embarked on a sustained and unrelenting campaign proclaiming the applicant's innocence likening the trial to that of Alfred Dreyfus.

> "An hour or so after verdict I received an email from the Philippines advising me of the verdicts and the world's press immediately reported the verdicts."

The media coverage was entirely uninformed and written in the main by those who had not heard the evidence or examined the record and few of those writing had any legal training. There was extensive criticism of Victoria Police, the Director of Public Prosecutions, who had carriage of the matter once charges were laid and, of the complainant, witness A, whose identity was suppressed.

An examination of the critiques serves little purpose at this time. The allegation that Victoria Police conducted a biased investigation was based on the allegation that complaints against the applicant were intentionally solicited and that there is evidence that the open and unbiased character of a police investigation was lacking. The Director of Public Prosecutions was accused of failing to exercise proper prosecutorial discretion prior to indicting; the verdicts confirm that the reasonable prospects of conviction test was satisfied.

Perhaps the most egregious example of gutter journalism followed the High Court decision and continues to this day where certain commentators continue to refer to the complainant as a liar notwithstanding the statements of the High Court that the decision "…proceeds on the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable" and that "… the Court of Appeal majority did not err in holding that A's evidence of the first incident did not contain discrepancies, or display inadequacies, of such a character as to require the jury to have entertained a doubt as to guilt," while finding it unnecessary to opine on the second incident. The complainant was a dignified witness and the media criticism is unfair and unjustified.

Finally, the trial throws into question the efficacy of the *Open Courts Act 2013* (Vic) and the situation in Victoria as the suppression capital of the common law world. The trial was subject to a suppression order to protect its integrity from the surrounding mountain of public commentary. Undoubtedly such an order was necessary. The verdicts came late one afternoon. An hour or so after verdict I received an email from the Philippines advising me of the verdicts and the world's press immediately reported the verdicts. The following day Australian media reported the verdicts. There are now prosecutions on foot against some thirty media organisations for contempt of court arising from breaching the suppression order which remained on foot. We shall have to await the outcome of these prosecutions; however, they certainly raise for discussion the absurd situation seeking to restrict the access of the Australian public to information available world wide and via the internet within Australia.

What will courtroom justice look like in the future?

JACQUI HORAN*

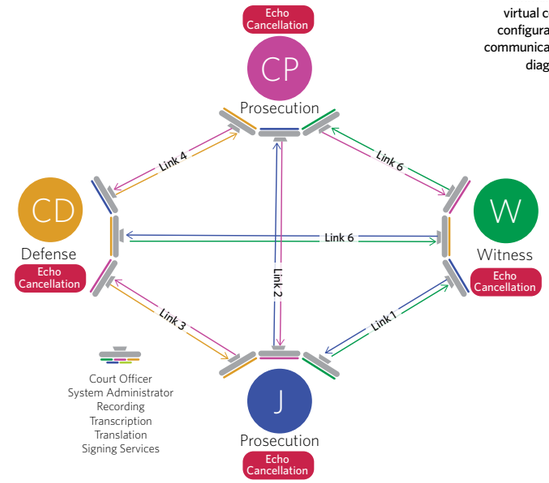
COVID-19 court closures have turbo-charged the need for justice systems to embrace technology. Justice delayed will ultimately result in justice denied, so the imperative for the application of technology-based solutions to ameliorate the pandemic delays has been placed at the forefront of government and court agendas.[1] As the pandemic has made it too risky to conduct hearings in person, the Victorian legal profession has been agile and has adjusted well to online justice. Online justice has rescued the court system from being at a stand-still. Whilst new technologies have been a god-send in 2020, will they, and should they become part of the 'new normal', post-pandemic?

One of the reasons that the Victorian justice system did not grind to a halt in 2020 is because, unlike many other legal systems around the world, we had already begun to harness new technologies to our benefit. For example, vulnerable witnesses can give evidence remotely; the Supreme Court webcasts trials, judgments and sentencing hearings in high profile cases; some juries have been given iPads to assist with their comprehension and deliberations. The innovations are numerous and varied. New technologies have the potential to improve our justice system and cut the time and expense of court work, which ultimately translates into greater community access to justice.

However, there is a gaping hole of understanding of the overall impact of online hearings on the quality of justice. Perceptions of justice are important for citizens (defendants, victims and plaintiffs) who need to feel as if they have been heard. Whether their 'day in court' requires attendance at a physical courthouse or whether a virtual courtroom is a satisfactory alternative is an unknown and will preoccupy researchers for the next few years. Whether online hearings are a satisfactory substitute for in-person hearings depends upon the atmosphere created around the online experience for users. As Tait and Rossner assert, "[i]ntroducing monitors into the courtroom requires a reimagining of courtroom spaces, social cues, symbols and performances"[2] in order to ensure that the quality of justice is not compromised.

Online justice v in-person justice—what does the research tell us?

Whilst we need to increase our factual understanding of the impact of online justice on perceptions of justice, the little research that is available is instructive. In a recent simulated Australian criminal trial study, where the defendant appeared 1) online, 2) in the dock or 3) seated next to his lawyer, the results concluded that defendants appearing on screen were no more likely to be found guilty than defendants seated next to their lawyer.[3] However, defendants in the dock were more likely to be found guilty. One US study found that defendants who appear online from jail are more likely to have higher bail and sentences imposed than those defendants that sit behind their lawyer in the courtroom.[4] Another US study concluded that asylum-seekers appearing remotely online are more likely to be deported than those that attend the courtroom.[5]



Immersive virtual court configuration communication diagram

The first ever online UK tax tribunal trials were conducted in 2018. Appellants and representatives from the tax office attended remotely from their home or office. Despite frequent technical glitches, the parties considered the format to be appropriately formal. The Court set up a virtual waiting room where the parties were regularly informed about the timing of the case. Parties could be productive at their desk, whilst waiting. The Court also conducted a 'dry run' before the hearing to ensure that sound and visual quality was satisfactory.[6] Research tells us that the space used for online appearances does impact upon the user's experience. If a party feels isolated from the process then it is more

One unit (or pod) of an immersive virtual court configuration prototype

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likely that they will not perceive the process as fair.

In order to replicate the court hearing experience as closely as possible and avoid a sense of online isolation, researchers from Australia, Canada and the US have developed a system designed to immerse the participants in the online hearing. Rather than having all court participants appear on the one screen, these immersive court hearing pods feature three screens with a camera attached to each screen. For example, the judge, prosecutor, defence (with the defendant in the same room) and witness will be able to connect from their unit to each other in order to conduct court business.

A custom-made and secure 'Zoom meeting'-style panel will ensure that the court maintains control. Laptops, iPads or iPhones can be used to message, share documents and manage files. These pods have been tested under lab conditions and will be showcased at the Monash City Chambers early next year.

The challenges of resuming jury trials

Jury trials did grind to a halt in 2020 as they are a physically intense experience which cannot be sustained during a pandemic. Social distance issues begin in the jury selection process and persist through to verdict. Assembling the jury is problematic. The Institute of Transport Studies determined that pre COVID-19, 220,000 Melburnians took public transport to the CBD every weekday. With social distancing rules in place, this will have to reduce to 22,000 commuters.[7] Car travel is still possible but it is unreasonable to expect that every citizen can afford the cost of a taxi/uber or the cost of city car parking. Some jury trials in NSW have had to be aborted due to juror and counsel fear over contracting COVID-19.[8]

In Texas, civil jury trials are being run online.[9] Whilst we have not chosen to go online for jury trials, Victoria has introduced a raft of new jury trial processes to deal with pandemic conditions. The Victorian Juries Commission Office has sensibly undertaken some of the jury panel induction processes online to alleviate the need for up to 200 citizens to attend in person. Nevertheless up to 45 citizens may still be required to attend for one empanelment. The courts will foot the bill for the cost of empanelled jurors avoiding public transport and requiring pandemic-friendly lunch options.

Victorian jury deliberation rooms are too small to run socially-distanced deliberations. This has forced the courts to use two courts per jury trial; the second is converted into a jury deliberation room. Other jurisdictions, such as the UK, have resorted to pop-up courts in order to provide enough venues for all of their judges to sit. Whilst this is a sensible solution, the chosen venues have not always been ideal. For example, in England and Scotland, they are running jury trials in entertainment venues like cinema complexes. Juror expectations of being entertained with popcorn and a riveting court-room drama that rivals *A Few Good Men* does not sit well with the gravity of the subject matter of a criminal jury trial.

The above examples of the challenges facing the resumption of jury trials highlight how problematic and expensive it is for the justice system to persist with running jury trials during a pandemic. However, jury trials must remain a firm feature of our justice system, despite their hefty price tag. The low take-up of the offer to defendants to have their trial heard more quickly by a judge suggests that a jury trial is integral to defendants' perceptions of a fair trial. Furthermore, citizen participation in the legal system is considered central to a healthy democracy. Research shows that juries are an effective PR machine for the courts;[10] first-hand experience of jury duty plays an important role in the community's positive perception of their justice system.

So, what will our justice system look like post-pandemic?

In 2020, we were plunged into a new world of virtual justice. This period of unprecedented technological innovation will place litigators in an ideal position to intimately understand the benefits and disadvantages that technology has to offer the courts. Whilst the intensity of this experience is not ideal, the technological innovation that the courts are introducing promises to remove many of the access to justice barriers that have plagued our system for decades. Thoughtfully applied online justice should become part of the 'new normal' post-pandemic. As long as we reflect, systematically study and learn from this unique experience, the justice system is likely to emerge better for it.

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PHOTOGRAPH COURTESY OF BY V. TAY.

An interview with Louise Milligan

JUSTIN WHEELAHAN AND TEMPLE SAVILLE

Louise Milligan's second book Witness, *published by Hachette, is the culmination of five years' work about complainants and victims of sexual abuse. Louise obviously has great affection for the barristers she interviewed in writing the book, while at the same time recognising there are general criticisms and conversations that need to be had. While the author thinks the police have come a long way as an institution, in terms of a more trauma-informed response and introducing more empathy into their approach, she thinks there is room for improvement at the Bar.*

VBN: It goes without saying that you have challenged barristers to think about cross-examination techniques. How much of your criticism, do you think, is based on the inherent nature of the system, as opposed to a barrister's individual style?
LM: It is a cop out to say it's the nature of system. It is not good enough to say, "It is not a perfect system but it is the only one we have—you come up with a better one." The quest to ensure that someone gets the best possible defence should not be re-traumatising. The presumption of innocence doesn't have to mean bullying. A lot goes to style. Having observed the system for long time, there are different ways to skin a cat, different ways to approach it. I have seen barristers achieve their forensic purpose without bullying in transcript and in real life. You don't have to tear apart a witness to create reasonable doubt in a jury. A lot goes to style.

VBN: As barristers, whether for prosecution or the defence, we have case concepts; we try and ask questions that elicit facts in a way that will support the narrative we want to make in our closing address. Do you think there are parallels to the way barristers build a narrative like this and the way journalists build a story?
LM: That's why barristers and journalists get along so well. We are similar creatures—we both build narrative and analyse things. The difference between barristers and journalists is that I have never spoken to anyone like I was spoken to as a witness. I would never treat anyone like that. I conduct robust interviews and ask hard questions—but I do not treat those I interview with disdain.

VBN: You quote Felicity Gerry that "achieving best evidence is good language. Dignity and respect is good language." And that it's all about that "old fashioned and patriarchal" concept of courtesy. How do you regulate courtesy?
LM: Shouting and thumping the Bar table and interrupting and talking down to people and speaking like a cantankerous school master to a disobedient girl is easy to avoid. A style has been adopted and developed by some barristers over a long time which is considered acceptable which would not be acceptable in any other work environment—except maybe in Parliament. But in Parliament you are not going to be asked about the worst thing that has happened to you, like, for example, being raped as a child. In the quest to achieve a reasonable doubt in a jury, complainants are often thrown under the bus.

VBN: Can the concept of courtesy be uncoupled from patriarchy?
LM: I'm not saying all females are lovely and males are table thumpers, but 30 per cent of the Victorian Bar is made up of women, the number of silks is tiny, and NSW is worse—23 per cent are women. NSW has twice as many men aged over 50 than any women. Of course, in that environment, patriarchal notions and sexism become somewhat unavoidable.

VBN: A tension which emerges from the book is between the principle 'innocent until proven guilty' (beyond reasonable doubt) and the need to ensure that victims do not emerge from the process worse off than when they went in. A particular issue is that our criminal justice system does not start with the assumption that a complainant is a victim. That would reverse the onus of proof. What thoughts do you have about how a victim can be treated humanely, in a manner which does not threaten protections for the accused?
LM: It is absolutely not about reasonable doubt shopping, but about the methods you have to employ. It is how you do it. Like standing over a witness yelling, appealing to a magistrate when the witness says it is not a yes or no answer—loudly demanding that the question cannot possibly be answered in any other way than a 'yes' or a 'no', and just old school patriarchal sexist language that is designed to humiliate the witness. It is not fair and should not happen.

VBN: Do you believe witnesses/complainants have a comprehensive understanding of the legal process such that they can take this into account when deciding if they would like to make a statement to police?
LM: No. That is another problem; that they have this misapprehension that the state is acting for them. People say 'my lawyer' when talking about a Crown prosecutor. That is a failing—not educating people about that. This goes to teaching civics in school. People who are abused are often set on a life trajectory which is damaging. By the time they get to court they are the perfect type of person for a defence counsel to tear to shreds. I often hear barristers talking down their nose about people not understanding the system.

VBN: Do you think Crown prosecutors could play a more active role in preparing witnesses for the trauma of onslaught cross-examination?
LM: Crown prosecutors need to take responsibility and intervene when an improper question is asked. This also includes the defence counsel's tone. Crown prosecutors sometimes take a low-profile approach. The complainant gets bullied. Judges need to take more of a role in enforcing the rule against improper questioning, and complainants ought to have a lawyer in court. If the witnesses' human rights are being affected, or s 41 of the *Evidence Act* is being breached, then there is someone there to make sure the person gets some fairness. There ought to be more professional education of barristers, of judges. I interviewed Judge Meryl Sexton of the County Court for my book, who has talked to her judicial colleagues about this. It seems to me that there needs to be a bit more of that.

VBN: How beneficial do you think having separate legal representation for witnesses would be?
LM: Representation is not to coach the witness, just to tell the witness what to expect. A Crown prosecutor has said that it is in the interest of a witness to cry, as it might invoke more empathy. What do they have to go through to get to that point? In my case, I had Jack Rush QC and Peter Morrissey QC, so I felt so well armed to go into that process. It breaks my heart to think of those people who are completely alone. I have a law degree, and had a publisher and the ABC behind me. It's distressing to think of these poor people who don't have any of this.

VBN: Members of the Victorian Bar are often called upon to give advice to witnesses by the OPP on a pro bono basis when a witness is at risk of self-incrimination. How should legal representation for witnesses to alleged sexual crimes be funded?
LM: Good question. Probably above my pay grade. That will be a stumbling block because it is anytime you ask the government for money. The Victorian State Government made a point of saying it will stand with victims. It should put its money where its mouth is.

VBN: You cite criminologist Michael Salter as saying witnesses don't want restorative justice; only nice white middle class people who like sitting in a room with their clip boards are interested in it. How can restorative justice be improved?
LM: I don't know. I think there is a design flaw. There are some cases where it might work, but it is a bit problematic. We fought hard to make people take these crimes seriously. To then make it restorative can trivialise it somewhat. Most victims that I speak to are horrified by their perpetrator and don't want to sit there and have a chat with them. Maybe it should be an option if that is what someone wants. But I don't think it is a fix-all panacea.

VBN: Research by Kathryn Daly indicates the 'justice needs' of victims are participation, voice, validation, vindication and offender accountability. Something like only 3 per cent of complaints results in a conviction. Isn't restorative justice a lateral option to the conventional trial process if a witness is not going to get their 'justice needs' out of a trial?
LM: The conventional process is broken. I feel that is a cop out for the conventional process.

VBN: Court rooms produce, accommodate, and reflect a hierarchy—but web hearings are collapsing that hierarchy and flattening it out. You can always reduce the volume of a belligerent opponent. Reducing a barrister's imposing bodily gravitas to a small face has a civilising effect on court advocacy. Gender and voice projection is less relevant—what matters is the substance of what is being said. What feedback have you got about advocacy during COVID?
LM: I have spoken to women barristers who found that. There has been a push for remote witness facilities, but I feel like the complainant is removed from the process in that sense and infantilised. The accused has so much power if well-resourced with a silk, junior and solicitor sitting there and taking notes—and the complainant is in the facility, with none of that. If that is the complainant's choice, fine. The other option is to take the accused out, there are jury directions about a witness not being present—the same directions could be given if the accused is not present. I don't see why that option can't be considered and some of the barristers I spoke to for *Witness* agreed.

Rethinking Culture in the Legal Profession

KYLIE WESTON-SCHEUBER

In recent times, there has been much more discussion than previously about judicial bullying and bullying within the legal profession. The Victorian Bar has a policy against bullying. CPDs have been presented about bullying and heads of jurisdiction have made statements about its unacceptability.[1]

Appellate courts have made comment on the inappropriateness of judicial bullying and threatening or insulting conduct by trial judges, which in some cases has formed the basis for successful appeals.[2]

It is the kind of conduct which, I suspect, would not have been commented on a decade or so ago, by an appellate court or otherwise. It is coming to be more frequently scrutinised as more attention is paid to the concept of judicial bullying and bullying within the legal profession generally.

While this raising of awareness of bullying in the profession is to be applauded, there needs, in my view, to be a broader discussion about behaviour and demeanour generally, what constitutes acceptable conduct, and indeed what should be considered praiseworthy, in our profession.

For all the recent discussion about bullying, it remains the case that aggression and rudeness are commonly held up as de rigeur in the legal profession. Unfortunately, I believe that this leads some advocates to consider that an aggressive style of cross-examination is what they should aim for as a general standard, rather than realising that some of the most effective cross-examination is done when the witness does not even realise that the answer they have given is damaging to their case.

The behaviour and demeanour that I am talking about extend well beyond advocacy, to written communication between solicitors and to communications between opposing parties. I not infrequently read correspondence between solicitors that could be described as "belittling" or "insulting". Members of the Bar are all too familiar with counsel who invite them for a "chat" before court only to attempt a "standover" involving belittling and derision of the opponent's case.

I recall some years ago being opposed to senior counsel (now a member of the judiciary) who, when I arrived every day in court and issued a pleasant greeting, would barely throw a glance in my direction. That didn't constitute bullying.

It was by no means anything that would warrant a formal complaint. It didn't stop me doing what I was there to do. But it was discourteous and it was unpleasant.

There are those who believe that this kind of conduct is not only something to be aimed for but also necessary to the proper fulfilment of one's role as a barrister. I recall a few years ago attending a CPD on bullying at the Bar where a definition of bullying was read out. A barrister behind me remarked to his companion, "That's in our job description, isn't it?" I'd like to think he was joking; I don't think he was.

There is absolutely no need for an advocate to bully, hector or be rude, in court or out of it. Being firm, even admonishing a witness to listen to the question, of course will be required from time to time. But unbridled aggression or rudeness is not necessary; nor, most of the time, is it helpful.

Adopting an aggressive stance with an opponent out of court, in my view, is never acceptable. There is absolutely no need for it.

And there is a real reason for raising this as an issue. Facing that kind of behaviour is at best unpleasant, and at worst damaging. It is, I suspect, a reason behind many decisions made to leave the legal profession. Depending on the area you practise in, and how frequently you encounter this type of behaviour, it can lead a barrister or solicitor to dread going to work. The ways in which some barristers deal with each other would not be tolerated in any other workplace. And I am not only talking about behaviour that squarely falls within the definition of "bullying" but also general unpleasantness and aggression that nobody wants to have to deal with in the workplace.

I am by no means suggesting that all or even most members of the legal profession engage in behaviour of this kind. There are many genuine, thoughtful and kind barristers, solicitors and judges who do their jobs day in and day out without engaging in unpleasant behaviour. They are firm and forthright when they need to be, but they don't use aggression as a tactic and they are never rude.

Justice Hollingworth recently spoke of the change brought about to courtroom appearances by COVID-19 and the onset of virtual appearances.

> "… a definition of bullying was read out. A barrister behind me remarked to his companion, "That's in our job description, isn't it?" I'd like to think he was joking; I don't think he was."

Her Honour noted that some barristers who had previously blustered their way into the courtroom surrounded by minions carrying their books now struggled to navigate the technology that allows them to appear virtually, with her Honour needing to remind them that they are "on mute" while staring up their nostrils as they attempt to adapt to the digital environment.[3]

Kathleen Foley has also commented upon the "equalising" effect of virtual advocacy, and the fact that physical presence becomes irrelevant when an advocate appears virtually.[4]

The transition to virtual court appearances has an impact not only inside the courtroom but also outside it. Standover tactics, sledging and rudeness to your opponent don't work when you're not sitting beside them at the Bar table.

I wonder whether COVID-19 and the changes that it has brought about will produce a long-term change in the way that we think about effective advocacy and culture in the legal profession more generally. I find it interesting to see the contrast in views between those who quite enjoy the new advocacy for its equalising effects and those who yearn for a return to face-to-face advocacy.

Like everyone else, I look forward to the end of COVID-19. What I would hope to see, however, is a continuing discussion about the ways to be an effective lawyer, and more importantly what that doesn't need to involve. Kindness, empathy, consideration for others and the willingness to listen are not only possible within our profession, but are also desirable qualities to which we should all aspire.

1 For example, Victorian Bar CPD on "Judicial Bullying", 24 Feb 2020.

2 For example, Adacot v Sowle [2020] FamCAFC 215; Lysons & Lysons and Anor [2019] FamCAFC 29; Stradford & Stradford [2019] FamCAFC 25; *Cook v The Queen* [2016] VSCA 174.

3 The Honourable Justice Elizabeth Hollingworth, Victorian Bar CPD in Session, "Could I just finish the question? – View from the Bench, Bar and solicitors on 'Female Judges, Interrupted'."

4 Kathleen Foley, "Gender and the Virtual Workplace during COVID-19", GenderIT.org, 14 August 2020.

NEWS AND VIEWS

Barristers are not immune from personal cost orders

HEATHER HIBBERD*

Personal or non-party cost orders against barristers have been more prevalent since the introduction of the *Civil Procedure Act 2010* (Vic). As a statutory remedy for breach of overarching obligations they do not attract advocates immunity and as such pose a significant risk to barristers.

Overarching obligations – a refresher

The Civil Procedure Act sets up a hierarchy of duties and obligations owed by practitioners. The duty to the court is paramount (section 16). The overarching obligations set out in sections 16 to 26 prevail over any contractual, legal or other obligations (section 12). If a practitioner is faced with instructions from a client that are inconsistent with the overarching obligations the practitioner cannot contravene, nor allow or cause the client to contravene the Act (sections 13 and 14).

The overarching purpose of the Act is the just, efficient, timely and cost-effective resolution of civil disputes. The overarching obligations apply to all parties, practitioners, insurers, funders and expert witnesses. They are to:

- act honestly at all times (section 17)
- only pursue claims and defences that have a proper basis, on the factual and legal material available at the time (section 18)
- only take steps reasonably believed to be necessary to resolve the dispute (section 19)
- co-operate with other parties (section 20)
- not mislead and deceive (section 21)
- use reasonable endeavours to resolve a dispute by agreement (section 22) or narrow issues (section 23)
- use reasonable endeavours to ensure costs are reasonable and proportionate to the complexity or importance of the issues and the amount in dispute (section 24)
- minimise delay (section 25)
- disclose 'critical documents' at the earliest reasonable time and on a continuous basis after becoming aware of their existence (section 26).

The court has powers to award costs against practitioners personally for:

- contravening an overarching obligation (section 29)
- failing to comply with discovery obligations or engaging in conduct intended to delay, frustrate or avoid discovery of discoverable documents (section 56).

While solicitors usually wear the brunt of personal cost order applications barristers are also susceptible to them.

Circumstances giving rise to personal cost order applications

Set out below are circumstances where personal cost applications have been made against barristers, and in some instances resulted in orders being made.

- Cases that arguably had no prospects of success. For example:
  - *Re Fanning [No 2]* [2014] VSC 370. Lack of evidence as to payment for land 40 years earlier. In the circumstances it was not a hopeless case as oral evidence was adduced and not necessarily inconsistent with no written evidence. No orders made.
  - *Gibb v Gibb* [2015] VSC 35. An application for provision out of an estate without first asking the trustee. No basis for the proceeding. Judge indicated personal cost orders warranted.
  - *Re Manlio (No 2)* [2016] VSC 130. Inconsistency in opening and closing addresses and the client's evidence and the fact that the client was unsuccessful on all claims was not enough for personal cost orders. The judge did refer the solicitor and barrister to the Legal Services Commissioner for unsatisfactory professional conduct.
- Wasted costs where excessive amounts of material was included in court books. For example:
  - *Yara Australia Pty Ltd & Ors v Oswal* [2013] VSCA 337. Security for costs application with voluminous court book materials. Order for personal costs made.
- Wasted costs where causes of action were pleaded but then either abandoned during the trial or no evidence was adduced supporting the cause of action during trial. For example:
  - *Norman South Pty Ltd & Anor v da Silva (No 2)* [2012] VSC 622. Allegations of fraudulent email abandoned on day three of the trial when arguably should have been obvious based on evidence earlier. No orders made.
  - *Apollo 169 Management Pty Ltd v Pinefield Nominees Pty Ltd (No. 2)* [2010] VSC2010] VSC75. Proceeded to trial knowing the pleading was false and there was no evidence to support it. Personal cost orders made.
- Wasted costs where barrister did not disclose reports or material facts. For example:
  - *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No. 6)* [2013] VSC 159. Failure to disclose earlier draft of expert evidence report. Personal cost orders made.
  - *Orpen v Tarantello &Ors* [2009] VSC 143 failure to make disclosure of material facts in an ex parte application. Personal cost order made.
- Wasted costs of repeated amendments to complex pleadings, following successful strike-out applications
- Costs of party joined without authority. For example:
  - *Bray & Anoth v Dye & Anor (no.2)* [2010] VSC 152. One of two plaintiffs gave no instructions to issue proceedings. Personal cost order made.
- Costs of additional parties joined to litigation unnecessarily or not all necessary parties joined. For example:
  - Parents joined to a family law proceeding when a subpoena would have been sufficient
  - One creditor left off a statutory demand resulting in the statutory demand being set aside.
- Applications where it is alleged that the barrister represented more than one party in a proceeding, and where a conflict between the clients became apparent mid-trial causing an adjournment and delay.
- Wasted costs caused by the barrister making prolix, repetitive or untenable submissions.

Lessons

Many of the allegations relate to the appropriate drafting of causes of action or defences, or the ability of the party to prove what was pleaded with appropriate evidence. Avoiding these mistakes is obvious in theory. It involves a good understanding of law in the relevant area of practice so that the pleadings are drafted correctly, and the evidence used to support the pleadings arguably achieve that aim. Attention to detail and good communication with clients and instructing solicitors are also essential. Set out below are some high-level things to consider.

Before drafting pleadings:

- make sure you understand the necessary elements of the cause of action and what needs to be proved
- understand the difference between a hopeless case and a case that is arguable but weak
- carefully review all available evidence, particularly where there are allegations of fraud and advise your instructing solicitor in writing of the evidence necessary to prove the cause of action or defence
- check details of all the potential parties in the proceeding including ABN and ACN to ensure the right parties are joined and no allegations can be made later that costs were wasted for having the wrong parties in the proceeding.

When accepting a brief after proceedings have commenced:

- review all the pleadings, assess the evidence and consider the prospects of success for all causes of action or defences as soon as possible. Don't assume previous drafting was correct and don't leave it to the last minute to consider these issues.
- understand the difference between a hopeless case and a case that is arguable but weak
- advise your instructing solicitor as soon as possible on your assessment of likely success of the case and whether pleadings need to be amended or causes of action or defences abandoned. The longer you wait the more costs may be wasted by the other side in preparing their case
- spend time with the client testing their recollections and evidence where your client's case depends on their oral evidence, so there are no surprises in court.

**Heather Hibberd is the Chief Risk Manager of the Legal Practitioners' Liability Committee.*

LPLC LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Decriminalising sex work in Victoria

BY FELICITY GERRY, SUZAN GENCAY AND SIMONE CURMI-BLACKWELL

The Victorian government has just received a landmark review into the state's sex work laws, which has not yet been made public.[1] We made a submission[2] with a focus on the decriminalisation of sex work, including raising awareness of Australia's commitment to non-punishment of trafficked persons. In Victoria, sex work is regulated under a legalised model, which means that sex work is only legal if it takes place within the licensing and registration framework.[3] Under that framework, an adult may legally engage in sex work provided they are licensed and unless they are engaging in street sex work.[4]

The decriminalisation of sex work is typically understood to mean the removal of criminal laws relating to consensual adult sex work and the regulation of sex work through standard business laws. Our submission sought to assist in distinguishing between sex work and sex trafficking. From the research conducted for that submission, we concluded that criminalisation creates discrimination and fear of being "outed" if a person reports issues, particularly in civil, family, immigration or criminal complaints. Decriminalisation can contribute to all sex workers feeling safe in contacting law enforcement to report crimes, instances of and human trafficking. The research also showed that decriminalisation of sex work leads to better health outcomes as sex workers maintain good health practices with a low level of STI/HIV infection.[5] Decriminalisation also leads to improved workplace safety regulations, social equity and reduced discrimination.

This article summarises the key findings and recommendations contained in our submission and expands on the background and reasons for our current legislation.

What is sex work?

Sex work is the consensual provision from one adult to another of sexual services, in return for payment or reward. Sex work is not human trafficking. If someone is trafficked for the purposes of sex slavery, this is known as 'sex trafficking' but is not sex work as it is non-consensual and denies victims autonomy.

The term 'prostitute' is obsolete and only used when directly quoting other material. The term 'sex work' is standard. It was coined by activist Carol Leigh in her essay "Inventing Sex Work", written in the late 1970s. It seeks to define the work done and not the status of the individual.[6]

There are three main legislative models for sex work.

First, criminalisation, where there are a range of offences that perceive sex workers as perpetrators of a crime. No Australian state operates under this model.

Second, legislation, which is the legalisation of some forms of sex work and not others. This can include regulatory and industry conditions, such as a licensing or registration system and zoning for street work. Any legislative model which criminalises some forms of sex work but not others will mean that some workers lack protection and/or are punished when seeking assistance. Victoria, Western Australia,[7] Tasmania,[8] Queensland,[9] the Australian Capital Territory[10] and South Australia[11] operate under this model.

South Australia's laws are the most antiquated sex work laws in Australia. Private sex work is legal; however, to occupy or frequent premises that are frequented by "reputed thieves, prostitutes, persons without lawful means of support or persons of notoriously bad character" is an offence.[12] There are also strict restrictions on "reports of immorality" (sex work advertising).[13] Western Australian legislation also makes reference to outdated language in relation to people who are deemed a "prostitute or of known immoral character".[14]

And third, the 'Nordic/Swedish Model', which is based on the 1998 Swedish legislation which criminalises the purchase of sex but legalises the selling of sex and attempts to eradicate sex work by targeting the demand. A 2004 Norwegian Ministry of Justice and Police Affairs report could not clearly identify any reliable data that demonstrated a positive benefit of this legislation and specifically noted that female sex workers felt the criminalisation had affected them negatively.[15] This model seeks to simultaneously save, protect and punish sex workers and suffers from an over complexity in operation.

Sex Work and Morality

Sex work is an industry that has continued to operate even when completely criminalised. However, the suggestion that sex work is immoral and that the law should reflect this by making it criminal seems contrary to the current approach of Victorian society.

It is arguable that in modern Victoria, sex work does not reach the level of conduct that ought to be criminalised at all. Victoria is a state with a human rights charter and it is well documented that controlling or criminalising adult consensual sexual relationships, including sex work, affects a person's independence, privacy and control over their body. Criminalising sex work can lead—and has led—to exploitation, stigmatisation and discrimination from law enforcement, clients and society in general.

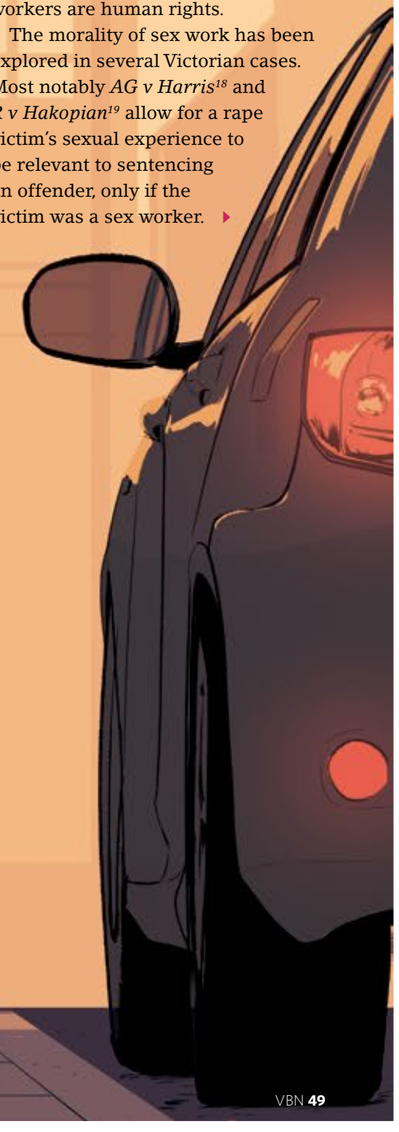
The stigmatisation of sex work is demonstrative of our community's appraisal of sexuality and sex acts in a hierarchical system,[16] for which the consensual exchange of sexual services for money or reward is ranked low. As American cultural anthropologist Gayle Rubin wrote in From Gender to Sexuality:

> As sexual behaviours or occupations fall lower on the scale, the individuals who practise them are subjected to a presumption of mental illness, disreputability, criminality, restricted social and physical mobility, loss of institutional support, and economic sanctions.[17]

As a result of this stigmatisation, a fear of being "outed" as a sex worker is a real concern for many in the industry. This fear is not unfounded as it is entrenched in our laws and processes.

Stigma has been identified as a major contributor to the exploitation and intimidation of sex workers. Stigma is perpetuated in legal frameworks which seek to regulate and criminalise aspects and forms of sex work. Decriminalisation is a significant acknowledgement that sex work is work and the rights of sex workers are human rights.

The morality of sex work has been explored in several Victorian cases. Most notably *AG v Harris*[18] and *R v Hakopian*[19] allow for a rape victim's sexual experience to be relevant to sentencing an offender, only if the victim was a sex worker.



> “Victoria is well placed to move towards a decriminalised model.”

Harris continues to be referred to in the Victorian Sentencing Manual.[20] The Manual also notes the Court of Appeal decision of *Daly*, which clarified that sex workers are vulnerable victims of sexual offending. In that decision, Justice Bongiorno agreed with the sentencing judge’s remarks that “the degrading and emotionally and physically traumatic experience which [the victim] had been through was not to be discounted in any way by virtue of her activities as a prostitute.”[21]

Due to social stigma, sex workers are vulnerable to exploitation and corruption from law enforcement, employers, clients and members of the community. Sex workers who are not paid risk being outed if they commence legal proceedings. Employers who mistreat sex workers similarly may not fear retribution due to workers not feeling confident in defending their workplace rights and reinforcing employer responsibilities. If sex workers are assaulted or raped, they face the possible consequence of having to admit to working “illegally” (for example, street sex work and illegal brothels). In addition, knowing that someone is a sex worker can be used against them as blackmail, including in family violence or family law proceedings.

Discrimination in general against sex work remains common, with companies like PayPal[22] and Airbnb[23] refusing to be linked with the industry in any way, even if they are operating legally.

Sex workers who identify as members of other marginalised groups, such as Aboriginal and Torres Strait Islander people, members of the LGBTIQA+ community, culturally or linguistically diverse people and migrants, face further barriers. For example, for a migrant sex worker, “the identity markers of race, language background, gender and being a sex worker combine to create structural barriers (e.g., migration and language) and socially constructed barriers (e.g., stigma and criminalisation of sex work, discrimination against migrants, gender discrimination) to accessing a range of resources.”[24] These barriers can alienate migrant workers and make them more vulnerable to exploitation.

The assumption that sex workers need to be protected because of their choice of work does not empower the people who work in the industry, but further prevents them from engaging meaningfully in social discourse and advocacy. If the goal is to identify trafficked persons and ensure that sex workers are safe and free from persecution, stigma, discrimination and exploitation, then a harm reduction approach, through the dignity and respect that flows from a human rights perspective rather than a criminal justice approach to sex workers, ought to be preferred. This underlying principle is important when considering the legislative models for sex work and how sex workers can determine the regulation for their industry, outside of criminal justice responses.

Decriminalisation

‘Decriminalisation’ is the removal of all criminal penalties and most, if not all, restrictions around sex work. Leading human rights organisations including Amnesty International,[25] Human Rights Watch[26] and the United Nations[27] support the decriminalisation of sex work as the best practice approach.

In 2019, the Northern Territory decriminalised sex work (see *Sex Industry Act 2019* (NT)). New South Wales also operates under a decriminalised model. In May 2016, the NSW government announced that it continues “to support decriminalisation of sex work as the best way of protecting sex workers and maintaining a more transparent sex work industry.”[28]

Sex work is decriminalised in New Zealand. The *Prostitution Reform Act 2003* (NZ) aims to:

> decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use); create a framework to safeguard the human rights of sex workers and protect them from exploitation; promote the welfare and occupational health and safety of sex workers; contribute to public health; and prohibit the use of prostitution of persons under 18 years of age. [29]

A study in 2007 was conducted to review the impacts of the legislative change and 90 per cent of sex workers were aware that they had increased employment, OHS and legal rights under the new legislation. Over half of the survey participants who had been sex workers prior to decriminalisation reported that police attitudes had changed for the better.[30]

Victoria is well placed to move towards a decriminalised model. The courts, government, Victoria Police and community legal services and community-based organisations have already, at times, worked together in an attempt to mitigate the effects of criminalisation and to address health and safety issues for sex workers. It was the initiative of Magistrate Popovic in 2003 to start what was formally known as the Tuesday Afternoon List, informally as the Sex Worker List. Operationally, it involved proactive steps by the court, police and organisations alike to assist sex workers in accessing health and community workers, and support in the broader sense and, of course, provided parties with access to dedicated legal representation.

The decriminalisation of sex work can also be integral to Australia’s commitments to non-punishment in the context of human trafficking. Identifying trafficked persons is achievable through criminalisation of traffickers and protection of victims, including through non-punishment of trafficked persons who commit crime. Decriminalisation of sex work does not alter Australia’s obligations to combat human trafficking. Decriminalisation is a necessary step in improving Australia’s implementation of international law in order to prevent, prosecute and protect victims of human trafficking. This has a flow on effect: it is easier to identify exploitative brothel managers; and to identify when trafficked persons appear as victims at various levels in chains of command.[31] In her 2014 article on decriminalising victims of sex trafficking,[32] Michelle Madden Dempsey has observed in the US context that jurisdictions continue to treat sex trafficking victims as criminals. Dempsey contends that the criminal law must decriminalise victims of sex trafficking. She considers the strengths and weaknesses of four methods of decriminalising victims of sex trafficking:[33]

- safe harbour laws which call for the protection of children;
- law enforcement officials and/or prosecutors identifying victims and exercising their discretion to decline to prosecute them;
- ‘[d]ecriminalise everyone involved in commercial sex, including the seller, buyer, pimp, brothel, owner etc.’;
- and the Nordic Model, that is, decriminalising people who sell sex and provide comprehensive social support programs for those who want to exit the industry.

Dempsey contends that the current efforts of US jurisdictions has been inadequate.[34] We contend for a separation of approaches to sex work and human trafficking. Autonomous and consensual sexual acts, including for payment, are socially and morally acceptable and should not be the subject of law or regulation. The exploitation of people through human trafficking (including slavery and slavery-like practices) should be recognised in laws, policies and procedures that correctly identify perpetrators and victims, regardless of their occupation. The move is to an acceptance that trafficked persons lack criminal responsibility, even if they consent, because they lacked autonomy when they acted to commit crime through the means and purposes of others.

Conclusion and some recommendations

The core human rights commitment to dignity and respect cannot be moderated for a particular group of people, no matter their profession. Victoria has reached a point where sex work does not easily fall into the category of criminalisation, whereas the criminalisation of those who traffic and exploit sex workers is capable of being a focus.

In addition, best practice is a harm reduction approach which comes with the decriminalisation of sex work combined with legislative protection for trafficked persons who commit other crimes. The decriminalisation of sex work is a human rights issue and it is our view, based on the research, that the rights of workers should not be diminished or restricted by any legalised model.

Sex work must be decriminalised in Victoria. This means that the *Sex Work Act* and Regulations must be repealed entirely. The decriminalisation model similar to that of New Zealand must be implemented. Any criminal record related to the previous sex work legislation or associated regulations must be removed under a spent conviction scheme.[35]

1 theconversation.com/will-victoria-be-the-first-place-in-the-world-to-fully-decriminalise-sex-work-146751
2 The authors would like to acknowledge their co-authors for the submission to Fiona Patten MP: Veronica Drago, Martin Radzaj, Ffyona Livingstone Clark and Robert Richter QC.
3 Sex Work Act 1994 (Vic) and Sex Work Regulations 2016 (Vic).
4 Sex Work Act 1994 (Vic), section 13.
5 afao.org.au/article/sex-work-legislation-stands-way-australias-commitments-decriminalisation-sex-workers-health-safety-rights/
6 Whores and Other Feminists edited by Jill Nagle, Chapter 24
7 Prostitution Act 2000 (WA) and Criminal Code Act Compilation Act 1913 (WA).
8 Sex Industry Offences Act 2005 (Tas).
9 Criminal Code 1899 and Prostitution Act 1999 (Qld).
10 Sex Work Act 1992 (ACT).
11 Summary Offences Act 1953 (SA) and the Criminal Law Consolidation Act 1935 (SA).
12 Summary Offences Act 1953 (SA), section 21(1).
13 Ibid section 35.
14 Criminal Code Act Compilation Act 1913 (WA), section 191(1)(a).
15 Norwegian Ministry of Justice and Police Affairs (2004) Purchasing Sexual Services in Sweden and the Netherlands, *52-53*.
16 Rubin GS, From Gender to Sexuality, citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.462.7005&rep=rep1&type=pdf at 150.
17 Ibid 151
18 Unreported, SCV, Court of Criminal Appeal, Strake, Crockett and Gray JJ, 11 Aug 1981.
19 Unreported, SCV, Court of Criminal Appeal, Crockett, Southwell and Teague JJ, 11 Dec 1991.
20 Victorian Sentencing Manual, 329 - 24.2.1 – Harm
21 DPP v Daly [2004] VSCA 63 at [18].
22 BACKPAGE.COM, LLC, Plaintiff-Appellant, v. THOMAS J. DART, Sheriff of Cook County, Illinois
23 vice.com/en/article/gvzzkx/why-its-perfectly-legal-for-airbnb-to-discriminate-against-sex-workers
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28 parliament.nsw.gov.au/ladocs/inquiries/1703/Government%20Response%20-%20Inquiry%20into%20the%20Regulation%20of%20Brothels.pdf
29 New Zealand Government, Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, May 2008, 13
30 otago.ac.nz/christchurch/otago018607.pdf - 13 to 15.
31 sbs.com.au/news/dateline/sex-trafficking-s-tragic-paradox-when-victims-become-perpetrators
32 Dempsey ‘Decriminalizing Victims of Sex Trafficking’ (2015) 52 American Criminal Law Review 207.
33 Ibid 223-229.
34 Ibid 229.
35 We note that at the time of this article being written the Spent Conviction Scheme Bill 2020 is being introduced into the Victorian Parliament.

HOW I SAVED AMERICA AND POSSIBLY THE WORLD

PART II

ANYONMOUS SC (DEFINITELY A SATIRE)

I know what you're thinking: that was a quick turnaround.

From ruining the world in the last issue of the *Bar News*, to saving it only a few months later. However, I must confess saving the world was easy. You can thank me later. (Perhaps a private dinner at my place for me and some of my very special friends?)

Anyway, as readers may recall, I returned to Melbourne from the White House in March, just as Scott from Marketing was pulling down the blinds and closing the borders.

Scotty had heard about my stint in Washington as an adviser to President Donald J Trump, and obviously really wanted to talk about it, because my phone rang as soon as I turned off flight mode, on the tarmac at Tullamarine. He was a bit gushy and excited. "Chris," he said, (my name's not Chris) "How was he, *really*? Amazing? Tremendous? He's a top bloke."

"Well," I said, "he's not as big as he looks. And he leans forward a lot." I couldn't reveal too much. What happens in the Oval Office stays in the OO. Unless it gets published in the *Bar News*.

That's when I did the strange noises, like a plane taking off, and mumbled, "so..ry … ime … inister… aking up. …ater," and hung up. When would these world leaders leave me alone?

The next few months were a little boring. I never did get my robes from chambers, so I was appearing in court on Webex from my living room, in my suit. Well, suit jacket anyway, because although I looked very carefully, there was no Practice Note stipulating that pants were mandatory. (Although one must remain ever vigilant—standing up to reach over to grab a folder may have caused some to get a brief glimpse of my bike shorts; not the lycra ones.)

I quite liked the appearing-in-court-from-home routine. Jump out of the shower three minutes before court starts, put on a tie, shirt and jacket, and click a link. I also quite like indulging in the background analysis of other people's private spaces—books on the shelves (McGrath likes macrame, a lot!), strange art on the walls (did someone actually choose to buy that?), and really ugly ornaments (what is that lump of red stuff? Was Flynn really that good with clay in kinder?). Not to mention cats moving slowly across a keyboard, kids yelling from another room—these private windows in people's lives.

I paid little attention to what was happening in the USA. Frankly, I wanted to put it all behind me. As members would appreciate, I was embarrassed and felt a little guilty about supporting the President's many

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confounding ideas: a wall to stop Americans escaping to Canada, annexing California to adjust voter balances, and getting a KFC for the White House lawn ("those security guys will love it"), and so on.

Anyway, Biden got the nomination. Despite shuffling around and stumbling over his words, he seemed to be up in the polls. All was looking good.

So there I was in late September, wearing trackie dacks and ugg boots, appearing in a long pre-trial hearing with a number of other counsel, clients, and instructors. There were 17 little windows on my Webex screen. Midway through the morning Chisholm (G) was in the middle of a somewhat abstruse statutory interpretation argument (is 'a' really very different from 'any'?) when another little window popped up on the screen.

> "Jaws dropped. Even O'Connell J, usually unflappable, raised an eyebrow and looked mildly surprised at this uninvited attendee."

It stood out because the little box was mostly a bright glow from the window behind a silhouette, one strangely familiar to me. As he came closer to the screen I saw that it was Trump, sitting at a desk, apparently in the Oval Office. He was there long enough for quite a few people on the link to notice. Jaws dropped. Even O'Connell J, usually unflappable, raised an eyebrow and looked mildly surprised at this uninvited attendee.

And then everyone else disappeared except the Pres, looming orangely into my living room.

"Koh-lynn," he mouthed soundlessly, and then mouthed some other things equally soundlessly.

"Mr President?" He kept talking. "Turn your microphone on, Mr President!" I said, loudly, as though the volume would help. He looked off-screen for a moment and then a factotum's hand reached in and pressed a button in front of him.

"Koh-lynn, can you hear me?" he said, very solemnly.

"Mr President, I'm in the middle of a court hearing, I can't talk now. Can I call you back later?"

"I got the CIA to hack into your zoom thingy, Koh-lynn, it's the only way we could reach you. It's very important. Who was that guy in purple?"

"The judge, Mr President. I've got to go."

I re-connected to the Webex link to hear O'Connell J say, "Alright, we seem to have restored the link. What were you saying Mr Chisholm?" It seems no-one really noticed, or if they did it was just a fleeting and unpleasant apparition. If only that were true.

Later that day I hit the link on the invite Trump sent me and found myself looking into the Oval Office again. Right in front of the camera was a large jar of foundation, and few tissues.

"There you are" he said. "What are we going to do Koh-lyn? Sleepy Joe is beating me. There's no way I'm losing to that guy. And that virus is out of control."

I'd thought about it. It was time to redeem myself. I set out my three-point plan.

"Mr President, I've got some ideas. Number one, appoint Rudy Giuliani as your campaign manager and chief legal adviser. I can recognise a brilliant, genius legal mind when I see one." (I didn't see one in Rudy.) At this point Rudy himself leered in from the side of the screen, swapping exhalations with the Pres, their cheeks close together, with his thumb up.

"Number two, stand up to Fox News when they're negative about you. Demand loyalty from all media outlets. Insist on it. You're the leader of the free world, start dictating your terms." I couldn't believe what I was seeing but he was actually writing this stuff down, his tongue poking out of the corner of his mouth.

"Number three—"

"Not so fast!" he commanded, very Presidentially. I paused.

"Number three… Mr President, you have to catch the virus." This was my masterstroke, or so I thought. It would literally take the wind out of his campaign (literally 'literally', even if he recovered, which was a big 'if'.) And it would demonstrate, conclusively, that POTUS couldn't even protect himself.

"That's brilliant!" he said. "Almost as smart as me." He was nodding approvingly, his eyes snaking off to the side as he watched himself nodding approvingly.

A few days later I was appearing virtually in the Supreme Court cross-examining a witness, several windows open on my screen, when he popped up again, waving frantically at me (and everyone else). Then he disappeared.

Hollingworth J was not impressed. She threw down her pen. "Who on earth was that?"

I just said, feigning innocence, "I think it was the President of the United States, Your Honour."

"I don't care who it was, I will not have people interrupting the proceedings of this Court. We'll have a short break while we check the link." We all bowed in our respective living rooms and studies towards our respective computers.

I ran to another room and called Rudy. "What the hell is going on here, Rudy, you've got to stop interrupting me like this."

"Look we've tried to give him Covid, we've tried everything, but I think he's immune. Melania's got it, I've got it, the kids have got it. We've been to rallies without a mask, but he's just not getting sick."

"Well fake it, Rudy, you don't have much time. There's heaps of out of work actors in the US, and Hollywood is just around the corner. Hire someone to pretend to be a doctor, and tell everyone he's got it. Just don't release the test results. Pretend they're tax returns." I hung up.

A couple of days later a handsome 'doctor' stood outside the Walter Reid Memorial Hospital giving a press conference. The POTUS badge on his white coat was enormous —the costume department had over-reached. He was semi-circled by several other white coats. They never should have let him answer questions, he had no idea what he was saying.

Journalist: "Has the President been placed on a ventilator?"

Actor: "A what?"

Journalist: "Has the President been given oxygen?"

Actor: "The President is breathing the air, and feeling tremendous."

Two out of three of my three-point plan worked wonders, especially on a few thousand people in Pennsylvania.

Rudy Giuliani led the campaign and the legal challenges from outside a sex store. I told him to always have a dictionary with him in court, and if the judge used big words, to look them up right there on the spot. "'Demurrer.' Your Honour, how do you spell that?" (I apologise to the judicial officers of Georgia and Wisconsin, but my duty is to the court in Australia.)

Trump offended Fox and Murdoch so badly they deserted him. He told me he was going to start his own news channel (go on, guess what he's going to call it) where he could say whatever he wanted anytime because the cameras would follow him 24 hours a day. They would even film him while he was watching himself watching himself on his own news channel, ready and waiting to capture any pearls of fact and wisdom from this Great Man.

I don't know that catching the virus was such a great idea, in hindsight. Some of his rusted-on supporters now think he's some manifestation of God, and that they are all immune too.

It's not over yet. A few days after the election, he facetimed me to thank me; he was on his way to play golf in the back of a limo. He seemed to think that it was all going very well. I told him it wasn't. I told him that everyone was lying to him, including Rudy and his own children, and he couldn't trust anyone. He looked aghast. I told him that he had to go down to Pennsylvania and start removing the fake Biden ballots himself.

"It's time to pull out the 'Lukashenko' Mr President." A look of steely determination came over his face.

Before he hung up I heard him say to his security guys, with urgency, "I've got to go to Philly. Incognito. Let's turn this 'cade around." Hopefully that's the last I hear of him.

The Future

PETER MATTHEWS

Beyond our gate is a new reality.
Autumn is still and coloured, as ever,
But a chance meeting unfolds carefully;
We speak across a divide to each other.
Shops are closed and quiet, their window signs
Envisage the end. But cafés remain,
With their empty tables and ordered lines
For the takeaways they work to maintain.
Perhaps their owners seek to hold their place
In a shifting world. An unknown future
Awaits us all as we seek a truce
With this formidable intruder.
Is there a sense of a new opening
That lies yet beyond reach, beyond knowing?

NEWS AND VIEWS

News & Views

The Victorian Commercial Arbitration Scheme

KIERAN HICKIE

In September 2020, the Victorian Commercial Arbitration Scheme (VCAS) was launched by the Victorian Bar to address the growing demand for quick and cost-effective ways to resolve civil and commercial disputes through arbitration instead of litigation, particularly in the developing COVID-19 environment.

Arbitration is a private process where parties agree to resolve a dispute by referring it to an arbitrator who makes a binding decision on the dispute (an award) which can be enforced in Court. The objective of VCAS is to facilitate the quick, cost-effective and fair resolution of commercial disputes through arbitration.

Parties who agree to resolve their disputes by way of VCAS arbitration will be bound by a set rules (VCAS Rules) and a guide (VCAS Guide). The VCAS Rules and the VCAS Guide have been designed with party autonomy, cost efficiency and speed in mind. The VCAS Rules are designed to be simple and flexible enough to accommodate the determination of a wide range of disputes expeditiously.

While VCAS arbitration is designed for disputes of all sizes, its features are beneficial to the resolution of smaller disputes, in an effort to avoid protracted litigation in Court. If the dispute is for $50,000 or less, or if the parties agree, the dispute will be heard and determined on a documents only basis, without a hearing. The award will be delivered within 90 days from the commencement of the arbitration. For other disputes, the parties can expect the award to be delivered within 120 days of the commencement of the arbitration.

VCAS arbitration has been developed with party autonomy and flexibility in mind. VCAS arbitration provides for, and encourages, online hearings (either through Zoom or other preferred online platforms) through to 'stop clock hearings' (where parties can agree to a time limit for hearings). However, these types of hearings are subject to the parties' agreement.

A key feature of VCAS arbitration is to reduce cost and expense of resolving disputes for parties. VCAS arbitration provides for fixed fee arbitration, which means the arbitrator's fees are capped at 10 per cent of the total amount in dispute (claim plus any counterclaim). This means that the arbitrator in each case agrees to charge their time on the basis of fixed rates in the VCAS guide, unless the parties otherwise agree, or exceptional circumstances apply.

Parties to a dispute who agree to resolve their dispute through VCAS arbitration are able to select one of the arbitrators on the panel of arbitrators maintained by VCAS. Otherwise, parties are free to decide on their own arbitrator.

VCAS has established an inaugural panel of qualified arbitrators. They are experienced in arbitration and available to hear and determine a dispute referred to VCAS arbitration. Each person appointed to the VCAS panel of arbitrators is a fellow of the Chartered Institute of Arbitrators (having completed an arbitration award writing course), or accredited with the Resolution Institute. The quality of the arbitral panel is an essential component of VCAS arbitration. The intention is to ensure that parties who refer their dispute to VCAS can be confident that they will receive a fair and proper hearing, and a binding and enforceable award within a short time frame.

The Victorian Bar encourages members who have an interest in arbitration, and who have the requisite qualifications, to apply to join the VCAS panel of arbitrators. VCAS is a terrific opportunity for practitioners interested in arbitration to gain arbitration experience (both as arbitrator, and as counsel representing a party in VCAS arbitration).

More information about VCAS (and a copy of the VCAS Rules and VCAS Guide) is available on the VCAS website at vcas.net.au.

The Open Justice Project – the Monash University and Victorian Bar Pro Bono Program

BY LAURA HILLY, TIM FARHALL AND WILLEM DRENT

Can you remember when you first saw 'law' in action?

Was it that summer you spent with the suburban solicitor who reminded you of Dennis Denuto, wrestling with the photocopier and navigating that precariously leaning multi-draw filing cabinet? Or was it when you started volunteering at your local community legal centre, watching lawyers working minor miracles sustained by long-life milk and that massive tin of Nescafe?

The moment when 'law' opens up—transforms from words in textbooks and hypotheticals in lecture theatres, to real people and real consequences—is an important moment in every legal career. For some aspiring lawyers, this is when they thank their lucky stars that they combined their law degree with a finance major and retreated to a job down the other end of Collins Street. But for others, including barristers, it is an introduction to work that can evolve into a lifelong profession, passion and dedication to service.

The Open Justice Project is an opportunity to open that door to a new generation of lawyers.

An initiative of the Victorian Bar and Monash University's Faculty of Law, the Project will set up a panel of selected later-year undergraduate and post-graduate students who can assist barristers at the Victorian Bar working on pro bono matters. Inspired by previous Victorian Bar and Monash Law initiatives and successful equivalent schemes operating at other Australian and international universities (such as the University of Queensland's 'Barrister Assistance Team' and the University of Oxford's 'Oxford Pro Bono Publico'), the Open Justice Project will provide students with practical experience to contextualise their legal studies, and to improve awareness amongst students of the work of a barrister, the value of pro bono work, and issues concerning access to justice.

In turn, students participating in the Open Justice Project will provide valuable pro bono legal research support and paralegal assistance. Despite the challenges and uncertainty of the past year, members of the Victorian Bar continue to perform tirelessly pro bono work. That assistance will help barristers to continue to support access to justice for all members of our community.

The Open Justice Project will complement a broad offering of "experiential" learning programs offered by the Monash Faculty of Law. As Dean of the Monash Faculty of Law, Professor Bryan Horrigan said:

> "Monash Law's long-standing commitment to access to justice in Victoria continues through our Monash Law Clinics under our unique Clinical Guarantee for law students. Monash Law is proud to work with VicBar to enable our students to assist Victorian barristers in pro bono legal work for those most in need of legal assistance, while also allowing students to develop real-life experience of client needs and law in practice."

The Open Justice Project is led by a working group of Laura Hilly and Willem Drent from the Victorian Bar Pro Bono Committee, Tim Farhall from the Victorian Bar Student Engagement Committee, and Associate Professor Ross Hyams and Melissa Fletcher, Manager of Experiential Education, from Monash University. A pilot of the Open Justice Project will commence in 2021, and upon review of an initial trial phase it is hoped that the program can be expanded. Look out for communications early in the new year!

Mediating in the time of COVID-19 and beyond

TONY ELDER, ADR COMMITTEE CHAIR & GLEN PAULINE, ADR COMMITTEE MEMBER

For the Bar's nationally accredited mediators, 2020 was the year in which a tectonic shift occurred in our practices. Until 2020, online mediation had been seen by some as the way of the future, possibly as an adjunct to the perceived real work of mediators which is performed face to face. Others could not have envisioned in their wildest dreams what was about to occur. Suddenly mediators, like counsel, judges and solicitors, were catapulted into the relatively unchartered territory of online videoconferencing.

Zoom, Microsoft Teams, Modron Spaces and more

Mediating in 2020 was first all about choosing a technology platform, or several, setting up an account and then understanding how to use it to try to replicate a face-to-face mediation!

Online private spaces and break-out rooms for videoconferencing needed to be mastered. Mediators quickly needed to become technology educators, firstly of themselves. Parties and solicitors had varying levels of familiarity with the technology. In the early days of COVID-19, it became necessary to spend time before the mediation checking that each participant received a link, was able to log on to a videocall, and had a device with a camera (some didn't realise their devices had no cameras until trying to log on to videoconferences!). This had some advantages. The relationship between the mediator and each party commenced earlier and, in a context where everything was new, the shared experience of adopting technology tended to help in getting the mediation process off to a positive start. Other times, however, problems with internet connections and the parties' unfamiliarity with the technology served to delay and distract the parties from engaging effectively in the mediation process.

Ensuring that mediation took place in privacy required extra effort. Parties appeared from home offices, loungerooms, bedrooms and the occasional parked car. Confidentiality was sometimes breached through the presence of toddlers and pets in view and out of view. Mediation agreements were amended to reflect these changes.

For some mediators, the concept of *asynchronous mediation* suddenly made a huge amount of sense for certain types of disputes. Without the need to travel, shorter sessions could be scheduled across several days, especially when the parties were heading towards a negotiated settlement but needed more time to consider matters and negotiate terms. Depending on the platform being used, messaging functions could be used to keep the communications within the vacuum of the confidential online environment rather than scattered throughout multiple parties' email boxes. This proved to be a very helpful case-management tool for mediators.

In this respect, on Modron Spaces, a platform custom-designed for mediation and online hearings, the messaging and uploading of documents in the Everybody Space creates a trail which can readily be viewed by all parties throughout the process for as long as it continues. In complex cases or where dispute resolution needs to occur over weeks or months, this way of managing mediation is likely to increase. On Zoom, the chat function can be used, and the 'chats' can be saved as a file.

As the courts commenced using different platforms for mediation, including Microsoft Teams and Zoom, solicitors and barristers by the end of 2020 became accustomed to mediating online. Overall, mediation continued unabated throughout the time of the pandemic as an essential tool in resolving disputes.

As COVID-19 restrictions ease, towards the end of 2020, and disputes arising from or caused by COVID-19 are likely to unfold through 2021, it seems likely that mediating online will continue to be normalised if not become the new normal. Indeed, online mediation may be the preference for many parties, as well as practitioners, courts, tribunals and government bodies involved in providing mediation. The significant benefits, including the convenience and reduced time and cost of travel for all participants, are likely to continue to be embraced by many. Barrister mediators have a unique opportunity to be at the forefront of the advances in mediation practice by embracing the technology to achieve our purpose: the *cost-effective and timely* settlement of disputes in a manner that meets the needs of the parties.

PHOTOS COURTESY OF BIGSTOCK

Expedited Mediation Scheme and Court Protocols

Since March, the Alternative Dispute Resolution Committee has worked on initiatives to capitalise on this moment in history to further advance mediation as the way most disputants receive access to justice. The committee has worked hard to assist the courts in managing the pressures imposed on the justice system due to the COVID-19 closures.

As at the close of 2020, the Bar has a strengthened foundation in cooperatively working with the courts to provide mediation services, both online and face-to-face, including the following initiatives:

- Lists of Vicbar mediators, who are willing to provide online mediation in family law, commercial and industrial list matters, have been provided to the Federal and Family Circuit Courts for display on their website;[1]
- The Victorian Bar Expedited Mediation Scheme;[2]
- Protocol for Commercial Panel Federal Circuit Court matters;[3]
- Protocol for Family Law Property Federal Circuit Court matters;[4]
- Protocol for Industrial (Fair Work Division) Property Federal Circuit Court matters;[5]
- County Court Commercial Division Mediator Referral Scheme.[6]

The County Court Commercial Division Mediator Referral Scheme was launched via Zoom on 20 October 2020 by Judge Woodward, Judge Tran and Judicial Registrar Muller in conversation with the Chair of the Bar's ADR Committee, Tony Elder.

Since commencing, there have been several referrals both from the Federal Circuit Court and from the County Court. It is anticipated that through referral of matters about to be heard at trial in the County Court, there will be a significant saving in the number of days of court trial time because cases have been successfully mediated. The County Court judges have indicated that this saving may be tracked and quantified as part of assessing the success of the referral scheme.

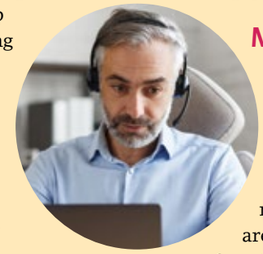
Lawyers Mediation Certificate—via Zoom

The first fully online Victorian Bar Lawyers Mediation Course was conducted by Peter Condliffe and Glen Pauline in November 2020 via Zoom, with technical support provided by Nina Massara and the education team of the Vicbar office. It was an overwhelming success and opens up new ways of delivering the expert ADR training that Vicbar provides to barristers aiming to enter the NMAS system of accreditation and grow their mediation practices.

While much of the teaching of the practical skills of a successful mediator is optimally conducted in a face-to-face environment, the theoretical material can easily be delivered to all participants on Zoom. Future LMC courses are likely to be a hybrid of online and face-to-face teaching, which should increase the level of satisfaction of participants and achieve efficiencies and savings in delivery of the course. This will in turn continue to position the Victorian Bar as a leading RMAB (Registered Mediation Accreditation Body) within the NMAS system, and enhance the reputation of the Lawyers Mediation Certificate Course as a leading mediator accreditation course, advancing the reputation and status of Victorian Bar mediators.

The ICC Commercial Mediation Competition and the Henry Jolson Prize

The first fully online International Chamber of Commerce mediation competition took place between 30 August and 1 September, 2020. It was conducted on Modron Spaces with the Grand Final held on Zoom. The Australian Disputes Centre managed the competition, which was sponsored by the Victorian Bar by way of prizemoney to the winning team. Judges from the Victorian Bar included William Lye QC, Michael Gronow QC and Glen Pauline, who presented the Victorian Bar's Henry Jolson Prize to the winning team, from the National University of Singapore.[7]



Mediating in 2021 and beyond

After the year we have had, it is hardly wise to plan for, or predict, what the world will be like next year. Many mediators are hopeful of returning to face-to-face mediation soon, in the cases that call for that, and where it is the preference of the parties. The first question for parties and lawyers in 2021, however, will not be "Where can we meet to mediate?" but, rather, "Shall we mediate face-to-face or online?"

1. see "Alternative dispute resolution, settlement and mediation services – stakeholder information" page at federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/adr-covid-info
2. The Scheme is available at ADR Appointment Services page of the Vicbar website at vicbar.com.au/public/adr/adr-appointment-services
3. Ibid
4. Ibid
5. Ibid
6. Ibid
7. Watch the GRAND FINAL and the Henry Jolson Prize being awarded to the winning team at disputescentre.com.au/apcmc-winners-and-awards/ (scroll down to GRAND FINAL)

IN THE MATTER OF *Her Majesty's Counsel*

SHP Steward and EA Gisonda

***A** few years ago, Simon Steward QC (now the Hon Justice Steward of the High Court of Australia), and Eddy Gisonda wrote an advice for the Bar Council at the request of the then president, Jennifer Batrouney QC. The question was this: what happens to QCs when the Queen dies? From time to time, since then, various silks and other luminaries have asked to see the advice. With permission,* **Bar News** *is publishing this advice for the benefit and interest of members, so that it may be on the public record.*

» What are the consequences for members of counsel who have been appointed to be one of Her Majesty's Counsel for the State of Victoria, on the demise of Her Majesty Elizabeth II the Queen of Australia, and the accession to the throne of the present male heir apparent? The answer is that those appointed Queen's Counsel will not need to seek new letters patent of appointment. Their current appointments will continue automatically, and by custom, they will be known as 'King's Counsel' or 'KC' without the need for anything further to be done.

» Queen's and King's Counsel traditionally were appointed by letters patent under the Great Seal.[1] Issuance is a prerogative power of the Crown,[2] exercisable in Victoria by the Governor, as representative of the Sovereign.

» The origins of the rank lie in an expedient taken by Elizabeth I in about 1594 to retain for the Crown the services of Francis Bacon—or at least to ensure his services could not be used *against* the Crown—who was appointed "learned counsel extraordinary to Her Majesty" but without any patent or fee.[3] It is not known what came of the appointment immediately on the demise of Elizabeth I, but Bacon had the favour of King James I and after receiving a knighthood in 1603, the King authorised letters patent in 1604 that appointed Sir Francis as "one of our counsel learned in the law" and granted him an annual stipend. This is the first known record of letters patent being issued for such purpose.

» The precedent was followed once by King James I in 1607 who granted similar letters patent to Henry Montague, later the Earl of Manchester.

Montague held the rank for four years until he was appointed King's Serjeant. Sir Francis had remained one of His Majesty's Counsel during his time as Solicitor-General and then as Attorney-General, but in 1618, he was appointed Lord Chancellor and this determined his appointment as King's Counsel. Thereafter the rank fell into temporary disuse.

» Charles I resumed the practice of appointing King's Counsel and, during his reign, made nine appointments and instituted the still-continuing practice of granting the office at pleasure rather than for good behaviour. The Crown could not entirely rely on the advice of the most senior barristers—the serjeants—who tended to oppose the interests of the Crown in matters of land law; hence the use of King's Counsel whose sole original function was to advise the Crown primarily by serving as an assistant to the Attorney-General or Solicitor-General.[4]

"During the 18th century, the office of King's Counsel came to be used to bestow rank and precedence on an individual, rather than as a form of engagement of forensic assistance for the Crown."

» At common law, all appointments at pleasure are determined on the death of the sovereign,[5] which included those who had at this time been appointed King's Counsel.[6] Following the Restoration, no living King's Counsel was re-appointed by Charles II, who proceeded to appoint more new King's Counsel than any of his predecessors. A declaration by the King in Council in 1671 gave his Majesty's Counsel precedence over the serjeants, which led to an increase in the appearances of King's Counsel in all courts, other than the Common Pleas.[7]

» During the 18th century, the office of King's Counsel came to be used to bestow rank and precedence on an individual, rather than as a form of engagement of forensic assistance for the Crown.[8] This had a number of consequences. First, appointment to the office became more frequent. Second, by 1831, King's Counsel no longer were paid an annual stipend or fee by the Crown, and barristers were no longer required to vacate their seat in Parliament upon being appointed a King's Counsel.[9] Third, and most importantly for present purposes, it precipitated the emergence of the custom that the office, though at pleasure, should enure for the life of the holder.

» In 1685, there were approximately 13 King's Counsel, and James II re-appointed 11 of them. Although William and Mary did not reappoint many of the King's Counsel who were alive following the death of King James II, their reign saw the passage of 7 & 8 Will III, c. 27, s 20, which provided:

> That no commission either Civil or Military shall cease determine or be void by reason of the Death or demise of His present Majesty or any of his Heires or Successors Kings or Queens of this Realme but that every such Commission shall bee continue and remaine in full force and virtue for the space of Six Months next after any such Death or Demise unlesse in the meane Time superseded determined or made void by the next and immediate Successor ...

» This provision was later explained by a statute of Queen Anne to include a "*patent* or grant of any office or employment".[10] Queen Anne had reappointed approximately half of the King's Counsel surviving the death of her predecessor, and George I similarly re-appointed approximately half of the Queen's Counsel surviving the death of his predecessor. Those whose offices were renewed received new individual patents and were sworn in again.

» It appears that George II renewed all of the surviving King's Counsel following the death of George I, while George III renewed approximately 10 of the existing 14 King's Counsel on his accession.[11] In 1817, as a one-off measure, it was provided in 57 Geo. III, c. 45, that all offices held during pleasure should continue following the demise of George III without the need for renewal by patent. Thence it was not necessary for George IV to renew any King's Counsel, but in 1830, it fell to William IV to reappoint those King's Counsel who had been first appointed before 1820. William IV instituted the practice of according specific precedence to King's Counsel by reference to a previously-appointed colleague. The *Colonial Offices Act 1830* (UK) (1 Will. IV, c 4, s 2) also was enacted during the reign of William IV, which provided that:

> No patent, commission, warrant, or other authority, for the exercise of any office or employment, civil or military, within any of his Majesty's plantations or possessions abroad, determinable at the pleasure of his Majesty, or of any of his Majesty's heirs and successors, shall by reason of any future demise of the crown be vacated or become void until the expiration of eighteen calendar months next after any such demise of the crown as aforesaid.

» On the accession of Queen Victoria, each King's Counsel (save a very small number who were not reappointed and thereby lost their office) received a new individual appointment as Queen's Counsel. This was the last time that fresh letters patents were issued to individually named members of the Inner Bar on the demise of the Crown in the United Kingdom.

"A silk gown is, I believe always given at home on the understanding that it is to be retained for life, or given up only under special and unforeseen circumstances."

» It is here convenient to track developments as were occurring in the colony of Victoria. On 10 August 1863, the Governor of Victoria had issued the first letters patent in the colony, appointing the Minister of Justice, Archibald Michie, and the Honourable Richard Ireland, to be one of Her Majesty's counsel. This was 10 years after the appointment of the first five Queen's Counsel in New South Wales. The appointments were governed by prerogative regulations made by the Governor-in-Council on 7 December 1857. The regulations provided that, with the exception of those having held the office of Attorney-General or Solicitor-General, no barrister should be appointed Her Majesty's Counsel except on the recommendation of the Chief Justice to the Governor in Council.[12] In his letters to Messrs Ireland and Michie explaining his intention to recommend their appointment, George Higginbotham, who was then the Attorney-General for Victoria but later the Chief Justice of the Supreme Court of Victoria, said:[13]

> No Queen's Counsel have hitherto been nominated in this Colony. I believe that such appointments would be acceptable to the profession and would prove beneficial to the Bar by bringing it into closer correspondence with the state in which the profession exists at home. But if Queen's Counsel are to be introduced here I think that care must be taken that the office shall exist in reality as well as in name; and that the conditions which are understood to be attached to the office, and which may in some cases be felt to be onerous, shall be accepted together with the title of distinction. *A silk gown is, I believe always given at home on the understanding that it is to be retained for life, or given up only under special and unforeseen circumstances.* A Queen's Counsel, moreover, is forbidden by the professional usage to practise in inferior courts, to draw pleadings and generally to undertake business which commonly falls to the share of the junior member of the profession. I am aware that their Honours, the judges of the Supreme Court, concur in the opinion that these and all other obligations attached to the office of Queen's Counsel in England and Ireland ought to be observed and enforced in Victoria. (*emphasis* ours)

» We have already made reference to the *Colonial Offices Act 1830* (UK). The *Electoral (Amending) Act 1888* (Vic) contained various provisions addressing the demise of the Crown, including s 52, which provided that:

> Every commission warrant or other authority for the exercise of any office or employment of any kind or nature within Victoria issued or exercised by the Governor in Council or the Governor or by any other person in the name and on behalf of Her Majesty or of any of her successors to the Crown in virtue of his office or under the authority of any Act of the Imperial Parliament or of the Parliament of Victoria or of any rules or regulations made thereunder respectively shall continue in full force notwithstanding any demise of the Crown and be of the same effect as if no such demise had happened, anything contained in an Act of the Imperial Parliament passed in the first year of the reign of His late Majesty King William the Fourth, chapter four, to the contrary notwithstanding.

» The effect of this provision was to provide for letters patent to continue and remain in full force beyond 18 months after the demise of the Crown in the colony of Victoria. This provision was re-enacted in identical form, as s 5 of the *Constitution Act Amendment Act 1890* (Vic), which remained in force following the death of Queen Victoria.

» On the accession of Edward VII in January 1901, all Queen's Counsel in the United Kingdom were continued in office, by general or encompassing letters patent appointing them to be of his Majesty's Counsel.[14] This was necessary because of 6 Anne, c. 41, s 8, which provided that upon the demise of the Crown, all civil offices continued for six months only. Those who were Queen's Counsel could obtain new letters without paying a fee.[15]

» In the interregnum between the demise of Queen Victoria, and the issuing of the new patents by Edward VII, there appeared to be some unnecessary confusion in the United Kingdom about whether those who were a Queen's Counsel were automatically to be called a King's Counsel.

» On 26 January 1901, being four days after the accession of King Edward VII, the *Law Journal* reported that[16]:

> The most common phrases of the legal world have undergone a sudden change: the 'Queen's Bench Division' has become the 'King's Bench Division', and the familiar title of 'Q.C.' is known in the Courts no more.

» On the same day, it was reported in the *Law Times* that "with the death of Queen Victoria, the suffix 'Q.C.' disappears".[17]

» The following week, however, the editors of the *Law Journal* said[18]:

> It is curious to note that many of the daily papers, on the demise of the Crown, at once changed the familiar title of Queen's Counsel into that of King's Counsel, and appended the letters K.C. to the names of the 'silks'. Whether in technical accuracy such an immediate change was justifiable is somewhat doubtful.
>
> The legal position appears to be strictly this. Certain members of the Bar, in numbers not a few, were by Letters Patent under the Great Seal of the late Sovereign appointed as her Majesty's counsel learned in the law. The office of Queen's Counsel being held at the pleasure of the Crown would formerly have been vacated by the demise of the Crown. By virtue, however, of the statute of 6 Anne, c. 41, s.8, every person in such office is continued in office for six months after the demise of the Crown unless sooner removed by the new Sovereign. The terms of his Majesty's recent proclamation confirm this statutory renewal of offices held under the Crown. But it is to be observed that the result of the statute and the proclamation is merely to effect an extension of office for six months without in any way changing the title or function of the holders of such offices.
>
> It would seem, therefore, that those who in the last reign attained the dignity of silk are still correctly described as QCs, being in fact by their patents her late Majesty's Counsel. They will, it is submitted, only become King's Counsel after patents have been issued to them under the Great Seal appointing them as such. That this is so seems clear when it is recollected that it is competent to the King to refuse to sign the warrant for the issue of the patent to any particular individual, as indeed was demonstrated on the demise of Queen Caroline, when George IV for personal reasons refused to appoint Brougham and Denman as King's Counsel, they having held the appointments of Attorney-General and Solicitor-General respectively to Queen Caroline.
>
> The appointment of a Queen's Counsel is from the terms of the patent creating it purely a personal one. No mention is made therein of the successors of the Crown, and a Queen's Counsel, on the demise of the Queen, can no more become a King's Counsel than one of her late Majesty's physicians can become one of his Majesty's physicians otherwise than by express appointment. It is noteworthy that the 16 gentlemen who were approved as Queen's Counsel just prior to the death of the Queen were sworn in as King's Counsel before the Lord Chancellor in his private room at the House of Lords on January 31, and on the same day went through the ceremony of being called within the Bar at the Law Courts. This is consistent with the view expressed above, as the patents issued to these gentlemen expressly appoint them to be his Majesty's Counsel. All the other gentlemen called within the Bar during the last reign will presumably in due course receive new patents as King's Counsel, and will subsequently take the usual form of oath as Counsel of his Majesty King Edward VII.

> "In Victoria, of the 24 appointments of Queen's Counsel in the life of the colony, 14 were still alive on the accession of King Edward VII."

» There appeared to be similar confusion elsewhere. A record of an exchange in court between Mr Justice Boucaut of the Supreme Court of South Australia and Sir Josiah Symon, KCMG, a month later states that:[19]

> At the Supreme Court on Friday morning Mr Justice Boucaut said he had noticed that since the death of the Queen practitioners who held the position of Queen's counsel had been designated by the letters "K.C.". According to his reading of the law that was incorrect. Under the Common Law the commission of Queen's counsel would lapse immediately on the demise of the Crown, and unless new patents were issued lawyers holding that office would not be entitled to wear silk. By virtue of a statutory enactment, however, they were entitled to retain the title for six months after the death of the Sovereign by whom it was conferred. Sir Josiah Symon said he agreed with his honor that there was no authority for the designation "King's counsel." They were still Queen's counsel and only entitled to wear the silk gowns up to the end of the term named. His Honor said that he would continue to use the letters Q.C. for the period of six months from the death of the Queen.

» In Victoria, of the 24 appointments of Queen's Counsel in the life of the colony, 14 were still alive on the accession of King Edward VII. On 8 February 1901, Isaac Isaacs (then the Attorney-General of Victoria) issued a notice in the Government Gazette that the Governor in Council had appointed certain named gentlemen to be His Majesty's Counsel.[20] Named thereunder were each of the 14 living Queen's Counsel in order of appointment, followed by three new appointments: the Honourable James Casey, George Neighbour, and Frank Gavan Duffy (later the Right Honourable Sir Frank Duffy, KCMG, Chief Justice of the High Court of Australia). The notice then continued as follows:

> And His Excellency has been pleased to direct that they shall have place, procedure, and precedence in His Majesty's Courts or elsewhere in the order in which their names are herein set forth, and that Letters Patent be issued accordingly: Provided that notwithstanding anything contained in the said Order or in the Regulations of His Excellency the Governor in Council, dated the 7th day of December, 1857, it shall not be necessary for any of the said gentleman to whom Letters Patent have heretofore been issued constituting, ordaining, and appointing him a Counsel of Her late Majesty Queen Victoria to take out any further Letters Patent.

» Although it was not immediately necessary to make this Order because of s 5 of the *Constitution Act Amendment Act 1890* (Vic), there may have been a number of reasons why the Order was made in any event. First, the Governor in Council may have thought it desirable to resolve the debate identified by the editors of the *Law Journal* as quoted above. Second, there might possibly have been a question about the combined operation of the statute 6 Anne, s 5 of the *Constitution Act Amendment Act 1890*, and the *Colonial Laws Validity Act 1865* (28 & 29 Vict. c. 63, s 2).[21] Third, there had not been a change of monarch for over 62 years, and the Order may have been issued as an abundance of caution in all of the circumstances, particularly when a similar course had been adopted in the United Kingdom. Fourth, in 1897, general precedence that had traditionally been granted by the appointment of Queen's Counsel in the United Kingdom was confined in that country to the courts.[22] The Order may be said to have served the purpose of confirming this change in the state of Victoria for all King's Counsel. Fifth, with the confining of precedence to the courts, and the appointment of new King's Counsel for the first time, it might have been thought convenient to confirm the order of seniority for all King's Counsel thereafter.

» Any doubt or confusion on this matter was removed in July 1901, with the passage of the *Demise of the Crown Act 1901* (UK). Sub-section 1(1) of the Act provided that:

> The holding of any office under the Crown, whether within or without His Majesty's dominions, should not be affected, nor should any fresh appointment thereto be rendered necessary by the demise of the Crown.

» The *Demise of the Crown Act 1901* (UK) remains in force in the United Kingdom today. In Victoria, s 11(1) of the *Constitution Act 1975* (Vic) continues to provide that all appointments by the Governor continue in force, notwithstanding the demise of the Crown. As well, the *Demise of the Crown Act 1901* (UK) applies by paramount force in Victoria.[23]

» By reason of this statutory regime, all King's and Queen's Counsel now keep their appointment for life unless specifically revoked, and no action is necessary on the demise of the Crown. As far as we are aware, no fresh letters patent were issued and no other action was gazetted in 1910, 1936,[24] or 1952.

» Following the death of King George VI, it was reported in the *Law Times* that[25]:

> Formerly on the death of the Sovereign the emphasis was on the change of the royal person, the fresh start. Not only was there the new Great Seal, the new coinage, the new regnal year, Parliament was automatically dissolved and civil and military offices under the Crown were similarly automatically vacated. Prosecutions and actions were suspended. For a while the whole Government of the realm came legally to a standstill. Throughout the 18th and 19th centuries the emphasis was shifting to continuity. The convenience of this was patent though perhaps there was sometimes more to be said in favour of the fresh start than may appear at first sight. … Be that as it may, judges were continued in their office; military officers were continued in their commissions. The continued life of Parliament was assured by the Representation of the People Act, 1867. And finally, by the Demise of the Crown Act, 1901, it was enacted that "the holding of any office under the Crown . . . shall not be affected, nor shall any fresh appointment thereto be rendered necessary, by the demise of the Crown." Thenceforward, to take a particular instance, though judges might adjourn their courts as a symbolic gesture on the announcement of the death of the Sovereign; there was no legal necessity for them to renew the judicial oath or the oath of allegiance. Similarly King's Counsel retain their patents without any fresh appointment. In the reign that is opening the change is notably marked for the lawyers by the return, after half a century, to the styles "Queen's Bench Division" and "Queen's Counsel." (It happens that there are still two men living who were Queen's Counsel before they were King's Counsel.) But beneath such forms as these and behind the splendid ceremonial of the Proclamation there remains the principle of continuity that the Sovereign never dies. The King is dead. Long live the Queen!

> "The King is dead. Long live the Queen!"

» In our law "the king is said never to die", for immediately on the decease of the reigning sovereign, the right of the crown vests, eo

instanti, upon their heir.[26] So too, in the event that a King succeeds a Queen or vice versa, the title and accompanying post-nominal letters of any of His or Her Majesty's Counsel will change statim.[27] The law reports show King's Counsel retaining their rank following each demise until 1952 when they became Queen's Counsel, seemingly without delay.

» Speaking of the relationship between Queen's Counsel and the Crown, Professor Arnheim has said:[28]

> A barrister taking silk in, say, 1841, early in the reign of Queen Victoria, would probably have spent the rest of his life as a 'Queen's Counsel', as the Queen's reign continued for another sixty years. But if by chance our hypothetical silk was still alive on 22 January 1901, he would automatically have become a 'King's Counsel' on that day, which marked the death of the old Queen and the accession of King Edward VII. All silks changed from QC to KC on that day, and all silks changed from KC to QC on 6 February 1952, when the death of King George VI brought Queen Elizabeth II to the throne. No new letters patent are needed for such a change to take place, and none are conferred. In fact, there is no real change of title at all, because, in formal terms, a silk is appointed to act as counsel to the Crown, regardless of who the monarch of the day may be, and his proper title is neither 'QC' nor 'KC' but simply 'one of Her Majesty's counsel' or 'one of His Majesty's counsel', as the case may be ...

» The position occupied by Queen's Counsel is in the nature of an office under the Crown, in some respects a "very special type of office",[29] although any duties which it entails are almost as unsubstantial as its emoluments; and it is also of the nature of an honour or dignity to this extent that it is a mark and recognition by the Sovereign of the professional eminence of Counsel.[30] Further, that the patent of a Queen's Counsel creates an "office under the Crown"[31] or an "office or employment of any kind or nature within Victoria issues or exercised by the Governor"[32] is clear from its terms. As we have already mentioned, King's Counsel and Queen's Counsel received a yearly stipend or fee from the Crown, and until the discontinuance of that fee in about 1831, a member of Parliament who was a barrister vacated his seat on appointment, thus showing that the appointment was regarded as an office under the Crown. Serjeant Pulling, in his work on the Order of the Coif, states that the appointment of King's Counsel was treated in Westminster Hall as an office under the Crown, however indefinite its duties and obligations.[33]

» It follows that on the next demise of the Crown, and unless there is any legislative amendment to the contrary, each of Her Majesty's Counsel for the state of Victoria will immediately and automatically become one of His Majesty's Counsel for the state of Victoria. The legislation, custom and practice to which we have referred above put beyond doubt that immediately following the death of the Queen of Australia, each of Her Majesty's Counsel for the State of Victoria will retain their letters patent, but be designated one of His Majesty's Counsel, or "King's Counsel" or "K.C.", thenceforth.

» We have examined the terms of appointment of Queen's Counsel in their current form, including the form that existed before 2000, and the present form that was introduced in 2014. The language of appointment is entirely consistent with this conclusion. There are no words used that indicate that the appointment is limited to the life of our current Queen. Nor do any other temporal limitations appear.

» Finally, the demise of the Crown has no impact on those members of counsel appointed to be one of the Senior Counsel for the State of Victoria, and who have not been appointed one of Her Majesty's Counsel. These members of counsel do not become a King's Counsel following the demise of the Crown.

1 For a more detailed explanation of the nature and history of the office, see J Sainty, *A list of English Law Officers, King's Counsel and Holders of Patents of Precedence* (1987, Selden Society Supplementary Series, vol. 7); J Baker, *Collected Papers on English Legal History* (2013, vol. 1), 124 ff.; W Holdsworth, *A History of English Law* (1924 vol. 6), 472 ff.; W Holdsworth, "The Rise of the Order of King's Counsel and its effects on the Legal Profession" (1920) 36 L.Q.R. 212. Separately, see J D Merralls, "Some Marginal Notes About Queen's Counsel" (1994) 89 Vic Bar News 51.

2 *Attorney-General for Dominion of Canada v Attorney-General for Province of Ontario* [1898] AC 247 at 252; *Waters v Acting Administrator of Northern Territory* (1993) 46 FCR 462 at 473; J D Merralls, "Some Marginal Notes About Queen's Counsel" (1994) 89 Vic Bar News 51 at 51.

3 Before this, barristers who advised the Crown and who provided assistance to the Attorney-General and the Solicitor-General were sometimes styled "King's Counsellors": see A Dean, *A Multitude of Counsellors* (1968), 259.

4 M T W Arnheim, "Silk, Stuff and Nonsense" (1984) 101 S.A.L.J. 376 at 378; see also W J V Windeyer, *Lectures on Legal History* (2nd edition, 1949), 157.

5 In *re Cardew; Ex parte Bank of Australasia* (1901) 10 QLJ 176 at 178.

6 J H Baker, *The Common Law Tradition* (2000), at 89 (cited in fn. 88, M Blackwell, "Taking Silk: An Empirical Study on the Award of Queen's Counsel Status 1981-2015" (2015) 78 M.L.R. 971).

7 J D Merralls, "Some Marginal Notes About Queen's Counsel" (1994) 89 Vic Bar News 51 at 51. As Mr Merralls says, further, the Serjeants retained their right of exclusive audience in the Court of Common Pleas until 1846.

8 W J V Windeyer, *Lectures on Legal History* (2nd edition, 1949), 157; Halsbury's Laws of England (4th edition), vol. 3(1), at [359]; J D Merralls, "Some Marginal Notes About Queen's Counsel" (1994) 89 Vic Bar News 51 at 51.

9 (1901) 36 L.J. 39, at 41.

10 1 Anne c. 2, s 1.

11 The reasons for not reappointing a number of the existing King's Counsel are not known to us, but it is possible that some (or all) of those who were not reappointed did not apply.

12 A Dean, *A Multitude of Counsellors* (1968), 259.

13 A Dean, *A Multitude of Counsellors* (1968), 259-260.

14 [1901] AC v; (1901) 110 L.T. 371, at 371. The announcement in the London Gazette was as follows:

> The King has been pleased, by several Letters Patent under the Great Seal, to appoint and declare:-
>
> That the persons who were appointed by Her late Majesty to be of Her Majesty's Counsel learned in the law shall be of His Majesty's Counsel learned in the law, with all such precedence, power, and authority as were originally granted to them

15 (1901) 110 L.T. 347, at 348.

16 (1901) 36 L.J. 39, at 39.

17 (1901) 110 L.T. 279, at 280.

18 (1901) 36 L.J. 51, at 51.

19 *The Adelaide Advertiser*, 9 March 1901, at 6.

20 Victoria Government Gazette (No. 21), 8 February 1901.

21 See, e.g., *In re Cardew; Ex parte Bank of Australasia* (1901) 10 QLJ 176 at 178.

22 For a copy of the letters patent, see J Sainty, *A list of English Law Officers, King's Counsel and Holders of Patents of Precedence* (1987, Selden Society Supplementary Series, vol. 7), at 297.

23 *Imperial Acts Application Act 1980* (Vic), s 4(1)(b); J Selway, *The Constitution of South Australia* (1997), at [2.3.2]; G Taylor, *The Constitution of Victoria* (2006), at 68 (footnote 25); A Twomey, *The Constitution of New South Wales* (2004), at 607 (footnote 118). See also letter from the Attorney General of Victoria to the Chair of the Standing Committee on Legislation, Legislative Council of Western Australia, 21 May 2015, in response to that Committee's Inquiry into the Demise of the Crown Statute.

24 Whereby a "demise" of the Crown was effected by instrument and statute: see s 1(1) of His Majesty's Declaration of Abdication Act 1936 (UK).

25 (1952) 213 L.T. 83, at 84.

26 W Blackstone, *Commentaries on the Laws of England* (1893 edition), 196, 249.

27 Commencing on 4 February 1952, Rose Heilbron, KC, appeared for solicitor Louis Bloom on a murder charge at Durham Assizes in Yorkshire. On 6 February, when Bloom finished giving evidence, Mr Justice Hallett announced that His Majesty the King George VI had died and adjourned the court for 10 minutes. As her biographer explains:

> Thereafter everyone wore court mourning—counsel swapping normal bands for white mourning bands. Overnight the King's Justices became the Queen's Justices and King's Counsel became Queen's Counsel.
>
> Following the conclusion of the case, on 10 February 1952, *The News Chronicle* acknowledged the change in her title, running a two-page spread entitled "Rose Heilbron Q.C. Ends Another Brilliant Case. Judge Talks of her Eloquent Advocacy": see H Heilbron, *Rose Heilbron: Trailblazer and Legal Icon* (2012), Chapter 10.
>
> On 18 February 1952, Time Magazine reported that:
>
> In London's High Court, King's Counselor Harold Shepherd had just finished cross-examining a defendant when the news came. The court adjourned. Ten minutes later, the lawyer resumed the floor as Queen's Counselor.

28 M T W Arnheim, "Silk, Stuff and Nonsense" (1984) 101 S.A.L.J. 376, at 378-379.

29 *Waters v Acting Administrator of Northern Territory* (1993) 46 FCR 462 at 473.

30 *Attorney-General for Dominion of Canada v Attorney-General for Province of Ontario* [1898] AC 247 at 252; *Waters v Acting Administrator of Northern Territory* (1993) 46 FCR 462 at 473.

31 *Demise of the Crown Act 1901* (UK), s 1(1).

32 *Constitution Act 1975* (Vic), s 11(1).

33 Serjeant Pulling, *The Order of the Coif* (1884).

NEWS AND VIEWS

Commemorating William Ah Ket —a life of diversity and service

Andrew Godwin*

William Ah Ket [麦锡祥] was born in Wangaratta in 1876. He studied law at the University of Melbourne before joining the law firm of Maddock & Jamieson (now Maddocks) and commencing the articled clerk's course in 1898. After completing the course in 1899, William won the Supreme Court Judges Prize in 1902 and was admitted to practice in 1903. William was called to the Bar the following year and is widely understood to have become the first Australian lawyer of Chinese descent to practise as a barrister at the independent Bar in the State of Victoria.

The *Australian Dictionary of Biography* notes the following in its entry on William Ah Ket:

> Ah Ket built up a healthy practice at the Victorian Bar, specializing in civil law. He was in the front rank of pleaders and became renowned as a fine cross-examiner—quietly spoken, courteous and shrewd—and as an outstanding jury man. He acquired a considerable reputation as a negotiator of settlements. Ah Ket's colleagues remembered him with warmth and affection as an amiable and gregarious man, greatly respected for his ability and integrity. He was an excellent after-dinner speaker, a prominent Freemason and a keen punter and golfer.

During his career at the Bar, William counted many well-known Australians among his friends, including Sir Robert Menzies, who is said to have modelled his oratory on William's, and Sir Owen Dixon.

A committed advocate for the Chinese community, William was particularly active in the fight against racial discrimination. In addition to lobbying against discriminatory legislation, such as the Immigration Restriction Bill of 1901, William appeared in many cases that would be described today as 'public interest' cases. In the High Court case of *Ingham v Hie Lee*, William represented a Chinese laundry owner who was charged with an offence under the *Factories and Shops Act 1905* in Victoria. The Act expressly discriminated against Chinese workers and prohibited after-hours work in a factory or work-room where furniture was made or where any Chinese person was at any time employed. The reason the Chinese laundry owner had been charged was that a Chinese man had been found in the laundry between 9 and 10pm ironing a shirt, allegedly in breach of the after-hours work prohibition. William's legal team successfully proved that the Chinese man was not an employee of the laundry but instead a boarder and that he had simply been ironing his own shirt!

William appeared in another High Court case: *Potter v Minahan*. In that case, he represented a man who was born in Australia of a Chinese father and a white Australian mother. At that time, people born in Australia were British citizens by right, regardless of their parents' origins. His father had taken him to China when he was about five years old. After living in China for many years, he returned to Australia as an adult but was treated as a prohibited immigrant because he failed the notorious dictation test imposed by the immigration legislation at the time. William's legal team successfully proved that he was not a prohibited immigrant. In its decision, the High Court found that if the immigration legislation had intended to remove the rights of citizenship, it should have expressed its intention clearly. In a well-known passage, Justice O'Connor stated as follows:

> It is … improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness…

Despite the bamboo ceiling that he is likely to have encountered during his life and career, William chose not to focus on his own circumstances but, instead, to work on removing barriers and achieving reconciliation between West and East. William's focus on reconciliation is reflected in the Second Morrison Lecture that he delivered in 1933. In the lecture, William questioned whether there was a real difference between the cultures of the East and the West and drew parallels between Western culture and Confucianism. Noting that music had a peculiar charm for Confucius, he mused that if Confucius had lived at that time, "it is quite likely that he would have found in the music of the bagpipes something particularly stirring and satisfying to the soul".

William would have had an affinity with bagpipes as his wife, Gertrude Bullock, was of Scottish descent. He possessed a deep knowledge of the Western classics and modern languages and was wont to quote Shakespeare and the Scottish poet Robert Burns during his appearances in court!

Clockwise from above: William Ah Ket in Selborne Chambers, Melbourne circa 1933; Ah Ket as a young man; Wangaratta Primary School, which William Ah Ket attended as a child; Visit of His Excellency Hwang How Cheng (Chinese Commissioner) to the Ballarat School of Mines, 13 November 1906, accompanied by William Ah Ket (front row, fourth from the left) as interpreter; Law Cricket Team with William Ah Ket as scorekeeper (standing, far left in dark suit and bowler hat), circa 1904

In addition to a busy career at the Bar, William spent time as a diplomat, serving as acting consul-general for China in 1913–1914 and in 1917. He and Gertrude had two sons and two daughters. His younger son, Stanley, became a solicitor but was killed in 1945 while serving in the Second World War. His elder daughter, Melaan, married the English guitarist, Len Williams. Their son, John Williams, is the world-renowned classical guitarist.

William's life was one of diversity and service. His legacy is one of which the Victorian Bar can rightly be proud.

** Dr Andrew Godwin is an Associate Professor at Melbourne Law School and is researching the life and legacy of William Ah Ket. Andrew can be contacted on a.godwin@unimelb.edu.au. The Victorian Bar will soon unveil a photograph of William Ah Ket.*

The Alfred Deakin bust by Stephen Benwell

CAMPBELL THOMSON AND SIOBHAN RYAN

Alfred Deakin came to the Bar in 1877 at the age of 21. He took chambers in Temple Court but could not get a brief. This gave him plenty of time to write plays, poetry and essays until David Syme, editor of *The Age*, gave him work as a journalist. Syme became his patron. For the next few years, he worked in Syme's newspapers where he excelled, becoming the editor of the weekly *Leader*. Aided by Syme, he was elected to State Parliament in 1879. By 1884, Deakin was Solicitor-General and Minister for Public Works. In 1887, he led the Victorian delegation to the Imperial Conference in London. By 1890, his party was in Opposition.

He lost the family fortune in the 1893 financial collapse and returned to the Bar to make a living. This time, he was more successful. In 1896, he acted pro bono for Frederick Deeming, charged with murdering his wife. Deakin unsuccessfully argued that Deeming was insane. Deeming was duly convicted and hung. According to London police, Deeming may have been Jack the Ripper. Deakin also acted for David Syme in a long running libel case, while a member of State Parliament.

Deakin's main preoccupation during the 1890s was the push for Federation. He attended all the official Federal conferences and conventions and, in that time, contributed to the shaping of the Constitution. In 1900, he represented Victoria in London in the final negotiations. The Deakin entry in the *Australian Dictionary of Biography* describes his contribution:

> London staged the final act of the Federation movement. In January 1900 Joseph Chamberlain invited the colonies to send delegates for the passing of the Constitution bill through the Imperial parliament. Allan McLean, Victorian premier, appointed Deakin, who later in the month sailed for London with his wife, sister and daughters. Barton, Kingston, Sir Philip Fysh of Tasmania and (Sir) James Dickson of Queensland made up the team selected to defend the Constitution to the last comma. In the end differences came down to clause 74, which forbade appeals to the Privy Council in matters affecting the interpretation of the Constitution. At first Chamberlain deleted the whole clause. In this he was fortified by the defection of Dickson, the wavering of some colonial premiers—to whom he had appealed—and the devious conduct of several chief justices, notably Griffith and Sir Samuel Way. Deakin, Barton and Kingston put their case to the British public, at numerous complimentary functions. In the event they compromised: appeals involving constitutional issues required leave of the High Court, otherwise the right of appeal remained unimpaired unless further limited by the parliament of the Commonwealth. The triumphant trio danced 'hand in hand' in jubilation. In July, as he sailed home to a great welcome, an "Act to constitute the Commonwealth of Australia" received the royal assent.

Some say Deakin's speech in favour of the *Judiciary Bill* to establish the High Court in 1903 is our finest piece of parliamentary advocacy.

As the Member for Ballarat, Deakin was Attorney-General in the first Australian parliament before serving three times as Prime Minister in 1903–1904, 1905–1908 and 1909–1910.

Nick-named 'Affable Alfred', he walked, cycled or trammed into work from the family home in Walsh Street, South Yarra, engaging passers-by in conversation about the issues of the day. His skill, during the tripartite party system of Australia's first decade, was bringing people together to form coalitions to pass essential legislation.

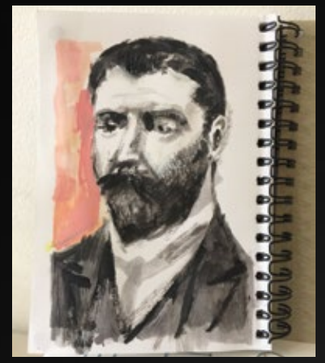
Deakin drafted the *Immigration Restriction Bill* that introduced the White Australia Policy in 1901. It was designed to stop Asian immigration with a near impossible dictation test. All three parties supported it. Only two MPs spoke against it. The debates in Hansard demonstrate that Australians of British origin then felt they occupied an outpost of the Empire that was threatened by the 'yellow peril.'

One-hundred-and-nineteen years later we can and do reconsider this history and Deakin's part in it.

Deakin retired from politics in 1913, suffering from dementia before his death in 1919.

Earlier this year, artist Stephen Benwell was commissioned to create a bust of Deakin. Influenced by 18th century Meissen porcelain and classical Greek statuary, Stephen Benwell's ceramics have been exhibited and sold internationally for many years. His most recent works have been forlorn male nudes that echo the 4th century BC figures by Lysippos and Praxiteles that were once brightly coloured but now sit in museums in white marble or plain bronze.

Commenting on Benwell's 2013 retrospective exhibition at Heide, *The Age* critic Robert Nelson described his work



as 'both delicate and lumpy, graceful and brutal, classical and misshapen'.

Benwell's bust of Deakin will be unveiled in 2021 when Professor Judith Brett, author of Deakin's biography, will discuss his legacy. Its luminous white and blue glazed ceramic will sit in a vitrine in the Peter O'Callaghan Gallery, near the painting of another Victorian barrister and Prime Minister, Robert Menzies.

Some have questioned why, in 2020, the Bar honours a man who played a key role in forming the White Australia policy. The Deakin bust was commissioned by the Art & Collections Committee in accordance with the Peter O'Callaghan QC Gallery Foundation's Acquisitions and Commissioning Protocol. The Protocol realises the Foundation's objective to hold portraits of members of our Bar who have attained certain high offices or have distinguished themselves in the practice of law, or service to the Victorian Bar or the wider community, whilst at the Bar.

Among the prescribed offices are the offices of Prime Minister, Governor-General, Governor, Premier and Commonwealth or State or Attorney General. To this end, the Foundation has commissioned portraits of James Gobbo (Governor of Victoria 1997 to 200) by Brook Andrew and Alex Chernov (Governor of Victoria 2011 to 2015) by David Rosetsky. It is progressing commissions of Linda Dessau (Governor of Victoria since 2015) and Harold Holt (Prime Minister 1966 to 1967). It also holds portraits of Robert Menzies (Prime Minister 1939 to1941 and 1949 to1966) by Ivor Hele, Isaac Isaacs (Governor General 1931 to1936) by Percy White, Zelman Cowen (Governor General 1977 to 1982) by Andrew Sibley, Ninian Stephen (Governor General 1982 to 1989) by Rick Amor, Henry Winneke (Governor of Victoria 1974 to 1982) and Richard McGarvie (Governor of Victoria 1992-1997) both by William Dargie. The commissioning of the Deakin bust by Stephen Benwell is part of this series.

The Acquisitions and Commissioning Protocol can be found at vicbar.com.au/public/about/about-victorian-bar/peter-ocallaghan-qc-gallery/acquisitions-and-commissioning-protocol

Inset: A sketch study for the commission

IMAGES BY DAVID MCARTHUR FOR NIAGARA GALLERIES

Pieter Henket, 'Bird' from the series *Congo Tales*, 2017. © Pieter Henket

NEWS AND VIEWS

Congo Tales
by Pieter Henket
PHOTO2021 AT THE PETER O'CALLAGHAN QC GALLERY

SIOBHAN RYAN

I interviewed the Dutch photographer Pieter Henket at his home in New York City via Zoom, as we do these days. It was Polling Day in the United States of America, and New York City had already begun "boarding up" in anticipation of unrest. The previous evening, Henket had got chatting with some young Latinos. They were equivocal about voting, but he thinks he talked them round. If they made good on their promises, it meant seven or eight more votes for Joe Biden. New York will go to the Democrats. "It always does," says Henket, but every vote counts.

Three years ago, Henket was thousands of miles and a cultural-world away from New York, in the Congo Basin as the guest of the people of Mbomo, a remote district in the Odzala Rainforest. He was part of an international crew commissioned to make a visual record of the stories, myths and legends of the area, which have traditionally been handed down orally.

It is said that when an elder dies, a library burns to the ground. This adage is the impetus for the *Tales of Us* project, whose mission is to preserve the lore of threatened cultures by having the people stage their own stories, in their own environment, and having portrait photographers photograph the event.

In the Congo Basin, the tradition of communicating history and lore through storytelling has been threatened by the impact of modernisation and of lives lost through disease and conflict. The *Tales of Us* team, comprising the founder Eva Vonk, Henket, Kovo N'Sonde (a French-Congalese artist and philosopher), Said Abiter (art director) and Roger Innis (production designer), and a truckload of equipment travelled 17 hours from the capital, Brazzaville, by 4WD, ferry and punt for a photo shoot which had been four years in the making. Contacts were made, stories gathered and translated, the villagers schooled in performance, and costumes and sets designed. *Tales of Us* required that the shoot be of the same high production standard expected of the glossy magazine and celebrity shoots which Henket is used to working on, which meant lugging cameras, lighting and gear to the site and having generators brought in. This was unprecedented for the Mbomo people, most of whom had only experienced photography on rare visits to an old-style photographic studio in town, to pose stiffly in front of hand-painted sets.

The result is uncompromising. Deceptively simple costumes and masks fashioned from the local flora bring the myths to life. The photos are seductive and lush—qualities which match the richness of the tales and the magnificence of the rainforest environment. The cast, drawn from the villagers, inhabit their parts. For all this lushness, however, the tales have a harshness which is true to the lives and the environment of their protagonists. Stories such as the *Murder of the Elders*, a sorry tale about rebellious youth, and *The Little Fish and*

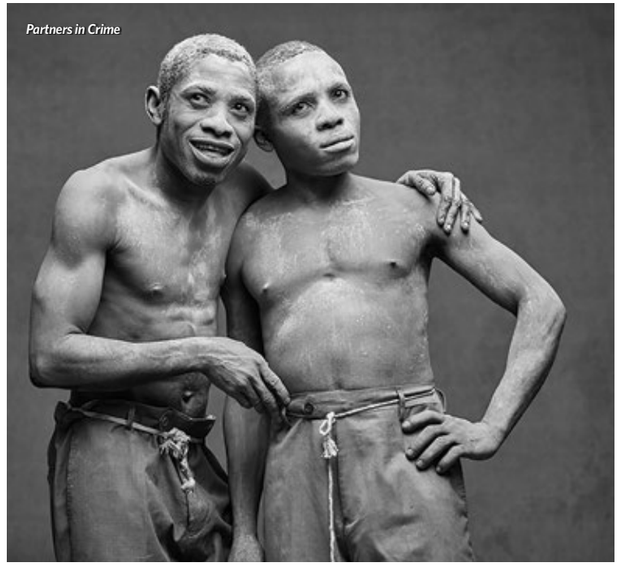
the Crocodile, in which friendship is sacrificed to primitive urges, demonstrate that oral traditions are the foundations of a society's morals and ethics.

Henket and the team travelled back to Brazzaville in 2018 to show *Congo Tales* to the Mbomo villagers and the people of the Republic of Congo. Since then, the suite has been shown at the Barberini Museum in Pottsdam, Germany, the Museum De Fundatie in Zwolle, Netherlands, and the Howard Greenberg Gallery in New York City, United States of America. Six photographs from the series were recently acquired by the Netherlands' Rijksmuseum. Next February, *Congo Tales* comes to the Peter O'Callaghan QC Gallery as part of PHOTO 2021, a biennial International Festival of Photography, for which the Bar will partner with government, educational and cultural institutions, as well as commercial galleries, to present a city-and-state-wide immersion into photography with the theme of *Truth*.

From the *The Story of the Little Fish and the Crocodile* series.

'Father Bosco,' The Murder of the Elders

'Gluttony'



Partners in Crime

From the *The Story of the Little Fish and the Crocodile* series.

Pieter Henket

BAR Lore

SIR ARCHIBALD MICHIE QC:

Victoria's first Queen's Counsel

DANIEL AGHION*

In normal times, the Friends of St Kilda Cemetery Inc (FOSKC) run regular tours of St Kilda Cemetery, including tours of the graves of famous lawyers and judges. The first lockdown meant that there was no chance to run a tour of the graves of lawyers and judges in Law Week. The FOSKC committee put a 'Zoom' proposal to the Victorian Bar, and the rest is history. The speakers were excellent, and there was plenty of good material with which they could (and did) work. The FOSKC is grateful to the Victorian Bar for the Bar's encouragement and support. Over 120 people joined our Zoom tour—and we hope to do it again next year.

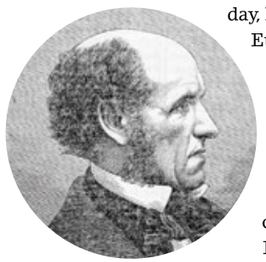
Sir Archibald Michie QC, buried at St Kilda Cemetery, was a thoroughly modern man. He was born in London in 1813, the son of a merchant. He became a barrister in England in 1838 and then in New South Wales in 1840.

Early years

Michie was an early activist against the transportation of convicts. In 1849 in Sydney, he spoke at a rally against the practice. His efforts assisted in ending transportation the following year.

Together with his wife Mary, he returned to England. Soon afterwards, they migrated to Canada, then back to Sydney and finally in 1852 to Melbourne. They arrived only one year after the colony was proclaimed.

The Michies were close to the A'Becketts, a leading legal family of the day. Michie was friends with the first Victorian Chief Justice, Sir William A'Beckett. When Michie arrived in the colony, he served as associate to William's brother, the solicitor Thomas Turner A'Beckett. Michie and Mary's daughter Isabella married Thomas's son Thomas Junior, who became Sir Thomas A'Beckett, a judge of the Supreme Court of Victoria.



Politics

Michie served as a member of the Victorian Parliament from 1852 to 1872 and was at times the Minister for Justice and Attorney-General.

Michie's political views were at the forefront of progressive thinking of the time. He was a staunch supporter of both Victorian and Australian independence from Mother England. He even spoke in favour of a motion that, if Great Britain were to declare war, the Australian colonies should be permitted to remain neutral.

In 1858, on a debate to extend the voting franchise to every male person over the age of 21 years—not just property owners and those with a miner's licence—Michie was the only parliamentarian to argue that the vote should be extended to females as well. He said that "he knew many women who were in every respect much better fitted for the exercise of any franchise than many of the members of the male sex".

But he could also be frustratingly inconsistent. One of the big issues of the day was freedom of trade. Michie voted sometimes with the free traders and other times with the protectionists. When challenged on this inconsistency, Michie said, "Tariffs are not protectionism, provided that the tariff is appropriately low."

Michie's time as a politician was not continuous. In 1863 for example, Michie lost the seat of St Kilda. Gavan Duffy, later Premier of Victoria, said that it was because Michie neglected his electorate.

Law

If Michie neglected his constituents, he certainly did not neglect his clients. He was a highly successful barrister and at his peak earned £8,000 a year, an enormous sum of money at the time.

In 1855, together with other leading barristers of the day, he volunteered without fee to defend the 13 Eureka rebels who had been charged with high treason. One of Michie's two clients, John Manning, was a reporter at the *Ballarat Times*. He reported on the government attacks on the miners' stockade and is described as Australia's first war correspondent. They were both acquitted, along with almost all of their co-accused.

It appears that Michie did not have much work to do in the Eureka trial. A contemporary report recorded that the first acquittal came early. It was cheered in the court and in the streets, and it was obvious what verdict the jury would deliver for the rest of the accused. The defence barristers apparently wandered off into other courts to attend to more profitable business. They had to be called back to the Eureka trial to criticise evidence that they cheerfully admitted they had not even been in court to hear! They knew they could rely on the jury to acquit the remaining accused—and the jury did.

This is not to downplay Michie's skill. He was a brilliant barrister. In his obituary in *The Argus* of Friday 23 June 1899, he was described as having "a quick eye for the weak points in an opponent's case", a humorous style, and "a clever knack of raiding a laugh at the expense of a witness whom he wished to disconcert". It is hardly surprising that, in 1863, he became Victoria's first QC.

But, if Michie had a fault, it was that he could be too severe in his cross-examination. In one insurance case, the plaintiff was a handsome young woman and widow of a young naval officer who had been well known in the colony. A modern barrister would describe a witness like that as uncross-examinable. A fire occurred in her house, and Michie's client—the insurer—refused to pay. So she sued.

Michie cross-examined the plaintiff so heavily that she burst into tears in the witness box. It was no surprise when the jury delivered a verdict for the woman, against the insurer.

In 1873, Michie bought a building at 73 Chancery Lane and established it as chambers for a number of barristers. It was named 'Michie's Building'—modesty was obviously not one of Michie's traits. Chancery Lane still exists, between Collins and Little Collins Streets, and Queen and William Streets—behind the RACV Club. Chancery Lane around that time was home to a warren of lawyers, but also Graham's slaughterhouse and the Victorian Cream and Butter Company. The butter company in particular used to pour tons of buttermilk waste into the surrounding laneways daily. The butter company's excuse was that if they kept the water running it would wash away, and buttermilk only smells if you let it lie around in stagnant pools! But that was the Melbourne of Michie's time.

A person of arts and letters

Michie was a lecturer, an author, a patron of the arts and a man of modern cultural tastes. One of Michie's particular interests was phrenology—the examination of the skull to determine human behaviour, especially to diagnose criminal tendencies. Although long since discredited, the study of phrenology was at the time considered a thoroughly modern from of scientific analysis, in that it treated certain parts of the brain as controlling specified personality traits. It was a precursor to psychiatry and psychology and formed part of a reformist movement to demystify and explain criminal behaviour. So, the reasoning went, if a person's head (and therefore their brain) contained certain physical features, then: (a) their criminal behaviour was not a matter of personal choice, but an accident of birth; and (b) the person was capable of reform by retraining to behave in a socially acceptable manner.

Michie was inspired by John Stuart Mill—the leading English philosopher of the time—and was friends with Charles Dickens—the great author. In Australia, he was an early supporter of the great Australian naturalist painter Eugene von Guerard. In 1866, Michie purchased and gifted a painting to the National Gallery of Victoria "Spring in the Valley of the Mitta Mitta with the Bogong Ranges". This was the first of von Guerard's paintings to enter a public collection and it was the modern art of its day.

Michie was even part-owner of a newspaper, the *Melbourne Morning Herald and General Daily Advertiser*. Michie may have been a brilliant speaker, but he was a terrible business manager: he sold out within two years at a huge loss. Nonetheless, the paper survives to this day—albeit in significantly modified form—as the Melbourne daily *Herald Sun*.

Later years

From 1873 to 1879, Michie served in London as agent-general for Victoria and was knighted for his service. He then returned to Melbourne and practised as a barrister, but it is said—with "no flashes of the old fire".

In his retirement, he wrote for the newspapers including the *London Times* under the byline "Letter from Melbourne".

Michie died on 21 June, 1899 at St Kilda, aged 87. He had lived in Alma Road, at the intersection with Hotham Street and just across the road from St Kilda Cemetery, where he was buried. The house is still standing. On Michie's death, he did not have far to travel to be interred.

Joan Rosanove QC

Sir Archibald Michie was Victoria's first QC and, obviously, Victoria's first male QC. We had to wait until 1965, more than 100 years later, to see the appointment of Victoria's first female QC, Joan Rosanove.

There is insufficient space in this article to consider the life of this formidable barrister, who at her peak was said to handle one-in-eight of all divorce cases in Victoria. It would be a remarkable coincidence if St Kilda Cemetery were the resting place of Victoria's first female QC as well. But it is not to be. Rosanove died at Frankston in 1974 and was cremated.

But there is a connection to St Kilda, nonetheless. Rosanove's grandfather, David Braham, is buried at St Kilda Cemetery. He was a lawyer too; his time in Melbourne coincided almost exactly with Michie's. I have no doubt they knew each other and crossed professional paths regularly. Braham is interred in the Jewish section in the south-western corner of St Kilda Cemetery, just across the road from Michie's old house in Alma Road.

In that indirect way, St Kilda Cemetery has a connection to Victoria's first male QC and to its first female QC as well.

** This article was first presented as a speech in "A Legal Zoom into St Kilda Cemetery", a presentation on 22 May 2020. The presentation was hosted by Rob Heath QC of Friends of St Kilda Cemetery, and was given alongside speeches by three other Victorian barristers. It has been slightly modified for publication in Victorian Bar News.*

BAR LORE

THE HISTORY OF THE VICTORIAN BAR

CHARACTERS & VIGNETTES

SIOBHAN RYAN

History waits for no-one and nor does its telling. In *VBN 166*, we published a preview of Dr Peter Yule's manuscript (working title, *History of the Victorian Bar*), which recalled the treason trials of the Eureka Stockade. We continue this series of extracts with an overview of the *History*, focusing on characters and vignettes. All portraits (except Redmond Barry's) are from the Victorian Bar's collection in the Peter O'Callaghan QC Gallery.

CHAPTER 1 THE PORT PHILLIP BAR, 1838–1851

Douglas Menzies, age 33, by Archibald Colquhoun

THE ORIGINS OF THE VICTORIAN BAR

Dr Yule's work is a complete history, from the Colonial Bar (1835–1880) to the Modern Bar (1980–2020). It commences with the first sitting of the Supreme Court on 12 April 1841 in an unassuming building on the south-west corner of Bourke and King Streets. The 'Supreme Court' is the Supreme Court of New South Wales for the District of Port Philip:

> A large number of Melbourne's inhabitants attended to witness the historic occasion. Since soon after the foundation of the town in 1835, the settler-colonists had called for a permanent legal body to administer justice. Finally, the day for the establishment of the Supreme Court of New South Wales for the District of Port Philip had come. In the converted court house, the Act for the prevention of 'vice and immorality' was read, the authority of the Court was proclaimed, and the Irish Judge Walpole Willis was ceremoniously sworn in.

The crown prosecutor, James Croke, and four barristers, including a young Redmond Barry, were admitted on that day. As Yule notes:

> After the oaths of allegiance were completed, the Port Phillip Bar, the forebear to the modern Victorian Bar, was created.

REDMOND BARRY

The son of a veteran of the Napoleonic Wars and one of 13 children, Redmond Barry was born in County Cork, Ireland, in 1813 and graduated from Trinity College, Dublin, before gaining his legal qualifications at Lincoln's Inn, London in 1839. He sailed for Australia the same year, with his fellow passengers on the *Calcutta*, including James Croke, the soon to be crown prosecutor. Barry was accepted at the New South Wales Bar but chose instead to look to Melbourne for his future prospects. Those prospects famously included presiding over the trial of the bushranger Ned Kelly, 40 years on, and dying within days of Kelly's execution.

In an earlier, less celebrated role, Redmond Barry was appointed Standing Counsel for Aborigines.

> He was a strong advocate for Aborigines who were charged under alien English law and tried before a jury made up of colonists in the Supreme Court. In *R v Bonjon*, a trial where Bonjon, an Indigenous man was accused of murdering another Indigenous man, Barry contended, "That there is nothing in the establishment of British sovereignty in this country which authorizes our submitting the aboriginal natives to punishment for acts of aggression committed 'inter se'". Barry, and for that matter Justice Willis, questioned the jurisdiction of the court over Aboriginal people. Citing Blackstone, Barry argued that British dominion was not acquired through conquest but by "occupancy alone", which did not confer British sovereign power over the original inhabitants, "unless there be some treaty or compact". Despite Barry's plea, the unusual trial proceeded without resolving the question of jurisdiction, until the prosecution abandoned the case. Bonjon was released, but within a few years he was killed in revenge.

It is not well-known that aboriginal sovereignty was argued by Redmond Barry well over a century before modern land rights cases dismantled the terra nullius doctrine.

CHAPTER 4
THE HOME GROWN BAR
THE COUNTY COURT ON CIRCUIT IN 1859

Contemporary court reports, which were faithfully reported in the newspapers as much for entertainment as for information, provide vivid insight into Victorian life. For example, the case load of the County Court on circuit at the goldfields town of Carisbrook in 1859 included:

- John Jones, charged with highway robbery: sentenced to nine years' hard labour;
- Charles Phillips, alias Earle, indicted for embezzling £1: acquitted;
- A man charged with obtaining goods under false pretences, the goods in question being a cup belonging to the Tallaroop Racing Club: acquitted;
- Three siblings charged with stealing drapery from a shop at Back Creek: two acquitted, with the third convicted and sentenced to 28 months' hard labour;
- Two Chinese, Ah Ching and Ah Sing, pleaded guilty to an assault: fined and released—the *Maryborough and Dunolly Advertiser* reported:

"[A barrister], Mr M'Donogh called his Honour's attention to the heavy chain to which the prisoners were manacled" *stating that* "It was contrary to the spirit of British law, which presumed every man innocent until proved to be guilty."

CHAPTER 9 LIFE AT THE BAR 1891–1914

THE FORTUNATE AND THE FAILURES

The *History of the Bar* well illustrates how history repeats itself. Chapter 9, "Life at the Bar 1891–1914", commences:

> There is nothing better for business at the Bar than a runaway economic boom, followed by a dramatic economic crash. The 1880s boom and the bust of the early 1890s were good times for the Bar. Work was plentiful and the number of barristers in active practice grew from perhaps 50 in the 1870s to about 80 in 1890.

And, of course, the good times did not last:

> The Victorian economy hit rock bottom in 1893 and recovery was painfully slow. For the entire period 1893–1939 the economy was weak, unemployment high, and growth minimal. Brief periods of expansion before and after the First World War were offset by the catastrophes of the war and the depression of the 1930s so that real income per head was only slightly higher in 1939 than it had been in 1890. The economic malaise was reflected at the Bar.

This chapter recounts the fortunes and misfortunes of barristers who made it and those who did not. Their concerns described in letters and diaries are touching and familiar:

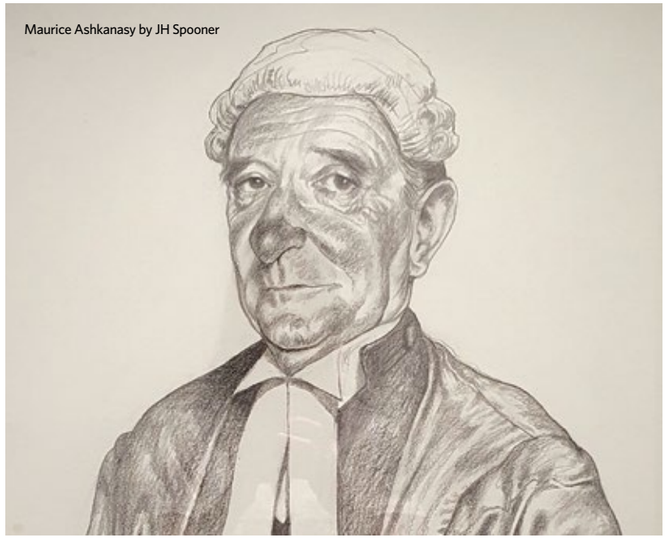
> Patrick Glynn, an Irish barrister, was admitted in Melbourne in 1880, but found that "attendance at the courts ... and speeches for political societies brought him not a single brief". He wrote to his brother that, "Trying to get business here as a stranger is like attacking the devil with an icicle."


Charles Lowe by Judy Cassab c 1965

A remarkable number of the Victorian Bar's most famous names came to the Bar between 1880 and 1914, most notably Leo Cussen, Charles Lowe, Hayden Starke, Frederick Mann, Henry Winneke (Snr), John Latham and Owen Dixon. None of these barristers came from privileged backgrounds:

> **Leo Cussen** was the son of an Irish Catholic shopkeeper in the tiny Western District town of Merino. Cussen won a scholarship to Hamilton College and then graduated in engineering from the University of Melbourne, working for the Victorian Railways for several years before studying law. **Charles Lowe's** father was a teacher, who lost his sight but was still able to support his wife and 10 children by running a store in Panmure, another small Western District village. Lowe walked five miles each way to attend a school where he could complete sixth grade. He then won a scholarship to Surrey College, a long-defunct Melbourne private school, but was forced to leave the school after three years to help support his family. Like Cussen, he worked as a teacher while he completed matriculation and the university law course. **Hayden Starke's** father was a doctor on the goldfields, who died when Starke was six, forcing his mother to work as a postmistress to support her family.... **Frederick Mann** was born in Mount Gambier, where his father was a telegraphist, and was educated at the local state school until his family moved to Melbourne. Mann worked as a tally clerk and later a clerk in the Crown Law Department while completing his schooling and studying at Melbourne University. **Henry Winneke's** father was a gold miner on the declining gold field of Talbot and young Henry was educated at the local state school before winning a scholarship to Dookie Agricultural College at the age of 13. Uninterested in a farming career, he then won a scholarship to Scotch College where he shone both as a scholar and sportsman, being dux in 1892 and 1893. Further scholarships paid his way through university.
>
> Two future chief justices of the High Court, **John Latham** and **Owen Dixon**, both came from humble backgrounds. Latham's father was a tinsmith, who founded the Victorian Society for the Protection of Animals and became its salaried secretary. John Latham won a scholarship to Scotch College and then completed a BA at the University of Melbourne, spending several years teaching at the Hamilton Academy before returning to university to study law. Like other less privileged law students, he supported himself by tutoring. Although **Owen Dixon's** father was a barrister, his practice was never large and he struggled with depression, alcoholism and increasing deafness before leaving the Bar in 1895 to become a partner in his brother's firm of solicitors. Owen Dixon was educated at Hawthorn Grammar School, where he developed a life-long love of the classics, but paternal pressure and the need to earn a living pushed him towards the law. His dream of studying classics at Oxford was supplanted by the reality of articles with Crisp & Cameron in Collins Street.


Owen Dixon by Archibald Colquhoun c 1961


Maurice Ashkanasy by JH Spooner

CHAPTER 10 THE BAR AND THE FIRST WORLD WAR
AND CHAPTER 13 THE BAR AND THE SECOND WORLD WAR
THE BAR AT WAR

Dedicated chapters describe Victorian barristers' wartime experiences. The First World War recount is predictably poignant. At least 20 barristers (about one quarter of those in active practice at the time) joined the armed forces. Five lost their lives.

Dr Yule quotes from Eugene Gorman's previously unpublished autobiography and reveals an interesting decision on court etiquette:

> Eugene Gorman, who had signed the Bar Roll in March 1914, enlisted in 1915, "not from any heroic considerations but because I felt it was impossible for me to continue in practice while so many men were giving up greater prospects." He recalled that when he was in camp with the 22nd Battalion at Broadmeadows, he received a brief to appear as junior to Herbert Bryant in a Supreme Court case. The army gave him leave to appear, but he was uncertain whether he should appear in uniform or in wig and gown. Bryant asked the Chief Justice, Sir John Madden, who "spoke of King and Country and went on to emphasise that the costume in which a young hero was prepared to die ... was obviously fit to be worn in court." So Gorman appeared in the uniform of a private soldier, "creating an unusual precedent and, more important, receiving the fee which I sorely needed".

After officer training, Gorman went to France with the 22nd Battalion, being awarded the Military Cross after the Battle of Bullecourt in 1917. He was offered the chance to leave the front line for a desk job but rejected it.

During the Second World War, barristers were not classified as essential workers and were liable to be conscripted. Forty saw active service and others held significant administrative roles in Australia and abroad.

Henry Winneke (Jnr) was recruited to the RAAF the day after the war began and rose to be Director of Personal Services with the rank of group captain. In this role he went to England in 1943 where he negotiated an agreement with the British Government on the conditions of service for the thousands of Australians serving in Bomber Command. Sadly, two of the three Victorian barristers who were killed in in the Second World War had read with Winneke: **James Mann** (in 1938) and **Harry Lawson** (in 1938):

> The son of the Chief Justice, Sir Frederick Mann, and Victoria's Rhodes Scholar in 1935, **James Mann** had a brilliant scholastic career before going to the Bar. He enlisted early in the war and was a lieutenant in the artillery when he was drowned during the evacuation from Crete in May 1941 after giving up his place on a life raft to another man.
>
> **Harry Lawson**, the son of a former premier, enlisted in the RAAF soon after he was married in June 1940. After pilot training in Australia and Canada, he had just joined 42 Squadron RAF when he was killed in a flying accident in November 1941.

The third barrister casualty was **Philip Jacobs**. A sergeant in the 2/21st Battalion of the 8th division, he was taken prisoner by the Japanese at Ambon in January 1942 and died in captivity on 27 July 1945.
The survival stories are both inspiring and horrifying:

> **Maurice Ashkanasy** was 38 and about to take silk when he volunteered for the AIF in July 1940. Made a lieutenant on the basis of his experience in the CMF, he was quickly promoted to captain and then major during 1941. He was attached to the headquarters of the 23rd Infantry Brigade in the 8th division, and embarked for Malaya in February 1941 where he was soon appointed deputy assistant adjutant-general to General Gordon Bennett, the commanding officer of the division. Following the fall of Singapore, he escaped with a few others in a small boat, with his war service record reporting that he was '*MISSING believed sailed from MALAYA*'. It was not until early March that he arrived in Perth after an adventurous journey through the Dutch East Indies, which were also under heavy attack by the Japanese. As assistant adjutant-general with the rank of lieutenant-colonel, Ashkanasy served successively with III, I and II Corps, and New Guinea Force until he ceased active duty in September 1944. It was not until 7 September 1944 that he was able to announce his appointment as KC in the State Full Court.

John Starke, the son of Hayden Starke of the High Court, signed the Bar Roll in 1939 and enlisted in the AIF the same year:

> Always an independent iconoclast (like his father), the first entry on his service record shows that in January 1940 he was admonished for "disobeying a lawful command given by his superior officer" and the second entry records a 15 shilling fine for being absent without leave. Nonetheless, he was soon promoted to bombardier and in August 1940 to lieutenant. From May 1941 his unit was on active service in the Middle East, where, in addition to his military duties, he represented many soldiers in courts martial, including two who were facing murder charges. His unit returned to Australia early in 1942 when Australia was threatened with invasion and was sent to the Northern Territory for several months before beginning jungle training. In 1944 Starke trained as a naval bombardment observer and was then sent to New Guinea, where he served on a succession of Australian and American war ships during 17 operations in the last year of the war, recalling that "It was a bit scary once the Kamikaze boys started in". He was discharged in February 1946 with the rank of temporary major. After his appointment to the Supreme Court in 1964, Starke wrote to the Department of Defence asking for a new set of medals as he needed them as part of the ceremonial regalia of a judge. He had never worn his original medals and was unable to find them.

During the First World War and for part of the Second, a scheme was put in place by the Bar Committee to preserve the practices and provide some income for barristers on war service:

> Solicitors were asked "to continue to place the name of the Counsel so absent on briefs and papers, together with the name of another Counsel (who is desired to do the necessary work) and deliver such briefs and papers to the clerk of the Counsel so absent … Counsel to whom any such brief is delivered will hold the same on behalf of such absent Counsel, and will so announce on appearance in Court, and will on payment of the fee marked on such brief, forthwith pay a sum equal to one third thereof to the clerk of the Counsel so absent."

Leo Cussen by John Longstaff c late 1920s

CHAPTER 14: THE GOOD TIMES 1945–1980

POST WAR PROSPERITY

Unexpectedly, for reasons which are explained in the *History*, the period of post-war prosperity extended to the 1970s. This happy circumstance is summed up in a quote from James Gobbo AC QC:

> The post-war decades were a wonderful time to go to the Bar. When James Gobbo returned from Oxford to go to the Bar in 1957, he recalls that a "confident young barrister said to me, 'You can make a living just by staying on your feet. If you can talk at the same time, you'll make a bloody fortune'."

Alex Chernov by David Rosetsky c 2018

CHAPTER 15 A CHAT BETWEEN THREE OR FOUR OLD BOYS OF THE PUBLIC SCHOOLS AND CHAPTER 18: THE WINDS OF CHANGE

The composition of the Bar is examined over two chapters. The dominance for much of the Bar's history of white Anglo-Saxon Protestants educated at the leading private schools is undeniable, but there were significant exceptions such as Cussen, Lowe, Starke, Mann, and Gorman.

Australia's first Australian-Chinese barrister, **William Ah Ket**, was born in Wangaratta, one of eight children of Chinese immigrants of the Goldrush era. A Supreme Court Prize winner, he signed the Bar Roll in 1904 and practised successfully for over 30 years but never attained silk or a judicial appointment. It was not until the 1970s that the next barrister of Asian origin came to the Bar. [Eds: see page 68 for more on William Ah Ket's fascinating story.]

IMMIGRANTS AND REFUGEES

There has always been a significant Jewish presence at the Victorian Bar, with Isaac Isaacs, Maurice Ashkanasy and Bill Coppel being in the front ranks of any listing of the Bar's greatest names. After the Second World War there was a steady stream of new Jewish barristers coming to the Bar, beginning with Charles Jacobs, who signed the Bar Roll early in 1946. He was followed by Sam Cohen, Bill Kaye, Leo Lazarus, Phil Opas, Ken Marks, Abe Monester, Jack Lazarus and, from a later generation, Jeff Sher, Alan Goldberg, Ron Castan, Ron Merkel and many more. Most came from well-off families and had been educated at the leading Protestant private schools. However, beginning with George Hampel in 1958 a very different cohort of Jewish barristers came to the Bar, who were born in Europe and came to Australia as refugees from the Holocaust. Most were educated in state primary and high schools.

Michael Rozenes, Henry Jolson, Ray Finkelstein and **Mary Bacynscki** were also among the refugee cohort.
Alex Chernov, was born in Lithuania of Russian parents. He arrived in Australia in the late 1940s speaking no English, as did **Remy van de Weil**, whose family came from Belgium. **John Kakar**, whose family were from Palestine (first language Arabic, second language French), came to Australia in 1964, working in factories while he learnt English and completed his schooling.

Peter O'Callaghan by Rick Amor

IRISH CATHOLICS

Brian Bourke, Peter O'Callaghan, Gerry Nash and **Frank Vincent** were sons of working-class Irish Catholics, which put them in another 'outsider' cohort:

> Frank Vincent was born in Port Melbourne in 1937 in a poor Irish Catholic working-class family. His father was "for practical purposes, unemployed. He was picking up odd jobs around the place". When Frank was two, the family moved to Burnie in Tasmania where his father joined the Waterside Workers' Federation and got work on the wharves. After two years he transferred back to Melbourne and the family lived in Port Melbourne where Frank went to the local Catholic parish school. His parents were "absolutely convinced that the way out was through education and they had the illusion that I was a very smart young boy." When he was in about 4th grade, "my Mother won some money at the trots and with that money booked me into the Christian Brothers over in Middle Park."

WOMEN

Only three women signed the Bar Roll before 1945—Joan Rosanove, Beatrix McKay and Margery King—but the obstacles were too great for any of them to build a practice. After developing a successful solicitor's practice, Rosanove returned to the Bar in 1949, and in 1965 became the first Victorian woman barrister to take silk. By 1970, seven more women had signed the Bar Roll: **Norma O'Connor** in 1954; **Gladys Hain** in 1954 (at the age of 67, having attained her law degree only after her barrister husband's death); **Allayne Kiddle** in 1959; **Mary 'Molly' Kingston** in 1962; **Anne Curtis** in 1963; **Lyn Opas** in 1967 and **Paulette Parkinson** in 1968. Each of their stories is told in the *History*, including this anecdote about Allayne Kiddle:

> She certainly appeared on several occasions as junior to Phil Opas, and their work together led to a strange postscript to her time at the Victorian Bar. In 1966 Allayne asked to be placed on the non-practising list and she and her husband returned to London where she began studying for an LLM at the LSE. Her studies were interrupted when Opas asked her to appear as his junior in the application for leave to appeal to the Privy Council in the attempt to save Ronald Ryan.

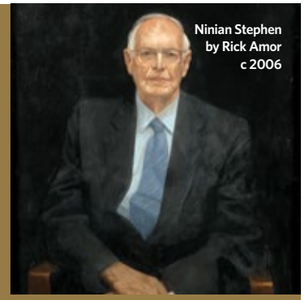
The 1970s saw an exponential rise in numbers of female barristers. Forty-five signed the Bar Roll between 1970 and 1979, including **Rowena Armstrong, Jan Wade, Linda Dessau, Margaret "Peg" Luscink, Ada Moshinsky, Mary Bacynscki, Betty King** and **Lillian Lieder.**

Betty King by Raelene Sharp

Dr Yule continues to write in lockdown and his finished work will take the History of the Bar *up to the very interesting and trying times of the present.*

CHAPTER 18: RADICALS AT THE BAR

BARRISTERS AS AGITATORS



Ninian Stephen by Rick Amor c 2006

Radicals at the Bar commences with the stories of communist barristers Ted Hill, Ted Laurie, Jack Lazarus, and Ken Marks:

> The 108 pages of Ken Marks' ASIO file was trivial in comparison with the 14 volumes covering the years 1948–81 during which ASIO trailed Jack Lazarus.

Yule's focus then turns to the Bar's advocacy against the death penalty. The commitment and sacrifice of the defence barristers was always personal and sometimes financial. In the aftermath of Ronald Ryan's execution in 1967, Phil Opas was charged by the Bar Council of unprofessional conduct because he had made a public appeal for a solicitor to instruct him in the appeal to the Privy Council. The call out to solicitors was said by the Ethics Committee to be touting. Opas is quoted:

> I took that very personally. I was depressed. I thought, if my colleagues think so poorly of me, as to charge me in these circumstances, I'm prepared to leave the Bar. I'm not going to defend myself. A number of my friends waited on me and said, "You've got to defend it. Let us appear." I finally said, "alright, so long as I take no part. I'm not going to give evidence, I'm not going to give an explanation, I'm not going to say a thing."
>
> Richard McGarvie appeared for me, with Ivor Greenwood as his junior ...
>
> Prosecuting me was Sir Ninian Stephen as the junior QC. He was a friend of mine, and it was the role of the junior silk to prosecute a case like this. I attended and the hearing took place in the Essoign Club ... I don't know what happened–I was present in body, not in mind. The last thing I remember was Lou Voumard as Chairman acquitting me, and saying that the Bar needed more Phil Opases, not one fewer. However, I felt rejected, depressed, isolated, and I decided to leave the Bar at the first opportunity.

A similar despair led to Frank Vincent temporarily leaving the Bar and exercising his considerable experience and talent defending for Aboriginal Legal Aid:

> At one time, devastated after losing a murder trial in Melbourne, he temporarily "left the Bar and I went to work at Victorian Aboriginal Legal Aid and then I left Victoria and I went to Alice. I stayed there for some months, just working with Geoff [Eames] and Central Australian Aboriginal Legal Aid and then decided really, I couldn't hide and I came back, and resumed at the Bar."

The immense achievements of Victorian barristers in legal aid and pro bono work makes fascinating reading for the horror, the humour and sheer diversity of human experience.

Poetry Corner

A Perry Christmas carol

MAX PERRY

Jail the widow, smite the orphan
do it with forensic zeal
if their cries are really heartfelt
there is always an appeal
Drive them weeping from the building
spurn their pleas for help or care
remember: if they don't have money
there is nothing left to share
ignore reports whenever written
by the well-intentioned throng
they themselves have not been bitten
by the crims who do us wrong
ignore the cries of weeping parents
or the pleas de factos raise
they have spent the wee small hours
seeking things that they can praise
assess instead the client's demeanour
as he stands inside the dock
guarded by two sturdy warders
and the chains which they can lock
impose instead mosaic sentence—
Scripture gives you great support
and if you hang them fast enough
their appeal will come to nought
Think always of the basic precept
that imbues our current law
"if you hit them hard enough
the bastards won't come back for more"
battery is best inflicted
with profound and hearty zest
after all, the average client
is nothing but a selfish pest
and for those this prose offends
and who seem likely to react
commit to memory if you're able
sections 5 to 8 of the Sentencing Act

Max Perry was called to the Bar in 1976, mere months after his date of admission. He is the author of Advocacy - a survival guide. The Age *has described Perry as "a criminal barrister, and no mean wit". Reflecting on Rumpole of the Bailey after the death of Leo McKern in 2002, Perry said, "Rumpole provided exquisite laughs and a rueful reflection upon life at the Bar." Such terms could be applied to the poetry of Max Perry himself.*

Back of the lift

Silence All Stand

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.*

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High Court of Australia

The Hon Justice Simon Harry Peter Steward

Bar Roll No 3324

Justice Steward has been an outstanding practitioner of the law over the entirety of his career. He graduated from the University of Melbourne with a Bachelor of Laws with First Class Honours. As a solicitor at then Mallesons Stephen Jaques, he came to specialise in revenue law, and became known for his sharp intellect, earning him the epithet "Your Honour". After being called to the Victorian Bar in 1999, he quickly established himself as a preeminent junior, appearing regularly in the Federal Court and High Court with the likes of David Bloom, the late Brian Shaw, Michelle Gordon, Tony Pagone and Alan Archibald in landmark tax cases such as *Linter Textiles*, *Stone*, *Citylink*, *McNeil*, *Bluebottle* and *Carpenter*. His Honour took silk at a mere 10 years' calling and soon became the counsel of choice for both the Commissioner of Taxation and private clients. He proved a formidable advocate, even persuading the Full Federal Court in *Channel Pastoral* to overturn one of its own decisions handed down only two years earlier.

His success as an advocate was a reflection of his dedication, thorough preparation and natural flair. The precision of his submissions was the product of a quest for legal principle, of hours spent reading and thinking, and debating with his juniors. His natural flair for advocacy enabled him to establish a rapport with those before whom he appeared, sometimes manifesting itself in gentle humour, even before the High Court. Whilst appearing in one special leave application, he responded to Justice Hayne that he "should have brought his fire retardant robes."

As a justice of the Federal Court, he has come to be known for his preparation, courtesy, efficiency and the clarity of his reasons.

Outside of the law, his Honour's passions are for art, music and history, particularly military history. Having studied fine arts at university (through which he met his wife), he is an avid collector of antiques and art and has been known to turn his own hand to painting. He is a ferocious reader, particularly of biographies. To his Honour, history is more than a chronology of events but is the story of the lives and characters of individuals.

His Honour's intellect is matched by his generosity of spirit. He has always taken most seriously his role as mentor to those more junior than he. As president of the Tax Bar Association, he worked tirelessly to promote the interests of junior barristers. He has never closed his door to those who have sought his guidance and has freely given his time to the University of Melbourne where he has lectured in the Master's program for over a decade, continuing even after his judicial appointment.

His Honour's work ethic, intellect, and commitment to duty will no doubt see him make an outstanding contribution as a justice of Australia's highest court.

LISA HESPE

Supreme Court of Victoria

The Hon Justice Jim Delany

Bar Roll No 1968

Justice Delany was appointed to the Supreme Court on 2 June 2020. Before his appointment, his Honour developed a diverse and highly successful practice with a special interest in land valuation, class actions, royal commissions, commercial litigation, contract and negligence. His Honour is known for his excellent judgement, legal reasoning and tactical skills, leadership, unflappable calm, and delighting in a good cross-examination (his children being familiar with this last skill in particular).

Those who worked with his Honour speak of his sincere and contagious enjoyment of the law and litigation generally, as well as his kindness and determination to bring out the best in his team. His extraordinary dedication to his clients, fuelled by coffees from Brunettis and Speck, is well known. He has been a champion of many juniors and women barristers in particular and delights in the achievements of those he has informally and formally mentored. His Honour also has quietly advocated for various social and environmental causes throughout his career, and his appointment no doubt will be feted by Victoria's population of greater glider and Leadbeater's possums amongst other wildlife.

It is also well known that his Honour moonlights as a cow farmer and anyone who has worked with him has been subjected to a barrage of images of his favourite bovine subjects. Whilst to the casual observer one image of a cow might seem much the same as the next, his Honour is adept at noticing minute differences (and pointing them out at length to the listener, if permitted). His Honour is also rabidly passionate about the Richmond Football Club, and the two Christmas gifts that he has been most excited about to date were a DVD of Richmond's 2017 Grand Final success and a dubious perfume released by the Richmond Football Club. The DVD was viewed, immediately, on Christmas afternoon (this ritual was repeated multiple times during the days thereafter). The cows watched on with curiosity. These two passions are only surpassed by his Honour's love of and dedication to his wife Clare and family.

The court has gained not only a talented advocate, but a mentor and champion of many in the Victorian legal community. We are certain that his Honour will enjoy a fulfilling and rewarding career on the Bench.

DOMINIC, ELLA AND MARCEL DELANY

The Hon Justice Katie Stynes

Bar Roll No 3799

On 22 June 2020, Justice Kathryn (Katie) Stynes joined the Trial Division of the Supreme Court.

Her Honour's appointment has been widely welcomed by her colleagues at the Bar and in private practice. After 14 years at Minter Ellison (including four in the construction team), her Honour was called to the Bar in 2005 and quickly carved out a practice as one of Australia's pre-eminent construction juniors. She read with Matt Connock (as his Honour then was) and joined level four of Joan Rosanove Chambers, now level 21 of Owen Dixon Chamber West. Justice Connock has continued to act as a mentor, now assisting her Honour to settle into life on the bench.

Justice Stynes reminisces fondly on her work at the Bar, where she valued the straightforward, hardworking nature of those in the construction industry and practice area alike. "I loved the subject matter," her Honour says, "and dealing with experts and the industry people involved. They are people of the highest calibre in their field, with a genuine interest in improving the service they provide." Of course, the same could be said of her Honour.

Justice Stynes' appointment is also an historical one: as best the authors can discern, no member of our Bar has ever been appointed to the court without first taking silk. This is entirely fitting, however, as her Honour is well known for being a trend-setter. Justin Graham SC recalls her being an early adopter of IT in litigation, and the first to consult on any question concerning electronic briefs. A visitor to her Honour's chambers will be welcomed not by rows of books, but a large screen and an iPad from which she conducts all of her matters, regardless of complexity or volume. Her Honour was also ahead of the curve on matters of well-being, coaxing her chambers colleagues to boot camps in Flagstaff Gardens and thrice-weekly pilates. It takes a rare strength of character (and biceps) to not only make Philip Crutchfield QC do burpees in public, but to also be the reigning 'push up challenge' champion.

Her Honour's great loves in life are her 'boys' (husband Damon, and sons Max and Hugo) and the time they spend together on their farm, surrounded by the resident animals, and the hobbies that keep them all busy. We hope that these continue to provide a valuable source of distraction from the busyness of life on the bench and wish her Honour all the very best.

FIONA CAMERON AND ANGELO GERMANO

County Court of Victoria

Her Honour Judge Fiona Todd

Bar Roll No 4442

Judge Todd was appointed to the County Court on 13 July 2020.

Her Honour was admitted to practice in 2007 and gained employment with Robert Stary, where she forged friendships with many of the capable lawyers there.

In 2011 her Honour came to the Bar where she read with Michael Croucher, now Justice Croucher. Little did she know during her readership that in a few short years she would be addressing his Honour on the ability to detect the direction of the flight of birds from a painting in the Brett Whitely alleged forgery trial and explaining to his Honour the derivation of "posh" in the "Tinnie Terrorist" case. The lengthy pre-trial argument in the "Tinnie Terrorist" case prompted a few of the barristers involved to take judicial appointments to escape. Her Honour held firm and saw the case through to its resolution but inexplicably failed to attend the celebratory meal to mark its end.

With her own appointment, she can finally complete her apprenticeship by replicating his Honour's skill of including musical references in the footnotes of judgments where necessary.

In only her second year at the Bar, her Honour set up David Ross Chambers ("DRC") with a group of other young barristers. Her Honour infused chambers with her buccaneering spirit, and the members of chambers grew to know some of her varied talents. The accurate (and endearing) imitations of other barristers and clients (rarely the same person) were no doubt improved by her Honour's past life as an actor. Her Honour's culinary skills were discovered when towards the end of the party held to open chambers, she produced to the astonishment of those remaining a sumptuous carbonara for the starving masses.

Perhaps prophetically, her Honour also became the self-appointed sentencer in DRC for those who stepped out of line. This should hold her in good stead for her new career, although it may make her ponder the effectiveness of general deterrence.

One of her Honour's last acts as a barrister was to play for DRC with her eight-year-old daughter Clementine in the annual cricket match against Gorman Chambers, while her husband, Guy "it's just a flesh wound" Coffey watched on.

Gorman needed boundaries to try and chase down the imposing total set by the powerful David Ross line-up in their annual cricket match. A juicy half-volley allowed Dermott Dann QC to smite a powerful drive that looked destined to speed away to the ropes.

But Clementine stood at extra cover with the words of advice from her mother ringing in her ears: "Watch the ball at all times", "Get your body behind the ball". This advice had been passed down to her Honour by her father Robert Todd AM (former member of the Victorian Bar and former Deputy President of the Commonwealth AAT).

The ball eluded Clementine's grasp and cracked into her lower leg but with quick thinking she picked it up and nearly effected a run-out at the bowler's end. This was the moment Gorman knew they had met their match.

The qualities demonstrated by Clementine of courage, determination and loyalty to DRC are those her Honour has shown on many occasions. Combined with her attention to detail, gift for language and feel for the criminal law, her Honour was a talented barrister and many an opponent realised early in court just what Gorman came to learn that day on the cricket pitch: they had met their match.

She will be an exceptional judge.

DAVID HALLOWES SC

Her Honour Judge Sarah Leighfield

Bar Roll No 3684

I first met Sarah 15 years ago at a photocopier in the old Gorman Chambers in the Equity Building. I was finishing university, employed as an eager research assistant to Duncan Allen and Julian McMahon, and I jammed the photocopier on my first day just as everyone was trying to print for court. Sarah spent 30 minutes helping me fix it.

Afterwards, I asked Duncan and Julian who she was. I learned she was viewed as one of the smartest, most hardworking and talented junior criminal defence barristers. She had won the Supreme Court prize, worked at Galbally and O'Bryan and was regularly besting senior opponents at the Bar.

I like this story about the photocopier, not just because it was the first time I met someone who would become a great friend, but also because it exemplifies Sarah: the best and the brightest stopped what she was doing and helped someone else who was struggling with a problem.

When I was later at the Bar myself and fortunate enough to share a room with Sarah for many years, I observed this on repeat. Sarah officially mentored students and young barristers—particularly those who (like her) had no connections in the law and were not from posh schools. She also unofficially mentored everyone else. Senior silks would regularly call to talk through an issue in a case.

I gave a speech about Sarah at our chambers drinks when she was appointed to the Magistrates' Court. I referred to the surprise that some had expressed to me about Sarah having left the criminal bar when she was clearly on a trajectory to lead it. I shared that surprise. But Sarah was always far cleverer.

She found being a magistrate immensely rewarding—even on the days when she had 50 cases in a day. In particular, over her years in Bendigo, she spoke with immense pride about being able to help young self-represented accused get back on track and mentoring inexperienced practitioners (prosecution and defence) who appeared before her.

As a judge, Sarah will have more opportunity to display her considerable intellect. I pity anyone trying to take one of her judgments on appeal. But she will also, I have no doubt, continue to contribute to the justice system in a far broader way. She is simply an outstanding human being and will be an outstanding judge. We are all very proud.

RUTH SHANN

His Honour Judge David Purcell

Bar Roll No 3613

His Honour was appointed to the County Court on 10 June 2020. The Victorian Bar News usually records such appointments after the welcome to the new judge. COVID-19, however, means that this has not yet occurred and not only will his Honour's performance as a lawyer pre-appointment be discussed at his welcome whenever that date is, but also his performance as a judge.

His Honour brings to the Bench a wealth of experience both as a solicitor and barrister.

After completing his secondary education at Warrnambool High School, his Honour studied law at Monash University. His holiday work at that time was as a carpet layer with his uncle and he continues to profess an expertise in that craft.

He returned to Warrnambool to undertake his articles with Madden & Co in 1993. He was admitted to practice in September 1994 and thereafter has practised exclusively in common law. He was then and has since been known by all as 'Perc', such that when a principal of his firm was introducing him to a client, he said in his presence he couldn't remember what his surname was.

His experience at Warrnambool with country jurors will prove invaluable in circuit work. In one case, a young juror who was forelady of a Supreme Court jury attempted to engage him during trial on a Friday night at the Whalers Hotel. He did everything he could to avoid such contact and properly reported her endeavours to all counsel on the Monday morning. A very disappointing verdict was ultimately received by the plaintiff (for which he was blamed) but the court of Appeal ordered a re-trial the following year. When the jury panel for the re-trial was being read over in court, his Honour fortunately recognised that the forelady was again on the panel and her name was removed before the jury was chosen for the re-trial.

His Honour moved from Madden & Co to Stringer Clark in 1996. In March 1997, he with Richard Morrow joined Gary Clark, the principal of that firm, as partners to become the largest common law firm outside Melbourne and in the top four plaintiff firms by size in Victoria.

As the young partner in a large firm, he immediately experienced the great uncertainty of the law when the Kennett Government moved to abolish common law for injured workers from 12 November 1997. Consideration of expanding to areas of criminal law and family law were not appetising to him and his partners, and they instead moved to lead the fight to save common law. Roger Hallam, the Minister for Workcover, was their local member and they were active in organising protest marches and other activities which instrumented to the retention of common law entitlements for workers.

After a successful practice as a solicitor, his Honour became the first member of the Stringer Clark partnership to be called to the Bar, his partners following him some time later. In May 2003, he read with Ross Middleton QC and quickly established a strong plaintiffs' practice in personal injuries. His skill and diligence were recognised by firms and leading counsel alike. He was much sought after as junior counsel. Very early in his career, he was junior counsel in a six-week trial in the County Court which resulted in a judgment for the plaintiff of $5 million.

His Honour's very strong practice meant that he could continue to indulge himself with new things: computers, phones and, in particular, cars. He seemed not to know how to register a car, trading them in on one or at times two new cars, just before registration was due. Car traders invited him to many functions, thinking he supported their brand but in fact he seemed to be buying from all. It is with interest that we observe what car he drives as a judicial officer.

In November 2017, his Honour took silk. Although small in stature (in the *Victorian Bar News* after his appointment he answered the question, "when you were a child, what did you want to be when you grew up?" with "BIG"), His Honour had established a very large practice in all jurisdictions, including being a strong appellant advocate. His popularity with solicitors was not only for his diligence and skill but also for his quick wit, which is already being reflected in some passages in his judgments.

His Honour brings a wealth of experience and humanity to the Bench, where his legal skills will enable him to dispense justice in all areas of the court.

TIM TOBIN SC

BACK OF THE LIFT

Her Honour Judge My Anh Tran

Bar Roll No 3525

On 10 June 2020, her Honour Judge My Anh Tran was appointed a Judge of the County Court. Her term commenced in the Common Law Division on 9 October 2020.

Her Honour has been described as "ridiculously smart". She studied science and law at the University of Melbourne, where she was awarded first class honours in law. She received many academic prizes, including the Corrs Chambers Westgarth prize for intellectual property, the Melbourne Abroad scholarship to study law at McGill University and an exhibition in psychology. She then completed a Bachelor of Civil Law at Oxford University, where she was awarded the Clifford Chance prize in civil procedure.

Judge Tran worked as a research assistant at the Victorian Court of Appeal and served articles with Freehills (now Herbert Smith Freehills). She was admitted to practice in May 2001 and called to the Bar in May 2002, reading with Justice Pamela Tate SC.

Judge Tran had a very successful commercial and administrative law practice. Her work included complex international construction arbitrations, property law and intellectual property law. She was regularly led by Justice Maree Kennedy QC, who describes Judge Tran as the best junior she ever had.

Judge Tran was secretary of the property and probate section of the Commercial Bar Association and reported for the Victorian Reports, contributed to the Fitzroy Legal Service Law Handbook and edited the Women Barristers Association newsletter. She practised as a barrister until the birth of her first child in 2008 and then returned to the Bar in December 2014.

Judge Tran was undertaking a PhD in law at the University of Melbourne pursuant to the Henry James Prestigious Scholarship, from which she withdrew upon her appointment as a judicial registrar of the Commercial Division of the County Court in May 2015. Her appointment as a judicial registrar was made pursuant to an innovative job share arrangement: the first of its kind in Australia.

Her Honour's ingenuity was highlighted by her observations at a Judicial College writing course before her appointment. She noted that the room had been set up for many more delegates than actual attendees. Judge Tran said "I have an idea. Given there are so few of us, perhaps we can move the tables into a group and be closer together?" She had not even started and was literally rearranging the furniture. A sign of many things to come.

As a judicial registrar, Judge Tran had a reputation for being extremely hard working and for being able to settle the "unsettleable". She heard interlocutory disputes, made orders on the papers, conducted judicial mediations, oversaw the self-represented litigants (SRL) program and assisted with the administration of the Commercial Division.

She is a member of the County Court Rules Committee, the ADR subcommittee, the County Court SRL Working Group, the County Court Website Redevelopment PSG, and the Project Advisory Group established to oversee the creation of a civil electronic case file at the County Court and to review and reform Commercial Division and registry procedures. She generates everything except the electricity in the court. Unless her associates kept a check on her diary, her Honour would list five judicial mediations a week with a directions hearing at 9.30am every day. She infamously does not know the word "no". Her Honour was even late for her own celebratory drinks as she continued to use her peacemaker services in a mediation which required her particular skills, given its daunting features.

In the four months since the announcement of Judge Tran's appointment, the Common Law Division has been warned: prepare for "Tornado Tran". Her appointment is well deserved and we wish her Honour a long, rewarding and successful career as a judge.

JUDICIAL REGISTRAR SHARON BURCHELL

Magistrates' Court of Victoria

Her Honour Magistrate Alexandra Burt

Her Honour Magistrate Melissa Stead

Other Appointments

John Olle: re-appointment to the Coroners Court

Rohan Hoult: appointed Senior Registrar of the Family Court of Australia

Adrian Muller: appointment as Judicial Registrar of the County Court

His Honour Judge Patrick O'Shannessy: appointment to the Federal Circuit Court

Kathleen Foley: appointed to the Victorian Law Reform Commission

Awards

Felicity Gerry QC: Lawyers Weekly Barrister of the Year 2020

Daye Gang: International Bar Association's Outstanding Young Lawyer 2020

Vale

John Selimi

Bar Roll No: 2989

John Selimi passed away in August 2020 at the age of 55 years.

John was admitted to Practice in 1990. He practised as a solicitor for five years with Mulcahy Mendelson & Round, working primarily in general commercial litigation and crime.

He came to the Bar in 1995 and read with Philip Dunn QC. He was the last reader to do so before Philip took silk.

At the Bar, John specialised in complex commercial matters. He also appeared in contested property disputes in the Family Court.

Vale John Selimi

VBN

The Hon Glenn Waldron AO QC

Bar Roll No 527

The former Chief Judge of the County Court, Glenn Waldron AO QC, died on 29 September, 2020 at the age of 89 years. He was born on 25 November 1930.

Glenn was a loving and proud family man. He and his wife Beverley were married in 1956 and had three children: Mark, Caroline and Elizabeth. They had 10 grandchildren.

Glenn was educated at Wesley College from primary level to year 12. He was a keen sportsman and a very bright student, matriculating with a general exhibition, a special exhibition in English and a senior government scholarship.

Glenn's tertiary education was at the University of Melbourne, where he obtained an honours degree in law with an exhibition in private international law. He was articled to Edgar Davies and admitted to practice on 15 February 1954, signing the Bar Roll on 4 March 1955. His clerks were Arthur Nicholls and Percy Dever, with John Dever becoming his father's junior clerk in 1973.

He rapidly built a large and successful junior practice. He mentored six readers: Brian Barter, Stan Fookes, Chester Keon-Cohen, Ian Robertson, Noel Ross and Gregory Levine.

Glenn took silk on 18 October 1973 and became a preferred leader in a formidable common law cohort which included such silks as Barry Beach, Neil McPhee, John Barnard, John Winneke, Jeffrey Sher, Alan McDonald, Jack Hedigan, Jim Gorman, Eugene Cullity, Cairns Villeneuve-Smith, David Kendall and Leo Hart. Many of this group were Glenn's friends from his university days.

He served on the Bar Council from 1976 to 1981 and as Chairman of the Ethics Committee and the Bar Fees Committee.

Throughout his time at the Bar, Glenn was very approachable and available to anyone seeking his assistance. He was a friendly man and embraced the collegiality of the Bar. He would go out of his way to introduce himself to junior counsel and was a source of encouragement and support for many.

In addition to being highly skilled as an advocate, Glenn was a role model in etiquette both in and out of court. He had a highly cultivated sense of fair play and the need to be very accurate in what was said or written. Poetic licence was intolerable. He avoided being adjectival and only sparingly invoked analogy.

Glenn was very thorough in his preparation and extremely relevant and concise in his submissions to the court—every word he used had a job to do and did it. As an advocate, Glenn was deadly in cross-examination, yet with a delivery which was calm and controlled.

By the early 1980s, it was recognised that the County Court was in need of fundamental change. It was understaffed. There were only 34 judges, none of whom were women. There was little cohesion or organisation. Some judges did not appear to regard themselves as being part of a team but more as independent contractors. They worked different hours. Others found themselves working many hours more than their colleagues.

BACK OF THE LIFT

The prestige of the court was diminishing. It was being avoided in preference to the Supreme Court. The Registry was understaffed and poorly equipped. The case management of the court was antiquated and unimaginative. Case flow was impeded and with it any managerial capacity to monitor the performance of the court. There was no system of judicial control over cases in the list. The legal profession was very much left to its own devices. Delays were substantial.

The court's accommodation was not nearly large enough, although it was only 14 years old. It was crowded and difficult to access. It was prematurely decaying and was to be cloaked in a web of unsightly scaffolding for years because of unstable cladding.

Glenn was appointed Chief Judge of the County Court on 3 February, 1982 and presided as such for more than 20 years until 24 November 2002.

He was confronted with the responsibility and challenge of achieving substantial change. He took the appointment realising the magnitude of the task and dedicated himself to reform of the court. He did so with great imagination and unwavering courage and vigour.

Glenn did not regard his position or his projects as being a popularity contest. He trod on many toes. He schemed, pushed and cajoled. There was grumbling and dissent from the government, bureaucrats and some judges who were resistant to change. On the other hand, Glenn received solid and loyal support from many judges including Bruce McNab, Eugene Cullity, Paul Mullaly, John Nixon, Leo Hart, Chester Keon Cohen, Murray Kellam, Michael McInerney, and Tom Wodak. His associate, Jim Benson, kept him well informed and was a great companion and protector.

Glen was a respected leader engaged on a vital and necessary mission. He eventually succeeded in achieving a spectacular transformation of the court.

Thus, as at the date of his retirement, the number of judges on the Bench had risen to 58, of whom 17 were women. In addition, Glenn fostered and achieved a team mentality among his judges. A spirit of co-operation and corporate solidarity emerged. The judges combined to enhance the performance and reputation of the court.

A very effective case management system was implemented, which conferred significant benefits in progressing cases from institution of proceedings to listing for trial. The system involved an innovative use of technology and engagement of suitably trained staff. Frequent directions hearings enabled judges to ensure that only real issues were litigated and that the profession played its part in expediting the process.

A committee of judges was formed to attack the backlog problem. The judges would work on a roster and call over each case. The parties would be questioned in detail as to the rate of progress and those cases which were not proceeding would be identified. The introduction of judicial control of cases was very successful with the backlog being reduced by more than 50 percent.

Additionally, specialist civil lists were created. The Medical List was the first specialist civil list created in Victoria and perhaps Australia. The list was managed electronically and not only collected information but enabled it to be instantly accessed. It was conducted with great vigour and was highly interventional.

The conduct of trials was very much assisted by the introduction of running transcripts, an adjunct of which was software enabling the management, indexing and summarising of transcript. Such IT equipment as document cameras and video link became available.

The use of the internet became customary and enabled quick and effective communication between judges and administrators who had previously exchanged letters and notes. Judges were also assisted by the development of a research unit consisting of two researchers. The appointment of the unit was correctly seen as a highly innovative measure.

The accommodation crisis confronting the court was solved by the design and erection of the present County Court building. This was an enormous project and occupied much of Glenn's time. Intensive lobbying was necessary before the government ultimately granted approval and commenced the search for a site.

Much work remained to be done by Glenn and his judges, particularly David Jones, John Hassett and Michael Strong. Considerable time was spent in participating in the planning, design and fit out of the building to ensure that it was successful. Years, not merely months, were energetically worked during this process.

The County Court building has proved to be peerless not only as a functional trials court but as a home for the effective administration of justice. The building is emblematic of Glenn Waldron's success as Chief Judge. It is fitting that a reception hall therein is named Waldron Hall in his honour and in recognition of his outstanding achievements.

Under the Waldron administration, the County Court became highly respected and came to effectively deal with a large load of criminal and civil cases. Its work became very complex. It was conferred with parallel jurisdiction to the Supreme Court in a number of areas. It hears many civil trials without monetary jurisdictional limit. It shares, under the *Courts (Case Transfer) Act 1991*, important trial work with the Supreme Court.

Glenn's strengths of intellect, wisdom, industry and behaviour were conspicuous in his conduct of trials. He was an excellent judge who ran his court to perfection. Whilst it is unfortunate that the weight and responsibilities of his administrative duties made it difficult for him to spend as much time in court as he would have liked, the very worthwhile consolation is that critically important reforms were undertaken and were so outstandingly successful.

On 21 November 2002 the profession farewelled the long serving Chief Judge of the County Court upon his retirement from the Bench. The Attorney-General, the Chairman of the Victorian Bar Council and the President of the Law Institute of Victoria wished Glenn a long and happy retirement.

Their wishes were granted.

During the subsequent 18 years, Glenn led an active and contented life. He was preoccupied by his large family and vitally interested in their activities. He holidayed regularly and enjoyed the company of his many friends. He was a keen and accomplished player of bridge and chess. He had an on-going interest in the Bar and regularly attended the annual Dever's List dinner. Even as his health commenced to fail him, Glenn remained strong and determined.

Glenn Waldron was an outstanding person. He was a wonderful family man and friend. He was a pre-eminent barrister and unrivalled as a Chief Judge. In this latter regard, his ground-breaking reforms not only revolutionised the court, but provided the foundation and trajectory for major developments which have occurred since his retirement.

Glenn Waldon's influence on the system of justice in the State of Victoria is both profound and permanent.

ROSS H. GILLIES QC

Eng B (Robin) Chan

Bar Roll No 4574

Robin was born in Malaysia and came to Australia in 1998 to study at the University of Melbourne. He graduated as a Dean's Honours List student in commerce and was awarded the 2003 Supreme Court Prize in law—the first foreign student to achieve this. Robin later completed a Master of Tax at the University of Melbourne and a Master of Laws at the National University of Singapore as an ASEAN student winning the M. Karthigesu Gold Medal and Memorial Prize. Robin was the architect of the Melbourne Master's subject 'Administrative Law in Tax', and was a member of an Administrative Law Expert Advisory Panel at the Melbourne Law School.

At law school, Robin was instrumental in creating Tarwirri, the Indigenous Law Students and Lawyers Association of Victoria and the Pre-Law Seminar Series to help Indigenous law students.

After graduating, Robin was a researcher for the Court of Appeal and the Federal Court, associate to Justices Chris Maxwell, Susan Kenny and David Habersberger, lawyer at what is now Norton Rose Fulbright and joined the Bar in 2013.

The law was Robin's passion. He was a perfectionist, dedicated to improving his skills and knowledge, spending his free time summarising High Court decisions.

Robin took immense joy in helping others: colleagues, clients, judges for whom he worked and students. Robin was frequently consulted by colleagues and never declined requests for assistance.

To most of the world, Robin was a quiet and reserved person. The privileged few who knew and worked with him experienced an outrageous wit and a mischievous sense of humour. His infectious laugh was once described as a 'Kookaburra chorus'. It entertained the whole floor.

Robin was particularly proud of his Bar heritage or Bar family. A decision of a judge who he regarded as part of that family was a "Great-Grandpa decision" or a "Grandma decision". One of his proudest moments was Justice Gordon introducing him to her Honour's Associate as her "Grandson".

Robin passed away on 28 September 2020 at the age of 41, following a year of serious illness. Even while very unwell, Robin plied his craft drafting submissions spoken to in the Federal Court some three weeks after his passing.

Robin leaves his parents, Cheng San Chan and Kim Bee Tong, partner Jenny Foo, sister Lee Shia Chan and brothers Weng Keong (Stan) Chan and Eng Bung (Jake) Chan.

MIA CLAREBROUGH, MATTHEW MENG AND FRANK O'LOUGHLIN QC

The Victorian Bar members care for each other, it goes without saying. On the evening of 24 August, I received an email from Robin Chan informing me he was about to undergo a bone marrow transplant. He asked me if it was possible to find some blood donors to donate their white blood cells.

I immediately emailed the members of Foley's List. In true Bar style, numerous members and others who had heard of my request replied immediately, offering to assist. Ultimately about six members were able to fulfil the necessary criteria and donated their white blood cells. Staff at the Royal Melbourne Hospital were amazed at the response.

Some responders had never heard of Robin but offered to assist. A truly altruistic response by all.

JOHN KELLY, CEO, FOLEY'S LIST

BACK OF THE LIFT

Jillian Mary Crowe

Bar Roll No 1786

Jill Crowe passed away on 4 October 2020 after a long illness. She was 68.

Jill was educated at Sacred Heart Girls' College in Oakleigh and commenced her Bachelor of Laws degree at the University of Melbourne in 1969. In 1975, she completed the Leo Cussen Training Course (in which she later lectured) and was admitted to practice on 3 November of that year.

After some experience in private practice, Jill commenced employment in the Criminal Law Branch of the Victorian Crown Solicitor's Office in February 1978. She was the first female lawyer in that office. Indeed, only two years earlier a junior solicitor named Marilyn Warren had unsuccessfully applied for a similar position in that office, only to be advised that it was not appropriate for women to read the depositions in the sexual offences matters, and that even the typists were male for that reason!

In spite of those concerns, by 1980, Jill had become Officer in Charge of the Rape Prosecution Section. She was also a member of the Premier's Rape Study Committee, a contributor to the Law Reform Commission reference on rape, a consultant to the Office of the Chief Parliamentary Counsel in legislative drafting. She lectured at the Leo Cussen Institute, at the Police Detective Training School and to police surgeons. In addition to all of the above, it was during this time that Jill took it upon herself to complete an Arts degree, majoring in archaeology and classics.

Jill came to the Bar in March 1983 and read with Michael Rozenes (as his Honour then was) as his first reader. Jill established a general criminal law practice, appearing in trials, pleas and appeals, along with some family law and Supreme Court custody cases.

On 1 February 1988, after five years at the Bar, Jill was appointed a magistrate—only the sixth female magistrate to be appointed in Victoria.

During her time as regional co-ordinating magistrate at Heidelberg Magistrates' Court, it became the first metropolitan court with a Family Violence Division. It was revolutionary and a cutting-edge innovation. The new process attracted observers from other Australian states as well as from New Zealand and China. Jill was 'a doer', serving on numerous committees throughout her time on the Bench, both law and non-law related.

Jill retired in February 2018 after 30 years on the bench. On the occasion of her retirement, Peter Ward of Galbally & O'Bryan was quoted as saying that Jill was "an ideal magistrate" due to her passion for and love of the law. It is a sentiment echoed by many in the profession.

Jill is survived by her husband, Peter, and daughters Vivienne and Veronica and her granddaughter, Zoe.

Deepest sympathies are extended to Jill's family.

PETER CHADWICK QC

Norman Rosenbaum

Bar Roll No 2309

Norman Rosenbaum (Stormin' Norman, as he was affectionately known to many) died suddenly at his home on 25 July 2020, a month shy of his 63rd birthday.

Norman and his younger brother Yankel grew up in Mont Albert in a deeply traditional Jewish home, where family, respect for others and education were highly valued.

Having initially embarked on studies at the Pharmacy College, Norman changed course to a career arguably more suited to his temperament and personality. He completed his legal training at Monash University, where he met his wife Ettie whom he married in 1981. With Ettie's support and encouragement, Norman became a prosecutor with the Australian Taxation Office, a lecturer and mentor for post-graduate law students at RMIT and the University of Melbourne, and a barrister, reading with the late Professor Harry Reicher.

Norman's career at the Bar focussed on taxation and white collar crime and he enjoyed a busy practice which saw him appear regularly in the courts of Victoria and New South Wales.

Jewish tradition (in common with Indigenous and Islamic belief) considers the body of a deceased person to be sacred. Following in the footsteps of his mentor, who by then had moved to the United States, Norman led a team of counsel working pro bono on behalf of members of the Jewish community who sought to avoid autopsy by bringing an urgent application to the Supreme Court to prevent the coroner from conducting an autopsy where no suspicious circumstances arose.

It was the murder of his beloved younger brother Yankel at the hands of rioters in New York City in 1991 that set Norman on a path that defined so much of his life in the ensuing decades. Norman was distraught at the acquittal of the murderer in State court, and at the age of only 34, with a young family including a newborn daughter, Norman began his decades long fight for justice for Yankel. Undaunted by a justice system that was both unfamiliar and located on the other side of the world, Norman began an odyssey that saw him travelling across the world hundreds of times until he was successful in having Yankel's killer convicted in Federal Court for violation of civil rights. Norman became a well-known and relentless campaigner for justice and was seen in the corridors of power in New York and Washington, as well as being a regular interviewee on radio and television as he lobbied for the case against his brother's killer to be kept alive.

His crusading role forged a reputation for Norman as a fearless advocate and spokesman (hence Stormin') and he frequently acted as an adviser and confidante of Holocaust survivors, synagogues and many other charities both at home and abroad that are too numerous to list by name.

Norman was a man with a personality larger than life. He had a wicked sense of humour and perfect comic timing, a sharp intellect and unshakeable faith. He had a booming voice that could command an audience and mobilise a crowd to march across the Brooklyn Bridge. There was always a twinkle in his eye when he was telling a story that he enjoyed. He was a fiercely proud Jew who chose to stand up for his beliefs, his family and his people. He is survived by his three sons, a daughter and their families, including four adored grandchildren in whom he took great pride and delight. May his memory be a blessing.

SAM TATARKA

The Hon Martin Charles Ravech QC

Bar Roll No 465

Martin Ravech was born in London in 1922 and came to Australia in 1929. He was educated at Melbourne High School and the University of Melbourne, where he initially commenced a Commerce degree in 1940 and joined the University Rifles. His early years at university were dominated by student theatre; he also performed in radio plays for the ABC, remaining a member of Actors' Equity until 1949.

His studies at university were interrupted when he enlisted in the AIF. Initially stationed in the Northern Territory, he was recruited to Z Special Unit in 1944 via the Botanical Hotel. After two neat whiskeys he was propositioned by a British Major: "Well Ravech, you seem to have had a dull war so far; how would you like to work behind Japanese lines?" Z Force carried out covert operations, sabotage and intelligence gathering. His Honour was based on Morotai, in the Moluccas Islands between New Guinea and the Philippines; also in Dutch New Guinea and Borneo. He served in Z Special Unit until the end of the war, attaining the rank of Staff Sergeant. The unit's work remained officially secret for 30 years, providing his Honour with a convenient rationale for not mentioning the war.

His Honour re-enrolled in 1946, completing his law degree in 1949. He was articled at Grant, Dixon and King on £2 per week, twice the amount he earned throughout his articles on Saturday mornings at Snows, a menswear shop in Flinders Street. His admission was moved the same year by Clifford Menhennitt (later Justice Menhennitt). On admission, he was offered an increase to £6 per week but, after significant negotiation, £7 per week was agreed when his final plea for an additional 5 shillings was accepted: "All I am asking for now is the equivalent of three packets of Turf per week, one from each of the partners". His Honour was delighted to have been awarded the equivalent of the basic labourer's wage.

His Honour came to the Bar in 1951. His career was nearly foreshortened after seeking to overturn a larceny conviction before Sir Charles Lowe. A 1949 Act, not updated by his master Gratton Gunson, precluded a judge hearing an appeal if he had presided at trial. His Honour, noting that his appeal was scheduled second last on the list, believed it would not be heard for several days. However, as Sir Charles Lowe would otherwise have sat on the Full Court, the hearing was shuffled to the top of the list without His Honour's knowledge. Whilst the Court of Appeal waited impatiently for him, his Honour was appearing at Malvern Petty Sessions. On his return that afternoon, the appeal was heard, and a retrial won, leading to an eventual acquittal. The court then turned to counsel's contempt. Astonished, the full bench heard that his tenure at the Bar would be "four months tomorrow". To the disappointment of the assembled press and some 50 onlookers, gathered in expectation of a sensational denouement, he was sternly warned that he had come perilously close to commitment for contempt and was required to update his master's Act. Gunson exclaimed he was lucky not to get six months for calling his master "learned" before Sir Norman O'Bryan.

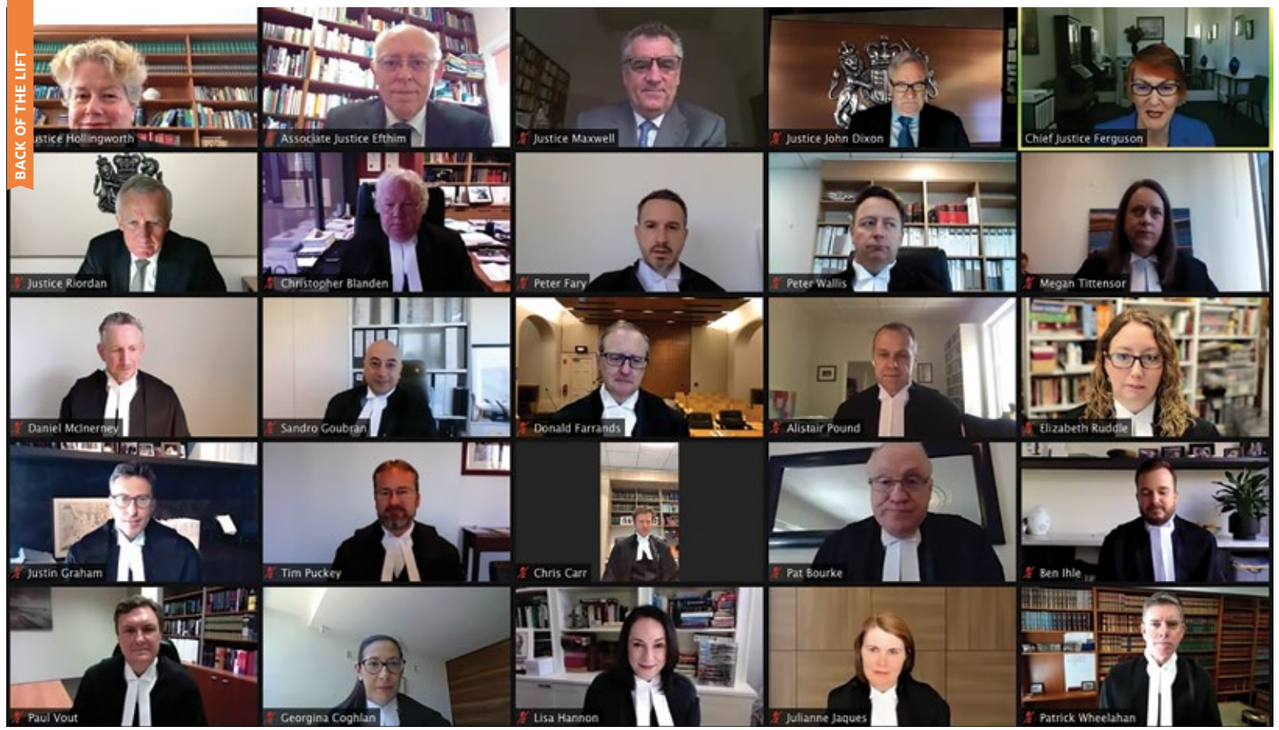
He subsequently developed a strong common law practice, specialising in personal injuries and industrial accidents. He was well-known on the Geelong and Ballarat circuits. His Honour took silk in 1974. In 1975 he was appointed as a judge of the County Court, where he served until his statutory retirement in 1994. His Honour was described by those appearing before him as a gentle and very sympathetic judge. As frequently reported in these pages, he had a quick wit, enjoyed by counsel and jurors.

His Honour served as a reserve judge of the County Court until 75 and then sat on the Victorian Legal Aid Appeals Board until the age of 90, chairing the Board for his final 10 years.

His Honour enjoyed the beach at Mt Martha and Noosa; he played tennis and rode his bike well into his eighties.

His Honour is survived by his wife Rosie, children David and Elizabeth, who both graduated from University of Melbourne Law School, and Thomas a winemaker, and his five grandchildren. His Honour's niece, nephew and great nephew are all members of the Victorian Bar.

DAVID, ELIZABETH AND THOMAS RAVECH



2020 New Silks Q&A

Don Farrands SC

How did you celebrate in lockdown? Quietly.
What advice would you offer yourself as a first-year law student? Enjoy and hold on for the ride.
Zoom, Webex or Microsoft Teams? Is there any other?
New hobbies or skills in lockdown? Professional home barista
Book/TV/movie/podcast recommendation? *The Law of Easements*
Soundtrack to your life? *Life of Pi.*
How has 2020 changed you? Less activity, more appreciating.
Who would play you in a movie, and why? Difficult choice between Brad Pitt and Brad Pitt.
Word/phrase of the year? Don't let the future pass you by.

Julianne Jaques SC

How did you celebrate in lockdown? With family, sharing a beautiful bottle of champagne (correctly described) from a colleague delivered on the day.
What advice would you offer yourself as a first year law student? Take the opportunities.
Most memorable junior brief? A brief that started with a seven-week trial (unusual for tax barristers) watching and learning from a leader who was an amazing cross-examiner, and ended in the High Court.
Most frequently cited case? *Sun Newspapers Limited v FCT* (1939) 61 CLR 337 at 363. Sorry—you probably have to be a tax barrister to appreciate that. But it does have an interesting back story.
Zoom, Webex or Microsoft Teams? Microsoft Teams for formal occasions, Zoom for casual.
New hobbies or skills in lockdown? See previous answer. And speed dishwashing to make way for another child's YouTube-inspired culinary experiment.
Book/TV/movie/podcast recommendation? More recently - *Big Little Lies* by Liane Moriarty and also the mini-series—but particularly the book with significant themes interspersed with much-needed light-hearted interludes. Runner-up is *A Gentleman in Moscow* by Amor Towles.
Soundtrack to your life? *Mamma Mia.* An ABBA fan even during the unfashionable years: I bought *ABBA Gold* before *Muriel's Wedding* and *Priscilla.*
How has 2020 changed you? Taught me that "Stop the world, I want to get off" isn't all it's cracked up to be. Oh, and that family and friends are most important, but I already knew that.
Who would play you in a movie, and why? Julia Roberts because—well, do I need to explain? Surely I'm not the only one to see the similarity?
Word/phrase of the year? There's a good time coming.

Lisa Hannon SC

How did you celebrate in lockdown? Zoom cocktails with some close friends, more Zoom drinks with my floor (note the theme) and Attica-at-Home with my family, being one of the few "fancy" digs that could manage same day delivery.
What advice would you offer yourself as a first year law student? Don't ski Little Buller Spur when the sign says "no snow" (ACL reconstruction to follow). Other than that, PERSIST. It will be worth it.
Most memorable junior brief? If I had to choose from many (none of them memorable in a good way), Dever sending me out to a certain private school to wrangle the Parents' Association AGM following a certain haircutting incident…
Most frequently cited case? *Darryl Kerrigan v Commonwealth of Australia* (1997) The Castle Law Reports (I have a fair practice in compulsory land acquisition and The Vibe often gets a run).
Zoom, Webex or Microsoft Teams? Zoom Zoom Zoom (but usually with a bit of Teams on the side)
New hobbies or skills in lockdown? Interpreting the Premier's daily pressers.
Book/TV/movie/podcast recommendation? At the moment I'm reading Amor Towles *A Gentleman in Moscow*; protracted house arrest is the new black. And John Oliver's *Last Week Tonight* as some respite from all things Trumpian.
Soundtrack to your life? Most recently, the CHO's daily analysis of the R number, CNN election updates and Trade Radio. Interspersed with Triple J and Yo-Yo Ma…
How has 2020 changed you? More than anything else, a clear-eyed appreciation of the things, and people, that are truly important in my life and, in particular, the friends and colleagues who have made this mostly awful year bearable.
Who would play you in a movie, and why? Rose Byrne. Cate Blanchett won't make a credible brunette in a Saints beanie.
Word/phrase of the year? Unsuitable for printing in such an august publication. In lieu of that, "omnishambles". Malcolm Tucker would have been at home in 2020.

Peter Fary SC

How did you celebrate in lockdown? Uber Eats and a bottle of Pinot from the floor.
What advice would you offer yourself as a first year law student? *"Plan to spend 2020 in Queensland. Just trust me"*
Most memorable junior brief? *Rambaldi v Mullins (No 2)* [2016] FCA 977.
Most frequently cited case? *Ugly Tribe v Sikola* [2001] VSC 189 (nine citations to go).
Zoom, Webex or Microsoft Teams? Zoom.
New hobbies or skills in lockdown? Amateur statistician/virologist.
Book/TV/movie/podcast recommendation? Lex Fridman podcast.
Soundtrack to your life? *Tree of Life Soundtrack*—Alexandre Desplat
How has 2020 changed you? Expanded my perspective.
Who would play you in a movie, and why? Patrick Brammall. I can relate to Danny Bright.
Word/phrase of the year? "You're on mute".

Tim Puckey SC

How did you celebrate in lockdown? With a good bottle of Henschke on Zoom, of course.
What advice would you offer yourself as a first year law student? Go to the pub.
Most memorable junior brief? A Turkish delight in Sydney.
Zoom, Webex or Microsoft Teams? Zoom.
New hobbies or skills in lockdown? Zooming.
Book/TV/movie/podcast recommendation? *Money Heist*
Soundtrack to your life? Queen's *Greatest Hits.*
How has 2020 changed you? I've grown an iso-beard.
Who would play you in a movie, and why? One of the Hemsworths—the beard.
Word/phrase of the year? It is what it is.

Patrick Wheelahan SC

How did you celebrate in lockdown? Around a bonfire at the farm with family & zoom with friends.
What advice would you offer yourself as a first year law student? Enjoy the law.
Most memorable junior brief? *Grocon v CFMEU*, Lonsdale street protests (Justice McDonald)
Most frequently cited case? As above
Zoom, Webex or Microsoft Teams? Zoom.

BACK OF THE LIFT

New hobbies or skills in lockdown? Meditation.
Book/TV/movie/podcast recommendation? *The Lazarus Strategy* (Audible).
Soundtrack to your life? "Always look on the bright side of life."
How has 2020 changed you? Joined the crew of mid-life crisis Harley Davidson riders.
Who would play you in a movie, and why? Clint Eastwood. Why? Because I'm lucky.
Word/phrase of the year? *Lockdown.*

Justin Graham SC

How did you celebrate in lockdown? With a can of Balter XPA and an episode of *Fauda* (Netflix).
What advice would you offer yourself as a first year law student? Don't throw away those tracky dacks—you're going to need them again in about 29 years' time.
Most memorable junior brief? With Graeme Clarke QC, for an urgent injunction to stop publication of medical records of unnamed footy players (and no, I am not saying who).
Most frequently cited case? *Codelfa*–it is the gift that keeps on giving.
Zoom, Webex or Microsoft Teams? Anything but Webex.
New hobbies or skills in lockdown? Gardening/weeding and vacuuming.
Book/TV/movie/podcast recommendation? *The Hamilton* musical movie, *Heavyweight* podcast, and Lee Child's *Jack Reacher* novels (guilty pleasure).
Soundtrack to your life? That's easy: anything by Billy Joel.
How has 2020 changed you? I am more aware of the mundane things, and grateful for them.
Who would play you in a movie, and why? I would like to think Hugh Grant; but probably Hugh Laurie.
Word/phrase of the year? Stay safe.

Megan Tittensor SC

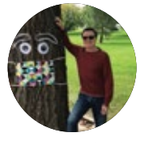
How did you celebrate in lockdown? In the traditional manner—bolstering the French champagne industry.
What advice would you offer yourself as a first year law student? Consider whether crime pays.
Most memorable junior brief? The last few years as Counsel Assisting in the Royal Commission into the Management of Police Informants will be forever burned into my mind. There are also some earlier cases that will never be forgotten—representing Myuran Sukumaran and Andrew Chan in the 'Bali Nine' case; the Vampire Gigolo murder case; and the Oil-for-Food Royal Commission and subsequent civil penalty proceedings.
Most frequently cited case? I'd love to say *R v Carmody* (1998) 100 A Crim R 41 and not *R v Verdins* (2007) 16 VR 269.
Zoom, Webex or Microsoft Teams? Facetime.
New hobbies or skills in lockdown? Pisco Sours.
Book/TV/movie/podcast recommendation? Anything by Sally Rooney—*Conversations with Friends /Normal People*; *Babylon Berlin*; *Freakonomics*.
Soundtrack to your life? *Lost in Translation.*
How has 2020 changed you? It has given me perfect vision.
Who would play you in a movie, and why? Judge Fiona Todd—for her exceptional acting in Janus and Blue Heelers in her former life
Word/phrase of the year? Noble cause corruption.

Peter Wallis SC

How did you celebrate in lockdown? A couple of drinks with my family after a long day in Court via Microsoft Teams.
What advice would you offer yourself as a first year law student? The same advice my grandfather always gave me as a young tennis player: "The more you practise and prepare, the luckier you get."
Most memorable junior brief? *Thomopoulos v Faulks* [2006] V ConvR 54-723—my first Supreme Court trial without a leader before Justice Cavanough, who as it happened was sitting in his first trial as a Supreme Court judge.
Most frequently cited case? *Blatch v Archer* (1774) 1 Cowp 63.
Zoom, Webex or Microsoft Teams? Three votes Zoom, two votes Microsoft Teams one vote Webex.
New hobbies or skills in lockdown? Cooking slow cooked beef brisket with BBQ sauce and mac and cheese.
Book/TV/movie/podcast recommendation? *Merlin*–fun family show that got us through the dark days of the first lockdown.
Soundtrack to your life? Bruce Springsteen discography.
How has 2020 changed you? It's been the least physically active year of my life since I learnt to crawl. Now taking preliminary steps to bounce back next year.
Who would play you in a movie, and why? Rupert Burns because he once played the role of my senior mentor (now Justice John Middleton) and made him look pretty good.
Word/phrase of the year? "Why has the washing machine suddenly started to shrink all my clothes?"

Alistair Pound SC

How did you celebrate in lockdown? Quietly, with my wife Louise and our kids.
What advice would you offer yourself as a first year law student? Think again about studying architecture.
Most memorable junior brief? Quite a few, and all for different reasons. A few that spring to mind are *Director of Housing v Sudi*, the Black Saturday Bushfires class actions and *Deloitte Touche Tohmatsu v Sadie Ville Pty Ltd*.
Most frequently cited case? I was briefed for one of the interveners in *Momcilovic v The Queen* (2011) 245 CLR 1. Can I claim that?
Zoom, Webex or Microsoft Teams? Please can we go back to a court room?!
New hobbies or skills in lockdown? Dancing to "The Fitness Marshall" with my kids!
Book/TV/movie/podcast recommendation? During lockdown, I've enjoyed reading Delia Owens' *Where the Crawdads Sing* and watching *Frances Ha* and *Call My Agent.*
Soundtrack to your life? It's a long list, but at the top are The Beatles and Radiohead.
How has 2020 changed you? It's reminded me how fortunate I am to live the life that I do, and how fragile it all is. And the fact that I now think the tracksuit pants/business shirt combo is acceptable business attire.
Who would play you in a movie, and why? I can't imagine why there would ever be a movie character based on me.
Word/phrase of the year? Lockdown.



Paul Vout SC

How did you celebrate in lockdown? My partner and I consumed a bottle of Krug that we had already chilled for our 20th anniversary the following week. Fear not: it was replaced and the anniversary duly celebrated too!
What advice would you offer yourself as a first year law student? Look to the social context and effect of the law you are studying. It gives that law its true meaning. And legal history is not simply for swats.
You can't really understand a legal principle or doctrine unless you know where it came from.
Most memorable junior brief? A two-week hearing in the Federal Court before Gordon J (her Honour's first long hearing as a (then) Federal Court judge), at the end of which my late leader felt unwell and asked me to close the case about half an hour before we were required to do so. We ultimately lost the case, but the task gave me confidence. And my leader gave me a red bag.
Most frequently cited case? *Redgrave v Hurd* (1881) 20 Ch 1,

> a decision of Sir George Jessel MR (he of fusion fallacy fame) (at 12-13): "Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contact. To do so is a moral delinquency: no man ought seek to take advantage of his own false statement".

Zoom, Webex or Microsoft Teams? Zoom—if only for ease.
New hobbies or skills in lockdown? Using Zoom, Webex and Microsoft Teams.
Book/TV/movie/podcast recommendation? Book: *A Gentleman in Moscow* by Amor Towles. Pure pleasure, especially for anyone even slightly interested in Russian history.
Soundtrack to your life? ABBA, Fleetwood Mac, Eurythmics and Tracy Chapman. Yes—tragically, I haven't gotten much past the 1980s.
How has 2020 changed you? It has made me focus more on the most important things: family and friends. And it reminded me why I started getting my hair cut short after about 1977.
Who would play you in a movie, and why? Ernest Borgnine. As Wikipedia notes: "He was noted for his gruff but calm voice and gap-toothed Cheshire Cat grin". I'm not sure about the gruff and the gap-toothed, but I'm told I am generally calm and have a big smile.
Word/phrase of the year? Kindness.

Sandro Goubran SC

How did you celebrate in lockdown? Surf on Sunnymeade Beach.
What advice would you offer yourself as a first year law student? Be persistent.
Most memorable junior brief? Appearing in the Shepperton Magistrate's Court regarding *Water Rights*.
Most frequently cited case? *Project Blue Sky.*
Zoom, Webex or Microsoft Teams? None of the above.
New hobbies or skills in lockdown? Playing games on my iPad.
Book/TV/movie/podcast recommendation? *The Last Voyage of the Pong Su*.
Soundtrack to your life? *Flower of Scotland*, Corries.
How has 2020 changed you? One year older.
Who would play you in a movie, and why? No-one, for good reason.
Word/phrase of the year? Bye bye Mr Trump.

Chris Carr SC

How did you celebrate in lockdown? With a non-socially distanced glass of champagne with my beloved.
What advice would you offer yourself as a first year law student? Go to some classes, you idiot—you might realise you actually like this stuff.
Most memorable junior brief? AB & CD v EF, most especially the day we called for a witness's file and happened upon a letter in which Nicola Gobbo sought a financial reward from the police for having sold her clients down the river.
Most frequently cited case? Ditto.
Zoom, Webex or Microsoft Teams? None of the above. Please bring back the gravity of a real courtroom,

and the ability to engage at a human level with the poor client who is facing the most difficult time in his or her life.
New hobbies or skills in lockdown? Driving a tractor.
Book/TV/movie/podcast recommendation? *The Hamish and Andy podcast*.
Soundtrack to your life? "Sweet Caroline".
How has 2020 changed you? I claim that I've grown more patient.
Who would play you in a movie, and why? Someone dashingly handsome and charming.
Word/phrase of the year? "Sorry my internet dropped out."

Daniel McInerney SC

How did you celebrate in lockdown? A delicious Providoor meal, shared with friends via Zoom.
What advice would you offer yourself as a first year law student? Get to the Bar quickly. It is the best career in the law.
Most memorable junior brief? First appearance—a plea in Dandenong Drug Court, a Court I didn't know existed.
Most frequently cited case? *Sun Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337
Zoom, Webex or Microsoft Teams? Zoom.
New hobbies or skills in lockdown? Running further.
Book/TV/movie/podcast recommendation? *Bluey*.
Soundtrack to your life? For the last six months—Morrisey's "Every day is like Sunday".
How has 2020 changed you? Much happier for having spent more time at home.
Who would play you in a movie, and why? Will Ferrell. It would make the movie funnier.
Word/phrase of the year? Covidiot

Georgina Coghlan SC

How did you celebrate in lockdown? With champagne, of course.
What advice would you offer yourself as a first year law student? It's okay to have some fun.
Most memorable junior brief? Any case with Dr David Neal SC.
Most frequently cited case? Not sure.
Zoom, Webex or Microsoft Teams? Zoom.
New hobbies or skills in lockdown? F45.
Book/TV/movie/podcast recommendation? *Gossip Girl*.
Soundtrack to your life? *Screamer*, Third Eye Blind (at the moment).
How has 2020 changed you? I'm not sure yet.
Who would play you in a movie, and why? Claudia Karvan. I apparently once looked a bit like her.
Word/phrase of the year? Donut day.

Liz Ruddle SC

How did you celebrate in lockdown? Champagne and hugs with my family.
What advice would you offer yourself as a first year law student? You can't cram a semester worth of learning into a weekend, even if someone did give you their notes.
Most memorable junior brief? Being asked whether it was "should" or "could" by Justice Hayne and celebrating with many drinks afterwards when it appeared I guessed correctly.
Most frequently cited case? *Baini v R*. I was in it and survived so I cite it even when totally unnecessary.
Zoom, Webex or Microsoft Teams? Zoom Zoom, baby!
New hobbies or skills in lockdown? Grade 4 maths. I also tried bottle cutting but just ended up with a rather violent looking recycle bin.
Book/TV/movie/podcast recommendation? *Speedcubers* on Netflix. I think we all need a little kindness right now.
Soundtrack to your life? Industrial and punk music, which might explain my hearing.
How has 2020 changed you? I own slippers now.
Who would play you in a movie, and why? Someone with curly hair because it wouldn't be believable with a blow dry.
Word/phrase of the year? - Quarantini.

Ben Ihle SC

How did you celebrate in lockdown? With my wife and kids, in 'comfy' pants and footwear.
What advice would you offer yourself as a first year law student? Read the case, not just the textbook.
Most memorable junior brief? Anything I did with Ruskin. Always interesting. Always learning. Often laughing.
Most frequently cited case? By courts—*Slaveski v State of Victoria*. By me at social functions, see answer to 3, above.
Zoom, Webex or Microsoft Teams? Zoom. All the way.
New hobbies or skills in lockdown? I've become a virtuoso in dressing for business on the top, comfort down below.
Book/TV/movie/podcast recommendation? I binged on *Succession* during lockdown. *McMafia* was also good.
Soundtrack to your life? Generally, some 90s hip hop. If it has to be a song, it would be "Relatively Easy" by Jason Isbell. It's a song that always gives me a healthy dose of perspective.
How has 2020 changed you? See answer to 6.
Who would play you in a movie, and why? Merryl. So versatile. Otherwise, I'm told Jason Bateman might be a decent suggestion.
Word/phrase of the year? 2020: Getting through it.

Boilerplate
A BIT ABOUT WORDS

Mentors and mentees

JULIAN BURNSIDE

In a regular communication to barristers, on 20 August 2020, the CEO of the Victorian Bar wrote to us announcing the "New VicBar Mentoring Program—Opportunities to participate".

The communication included the following paragraph:

> Mentoring has always been a vital part of the Bar—in both formal reader/mentor relationships, and informal arrangements that members have pursued themselves. Mentoring relationships bring benefits to both mentors and mentees—exchanging knowledge and know-how, expanding networks, and sharing skills and experience. Building strong mentoring relationships is part of VicBar's commitment to support, connect and develop the next generation of leaders.

It was a reminder of the importance that those of us with experience should share it with those who have less experience. But in a very different way it made me feel the weight of my years at the Bar.

Odysseus (Ulysses) the King of Ithaca, went off to fight the Trojan wars. On his way back to Ithaca, he was shipwrecked, and spent years on an island as the captive of Calypso. He had left his son, Telemachus, to be educated and guided by an Ithacan nobleman, Mentor. During Ulysses' absence, Mentor was sometimes used as a false identity by the Goddess Athena, daughter of Zeus. Because of his role, Mentor's name has become synonymous with guidance and instruction.

Although I cannot claim close acquaintance with Homer's Odyssey, I do have some familiarity with the English language and some of its quixotic ways. The OED gives this definition of *mentor*:

> Mentor: With initial capital: The name of the Ithacan noble whose disguise the goddess Athene assumed in order to act as the guide and adviser of the young Telemachus; allusively, one who fulfils the office which the supposed Mentor fulfilled towards Telemachus.
>
> Hence, as common noun: An experienced and trusted counsellor.

Conspicuously, the OED does not include an entry for *mentee*. The Bar's CEO is probably shocked to learn this. All other major dictionaries of English have definitions of *mentor* which refer to the role of Mentor in relation to Telemachus, but they do *not* have an entry for *mentee*. But *mentee* is certainly a word in English today (see, for example, the online editions of the Merriam-Webster dictionary and the Cambridge English Dictionary. The worldwide web is a good, if undisciplined, place: you can find almost any word you want online). Apart from online dictionaries having definitions of *mentee*, the word also appears in various university websites and in Wikipedia. Wikipedia, to its credit, gives a little history:

> The roots of the practice are lost in antiquity. The word itself was inspired by the character of Mentor in Homer's Odyssey. Though the actual Mentor in the story is a somewhat ineffective old man, the goddess Athena takes on his appearance in order to guide young Telemachus in his time of difficulty.

Putting aside its dismissive assessment of Mentor, Wikipedia is quite close to the OED definition But it includes references to *mentees*.

Wiktionary, a dictionary offshoot of Wikipedia, defines mentee this way:

> Back-formation from mentor. Although mentor comes from Ancient Greek Μέντωρ (Méntōr), the name of a mythological figure..., it was reanalyzed as terminating in the Latinate suffix -tor ("doer"), leading to a form using the corresponding suffix -ee ("one who has an action done upon them")...

> "It grates to see a word toyed with in ways that ignore the fundamentals of our language."

So, how do we get from *mentor* to *mentee*, in a way which seems natural enough that *mentee* has become a recognised word? It all goes back to Anglo-French and we lawyers bear a large part of the responsibility. French had a significant influence on English after 1066. In Anglo-French, many past participles ending with an é (e acute) were adopted into English as ending with *ee* and were treated as nouns. So, for example, *apelé* became *appellee*; *abandonné* became *abandonee; nominé* became *nominee*. By small degrees, nouns ending *-ee* came to mean the recipient or object of the function implied by the corresponding word which typically ended *-er* or *-or*. By a process of borrowing which began with our adaptations of French words (borrowing words from other languages is a process at which English has shown itself very adept) we invented *payee* (from *payer*), *lessee* (from *lessor*), *abandonnee, experimentee, legatee* and so on. Although it is almost always the object of an action who gets the *-ee* suffix, it is not always so: for example, *absentee*. I am not aware of other equivalent creations.

It was only a matter of time before *mentor* generated *mentee*. I will confess that it grates for me. It troubles me to make that confession, because I like to think that I support the development of our language. But *Mentor* has been used with its current meaning since about 1750, and usually with a capital M, so it would be understood as a classical reference, but *mentee* is very recent. It grates to see a word toyed with in ways that ignore the fundamentals of our language.

However recent mentee seems in contemporary English, in 1958 it appeared in an American text: *Educating Youth for Economic Competence*...[1], volume 15:

> The *mentee* **occasionally** teaches the class, regularly confers with students, conducts optional special study sessions, and relieves the professor of most clerical classroom functions...

To be candid, I was astonished to learn that the Americans had used *mentee* for such a long time. Whether its use in an American text in 1958 adds anything at all, may depend on your approach to English.

I fear that my approach to English was shaped by the musical (and film) *My Fair Lady*, which was written by Lerner & Lowe in 1956. It was based on George Bernard Shaw's Pygmalion (1913). Early in the piece Henry Higgins sings:

> ...Oh, why can't the English learn to
> set a good example to people whose
> English is painful to your ears?
> The Scotch and the Irish leave you
> close to tears.
> There even are places where English
> completely disappears.
> Well, in America, they haven't used it
> for years!...

Henry Higgins in Pygmalion was based on philologist Henry Sweet who was born in 1845 and died in 1912: just a year before Shaw wrote Pygmalion. In My Fair Lady, Henry Higgins does not have the sharp personality which Henry Sweet is reputed to have had.

All grumbles aside, *mentee* is a useful word – it might not pass Henry Sweet's test or even Henry Higgins' test, but it has no obvious substitute or synonym. Perhaps we should celebrate it, as a modification (using a 14th century device) of a word borrowed from the ancient Greek events of about 1100 BC.

I suppose we should embrace it as a new enrichment of our language.

In any event, we might as well get used to it.

PHOTO COURTESY OF BIGSTOCK ID 109625918 – ALEXANDRE17

LANGUAGE MATTERS

A triumph for forensic linguistics?

Peter Gray

Many of us will remember the two-part ABC *Australian Story* program about Di McDonald, a victim of horrendous stalking by her ex-partner Max Gardiner. Gardiner pleaded guilty to some charges and was imprisoned. Among other things, he was alleged to have put up posters containing scandalous imputations about McDonald, in public places that she frequented.

The ABC presented the case as having been solved by retired FBI forensic linguist Jim Fitzgerald, the man who was also credited with solving the case of the Unabomber. Fitzgerald made a comparison of the posters with some love letters and court documents known to have been written by Gardiner. Fitzgerald concluded that some features of the language used in both the posters and the known documents made the language *extremely distinctive*. This has led to disquiet among Australian forensic linguists.

There is no doubt that a linguist with the right expertise can engage in authorship comparison. The process involves comparing one or more questioned documents with samples whose authorship is known. Identification of similarities in lexical, morphological, syntactic, register and stylistic features is very important. The outcome might depend on the aim of the exercise.

For instance, it might be possible to express a positive view that the two sets of documents were not written by the same person. In England, forensic linguist Malcolm Coulthard has been able to do this more than once. One example is the case of a 15-year-old girl called Danielle, who disappeared, along with her mobile phone. In 2002, her favourite uncle (by whom Danielle turned out to have been pregnant) was convicted of murdering her[1]. As part of the investigation, the police were able to get from Danielle's telephone service provider the last three days of her text messages, a corpus of 70 messages. The last message was to her uncle. Coulthard identified a number of linguistic choices in the last message that were not present at all, or were rare, in the rest of the corpus. He was able to express the opinion that it was *fairly likely* that Danielle had not written the last message.

It is much harder to express a view that the same person, who is known to have written the comparison sample, did write the questioned document or documents. Identifying the similar features of the two sets of documents does not take the expert all the way to this conclusion. This is because the similar features might be present in the writing of people other than the putative author. Demonstrating the uniqueness of the features to one author is very difficult.

Sometimes, using language corpora can assist. Various corpora are available on the internet. They are collections of written language, or transcriptions of spoken language, gathered to assist researchers. A corpus can be general, or specific. For instance, there are corpora of Australian English compiled by various Australian universities, accessible online[2]. A corpus can be very useful in comparing the frequency with which words appear, and in searching for collocated words or phrases. In some circumstances, the whole internet can be used as a corpus of language.

Where a questioned document is expressed in the language of a political extremist, it is necessary to be careful. Extremist subcultures typically recycle words and phrases in the documents they produce, so that it becomes difficult to attribute a document to a particular member of the subculture. The writings of members of extremist subcultures might not be represented in corpora.

In the Unabomber case, Fitzgerald expressed a positive opinion that the author of the Unabomber's manifesto was written by the same person who had written a number of other documents, of which the suspect was the known author. The suspect eventually pleaded guilty and was imprisoned. Despite the guilty plea, linguists have questioned the validity of the authorship comparison in that case.

> "The expertise is available in Melbourne. There is no need to look overseas."

As far as I am aware, Fitzgerald's report in the McDonald/Gardiner case has not been published. We cannot know the full reasons for his conclusion that the features he compared showed the language of the documents to be "extremely distinctive". Features that Fitzgerald mentions in the program include inconsistent use of apostrophes for possessives and plurals, and single-sentence paragraphs indented but *not in any real steady pattern*. Nothing about either of these features suggests they point to one author. Many people have trouble identifying the purpose of apostrophes. Journalists are trained to write in one-sentence, indented paragraphs. It is not clear what the absence of a *real steady pattern* means, but it seems easy for any author to indent inconsistently. The program hints at other features, but we cannot know what they are, without access to the original report.

In the program, a police officer suggests that authorship comparison had not been done in Australia, particularly not in Victoria, before. This is untrue. There are Australian linguists who have the necessary skills to do this sort of analysis and to do it thoroughly professionally. I have been approached by a police officer and asked to do a similar job. I declined on the ground that I did not have the level of expertise required. I recommended a linguist capable of performing authorship comparison. He in turn passed the case to another linguist who undertook the task.

The pleas of guilty in both the Unabomber case and the McDonald/Gardiner case should not overshadow the need for proper, professional analysis, if authorship comparison evidence is required. The harm done by a simplistic comparison of similar features, without proper attention to the question of uniqueness is obvious. The expertise is available in Melbourne. There is no need to look overseas. A good starting point to find local expertise is the recently established Research Hub for Language in Forensic Evidence at the University of Melbourne[3].

The Hon Peter R A Gray AM was a judge of the Federal Court of Australia for 29 years. During part of that time, he was also Aboriginal Land Commissioner, hearing land rights claims in the Northern Territory. He became interested in issues of cross-cultural communication in the legal system. That interest led him to a biennial conference of the International Association of Forensic linguists in 2003 and to membership of that association since then. Since his retirement in 2013, Peter has been trying to teach law students about language issues and to obtain a qualification in linguistics. He currently co-teaches a subject called Language, Communication and the Legal Process at Monash University Law School. He also co-teaches in the Legal Writing course in the law school at Swinburne University, where he is an Adjunct Professor. Recently he completed a Master of Applied Linguistics at the University of New England.

1 Malcolm Coulthard and Alison Johnson, *An Introduction to Forensic Linguistics: Language in Evidence* (2007), Routledge, at pp 201-203.

2 Ten separate corpora are available for search (with appropriate permission) at ausnc.org.au/.

3 arts.unimelb.edu.au/school-of-languages-and-linguistics/our-research/research-centres-hubs-and-units/research-hub-for-language-in-forensic-evidence.

BOILERPLATE

BOOK REVIEW

Dissenting Opinions

by Michael Sexton

JUDGE DAMIAN MURPHY

Public intellectuals of a contrarian bent within the legal profession are relatively rare in this country. What makes this collection of opinion pieces and book reviews unique is that the author has for most of the period covered held office as the Solicitor General of New South Wales.

Michael Sexton SC was educated at the Melbourne Law School and the University of Virginia and commenced his legal career as an advisor within the Whitlam government. Out of that experience emerged well-received works on the Whitlam government, Australian involvement in the Vietnam war, and the legal profession. His professional career then moved to practice in NSW in defamation and public law as well as directorships of government instrumentalities. For approximately the last 20 years, he has been the second law officer of NSW. All the while during his career, he has contributed op-ed pieces to the mastheads of both the Fairfax and News Ltd media empires and *The Spectator*.

These contributions, which the author describes as being "in the main a departure from what might be characterised as the conventional wisdom, that is, the views and values of those who preside over most public and private institutions in Australia, including much of the media", have been compiled into a volume structured around recurring themes of public discourse in this country. His aim is that there will be "much greater scope in the immediate future for the full-blooded public debate of social, economic and political issues in Australia".

And the author does not hold back. On "Free Speech or Hate Speech" he is in his element in opposition to Section 18C of the *Racial Discrimination Act* (Cth) and is critical of the Victorian anti-vilification laws and the Tasmanian Anti-Discrimination Commissioner in seeking to investigate the Catholic Church for opposing gay marriage. He opposes the use of the Human Rights Commission and the Federal Court to stifle public debate: "injured feelings may sometimes be the price of freedom of speech".

The world of political correctness gets a going over. Although he held a spot on the board of the Sydney Writers' Festival, he is critical of the lack of contrary opinions among the presenters and the problem of "getting any response from the smug holders of the conventional wisdom [such that one] can only hope that eventually there will be a reaction against the current claustrophobic climate of opinion". That climate, according to this opinion leader, is that key institutions in Australia are dominated by "humourless preachers of PC conformity". He mentions same-sex marriage, climate change, depictions that Australia is essentially racist, support for a bill of rights, scepticism of police and law enforcement, indifference to border security, and hostility to Israel. What a bill of fare! Yet on each of them he prosecutes a considered case that there are alternative views that are not tolerated: "It is as if those contrary views represent a threat to their role of moral guardians whereas they occupy most of the commanding heights of Australian society and are unfortunately not all threatened. One thing they have done, however, is to lower the tone of public debate by virulent attacks on their opponents that reflect the deep intensity of their sanctimonious opinions." Strong stuff! It says something for Sexton's standing that he can hold and publish these opinions while still holding his day job as NSW SG.

Lawyers who are proponents of a bill of rights are the subject of a dissenting critique in "The Rule of Law or the Rule of Lawyers". Sexton sees a bill of rights as undemocratically shifting power from the legislature to the unelected judiciary. He is critical of both the Victorian and ACT charters of rights and publicly opposed a Queensland proposal.

On his account, disputes over the "compromised" appointment of judges to the US Supreme Court form the basis of his admonition that bills of rights will similarly politicise our High Court. In his view, the judiciary, even the highest courts in the UK and the US, has too much say in politics.

In a section headed "Australian Politics", the author weighs in on the issue of the growth of government, suggesting that the ability of government to confine its functions or to limit its expenditures is severely constrained by the expectations of the Australian electorate. In some prophetic comments he refers to the widening gap between committed expenditure and potential revenues and the problem of addressing this in an unstable political and financial environment, particularly where there has been a long period of economic growth. The issue is also raised more severely in other Western democracies. He concludes: "In Australia, however, the combination of governments struggling to control their finances and an electorate growing steadily more cynical and self-interested may eventually lead to much more difficult times in the year ahead." And this was written before COVID!

This volume also includes a number of book reviews that form the basis of reflections on current political issues and prime ministers including Menzies, Turnbull, Fraser, McMahon, Whitlam and Keating. Generally, Sexton is not backward in providing advice to the Liberal Party and is no fan of the Greens.

Although these pieces have all been previously published and directed to a lay audience, lawyers interested in a bracing antidote to the prevailing orthodoxy on a wide range of current and recurring public issues from a deeply thoughtful author will find plenty of food for thought in this volume. Michael Sexton may even change your views.

Dissenting Opinions
by Michael Sexton
Connor Court Publishing, 2020
Paperback, 320 pages, RRP $39.95

A Classic that improves with age

MATTHEW HARVEY

"A ship is the most living of inanimate things".[1] A ship can be arrested. A ship can be a defendant to a proceeding. As curious as they seem, these propositions sit at the heart of admiralty law.

The processes leading to the arrest of a ship are some of the most exciting an admiralty lawyer will experience. There are the confidential discussions with the Admiralty Marshal (who will effect the arrest). There's the preparation of the arrest warrant and supporting documents. There's the wait for the ship to arrive at port—one can now watch this in real time on ship-finder sites on the web. And, finally, there's the news that the marshal has arrested the ship.

The leading text on admiralty law in Australia is Dr Damian Cremean's *Admiralty Jurisdiction,* in its fifth edition this year. Dr Cremean, a member of our Bar, was a researcher for the Law Reform Commission's Report No. 33, entitled *Civil Admiralty Jurisdiction.* This report led to the enactment of the *Admiralty Act 1988* (Cth), a momentous step in this country's development of admiralty law.

Previous editions of this book have included a systematic review of admiralty law in other jurisdictions. Dr Cremean has expanded the review in the latest edition, so it now includes Australia, New Zealand, Singapore, the United Kingdom, Hong Kong, Malaysia, South Africa, Canada and India. This is of interest to Australian lawyers, particularly when advancing a submission that the law of our country should work harmoniously with common law nations.

This edition is divided into five chapters. The first chapter covers introductory matters: the historical development of the admiralty jurisdiction in England, Australia and other jurisdictions; a jurisdictional overview of various common law jurisdictions; and a brief but interesting examination of constitutional issues in Australia and in Canada.

The second chapter, entitled "Courts and Jurisdiction", includes an introductory examination of the action in rem, that is, an action—in most circumstances—against a ship. It also considers the fascinating and by no means completely settled question of what is a "ship".

The third chapter considers the two general types of admiralty claims: proprietary maritime claims (for example, disputes as to possession, title, co-ownership) and general maritime claims. Within this second type of claim, we find claims involving loss of life, loss of cargo, agreements for the hire of ships, salvage, towage, pilotage, port and harbour dues, crew's wages, and many more.

The fourth chapter, entitled "Practice and Procedure", delves more deeply into actions in rem. These are to be contrasted with actions in personam, with which we are very familiar in common law jurisdictions.

The final chapter deals with procedural rules. Here, matters such as service, appearance, caveats against arrest, caveats against release, bail bonds, and valuation and sale are considered.

For those starting out in admiralty law, this is a must-have, foundational text. For those who have practised in the area for some time, there is plenty to discover about how the law operates in other common law jurisdictions.

Dr Cremean is to be congratulated on this excellent new edition of his classic work.

Admiralty Jurisdiction (5th ed)
by Dr Damien Cremean,
The Federation Press, 2020
RRP $265

1 O.W. Holmes, *The Common Law* (MacMillan & Co, London, 1882) page 26.

BOILERPLATE

The Personal History of William Buckley: Murrangurk among the First People, by Robert Larkins

I J Hardingham

IMAGE COURTESY OF THE NLA

Robert Larkins, a member of the Victorian Bar, has written a lucid, entertaining and well-researched history of the life and times of William Buckley. The previous biography of William Buckley was written by James Bonwick over 150 years ago, with the title of *The Wild White Man and his Port Phillip Black Friends*, or at least that was the case until a few months ago when three separate biographies of Buckley were published in quick succession. I enjoyed Larkins's account. He shows, in his writing, great respect for the First People and a sensitivity to their plight in the face of forceable European settlement and displacement. Larkins' book is written in an easy to read style and incorporates a number of interesting historical asides and anecdotes.

William Buckley was born in 1780 in Cheshire, England. He became an apprentice bricklayer but cut short his apprenticeship to join the army. While on leave, Buckley participated in the theft of several bolts of cloth. Following his arrest, he was put on trial before Baron Hotham at the Lewes Assizes, found guilty and sentenced to death by hanging. This was in August 1802. Ultimately, the death sentence was commuted and Buckley's sentence became one of "transportation beyond the seas for the term of [his] natural life". Buckley was incarcerated in a hulk moored on the Thames pending transportation.

Meanwhile, fear of potential French settlement in the Port Phillip area caused New South Wales Governor King to request the establishment of a British settlement there. In December 1802 Lord Hobart sanctioned the proposed settlement.

In 1803 King George III appointed David Collins as Lieutenant Governor of the proposed colony at Port Phillip. William Buckley was chosen to be part of the first fleet to Port Phillip, probably because he was strong—he was over six feet five inches tall—had building skills and was a non-violent offender. The fleet, consisting of two ships with over six hundred people including crew, convicts, and settlers, took six months to complete the voyage to Port Phillip via Rio de Janeiro, Cape Town, the Indian Ocean and Bass Strait.

The settlement was established at Sullivan Bay near Sorrento, close to the Heads so that any French incursion would be easily observed. It was a disaster from the outset—there was a lack of fresh water and fresh food. Nothing would grow except, prolifically, agapanthus the bulbs of which were acquired in Cape Town. Discipline started to break down and there was a fear that, if the First People mounted a full-on attack, the settlers would be outnumbered and out fought.

In these circumstances, Collins asked Governor King for permission to abandon the settlement. King approved and ordered relocation to the Derwent in Van Diemen's Land. The Port Phillip settlement lasted less than six months. Collins left for the Derwent area in early 1804 and subsequently was instrumental in establishing Hobart Town.

The Personal History of William Buckley: Murrangurk among the First People
Robert Larkins
Arcadia 2020 XV + 248pp RRP $44.00

Meanwhile, Buckley decided that resettlement as a convict for life in Van Diemen's Land was not for him. He made his escape from the settlement just after Christmas 1803. Instead of heading directly for Port Jackson, he travelled around the bay in the hope that he could lure a rescue boat across to the Point Lonsdale area, seize the boat and make his way north to Port Jackson. Buckley could not put his plan into effect and so he found himself in desperate straits, lacking proper clothing and sustenance.

Near to death, Buckley was saved by some people from the Wallarranga clan which was part of the Wathawurrung community, one of five communities making up the Kulin Nation. Buckley was taken to the clan's village situated on Lake Connewarre on the Barwon River. The clan believed that Buckley was a deceased warrior reincarnated. He was assigned that deceased warrior, Murrangurk's, name and adopted by the family of his brother, Nullaboin.

Buckley lived happily with the clan for the next 31 years, learning its language and customs. It seems that he made every effort to fit in with the way of life of the Wallarranga and was careful not to give offence in any way.

In many ways, Buckley's life with the Wallarranga was better than any life he could have expected in England. He enjoyed a balanced and generous diet consisting of kangaroo, fish (salt and fresh water), eel, tubers and other vegetation. The clan worked shorter hours than Buckley would have been used to and had no class or caste system. Until a later time, the clan was not exposed to European disease. Buckley mediated inter-clan disputes that may otherwise have led to loss of life. He never had to mediate land disputes because it was unheard of that one clan would attempt to seize another clan's land.

"In many ways, Buckley's life with the Wallarranga was better than any life he could have expected in England. He enjoyed a balanced and generous diet consisting of kangaroo, fish (salt and fresh water), eel, tubers and other vegetation."

Buckley accompanied clan members on expeditions from the village for hunting and pleasure purposes. Later, of course, European disease and settlement would have a catastrophic effect on the Kulin's timeless culture.

Following Nullaboin's death, Buckley struck out from the clan. In 1835 he came across an advance party of the Port Phillip Association, Launceston based backers of John Batman's proposal to establish European settlements at Indented Head (later abandoned) and at the head of the bay on the Yarra River. Buckley was ultimately persuaded to join John Batman's team because of his knowledge of local language and customs.

Meanwhile, John Pascoe Fawkner who, as a child, with his family, had been one of the settlers at Sullivan Bay under Lieutenant Governor Collins, had his own plans to establish a settlement on the Yarra.

Kulin people observing the activities of Batman and Fawkner were divided; some saw advantage in working with the settlers, others thought that the best course was to drive the settlers away by force.

Buckley's knowledge and capacity to negotiate were used to calm matters down and, by placating the opposing factions, to minimise bloodshed.

At this time, John Wedge, the Port Phillip Association's surveyor, arranged a pardon for Buckley from Lieutenant Governor Arthur in Van Diemen's Land.

In 1836 the European settlement on the Yarra River was a lawless shanty town. It was unauthorised under British law. It was unnamed; John Wedge wanted to call it Batmania. Drunkenness, violence and disease were rife as were brutalised ex-convicts from Van Diemen's Land. All of this prompted Governor Bourke to send Captain Lonsdale and 30 soldiers down from Port Jackson. Lonsdale assumed the role of magistrate and appointed Buckley as a constable. Governor Bourke paid a visit. He named the settlement Melbourne after the British Prime Minister, Lord Melbourne, and approved Robert Hoddle's rectangular plan for the town's layout.

Bourke named some significant streets on the plan: Bourke Street, Collins Street, Lonsdale Street and Swanston Street, the latter named after Charles Swanston, banker to the Port Phillip Association. The names of Batman and Fawkner are noticeable by their absence.

Having been hounded and vilified by Fawkner over an extended period, Buckley decided that he would resettle in Van Diemen's Land. He left for Van Diemen's Land on 28 December 1837 and settled in Hobart. He married in 1840 and died in 1856 aged 75, as a result of an accident.

Batman died penniless and noseless (syphilis) aged 38. Fawkner, despite a period of imprisonment, a flogging and his vocation as a "blood house" publican, went on to become a person of considerable influence and a member of the Legislative Council. With wool and gold, Melbourne outgrew its shanty town's image and thrived. The First People of the Kulin Nation were discarded and displaced by one means or another.

I would encourage members of the Bar to read this book which not only gives an account of the life of a most interesting figure in Victorian history and of the hospitality and care afforded him by the Wathawurrung people over 31 years, but also provides insights into the dubious history of early settlement at Port Phillip.

BOILERPLATE

Comfort Food TV during lockdown, for inspiration over summer

NATALIE HICKEY

Recently, the Chief Health Officer for South Australia, Professor Nicola Spurrier, recommended that residents find a safe place for a 'Netflix blitz', as that state entered a short, sharp lockdown. In Victoria, we know exactly what she is talking about.

As we navigated a long winter and spring in lockdown, streaming platforms and free-to-air television kept us going. Television became a form of comfort food, providing consolation or a feeling of well-being.

RuPaul Drag Race UK RuVeal at Manchester Pride 2019.

What shows induced feelings akin to a sugar rush or satiation? At *Bar News* at least, lots of them! Shows nominated by members of the committee were eclectic and disparate, a fair reflection of the composition of our group. Here is a short list to explore (if you haven't already), when relaxing over summer.

For many, lockdown was a family affair, influencing choice and the need to accommodate a variety of tastes. One member had a weekly Family Movie Night which had to satisfy three quite different young adult children. As this person observed, "There have been a lot of weeks this year.". Selections which nevertheless received a thumbs up from those harshest of critics included ***Asterix – Mission Cleopatra*** ("an oldie but a goodie"), ***Moonlight***, ***Chicago***, ***Les Choristes***, ***The Boy who Harnessed the Wind***, ***RBG***, and ***I am Woman***.

One fan of Ryan Murphy, the American screenwriter, director and producer, thanked him for "some gorgeous escapist fantasy"with ***Hollywood*** and ***The Politician***. To provide an idea of the tone of the genre, in *The Politician*, 'Payton Hobart' has dreamed of being elected President of the United States since childhood, and is running for student body president against the popular and athletic 'River Barkley'.

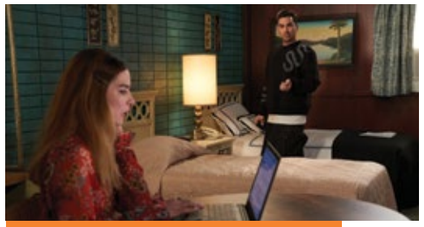
For those more interested in political thrillers, ***The Bureau*** is a French series which revolves around the lives of members of France's foreign intelligence unit, the DGSE (General Directorate of External Security) and their lives working under deep-cover, or when returning to their former lives in an attempt to discover some semblance of normalcy. One person referred to this as, "clever taut and sophisticated, demonstrating why long form television is the art form of the early 21st century … five stars."Watch this show accompanied by a glass of Beaujolais.

Originally called Bron / Broen, The Bridge stars Kim Bodnia and Sofia Helin.

For others, the aim was to keep things light: "I have been watching re-runs (i.e. have already watched all seasons) of ***Ru Paul's Drag Race***. My pandemic brain could not deal with anything remotely serious, nor new."If the show has not yet entered your sphere, the concept is simple. Fourteen contestants compete for the coveted title of America's Next Drag Superstar and a prize package that includes $100,000, a 'sickening supply' of cosmetics and a headlining spot on the Drag Race Tour.

Comfort food TV is many things to many people. For some, it is about gore and horror, such as ***The Terror***. This is a Ridley Scott produced series based on the true events of Arctic exploration on a boat called the *Terror*, complete with other worldly hauntings and "good old-fashioned cannibalism." There is also ***The End of the F*&#ng World***, "full of teen angst and murderous gore initially, but actually a really deft examination of the subtleties of trust and friendship." One must also not forget ***The Bridge***, although "my husband now thinks we should avoid Scandinavia if we want to not be murdered by some very creative serial killers." Given this list, it does not surprise that this committee member has just started watching the latest season of ***Fargo*** set in 1950s Minnesota.

To conclude, one committee member was succinct, "***The Big Lebowski*** for me."



The show that came closest to popular consensus was ***Schitt's Creek***. This Canadian sitcom created by Dan Levy and his father Eugene, follows the trials and tribulations of the formerly wealthy Rose family after they must adjust to life without money in Schitt's Creek, a small town they once purchased as a joke. 'How good is Schitt's Creek?', said one committee member. Another warned that one had to get past the first season, after which things picked up. That led to sharp rebuttal from a third, 'I was hooked from the first minute that I watched. Perhaps I'm an easy audience (I don't think so)'.

The Big Lebowski, directed by Joel and Ethan Coen, starred Jeff Bridges as Jeffrey "The Dude" Lebowski, Steve Buscemi as Donny Kerabatsos and John Goodman as Walter Sobchak in this cult classic about The Dude's journey for compensation for his ruined rug.

BFA / ALAMY STOCK PHOTO

COMEDY CENTRAL / THE HOLLYWOOD ARCHIVE

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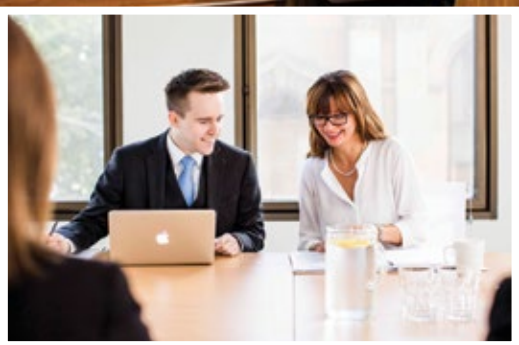

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