ISSUE 169 WINTER 2021

VICTORIAN BAR NEWS

Sexual Harassment: It's still happening

By Rachel Doyle SC

The Annual Bar Dinner is back!

Plus: Vale Peter Heerey AM QC, founder of *Bar News*

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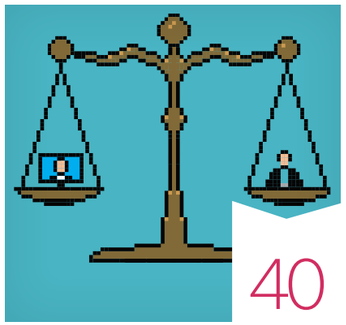

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VICTORIAN BAR NEWS

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Editorial

Seated L-R: Hadi Mazloum, Michael Wise QC, Natalie Hickey, Justin Wheelahan
Standing L-R: Temple Saville, Annette Charak, Campbell Thomson, Carmella Ben-Simon, Tony Horan
Absent: Stephen Warne, Amy Wood, Brad Barr, John Tesarsch, Jesse Rudd, Shanta Martin, Veronica Holt, Denise Bennett, Amanda Utt

Not wasting a moment of our freedoms

NATALIE HICKEY, JUSTIN WHEELAHAN, ANNETTE CHARAK

The new normal of 2021 doesn't feel very normal. Despite or because of this, the determination of Victorian barristers to embrace all that our professional and social community has to offer leaps from the pages of this Winter issue of *Bar News*.

From the get-go this year, we have been inundated with articles and photographs from barristers enthusiastic to document the social gatherings we no longer take for granted. We have celebrated being physically together with unusual intensity. The Criminal Bar came together for a conference in Lorne after a challenging 2020. Family law practitioners engaged in barefoot bowls. Pro bono contributions were awarded. Lives and careers were acknowledged and celebrated. Art formed a focal point once again.

In-person court appearances returned for many, often with instructors appearing virtually or via other hybrid arrangements. We adapted. Hygiene and the efficient administration of justice sometimes sat awkwardly together, becoming matters to negotiate and navigate. Judges and barristers discussed the use of hard copy court books with witnesses. Barristers in some courts were asked to bring their own water bottles—jugs and glasses were no longer available except with the clandestine assistance of fantastic court staff. Seating became a commodity with many seats blanketed in 'police tape' to encourage social distancing.

We recognise the remarkable achievement of the Victorian Bar (and, in particular, the organisers) in hosting almost 600 barristers at the 2021 Bar Dinner. Our photospread reveals a sparkling evening.

We were in denial that we faced yet another lockdown as our publishing deadline loomed. The experience was—as it was for everyone—flattening.

PHOTO COURTESY OF PETER BONGIORNO

Yet the friendship, collegiality and unstinting efforts of our *VBN* committee of volunteers motivated us to bring this issue to fruition.

It does not surprise, in an environment where we cannot assume any swift snap-back to 'life before', that many barristers have written nostalgically of past experiences, or become more inward-focussed and reflective. We have compiled a new section, 'Introspectives', which groups these moving and warm articles. They remind us of the precious, supportive community to which we belong.

The spectrum of content we received, from an article on Peter Vickery QC's part in drafting a new verse for Australia's national anthem, to Graham Robertson's encounters with F.A. Hayek and Lech Wałęsa, reminded us that our common interests in justice can transcend our differences.

Victorian Bar News is also known for its penetrating analysis. In keeping with this, Rachel Doyle SC, fresh from publishing *Power & Consent*, challenges us in 'Sexual harassment: it's still happening'. That the Bar has engaged in numerous surveys and reports over the years does not mean that these issues are now resolved.

Tom Battersby in 'Videolinks and Justice in Victorian Courts' argues that we cannot allow remote hearings to become entrenched without first considering their impact on the quality of our justice system. He asks us to consider how to use available technologies without diminishing what makes our courts human.

Michael Stanton and Paul Smallwood present the case against abolishing de novo criminal appeals: reforms that have been put on hold due to the Covid pandemic, by asking the question if de novo appeals should not be abolished now, should they be abolished at all?

We pay tribute to *Bar News* founder, Peter Heerey AM QC, who died recently. In preparing our tribute, we enjoyed looking through archival copies and seeing aspects of his life, poetry, good humour, civility and achievements recorded within their pages.

'Verbatim' was a regular feature of *Bar News* under Peter Heerey's stewardship. For the uninitiated, almost from this magazine's inception, readers have sent in excerpts of transcript, recording lighter moments of court appearances. In fact, so many contributions were provided by 1988, the Bar Council of the day published a book of best examples. In recent years, 'Verbatim' had largely lapsed, buckling somewhat under the weight of suppression orders and other legislative road-blocks which make it more challenging to publish with impunity. Undeterred, we want to bring back this tradition. The final pages showcase examples past and present for your enjoyment and inspiration.

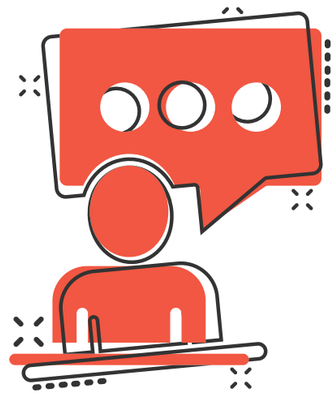
Thanks once again to Guy Shield who has done stellar work in bringing our magazine to life. We also thank Denise Bennett of Bar Office who has provided amazing support behind the scenes for so many years. Denise is the very best of detectives, helping our committee track down authors for our Back of the Lift Section, organising our articles, and making sure that we remain focussed on the task at hand.

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

Circa 1990, Peter Heerey captaining his Latham side to victory (although reportedly surpassed by the Owen Dixon West team in "wine appreciation and other objective standards of general revelry").

Social distancing rules at the Federal Court Building in William Street mean it's standing room only for conferrals.



VERBATIM is BACK!

Letters TO THE Editors

Silbert's article concerning *Pell v The Queen* in (2020) 168 Vic. B.N

Dear Editors,

Gavin Silbert QC's article in issue 168 of the *Bar News* (Summer Edition) leaves, or may leave the reader, with the impression that the alleged victim in Cardinal Pell's case was a person who told the truth and that the High Court decision was not a complete exoneration of the Cardinal.

Indeed, after reading the article, one might feel compassion for the alleged victim rather than compassion for the actual victim, Cardinal Pell.

We ask that you publish this letter in the next issue of the *Bar News* because we feel it is essential that the balance be corrected so that those barristers who have not been following the detail of this unusual case can seriously consider whether or not the rule of law in this state failed the Cardinal. In doing so, we acknowledge Gavin Silbert's right to hold the views he has expressed, but disagree with them in material respects.

Silbert says there were two complainants: but there was only ever one; and he made his complaint after the second alleged victim was dead. That second alleged victim had, in fact, denied ever having been sexually assaulted and one of the disadvantages faced by the Cardinal as a result of the long delay by the complainant in making his historical complaint was that the Cardinal was denied the opportunity of calling the second alleged victim to refute the allegations.

Silbert objects to any journalist who has asserted, since the High Court decision, that the complainant was a liar. In our view, even if he was not a liar, any reasonable mind must conclude that the complainant's evidence was false.

The complainant asserted that the Cardinal carried out the most horrific sexual assaults, including fellatio, on two 13-year-old boys without any grooming and, indeed, without any knowledge of their personal background, whilst in full Church regalia immediately after a well-attended Solemn Mass; and in a room with an open door which was about to be overrun by numerous co-celebrants, altar boys and others at the conclusion of a procession and who were then to commence ferrying numerous sacred objects from the sanctuary near the altar to that room.

These basic facts invite incredulity but, in addition, there were numerous witnesses who attested that such activity by the Cardinal was impossible. Not only was the room the centre of "a hive of activity" at that time, but the Cardinal was required by old Church lore to be accompanied at all times while in full dress at the Cathedral.

The alleged victims were choir boys in a choir controlled by a choir master and a dozen adult choristers; and were strictly required to remain in the formal procession and commence choir practice immediately thereafter. Examination of the time frame for the performance of the actions of those involved confirms the implausibility of the complainant's account.

> “It is a natural inference that this systemic break-down was a consequence of the fetid atmosphere created by media propaganda.”

Of course, the nature of the appeal under section 274 of the *Criminal Procedure Act* 2009 (Vic.) presupposed that the jury had accepted the honesty of the complainant, but that does not detract from the fact that the complainant’s allegations were demonstrably false and that the Cardinal had to be acquitted.

Robert Richter QC, acting for the Cardinal, told the jury that the allegations were impossible whilst Justice Weinberg, whose dissent in the Court of Appeal was upheld by the High Court, considered that the complainant’s evidence in respect of the second occasion of offending was so implausible that, “I would have thought that any prosecutor would be wary of bringing a charge of this gravity against anyone” ([2019] VSCA 186 at [1096]).

Richter’s cross-examination at the committal uncovered that the police did not investigate a crime; rather they investigated a citizen. They canvassed for people to come forward with allegations to support charges. This manner of proceeding is more akin to the conduct of a police state rather than of a liberal democracy.

Silbert says the complainant was “dignified”. The majority in the Court of Appeal found his demeanour convincing. But so what! Dignity and demeanour are woefully fragile foundations for the truth. This is well recognised: see Weinberg J’s discussion at [916]-[924].

Silbert says that the fact that the Cardinal was found guilty by the jury justified the bringing of the charges. This is circular logic. The worst consequence of the breakdown in the normal checks and balances of the legal process is that an innocent person will be found guilty.

Silbert contends that there was a sustained and unrelenting campaign proclaiming the Cardinal’s innocence. This is an inversion of what occurred. From the outset, there was an unrelenting media campaign directed against the Cardinal and his Church which created such an atmosphere of antipathy that many were convinced that he could never get a fair trial. Silbert, for his part, excuses this, implying that the Cardinal, being who he was, and “enjoying” a controversial public reputation, was fair game. In the same *Bar News* in which Silbert’s article appears, there is an excellent article by Andrew Kirkham QC, who represented the Chamberlains in the 1980s. Kirkham draws an analogy between the hostile press in the Chamberlains’ case, which created a pre-trial presumption of guilt and the adverse pre-trial atmosphere created by the media in the Cardinal’s case. That analogy is correctly made.

Those journalists, who were concerned that the Cardinal was being persecuted, rather than prosecuted, were very thin on the ground and constantly derided for their views. In the result, their fears were well grounded and were borne out. Such journalists were the antithesis of the gutter press. The ugly lynch mobs outside the Magistrates’ Court during the committal, and outside the County Court even on the first mention date following the committal, were a plain manifestation of this hatred fomented by certain sections of the media. To see Cardinal Pell having to jostle his way through faces of hatred and shouted taunts as he made his way to the entrance of the County Court for his sentencing hearing, and to hear the rejoicing mob chanting and singing outside the Court, once it was known that Cardinal Pell had been imprisoned, was deeply disturbing. Victoria has not witnessed such conduct even when a serial killer like Dupas was sentenced. A proper investigation of the allegations should inevitably have resulted in the police and the DPP refusing to take them further. But that would have required the courage to withstand the pressure.

Controlling the media is, of course, a fraught problem. Freedom of the media is important, but some journalists abuse it and alas there are always politicians who are too ready to jump on the band wagon. It is for this reason that the other checks and balances of the democratic legal process are so important. Unfortunately, the power of the propaganda was such that it overwhelmed those checks and balances in Victoria.

As noted earlier, Silbert suggests that those who continued to refer to the complainant as a liar constitute a “more egregious example of gutter journalism”. Notwithstanding that there are grounds for believing the complainant did not tell the truth, he has been able to keep his identity secret. This ability to name and besmirch others whilst remaining anonymous is one of the more troubling aspects of modern procedures.

We consider that a further worrying part of this matter is the majority judgment of the Court of Appeal. The majority appear to have inverted the onus and standard of proof. They determined, despite what Weinberg J and the High Court called the “compounding improbabilities” created by numerous witnesses testifying that the occasions described by the complainant could not have occurred, that it was still possible that they did occur. For them, this possibility sustained the Cardinal’s guilt. Yet, for Silbert, their error was apparently no more than grammatical, a mere “solecism”.

The High Court had no difficulty allowing the appeal in a comparatively short and emphatic judgment that was, not only unanimous, but also spoke with one voice of all seven judges.

The Crown asked the High Court to schedule yet a further hearing if the appeal were to be successful, but the High Court would have none of that. It dismissed the Crown’s argument on this score as specious, quashed the convictions and entered verdicts of acquittal on all charges.

As Australians, we can be relieved that the High Court continues to protect us under the rule of law. As Victorians, we must face the reality that the rule of law broke down and failed the Cardinal (albeit that Robert Richter QC and Weinberg J upheld the finest traditions of the Victorian Bar and judiciary).

It is a natural inference that this systemic break-down was a consequence of the fetid atmosphere created by media propaganda. To restore the rule of law in Victoria, we consider that it must be acknowledged that it failed in respect of the Cardinal. Silbert’s article does not acknowledge this.

Unfortunately, this is not the only case where a Catholic priest has been found guilty by a jury where the evidence obviously did not support that finding; *Tyrrell v. R* [2019] VSCA 52 is another shocking example.

In our view, Silbert is wrong to deride the analogy with the Dreyfus Case: Dreyfus was charged, convicted and imprisoned because he was a Jew. It is, unfortunately, now open to conclude that Cardinal Pell was charged, convicted and imprisoned because he was a Catholic.

Since writing the above, we have read the exchange of emails between the author and journalist Mr Gerard Henderson and Gavin Silbert QC which was published by the former on his Media Watch Dog site. On 23 February 2021, Silbert wrote that he had recently finished reading

> *‘The Persecution of George Pell’* by Keith Windschuttle ‘which is as good an analysis as one could hope to find…I must say after reading this I was persuaded that not only was the standard of proof not met, but that Pell was an innocent man.’

This acknowledgement by Silbert is entirely consistent with his reputation as a fair prosecutor and, of course, perfectly in accord with the best traditions of the Victorian Bar.

In that exchange of emails, Mr Henderson says that he, himself, has

> never described [the complainant] as a “liar”. I believe that some individuals have clear “recollections” of events that never happened and I am well aware of the fallibility of memory. You don’t have to regard a complainant as a conscious liar to cast doubt on his or her recollection of events.

We agree. Although we believe that the allegations were demonstrably false, we have no way of knowing whether or not the complainant believed his assertions.

Yours faithfully,

RP Dalton QC
Michael Waugh
JX Smith

A right of reply

The Editors,
Victorian Bar News

The letter from Messrs. R P Dalton QC, Michael Waugh and J X Smith, in my view, misunderstands the criminal law. Any reader of their letter need only study the judgment of the High Court to read a complete response to their assertions.

Apart from one typographical error placing the complainant’s first complaint in 2005 rather than 2015, I unequivocally reject the criticisms made.

I feel that my case note covered the legal issues involved in the case, acknowledged the erroneous majority judgment of the Court of Appeal and concluded that the High Court rectified the miscarriage of justice by the application of conventional and settled law. I also referred to the unfortunate public controversy amongst the Cardinal’s proponents and opponents and related publications fuelling public discord. A reply to this letter would do nothing other than prolong an emotional and polemical dispute. In short, I am happy with my piece and see no point in explaining the meaning of a verdict of “not guilty” to members of the Bar.

Incidentally, I have just finished reading Keith Windshuttle’s *The Persecution of George Pell* which contains a large amount of material not produced at the trial. Having read that book I am persuaded that the Cardinal was an innocent man but that is not a conclusion that one may draw from the judgment of the High Court and to reason, as your correspondents do, that the judgment permits such a conclusion is not, in my view, permissible.

Gavin Silbert QC
Owen Dixon Chambers

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

NEWS AND VIEWS

PRESIDENT'S MESSAGE

Challenges and rewards

CHRISTOPHER BLANDEN

PHOTO COURTESY OF PETER BONGIORNO

This year, the Bar's 180th anniversary, has proved to be interesting, challenging and rewarding, not always in equal measure.

When the current Bar Council took office late last year, there was a significant level of discontent among our members in relation to a number of issues. Chief among them was a feeling that listening to members was no longer popular. The fundamental concept that the Bar is a member organisation seemed to have lost importance. Consultants appeared to have more sway on significant Bar issues than members' voices. A number of our cherished institutions looked to be under threat. The Bar Council's first priority was to listen to members and address some of the areas of greatest concern.

We set about working through the immediate issues. Adoption of the Nous report was revoked and the future responsibility for the course structure was retained by the Readers' Course Committee. Discussions commenced with the Essoign Club to secure its future and by the time you read this, the Bar and the club should have entered into a new long-term lease.

We quickly focused on the need to overcome the organisational and financial impacts of the pandemic while providing our members with meaningful support. We have managed to achieve substantial savings in the Bar's expenditure and were very pleased to announce as a direct product of this a rebate on the current year's member subscriptions and reduced subscriptions for next year.

There have been a number of changes in the organisational structure of the Bar office and we are delighted with the appointment of our new executive director, Amanda Utt.

> "The past year has shown that we can't take for granted that the Bar as we know it will always be here."

As we all know, the return to face-to-face court hearings has proved difficult. Social distancing requirements until recently had particularly impacted on jury trials. Thankfully, and despite the recent circuit breaker interruption, the trend is towards in-person hearings again being the default position. Jury trials are returning.

Court employees and barristers are now, appropriately, considered authorised workers, enabling work from chambers during coronavirus-induced lockdowns and the provision of the ancillary services.

Importantly, it is up to individual members to determine how to comply with their legal obligations when it comes to whether they are able to work at home or otherwise. It is not the Bar's task to tell you which choice to make, rather to facilitate your ability to make that choice. The beauty of the Bar (and presumably the reason many of us joined) is that as barristers we make our own decisions about our legal obligations and run our own practices.

A number of other issues have arisen. The publication of the Szoke report provoked many headlines and shone a spotlight on sexual harassment in the law, with only one of its recommendations directed to the Bar. Pleasingly, under the direction of the Equality & Diversity Committee, the Bar was already in the process of preparing a leadership CPD, that now incorporates the recommendations of the report.

The Royal Commission into the Management of Police Informants produced its findings and recommendations late last year. The Bar has an ongoing role in the implementation of some of the recommendations through its participation in the RCMPI taskforce. This is an exercise not without its challenges, as there are a number of recommendations with which the Bar does not agree.

Recommendation 88 has already seen the Legal Services Commissioner withdraw the Bar's delegation to investigate complaints against barristers as of 30 June 2021—notwithstanding our opposition. Recommendation 86 suggests the introduction of mandatory reporting by lawyers of the suspected misconduct of other lawyers. Both the ABA and the Victorian Bar oppose this as unnecessary and unworkable. There is much to play out in this space.

Among this year's notable achievements was the launch of the Bar's health & wellbeing portal. The brainchild of the Health & Wellbeing Committee, the portal's great value is that it provides information and practical resources to support the physical and mental wellbeing of our members and their families and colleagues.

The outstanding efforts of Victorian barristers in assisting access to justice at all seniority levels and in many different forums were recognised, in part, in the Victorian Bar Pro Bono Awards. Our congratulations to the nominees and winners of this year's awards.

We were delighted that the decision to proceed with this year's Bar dinner proved the correct one (although only just!). The biggest dinner ever held with 573 attendees, it was also one of the most successful, with a fabulous night enjoyed by all. We were able to celebrate the notable achievements of more than 80 of our members. The shared identity and camaraderie of being a member of the Bar was clearly on show.

Finally, the past year has shown that we can't take for granted that the Bar as we know it will always be here. The view that the independent Bar is integral to our society and system of justice is not a view necessarily shared by everyone. It is up to us all to ensure the continuance of a strong independent Bar.

THE 2021 Victorian Bar DINNER

BY JUSTIN WHEELAHAN

ON 21 MAY 2021, THE VICTORIAN BAR REPRISED THE ANNUAL BAR DINNER FOR A FLEETING MOMENT OF LIBERTY AFTER LAST YEAR'S EVENT WAS CANCELLED. SPIRITS WERE HIGH AS WE WERE GREETED ON COLLINS STREET BY VICE-PRESIDENT RÓISÍN ANNESLEY QC AND EXECUTIVE DIRECTOR AMANDA UTT. WE THEN DESCENDED THE GRAND STAIRCASE OF THE SPANISH PIAZZA STYLE FOYER INTO THE STUCCO ROCOCO PURPLE LIT INTERIOR OF THE PLAZA BALLROOM.

The format was a little different this year: a slick professional covers band helped everybody feel relaxed and comfortable, the speeches were short, and the bar served dark ale—but there was no dancing. Victorian Bar President, Christopher Blanden QC welcomed more than fourscore honoured guests. He then skipped over several pages of his prepared speech with "I can't say that", until he got to the part about the venue's COVID restriction requirements.

Chris Blanden explained the venue had restricted 25 people to the dance floor at any given time in order to comply with the gazetted density quotient of one person per four square metres. The venue also required a "dance monitor" to be nominated to enforce the said dancing density quotient. Junior Vice President Helen Rofe QC (as her Honour then was) had (unsurprisingly) declined the President's invitation to take up this role, given she obviously had better things to do. So, there was to be no dancing.

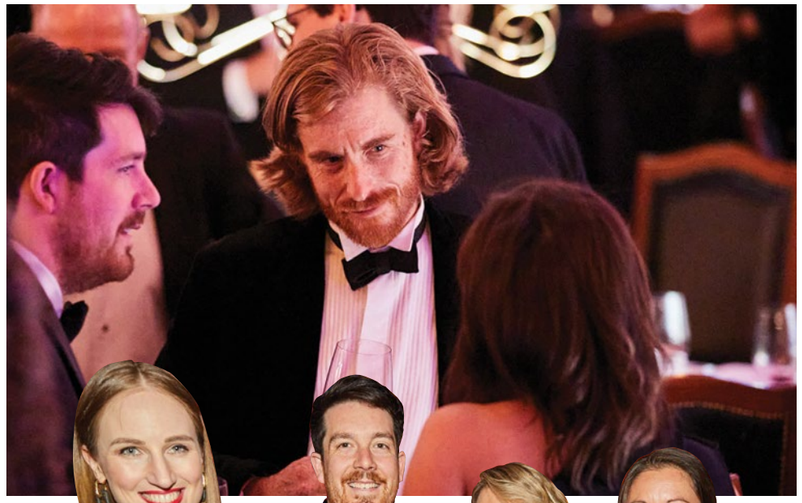
Senator the Hon Amanda Stoker, the Assistant Minister to the Attorney-General, Women, and Industrial Relations, also made a speech. Róisín Annesley gave a ludic introduction to the Hon Justice Simon Steward derived from her extensive research of the Internet. Justice Steward gave a recondite account of the inception of the Victorian Bar, and told the story of young Sir Owen Dixon's "abject failure to persuade" Justice Higgins in an obscure tax case. This gave some solace to all those present, all of whom who had at some point shared the traumatic bond of having failed to persuade the bench. But the most resounding applause came for Justice Steward's account of the Victorian Bar's lightning speed in accepting pro bono jobs advertised on the new portal.

For the record breaking 573 guests who came out, it was a great opportunity for conviviality and to catch up with colleagues who we had not seen in the flesh for over a year. Now many of us feel a bit like Dorothy returning to the black and white of Kansas after the technicolour of Oz: "But it wasn't a dream. It was a place, and you and you and you... and you were there! But you couldn't have been, could you?" Little did we know that within a week, Victoria would be locked down again. It is a testament to the Bar Council, and especially Róisín Annesley, for organising such a great party that ensured the tradition of the Victorian Bar Dinner continued in 2021.

PHOTOS COURTESY OF PETER BONGIORNO

1. Elle Nikou Madalin, Nik Dragojlovic 2. Christopher Blanden QC, the Hon Justice Steward 3. Georgie Costello QC, Phil Cadman 4 Anthony Strahan QC, Kate Beattie, Justin Wheelahan 5. Senator the Hon Amanda Stoker 6. Natalie Campbell, Alex Finemore, Hadi Mazloum, Julia Lucas 7. Gemma Cafarella, Anna Martin, Rebecca McCarthy, Katie Powell

2021 VICTORIAN BAR DINNER



1. Victorian Bar Vice-President Róisín Annesley QC
2. Dr Andrew Hanak QC, Peter Jopling AM QC
3. Caitlin Dwyer, Ben Bromberg, Rose Singleton, Anna Martin
4. Simon Wilson QC, Gerard Meehan
5. Victorian Bar President, Christopher Blanden QC
6. Dara Isaacson, Lara O'Rorke
7. Zoe Anderson, Jesse Rudd, Claire Harris QC
8. The Hon Justice Will Alstergren, the Hon Justice Michelle Quigley

2021 VICTORIAN BAR DINNER

AROUND Town

01. Simon Lee, Bradley Newton 02. Charlotte Duckett, Judge Elizabeth Gaynor, Elizabeth Ruddle SC 03. CBA President David Hallowes SC, CBA Vice-President Sally Flynn QC 04. Gordon Chisholm, Elizabeth Tueno, Amanda Hurst, Samantha Holmes 05. Jim Shaw, Kyriaki Vavoulis 06. Campbell Thomson, John Dickie 07. David Hallowes SC, Neil Hutton 08. Vivienne Jones, Briana Goding, Jennifer McGarvie, Julia Kretzenbacher, Stephanie Wallace 09. Dr Steven Stern, Tom Sawyer, Rohan Barton 10. Judge Gerard Mullaly, Judge Elizabeth Gaynor, David Hallowes SC, Justice Lex Lasry 11. Nick Mutton, Kyle Jeans, Annie Yuan 12. Joanne Poole, Glenn Barr 13. Stewart Bayles, Diana Price

Surviving the pandemic— Lorne hosts the Criminal Bar

CAMPBELL THOMSON

Between 19–21 March 2021, over a hundred members of the Criminal Bar Association gathered for a conference in Lorne after a year without jury trials. The incomes of many had declined by at least 80 per cent. JobKeeper might have paid for chambers but it didn't pay the mortgage or school fees. But when Jim Shaw's band Bridgetown played *Echo Beach* by Martha and the Muffins on Saturday night at the Mantra Hotel, barristers and judges let it all hang out.

The 2020 conference had to be adjourned when the Criminal Bar's annus horribilis began. At the welcome drinks at Movida Lorne on Friday night, WebEx-weary barristers looked forward to possible jury trials in the County and Supreme Courts. They pondered when the Magistrates' Court would open for business. They greeted friends they'd only been seeing on Zoom.

In her opening address on Saturday morning, Justice Lesley Taylor asked "What can Harry Potter teach criminal barristers?" The answers were witty, erudite and engaging, especially for those whose kids would not sleep without hearing about *Harry Potter and the Prisoner of Azkaban*. Sadly, the Veritaserum (Eds: powerful truth serum for the uninitiated) is still unavailable to cross-examiners. We need the Reviving Spell for all Courts.

Professor Gary Edmond then contended that the High Court in *IMM v The Queen* ([2016] HCA 14) was out of step with other common law jurisdictions in deciding that the reliability of evidence was a jury matter. In his view, there must be an accepted knowledge base to justify the validity of a forensic technique. For example, DNA has well justified validity testing, but fingerprint evidence has a high error rate. If you can't say what the error rate is for a particular test, you can't say what weight a jury should give to any result. *Volpe v The Queen* ([2020] VSCA 268), the recent case on shoe print evidence, made the point. Unconscious bias is a problem which jury directions can't alleviate. If fire experts are told insurance coverage rose before a fire, testing found that the experts are more likely to conclude there was arson.

Judges Trish Riddell and Mandy Fox then demonstrated how the *Sentencing Act 1991 (Vic.)* could use some scientific clarity. Printed on double-sided A4, it's bigger than the phone book. You need a magnifying glass to decipher it. Further, the *Act* could be considered a straitjacket for judges. Standard (ersatz mandatory) sentencing applies to serious offences, but not if the offender is under 18, not if the offence is heard summarily, and not if the offence occurred before February 2018. When does an offender qualify for mitigation for assisting the prosecution? What level of impaired mental functioning is required to make general deterrence less relevant? To find the answers you need to loop back and forwards through the statute and its schedules. As was convincingly put, no layperson without a PhD in logic and linguistics could follow it.

After lunch, the panel of Justice Lasry, Judges Gaynor and Mullaly plus CBA Chair David Hallowes SC discussed post-Covid trials. There was clear frustration that 75,000 screaming spectators could occupy the MCG but, at the time, the County Court could only cater for six jury trials. Judge Mullaly explained how this should soon expand with 11 in Melbourne and six on circuit in modified courts. There were frank discussions about the problems, on the basis that this will not be enough to keep us all in business. Several members have given up chambers and are taking on other jobs.

> "Several members have given up chambers and are taking on other jobs."

The tucker at the dinner on Saturday night was okay. The dancing afterwards was a blast. Nothing like jumping up and down with your mates to let off steam. Even the gate crashers thought so!

Sunday morning's session on vicarious trauma with Psychologist Robyn Brady saw many nursing self-inflicted trauma from the night before. Vicarious trauma became a thing when those treating Holocaust victims began suffering the same symptoms as their patients through bearing witness to their suffering. We are empathetic creatures with mirror neurones. Criminal barristers deal with traumatic facts all the time. We need to recognise this and act accordingly. We can suffer from hyperarousal, avoidance behaviour, somatic disturbance, anxiety or adrenalin addiction without realising it. Protective behaviours include having supportive relationships to talk things out, proper holidays so harmful brain chemicals break down, allowing humour to release stress, and using different activities to regenerate. Cultivate gratitude and empathy, maintain mentors, ask colleagues how they're going, don't be afraid to seek help. Mindfulness, good posture and deep breathing all work. Be proud to be in a caring profession.

Gavin Silbert QC and Sally Flynn QC, speaking on miscarriages of justice, was light relief in comparison. The conference wrapped up with Peter Chadwick QC using hypotheticals to illustrate ethical dilemmas and how to solve them.

Well done to the CBA for organising this conference with something to take from every session. The Criminal Bar is vital to criminal justice Good dialogue with the Bench is essential. The high from bopping to Bridgetown takes us only so far.

For the Public Good

A report from the 2021 Victorian Bar Pro Bono Awards Ceremony

CHRISTOPHER LUM AND CHARLIE MORSHEAD

Every two years, the Bar's Pro Bono Awards recognise some of the exceptional pro bono contributions made by Victorian barristers. While much pro bono work done at the Bar goes relatively unseen, the Awards serve as a valuable reminder of the power of this work and its important place in our Bar's culture.

This year's Awards were announced at a ceremony at the Owen Dixon Commonwealth Law Courts building on 5 May 2021, thanks to the generosity of the Family, Federal and High Courts in permitting the first public function to be held in the building since the start of the pandemic. The Victorian Bar Choir (together with DHHS choir 'Acapella Go!') opened proceedings with rousing renditions of *Let Your Little Light Shine, Blackbird* and *Freedom is Coming*, to the delight of attendees who had not heard live music in months.

Justice Joshua Wilson of the Family Court gave an opening speech celebrating the efforts of the various nominees in providing a voice to those who most need it. His Honour noted how those who offered pro bono assistance did so with the pure objective of acting in the public good, rather than the desire for recognition. Following a further welcome from the Chair of the Bar's Pro Bono Committee, Meredith Schilling, the first of four new awards was inaugurated: the Debbie Mortimer SC Award for outstanding pro bono work in a Tribunal or Magistrates' Court. As Justice Mortimer reminded those in attendance:

> These are jurisdictions where members of our Victorian community are most likely to interact with the justice system. Where we find the greatest diversity in backgrounds, cultures, languages, needs and legal problems.

And:

> The dignity and value of pro bono work does not come from the venue, the number of judges present, the level of media coverage, or whether your name ends up in the authorised reports. No, it comes from the quality of the service you provide to a fellow member of your community who needs your skills and experience.

Another notable addition to the Awards was the Uncle Jim Berg Award for outstanding pro bono advice or advocacy that enhances access to justice for First Nations clients (either nationally or in Victoria). The award recognises the significant contribution made by Gunditjmara elder Uncle Jim Berg, described to those present by Ron Merkel QC:

> [I]n the early 1970s Ron Castan, myself and other founders of the Victorian Aboriginal Legal Service appointed a then very much younger Jim as the first field officer of the Service.
>
> Jim, with Ron and my support as the Service's legal advisers, built up a record of achievement in creating access to justice for the Koori people in Victoria and in protecting their cultural heritage.
>
> ...
>
> In Uncle Jim's words he has been driven in everything he has done by the principles taught by his elders. He has written about those principles but from my observations over 50 years, Uncle Jim's basic principle has always been that the ends do not justify the means.

Magistrate Abigail Burchill, a Yorta Yorta/Dja Dja Wurrung woman, spoke powerfully about Uncle Jim's contribution as a mentor to her and other indigenous lawyers and the significance of the Bar now having for the first time an award named for a First Nations person which specifically celebrates work assisting First Nations people.

Among the award presenters, distinguished guests Susan Crennan AC QC and Ron Merkel QC presented existing awards named in their honour, while Renee Sion presented the Daniel Pollak Readers' Award named in honour of her late brother.

The evening's grand prize, the Victorian Bar Pro Bono Trophy (for outstanding individual achievement in pro bono advocacy over a long period) went to Matthew Albert, for his exceptional pro bono contribution over many years, including substantial recent work in the NTCAT and NT Supreme Court assisting residents of remote indigenous communities to secure safe and comfortable housing. The Trophy was presented by 2019 winner Michael Gronow QC, who was thrilled to announce Matthew to be "a very deserving winner". In an inspiring acceptance speech, Mr Albert recalled Lord Darling's ironic observation that "the courts, like the doors of the Ritz Hotel, are open to rich and poor alike", and noted the privilege pro bono work gave him to admit his clients to the Ritz.

All award winners, as well as those nominated and all members of the Victorian Bar who provide pro bono assistance, deserve congratulations for their efforts not only in giving their clients access to justice, but also in assisting our courts and tribunals in the administration of justice. Pro bono work is meaningful in every form it takes.

The winners of the 2021 Pro Bono Awards were:

- Debbie Mortimer SC Award—Joel Tito
- Uncle Jim Berg Award—Jason Gullaci
- Daniel Pollak Readers' Award—Stephanie Brenker
- Ron Castan AM QC Award—Jim Hartley
- Susan Crennan AC QC Award—Scott Morris
- Ron Merkel QC Award—Haydn Carmichael
- Public Interest/Justice Innovation Award—Michelle Zammit
- Equality Award—Leopold Faust
- Pro Bono Team Excellence Award—Áine Magee QC, Dr Sue McNicol AM QC, Elizabeth Ruddle SC, Marko Cvjeticanin, Fiona Ryan, Maria Pilipasidis, Barbara Myers, Fiona Spencer, Andrew Sim, Dr Kylie Weston-Scheuber, Mathew Kenneally and Gayann Walker
- Victorian Bar Pro Bono Trophy—Matthew Albert

Descriptions of the work done by the winners, and a full list of those nominated for the 2021 Awards, are available on the Victorian Bar's website.

Shaun Gladwell and Allan Myers AC QC

Moving Pictures: Shaun Gladwell's portrait of Allan Myers AC QC

SIOBHAN RYAN*

For a medium which is over 120 years old, it is surprising that there are not more moving picture portraits in public collections. Moving pictures engage the senses in ways that traditional media such as painting or still photography do not.

The National Portrait Gallery of Australia has a moving picture portrait of Cate Blanchett by David Rosetsky (Cate Blanchett Portrait 2008).[1] Filmed in a cavernous room at Sydney Theatre Company, Cate engages with a chair, puts on a costume and dances alone. Strange moves but it works because Cate, being one of the world's great screen actors, is a masterful communicator. She can move her body in ways which do not need words.

Reko Rennie's video work (OA_RR 2016), commissioned for the NGA's Indigenous Art Triennial: Defying Empire in 2017, is a self-portrait. In it, Rennie road-trips in a 1973 Rolls-Royce Corniche, which he has daubed in camouflage underlaid with a motif of the Kamilaroi people, whose country covers vast areas of northern New South Wales and southern Queensland. This is his grandmother Julia's country; the place from which she was taken at the age of five to live on missions and work for rations on pastoral stations. The Rolls-Royce is a reference to white wealth. The hot pink Kamilaroi motif breaking through black camouflage is Rennie's call to defiance. On country, he drives around and around in circles—doughnuts, actually—in the sand. The tracks emulate the massive sand paintings traditionally worked by the Kamilaroi. At the NGA, OA_RR 2016 was projected on three walls in a dedicated room with a thumping guitar backing track. The effect was mesmerizing. Nowadays it can be viewed at the Melbourne CBD restaurant, Di Stasio Citta; still mesmerizing—especially after an aperitivo or three.

Shaun Gladwell is another master of the moving picture portrait. His breakout work Storm Sequence (2000) is also a self-portrait. Filmed in slow motion on the edge of a concrete pier, with a storm rising, Gladwell works his skateboard gracefully, grinding and twisting it until the storm rolls in, enveloping him and obliterating the lens. It is the antithesis to the high energy, grunt skateboard videos which populate YouTube. Nine years later, Gladwell was in Afghanistan as Australia's Official War Artist. Double Field, Viewfinder (Tarin Kout 2009) is his official portrait of the Australian soldiers stationed there.

Now, the Peter O'Callaghan QC Gallery has its own video portrait. A portrait of Allan Myers AC QC by Shaun Gladwell. The 13-minute video begins with Gladwell, back to camera, painting a portrait of a man. This portrait dissolves into the living Allan Myers in his garden at Dunkeld. In the final minutes, the filmic view transitions to another painting of Myers by Gladwell. Mt Sturgeon dominates the landscape in both the film and the painting.

Eugene Von Guerard (active in Australia from 1852–1882) and Arthur Streeton (1867–1943) also painted the Grampians, each artist seeing them differently and reflecting that in their techniques.

PHOTOS COURTESY OF PETER BONGIORNO

Anna Schwartz and Professor Glyn Davis AC

Gladwell, who originally trained as a painter, consciously references those differences in the Myers portrait.

As the artist wrote in May 2020:

> This portrait will combine forms to describe a transition from the romantic lighting and detail of Eugene Von Guerard's rendering of Mt Abrupt to the sharper light and abbreviated forms of Arthur Streeton's impressionism. These stylistic shifts will survey and represent the range of artistic styles that have engaged with this location whilst also symbolising and reflecting the multi-faceted, multi-dimensional aspect of the subject. **Shaun Gladwell May 2020**.

The portrait of Allan Myers was unveiled at the Peter O'Callaghan QC Gallery on 12 April 2021, on the day which also marked the 180th anniversary of the founding of the Victorian Bar. Myers' family and friends from the Bar and beyond were in attendance, as well as the artist, Gladwell, and gallerist Anna Schwartz. Professor Glyn Davis, Myers' friend and colleague, did the honours.

*Siobhan Ryan is a member of the Art & Collections Committee

1 David Rosetsky photographed the Hon Alex Chernov AC QC for the Peter O'Callaghan QC Gallery Foundation in 2018.

Professor Davis has kindly allowed *VBN* to reprint his very insightful reflections on the Bar, the sitter and the artist. Omitting the formalities, as they say:

This year the Victorian Bar celebrates 180 years since—on this day in 1841—the first Crown Prosecutor and four barristers were admitted to practice. In the faces around us, on the walls and in the room, Peter [Jopling], you and your committee capture and celebrate the changing nature of legal practice in our state.

These portraits convey changing generations and growing diversity. They acknowledge silences too, such as the fine portrait of William Ah Ket, Victoria's first Australian-Chinese barrister who practised with distinction for decades yet achieved neither silk nor judicial appointment.

Now these walls will include one of the great fixtures of this proud institution, Allan Myers AC QC, whose portrait by the artist Shaun Gladwell joins the collection today.

You will know the many public roles and honours held by Allan Myers, his achievements in the law, business, public life, the first Chancellor of the University of Melbourne since Sir Robert Menzies chosen from outside of the existing ranks of the Council, the distinguished chair of galleries, institutions and foundations.

You will know, too, something of his journey—the boy from the modest circumstances in Dunkeld, who at 18 won a competitive scholarship to Newman College to begin degrees in arts and law at the University where he now presides, a university where he would study, lecture, romance and live. It would remain a constant in his life.

The young lawyer who went on to study at Oxford, to teach in Canada, to return to Australia and join this Victorian Bar in 1975. Who rose to become a senior Queen's Counsel, a successful entrepreneur, a major benefactor of his home town, a name renowned far beyond the many circles in which he moves.

How does any portrait capture such intricacy and range? For a good portrait is not just a plausible likeness—it should convey something of the soul. It must produce intimacy on a flat surface, allow us to glimpse the person it portrays.

Sometimes character forces itself on the viewer. All the paintings of chancellors at Melbourne are three-quarter views, traditional for an institution. One chancellor though, knowing his painting would eventually hang with the others in the Council chamber, insisted on a full-length portrait, twice the size of all who went before. We are left with few doubts about the domineering personality of Pansy Wright.

You can be certain Allan Myers would not follow that path—but how does an essentially private man present himself? For, despite the fame, the necessary public theatre of a courtroom, there is a distance, a reserve, a man who controls carefully what he reveals.

Always that careful penetrating intelligence, watching himself and others, saying much—or nothing. How much hinterland will Allan Myers reveal in any likeness?

In his artistic statement, Shaun Gladwell makes clear he found Allan Myers fascinating and complex. The Museum of Contemporary Art has written that Shaun Gladwell's practice is characterised by a "sophisticated dialogue with histories of representation, in particular art history and film."

For here, perhaps, is the surprise—Allan Myers has chosen as his portrait artist one of the great practitioners of video, famous for works which depict a lone figure absorbed in a natural background. Shaun Gladwell began his career with Storm Sequence, in which the artist pirouettes on a skateboard by Bondi Beach while storm clouds gather, the sea turns angry, and the stationary camera lens is slowly speckled and splashed as the rain begins.

This video portrait is the first ever in the Victorian Bar collection. Like Storm Sequence it begins with a figure in a setting—which is to say, not just a person but a person located in a very specific landscape.

That place is the beautiful garden Allan and Maria have built at the foot of Mt Sturgeon. We then move to a carefully controlled set of images that track toward photograph exactitude.

It is a clever commission because it is illuminating—a portrait expressing dual aspects of Allan Myers.

The first is grounded, in place, in family connections. For the garden in the video is Dunkeld, the town of many Myer generations including his parents, his siblings, his own family. Here is an image of connection, a man reminding himself and us of his community.

We might extend our horizon far beyond that starting point, we might draw new knowledge and connections into our lives, but a man who stands in his garden for a portrait is telling us this context matters to him, as do the people, once and now, who inhabit the space.

Walk around that garden, and there are reminders everywhere of the Myers family and its predecessors, the deep connections into western Victoria and back to Ireland, the long story in which any individual is but a passing moment in a landscape. It is a garden both wild and narrated, intended to endure and grow with the generations.

Inside that beautifully designed space there is superb art. This too influenced Shaun Gladwell. His artist statement speaks of Allan Myers the collector, and the second stage of the video steps toward verisimilitude. Its nod to traditional portraiture is a tribute to the Australian and European masters in the Myers private gallery.

Again, form here signals something about Allan Myers. When you talk with Allan about any of the paintings in his collection, something interesting happens. He can describe detail in the artist and the provenance of the work but then often Allan closes his eyes—as though rotating the image in his mind's eye—to focus on the underlying geometry of the painting, the unexpected cues and invisible lines which draw the image together.

In such moments you sense his uncommon ability to grasp all the hidden connections within a story—a skill which must terrify opposing counsel in the middle of a trial.

And so this video in two parts brings together context and art, a sense of place and people, of images close and distant, of a man firmly grounded in a landscape but also living in his imagination, able to weave disparate experience and knowledge into his sense of journey and self.

But a video offers another, powerful, message about its subject matter. For unlike a two-dimensional painting, a video can be turned off at any time. The images can vanish. It is, like our lives, of the moment, understood to be ephemeral. A video allows this "vastly complex individual", as Shaun called him, to disappear at will. The medium, as much as the content, tells us much about Allan Myers.

It is an honour therefore to unveil this video portrait—Allan Myers by Shaun Gladwell—a great addition to an important collection, a celebration of the Victorian Bar and one of its finest. Long may this video, and these fine portraits, grace the work done in these chambers.

Readers' Digest

TEMPLE SAVILLE, HADI MAZLOUM AND VERONICA HOLT

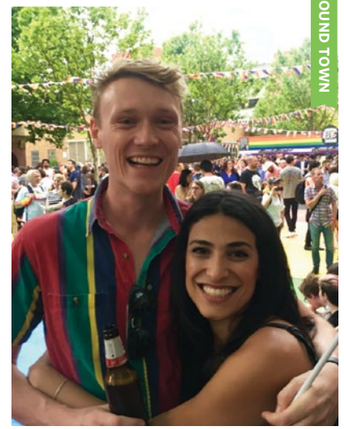
On 6 May, 2021, 47 readers (20 women, 27 men) signed the Roll of Counsel, having completed the two-month readers' course—which had a hybrid format of online/in-person. *Bar News* committee members, Temple, Hadi and Veronica reached out to the readers, asking them to share some information about themselves so that the Bar can get to know our newest members as they embark on an exciting and challenging time ahead.

Nicholas Baum

What are your areas of practice?
Commercial law, public law, and wills and estates.
What are you looking forward to most in joining the Bar?
Having my own ready-made Harry Potter costume for the next fancy dress party I'm invited to (or my nine-week-old's first careers day, whichever comes first).
Why did you decide to become a barrister?
My handwriting is terrible, so I thought it would be more efficient to try and make my point directly to the judge, rather than continuing to waste Post-It Notes.

Nicholas Petrie

How would you describe this readers' course in one word?
New-normal.
What are your areas of practice?
Commercial and public. I come to the Bar having worked as a solicitor in these areas, in Melbourne, Darwin and London.
Highlight of the course?
A three-way tie between Kathleen Foley's injunction session, Emrys Nekvapil's technology session and Tim Goodwin's diversity session. Each gave clear and practical guidance on issues which are likely to be important for readers in their first few months and years at the Bar.



Luke Perilli

Do you feel that you were able to learn well online?
After adjusting to working from home full-time during the Covid-19 pandemic in the12 months prior to commencing the course, I found it easy to adapt to learning online. As I have less than neat penmanship, being able to type notes during online presentations also played to my strengths.
What are your areas of practice?
Common law and personal injuries. I have come to the bar having worked in all areas of personal injuries, most recently asbestos and occupational diseases. I look forward to welcoming briefs from a wide range of areas and can't wait to explore new areas of law!
What are your interests and hobbies (outside of the law)?
I am, at all material times (including before, during and after games) an Essendon Bombers fan! If not at the footy you'll find me on the tennis court, trying to surf or running around with my groodle—Rafa, named after Nadal.

Julia Wang

Were you able to develop friendships/relationships with the course being conducted mostly online?
Yes—we've had various social catch-ups during the course and there may have even been a readers' karaoke night!
What are your interests and hobbies (outside of the law)?
Running, rogaining, singing, making (and eating) sweet treats.
What are you looking forward to most in joining the Bar?
The interesting and challenging work, and the friendships.

Manu Choudhary

Did the course meet your expectations?
The course went beyond my expectations. I thought it was very practical and beneficial. I acquired lifelong skills which has given me a lot of confidence for my practice.
Why did you decide to become a barrister?
It is such a rewarding profession! You are often handling significant issues in people's lives and can make a big difference in a positive way. It is one of the best feelings in the world.
What are your interests and hobbies (outside of the law)?
I enjoy car racing, which I find is an effective way to relieve stress. I participate in amateur events at circuits such as Winton, Phillip Island, Sandown, and Wakefield Park. The adrenalin you experience on track is exhilarating. The harrowing week you have just had will be left behind.

Julia Nikolic

How have you managed to develop your relationship with your mentor?
I have been fortunate to be in chambers with my mentor, Helen Tiplady, during the online components of the bar readers course. This bonus time in chambers has allowed me to ask questions, seek feedback and meet other barristers on the floor and has been an unexpected upside of our course being mainly online.
What are your interests and hobbies (outside of the law)?
I enjoy running and cycling outside as a refreshing change from office based work. I also enjoy spending time with my miniature dachshund—Snickers!
What are you looking forward to most in joining the Bar?
I aim to develop a practice in commercial and public law and I am looking forward to working on a variety of interesting and challenging matters. I am also looking forward to meeting and working with many more of the incredible members of the Victorian Bar.

Kate Lyle

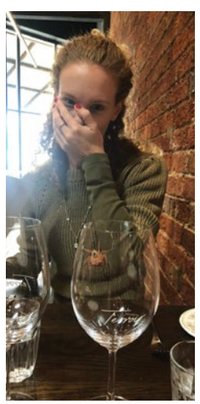
Highlight of the course?
Hands down, Emrys Nekvapil's session on IT. I immediately bought an Adobe subscription.
What are your interests and hobbies (outside of the law)?
love to be by the beach, so on the weekends I always try and get home to Torquay. Despite my best efforts, I'm rubbish at surfing, so you'll find me swimming, hiking or kayaking whenever I can.
What are your areas of practice?
Primarily town planning! Although, having worked in and for state and local government across the past eight years, I am keen to also develop a broader administrative law practice.

Liam McAuliffe

Highlight of the course?
Getting to know other Readers.
How have you managed to develop your relationship with your mentor?
My mentor has also played a key role in my skills development—somewhat terrifyingly, she has watched all my practice moot videos!
What are your areas of practice?
Public and administrative law, quasi-criminal law and criminal law.

Lara O'Rorke

Highlight of the course?
The comedic double act, Justin Graham QC and the Honourable Justice Connock, and their role play in our pleading and affidavit sessions. The readers are looking forward to seeing their preview show at next year's comedy festival.
What are your interests and hobbies (outside of the law)?
I have two, which are inextricably linked—BodyFit gym, and wining and dining at Melbourne's institutions or newest/trendiest offerings (see photo of a recent dining incident post-lockdown).
What are your areas of practice?
All* areas of commercial law (*will take any brief!). I'm looking forward to having a broad and varied practice.



Ella Zauner

Why did you decide to become a barrister?
Because barristers get to do all the fun stuff.
Favourite session in the course not directly related to your intended area of practice?
There were a lot of outstanding sessions, but my favourite might be the 'critical software for a barrister' session with Emyrs Nekvapil—in a time of great uncertainty, it helped instil a (completely false) sense of calm and control by way of setting up template documents and folder structures.
Highlight of the course?
My fellow readers, and the many presenters (judges, silks, junior barristers) who were exceptionally generous with their time and candid in their insights.

Monique Hardinge

Why did you decide to become a barrister?
I really enjoy the process of solving complex problems and have always liked advocacy—my parents say I started arguing as soon as I could talk! Coming to the Bar seemed like a perfect fit.
What are your interests and hobbies (outside of the law)?
I love to travel but while that has been difficult in 2020 and 2021, I have kept busy by cooking and tending to my fruit and vegetable garden.
What are your areas of practice?
Prior to coming to the Bar, I spent two years as a judges' associate and five years in commercial practice in London and Melbourne. I hope to build on this experience and develop a commercial and public law practice at the Bar.

James Penny

What are you looking forward to most in joining the Bar?
The freedom of self-employment, oral advocacy and the collegiality of the Bar.
Why did you decide to become a barrister?
I became a barrister for two main reasons, advocacy and self-employment. My Mum started an IT company with others, which grew from a small few to a large business. Self-employment has been something that I have always known growing up. I came to love advocacy at university, partaking in competitive mooting, where I was university champion two years in a row. I then worked as a solicitor advocate which further entrenched my love of the courtroom.
What are your interests and hobbies (outside of the law)?
Motorcycling, snowboarding, soccer, playing guitar, motorsports, scuba diving.

Nadia Deltondo

If you could describe yourself in three words, what would they be?
Happy, driven and passionate.
What are you looking forward to most in joining the Bar?
Rising to the challenge, learning something new and developing the art of persuasion.
What are your interests and hobbies (outside of the law)?
I enjoy playing classical music on my beautiful piano, mastering the Italian language and chilling out with my "little people" who are my greatest achievements.

WBA FUNCTION AT THE ESSOIGN CLUB TO MARK THE RETIREMENT OF

Justice Pamela Tate

JENNIFER BATROUNEY*

A star-studded function to mark the retirement of Justice Pamela Tate from the Court of Appeal was organised by the Women Barristers' Association. The room was abuzz with joyous anticipation for the celebration of the WBA's retiring patron and her enormous contribution to the legal profession. Chocolates and fresh roses adorned every table and the drinks were flowing.

The speeches were kicked off by the Hon Rachelle Lewitan AM QC—the first woman ever elected to Bar Council and the founding convenor of the WBA. Rachelle described first meeting Pamela on 11 November, 1993, at the inaugural meeting of the WBA in the marriage room of the Mint building. Pamela was pregnant at the time. One of the important concerns for the newly formed organisation was the right to retain rooms at Owen Dixon Chambers for some months after a baby was born. Rachelle said that the message in those days was, "Go ahead, have your baby, good luck. But be prepared to lose your chambers."

Pamela became WBA convenor in 1999. Earlier, in July 1998, the Victorian Bar Council had published a report on the "equality of opportunity for women at the Victorian Bar". It commissioned this report at the request of the WBA from Associate Professor Rosemary Hunter and Helen McKelvie. It concluded that there were indeed barriers to women's careers at the Bar and these would not be overcome merely by the passage of time. Positive steps needed to be taken. Pamela was instrumental in working with the Bar Council to promote women's integration at the Bar. She worked tirelessly, attending meetings with working parties, with clerks, and with the group of people described as "opinion setters" at the Bar, in a series of meetings chaired by an external consultant.

Rachelle said it was clear to Pamela that many women had indeed been marginalised at the Bar. Pamela's stated aim was that women barristers should move from the marginal to the mainstream. She encouraged the Bar Council to adopt procedures to ensure greater representation of women in the courts, and on the Bar Council and its subcommittees.

Jennifer Batrouney

In closing her speech, Rachelle observed that Pamela was the person who initiated the compilation of a directory of women barristers. Subsequently, the WBA made the radical suggestion that the directory be available on the Internet. Such a directory would overcome the informal social connections and boys' club privileges that could give the nod to fellow male barristers rather than to women of equal or superior expertise when it came to making recommendations for appearance work. The Bar Council considered this such a good idea that it decided a directory should be prepared for all barristers. Ultimately, this became the online Vicbar "find a barrister" webpage.

In the second speech of the night, Justice Michelle Quigley referred to her shared experience of taking silk with Pamela in December 2002. It was remarkable for the women individually and collectively. There were six women from Victoria appointed silk, a record at the time for any state in Australia: Frances O'Brien QC, now Justices Melanie Sloss, Michelle Quigley, Elizabeth Hollingworth, Maree Kennedy and junior silk, Pamela Tate.

Michelle referred to Pamela's enormous contribution to jurisprudence and to the profession, in advancing the cause for women in the law, and in advocacy. Michelle added that what she (and many others) most admire and treasure is Pamela's integrity, her quiet, sensible and empathetic counsel as a friend and colleague, her steady leadership and advocacy, and her principled approach to all she does.

The (then) solicitor-general, Kris Walker QC, spoke about Pamela in her capacity as the first woman to be appointed solicitor-general for Victoria. And only the second ever in Australia, after Mary Gaudron.

Kris said that Victoria was very fortunate to have Pamela as solicitor-general. A particular achievement of Pamela's time as solicitor-general was her work on the *Charter of Human Rights and Responsibilities*, as an adviser to the consultative committee, later appearing in *Charter* cases in the courts, and then of course sitting on *Charter* cases following her appointment. The *Charter* will be part of Pamela's legacy, as a central aspect of Victoria's legal system.

Kris noted that, during her seven years as solicitor-general, Pamela appeared regularly before the High Court. Perhaps the most significant High Court case in which she appeared was the constitutional challenge to the Howard government's *Workchoices* legislation. That was a challenge brought by all six states against the Commonwealth. Measured by the numbers of barristers, it was surely one of the largest cases ever heard by the High Court. There were 39 barristers in three rows of Bar tables. Pamela led a team of six barristers.

Kris said that in her time as SG, Pamela was a true mentor for younger women at the Bar. She regularly selected women juniors. Naturally, she worked with the WBA to advance the position of women at the Bar, having arrived herself into an environment that was often hostile to women. Some of Pamela's speeches recall List dinners at men-only clubs, and senior barristers who genuinely thought that women weren't cut out to be barristers. Pamela put paid to that myth simply by practising at the highest levels of the profession.

Pamela didn't just focus on her own practice. She has said that her personal aim was to try to ensure that women barristers moved from the margin to the mainstream. In that regard, she—together with others—has very much succeeded.

Justice Karin Emerton spoke of Pamela's time on the Court of Appeal. She noted that Pamela was a demon for hard work and an opinion leader on the court. In her 10-plus years on the court, she sat on more than 500 appeals, presided over hundreds of hearings and wrote a great many thoughtful and elegant judgments. No less than 97 of those judgments have been reported—a daunting achievement.

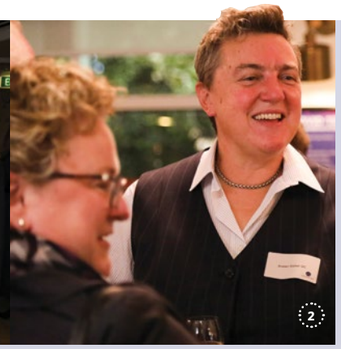
Pamela has made important contributions to jurisprudence in a wide variety of areas—in her preferred areas of constitutional and public law, and specifically human rights, but also in the 'bread and butter' work of a state appellate court: torts and contracts; wills and trusts; tenancies and building disputes; land use and revenue; crime and sentencing. To give an idea of the range of Pamela's contribution, some highlights were identified:

Patient Review Panel v ABY[1]—whether a registered sex offender was entitled to receive IVF treatment.

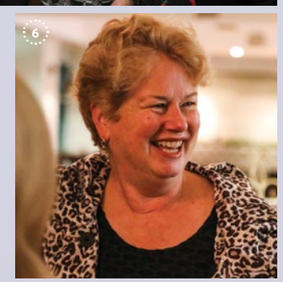
MyEnvironment Inc v VicForests[2]—the legality of regulatory instruments permitting the logging of forests that were habitat for Leadbeater's possums.

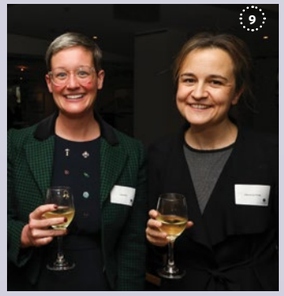
Bare v IBAC[3]—a watershed *Charter* case concerning IBAC's obligation to investigate a complaint of racial assault during a police arrest.

Bauer Media v Wilson (No 2)[4]—the Rebel Wilson defamation case, in which the Court of Appeal made it



01. The Hon Justice Michelle Quigley, Dr Kylie Weston-Scheuber, Astrid Haban-Beer, the Hon Justice Maree Kennedy, Georgina Costello QC 02. The Hon Justice Kristen Walker 03. Chris Belyea, Kylie Evans, the Hon Pamela Tate QC, Elspeth Strong SC 04. Kateena O'Gorman, Julia Wang 05. Kylie Evans, Dr Julie Debeljak, Anna Robertson 06. The Hon Justice Elizabeth Hollingworth 07. Gayann Walker, Alison Umbers, Natalie Blok 08. Louise Martin, Diana Price, Susan Aufgang 09. Jess Moir, Alexandra Folie 10. Alison Umbers, the Hon Justice Melinda Richards, the Hon Pamela Tate QC, Jennifer Batrouney AM QC, Gayann Walker

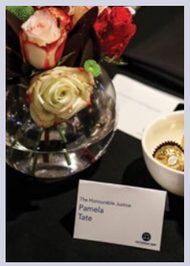




PHOTOS COURTESY OF PETER BONGIORNO


The Hon Justice Tate


The Hon Judge Rachelle Lewitan



onto the pages of the world's premier entertainment sites.

A case identified by Karin as a personal favourite is *Victoria Police Toll Enforcement v Taha,*[5] a decision arising from the threatened imprisonment of an intellectually disabled man for non-payment of fines. Pamela applied the *Charter's* rights to liberty, a fair hearing and equal protection of the law, all while engaging constructively and helpfully with the High Court decision in *Momcilovic.*[6]

Karin said that what is manifest in this impressive body of work is not only Pamela's intellectual rigour, but her intellectual agility, her compassion and eye for injustice and, above all, her deep respect for the rule of law. Karin said that Pamela has treated every appeal as important, every argument as worthy of her considered attention, and every person coming before the court as deserving of courtesy and respect.

Karin noted that, throughout her career, Pamela has often been the only woman in the room. She understands the forces that have made that so and has worked to change them, paving the way for other women. She has always been aware of the need to support and promote women in the law and continued to do so in her time on the Court of Appeal.

For several years, Pamela has organised a mooting competition for women barristers to help them develop their skills as appellate advocates. Pamela was also responsible for initiating the court's gathering of statistics on appearances by women barristers, a practice which has likely made a small difference to the number of women barristers appearing in the Court of Appeal through the simple device of making female under-representation apparent and thereby showing it to be problematic.

Karin finished her comments by noting that Pamela steps up, in both her professional life and in her friendships. She is a thoughtful and generous friend and has been a wise and compassionate judge, who will be greatly missed on the Bench.

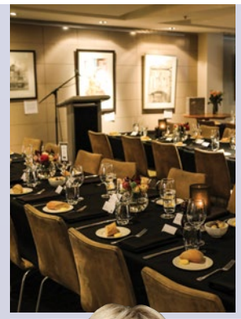
Dr Kylie Weston-Scheuber, the WBA convenor during most of Pamela's time as WBA patron, noted that in her role as patron, Pamela has rounded out a long history with WBA. And far from being a mere figurehead, Pamela has been a 'hands on' patron, actively engaged in promoting the careers of women barristers and encouraging us to step forward and to flourish.

Justice Pamela Tate is, and has always been, a champion of women in the law. Happily, she will continue to contribute to the development of the law through her academic work.

We sincerely thank the Hon Pamela Tate QC for her enormous and enduring contribution and wish her all the best in this new phase of her career.

** Jennifer Batrouney AM QC is convenor of the Women Barristers' Association*

1 *Patient Review Panel v ABY* (2012) 37 VR 634.
2 *MyEnvironment Inc v VicForests* (2013) 42 VR 456.
3 *Bare v IBAC* (2015) 48 VR 129.
4 *Bauer Media v Wilson (No 2)* (2018) 56 VR 674.
5 (2013) 49 VR 1.
6 *Momcilovic v R* (2011) 245 CLR 1.




The Hon Justice Michelle Quigley


The Hon Justice Tate and Jennifer Batrouney

WBA Farewell Dinner speech

PAMELA TATE*

My sincere thanks to the Women Barristers' Association for organising this glittering farewell dinner. It means a great deal to me.

Thanks also to the star-studded cast of speakers we have just heard from: Rachelle Lewitan AM QC; Justice Michelle Quigley; Kristen Walker QC, solicitor-general for Victoria; Justice Karin Emerton; and Kylie Weston-Scheuber of counsel. I feel very touched by what they had to say.

I would like to draw together my remarks tonight under the theme of empathy. First, there is the negative consequence of the lack of it and secondly, there is the positive benefit of having it.

One of the photos I have in my chambers is a photo of the Bench I used to appear before in the High Court when I was solicitor-general for Victoria. During this time, there was a stable core group of judges: Justices Gummow, Hayne, and Dyson Heydon.

As it happens, Dyson Heydon was appointed a judge of the High Court a couple of months before I was appointed solicitor-general. As Michelle mentioned, there was a celebration of Heydon's appointment to the High Court at the same time as we took our bows in Canberra to announce that we had taken silk. Heydon reigned on the bench throughout my entire appointment as solicitor-general.

The photo I mentioned used to hang on the wall directly beside my desk where I would draft submissions for the High Court. I adhered to the fundamental guiding principle for a barrister: 'know your tribunal'. I used to look up at that photo almost every day and test out my submissions on the judges.

Of all the judges on the High Court Bench, Dyson Heydon radiated an air of moral superiority. He appeared not only dedicated and learned in the law but also rather above the stuff of mere mortals. He was someone who commanded deference. His integrity could not be impugned.

Last year, I read the statement by the Hon Susan Kiefel, Chief Justice of the High Court, about the independent investigation that found that six former court staff members who were judges' associates were harassed by Dyson Heydon. When I read about Heydon's shameful sexually predatory behaviour, I felt gutted. The media said it was an open secret. It was not an open secret to me. I had looked up to him on the Bench for seven years with respect for his intellect and moral authority.

I was shocked at the breach of trust to his victims, the legal profession, and the community—a breach of trust born from a lack of empathy. I was appalled that someone with such a shameful lack of empathy could occupy a position at the apex of our system of justice.

It is timely that the courts, parliaments, businesses and other institutions are closely examining their procedures and protocols for dealing with and eliminating sexual harassment. In the case of the Victorian courts, as the Szoke report[1] has revealed, judicial officers must earn the respect that the profession and the public afford to them by reason of their role.

Let me turn to a key benefit of having empathy. Empathy can allow you to draw upon the confidence of others. You can identify with others in the roles you aspire to.

For women barristers, this is so important. It means you can be junior barrister and see yourself in the role of silk. You can be a QC and see yourself as a judge.

In my case, I can be a judge and follow the example of the former patron of WBA, the Hon Marilyn Warren AC QC, and remain committed to the legal profession when I retire from the court.

I have drawn upon the confidence of others.

I recall seeing Rachelle Lewitan speak at the inaugural meeting of WBA. I knew she was the first woman ever to be elected to the Bar Council. I was inspired by the understanding she had about how the Bar operates. It made me feel that women have a place at the Bar.

On taking silk, I learnt from Michelle Quigley and our 'Class of 2002' how to adapt to the new role. Seeing Michelle assume the responsibilities of a silk with such ease—and vitality—made me feel I could fit into the new role.

> "I would never have survived, let alone thrived, in any of these roles if it had not been for other women."

I was fortunate when I faced the demands of being the solicitor-general that I had Kris Walker frequently to assist me in the High Court. This was in the days when, once the judges took their seats, it was only seconds before one knew which way the wind was howling. Kris and I enjoyed the shared experience of something akin to an extreme sport—it was intense and it was fun.

I looked to Karin Emerton's natural authority as a judge to assess how I would feel if I went to the Supreme Court. Karin set an example and assured me that I would love it. She was right.

I would never have survived, let alone thrived, in any of these roles if it had not been for other women. I recognised that, especially for women barristers, it is so important to find your own personal confidence in the achievements of all those women around you and to build confidence in other women.

This lies at the core of an organisation like the WBA. It was the reason I agreed to be patron. It was the reason I worked so closely with Kylie Weston-Scheuber on the Court of Appeal moot and other projects.

I realised quickly that Kylie's dedication and commitment was tireless—perhaps matched only by that of the current convenor, Jennifer Batrouney AM QC. I stand in awe of Jenny's determination and energy.

We are fortunate to have the WBA in Victoria. Long may it provide the environment for women to support and inspire each other to reach our career goals.

I hope always to be part of it.

Finally, may I congratulate Justice Melinda Richards on agreeing to become patron of WBA as I stand down from that role. There is no doubt that Melinda will perform the role with distinction.

** The Hon Pamela Tate QC is a former Judge of the Court of Appeal, Supreme Court of Victoria.*

1 Dr Helen Szoke AO, Review of Sexual Harassment in Victorian Courts and VCAT (March 2021).

CELEBRATING THE LIFE OF

Peter O'Callaghan QC

JEFF GLEESON QC

A remote ritual was never going to suffice for those who wanted to celebrate the life of Peter J. O'Callaghan QC. So, we swallowed our sadness and tucked away our stories until we could share them in person at a splendid dinner to honour Peter's memory. It was held at the Essoign Club on 25 February 2021.

The room was full of friends and colleagues and it was wonderful that Peter's sons and extended family were also able to attend.

Allan Myers AC QC and Susan Crennan AC QC both spoke with warmth, respect and great humour about Peter's life, his career, his humanity and his wisdom.

Although it can be safely assumed that nobody among the crowd quite matched Peter's talent for delivering a beautifully crafted anecdote, many spirited attempts were undertaken on a night of which Peter would have warmly approved and in which he would have dearly wished to participate.

ADDRESS BY ALLAN MYERS AC QC

Your Excellency

Other members of the Bar, ladies and gentlemen.

Everyone here knew Peter O'Callaghan. Each of us knew him differently. Four of Peter's sons are here this evening. They knew Peter as none of us can have known him, and loved him, as did his grandchildren, three of whom are here this evening. Of them I ask, as I do of all of you, to accept my remarks about Peter charitably, as the well-intentioned observations of one who loved him and called him a friend.

First, his portrait. The portrait is an image of Peter as I never knew him. The hands are good. The jowls, and what Villeneuve-Smith called "the pumpkin head", are good. But the expression is stern and sad. The forehead carries a scowl. The eyes are judgmental. That was not Peter, even in old age. Peter loved people. He was first and foremost interested in what all people are most interested in, that is, other people.

Peter grew up in a loving family in a country town before Australians had to cope with affluence. He relished the everyday life of a child and young man in a small community in which one could enjoy the security of being known as the son of good people and in which the values of the society were not contested and were passed confidently from parents to child.

He learnt early who he was and what was right to do. His whole life, as I knew it, was lived according to the values which he learnt as a boy. The values were indisputably Christian and Catholic but also tolerant and egalitarian, as was the community in which he grew up.

Peter's father was a mechanic who conducted his business from the backyard of the family house. Peter worked with his father until Mark O'Brien, a local doctor, persuaded him to undertake, at Taylors College by

correspondence, a course of study for the Matriculation Examination for entry into Melbourne University. Peter did well, entered the law course, lived a while at Newman College and later at the Shakespeare Hotel in North Melbourne, where he worked part time. Then articles with Brendon McGuiness, followed by a short time as a solicitor, and then to the Bar.

The first time I met Peter he was established in silk. I was junior in a matter concerning construction of provisions of the Land Tax Act. The provisions were of meaningless and bewildering complexity. Merralls pronounced the client's case hopeless. Not surprisingly the solicitor passed the brief to an advocate who believed the client could succeed. That was Peter, maybe a day before the hearing. Sundberg, the softly-spoken oracle for the Land Tax Commissioner, had command of every nuance and subtlety. Peter Murphy was the judge. Under O'Callaghan's wily guidance Peter Murphy was soon hostile to Sundberg's client and advocacy. O'Callaghan's client had an unappealable victory.

Soon afterwards, I had a brief as Peter's opponent. The case was honourably compromised at the last moment 'without troubling the judge'. (Remember those days, when the judges had not read the pleadings, which counsel did aloud to the court in opening the matter, and the judge made up his mind on the basis of what was said in court?) Afterwards I was taken by the managing director of my client to lunch at Fanny's. On the way there he said, "That fellow Peter O'Callaghan, who was appearing for the plaintiff, I think I know him." I said, "He is a senior barrister, grew up in Horsham." My client said, "Yes, I remember him—a showy full forward. Mark the ball on his chest and then wave it in the air for about a minute before missing the goal." I said, "I think you must have the wrong man!"

Peter undertook every class of work at the Bar. Licensing, town planning, workers compensation, personal injuries, criminal (petty to murder—and remember he was Forsyth's chosen counsel along with Tony Howard when Forsyth was prosecuted), company, taxation in its many forms, trade practices, administrative and constitutional law, boards of enquiry, royal commissions, circuit, County Court, Supreme Court, High Court. He was amongst the best of his day at the Bar. He could turn his hand to everything. Lay clients and solicitors liked Peter because he always fought hard for his client's cause.

Peter was a great circuiteer, especially at Ballarat and Warrnambool. His regular opponents were McPhee, Villeneuve-Smith, Barry Dove and Frank Dyatt. In Melbourne, lunch was at the Latin in the days before the Essoign. Sunday was for 'paperwork' with a ham sandwich and a bottle of beer. A taste of the life on circuit is captured in a ballad by Villeneuve-Smith entitled *Random Reflections of a Nisi Prius Trial Holden at the Diggings at Ballarat in the Colony of Victoria*. I quote a little that refers to Peter.

Peter served the Bar in many other ways. He was chairman of the building

committee to erect Owen Dixon West. In those days, what would now fall to be done by a swarm of paid staff of the Bar and numerous consultants was mainly undertaken by members of the Bar without remuneration. Countless weeks of Peter's time was spent on Owen Dixon West and as a director of Barristers' Chambers Limited.

Many barristers who found themselves in difficulty turned to Peter for help. I recall, in particular, ICF Spry at the time of the scandals of the Toorak Road Tram and the spray paint on the pavement outside the BHP building at the corner of William and Bourke Streets. I was engaged with O'Callaghan for Spry before the Ethics Committee. There were unsavoury aspects of the matter. They need not be mentioned, save for one. At the same time as the ethical issues were in contest, Spry, led by McPhee, was one of my opponents in a large arbitration. Peter, Bill Kaye and Tony Murray were the arbitrators. While taking Peter's help (and unbeknown to McPhee) Spry, led by Bennett of the Sydney Bar, was formulating a claim of bias against Peter in relation to the arbitration. When Peter had saved Spry's skin (for the time being) and Spry's duplicity was revealed, Peter shrugged his shoulders, made a self-deprecating remark and got on with the next matter.

Peter never accepted judicial appointment, though the Federal Court was offered to him. He said he could not afford it. That may well have been true. His generosity of spirit and optimism led him into numerous unsafe financial transactions, which he called 'investments'. No doubt the real reason was that he didn't want to give up the life of a barrister to become a judge. Of judges he often said, "They all turn out to be bastards, it just takes the good blokes a bit longer."

In 1996, Peter was asked to accept an appointment as the Independent Commissioner to inquire into and advise the Catholic Archbishop of Melbourne with respect to allegations of sexual misconduct within the archdiocese of Melbourne by persons with authority in the church. This was a job no one would wish to do, but Peter accepted the community responsibility and undertook the work continuously for more than 20 years. In doing so, he served, with compassion, those who have suffered as a result of sexual misconduct in the Catholic Church. Peter was subject to entirely unfounded and unfair criticism, particularly by McClellan the Royal Commissioner, for the work he undertook as the Independent Commissioner. This criticism was very hurtful to him.

Peter is remembered as a decent, compassionate, wise and just man in and out of court. He was a great raconteur. He had a wide knowledge (or at least love) of music, literature and film. He was the epitome of a good man. He did not speak ill of anyone and took criticism with a shrug of his shoulders. Peter relished life in all its ages, from boyhood to old age. He enriched the life of everyone he met. He was a truly good man whose decency and discretion remain a model for all. Horace Walpole wrote, "For a man who feels, life is a tragedy; for a man who thinks, life is a comedy." Peter thought and felt about the events of life and in his generous and sweet character reconciled its conflicting elements, as do very few.

The lives of Peter and me intersected in many ways. Outside the Bar, life was always better with Peter around. One last story. After Jennifer died, Peter often came to dinner at our house. At a certain time, our then almost two-year-old granddaughter, Grace, was with us; she saw 'Pete' on many evenings sitting at the table always at the same place. One morning she came down to breakfast, looked at 'Pete's' seat and said, "Pete not here. Has Pete gone?"

Yes, he has. Sadly for us. But how would he have coped with Eddie dethroned at Collingwood and the restrictions of the age of coronavirus, some of which the High Court, just yesterday, justified by reasons which authorise the destruction of our Federation.

Barefoot Bowls starts off 2021 in style

CAROLINE PATERSON

On Friday 23 April, 2021, the Annual Flagstaff Bell barefoot bowls event, headlining the return to in-person social activities for the Family Law Bar Association, was held at Melbourne City Bowls, just a stone's throw from the Commonwealth Law Courts building. That afternoon there had been a ceremonial sitting to welcome the Family Law Bar Association's beloved and dedicated Secretary, Judge Jennifer Howe as a Judge of the Federal Circuit Court of Australia. The bowls was attended by 180 guests including judges of the Federal Circuit Court, around 30 associates from the two courts, barristers and solicitors.

This event usually takes place in February, but was postponed due to the snap five-day lockdown. Summer clothing and bare feet gave way to puffer jackets and socks, but there was no shortage of warm smiles and embraces as our family law colleagues were able to freely socialise with each other once again. The judges' associates attended this year's event as guests of the Family Law Bar Association. This was our way of thanking them for their extraordinary efforts in 2020 in supporting not just their judges but the profession as a whole, in adapting to and managing online court hearings.

The Bar and Bench team prevailed over the Solicitors 11–7 and the trophy will be displayed by Judge Carter in her chambers until next year—a fantastic achievement given that her Honour revealed that she has never before captained a sporting team of any kind, let alone been interested in doing so!

The Flagstaff Bell will be held again in February 2022.

News & Views

Sexual Harassment: IT'S STILL HAPPENING

RACHEL DOYLE SC

Houston we have a problem

To those who say (or think) that sexual harassment does not happen at the Victorian Bar, or that it doesn't happen often, or doesn't happen any longer—I need to set you straight.

There have been many reviews conducted in relation to sexual harassment over the years. The reviews and reports published since 2018 in relation to the prevalence of sexual harassment in Australian workplaces include the following:

- Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*, 2018.
- Australian Human Rights Commission: *Respect@Work: Sexual Harassment National Inquiry Report*, January 2020.
- Commonwealth Government: *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces, the Australian Government's Response to Respect@Work Report*, 8 April 2021.

During the same period, several reports were also released which are specific to the legal profession:

- Victorian Bar, *Quality of Working Life Survey: Final Report and Analysis*, October 2018.
- Victorian Legal Services Board and Commissioner, *Sexual Harassment in the Victorian Legal Sector: 2019 Study of Legal Professionals and Legal Entities*, 2019.
- International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession*, 2019.
- Law Council of Australia *National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession*, December 2020.
- Dr Helen Szoke AO, *Review of Sexual Harassment in Victorian Courts: Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT*, Report and Recommendations, March 2021.
- Report by the Equal Opportunity Commission to the Attorney-General for South Australia, *Review of Harassment in the South Australian Legal Profession*, April 2021.

These reports confirm that the prevalence of sexual harassment in Australian workplaces and in the legal profession sits stubbornly at a rate where between a quarter and a third of women report they have experienced sexual harassment at work in the preceding five years.

By way of example, the statistics in the 2018 report Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*[1] are as follows:

- 39% of women and 26% of men reported having experienced sexual harassment at work in the preceding five years;[2]
- 23% of women (and 16% of men) in the Australian workforce reported they had experienced some form of workplace sexual harassment in the preceding 12 months.

Lest it be thought these statistics drawn from a nationwide survey are skewed by the inclusion of rogue industries where sexual harassment is rife, the outcomes reported in relation to the inquiries and reviews pertaining specifically to the legal sector include the following:

- The Victorian Legal Services Board and Commissioner, *Sexual Harassment in the Victorian Legal Sector: 2019 Study of Legal Professionals and Legal Entities*, 2019[3] reported that 36% of legal professionals reported having experienced sexual harassment in the profession (61% of women respondents and 12% of men). In addition, one in four legal professionals reported having experienced sexual harassment in the legal sector within the preceding 12 months, and 57% within the preceding five years.[4]
- The Victorian Bar, *Quality of Working Life Survey: Final Report and Analysis*, October 2018 report revealed that 16% of women and 2% of men at the Victorian Bar who responded to the survey reported that they had experienced sexual harassment in the year preceding the survey. When asked the same question referable to the previous five years, the reported rate for women went up to 25% (and, curiously, down to 1% for men).[5]

Keeping it real

The statistics might leave you equal parts outraged and cold. These disembodied numbers do not shed much light on what is actually happening in the legal profession, in law firms and at the Victorian Bar.

Well, I have read the surveys and the reports. I have read some of the decisions handed down by our courts, tribunals and disciplinary bodies in relation to sexual harassment in the legal profession. I have been sexually harassed (when a very junior practitioner). I have listened to people who have told me that they have been sexually harassed while in practice at the Bar, or have witnessed someone being sexually harassed.

So, I propose we walk together through a case study, set out below. This example offers the benefit of permitting us to flirt with the warm glow of smugness that may come from telling ourselves: "That could never happen here. So Sydney."

Or is it? You be the judge.

***Council of the New South Wales Bar Association v EFA* [2021] NSWCATOD 21**[6]

The New South Wales Bar Association brought an application for disciplinary findings and orders against a barrister, EFA.[7] A dinner was held in July 2017 at Jones Bay Wharf as part of the New South Wales Barristers' Clerks Conference. Attendance at

the dinner was restricted to clerks, barristers and other guests invited by the clerks. EFA, a barrister, attended the dinner. Barrister A, a friend of EFA, was also in attendance, seated at a table with people including staff of his clerk, one of whom was a female junior clerk, named H.

Just before 11pm, barrister EFA approached the table where barrister A and junior clerk H (whom EFA had not ever previously met) were seated. Within the sight of the junior clerk H, and others at the table, the two barristers EFA and A commenced to perform what the Tribunal later described as a "ritualised greeting".

These two wags apparently had a habit of greeting each other in the following manner:

> As he approached the table, EFA gestured to barrister A, sticking up the middle finger of his right hand. A raised his hands to cover his face, his right hand behind his left hand. He then moved his left hand to reveal that the middle finger of his right hand was raised toward EFA. A raised his hands to his face again, the left hand covering the right hand. A moved his left hand to the left and dropped his right hand to his chest, with the middle finger raised and directed at EFA, who was still approaching. EFA walked towards A, who again covered his face with his hands, and then uncovered his right hand by moving his left hand, revealing that the middle finger of his right hand was up, a gesture clearly directed to EFA. A smiled at EFA.[8]

For anyone having trouble decoding the Tribunal's stilted prose and the heavy-handed use of pseudonyms, it might be easier to picture the scene thus: the two pranksters (barristers EFA and A) are friends. During the dinner, they gave each other the middle finger.

But wait—you have to understand: they did it in a *really funny way*. They coyly shielded the raised middle finger with their other hand. Then, for maximum comedic effect, each of them pulled back the "shielding" hand to reveal their raised middle digits! I am sure you will agree with me that this is hilarious. Laugh? I nearly cried.

On completion of this touching greeting ritual between two good friends, EFA then stood near barrister A, who remained seated. As if the middle finger pantomime had not been funny enough, this is when these guys really got started. EFA, while standing, took the back of A's head. EFA then moved A's head forwards and back, towards and away from EFA's crotch several times. In other words, their next move was to perform a hilarious simulation of oral sex. Junior clerk H saw this performance.

The Tribunal readily accepted that EFA and A are good friends and that their interaction appeared to be "a private joke between them."[9] The Tribunal's findings of fact include a careful conclusion that barrister A was amused throughout most of the incident: "At no stage does he look uncomfortable. He did not suggest in his affidavit, or his evidence, that he felt uncomfortable".[10] Indeed, said the Tribunal the "brief simulation of oral sex" appeared to be, "a ritualised greeting which, in part, parodied oral sex".

Thus, the Tribunal was able to conclude that what had unfolded between EFA and A was inappropriate sexual conduct, but was not a sexual advance. The Tribunal also concluded that the interaction "was clearly not appropriate at a barristers' clerks' dinner, even late in the evening, and had the potential to offend onlookers".[11] Hmmmm. Do you think?

> "H had appeared visibly shaken, and her hands were trembling."

But here's the kicker.

After a brief conversation with barrister A, EFA then moved and stood between junior clerk H and A. It is important to understand that at this point, EFA was still standing, and A and H were both still seated at their table. EFA bent from the waist a little and reached out with his left hand to the back of clerk H's head. EFA, still behind and to the right of H, touched H's head with his left hand and "lightly pushed"[12] her head with sufficient pressure that her head involuntarily moved forward once and then back once,[13] while at the same time he said to her: "suck my dick." [14] H had a shocked look on her face. She did not speak [15]

A stood up; he and EFA hugged.[16] While this part of the event is not described in detail, I assume that this embrace was conducted in a manner which celebrated both their incredible friendship and their mutual admiration for each other's brilliant sense of humour.

EFA and A then moved toward barrister G, who was still seated at the table. The three barristers EFA, A and G then had a group hug. H looked around and then got up and walked away. The entire interaction had occupied two minutes.[17]

H went outside and found W, who is the clerk of the Chambers in which she was employed. She immediately recounted to him what had happened. W's evidence to the Tribunal included that H had appeared visibly shaken, and her hands were trembling.[18]

H made a statement four days after the dinner, on 25 July, 2017.[19] Presumably in response thereto, barrister A sent her a written apology on 3 August, 2017. In it, he said that while he did not recall the incident, he could recall "horsing around" with barrister A.[20]

In the hearing at the Tribunal, H gave evidence and was cross-examined by senior counsel for EFA. The Tribunal observed that H's communication style was "not altogether clear or precise".[21] In addition, there was the difficulty that in her statement and evidence she had suggested that EFA had moved her head backwards and forwards towards his crotch, when in fact his crotch was "entirely behind and to the right hand side of H at the time".[22]

In short, the Tribunal concluded that H appeared to have conflated aspects of EFA's oral sex simulation with A with what he subsequently did to her.[23] The Tribunal concluded that while H was mistaken about some aspects of the incident, this did not mean her evidence could not be relied upon for other aspects.[24]

No other witness was able to give a direct account of the incident—either because they were intoxicated or because their attention was elsewhere.[25] Barrister G of the 'group hug' said he had a general recollection of the dinner, but believed he was focused on his conversation with F at the time and did not notice the incident.[26]

You may wonder then how the Tribunal was able to analyse the events with such a granular level of detail?

Well, you'll love this bit: the entire thing was captured by security cameras. The Tribunal's reasons disclose that the CCTV footage from two cameras was viewed by the Tribunal several times, played at real time speed, in slow motion, and at times frame by frame.[27] They must have had fun with that.

The Tribunal readily found that the words "suck my dick" said by barrister EFA to clerk H possessed a sexual character and were inappropriate conduct towards a clerk previously unknown to him in the context of the barristers' clerks' dinner.[28] But, said the Tribunal, while this constituted inappropriate sexual conduct, it was not a sexually inappropriate advance or an advance of any kind.[29] The Tribunal reached that conclusion because it found as follows:

> EFA was not actually inviting H to have oral sex with him. It seemed, rather, from the CCTV footage, that *he was extending to her an abridged echo of the greeting he had offered to A. He was including her in the horseplay he had engaged in with A.* It was very poorly judged, doubtless on account of EFA's significant level of intoxication. EFA failed to take into account H's likely feelings of anger, embarrassment and humiliation. Using the words of the Application, EFA's conduct was "sexually inappropriate conduct"(or, more accurately, "inappropriate sexual conduct"), but it was not "a sexually inappropriate advance"or any kind of advance at all. [emphasis added]

With respect, the Tribunal seems to have gotten a little distracted by an analysis of whether EFA was *actually* inviting H to perform oral sex on him at the dinner table, which of course is unlikely. Further, applying the label "horseplay" risks minimising the event as a joke gone wrong, rather than maintaining sufficient focus on the fact a barrister has just simulated oral sex with one person, then turned to a woman he has never met and said "suck my dick" while "lightly" pushing her head.

The Tribunal concluded by describing EFA's conduct as follows: poorly judged, vulgar and inappropriate. The Tribunal also described his level of intoxication as inappropriate at a function connected with the practice of the law.[30] The Tribunal concluded that EFA's conduct was discreditable to a barrister and constituted conduct likely to bring the legal profession into disrepute, and thus was a contravention of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, Rules 8(a) and 8(c).[31] While those contraventions were found to constitute unsatisfactory professional conduct,[32] they were determined to be not sufficiently serious to constitute professional misconduct.[33] The parties have been ordered to provide further materials in relation to appropriate orders in the matter.

Audience participation

The decision in *Council of the New South Wales Bar Association v EFA* neatly throws up for consideration questions including the following:

- **Sexual conduct:** What is a sexual advance? What is sexually inappropriate conduct?
- **Humour:** What is a joke? Whose sense of humour matters? In *EFA*, why did the barristers find it funny, but the clerk did not? For another riff on the theme of "it's just my sense of humour", see *Council of New South Wales Bar Association v Raphael* [2021] NSWCATOD 44.[34]
- **Culture:** What conduct is appropriate at a dinner attended by professionals who work together, and by those who support their practices?
- **Bystanders:** Why did no one else see or hear what happened that night? How embarrassed was everyone when it became clear the entire thing had been caught on camera?
- **Excuses:** Those who engage in sexual harassment continue to minimise their conduct and rely heavily on the same short list of excuses, which typically include variations on these themes: *It was just a joke. It's just my sense of humour. She didn't get the joke. I was drunk.*
- **Alcohol:** Is it enough to say that you were drunk and can't recall? Or should barristers be more careful about how much they drink at functions attended by those in the profession and those who support our profession?
- **Apologies:** Is there any value in an apology in which the protagonist says sorry, but at the same time says they cannot recall what happened, but nevertheless feel confident asserting it was just a joke?

It's not my problem

When the topic of sexual harassment is raised among groups of barristers, I often hear variations on the theme that we are self-employed professionals who can and should look after ourselves. In other words: *it's not a problem*, or *it's not my problem*.

I disagree. It is your problem, and it's our problem.

First, in a number of circumstances, barristers are covered by or affected by the operation of the *Sex Discrimination Act 1984* (Cth) and the *Equal Opportunity Act 2010 (Vic.)*, both of which render sexual harassment unlawful in the context of employment relationships. Many of us are employers of personal assistants, research students and book keepers. Those legislative regimes apply to us directly as employers: it is unlawful for us to harass our employees. If a barrister

> “Surely all barristers want to practise at a Bar, on a list and from chambers that make it clear sexual harassment of anyone will not be tolerated?”

employs more than one person, it is also unlawful for those employees to sexually harass one another.[35] As an employer, we are also susceptible to vicarious liability if we do not take reasonable steps to ensure our employees and agents do not engage in sexual harassment against their co-workers.[36]

In addition, we practise in the same physical space as people who are employed by others. Employees of others in our orbits include the personal assistant employed by another barrister on the same floor, the staff of the clerks’ offices who visit your chambers, and employees of the Bar Council Office and BCL with whom you interact. This cohort also includes the solicitors employed by firms who visit your floor.

For each of those people, your chambers is their workplace, or is a location they are obliged to attend in the course of performing their work. Those other persons and their employers are bound by (and protected by) the laws which render sexual harassment unlawful. Why does this matter? If you or another barrister in chambers subject a person working on or visiting your floor in discharge of their work obligations to sexual harassment, *their* employer may come knocking on your door when a complaint is made. You may find yourself the principal witness in the proceedings brought by the complainant against their employer—either because you perpetrated the sexual harassment, or because you witnessed it happen, or because you did nothing to stop it.

Second, as barristers we are bound by the *Legal Professional Uniform Conduct (Barristers) Rules 2015*. Rule 123 provides that a barrister must not in the course of practice, engage in conduct which constitutes:

(a) discrimination;
(b) sexual harassment;[37] or
(c) workplace bullying.[38]

As the decision in *Council of the New South Wales Bar Association v EFA* demonstrates, sexually inappropriate conduct may be found to constitute conduct which is discreditable to a barrister, or to be conduct which brings the legal profession into disrepute. This, in turn, may be found to constitute unprofessional conduct under the rules.

Third, quite apart from the law and the rules, I ask this: surely any barrister would aspire to best practice? Surely all barristers want to practise at a Bar, on a list and from chambers that make it clear sexual harassment of anyone will not be tolerated?

Barristers do not and cannot operate as an island. We share chambers with other counsel. We have landlords in common. We sometimes jointly employ others. We work together on cases (both together in teams and as opponents). Our chambers are a place where solicitors come to meet with us to work on cases. Our chambers are also places where Bar readers are mentored and where law students gain experience in the profession.

Why wouldn’t a group of self-employed professionals who practise in the same chambers adhere to a shared view that in our profession, in our chambers and in the workplaces of those who support our practices, sexual harassment will not be tolerated?

It seems obvious to me that the Bar and each of our chambers ought to make it clear that in addition to the law and the rules, we are all prepared to adhere to policies designed to minimise the risk of sexual harassment occurring, to support those who endure it, and to deal with the behaviour of those who perpetrate it.

More profoundly, humans who share the same physical space often need to establish rules to guide and regulate the way in which we can share that space harmoniously. For goodness’ sake, I know of some chambers where you would need to devote 10 minutes to reading the rules that apply to stacking the dishwasher. So let’s also make sure that our chambers’ policies also provide direction on not sexually harassing one another.

I will go further: why would barristers be reluctant to be leaders of the profession and leaders of the community on this topic? I note that in response to the report published by Dr Helen Szoke AO, *Review of Sexual Harassment in Victorian Courts: Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT*, Report and Recommendations, March 2021, Chief Justice Ferguson said the following:

> Sexual harassment is harmful, unlawful and wrong. It goes against everything our justice system is built on. I want to make it clear we will not put up with any form of wrongful conduct in our courts or VCAT. There will be zero tolerance for sexual harassment.[39]

If it’s good enough for the courts, I suggest it’s not only good enough for the Bar: it’s a no-brainer.

1 The AHRC National Survey was conducted in each of the years 2003, 2008, 2012 and 2018. The 2018 National Survey was conducted both online and by telephone with a sample of over 10,000 Australians. The survey instrument and the methodology used to conduct the 2018 National Survey received approval from the Human Research Ethics Committee at the University of Sydney: see report page 12.

2 The most common forms of sexual harassment reported were offensive sexually suggestive comments or jokes; inappropriate physical contact and unwelcome touching, hugging, cornering or kissing.

3 Two surveys were conducted as part of the study: a practitioner survey and a management practices survey. 2,324 people took part in the practitioner survey. The management practices survey (sent to principals of Victorian law practices) gathered responses from 259 people.

4 Report of the Victorian Legal Services Board and Commissioner Sexual Harassment in the Victorian Legal Sector, 2019 at page vii.

5 Victorian Bar, Quality of Working Life Survey: Final Report and Analysis, October 2018 at pages 16 to 19. The Quality of Working Life Survey was sent in June 2018 to 2160 Victorian Bar practising certificate holders and 856 valid responses were returned (40%).

6 A decision of the Occupational Division of the Civil and Administrative Tribunal of New South Wales.

7 A non-disclosure order was made to protect the identity of the complainant; the terms of that order also cover EFA.

8 Council of the New South Wales Bar Association v EFA [2021] NSWCATOD 21, at [28]

9 At [52]

10 At [56]

11 At [56]

12 At [44]

13 At [44]

14 At [49]

15 At [31]

16 At [32]- [34]

17 At [32]- [34]

18 At [11] – [12]

19 At [9]–[10]

20 At [17]

21 At [46]

22 At [43]

23 At [39], [45] [49]

24 At [47]

25 At [48]

26 At [21]–[22]

27 At [23]

28 At [58]

29 At [58]

30 At [76]

31 See EFA at [81]. Rule 8 provides:
General
A barrister must not engage in conduct which is:
(a) dishonest or otherwise discreditable to a barrister;
(b) prejudicial to the administration of justice; or
(c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

32 See EFA at [81] and [84]. The Legal Profession Uniform Law defines unsatisfactory professional conduct in section 296 as conduct which includes “conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer”.

33 See EFA at [81] and [83]. The Legal Profession Uniform Law defines professional misconduct in section 297. The section is not repeated in full here. It suffices to note that the provision invokes the touchstones of unsatisfactory professional conduct which involves a substantial or consistent failure to reach or maintain a reasonable standard of competence or diligence and conduct (whether occurring in connection with the practice of the law or not) which would justify a finding that the lawyer is not a fit and proper person to engage in legal practice.

34 In that case, the Tribunal made findings in relation to a barrister and a junior solicitor who were opposed in Supreme Court proceedings during June 2017. They had not previously met. The barrister entered a conference room occupied by the junior solicitor who was on the phone. He made a reference to the wedding ring she was wearing and said, “Won’t your husband get jealous because we’re spending so much time together? He will think something’s going on.” She became upset, he placed his arm on her shoulder for between 10 and 20 seconds and kissed the top of her head saying, “Don’t worry you poor thing.” The barrister variously described his conduct as “attempted chivalry”, without “the slightest sexual aspect to it”; “a misguided attempt to console a younger female solicitor”; “not to be taken as anything other than intended self-deprecating humour”. In similar vein, his character referees said he was eccentric and old-fashioned with an unusual sense of humour: see at [35]–[36] and [46]–[50]. The Tribunal accepted that the barrister’s remarks were intended to console and lighten the mood, but also said that, viewed objectively, they had sexual undertones and they involved an overt act of physical intimacy: see at [23]. The barrister admitted that the physical conduct constituted unsatisfactory professional conduct. The disposition of the matter included a reprimand and an order that the barrister undergo counselling.

35 See sections 28A and 28B of the *Sex Discrimination Act 1984* (Cth); *Equal Opportunity Act 2010* (Vic.), Part 6.

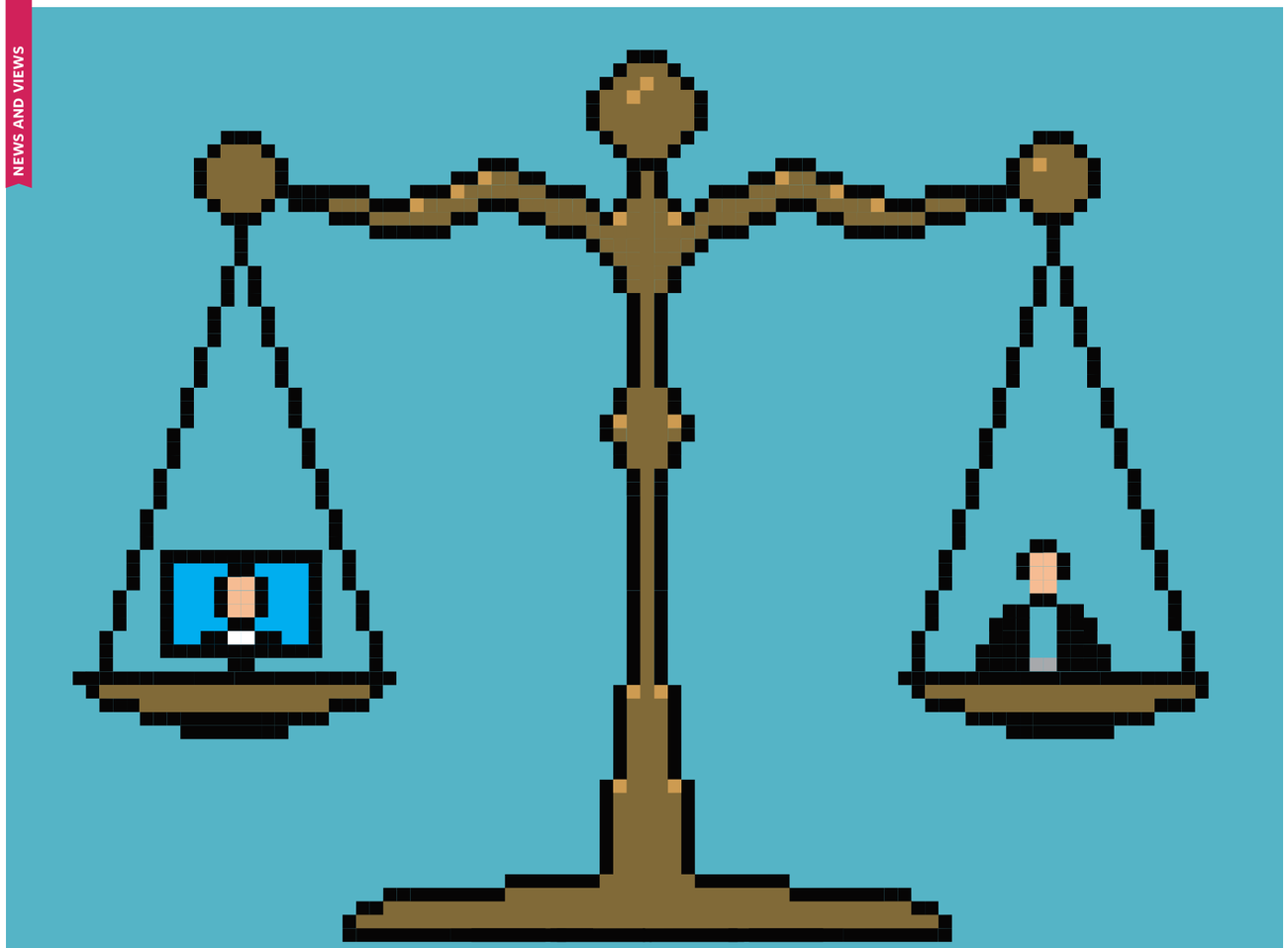
36 See subsection 106(2) of the *Sex Discrimination Act 1984 (Cth)*. *Equal Opportunity Act 2010* (Vic.), sections 109 and 110.

37 In the rules, sexual harassment means sexual harassment as defined under the applicable state, territory or federal anti-discrimination or human rights legislation. So, this will take you back to section 28A of the *Sex Discrimination Act 1984* (Cth) and its cognate provision section 22 of the *Equal Opportunity Act 2010* (Vic.).

38 In the rules, workplace bullying means unreasonable behaviour that could reasonably be expected to intimidate, degrade, humiliate, isolate, alienate, or cause serious offence to a person working in a workplace.

39 https://www.supremecourt.vic.gov.au/about-the-court/review-of-sexual-harassment-in-victorian-courts-and-vcat

NEWS AND VIEWS



How remote?

Videolinks and justice in Victorian Courts

TOM BATTERSBY

While the sentencing process has many faults one of its strengths is that it is at least a human process. It does not add to the human strength of the sentencing process to turn it into a disembodied electronic exercise.

Justice Campbell in *R. v. Fecteau* (1989) 49 C.C.C. (3d) 534 (Ont. H.C.J)

Since March 2020, courts in Victoria have adapted to Covid-19 by shifting hearings online. It has become commonplace for judges and lawyers to take part in proceedings while sitting in front of a computer at home or in chambers. Even now, as lockdown measures in Victoria taper off, participants in court are still most likely to appear via videolink.

Clearly there are trade-offs that must be made in determining how best to maintain the justice system during a global pandemic. But there is a risk that remote hearings present a model that is so convenient that it will automatically be retained into the future. We cannot allow practices occasioned by necessity to become entrenched without first considering their impact on the quality of our justice system.

The rapid proliferation of 'virtual hearings'—described in AUSPUBLAW as a 'breakneck transition'—is unusual for a profession which is more comfortable with incremental change.[1] In the absence of a public health emergency, such profound changes would ordinarily be phased-in carefully after widescale consultation.

Back in 2009, the UK Ministry of Justice launched a pilot program allowing defendants to plead guilty in selected Magistrates' courts while appearing on a videolink from a police station. The pilot was designed to achieve greater efficiency, but difficulties with the program were soon identified by its participants. Some solicitors refused to take part in the pilot because they felt it placed them in an impossible position, having to choose between accompanying their clients to provide support or attending at court to better participate in proceedings. In response to the program, solicitor Robin Murray noted that the process left defendants isolated and without the support of family or friends who would otherwise attend, stating "I think it is an isolating feature—the fact that you are almost taking part in a remote video game. It rather depersonalises the whole process."[2] Similar comments were made regarding the pilot by the director of human rights organisation Justice Roger Smith, who noted that "virtual courts" undermined the gravitas of the judicial process:

> '[b]eing arrested, taken to a police station and then on to court is a shaming process. It is an extremely unpleasant experience to stand in a dock and be told by a judge that you're going to receive a sentence. There is a danger that this process would be debased by being made to look like a reality TV game'.[3]

A 2017 study by the group Transform Justice on the impact of videolinks in UK courts found that "virtual technology inevitably degrades the quality of human interaction" and that "nuances may be undetected, misunderstandings may go unnoticed more easily".[4] Whether or not such findings are applicable to the current state of Victorian courts, the nature of the pandemic has been such that, without online hearings, the administration of justice in this state would have ground to a shuddering halt.

There have been many public statements made regarding the shift to online hearings. Notably the President of the Victorian Bar, Christopher Blanden QC, advised members of the Bar that he found it "disappointing" to hear that some barristers had declined to physically appear in court on the basis of convenience.[5] In response to this statement, other members of the Bar have highlighted the flexibility of remote appearances, particularly when juggling family responsibilities or other commitments.[6]

> "In the absence of a public health emergency, such profound changes would ordinarily be phased-in carefully after widescale consultation."

The Law Council of Australia notes that while courts have adapted quickly to the pandemic, virtual hearings are not always effective substitutes for physical attendance, particularly when dealing with vulnerable clients:

> 'face-to-face relationships between lawyers and [in particular] marginalised and vulnerable communities are often crucial in building trust and respect, both of which are important in securing positive justice outcomes'.[7] The Law Council suggests that before current practices become entrenched, further analysis should be conducted with particular regard to the "practical implementation of technology in the court and tribunals, access to justice, and maintaining trust in the judiciary".[8]

The use of technology in courts is not a new issue for the judiciary. In the case of *Butera*, the High Court referred to the importance of the "atmosphere" that can be created during the giving of oral evidence in court:

> The adducing of oral evidence from witnesses in criminal trials underlies the rules of procedure which the law ordains for their conduct. A witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form. [...] Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witness.[9]

More recently, in Cardinal Pell's proceedings, the Court of Appeal was asked to consider the validity of an arraignment that was broadcast to a jury via videolink. On appeal, it was submitted that because the arraignment took place with the accused and the jury in different rooms, the trial was rendered a "nullity" due to the fundamental irregularity of the trial process. Justice Weinberg noted:

> ...there are older authorities which suggest that the term 'present', in a statutory context, should ordinarily be interpreted as 'physically present.' In the light of modern technology, such a narrow and restrictive interpretation of that term seems, to me, not to be warranted.[10]

There is also precedent suggesting that the mode of presentation in court can impact proceedings, creating a risk of unfair prejudice.

In the case of *Benbrika*, an application was made by defence to remove perspex security screens surrounding the accused due to the risk that such an arrangement in court would lead to unfair prejudice. In granting the application, Justice Bongiorno noted that:

> '[the screens] cut the accused off from the court room in such a way as to render the accused's presence hardly more real that if they appeared by video link'.[11]

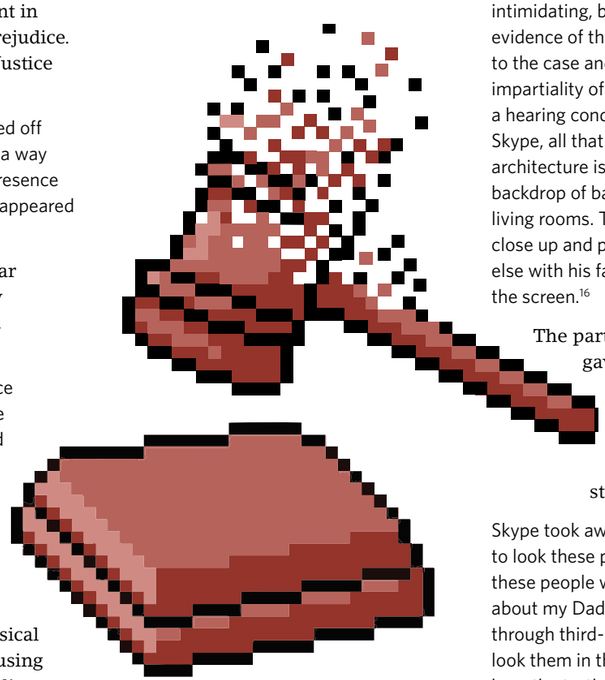
When dealing with a similar application made in the New South Wales Supreme Court, Justice Whealy stated:

> '[i]n my opinion, the presence of the glass screen is but one more layer of prejudice ...and it is an aspect of prejudice that can be avoided altogether by relatively simple and comparatively inexpensive means'.[12]

The same could be said in comparing videolinks to physical appearances. The impact of using a videolink will differ depending on the type of hearing involved. A practice that may be appropriate for purely procedural appearances may be prejudicial for evidentiary hearings that involve discretionary assessment.

Evidentiary hearings

Research suggests that victims and witnesses who testify live are generally more positively evaluated by juries as well as being perceived as more honest and convincing than those who testify over a videolink.[13] Part of this observed difference may be explained by what sociological researchers have termed the "vividness effect". In essence, this effect is the proposed correlation between information that is vividly presented and the persuasive impact that it has on an audience. Vivid testimonies have been assessed as being more credible, and easier for an audience to remember when compared with evidence presented in a dull manner.[14] One suggestion of why this is the case is that:



> 'vivid information presented at trials may garner more attention, recruit more additional information from memory, cause people to spend more time in thought, be more available in memory, be perceived as having a more credible source, and have a greater affective impact'.[15]

Human considerations

A post by Celia Kitzinger on The Transparency Project gives a powerful personal perspective, vividly describing her experience of supporting a person whose father was the subject of the first entirely online hearing in the UK Court of Protection:

> In other cases, I've been involved in, families have often talked about the gravitas attached to a courtroom hearing: the formality of architecture and room layout, the elevated more distant seat for the judge, the ritual of rising when the judge enters, the element of theatre. It can feel intimidating, but it is also reassuring evidence of the seriousness attached to the case and the ceremonial impartiality of justice. [...] With a hearing conducted wholly over Skype, all that gravitas is lost. Court architecture is replaced with the backdrop of barristers' and witnesses' living rooms. The judge appears close up and personal, just like anyone else with his face in a little square in the screen.[16]

The participant in this case gave evidence about managing her father's health, but felt disconnected from proceedings, stating that:

> Skype took away from me the ability to look these people in the eyes—these people who have their opinions about my Dad and only knew him through third-hand notes. I wanted to look them in the eyes and make them hear the truth but I was looking at a computer screen.[17]

In May of 2020, Punitham Genesan was sentenced to death via Zoom in the Supreme Court of Singapore. In the same month, Olalekan Hameed was sentenced to death via Zoom in the Lagos State High Court, Nigeria. Several death sentences have been handed down via Zoom in Indonesian courts.[18] It seems completely inhuman for a court to have such a profound impact on the life of another without having to look at them face-to-face. The continued existence of the death sentence is repugnant enough to contemplate, but the inhumanity of a prisoner sitting down in front of a computer screen to be told that the State is going to take their life elevates the injustice of such practices to a new and perverse level.

The issues with sound quality are bad enough with videolinks, but in the Bail and Remand Court, new practices have meant that it is not uncommon for prisoners to appear at their bail application on speakerphone. This novel technological feat is managed by a custody officer balancing a mobile phone on the trap of the appropriate holding cell. The sound quality for these proceedings is extraordinarily poor, with the excessive reverb from the cell making the accused sound as though they are drifting off into space, often frustrated and unintelligible, and usually placed on mute fairly quickly. The ability to mute prisoners with such ease suggests that prisoners participating in remote hearings are further removed from proceedings, and less able to participate as a result. As noted by Dr Emma Rowden, "[d]efendants in the live videolink are often doubly trapped: framed within the screen and judged in the context of their confinement".[19]

> "Defendants in the live videolink are often doubly trapped: framed within the screen and judged in the context of their confinement".

Procedural hearings

As well as the qualitative issues raised by videolink hearings, there is also the risk that videolinks create an illusion of efficiency. When all the relevant parties are physically at court, it is often possible for resolutions to be reached, or for courts to discover extra capacity to hear matters that would not otherwise have been able to proceed. On a videolink, court time seems more rigid. Matters booked in for one purpose are unlikely to proceed in a different manner, and it is difficult for parties to continue discussions once the link is closed.

A 2009 study of the efficiency of a Video Remand Court in Ontario found that its court hearings were shorter in duration, but likely to require more appearances.[20] The study found the number of cases which had resolved or could be finalised was significantly reduced, due to the perception that court time in the video remand court was essentially "cost-free".[21] Disturbingly, this study found that bail matters that progressed through the video remand court took an average of seven appearances while matters dealt with in open court took only 2.1 appearances.[22] This finding suggests that while videolinks appear to create greater efficiencies on the surface, there may be hidden procedural costs that would make it more difficult to get through the frightening backlog in Victorian courts.

Conclusion

Covid-19 presents opportunities to redesign and improve systems within a traditionally conservative profession. While there are positives that have been brought about through an increased use of videolink technology in Victorian courts, there is also time now to reflect on what may be lost. It is unacceptable to let wholesale prejudice creep into the system on the basis of convenience.

Now that we see some light at the end of the Covid-19 tunnel, it is time to decide how we want our future courts to look and feel, making the best use of available technologies but without diminishing what makes our courts human.

1 Joe Mcintyre, Anna Olijnyk and Kieran Pender, "Courts and COVID-19: Challenges and Opportunities in Australia", AUSPUBLAW (Blog Post, 4 May 2020) < https://auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/>.

2 "'Virtual court' cases go on trial in London", *Evening Standard* (online, 9 May 2007) <https://www.standard.co.uk/hp/front/virtual-court-cases-go-on-trial-in-london-6581106>.

3 Ibid.

4 Transform Justice, "Defendants on video – conveyor belt justice or a revolution in access?" (October 2017) <https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>.

5 In Brief #1001, Victorian Bar.

6 Michael Pelly, "No thongs please, we're barristers", *Australian Financial Review* (Sydney, 18 March, 2021).

7 Law Council of Australia, Submission to Select Committee on COVID-19, Parliament of Australia, Inquiry into the Australian Government's Response to the COVID-19 Pandemic (15 June 2020) 29 [113].

8 Law Council of Australia, Submission to Select Committee on COVID-19, Parliament of Australia, Inquiry into the Australian Government's Response to the COVID-19 Pandemic (15 June 2020) 18 [60].

9 *Butera v Director of Public Prosecutions* (Vic) [1987] HCA 58, [15] (Mason C.J, Brennan and Deane JJ).

10 *Pell v The Queen* [20190] VSCA 186, [1167] (Weinberg JA).

11 *R v Benbrika and Ors* (No. 12) [2007] VSC 524.

12 *R v Baladjam and Ors* (No. 41) [2008] NSWSC 714, [78].

13 Sara Landström, Karl Ask & Charlotte Sommar, "Credibility judgments in context: effects of emotional expression, presentation mode, and statement consistency" (2019) 25(3), *Psychology, Crime & Law.*

14 Brad E. Bell & Elizabeth F Loftus, "Vivid Persuasion in the Courtroom"(1986) *Journal of Personality Assessment* 49 (6).

15 Ibid.

16 Celia Kitzinger, "Remote justice: a family perspective" *Transparency Project* (Blog Post: 29 March 2020) <https://www.transparencyproject.org.uk/remote-justice-a-family-perspective/>.

17 Ibid.

18 Harm Reduction International, "The Death Penalty for Drug Offences: Global Overview 2020"(Report) <https://www.hri.global/files/2021/04/07/HRI_Death_Penalty_Report_2020_FINAL.pdf>.

19 Elizabeth Rowden, "Remote participation and the distributed court: An approach to court architecture in the age of video-mediated communications"(PhD Thesis, The University of Melbourne, 2011).

20 Cheryl Marie Webster, "Out of Sight, Out of Mind: A Case Study of Bail Efficiency in an Ontario Video Remand Court" (2009) 21(1) *Current Issues in Criminal Justice*.

21 Ibid, 121.

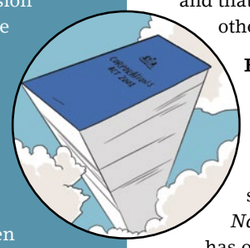
22 Ibid, 119.

NEWS AND VIEWS

You're almost 20, Corporations Act

A light-hearted dialogue in which a discontented mother and father implore their son (the Corporations Act) to grow up.

At over 3,700 pages, the *Corporations Act 2001* (Cth) is a weighty tome that requires dedication and persistence to decipher. The Australian Law Reform Commission (ALRC) has the task of reviewing the legislative framework for corporations and financial services regulation in Australia, focusing on the Corporations Act. To help lighten the cerebral load in the ALRC office, lunchtime discussions about derivatives, superannuation and insurance have progressed to trying to find the lighter side of Corporations Act reform. A by-product has been the fictional dialogue produced below.



The genesis of the script is the upcoming 20th birthday of the Corporations Act. William Isdale (Senior Legal Officer) and Nicholas Simoes da Silva (Legal Officer) document a fictional conversation that illustrates some of the substantive issues being considered by the ALRC. In the dialogue, a discontented mother and father implore their son (the anthropomorphised Corporations Act) to grow up. It is worth noting that the Inquiry's terms of reference emphasise the simplification and rationalisation of the relevant law "within existing policy settings". The Inquiry will involve three interim reports: the first concerning the use of definitions; the second concerning the coherence of the regulatory design and hierarchy of laws; and the third concerning the potential reframing or restructuring of Chapter 7 of the *Corporations Act 2001* (Cth).

***Father*:** *Corporations Act 2001* (Cth), could you come here please? Your mother and I would like to speak with you.

[*Enter Corporations Act.*]

***Father*:** Son, this year you're turning 20 years old. Your mother and I are proud of you—you've achieved a lot: a nationally consistent regulation of basic company law, insolvency, financial markets, products and services, and so much else. However, we are concerned about you. You need to grow up.

Corporations Act: What did I do? Was it the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*?

Father: No son, it's nothing to do with that. Please take a seat. And remember, what we're about to say comes from a place of love.

Oh how you've grown

Mother: Your father and I remember when you were just 1866 pages. You've grown a lot since then, but don't you think you should slow down a bit? You've really been bulking up. You're now over 3,700 pages, and that doesn't even include your regulations and other legislative instruments!

Father: I can barely get my arms around your primary provisions without opening six PDFs on the Federal Register of Legislation! Your brother, the *ASIC Act 2001* (Cth), only put on 232 pages in the same time period. And your sister, the *National Consumer Credit Protection Act 2009*, has only grown by 273 pages since she was born in 2009.

Corporations Act: That's not fair, I do so much more than them!

Mother: That's true, son. But your father and I think you should focus on your strengths. You're trying to do too much. Maybe it's time you gave up insolvency and financial markets regulation, and left them for other Acts to focus on. Please give it some thought.

You're hiding stuff under your bed

Father: I was vacuuming the other day and found over 366 legislative instruments under your bed, and a box of thousands of individual relief instruments. Why are you hiding these from us? We looked on the Federal Register of Legislation and found that many of them weren't on there. How are people meant to find the law? We raised you to be better than that.

Mother: I took a look at some and could barely understand them! Many of them were written as 'notional' legislative provisions, obscuring their actual effect. Didn't they teach you to express yourself clearly in school?

Corporations Act: It's not my fault—I need instruments to function!

Mother: Well, that leads us to our next concern, son …

You're addicted to instruments

Father: We're worried you might be addicted to legislative and other instruments. You can't just keep putting an instrument on the parts of yourself you don't like. We barely recognise the boy we raised! Just last year, an ASIC legislative instrument 'modified' you so that your Australian Financial Services licence regime would apply in a significantly different way to foreign financial services providers.

Mother: We don't think you need all these instruments, honey. Don't you think you should be able to stand on your own two feet and let the nice people at ASIC get on with their other important work?

Corporations Act: Whatever, Mum. Everyone's using instruments these days. You just don't understand …

You're too complicated

Mother: That's not the only thing I don't understand about you! You've become so complex – it's like I barely know you anymore. You've been using all these obscure definitions, like "simple corporate bonds depository nominee"—but there's nothing simple about it!

Father: Son, I'm sure you think using all this elaborate language is really cool, but a mark of maturity is expressing yourself clearly. No one talks like you in the real world. We think it's time you were a little clearer.

Corporations Act: I think you're being unfair. I've been a huge success, Mum and Dad—I've registered millions of companies and tens of thousands of licensees and representatives, while also punishing bad guys, and contributing to the economic success of our country!

You're falling behind

Father: That's well and good son, but you're falling behind. Even your cousin over the ditch is now machine-readable, while many of your instruments are saved as images!

Mother: You really do need to keep up with technology. Why are you still requiring directors to execute documents on a single, hard copy? And requiring meetings to be conducted in person, rather than digitally? You're falling behind the other kids.

Corporations Act: But ASIC fixed that for me last year!

Mother: We know son. But those modifications are time-limited, and intended simply to deal with the effects of the coronavirus pandemic. Don't you think it's time for a more fundamental review, to ensure you're keeping pace with technological change?

It's time to listen to your friends

Father: The truth is, son, that people are starting to say unkind things about you. Your uncle Hayne said that you've been "piling exception upon exception" and "carving out special rules for special interests". And Justice Rares said you were starting to look a bit like "legislative porridge".

Mother: Your teacher, Cally Jordan, said your class-mates thought you were "unlovely and unloved".

Corporations Act: Ouch!

Mother: We still love you son. But we do think it's time you grew up.

Father: Your mother is right. It's time you took a good hard look at your definitions and considered consolidating them, using them consistently, and making them clearer. And it's time to consider your legislative design—how you're using regulations and instruments, and how they can be made more accessible.

Mother: And it's time you ensured that you are clearer about what you're trying to achieve, so that your intent is actually realised.

Corporations Act: Ok Mum and Dad. I'll have a think about it. I feel a bit bruised, but I know you're just trying to help me.

Mother: Perhaps you should talk to the ALRC, son? I hear they've got some ideas …
[*Fade to black.*]

Disclaimer

The above dialogue is entirely fictional. No feelings of the Corporations Act were harmed in its production. To find out more about the ALRC's Corporations and Financial Services Legislation Inquiry visit: https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/

William Isdale and Nicholas Simoes da Silva are Senior Legal Officer and Legal Officer, respectively, at the Australian Law Reform Commission. Their views, and comedic ineptitude, are entirely their own, and not those of the ALRC.

Pause for Thought? The Case for Reversing the Abolition of De Novo Criminal Appeals

Michael Stanton and Paul Smallwood[1]

Overview

Following the enactment of legislation passed by the Victorian Government in 2019,[2] de novo appeals from the Magistrates' Court to the County Court were to be abolished from 3 July 2021 ('the reforms').[3] On 23 March 2021, the *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic.) received Royal Assent, delaying the reforms until 1 January 2023.[4] That delay was said to be justified on the basis that "[c]hanging the forced commencement date supports the implementation of these reforms by providing additional time to prepare for commencement, in light of the impact of COVID-19 on the justice system".[5]

No doubt this comes as a relief to those operating in an overburdened system struggling with the reality of 'COVID-normal' and the backlog of summary cases and criminal trials. However, it also raises the question: if de novo appeals should not be abolished now, should they be abolished at all?

De Novo Appeals in Criminal Matters

De novo appeals allow for matters determined in the Magistrates' Court to be reconsidered afresh by way of rehearing in the County Court.[6] The accused person is not bound by his or her plea in the Magistrates' Court.[7] The origin of the de novo appeal lies in the accused forgoing his or her right to trial by jury, and the principle that by consenting to summary jurisdiction the de novo appeal is a 'counterweight' that provides protection to the accused.[8] Given the "paramount importance of the individual's right to have indictable charges tried by a jury",[9] consenting to summary jurisdiction is no small thing. Those with practical experience in the Magistrates' Court know that this 'safety net' can provide a powerful reason for accused persons to resolve matters summarily.

Magistrates sometimes have to deal with more than 80 matters in a day. In 2018–19 alone, 151,765 cases were initiated and 67,973 were finalised in the Magistrates' Court.[10] There were 660,262 criminal listings.[11] This vast caseload places great pressure on all involved. Magistrates must make swift decisions that can have lasting consequences for an accused (such as imposing a conviction or a gaol sentence), and the majority of decisions are given ex tempore. While a day may be available for a plea hearing in the County Court, a hearing in the Magistrates' Court may take as little as a few minutes. A large number of summary matters involve unrepresented accused, or legal representation by relatively junior lawyers. Due to changes to legal aid eligibility guidelines in 2015, more work has to be undertaken by duty lawyers, who regularly have to meet multiple accused persons, give advice to unrepresented accused, take instructions, and prepare and present multiple pleas on any given day. The de novo appeal provides a vital safety net.

As the then attorney-general remarked when introducing the reforms, the Magistrates' Court handles over 90 per cent of all cases that come before Victorian criminal courts each year, and only a small percentage are appealed.[12] In contrast to the figures from the Magistrates' Court, in 2018–19 there were only 2,498 criminal appeals commenced in the County Court, with 2,273 finalised (with 96 per cent disposed of within six months).[13] Such appeals have formed a relatively small proportion of the business of the County Court.

Written submissions are now required for all County Court pleas.[14] There is generally the time to make detailed submissions and for relevant points of law to be addressed and determined. Applications for leave to appeal against sentence from the County Court to the Court of Appeal require the identification of an error in the sentence first imposed.[15] Points not made before the County Court will rarely be entertained if ventilated for the first time on appeal before the Court of Appeal.[16]

Proceeding with the abolition of de novo appeals will narrow the distinction between how summary and indictable proceedings are heard and determined. That would be a misstep. It would increase costs. It would increase delays. It would result in relatively fewer matters being determined summarily, and those matters that are to be finalised in the Magistrates' Court being approached as though they were indictable proceedings.

The last significant investigation into the de novo appeals system in Victoria was undertaken by the Law Reform Committee of the Parliament of Victoria in October 2006.[17] The findings of that investigation were published in a 270-page report entitled 'De Novo Appeals to the County Court' (the Report) which recommended that de novo appeals be retained. The Report concluded:

> As the framers of the English criminal justice system apparently realised in the 17th century, de novo appeals are not a substitute for trial by jury, but they do provide an important counterweight to summary trial. For this reason, de novo appeals can also be seen as serving to enhance public confidence in the criminal justice system.[18]

The Report also found that the abolition of the de novo appeal system would 'almost certainly reduce the efficiency of, and increase costs for, the Magistrates' Court' and would make hearings in the Magistrates' Court longer and more complex.[19] Further, the Report considered the need for people to access a fair appeals system and warned against weakening the protections against errors made in the Magistrates' Court.[20]

The Reforms

Once operational, the reforms will, amongst other things, abolish 'as of right' appeals to the County Court for all matters where a person pleaded guilty or did not appear when convicted and sentenced at the Magistrates' Court.[21]

For both conviction and sentence matters, after filing an application for leave to appeal or a notice of appeal within 28 days of the relevant sentence,[22] the reforms require the filing of a 'summary of appeal notice' within the next 28 days stating the general grounds of appeal in the prescribed form.[23] For an application for leave to appeal, the County Court may only grant leave if it is in the interests of justice – and this test will apply to people seeking to change their plea.[24] An appeal may be struck out on the basis that it does not have reasonable prospects of success.[25] The County Court will be empowered to remit matters, dismiss charges, substitute charges, and to vary and impose sentences.[26]

In relation to appeals against conviction, the reforms limit the right of appeal, in general, to a reconsideration of the evidence given before the Magistrates' Court in the summary hearing.[27] The Court *must* consider the reasons of the Magistrates' Court.[28] The Court may receive further evidence if it is in the interests of justice having regard to factors including the right of an appellant to fully present their appeal and whether the evidence was available at the summary hearing.[29] For what is deemed as "protected" evidence,[30] the evidence must be "substantially relevant to a fact in issue".[31] If there is a recording available of the evidence, consideration must be given as to why the evidence should be given again.[32]

In relation to appeals against sentence, the reforms limit the right of appeal to a reconsideration of the evidence and other material that was before the Magistrates' Court,[33] although the Court may have regard to evidence, material or information that occurred *after* the Magistrates' Court sentenced the person.[34]

Concerningly, there is no express power to have regard to material in existence at the time, but not relied on, before the Magistrates' Court. The Court must only allow an appeal if it is satisfied that there are "substantial reasons" to impose a different sentence.[35] The Court *must* have regard to the reasons of the Magistrates' Court and "the need for a fair and just outcome".[36] The Court is not required to find specific error, but it must be more than merely arguable that a different sentence should be imposed (although the Court does not have to be satisfied that the sentence was unreasonable or plainly unjust).[37]

What this all means will have to be tested.

The Consequences

Abolishing de novo appeals removes a powerful reason for accused persons to resolve matters summarily. That would be unfortunate given the utilitarian benefits that summary resolutions bring, including to the community and to victims. It also imposes a very different model of advocacy upon those who practise in the Magistrates' Court, and a burden on Magistrates that is simply not practicable given the pressures on that court.

These reforms would require defence lawyers to obtain recordings and/or transcript of Magistrates' Court hearings[38] and all the material that was before the court, consider whether there are errors in the reasons in order to frame notices for leave to appeal, and prepare an entirely different form of submissions to the County Court. Whether Victoria Legal Aid will be able to able to properly fund this exercise for those unable to afford private legal representation is not known. The County Court will be confronted with more complex appeals, and more jury trials as more accused persons refuse to plead guilty and/or consent to summary jurisdiction without the safety net.

The Purported Basis for the Reforms

The arguments in favour of the abolition of de novo appeals are misguided. To the extent it is claimed that de novo appeals undermine public confidence in Magistrates[39] or their abolition would result in better decision-making, there is no evidence that is so. Imposing an obligation on Magistrates to give full reasons with one eye on a potential appeal, when the practical constraints of the court make it almost impossible to do so, is simply

unfair. Magistrates already face vast pressure operating at the coalface of the criminal justice system.

To the extent it is claimed that de novo appeals can traumatise complainants by them having to give evidence a second time,[40] in almost all circumstances that only applies to conviction appeals, which are a small part of the County Court's appeal workload. It is already the case that pre-recorded evidence is admissible in many cases.[41] Any inappropriate cross-examination should be stopped.[42] There are significant protections in relation to how witnesses may give their evidence.[43] It is certainly, at its highest, not an argument for the abolition of de novo sentence appeals.

It also wrong to suggest that de novo appeals, when conducted properly, are inefficient. Such appeals, in the vast majority of matters, are more efficient than having to obtain material, prepare and present legal submissions, and then have a judge review and resolve issues in dispute in an appellate jurisdiction bound in part by the way the matter proceeded before the Magistrates' Court.

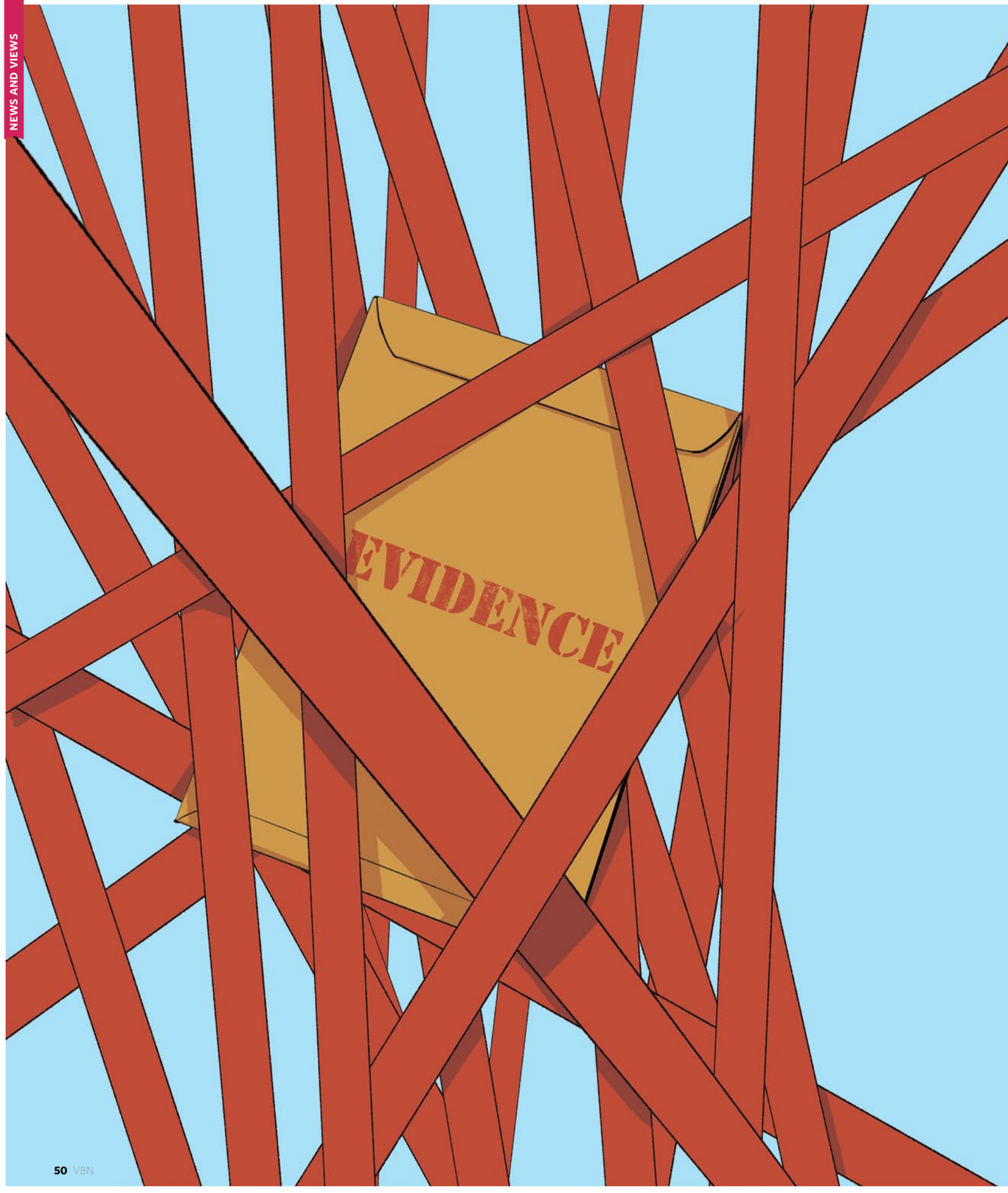
Conclusion

In 2006, the Law Reform Committee concluded:

> Victoria's system of de novo appeal is both comparatively efficient—when seen in the wider context of its place within the criminal justice system—and comparatively fair. In the Committee's view, Victoria's system of de novo appeal achieves a remarkable synthesis of justice and value for money.[44]

Preserving this "remarkable synthesis" during the COVID-19 crisis was necessary. There is now time for reflection, and the reforms should be reversed.

1 Some of the following is based on a comment prepared by Liberty Victoria on the Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018 (Vic.). With thanks to colleagues Stewart Bayles and Julia Kretzenbacher.
2 *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic.) ("the 2019 Act") pt 3 div 1.
3 Ibid s 2(3). It also applies to appeals under the *Children, Youth and Families Act 2005* (Vic.). The proposed reforms had attracted significant criticism from parts of the legal community. See, e.g., Karin Derkley, "De novo appeals a vital 'safety net'", *Law Institute Journal* (Web Page, 14 August 2018). <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/August-2018/De-novo-appeals-a-vital--safety-net->.
4 *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic.), pt 19.
5 Explanatory Memorandum to the Justice Legislation Amendment (System Enhancements and Other Matters) Bill 2021 (Vic.) cl 124.
6 *Criminal Procedure Act 2009* (Vic.) pt 6.1.
7 Ibid, s 256(1).
8 Law Reform Committee, Parliament of Victoria, "De Novo Appeals to the County Court" (Final Report, 17 October 2006) 30.
9 *Clayton v Hall & Anor* (2008) 184 A Crim R 440, 450 [33] (Kaye J).
10 Magistrates' Court of Victoria, Annual Report 2018–19 (Report, 14 November 2019) 33 <https://www.mcv.vic.gov.au/sites/default/files/2019-11/Annual_Report_18-19.pdf>. Given the impact of COVID-19 in 2019–20, this article refers to the 2018-19 statistics.
11 Ibid.
12 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3687 (The Hon Jill Hennessy, Attorney-General, Minister for Workplace Safety).
13 County Court of Victoria, Annual Report 2018–19 (Report, 2019) 7 <https://www.countycourt.vic.gov.au/files/documents/2019-10/ccv-annual-report-2018-19.pdf>.
14 County Court of Victoria, Practice Note PNCR 1-2015 (12 July 2019) 10 [7.12].
15 *Criminal Procedure Act 2009* (Vic.) s 281(1). And that a different sentence should be imposed.
16 *Romero v The Queen* (2011) 32 VR 486.
17 See Liberty Victoria, Comment on the Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill, (web page 18 August 2018) <https://libertyvictoria.org.au/content/justice-legislation-amendment-unlawful-association-and-criminal-appeals-bill>.
18 The Report, 202.
19 Ibid 5.
20 Ibid xi.
21 *Criminal Procedure Act 2009* (Vic.) s 254(2) (as will be substituted once pt 3 div 1 of the 2019 Act becomes operational on 1 January 2023). A person who did not appear must first apply to the Magistrates' Court for the matter to be reheard: s 254(3). Pursuant to s 254(4), an application or appeal against a decision of the Chief Magistrate as a dual commission holder must be made to the Trial Division of the Supreme Court.
22 Ibid s 255(1).
23 Ibid s 255A. Or the appeal with be taken to be abandoned and may be struck out pursuant to s 266A.
24 Ibid s 255B.
25 Ibid s 268A.
26 Ibid ss 256, 256B(8). The reforms also abolish the limited right of an accused person to seek leave to appeal to the Court of Appeal against a sentence of imprisonment imposed by the County Court on appeal from the Magistrates' Court or Children's Court, where the original court did not order the person to be imprisoned: *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic.) ss 16, 30. In contrast, the limited right of the DPP to appeal to the Court of Appeal for some categories of cases pursuant to s 290A of the *Criminal Procedure Act 2009* (Vic.) is preserved.
27 Ibid s 256(1).
28 Ibid s 256(1)(c).
29 Ibid s 265E(2).
30 Ibid s 265E(3)-(4), involving complainants in sexual offences, family violence and obscenity matters, and witnesses in such matters (or where the offence involves an assault or injury or threat of injury) who were children, or cognitively impaired, at the time that the criminal proceeding commenced.
31 *Criminal Procedure Act 2009* (Vic.) s 265(1), (3)-(4) (as will be amended when the 2019 Act comes into operation).
32 Ibid s 265E(d)(ii).
33 Ibid s 256B(1), having regard to s 256B(2).
34 Ibid s 256B(3).
35 Ibid s 256B(5).
36 Ibid s 256B(6).
37 Ibid s 256B(7).
38 Ibid s 265C. Transcripts may be ordered by the Court at a pre-appeal mention hearing or by a registrar or the Prothonotary.
39 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3687 (The Hon Jill Hennessy, Attorney-General, Minister for Workplace Safety).
40 Ibid.
41 *Criminal Procedure Act 2009* (Vic.) pt 8.2 div 5.
42 *Evidence Act 2008* (Vic) s 41.
43 *Criminal Procedure Act 2009* (Vic.) s 360.
44 Law Reform Committee, Parliament of Victoria, *De Novo Appeals to the County Court* (Final Report, 17 October 2006) xvii.



Evidence law
and the mess we are in

GEOFFREY GIBSON

During 30 of my 50 years in the law, I tried cases in tribunals which were not bound by the rules of evidence. You still usually apply the basic rules, partly because of professional conditioning, but mostly because they reflect logic and common fairness. Their purpose is not just to protect fairness, but to ensure that people stick to the point and resolve the dispute with speed. It may help to reflect on them.

Over centuries, the common law moved to determine issues of fact by people rather than God—by a jury (in pais). One reason we have lost our way is by reducing the role of the jury. When that body of law called equity grew in Chancery, its judges proceeded by way of written evidence. This deviation contributed to the dreadful delay, cost, and chanciness of litigation in Chancery that Dickens pilloried in *Bleak House*. And Chancery had no contact with ordinary people on a jury – they created elegant doctrines far above the reach, or sense, of most of us. A body set up to protect the poor and oppressed became a shield of the rich and powerful.

Evidence law controls the way in which a witness gives evidence of facts in a common law trial. A 'witness,' says the *Oxford English Dictionary,* is 'one who gives evidence in relation to matters of fact under inquiry.' 'Evidence' is 'ground for belief; that which tends to prove or disprove any conclusion.' The 'matter of fact under inquiry' is determined by the allegations of fact made by the parties and by the remedy that is sought. Historically, the object of pleadings was to define an issue to which the jury could give a simple answer – yes or no. Sadly, all that fell away decades ago.

Our system is not inquisitorial. It is adversarial. The judges in civil actions listen to the evidence and the arguments, then ruling in favour of the case they prefer. They are not purporting to record what happened as a matter of historical fact, but to find which side's case seems more likely. As Justice Dawson observed in *Whitehorn v R (1983) 152 CLR 657, 682*, "a trial is not a pursuit of truth by any means". The judge is not there to build a case or compile a dossier, or supply matter not put by the parties, but merely to act like a cricket umpire responding to the long-sanctioned appeal, "Howzat?".

This is clear from the varying standards of proof. A criminal charge must be proved beyond reasonable doubt. Everyone knows what that means, and we are expressly forbidden to flirt with it. The claimant in a civil suit need only achieve the response that the claim is more likely than not—what is termed the balance of probabilities. If the allegation carries very serious consequences, then an intermediate standard may be imposed that takes its name from an old case on adultery (*Briginshaw v Briginshaw (1938), 60 CLR 336, 343-344, Latham, CJ)*. I have struggled with this ruling. Instinctively, there are obvious differences in the evidentiary certainty which might lead without hesitation to a finding that a man owes a debt, but not to a finding that might hang him.

What are the basic rules of evidence?

It is hardly a rule, because it should be self-evident —the evidence must come from the witness and not their lawyer. Counsel may not phrase the question to their witness in a way that suggests the answer. So, we come immediately to the problem of evidence tendered in writing, by affidavit or witness statement. There, the lawyers don't just suggest the answer—they write it. The perils are obvious. This is why we banned written statements in crime. It had become a circus.

Next, the witness is there to give evidence about matters of fact, not opinion. The witness is there to say what they saw—not to say, "In my view the accident happened because the Porsche was going too fast". The most obvious exception is expert evidence, such as that given by doctors,

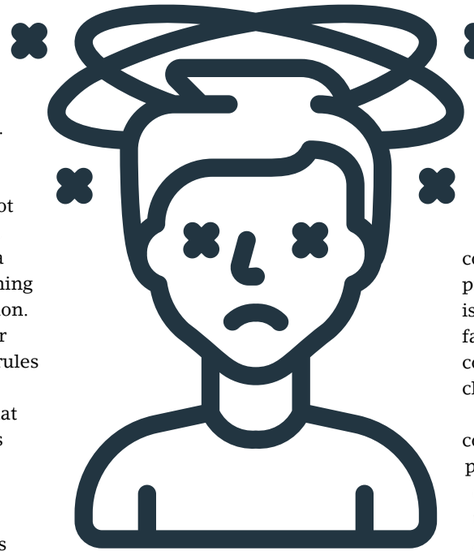
surveyors, or economists. They are there to assist the jury to apply evidence that links the facts deposed to by witnesses to the forensic conclusion—such as that that one merchant has achieved dominance in a market. The problem there is not in the rules, but in the conflict between the obligation to tell the truth and the felt need to serve the interests of the client paying them.

A primary rule is that the evidence must be relevant to the proof or disproof of the matter in issue. Arguments here turn on the degree to which that issue has been crystallised in the pleadings filed by the parties.

There is, therefore, a prohibition in adducing evidence in chief that does not go to the issue in the dispute, but only to the credibility of a witness. This kind of questioning is allowed in cross-examination. The major examples are prior inconsistent statements, the rules about which we have largely forgotten. But the law says that if the cross-examination goes only to credit, you are bound by the answer: you cannot lead evidence to contradict evidence of an earlier witness on a peripheral issue. In my time hearing cases, I cannot recall hearing this law being invoked once. In the result, we see grown adults chasing rabbits down burrows everywhere, mini inquisitions that take the case clean off the rails and put the costs through the roof, and reputations getting murdered in plain sight.

Next, because of our insistence that the evidence must come from the witness in the box, the witness is precluded from giving evidence of a statement made out of court as evidence of the truth of that statement. The rationale of the hearsay rule is obvious. The main exceptions are statements against interest—admissions and confessions—and business records about business dealings.

Then, as a matter of policy, witnesses may be relieved from answering some questions which might unfairly encroach on their rights. Examples are the privilege against incriminating yourself or revealing what you told your lawyers or what advice they gave you. You can be held to have waived your privilege if you say that you were acting on



> “We have created a monster by converting an adversarial Morris Minor into an inquisitorial Rolls Royce.”

legal advice. Another protected area is what is said in bona fide settlement negotiations and mediations. The court has a strong interest in protecting attempts at settlement.

One well-known rule is based on fairness. If one party conducts themselves in a way that leads the other party to proceed on the basis of an assumption, that party will be held to that assumption if to resile from it would be unfair to the other party. The law of ‘estoppel’ has a decent history in our common law. When I started, you could fairly call it a rule of the law of evidence. But after the intervention of equity, that is no longer so. Here is a real clash between the need to be fair and the wish to control and decide the dispute expeditiously.

Next, what if you want to say that I have evidence that this builder ruined other projects and I wish to tender it to help prove that he ruined mine? Well, if that evidence does help—the phrase is “has probative value”—why not let it in? But we recoil from saying that this accused has been found guilty of these offences before, and we wish to tender evidence of those convictions to support our contention that he is guilty of the present charge. These are difficult issues, and the law relating to similar fact evidence or ‘tendency and coincidence’ will always call for close scrutiny.

Finally, there are two dictates of common sense and fairness. If a party has access to evidence, but does not produce it, the inference may well be that such evidence is against the case of that party. And if you are going to call evidence on a point on which you are cross-examining a witness, you should put the substance of that evidence to the witness. This means simply that you should allow the other side the right to respond to your case.

They are the basic rules of the law of evidence—and they are all rules that you would expect to be referred to before a tribunal that is not bound by the laws of evidence. The rest is detail. What does this say about our trial process now?

Precedent now is a morass of footnoted oblivion. With avalanches of documentation produced on discovery, witness statements, and written statements of the case, we have created a monster by converting an adversarial Morris Minor into an inquisitorial Rolls Royce. And cross-examination is now as close to extinction as examination in chief. Instead of cross-examination, we get: ‘You and I are going on a little journey, Sunshine, and we will wave under your nose every dirty bit of laundry and every silly or naughty thing you have ever said in the past until you give us what we want.’

> “Judges need to come down harder on cross-examination that is inept, oppressive or slippery.”

The pleadings were meant to define the issue. Much time, money and ingenuity are spent on gorgeous displays that end up being of as much use as the fantail of a peacock. Too often the real point is buried in a second grade category called ‘particulars’—details or, if you prefer, material facts, rather than broad legal conclusions—that the other party does not plead to. The horrors and traps in discovery and court books are well known. Now counsel keep getting asked for more written submissions as if some judges want their decisions written for them.

The failure properly to control the trial process is most evident in how judges handle the examination of witnesses. Some cross-examination goes on for hours, days even. This is a real flaw in our process and a denial of fairness both to the parties and the taxpayers who fund this gravy train. There is, in my view, no reason why time limits should not be imposed on cross-examination, and judges need to come down harder on cross-examination that is inept, oppressive or slippery. The court has the power to disallow questions that are misleading, confusing, unduly annoying or repetitive, insulting or otherwise inappropriate. And the court must take action against such bad cross-examination even if counsel for the witness takes no objection. How could it be otherwise? Justice at law is a precious resource that has to be protected by the judges so that to the extent possible it is available to all of us. If that requires a kind of rationing, so be it.

Lord Mansfield was Lord Chief Justice for 32 years. He decided about 700 causes a year. He insisted on clearing his list about once each term. He knew that delay and increased costs come from the lawyers, and that no litigant with a fair case ever wants delay. He outlawed adjournments even by consent. He knew instinctively what all judges should know and act on: delay and expense favour the rich and the powerful. The point is simple. If the trial process takes too long, it is not fair. Since Magna Carta entered our forensic fabric in 1215, it has been axiomatic that justice delayed is justice denied. And if the judges at Nuremberg and at the ultimate courts of Australia, the US, and the UK imposed strict time limits, why on earth cannot our trial judges do that at the trial?

There is another way, based on the way magistrates proceeded when I started in the law. Instead of a long war of attrition, we can offer a quick trial. When you receive a request for relief, you fix a date for hearing, say in six weeks, to allow time for both sides to get ready to go into the ring. You then proceed on the footing that the claimant and the person sued both want to get out of this ugly fight and to get on with their lives—and that their lawyers are equipped to help them do just that. Your process is not inquisitorial. It is for the parties to engage. Then they turn up on the day and the better case wins. You have let it be known that an adjournment would require something like an act of God. You will hear plenty of groaning, threatening and posturing—but not from two people—the person who first came to you for relief, or the taxpayer who has to bear most of the cost of the super deluxe model. That is how state tax cases were decided by the Victorian tax tribunal. And in every case, the decision was given either at the hearing or a day or two later—and before any transcript arrived at the tribunal.

May I come back to witness statements? In my view, that practice is not fair to the witness, the lawyers, or the tribunal. They want to assess the witnesses by hearing them give their evidence from the start and the witnesses should be able to find their feet before they are put to the test.

The last tax case I heard *(Di Dio Nominees v Commissioner for State Revenue VCAT [2004]1824)* showed how bad it can be. A Sicilian migrant changed from being a butcher to a baker in Werribee—he did not like the cool room—and he astutely bought land in the corridor. By the time he got to me, he was worth well north of $40 million. He distrusted lawyers and all professionals. Was he now a farmer? Someone in my absence had made directions for witness statements. The Sicilian filed a long statement in impeccable English all about trusts and companies. The Sicilian probably contributed not one word to the document. The first thing he did in the witness box was to ask for an interpreter. But he knew his occupation: “Farmer,” he said with pride and drilled determination, in English. Since that answer might be thought to beg the whole question in the case, I asked the interpreter what was the Italian word for “farmer.” He said there was none. It was Alice in Wonderland. And it was degrading.

May I conclude with the sample peroration with which Aristotle closed *Rhetoric*? “I have done. You have heard me. The facts are before you. I ask for your judgment.”

Geoff Gibson *has divided his 51 years in the law between the Bar, partnership in an international law firm, 30 years presiding over tribunals on a sessional basis, and writing five books on the law, including* The Common Law, A History.

Amending the national anthem—from words of exclusion to inclusion

An interview with the Hon Peter Vickery QC [1]

BY ARNOLD DIX[2]

Introduction

The word-change to the Australian national anthem to: "Australians all let us rejoice, For we are **ONE** and free", proposed by the Honourable Peter Vickery QC on behalf of the Recognition in Anthem Project (RAP), is now part of our national song.

On New Year's Eve, 31 December, 2020, the Prime Minister officially announced that the Governor-General, the Honourable David Hurley, had proclaimed the new words effective from 1 January, 2021.

As the Prime Minister said in announcing the change to greet the new year, "This change is for all Australians. We are one country and have proven so from generation to generation. 'One and free' is and must be the story of every Australian. It's the way we truly Advance Australia Fair."

I share chambers with Peter Vickery, have an indigenous heritage, and have closely followed the progress of his proposal over the years. When I heard news of the change to the national anthem, it struck me as being both a momentous advance and an interesting example of the exercise of executive power. I arranged to conduct an online interview to gain further insight into the project which led to this development. It has been a fascinating journey.

What inspired you to press for change—what was the need?

So many of our First Nation peoples have found it difficult, if not impossible, to sing our national anthem with the "young" word. After all, with reference to "Australians all" it excludes those Australians whose ongoing culture and connection with our land is not young at all, but ancient. I found this to be profoundly discriminatory and unjust.

A notable example of this problem was demonstrated by Yorta Yorta opera singer Deborah Cheetham, who in 2015 refused the prestigious invitation of the AFL to sing the anthem at the grand final of that year. She said at the time: "It was a great honour … But I really can no longer sing the word 'young'. It perpetuates the idea of terra nullius", she went on to say. She was joined by a number of Indigenous sport leaders.

The change has been long overdue. As related to me by Shane Phillips (Bundjalung, Wonnarua & Bidjugal), a community leader and activist from Redfern:

> "We've been waiting for a chance in history to sing and feel included in the anthem for this country. The current anthem does not include us. We want to sing the anthem alongside other Aussies."

No other national anthem of the world has had the effect of excluding any citizens of a country.

However, in this 'one' word we find a vision for the future. The new anthem recognises how far we have come as a nation. It focusses on what unifies us, rather than what pulls us apart. By replacing "young" with "one", a word of exclusion and hurt has at last been replaced by a word of inclusion. It paves a path towards reconciliation.

In a practical sense, it also recognises the reality that since 1945 the world has seen the emergence of at least 136 new nations. In this context, Australia can no longer comfortably cling to the concept of 'young'. It has achieved the standing of a significant power in the Asia-Pacific and has surely come of age.

How did "ONE and free" come about?

It was clear that "young" had to go. I obtained the consent of Judith Durham[3] to use her lyric "In Peace and harmony" to replace the second line. But then the important word "free", referring to rule of law and our democratic system, would have been lost forever. Some at the time were suggesting "strong" as the replacement. But with the hint of a chest beating locker room war cry at half-time, the endearing quality of the 'quiet Australian' would be lost. Besides, it might have disturbed the neighbours.

The dilemma was solved in conversation with my long-time mentor and friend, Michael Black.[4] His suggestion for "one and free" bubbled to the surface and immediately fell on fertile ground. It worked seamlessly to introduce my Verses 2 and 3 which sing of what it means to be an inclusive people and what it means to be Australian. The song at last was made whole.

What about verse 2 – what does this do?

Verse 2 about our people, is the main recognition verse. It is written as part of the truth-telling process for the nation. Here, respect is shown to our First Peoples—their occupation of the continent and adjacent islands for 60,000 years or more, their connection to country, their culture, their spirituality and their elders, past and present.

In the line, "To walk together on this soil", we make a declaration of peace as we walk together towards reconciliation. This was inspired by words spoken about the late Dr G Yunupingu at the memorial service for him in September 2017. Dr Yunupingu was one of Australia's most revered Aboriginal musicians providing a voice for indigenous Australians and fostering racial harmony. Djungatjunga Yunupingu said this in his eulogy about his nephew:

> "He went into the world. He did.
> He wasn't fighting for himself.
> He wasn't talking for himself.
> He was talking for all Australians
> to unite and walk together."

The verse concludes with respect for our multicultural society drawn from "everywhere on Earth" and recognises its strength for the 21st century.

What were the inspirations for verse 3?

Verse 3 essentially came from the bush. It celebrates the uniquely Australian value of mateship and resilience, and it looks to the future in underscoring the freedom provided by our democracy and the rule of law, and our value in a fair go. Finally, it places our vast home beneath the Southern Cross, where it has lived for millennia. In this way it works with

verse 2 to sing of our core values, as expressed by our Prime Ministers from Bob Hawke to Scott Morrison.

The project began in Tumut, NSW, where my wife grew up. Tumut is in the Snowy Mountains, in Wiradjuri country. It is near to where the dog sits on the tuckerbox, nine miles from Gundagai,[5] and near to Batlow, where my late father-in-law worked as a gun shearer in his younger days, and later as an international fruit and vegetable marketer.

Natural disaster is part of the landscape of the area. Batlow fell victim to the long running drought of this century and was devasted in the bushfires which raged in early 2020. At one point, as these terrible fires approached on all sides, the word was out—"Batlow could not be saved". The 'servo' blew up in a massive explosion as two houses in my family were engulfed at the other end of town. Many others lost their orchards, farms and homes. But the fire fighters kept their heads and bravely persevered. Most of the town was saved, and with the support of others, in the true Australian spirit of lending a helping hand, people rebuilt their lives.

Much earlier, it was the scene of one of the largest natural disasters in Australia's history. The First People of Gundagai warned the early settlers not to build their houses near to the Murrumbidgee River, but the advice was ignored in favour of what looked to be a comfortable and convenient setting.

On the night of 24 June 1852, the river burst its banks in a catastrophic flood which swept through Gundagai, killing an estimated 89 people – approximately a third of the town's population. The water rose quickly to become a torrent that swept whole buildings away and left people clinging for their lives in trees. Only three buildings were left standing when the water receded.

Aboriginal locals of the Wiradjuri nation, Yarri and Jacky Jacky, assisted by other Aboriginal people, including Long Jimmy and Tommy Davis, worked tirelessly over three days and nights to rescue of many of the settler-colonisers. Using bark canoes, they were able to locate stranded people and bring them to safety.

Their heroism is remembered to this day. On 25 June, 2017, on the 165th anniversary of the great flood, a bronze sculpture of Yarri and Jacky Jacky was unveiled in the main street of Gundagai. The sculpture, titled *The Great Rescue of 1852,* was created by a Melbourne artist, Darien Pullen.

This story graphically illustrates that life can be tough in Australia, but with a helping hand and ingrained resilience, Australians can get through. It is then that "Wattle blooms again", as verse 3 runs. This means a lot to people who have suffered natural disaster and brings some to tears when singing it.

How did the RAP project begin?

The Recognition in Anthem Project commenced when I asked a Tumut Wiradjuri Elder, Aunty Sue Bulger, to join me to launch the project. Aunty Sue had a remarkable story to tell. In the mid-1960s she lived with her family in nearby Brungle. They had a bus driver whose job it was to transport children to and from school. But he refused to pick up Aboriginal children to travel in the same bus with white children. So, the Bulger family moved house to Gilmore Station, close by. They had a different bus driver—a wonderful bloke called Morrie Bailey. He welcomed the family to the area—and saw to it that the Bulger children were driven to school to receive an education, and he looked after them along the way.

Aunty Sue did not waste her education. She became a Wiradjuri Elder and went on to become CEO of the Brungle-Tumut Local Aboriginal Council. In 2000 she joined the Council of the Shire of Tumut and was elected as the first Indigenous Mayor of the Shire in 2015. The Recognition in Anthem project was launched by Aunty Sue on Australia Day, 26 January 2017, at a ceremony in Tumut, in her Welcome to Country.

RAP soon developed with an expanded executive committee with a majority of eminent Indigenous members. These include Gungarri baritone, Don Bemrose, one of Australia's leading male opera singers; educationalist Dr Chris Sarra (Gurang Gurang), a former Queenslander of the year; and chorister, Dr Martin Haskett.

We were assisted in the early days by the musical expertise of the late Richard Gill[6] who advised on musical pattern and scan for the lyrics. The new lines were written using the original four-line 'ballad stanza' format of "Advance Australia Fair" where only the second and fourth lines rhyme in an a/b/c/b pattern.

What were the origins of "Advance Australia Fair"?

The present anthem had its origins in a four-verse piece, "Advance Australia Fair", first written in 1878 by a Scottish colonialist, Peter Dodds McCormick. It was a product of its time and was strongly pro-British and white Anglo Celtic in its lyrics, including such lines as: "Britannia rules the wave" and "From England soil and Fatherland, Scotia[7] and Erin[8] fair, Let all combine with heart and hand, To advance Australia fair."

Further, the original verse 1 commenced with "Australia's *sons* let us rejoice". This did not include women. Nor did it include Indigenous Australians in the line which followed "For we are *young* and free". Both women and our First Peoples and their cultures and traditions, were simply ignored in favour of an overriding "rule Britannia" and male dominated view of the world.

But Dodds McCormick did not stop there. He made two changes to the song during his lifetime to adapt to changed conditions—once in 1901, when he introduced a new second verse to recognise the new political structure for the country with the federation of the Australian colonies; and another in 1907, at the behest of a Scottish academic, Professor Stuart Blackie, when he made a change to reinforce allegiance to Britain, with the new line, "Her sons in fair Australia's land, Still keep a British soul". This change in lyrics occurred against the backdrop of a naval arms race between Germany and Great Britain which had developed between 1902 and 1910, as the world prepared for war. This was the last change to "Advance Australia Fair" until about 77 years later, in 1984.

It well-illustrates how adaptation is part of the history and genius of the song. The lines in verse 1, "In history's page let every stage, Advance Australia fair", speak confidently about embracing change. This is a moment when the past is asking something of the present—to walk on the stage of the 21st century, grasp the opportunities and complete unfinished business.

My hope is that the tradition set by our national anthem to adapt to change leads the way with verse which works for our time.

How did we get the national anthem of 1984?

To cut a long story short, following an exhaustive selection process in the Whitlam years, it was in 1977 that the Fraser government conducted a plebiscite as part of a program to change the national anthem from "God Save The Queen". The question put to Australians was carefully worded. It asked, "What *tune* do you prefer?"

Four alternative tunes distilled from the earlier processes were put to the vote. The tune "Advance Australia Fair" won easily (polling at 43.29 per cent) ahead of "Waltzing Matilda" (at 28.28 per cent), with a turnout exceeding 83 per cent.

However, this settled only the music.

In 1981 the Hawke government appointed a committee of eminent Australians, the National Australia Day Committee, to settle the words.

The committee introduced fundamental changes to the character of the original song written by Dodds McCormick. The four verses were cut down to two verses; all references to Britain were deleted; and the lyrics were made 'gender neutral'. For example, the first line was changed from "Australia's *sons* let us rejoice" to "Australians *all* let us rejoice". This was suggested by Ken Warby, an Australian motorboat racer and a committee member who still holds the water speed record of the world achieved on Lake Blowering in the Snowy Mountains near Tumut in his boat *Spirit of Australia*.[9]

However, there was no change to the second line to ensure it did not exclude Indigenous Australians by replacing the word "young". The committee did not have an Indigenous voice in its membership.

In this way it came to pass that any reference to our First Peoples was omitted.

What is the legal basis for changing the national anthem?

The executive power under section 61 of the *Australian Constitution was used by the present government by the Proclamation made on 30 January 2020* to introduce the new lyric for the national anthem. Brennan J reinforced this approach in *Davis v The Commonwealth*[10] where he said:

> "The end and purpose of the Constitution is to sustain the nation. If the executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood—a flag or anthem, for example—or the benefit of many national initiatives in science, literature and the arts."

Use of the executive power in this way is supported by further High Court authority.[11]

This was precisely the mechanism used by Prime Minister Bob Hawke when, on 19 April, 1984, the revised version of "Advance Australia Fair" was introduced to replace "God Save The Queen". This was effected by proclamation of the Governor General of the day, Sir Ninian Stephen, a former Judge of the High Court and member of the Victorian Bar.[12]

What were the highlights along the way?

There were many memorable moments that have left their mark. A stand out was in 2018 when I was invited to meet with the Former Prime Minister of Australia, the late Bob Hawke, in his Sydney office to discuss the Anthem Project. This was a great honour and left me with a lasting memory. I was met by a man who was physically frail but with brilliance penetrating from the Hawke steely blue eyes, sharp as ever. Responding to the proposed new lyrics for the anthem at that time which I showed to him, he said without hesitation: "This is fantastic". It was a remarkable comment from the very person who introduced the National Anthem for Australia in 1984.

Bob Hawke agreed to become Patron of the Recognition in Anthem Project. However, due to ill health, he later advised that he was compelled to withdraw, along with other public commitments. Bob Hawke passed away on 16 May, 2019.

Following some three years of consultation Australia-wide, as far as our resources permitted, on 14 June, 2019, the lyrics of "Advance Australia Fair 2.0" were finalised and were adopted by the Project. This was the day of Bob Hawke's memorial service conducted at the Opera House on Bennelong Point—"A very Australian celebration", as it was described at the time.[13]

The RAP piece is dedicated to Bob Hawke. The dedication reads: "Bob Hawke gave us our National Anthem in 1984—in his last years he supported its change for the Australia of the 21st century."

Another highlight was the premier performance of the proposed new anthem at the Desert Song Festival held in Alice Springs on 15 September 2019. This was an opportunity to road-test and tweak the piece for 'singability'. The renowned Central Australian Aboriginal Women's Choir, supported by choirs from Adelaide and elsewhere, performed it at Ormiston Gorge to an enthusiastic audience of about 1000 sitting on the sand. The performance enjoyed prolonged acclamation and applause, and a standing ovation. It was a deeply spiritual and moving event. The piece was sung from the heart, in Australia's heart.

The launch attracted considerable media coverage, Australia-wide, which was a great endorsement.

Then came Cathy Freeman's support. She said in a media statement on 25 February 2020:

> I agree with Peter Vickery that the National Anthem doesn't acknowledge indigenous existence in Australia. The minimalist change to the opening verse, just changing that one word, I believe puts us on the right path.

This culminated in the Premier of New South Wales, Gladys Berejiklian, on 11 November, 2020 announcing her support for the "one-word change" to "Advance Australia Fair" from "young" to "one"to represent the country's long Indigenous history. Then followed the Prime Minister's adoption of the idea, and the proclamation of the Governor-General.

Why not have a complete change with new music?

There are numbers of potential candidates for the national anthem. For example, the brilliant national song "I am Australian" written in 1987 by **Bruce Woodley** of The Seekers and Dobe Newton of The Bushwackers, has stood out as an alternative. The lyrics are filled with many historic and cultural references and is much enjoyed on public occasions. The song became very popular, with the copyright subsequently acquired by Woodley's company in its entirety.

But in the contemporary context, a national anthem for our country has a different job to do beyond being a popular song. It should provide reinforcement for the Australian public, and a proud welcome to new citizens, of the key qualities of our great country, its people and its values.

Further, and substantially, a change of music in the song would suffer from the drawback of massive cost. It would require a plebiscite to reverse the outcome of 1977 which selected the tune "Advance Australia Fair". Based on costings for a same sex marriage plebiscite, originally proposed by the government in 2017, this would be prohibitively expensive for the taxpayer. It was calculated by consultants PricewaterhouseCoopers to be $525 million, made up of $160 million for the same sex ballot itself, $66 million to fund the "yes" and "no" cases, and $281 million in lost productivity (with $18 million presumably for contingencies).

In the case of the national anthem, if a change to the tune was to be considered, there would also be very significant additional costs associated with the vetting of public submissions and selection of a new tune or tunes (with accompanying new words) following a shortlisting process, prior to a finalised list being put to a national ballot conducted as a plebiscite. Taking into account acquisition of any copyright which is privately held, expenditure north of $600 million could be expected.

Frankly, I would rather spend the money on constructive programs to advance Indigenous welfare devoted to health, education and tackling incarceration rates.

On the other hand, further positive change limited to the words of the National Anthem could be pursued at no cost using the executive power—which is effectively a free process, given that RAP, as a charitable organisation, offers its piece with no payment for copyright.

Our other great songs can best find a place, as they do at present, as national treasures commonly sung alongside the national anthem on occasions of celebration. The stunning performance by Delta Goodram of the new national anthem alongside "I Am Australian" on New Year's Eve 2020, bears witness to the success of this approach. It is supported by the great songs of other countries, such as the United States, where "This Land Is Your Land"/ "America the Beautiful" was sung by Jennifer Lopez at the inauguration of President Biden, accompanied by Lady Gaga singing the national anthem "The Star Spangled Banner". And Britain, has no shortage of patriotic songs such as "There'll Always Be An England", sung with traditional gusto at the Proms at Albert Hall each year.

What lies ahead?

My first point is that symbolism can never be a substitute for substance. The changes proposed for one of our most important national symbols will be no substitute for practical policies and structures designed to make real and lasting differences to the lives of our Indigenous citizens. Rather, the changes to the national anthem are advanced in support of such policies and structures and will work alongside them. All strands need to be woven together to lift the weight.

This is not the end of our journey. Rather, it marks the continuation of a story. There is much to be done. As Paul Kelly sang so beautifully on New Year's Eve 2020: "From little things, big things grow".

If adopted, verses 2 and 3 will work together with the change to verse 1 to provide a full celebration of what it means to be "ONE"and what it means to be an Australian. Our quest is to make the song whole. But a very positive start has now been cemented into verse 1 by the Governor-General's Proclamation. At last, a long standing wrong has been put right. This is a foundation upon which we can build further.

As to building further, on 5 December, 2020, a Wiradjuri young woman, Olivia Fox, sang the Australian national anthem in the Indigenous Eora language. This was the language of 'first contact' in the Sydney region.[14] Olivia sang her piece before the Tri Nations rugby union game between the Wallabies and Argentina. It was a magnificent and inspiring performance. It took discussion about the form of recognition in the national anthem to a new level.

This part of the RAP goal is in its early stages, and there is much work to be done, both in gathering translations and devising legislation to accommodate the hundreds of Indigenous languages. But now a settled version of verse 1 has been achieved with the Proclamation of the Governor-General, RAP proposes to proceed with this component of the project. A new portal to our website has been added and is being developed: "Indigenous Language Versions". This includes an opening suggestion for legislative change to accommodate the many First Nation languages.

Our committee sees language as critically important for the preservation of Indigenous culture and for generating respect for its existence. To return to our theme, this is a moment when the past is asking something of the present.

Conclusion by Arnold Dix

This is a positive story of our evolving national identity and testament to our collective ability to embrace positive change through community activism.

Verses 2 and 3 as proposed by RAP are set out below. My congratulations on the achievements in implementing the reform and best wishes to the Project on the journey which lies ahead.

Additional Verses 2 and 3 Proposed by the Recognition in Anthem Project

Verse 2—Our People

For sixty thousand years and more
First peoples of this land
Sustained by Country, Dreaming told
By song and artist's hand.
Unite our cultures from afar
In peace with those first here
To walk together on this soil
Respect for all grows there.
From everywhere on Earth we sing,
Advance Australia Fair.

Verse 3—Our Values

In times of drought and flood and fire
When all but hope is gone
Australians join with helping hands
And wattle blooms again.
Tomorrow may this timeless land
Live for our young to share
From red-rock heart to sun-filled shore
Our country free and fair.
Beneath the Southern Cross we sing,
Advance Australia Fair.

1 Hon Peter Vickery QC FCIArb is a former member of the Victorian Bar (1978-2008) and Judge of the Supreme Court of Victoria (2008-2018). He is a Senior Fellow in the Law School, Melbourne University, a lecturer at the University of Technology, Sydney (UTS), and conducts practice as an arbitrator and mediator.

2 Professor Arnold Dix is a Barrister (Victorian Bar); Scientist (geology); Adj Assoc Professor of Tunnel Engineering, Tokyo City University; and Vice President of the International Tunnelling Association (ITA).

3 Judith Durham AO is an Australian singer, songwriter and musician who became the lead singer of the Australian popular folk music group The Seekers in 1963. In 2006, Judith Durham, Kutcha Edwards and others launched their pioneering total re-write lyrics for a new Australian national anthem "Lyric for Contemporary Australia".

4 The Hon Michael Black AC QC practised at the Victorian Bar from 1964 until 1990 when he was appointed Chief Justice of the Federal Court of Australia (1991-2010). Peter Vickery was one of his readers.

5 "Nine Miles from Gundagai: The Dog and the Tucker Box" is a poem by Jack Moses, published in the 1920s.

6 Richard Gill AO (4 November 1941–28 October 2018) was an Australian conductor of choral, orchestral and operatic works. He was known as a music educator and for his advocacy for music education of children.

7 Archaic for Scotland.

8 Archaic for Ireland.

9 The world water speed record achieved by Ken Warby on 8 October, 1978, which he holds to this day, was of 275.97 knots (511.10 km/h; 317.58 mph). As a child, Warby's hero was the British champion Donald Campbell, who died in the Lake District, England, attempting to break the record in 1967.

10 (1988) 166 CLR 79 at [13].

11 See *Victoria v Commonwealth* (1975) 134 CLR 338 at 397; *R v Duncan* (1983) 158 CLR 535 at 560; *R v Hughes* (2000) 202 CLR 535 at [554-555]; and *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

12 Sir Ninian Stephen was admitted to the Victorian Bar in 1949.

13 SBS News, 14 june 2019, Maani Truu.

14 "Eora" was the name given to the First Peoples of the Sydney Basin by the early colonists. Eora is commonly referred to as "the Sydney Language".

Australian Bar Association

Re-emerge
The Australian Bar after COVID-19
Energised, Innovative, Enduring

2021 National Conference RE-EMERGE 2021

Conversation Quarter, SLV.

From the spectacularly renovated halls of the State Library of Victoria, to drinks in the Old Melbourne Gaol, and a Gala Dinner at the new W Hotel, the 2021 ABA Conference will debate the challenges facing, and the enduring role of, the Australian Bar in three iconic Melbourne settings.

RE-EMERGE 2021 will be the first national gathering of the Australian Bar for more than 18 months. The conference is an opportunity to re-engage with colleagues, reflect on having endured a momentous year, and participate in important discussions about the future.

In a full program over three days, RE-EMERGE 2021 will bring together leaders from the judiciary, the Bar, the profession, politics, academia and the media, from across Australia and internationally.

In the Conversation Quarter of the State Library, RE-EMERGE 2021 will begin on the afternoon of Thursday 16 September with a keynote address by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia. The Chief Justice will be followed by legal futurist, Professor Richard Susskind OBE, reflecting on access to the law, remote courts, and how accelerated innovation is re-imagining the provision of justice. The Hon James Allsop AO, Chief Justice of the Federal Court of Australia, will provide an Australian perspective. The ABA will then host welcome drinks at the Old Melbourne Gaol, before a number of Victorian Bar Associations hold dinners to welcome their interstate colleagues and wrap up day one of the conference.


Matt Howard SC, President ABA

"We're designing a conference that brings together leaders in our profession, politicians, journalists, and professionals from academia, healthcare and mental health to participate in a series of keynote and panel sessions over the course of three days to drill down into the issues that affect the Australian Bar in 2021 and beyond", says Matthew Howard SC, President of the ABA. "There's a good mix of sessions that discuss black letter law across all practice areas, ethical and reputational issues for the Bar, and, of course, the impact of the pandemic on our profession, the courts and our clients. This will be an unmissable conference event for 2021. We're delighted that we've been able to bring distinguished speakers together."


The Old Melbourne Gaol.

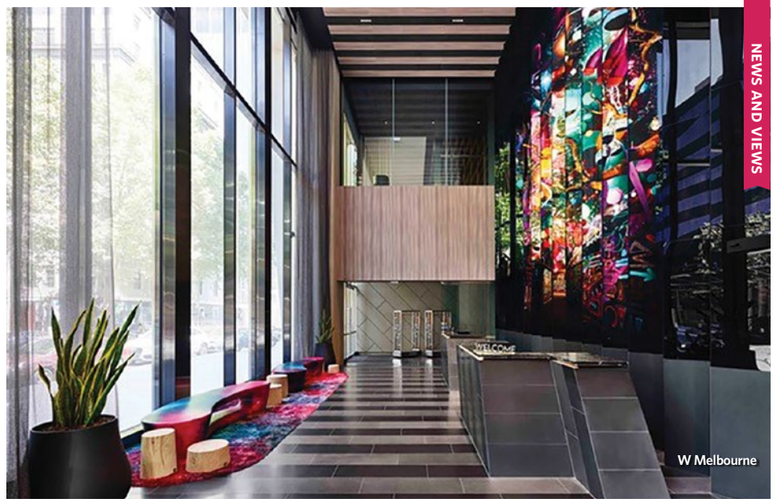
Friday 17 September will feature a full day of plenary and panel sessions. After an opening speech by the Chief Justice of Victoria, the Hon Anne Ferguson, household-name panellists drawn from the media, politics and the law will address the impact of the pandemic on the Australian federation both politically and constitutionally. They will be followed by sessions on the physical and emotional impact of uncertainty on our profession, and a focus on ethical and cultural issues currently confronting the judiciary and the Bar, including sexual harassment.
In the afternoon, streamed sessions will drill deeper into issues of law and practice for the criminal and common law, commercial and tax Bars: understanding the psychology of juries; clearing the back-log; how the Bar can improve communicating with corporate counsel; essential issues in data protection; and insights into topical issues in taxation law.
The conference day will conclude with sessions addressing the impact of virtual courts on open justice, and reconciliation with Australia's First Nations' peoples and the proposal for an Indigenous Voice to Parliament enshrined in the Constitution.

"We will be inviting participants to reflect on the really big issues confronting the Australian Bar as we emerge from the pandemic, with speakers of unrivalled expertise," Matt Howard SC adds. "The Gala Dinner at the new W Hotel in Melbourne on Friday evening will cap a formidable program."
There will be further robust debate on the morning of Saturday 18 September, including a "National Cabinet of Attorneys-General"; a judges' panel, in association with the Australasian Institute of Judicial Administration, discussing the view of remote advocates and remote advocacy from the perspective of the Bench; discussions about the lived experience of disability in our profession—perhaps the forgotten diversity boundary; and a plenary session chaired by the Hon William Alstergren about the enduring legacy for the courts and the profession of the year that has passed.

Participants will also hear from Justice Gordon of the High Court, the Hon Andrew Bell, President of the NSW Court of Appeal, the Hon Patricia Bergin, who most recently conducted the NSW Casino Inquiry, Prof Sharon Lewin AO, Director of the Doherty Institute, Fiona McLeay, the Victorian Legal Services Commissioner and CEO of the VSLB, Ken Adams, General Counsel of ANZ Bank, and many other panellists, including sitting and retired judges and barristers. RE-EMERGE 2021 will capture the energy, the innovation and the endurance of our profession.

RE-EMERGE 2021 concludes with a panel "War Room", presented by Dr Matt Collins AM QC, Vice-President of the ABA and Chair of the Conference Steering Committee. In a cryptic teaser, Dr Collins foreshadowed:

> *Going Viral (Again)* involves a panel of high-profile participants, including journalists, politicians, barristers and a leading expert in infectious diseases, being presented with and asked to respond to an imagined scenario, that will unfold in myriad unexpected ways. Prepare to be provoked, entertained, illuminated and, perhaps, just a little bit terrified.
>
> The choice of Melbourne as the location for the conference was deliberate. While Bars across Australia struggled with the impact of the pandemic and restrictions, the 111-day lockdown we endured brought unique challenges to our college and the administration of justice. By choosing Melbourne as the host city for this landmark conference, the ABA is recognising that impact and showing its support for our Bar.
>
> We hope to see as many members of the Victorian Bar at the conference as possible, not only to welcome our interstate colleagues, but also to showcase our resilience and continuing excellence.



W Melbourne

Please save the date: ABA National Conference RE-EMERGE 2021

Live and in-person in Melbourne and fully-remotely for those unable to attend.

Thursday 16 September
Welcome and keynote speakers from 2.15pm—State Library of Victoria.
Welcome drinks from 5.30pm—Old Melbourne Gaol.
Bar Association dinners from 7.45pm—Venues to be announced.

Friday 17 September
Full-day program from 9am—State Library of Victoria.
Gala Dinner from 7.30pm—W Melbourne Great Room.

Saturday 18 September
Morning program from 9am concluding at 1.30pm—State Library of Victoria.

For more information and to register visit austbar.asn.au/reemerge2021

CHOICES

ASHLEY HALPHEN

I was discharged from the Alfred Hospital on Tuesday, 23 March 2021.

It was so bad but good.

I've been meaning to delve into my memory box but blocked, creative pathways frustrated endeavor. I've not so much made the space now but the space has made me. Anyway, if all you really own is what you have to give to others, I should retrace recent steps and share the footprints with Bar members.

What follows speaks for itself.

My status as a patient lasted long enough to miss the transition from summer to autumn. As we drove home, I noticed bundles of leaves scattered everywhere. The hazy brown collaborations leapt out at me. I had not revelled in the marvel of nature for a very long time. In fact, with all the sights, smells and sounds impressing, I felt the sensations of a long term prisoner on day release.

Rewind. For the longest time, I was standing upright but looking down and listening to podcast after podcast, able to only hear my voice repeating, "one step at a time, one step at a time, keep walking". Thousands of kilometres would ultimately pass so to help stay buoyant in spite of the idleness of locked time.

Children, wild and bewildered with cabin fever in a space big enough for five but not all at the same time, every day, was no different to the happenings at the neighbours and at the lovely family with twins across the road. What made a difference were the whispers I was sharing with myself, at myself and by myself.

I was reading everything from creative activities for children in the backyard to what a joy the unique opportunity had brought to spend time with family. Then I walked past playgrounds with crime scene ribbon strapped around the swings and slides. This was reality, no matter how many squishy marshmallows charred over the fire near the tents pitched in the backyard. Watching Schitt's Creek provided some respite.

I kept walking, kept moving, kept listening to podcasts and checking the court lists to roughly gauge how much work was out there. No matter how far I walked, I was paralyzed by fear of the unknown. For many months, never was I present and never was I in the present. Mustering any and all strength to be at the starting blocks when the new normal ushered into being. "Be there. Just be there—ready/willing/able."

And I kept walking for many hours a day. My winter stride wore down to a shuffle by spring, but never going backwards. I used the time to reach out and connect. Gripping the phone as though making a 000 call, I prayed to hear that others were on the same sinking ship, only to discover otherwise, "I've been lucky, I've had a constant flow of work".

November came, Christmas passed and then 2021 submitted itself to the potential for new horizons. What had gone was nothing compared to what would be. I was not going to make that start.

Before chambers resumed in earnest in the weeks leading into the festive season, they emptied again. This agitated some concern. Was history about to repeat? I continued to walk and suckle the safe trappings of my familiar suburban routine.

> "On a day that was a Saturday, my back seized. The walking stopped."

Beyond the four walls of my residential address, I managed an 'in-person' in January. The flow and delivery was not quite the same as before, perhaps corrupted by the effluxion of empty time, or at least that is what I thought. Even if fanciful or unfair, there was ammunition for harsh judgement. Pressure mounting in the absence of work, became pressure persisting for want of performance. Freedom is to live without fear. I was still living without freedom.

The snap lockdown was home to the knockout punch. "Will everything be ok?" were the first words I murmured as I became aware of the full force of nervous energy welcoming me into the dark hour of each dawn. I kept walking, kept cooking and kept the house tidy. Clinging on to daily basics that I could control.

March was around the corner, the same month as last year when the saga began. What happened in between as time dawdled and months passed like a streak of speed? Once scaling mountains with the invincible air of a teenager, I was now navigating a minefield, tiptoeing between moments. I tried desperately to accept disappointment as finite but never lost sight of infinite hope. Fragile, I stayed constant in a rigid routine waiting for change. Days passed but not much else.

On a day that was a Saturday, my back seized. The walking stopped. I was bed-ridden and in and out of sleep. Sometimes the Panadol worked, sometimes it didn't. My body and I were still. For the first time in a year, peace and calm. It was heaven. Then the coughing came. Followed by a negative COVID test. And finally an admission into hospital. My exhausted body had broken down. Paradoxically, rescuing me from wherever I was heading.

Change had finally arrived. First, by revelations when laying still on a hospital bed, waiting for doctors to deliver some definitive advice on the direction of my fate. Next, by gathering the many insights and importing them into my daily life. Action unquestionably the enemy of thought.

I have created a space where creativity and well-being are flourishing. Many things remain uncertain, yet anything is possible. Once a prisoner of circumstance, now unshackled from the chains that fastened with lofty expectation. They now dangle by my side. Perception the key, I have opened my mind to positive ideas and at the same time brushed aside self-doubt. The pandemic was so bad but it gifted me a new form of freedom, of a kind that targets my immediate needs and generates greater balance. It is allowing me to reach towards a level of authenticity that is making me proud.

I am well, even thriving…
I am lucky.

I don't walk anymore except when I need to catch the tram!

Ashley has extensive experience as a trial advocate in both the Supreme Court and County Court of Victoria. He is an accredited indictable offence specialist and a Victorian Legal Aid Criminal Trial Preferred Barrister. Ashley is a long-standing member of the Criminal Bar Association. He received the Susan Crennan AC QC Victorian Bar Pro Bono Award for his volunteer work in death penalty jurisdictions in the United States; for assisting in access to justice issues in West Africa; and for acting on behalf of indigenous defendants in remote parts of Northern Australia.

LEARNING to fail

JOHN HEARD

It is funny to think of all the ways you can fail. For barristers who work not to fail, who are paid to be the best, to know, to be succinct and persuasive, failure is a tremendous and daunting thing. Most of us avoid it. I am teaching myself to embrace it.

I do this because I figure that you can't get better at something without practice. And you can't be a good barrister without practice. And you can't be a good anything really without trying. Yet we are taught (at least I was) to be sui generis, self-made, complete and whole from the womb. Look! It's a lawyer and they're perfect and they never will not be perfect.

It's such nonsense and yet we eat it up.

Not me—I'm trying things I'm not good at. I tell people I'm having a go.

I started with knitting. My dad showed me how. This was not odd in my family. My street kid, orphanage surviving, tattooed, silent generations Indigenous father gently and carefully showing me and my twin how to loop the yarn and purl one, stitch whatever. He'd puff on cherry tobacco and knit, or make leather stuff, or show me how to tie a hook to a fishing line, or gut a fish, or yeah—how to knit a beanie. He said he'd learned in the '70s.

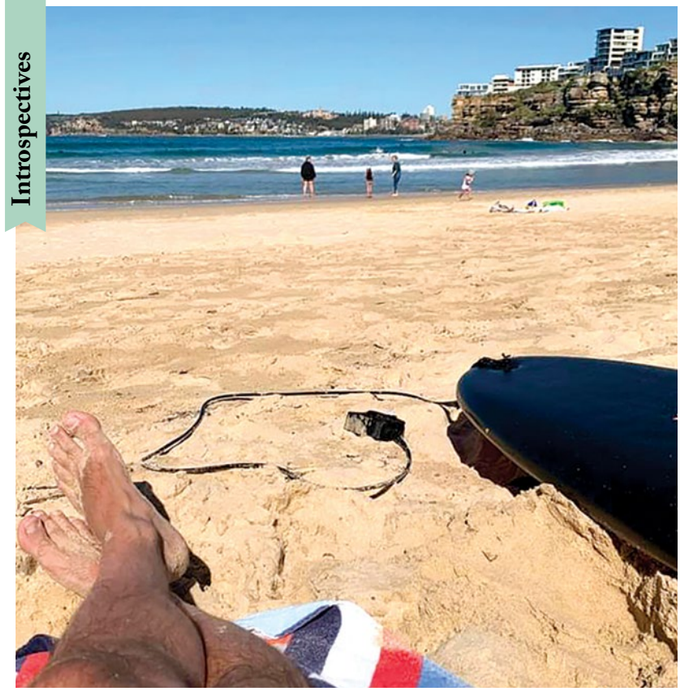
My dad had done all sorts of things, he lived a nearly unbelievable life, so we didn't think much of it—and he could definitely knit.

It was only when we turned up at my pretty rough country primary school and the local kids saw us with our knitting bags, crafted lovingly by my Ukrainian Australian grandmother (mum's mum) out of corduroy and scraps, that we learned it was a bit weird. We didn't care—dad didn't care. I still don't and I still knit when I have too much nervous energy. And I don't mind if I drop a stitch or it's a bit wonky. Dad would say that has "character" and admire whatever crap we'd spun out. His vibe was that people who made things with their hands that were original, that had character, that had "cool", themselves had character and were close to attaining "cool". Dad was always trying to get us, and mum—who is distinctly not "cool" and never had it—to be and to have some "cool".

Dad was "cool". I once saw that man find a nest of baby red-belly black snakes in a tree we were leaning against while yabbying. He stood up, told me calmly but firmly to get out of there, and then proceeded to deal with the mother snake and get us safely away with all of our stuff.

He also tried to get me to be a star footy player, but my heart wasn't in it, which drove him crazy. "You have such natural talent, look at you go Bungee" he'd say as I sprinted here or kicked there—but it was rugby I was obsessed with. One afternoon, in our country town near the NSW/Victorian border, where we got all of the codes and lots of sport on TV, we randomly switched over to a rugby match. There was running and scrummaging and tackles galore, and next thing someone had his eye popped out and I remember seeing it hang from a thread while the poor fella held it in—and I was hooked. What was this wild, manic, completely real and compelling sport?

I wanted in with rugby, but I played footy until I was about 15 or so instead, going up the Australian country town ranks from



mini midgets through Auskick up to juniors then under-16s with a bunch of boys and families who became like second families—and a whole other bunch from our opposition teams who were our mortal enemies. Footy was one thing dad lost his cool over, and unfortunately, I learned to be a perfectionist about my football. It didn't help. The more I tried with that shame-oriented and fear-oriented vibe the worse I got.

I say I played footy until about 15 because when I was around 13, in Year 8, I remember being one of the footy boys with all of my mates until one of them decided I was gay. That started a couple of years of bullying that ended with me quitting the sport. It seemed that the worst, laziest boy on my under-16s team—the mighty Imperials—was suddenly higher in the pecking order than me and that seemed totally unfair. So, I wasn't giving my energy to that team anymore. Changing teams was unthinkable.

I rowed at college at uni but that was mainly because there was a bunch of Xavier boys who'd apparently pulled off a rare feat and won Head of the River one year before coming up to the college. All of a sudden, the place was rowing mad and I was semi-forced to get involved. I loved it, I was terrible at it, but I was happy to fail and then I rapidly became good enough to be picked to row at three-seat in the 2nd VIII. It seemed all of the learned perfectionism slid away. I had fun. Some of the homophobia remained, including internalised (I only came out a couple years later). But I remember rowing down the Yarra in the Intercollegiate Regatta thinking that my strokes had character. Dad was over the moon to hear about it all, no matter that we lost our first heat and were doing "boat races" of a different kind in the shed by 9am.

Later, I gave up on sports, although I kept keen on rugby. I was never allowed to play as a kid; that was one sport mum said was 200 per cent out of bounds, but it still thrilled me.

On a trip to Paris with my ex for his 21st birthday, I bought tickets for a Six Nations Scotland v France match at the Stade de France. I had to drag him along. But once he saw that storied stadium, and we were seated in a massive bowl of drunk, howling and joyous French people singing *La Marseillaise* in a haunting, full throated way, his blood ran pure with the rugby fever I'd caught as a kid.

Back in Melbourne, *he* joined the local gay and inclusive rugby team set up by the Melbourne Unicorns in Toorak and they found out *I* could kick and pass and run. That started a nearly five-year involvement with club rugby, culminating in a 20–0 win at Ballymore at the Purchas Cup (the "gay Bledisloe") in September 2019 playing run-on number 14 for an invitational Barbarians side. After just an hour or so of training together, just after meeting each other, that motley side of players from all over the world gelled and we progressed to our tier grand final. It was wild.

The whole time I was involved with rugby I kept in the back of my mind, "it's okay to drop the ball, it's okay to miss the pass". Rugby players are obsessed with dropping the ball. I am no sports psychologist, but I think it is obviously shame oriented and deeply ingrained. I found that if I kept my "cool", if I allowed myself to fail, if I recognised that everyone

> "'Be like a cat" and step lightly. I can't think of a more helpful piece of advice for a day in Court."

from the Wallabies (sadly too often lately) down to me playing at some scrubber pitch in the outer suburbs could and probably would drop the ball, then I actually dropped the ball far less often. Then I relaxed. After I relaxed, I seemed to have glue hands—I couldn't drop the ball.

Which brings me to surfing and being a barrister. I am turning 40 this year. Dad passed away in February 2020. It still hurts. I am also physically a bit broken. Like so many of us club rugby people, I have a stuffed shoulder and I am semi (probably permanently) retired from the pitch. Last year I came to the Bar. Everything happens at once.

I have been invited to play at the International Gay Rugby World Cup in Ottawa in 2022. As tempting as it would be to play and tour in a Bingham Cup for Australia, it seems ridiculous. Being open to failure is one thing; putting my body on the line at this age seems unnecessarily reckless.

Surfing doesn't. It's hard and I'm terrible. I'm hooked. I have leg cardio fitness but not arm cardio fitness which is not great for paddling out, or even staying on the board. But taking a foam board out at Freshwater Beach above Manly in the depths of Covid-19, when I was stuck in a different city and state and I had no idea if anyone would ever brief me, seemed like the sanest thing to do. I'm learning. I'm okay to fail. At Freshy I flopped around and fell off so much an older couple walking by stopped and pointed and tried to give me pointers from 100 metres away. I also posted a photo on social media that day in my useless leaky borrowed wetsuit with the hashtag "kookiestkook" and I have this smile on my face. It was magic.

Later, as my partner Mark was packing up, and while I was sitting on the beach there feeling sore and happy, I got an email from the people investigating my dad's file from his orphanage days. They'd previously sent a few unseen pics of dad during those vulnerable days for him and I was shocked. It was like he was reaching out and reminding me again, as he had so many times, that "cool" is about having a go and being open to failure. He never tried surfing, but we always meant to. It felt like his approval—for surfing, for the leap into the void of the Bar, for how we were managing the pandemic, for all of it.

A few weeks later my first proper briefs came in and I was off and barristering. I could almost feel the board sway under me as I did it—that openness to failure making me a better, more careful, more creative and self-aware advocate. The way you need to find your balance and get on, then get up, then stay on. And I think now about how my Byron Bay surf coach told me to "be like a cat" and step lightly. I can't think of a more helpful piece of advice for a day in Court where you can prepare for X and Y and all you spend your time doing is A and B. Get on, get up, stay on—be like a cat, step lightly.

Now when I paddle out, in that saltwater that my dad taught me was the "best medicine", we do it together in a way. Just like knitting and all of the rest of it, I feel him with me telling me to keep my "cool" when I get a brief and it's a bit hairy. I am so grateful to dad, grateful for dad, and grateful that I get to surf. And I am grateful that I got to have a parent who told me it was okay to do things like fall off and learn to fail and knit. I've been lucky enough to learn along the way that that is really the only way you get anywhere near perfect.

International arbitration DURING COVID-19

MATTHEW HARVEY

By the middle of February 2020, I had resolved upon a plan. I would travel to Kuala Lumpur to undertake the Chartered Institute of Arbitrators' Diploma of International Commercial Arbitration at the Asian International Arbitration Centre. This course had come highly recommended by a number of colleagues. I had space in my diary. I had sorted out accommodation. Then Covid hit.

My interest in international arbitration has developed from my maritime law practice. I have appeared in a number of arbitrations involving cargoes and shipping contracts. This ultimately led into other commercial disputes. About 18 years ago, I joined the Institute of Arbitrators and Mediators Australia (IAMA) and completed their Professional Certificate in Arbitration. At the time, IAMA appeared to be the premier arbitration organisation in Australia.

Some years later, the law of domestic arbitration changed upon the states' adoption of the UNCITRAL Model Law on International Commercial Arbitration. By this time, the Chartered Institute of Arbitrators appeared, at least in my eyes, to have become the premier arbitration organisation in Australia. It also had the advantage of being an international organisation with international recognition.

As lock downs began and I learned to work more efficiently from home, I thought it would be a good use of time to undertake the Chartered Institute of Arbitrators' award writing course. However, since I was only an Associate of the Institute and because some extra study never hurt anyone, I decided to upgrade my membership from associate to member by undertaking the Accelerated Route to Membership (ARM). I would then upgrade my membership from member to fellow.

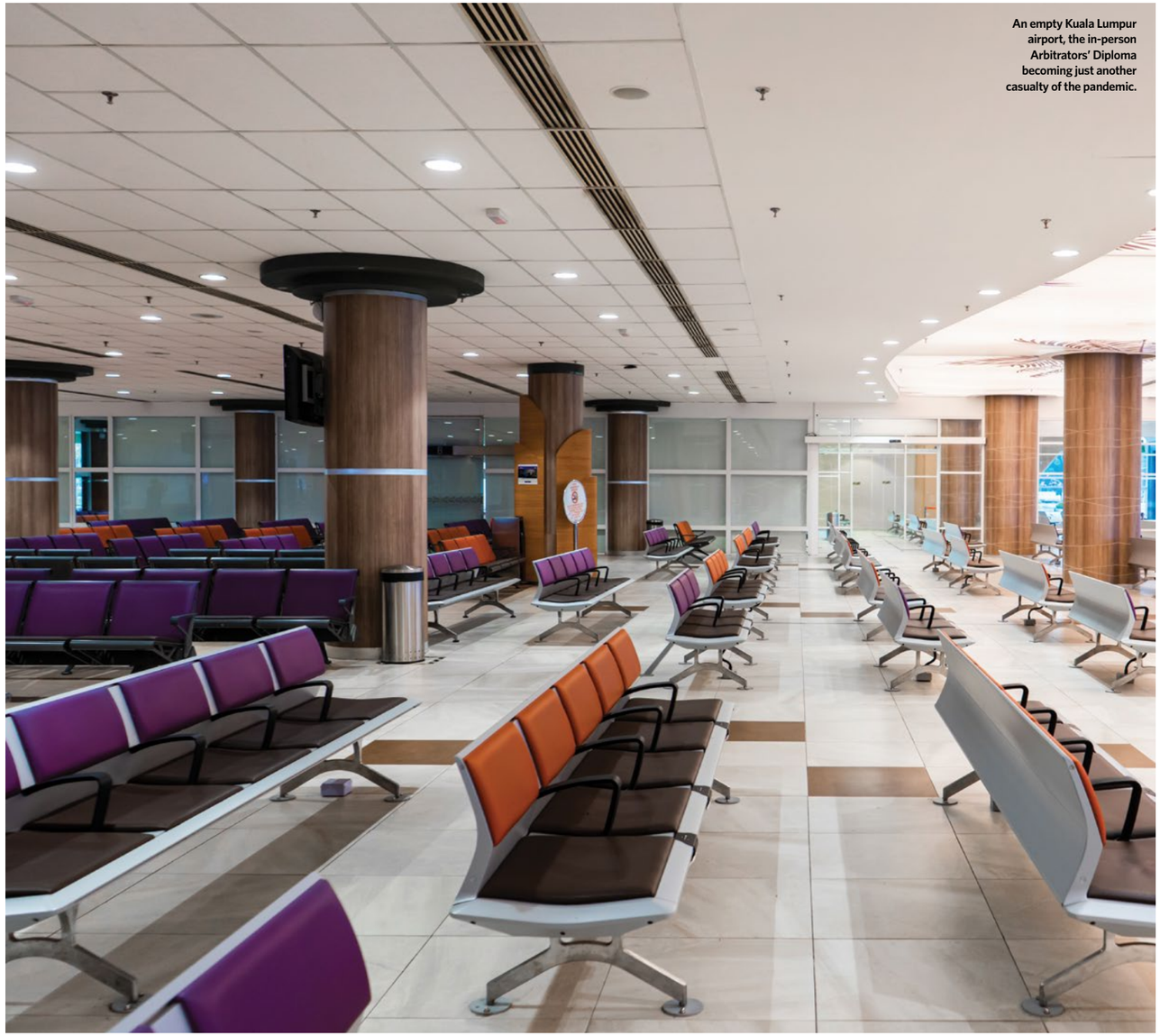
The ARM focuses upon the law, practice and procedure of international commercial arbitration. There is a pre-course assignment worth 20 per cent. Through Zoom, I attended the two-day workshops and tutorials.

The materials for the ARM comprised a lever arched folder of materials, double sided. I recommend that you print them because it gives the opportunity to mark up, use Post-It Notes, and digest the information more thoroughly. Dr Vicky Priskich was the course director of the ARM. She was assisted by Albert Monichino QC and Dr Andrew Hanak QC.

The tutorials were relaxed, thought provoking and very useful. Vicky, Albert and Andrew spent a lot of time with us discussing all manner of things arising out of arbitration. It was a practical and interesting course.

After finishing the tutorials, we then sat a take-home exam, comprising four essays on topics taught in the ARM. To pass, you had to achieve at least 65 per cent. Thankfully, I cleared that hurdle.

Next, in order to undertake the award writing course, I had to pass a module called "The Law of Obligations". Lawyers of some years' experience are eligible to sit an exemption test. To pass the exemption test, you must achieve at least 70 per cent. My advice to a person sitting the exemption test is to give themselves plenty of time and not to rush through it. It is an online, multiple choice test and, while I would expect any barrister at our Bar to understand the law of obligations, the multiple choice test does address matters of foreign law. But do not fear. You are given the materials for the law of obligations in advance and, therefore, a quick search through the materials will provide you with the information you need.



An empty Kuala Lumpur airport, the in-person Arbitrators' Diploma becoming just another casualty of the pandemic.

Having passed the ARM take-home exam and the law of obligations exemption test, I was in a position to undertake the award writing course.

The award writing course is not for the fainthearted. Without naming names, I know a number of adept lawyers who failed the exam on their first attempt. There are also stories of retired judges who, for one reason or another, failed this exam.

With these ominous stories, I undertook the award writing course. The course director was Carolyn Kenny QC, who was assisted by Vicky Priskich, Albert Monichino, Andrew Hanak, Gordon Smith and Malcolm Holmes QC. There was, again, a lever arch folder of materials. I again recommend that you print them, for the reasons stated above. We were required to attend three full-day tutorials.

Writing an award is quite a challenge. While it bears similarities to a court's judgment, there are particular demands as to form and substance that make it different.

> "Without naming names, I know a number of adept lawyers who failed the exam on their first attempt."

While an award should be clear, concise and reasoned, it should contain a brief description of the arbitral process and hearing. It should not be discursive and should not canvass issues that were not put to the arbitrator.

Before we undertook our last tutorial, Tom Clarke of our Bar produced a draft award and, I must say, it was extremely well written.

After completing our tutorials, a take home exam was provided to us in two parts. The first part enabled us to write approximately half of the award. We were given about a week to prepare this. The second half of the exam was given to us to complete within 48 hours. This information enabled us to complete our award.

The assessment was challenging and, I think, a fair assessment of what we had learned. Once you have passed the award writing exam, then you can apply to become a fellow of the Chartered Institute of Arbitrators.

If you are keen to work in the arbitration field, I strongly recommend that, at the very least, you complete the ARM. A number of our colleagues have already done so. I also recommend that you complete the award writing course and become a fellow of the Institute. Obviously, if you want to become an arbitrator this is bordering on the essential, particularly in the international field. But for barristers wanting only to work as counsel before arbitrations, I think it is useful to know what an arbitrator is wanting to know, so you can assist him or her in preparing a binding award.

The tutors and materials were excellent. I cannot recommend these courses more highly.

My close encounters with Nobel Prize winners

GRAHAM ROBERTSON

My late father-in-law, economist Charles "Ref" Denton Kemp CBE (who was born on referendum day 1911 and was nicknamed "Ref"), became one of the founders of the Institute of Public Affairs. In 1976 the IPA invited the 1974 Nobel Prize winning economist Professor Friedrich von Hayek to Melbourne to speak.

The Professor had written a book published in 1944 entitled, *The Road To Serfdom*, which became very influential (but despised by state socialists). He made it clear he was not criticising the welfare state. In brief, Hayek warned of the danger of tyranny that inevitably results from government control of economic decision making through central planning.

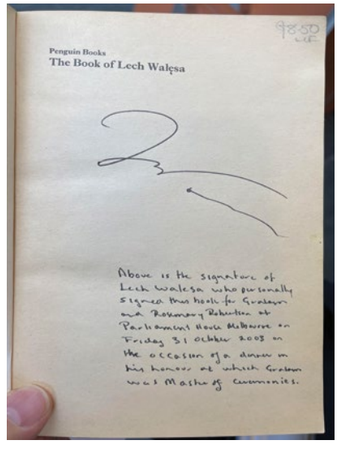
As it happened, Professor von Hayek and his wife stayed with Ref and my mother-in-law, Betty Kemp, at their home Pinjarra in Mt Macedon. At this time I also lived with my wife and young family lower down the mountain on a hobby 'farm' (55 sheep and a horse) called "Robin Hill". On a Sunday afternoon during their stay, my in-laws brought Professor and Mrs Hayek down to Robin Hill for afternoon tea followed by a visit to the Barringo Wildlife Reserve, where I introduced them to Kangaroos and Koalas, etc. Given Law is my field, in the presence of a Nobel Prize winner I tried to be erudite on the subject of Australian fauna and sheep!

Well, time passed, and we returned to Melbourne after the 1983 bush fires and I came to the Bar in 1984, never thinking that I would ever meet another Nobel Prize winner. As fate would have it, in 2003 I was approached by Murray Thompson, then MLA for Sandringham, to MC a dinner on 31 October at Parliament House, Melbourne. The dinner was for no lesser person than one of my heroes, Lech Walesa (pronounced "Walensa"), leader of the Polish solidarity movement, who helped to bring down the Iron Curtain. Historians say he played a central role in dismantling Soviet communism towards the end of the cold war.

If you are too young to know of the incredible story of this humble auto electrician, there is much material on the Net and many books on his life and achievements. Lech Walesa won the Nobel Peace Prize in 1983, and when I met him he had been the first democratically elected President of Poland until 1995.

This encounter had a number of interesting aspects. First, Murray Thompson rang me and told me I had to be at the St Kilda Marina at 7am on the day of the dinner. Why? I asked. Well, the President runs a fishing show in Poland a la Rex Hunt and Rex is taking us all out fishing!

Fortunately for me, the president was too tired from travelling and it was cancelled. The next thing I had to do was learn some Polish. To that end I contacted Ivona Clarke (wife of our colleague Marcus Clarke QC) for instruction. I cannot recall all that Ivona taught me, but I do remember the phrase for, "How are you going?" Would you believe, it is "Yuk Shemush"! She also taught me how to pronounce "Kosciuszko".


Penguin Books
The Book of Lech Wałęsa

Above is the signature of Lech Walesa who personally signed this book for Graham and Rosemary Robertson at Parliament House Melbourne on Friday 31 October 2003 on the occasion of a dinner in his honour at which Graham was Master of Ceremonies.

A signed edition of The Book of Lech Walesa. Inscription reads: 'Above is the signature of Lech Walesa, who personally signed this book for Graham and Rosemary Robertson at Parliament House, Melbourne, on Friday 31 October, 2003 on the occasion of a dinner in his honour at which Graham was Master of Ceremonies'.

As most Australians know, Mt Kosciuszko is Australia's highest mountain, but they might not know that it was named by another Pole the explorer Count Paul Strzelecki in 1840 after the Polish hero Tadeusz Kosciuszko (qv). You do not say "Kozzieosko" as we do; the correct pronunciation is "Koshshushko".

Having been educated by Ivona, when I welcomed Lech, I said "Yuk Shemush Mr President", which he acknowledged, so I think my pronunciation was ok. The president's interpreter was a Collins Street dentist who did a fine job. I next said, "Mr President it is a great pity you were too tired to come fishing with us this morning because out there in the Bay we have a fish which is just like you. It is called the snapper and it puts up a great fight just like you and is very hard to land." To which Lech replied, via his interpreter, "But yes Mr Robertson, how does it eat?". I then went on to express some personal observations about Lech Walesa. I said I clearly recalled my wife and I watching the news on the day he climbed the wall of the Gdansk shipyard urging his comrades to strike and saying to my wife, "the communists will kill him".


Graham Robertson and Lech Wałęsa

Who would have imagined what happened subsequently? I went on to recount Polish contacts with Australia: Count Strzelecki after whom the Strzelecki Ranges in Gippsland are named and who named our highest mountain; the great seafarer and writer Joseph Conrad who arrived aboard ship in Sydney as an ordinary seaman in January 1879; a priest named Karol Wojtlya who earlier had come to the Ukrainian Catholic Church in North Melbourne, and who in due course became Lech Walesa's staunch supporter and defender, none other than Pope John Paul II; and finally, one of the most courageous men of the 20th century, Lech Walesa. That is about all I can recall saying before other speakers then took over. I can say that after the dinner Ivona and her parents had a whispered conversation in Polish with President and Mrs Walesa for about 20 minutes.

I recall joining in and I recall Mrs Walesa telling us that she had her husband's overnight bag permanently packed given that he was so frequently carted off to jail. The dinner went very well and when it was over, as I walked down the narrow corridor of Parliament House, a little man who was about my shoulder height whispered into my ear, "Mr Robertson, you said some very nice things tonight about the President and the Polish people, but I want you to know that there was $80 million CIA money behind him!" I thought to myself the SVR (successor to the KGB) never rests!

The visit ended very early next morning at their hotel where Murray and I farewelled them on their trip to Rome, where they were meeting up with Pope John Paul II. For my part it was a unique experience to meet with a truly historical figure to whom we in the west—in my humble opinion—owe so much. I am indebted to Murray Thompson (a lawyer) for the opportunity he gave me.

An encounter with an elected judge in the Deep South

ROBERT LARKINS

On the morning of Friday 27 July, 2012, I was in New Orleans being shown around by a lawyer friend. Her hospitality extended to taking me to a law court.

The District Criminal Court, Parish of Orleans, is a grand building. The enormous size of the place is a reflection of the booming economy that crashed the year construction was completed in 1929. It would seem that the architect was briefed to design a building that would overawe the public rather than make them feel comfortable that justice is accessible. The façade references the Parthenon. If you look up from the broad front steps and direct your gaze to where the Elgin Marbles were once attached to the original, you'll see inscribed these comforting words: "THE IMPARTIAL ADMINISTRATION OF JUSTICE IS THE FOUNDATION OF LIBERTY". A walk around outside the building revealed a side door more ominously flanked with the words "LAW" and "ORDER". Once inside, the vast interior is in white marble. The overwhelming effect is to make the individual feel diminished.

The visit was my first encounter with a system where judges are elected. There are 12 judges of the District Criminal Court, Parish of Orleans. All are elected and in 2012, men dominated. Anyone who has held a law ticket in Louisiana for five years is eligible for election. More important than legal qualification, expertise or experience is the ability to run an effective election campaign. It is inherent in the process that a candidate will have the means or more importantly, the connections to raise campaign funds. In 2012, a campaign based on law, order and speedy justice was a proven recipe for success.

Once elected, the judges are each assigned their own permanent courtroom. Above the large entrance door to their court is embossed the judge's name to indicate it is that judge whose domain lies within.

The first courtroom we entered was an instant reality check. There were five manacled African Americans sitting in the front row. My friend whispered to me that the colour of poverty in Louisiana is black. The first case we watched involved another African American. He had confidently jaunted in wearing street clothes. His sunny disposition and clothing distinguished him from the other black men who were all wearing orange prison garb. He addressed the judge to the effect that he wanted an adjournment and that his lawyer had told him it would be automatic. It turned out that the judge was not much interested in engaging in a discussion about an adjournment. Instead, he asked the man whether he'd pass a drug test. The judge then simply ordered the sheriff to take the man down to the ground floor for an on-the-spot test. The judge made it clear to the man that if he failed the drug test, he would be going straight to prison pending the hearing. There would be no lawyer, no submissions and certainly no adjournment.

I was still computing what I'd just observed when my friend moved me on to another courtroom.

The entrance to the second court was also through a large door. Inside, the court looked much the same as the first except there were no manacled prisoners. This may have accounted for why the sheriff was asleep. He was not just asleep but asleep in classic Western style with his chair tipped back against the wall and his head slumped forward on his chest. We seemed to be in a mention court.

There were three prosecutors at the bar table and each was apparently concerned with their own separate matter.

We took our seats as the next case was being called. The defence attorney stood and addressed the judge noting that this was a hearing to set a trial date. The judge said he had the docket and the docket said it was listed for trial that very day. "So, get started." The defence disagreed and noted that the assistant DA prosecuting the case concurred that the listing was not for a trial but to set a date for the trial. The judge replied, "You're manipulating the system". Defence responded that the judge's docket was obviously a clerical error and that all who work at the court know that such errors are an only too regular occurrence. The judge repeated, "You're manipulating the system". The defence said, "Judge, how could I be manipulating the system when it's a Friday and the court has no jury pool on a Friday?". The judge turned to the accused, "Your lawyer is manipulating the system and as a result you are going inside, now". The judge then called to the sheriff who woke with a start. "Take that man away". The sheriff handcuffed the protesting client and escorted him out through the small door which was just to the side of the judge's bench. The sheriff then returned, resumed his chair and promptly fell back asleep as if nothing had happened. Any pretence by the defence attorney of respect for the judge evaporated. "Judge! This is idiotic! What are your reasons?" The judge refused to give reasons but did make a bizarre comment, "I read in the paper that quote attributed to you". The judge then fixed a trial date for 20 August, which meant the accused would be incarcerated in the Louisiana State Prison system for three weeks pending trial. Defence continued to argue with the judge. The judge threatened him by waking the sheriff. The defence attorney decided that discretion was the better part of valour and withdrew—obviously he preferred to exit by the big door behind him rather than the small door beside the judge.

The next case was called. There was no accused or defence attorney present and certainly no jury. The judge looked at the docket then asked the assistant DA prosecuting to start the trial with her opening address. The assistant DA said she was not there to open the prosecution case but to seek an adjournment. She told the judge that the prosecution had been having trouble locating their only and key witness. She asked for a warrant to be issued with a material witness bond. The judge reverted to his mantra, "You are manipulating the system. Start the trial now by commencing your opening address!" "I can't judge, there is no accused in court, no defence attorney and no jury!" "So, you refuse?" "Yes, I do". The judge's eyes then looked along the bar table to the next prosecutor. This gentleman suddenly had his head down and was busily shuffling papers. "Are you prepared to start the trial?" "No judge, it's not my case". The third prosecutor was then asked and not surprisingly, also declined. "Sheriff! Arrest all three prosecutors for contempt and take them to the cells!" We then witnessed the extraordinary sight of three prosecutors being made to stand, before being led out of the court by the sheriff through the small door where they would be incarcerated. I had to feel sorry for the sheriff, he was now being run off his feet and getting next to no shut-eye.

The sheriff was only gone a few moments and by the time he returned, the court seemed to have emptied. The judge surveyed his domain as his eyes scanned the now near empty court room. His honour's eyes stopped at us. I'm thinking, no he wouldn't would he, surely not audience participation?

"You two, what are you doing in here?" We both rose to our feet. I'm thinking, I wish I had the number of the Australian Embassy for my one phone call but I say, "Your Honour, I am here under the impression that this is an open court". "Are you lawyers?" he demanded. Before we could answer he continued in such a southern drawl that I couldn't understand what he was saying but found out later from my friend that he was concerned we were in his court as observers for an organisation named 'Court Watch'. Unbeknown to me it had been set-up to monitor some of "The Impartial Administration of Justice" being metered out in the District Criminal Court in the Parish of Orleans. The sheriff, who was now wide awake, rose to his feet in readiness. My friend tried to placate the judge by saying she was just showing me around and assured him we had also visited other courts—not just his. The judge quizzed my friend further: "Do you work for the public defender's office?" "No", she replied truthfully. He looked at me. "Where are you from?" I was still standing and replied, "Melbourne, Australia". He gave a dismissive sneer and said, "Never heard of it".

Orleans Parish judge threatens prosecutors with jail time over trial delay

John Simerman, NOLA.com | The Times-Picayune JUL 28, 2012 - 6:10 AM 1 min to read

Orleans Parish Criminal District Judge Benedict Willard was handing out discipline like candy on Friday. He ordered three prosecutors held for 24 hours on contempt charges -- and also shackled a criminal defendant in a separate case -- before letting all four go home.

INSET: Introduction from The Times-Picayune, 28 July 2012 edition

We resumed our seats. My friend whispered to me, "I'd rather leave by the big door". I said, "It'd be a pity to trouble the sheriff".

On the following Sunday, 29 July, 2012, I was on a plane heading home and picked up a Saturday paper at the airport. It was *The New Orleans Times-Picayune.* There on page 3, to my relief, was an account of the judge's actions the previous Friday. I was relieved to see it in print because I thought without some sort of corroboration, no one would ever believe me. It seems that in the afternoon following our visit, the District Attorney had attended the court in person somewhat concerned about the welfare of his staff. He made submissions to the judge and as a result, all three assistant DAs were released that evening.

Postscript

New Orleans has one of the highest incarcerations rates in the USA, which is quite an achievement in a nation where harsh mandatory sentencing is too often the norm. However, since 2012 there is some cause for hope. One obvious change is that nine of the elected judges in the Parish of Orleans District Criminal Court are now women and at least two of those women are African American.

The newly elected District Attorney for the Parish of Orleans is also an African American. He is concerned about the high rate of wrongful convictions. His campaign was based on a ticket to reform what he has called the 'win at all costs' prosecution culture where a finding of guilt is regarded as 'a notch on the belt.' His intended reforms include matters that are the norm in Australia. As an example of one of the new DA's progressive initiatives, he wants to discourage his prosecutors from suppressing exculpatory evidence. Instead, evidence favourable to the accused is to be made available to the defence. However, he admits it won't be easy and that he is expecting push-back from within his office.

INSET: Image of City of New Orleans Criminal Courts Building;

BAR Lore

No Greater Love: James Gilbert Mann—Bar Roll 333

BY JOSEPH SANTAMARIA

Fleur de Lys 1935 / courtesy of Trinity College Archives

Before I left for Oxford, my father asked me to see if I could track down the details of James Mann. He told me that they had both been shortlisted for the Rhodes in 1935 and that the scholarship was awarded to Mann. My father said that Mann was far and away the outstanding candidate, but that he had not heard of him since the day they were both interviewed.

It proved to be not a difficult task. I took myself to Rhodes House and, as I was waiting to explain my presence, I looked up at the Rotunda on which were etched the names of scholars who had given their lives in conflict. One of them read "J.G. Mann, 1941".

I am not sure when it was but I developed an interest in Jim Mann. It may have arisen out of a conversation with Jim Merralls who had sent me an extract from the Australian Dictionary of Biography on Mann's father, Sir Frederick Mann, who was the Chief Justice of Victoria between 1935 and 1944. I still have the extract, written in Jim's copperplate:

> In 1941 Mann suffered a great personal loss when his elder son, James Gilbert, was killed in action in Crete. Having been chosen as Victorian Rhodes Scholar for 1935, James won brilliant firsts and the Vinerian Scholarship at Oxford, and was regarded as the outstanding young lawyer of his generation. He was a lieutenant in the Royal Australian Artillery when he gave up his life raft to an exhausted man after the ship evacuating his men was bombed. Rather than overload other rafts, he swam out to sea.

Realizing that it was almost the 50th anniversary of his death, I decided at some stage to follow things up. I got in touch with Michael Collins Persse, who was then the archivist at Geelong Grammar. He provided me with two extracts from *The Corian*. The first was dated December 1941. It reads as follows:

> DIED ON ACTIVE SERVICE
> Pro Deo et Patria
> JAMES GILBERT MANN: –
>
> Lieutenant Anti-Aircraft Regiment. Drowned at sea during evacuation from Crete. School 1925–1931. Cuthbert-prize 1929, 1931. Distinguished scholastic career at School, Melbourne University and at Oxford. Secured First Class Honours in Latin and Greek in Public Examinations, shared the Exhibition in Latin and won a Senior Government Scholarship. In 1932, at Trinity College, gained First Class Honours in Greek I, Latin I and Ancient History together with the Exhibitions in these three subjects. 1933 saw further successes—First Classes in Greek II, Latin II and Jurisprudence I with the Exhibitions in Greek II and Jurisprudence. In 1934 secured First Class in Classical Philology, and rounded off his Arts course with a Wyselaskie Scholarship, an Exhibition in Comparative Philology and First Class Final Honours. He was a Senior Student in Trinity in 1935 and represented the College in XI and XVIII. Awarded a Rhodes Scholarship, and proceeded to Oxford. In 1937 he gained First Class Honours in the Honours School of Jurisprudence at Oxford, and was placed first in the final Bar examinations for all England winning the Vinerian Scholarship. Admitted to the Victoria Bar in 1938. Enlisted shortly after the outbreak of war in Field Artillery; was promoted sergeant; transferred to an Anti-Aircraft Regiment , and gained a commission. Left Australia as a lieutenant and saw service in the Middle East and Crete.

The second extract was from *The Corian*, August 1942. It reads as follows:

> We are indebted to Mr H. W. Raleigh for the following account written by a brother officer of JAMES GILBERT MANN: –
>
> My informant, a man of Jim's battery, invalided back from Italy, told me that he was on the HMS Hereward when it was bombed and sunk with the boys on it. All the information he could give me about Jim Mann was that, when the ship went down, Jim swam from raft to raft, doing what he could for wounded and also rescuing exhausted men from the water who were not able to make the distance on their own. Eventually he rested on a raft himself. The last that was seen of him was that he saw a young fellow in trouble so he rescued him and gave up his place on the raft to him. He then swam away, and was not seen again. Jim was a fine soldier, and did a wonderful job while on Crete. We are all proud of him.

Michael Collins Persse put me in touch with Sir James Darling who was the headmaster at Geelong Grammar for over three decades. (Peter R.D. Gray QC is his grandson.) I spoke to Sir James, and my note is as follows:

> "Jim swam from raft to raft, doing what he could for wounded and also rescuing exhausted men from the water who were not able to make the distance on their own."

I arrived in Geelong Grammar in 1930. James Mann was the son of Sir Frederick Mann. His mother was a Raleigh. They (presumably the Raleighs) were another family at Geelong Grammar. He was a very able boy. He was dux of the school in 1929. However, there was a rule that one could not be dux in successive years. Somebody else was dux in 1930. However, James Mann was dux again in 1931. After Geelong Grammar, he went to Trinity. He was a brilliant student in classics. During 1931, we produced a "bi-millennium" of Virgil at the school. We produced a presentation of the 6th Book of the *Aeneid*. Michael Thwaites and John S. Manifold were in the chorus. Jim Mann was Anchises. (*The Corian*, in fact, records that Jim Mann was Acestes. Acestes was the Trojan governor of Eryx who organised the funeral games for Anchises.)

> After he died, his father wanted a memorial started. He didn't want a window in the chapel; he was not that way inclined. So we started furnishing the Hawker library. We used Queensland maple. He was the first boy to be so commemorated.

Sir James suggested a few names to follow up, including John Starke and William Mann, James's brother. He gave me the contact details of Mr Mann. I rang and spoke to William Mann. He treated this intruder with great courtesy, but my recollection of the conversation is his curiosity as to what had prompted my interest in his brother.

I spoke briefly to Mr Justice Starke at drinks on the 18th Floor of Owen Dixon Chambers West. He did not tell me much other than to convey that he revered the memory of Mann.

In 1932, Jim Mann entered Trinity with an A.W. White Scholarship. In his application dated 25 July 1932 to join the Melbourne University Rifles (then part of the militia), James described himself as a law student.

Fleur-de-Lys, the annual publication of Trinity College records further details of Mann's short life. He entered the College in 1931 and read Latin and Greek as part of an Arts degree. He won first-class honours in both subjects, as well as for Ancient History, in the final examinations for 1932. He received comparable results in 1933. By then, he had commenced Law studies and was joint winner of the Sir George Turner exhibition in Jurisprudence. He was a member of the XI and played on the half back flank for the XVIII. In 1935, he was elected President of the Students' Club, and later in the year awarded the Rhodes Scholarship. *Fleur-de Lys* records:

> At the end of Second Term the College said goodbye to Mr JG Mann, Senior Student during the past year and Rhodes Scholar for 1935. Mr Mann came up from Corio with an A.M. White Scholarship in 1932 and during his four years in Trinity more than lived up to the reputation he had won for himself at school. Among other things he took a First in Classical Philology, won a Wyselaskie Scholarship and played cricket and football for the college. But a full catalogue of his achievements would be out of place in these columns; we can only affirm our confidence in the selection committee's judgement and wish their choice the success he deserves. Balliol's gain is Trinity's loss. Mr Mann is the 12th member of the college to win a Rhodes scholarship.

At Trinity, there is a trophy bowl, engraved: "TRINITY COLLEGE/ Billiards Championship/ J.G. MANN/ 1934". He did not waste his time.

At some stage, I must have spoken to Bruce McLean, then the Prothonotary of the Supreme Court, and asked him for what

details he had on Jim Mann. The details included his success in Oxford, his admission to the Middle Temple, his admission to practice (2 November, 1938), his signing of the Bar Roll (4 November, 1938) and the circumstances of his death.

When he signed the Bar Roll, he was given the Roll Number 333.

Mann was only briefly a member of our Bar. When war broke out, he was a "Thirty-Niner"—one of the men who were serving in the militia or the RAN/RAAF reserves when World War II started.

It would have been in the law that Mann met other members of the 7th Battery such as SCG ("Jock") Macindoe, later senior partner of Hedderwicks Fookes and Alston and a director of Westpac.

When I first tried to assemble some details of the life of James Mann, I did not have the advantage of the Internet. The 2nd/3rd Australian Light Anti-Aircraft Regiment Association was formed at the end of hostilities. It has a website: *antiaircraft.org.au* and, within that website, there is the text of "On Target: The Story of the 2/3rd Australian Light Anti-Aircraft Regiment".

The book tells the story of the raising of the regiment in July 1940 at the Werribee racecourse, its travel to the Middle East via Perth and Colombo on HM Troopship *Mauretania*, through to its arrival in Palestine. From there, it was taken to the staging camp at Amariya, a few miles from Alexandria in Egypt. The information that follows is taken from that book (which can be read on the Net in its entirety).

On 23 April, 1941, the 7th Battery embarked for Crete "to assist in the defence of the Navy Air Bases on the island". On 24 April, the evacuation of Greece had commenced. The 7th Battery disembarked in Suda Bay, and took up a position "in an olive grove on the slopes overlooking Canea". Immediately, they became mixed up in the evacuation from Greece. By 26 April, B and C Troops had moved to take up defence positions around Heraklion. On 28 May, the order to evacuate was made. The majority of B Troop men were on the Hereward. It sailed with the rest of the fleet at 3.20am, unopposed. When it was in the Kasos Strait between Crete and Kasos, Hereward suffered a direct hit from a dive-bomber. It was every man for himself. This was when Jim Mann drowned. Those on rafts or in life jackets were rescued by the Italian Navy and taken into captivity. Other members of the 7th battery were on

the *Dido* and the *Orion*. Both vessels made it back to Alexandria by 29 May, but suffered terrible casualties en route from the dive-bombers.

The *Official War History 1939–1945* gives further details of the heroism of Mann. In the volume entitled *Greece, Crete and Syria*, Gavin Long, in his description of the retreat from Crete, gives the following account:

> Most of the Australian anti-aircraft gunners were on *Hereward*. One of them wrote afterwards: "Lt Jim Mann of 'B' Troop [Lt J G Mann a Melbourne barrister and Rhodes scholar] was an inspiration to all on board because of the soldierly way in which he helped organise the 'Abandon Ship' , and saw that men had something to keep them afloat. He was one of the last to leave and was drowned. When his turn came to leave all floating material had been used. In the water we were strafed and bombed by a Stuka for a short while. Later an Italian Red Cross plane arrived and kept the Stuka away, by circling round the men in the water. Italian motor torpedo boats took the survivors to Scarpanto and later an Italian destroyer took us to Rhodes."

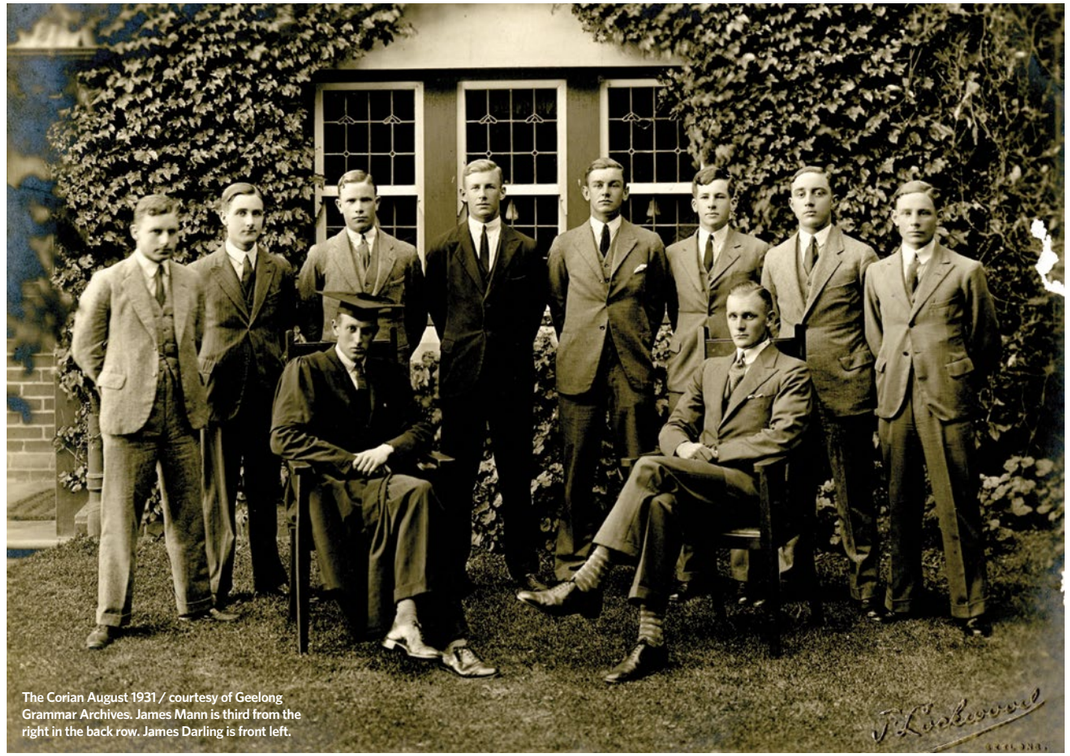
The same volume of the *Official War History* describes the circumstances in which Mann's younger brother, William Raleigh Mann (VX 3933), a platoon commander within the 2/6 Battalion was wounded and captured. It occurred on the morning of 26 April, 1942. William's platoon was defending the canal at Corinth. Eventually, it was overwhelmed by German paratroopers.

Papers of Sir Frederick Mann kept in the National Archives, contain two eyewitness accounts of what happened. WO Jack Bartlett MM (VX 37285) wrote to Sir Frederick from his POW camp on 18 October, 1941:

> After entering the water I noticed your son swimming around, and I asked him how he was, and he called out "O.K. Thanks". Other men who were clinging to a raft called out to him to come and hang on to their raft but he declined as the raft was already overloaded, he also declined to hang on to the chair that I was hanging on to with another corporal as he considered that it would not keep the three of us afloat. Also owing to the heavy sea that was running it would be impossible for anyone to survive unless he had a support to hang onto.

On 28 June 1942, Lt Edgar, who had been repatriated upon an exchange of prisoners wrote to Sir Frederick and told him what he had learnt in the POW camp from the men who were the last to see Jim alive:

> After the *Hereward* had been bombed and the men on board had taken to the sea, clinging to rafts and spas, Lieutenant Mann was seen by several men swimming from raft to raft helping as many as he could. He gave up his position on a buoy, to which he was clinging to rest, to an exhausted man and swam away past to other groups of men. No further was heard or seen of him and I regret to say that it is the opinion of the men who underwent that trial that he could not have survived very long in the sea that was running.


The Corian August 1931 / courtesy of Geelong Grammar Archives. James Mann is third from the right in the back row. James Darling is front left.

In an article published in *The Australasian* in 1941, the following is written under the heading "Rhodes Scholar's Record":

> Those who knew Jim Mann held him in high esteem. I knew him well, and among the many public schoolboys of his period there were not many for whom there was more genuine affection.
>
> All through his course he was known as a sound student and of exceptional ability, and he played his games with keenness. Above all he was admired for his charm of manner and his force of character. When it was known that he was a candidate for the Rhodes scholarship for 1935 it was felt that it would require someone with particularly brilliant qualifications to deprive him of that honour. It caused no surprise therefore, when the announcement was made that James Gilbert Mann was the new Rhodes scholar. He went to Oxford at the end of the year, and his career there was even more brilliant that it had been in Melbourne.
>
> He returned to Australia and was admitted to the Victorian Bar, but before he could settle down to practise he enlisted. He soon gained promotion, and sailed for the Middle East as a lieutenant. From time to time one heard of him, and we learned of the high esteem in which he was held. Those attributes which Cecil Rhodes the founder of the Rhodes scholarship desired to foster were fully developed in him. From the time of his entering Glamorgan until he lost his life he was marked down as a young man of great promise, in whom leadership and character were fully developed.

James Mann is memorialised at the Athens Memorial maintained by the Commonwealth War Graves (Face 10). The entry reads:

> In Memory Of
>
> Lieutenant
> JAMES GILBERT MANN
>
> Service Number: VX14000
>
> A.I.F. 3 Aust. Lt. A.A. Regt., Royal Australian Artillery who died on 29 May 1941 Age 27.
>
> Son of Frederick Wollaston Mann and Adeline Mary Mann, of South Yarra, Victoria, Australia. B.A., B.C.L., Rhodes Scholar, Victoria, 1935, Vinerian Scholar, Oxon. Member of Bar Victoria and Middle Temple, England, Barrister.
>
> Remembered with Honour.

In 1995, to mark the 50th anniversary of the end of the War, a "Field of Remembrance" comprising individual wooden crosses was installed on the grass verge around the Shrine of Remembrance. One of them was inscribed "James Mann VX 14000". He had not been forgotten.

Lest we forget.

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.*

Adjourned Sine Die

Silence All Stand

Vale

Gonged!

2021 AUSTRALIA DAY AWARDS

Bret Walker AO SC (Interstate member)
Daryl J Williams AM QC
Patrick F Tehan OAM QC

2021 QUEENS BIRTHDAY HONOURS

The Honourable Patricia Anne Bergin AO SC (interstate member)
Dr Ian Richard Freckelton AO QC
Her Honour Judge Felicity Pia Hampel AM
The Honourable David James Porter AM (interstate member)
His Honour Ian Leslie Gray AM
Brigadier Douglas Watson Laidlaw AM CSC
Mr Michael John Sweeney OAM

Back of the lift
Adjourned Sine Die

High Court

The Hon Geoffrey Nettle

Bar Roll No 1733

The Hon Geoffrey Nettle AC QC retired as a judge of the High Court on 30 November, 2020. I was his Honour's reader in 1992. At that time, he was a very busy barrister and the Bar's leading junior in commercial, tax, constitutional and administrative law. Apart from his Honour's extraordinary work ethic and gentle humour, my main recollection from those nine months is the stream of barristers seeking advice, calls from common law barristers on circuit seeking assistance with legal submissions during trials and his uncanny ability to pluck from memory the key cases in any field of law.

While his Honour had a formidable reputation as an advocate, he has a soft underbelly: he is a kind and generous man, lacking any sense of self-importance. His Honour enjoyed assisting juniors and gave advice freely. No matter how busy he was, none of his readers' work was returned to instructors without him having cast his eye over it. Even as one of the Bar's leading juniors he was still accepting briefs from the many sole practitioners and small firms that had briefed him when he first came to the Bar in 1982. Many of those practitioners celebrated with him upon his appointments to the Supreme Court in 2002, the Court of Appeal in 2004 and the High Court in 2015.

His Honour had a great respect for the traditions of the Bar. He assisted on a pro bono basis many barristers who had got themselves into difficulties and took briefs that no one else would. In one case, the trial ran for two weeks. In 1992, one of the most litigious banks had entered into retainers with many of the Bar's leading counsel to prevent them acting against the bank. After receiving a statement of claim signed by his Honour, one of the bank's executives rang his chambers and told his Honour that the bank would never brief him again, to which his Honour responded by saying "you can brief whomever you like" and put the phone down.

Despite his busy practice, his Honour served as a part-time member of VCAT (and its predecessor) from 1989 to 2002.

His Honour had three readers: Robert Hay, Pamela Tate and Michelle Gordon.

Before his Honour was appointed a judge of the Supreme Court in 2002, the attorney-general, Mr Hulls, was reported as saying that such was the disinclination of barristers to accept judicial appointments, that he had offered six persons an appointment only to have all six offers refused. His Honour, who was 51 when he was appointed and would have been at the peak of his earning power as a barrister, said at his welcome:

> It is with an immense sense of privilege and good fortune for the opportunity that has been afforded me by this appointment that I now take up my work as a judge of this great court… I am one … who still regards judicial appointment as the ultimate mark of success for a barrister.

As a judge, his Honour was unfailingly courteous to counsel. Despite his background in commercial law, he had a great interest in the criminal law and while a Justice of Appeal was responsible (with Ashley JA) for drafting the criminal procedure rules in Part 6 of the *Criminal Procedure Act 2009*. While an Appeal Justice, his Honour presided over criminal trials and was the judge in the trial of Adrian Bayley for the rape and murder of Jill Meagher. He also sat as an Acting Justice of Appeal in criminal appeals on the New South Wales Court of Appeal.

Outside the law, his Honour maintains a love of restoring cars. He has a mechanic's pit in his garage and has restored a 1.8 litre MGB, a 5.8 litre V12 S-type Jaguar, a 1946 Mark IV Jaguar and a 1972 944 Porsche. He is also a keen sailor and runner and has completed 14 Melbourne marathons.

His Honour's presence on the court will be missed. We wish him all the best in his retirement.

ROBERT HAY

Court of Appeal

The Hon Pamela Mary Tate

Bar Roll No 2675

On 29 April, 2021, a dinner was held to farewell the Hon Pamela Tate after her almost 11 years of service as a judge of the Victorian Supreme Court of Appeal. The room was full of Pamela's family, friends and colleagues, who came to congratulate her on the rich achievements of her long legal career.

The speeches from this evening exemplify some of Pamela's finest qualities: her steadfast commitment to the law, her intellect and her unfailing and steely determination to support women barristers.

Pamela Tate was appointed to the Supreme Court of Victoria on 14 September 2010, following a legal career commencing at the Victorian Bar in 1991 and extending until her appointment as Victoria's first female solicitor-general in 2003. As solicitor-general, Pamela appeared for the State of Victoria in numerous highly significant cases. During this time, she was instrumental in the enactment and implementation of the Victorian Charter of Human Rights and Responsibilities in 2006. After her appointment, she wrote many of the seminal decisions on the Charter, as well as other leading judgments. Her clear written expression is a pleasure to read.

Law was not Pamela's first career. She came to Australia from Dunedin, New Zealand after being a student of philosophy. She brought to the court a philosopher's depth and skill.

At each step of her career, she has made meaningful efforts to support women in the law. This was most recently displayed in her creation of the well regarded "Feedback from the Bench Moot" which provides an opportunity for women barristers to practise appellate advocacy skills. Pamela doesn't just think: she does.

On a personal note, the author recalls the warmth with which Pamela approached her colleagues and thanks her for her mentoring.

On behalf of the Victorian Bar, we wish her a satisfying next chapter and thank her for the enduring contributions she has made to the profession over the past 30 years.

KYLIE EVANS

Supreme Court

The Hon Peter Waddington Almond QC

Bar Roll No 1715

It is customary that when a judicial officer of the Supreme Court retires, a ceremonial sitting

BACK OF THE LIFT

is held to farewell that judge and to acknowledge their service to the court and the legal profession more broadly. Typically, judges, barristers, lawyers, court staff, family, friends and other dignitaries are packed into Banco Court, with latecomers tightly squeezed in the entrance way, breathing awkwardly on each other like the (pre-Covid) rush hour tram ride, to hear the farewell speeches on behalf of the Victorian government, the Victorian Bar, the Law Institute of Victoria and from the retiring judge in reply.

With the retirement of the Hon Peter Almond QC on 31 March, 2021, in the middle of a global pandemic, a conventional ceremonial sitting was not practicable. Instead, his Honour opted to farewell the profession without the fanfare (as is his way) in a brief pre-recorded address which is available to stream on the Supreme Court website. We could not, however, allow him to bid us adieu without paying tribute to his service of nearly 11 years on the bench.

His Honour brought a wealth of experience to the court after 28 years as a barrister (the final 11 years as silk) at the Victorian Bar. He had a successful and largely commercial practice. One of his lesser known achievements is that he is co-founder, along with William Houghton QC and Peter Collinson QC, of the North Melbourne Legal Service (now Inner Melbourne Community Legal), which the trio started in 1978 when they were law students. Motivated by a strong desire to improve access to justice for those most vulnerable in the community, they were able to assist many people during their time at the legal service.

Peter was a highly respected judge, who was dedicated to ensuring that every party was afforded procedural fairness in his courtroom. Counsel have frequently remarked to the writers how nice it was to appear before a judge who was so decent, commercial, respectful and fair. There were few dry eyes around the table at our recent former associates' lunch when his Honour said, with a crack in his voice, that for him, ensuring that parties felt they had each been fairly and equally heard was his most important achievement as a judge. It is a testament to his integrity and humility. These qualities shone through in his farewell message as he thanked everyone who had supported him, from the cleaners to the chief justices. Peter's dignified and thoughtful address has an important message for us all: that no one can discharge their duties alone.

His Honour presided mainly in the Commercial Court (usually in Court 13) but also in criminal trials and in the Court of Appeal on civil and criminal appeals. He was extremely diligent, hardworking and efficient, and would regularly adjourn to consider arguments over the lunch break and deliver 'ex temp' reasons the same afternoon. His judgments were remarkably clear and thorough, yet to the point.

Peter had 15 associates (including us five writers who are now barristers at the Victorian Bar), who know him for his kindness, sense of humour, optimism and love of prime numbers. He had an open door policy and always made time to provide sage advice and encouragement to his associates, whatever their future endeavour. We have such fond memories of our time as associates, from the 9.15am morning banter, to post-court debriefs debating the finer points of law and advocacy, to post-judgment celebrations over coffee and raspberry friands—our time as associates to his Honour was and remains a professional and personal highlight for us.

His Honour is also a very proud and loving father and husband. It was inspiring to see how he and Carmel Mulhern, despite their demanding jobs, made so much time for their three children and their personal interests. We are so happy that Peter will have the opportunity to spend more quality time with his family and pursuing his passions like cycling and furniture making. He also intends to digitise his family history. Farewell to the 138th judge of the Supreme Court. We wish him all the best in retirement!

EVELYN TADROS, VERONICA HOLT, LUCY LINE, GRANT LUBOFSKY AND JOHN HEARD

The Hon Simon Whelan QC

Bar Roll No 1675

The Hon Simon Whelan QC has already retired twice: once last year at Easter so he could re-join his friends on the weekly "Coodabeens" football show on ABC Radio (before being re-commissioned as a reserve judge after the grand final) and again at Easter this year so that he could go back to his beloved Coodabeens!

His Honour was admitted to practice on 3 April 1978 and signed the Bar Roll on 19 November, 1981. He read with Les Ross, later Judge Ross of the County Court, and had four readers: Adrian Ryan SC, Annette Rubinstein, Jonathan Davis (now Judge Davis) and Jacqueline Horan.

His Honour took silk in 1995 and was appointed a Judge of the Trial Division of the Supreme Court in February 2004. In October 2012, he was elevated to the Court of Appeal where he remained until his retirement.

As counsel, Simon developed a strong practice, particularly in the areas of commercial and insolvency law where his skills, even as a junior, were recognised by his many leaders.

Simon met his wife, solicitor Clare Morton, in the lift at Owen Dixon Chambers East. I had invited Ms Morton to lunch at the Essoign after a court appearance in which she had briefed me. Simon got into the lift. I introduced him to Clare and politely asked whether he wished to join us for lunch. He accepted (perhaps surprisingly) and the rest is history. Simon has always denied the veracity of that story (he says he paid for lunch) but the truth always outs.

Simon and Clare have had a long and happy marriage producing three outstanding children. Their eldest daughter, Alexandra, is practising at the London Bar. Madeline, the middle child, occupies a senior public health position in local government in England. The youngest, Hugh, is undertaking the Bar course at the London Bar.

Whilst his Honour had a predominantly commercial practice at the Bar, he was known to prosecute criminal matters in the County Court while still a junior. As a trial judge, although sitting mainly in the Commercial Division, he also spent considerable time trying murder cases in the Trial Division.

His Honour is one of a long line of former and sitting judges occupying a residence in or around Alfred Crescent, North Fitzroy. His present residence, a very stately home, was the subject of an apt comment by Jem Ryan, the youngest son of his first reader. When Adrian Ryan took his children to visit one day, Jem looked up at the stately home and remarked to his father, "Daddy, a king must live here because this is a castle".

On the Bench, his Honour did indeed preside regally, fully mastering the intricacies of controlling the court room (and bickering counsel) while at the same time delivering learned rulings on evidence after rigorously researching the relevant authorities, sometimes without the assistance of counsel. His undoubted wit could, at times, be acerbic and his questioning, always necessary during a difficult case, could cause even the most experienced counsel to tremble.

His Honour's mastery of the law was well known. He was rarely reversed on appeal when sitting as a trial judge and even less so when sitting on the Court of Appeal.

Whilst the wider community will remember him as a fine barrister and an even finer judge, Simon would probably want to be remembered for his prowess as a broadcaster and his knowledge of AFL football. He was one of the founders of the Coodabeen Champions when they first started broadcasting on community radio before moving to ABC Radio. Even though he is a long suffering St Kilda supporter, he managed to inject considerable humour and levity into the weekly program. He was forced to give up his role when first appointed to the Trial Division but he has now returned to that post to continue to entertain his grateful audience.

Simon has always had a great love of the outdoors and he and Clare have undertaken many hiking trips both in Australia and abroad. He has also spent many weeks in Italy enjoying that country and learning its language.

Even as counsel, his Honour never suffered fools gladly. His quick intellect and wit often led him into spirited exchanges. He disliked repetition. But he had those great characteristics of all good judges: unfailing courtesy (usually) to those who appeared in his court and the ability to listen and question intensely to identify and then resolve the relevant issues. We wish him a happy and satisfying retirement.

WILLIAM T HOUGHTON QC

Silence All Stand

Court of Appeal

The Hon Justice Maree Kennedy

The Hon Justice Kristen Walker

Bar Roll No 3754

Justice Kristen Walker was appointed to the Court of Appeal on 3 May, 2021.

Kristen is one of those rare beings who excel in both the academic and practical spheres of the law. She has also contributed effectively over many years to the causes of people whose lives are at the margins of the law, in particular asylum seekers, lesbian mothers, transgender people, and women seeking safe access to abortions and assisted reproductive services.

After attending school at PLC in Melbourne, Kristen entered Melbourne University in 1986, studying for both a Bachelor of Laws and a Bachelor of Science. Kristen made an immediate impression on all who encountered her, not least for her scholarship, attention to detail and the seriousness with which she approached her chosen career. Amongst many accomplishments as an undergraduate, she competed as a member of the Melbourne University team in the 1992 Jessup Moot competition, where she met her life partner, Miranda Stewart (now Professor Stewart). She was awarded the Supreme Court Prize in the LLB graduating class of 1991 and won a Fulbright scholarship to Columbia University Law School in New York, where she was awarded a Master of Laws. Kristen has also received a Master of Laws from Melbourne University.

Kristen completed her articles with Arthur Robinson and Hedderwicks in Melbourne in 1993 and served as associate to Sir Anthony Mason, then Chief Justice of Australia, in 1993–1994.

From 1994 to 2010, Kristen was an associate professor in law at Melbourne University, where she taught constitutional law and international law in the LLB and JD programs, and written advocacy (with Andrew Palmer QC) and constitutional litigation in the Master of Laws. Kristen was also an adjunct professor at Columbia University from 1998 to 2000, teaching international human rights law and legal ethics, and at the University of Arizona in 2003, teaching international human rights law. Kristen has had a long and virtually continuous association with the Melbourne Law School, where she is currently a principal fellow.

A perusal of Kristen's publications demonstrates the breadth of her expertise. They include numerous

BACK OF THE LIFT

articles on constitutional law and administrative law, as well as articles on international law, refugee law, electoral law, law and sexuality, and the law concerning access to assisted reproductive services.

Kristen came to the Bar in 2004 and read with Stephen McLeish (as his Honour then was). Kristen's first case, *Ruhani v Director of Police*, involved her addressing the High Court in oral argument four days after signing the Bar Roll. Since then she has appeared as counsel in more than 30 High Court cases, including matters involving the right to vote under the Australian Constitution (*Roach v Electoral Commissioner* and *Rowe v Electoral Commissioner*) led by the Hon Ron Merkel QC and a number of high profile cases concerning refugees, including the Malaysian Solution case (with Debra Mortimer QC and Richard Niall QC, as their Honours then were). Kristen also appeared pro bono in a range of cases concerning the rights of transgender people, including *NSW Registrar of Births, Deaths and Marriages v Norrie* in 2014 and *Re Kelvin* in the Full Family Court in 2017.

Kristen took silk in 2014 and was appointed solicitor-general in 2017. Kristen's time as solicitor-general involved advising and appearing across a range of matters of significance to the State of Victoria. In particular, she successfully defended Victoria's law providing for "safe access zones" adjacent to abortion clinics (*Clubb v Edwards*) and, as an intervener presented the successful argument in *Spence v Queensland*, concerning the validity of certain aspects of the Commonwealth's electoral donation regime. In addition, her time as solicitor-general encompassed the Covid period. During that time, Kristen was called upon to provide fast and decisive analysis of the statutory regimes relevant to the management of the pandemic. Kristen successfully appeared to defend the various challenges to the public health orders that imposed restrictions on many aspects of daily life, in particular *Loielo v Giles* in the Supreme Court (concerning the curfew) and *Gerner v Victoria* in the High Court (concerning restrictions on movement more generally).

Kristen's appointment to the Court of Appeal has been very warmly received. To take just one example, Anna Brown OAM, CEO of Equality Australia, noted the contributions to reform achieved through Kristen's extensive pro bono practice dating back at least to assisting the legal team in *Croome v Tasmania* in 1997 and to the marriage equality campaign. Ms Brown recalled her experiences working with Kristen and has rightly said that she will contribute both exceptional legal expertise and diversity to Victoria's highest court.

Her friends attest to her abiding sense of justice, her dedication to ensuring access to justice for those at the margins and her conviction that diversity must be embraced and practised. Just as importantly, Kristen also brings to her judicial duties rigorous scholarship and an unshakeable respect for the law, in all its complexity. She will be a fine judge. We wish her well in her new role.

PETER GRAY AND LIZ BENNETT

Supreme Court of Victoria

The Hon Justice Michael Osborne

Bar Roll No 2895

Justice Michael Osborne was appointed to the Supreme Court of Victoria on 15 December, 2020.

Justice Osborne signed the Bar Roll on 23 April 1994—the year in which the Geelong Football Club lost to the West Coast Eagles in the grand final. His Honour attended this game, the result strengthening his general pessimism about the Geelong Football Club and its future prospects.

His Honour read in the chambers of Tim North QC. Save for the outcome of the grand final, 1994 was a good year for the Cats. If asked about that game, his Honour almost always mentions three things. First, he got to the MCG at 8am, where he remained until the final siren. Second, it rained, and he was not sitting under cover. Third, as to the prospects of the Cats throughout the game, he did not share the unfailing optimism of his companion, Frank O'Donnell, one of his Honour's instructing solicitors.

In the second half of 2007, Justice Osborne was hosting one of his six readers. In the week leading up to the grand final, on a regular basis, his Honour entertained the reader (as well as his neighbours in chambers) with the *Geelong Advertiser's* music video titled "Year of the Cat". Of course, in his eyes, the grand final result was magnificent. On the Monday morning after, however, his Honour urged caution about the team's future prospects. This was no time for unfounded optimism. Invariably he adopted the same thinking in respect of reserved judgments.

Justice Osborne took silk in late November 2013. By that stage, notwithstanding the loss in the preliminary final, the Geelong Football Club had established itself as a football powerhouse; similarly, his Honour had developed a large practice as an effective trial advocate. Good judgement and humility were—and remain—two of his hallmarks.

In the next seven years, Justice Osborne ran many trials and appeals. This was the "premiership quarter" in which his Honour demonstrated skill in leading teams—leading from the front and leading by example. Above all, he valued and respected team players.

Justice Osborne will doubtless continue to display industry and good judgement. There is no doubt, too, that his Honour will continue to value and respect team players.

Justice Osborne will make an excellent judge and his Honour's friends and colleagues wish him the very best for this next stage in his career.

ROB HEATH

County Court of Victoria

His Honour Judge Justin Hannebery

Bar Roll No 3212

Judge Hannebery was appointed to the County Court of Victoria on 8 December 2021.

While his Honour professes that his legal career can be summarised as "son of lawyer becomes lawyer", the reality is far more interesting than that.

Judge Hannebery completed articles with his father at Tony Hannebery Lawyers. He was admitted to practice in 1996, after which he cut his teeth working as a solicitor at Balmer & Associates. Thrown in the deep end, his Honour was grateful for the opportunity to gain the volume of experience in a relatively short time that was offered by working in a small criminal defence firm. His interest in advocacy was sparked and he signed the Bar Roll in 1998.

At the Bar, his Honour quickly developed a reputation for impeccable forensic judgement and highly effective, no-nonsense court craft. A journalist observing Australia's largest art-fraud case famously described his Honour as "tall, striking and assured", slashing through the "legal brambles" of an increasingly peculiar case.

Well in advance of his appointment to silk in 2018, his Honour was entrusted by his instructors with complex and serious criminal trials. His Honour also developed a particular expertise in OH&S matters and was regularly briefed in difficult cases of workplace malfeasance. Though highly sought after for privately funded criminal work, he regularly took Legal Aid and pro bono briefs.

As a leader, his Honour encouraged and supported his juniors to take every opportunity to develop their skills. Having appropriated the chambers whiteboard, he would distil an entire case strategy down to a handful of bullet points. His juniors learned the importance and benefit of approaching each case logically and with a clear plan.

Judge Hannebery was renowned as a mentor and had nine readers. Aside from formal mentoring relationships, his Honour was known in chambers as a person whose door was always open and who always made time to listen to the problems of others. His Honour had a way of listening to a complex problem, digesting the issue and whittling it down to a simple proposition.

His Honour was a great servant to the Bar, completing 12 terms on Bar Council as well as contributing to *Bar News*, the Criminal Bar Association, the readers' course and many other projects. His Honour was devoted to giving something back to the institution that provided him a distinguished career. His Honour's appointment to the County Court is a further progression in his desire to serve. We have no doubt his Honour will be a great asset to the Court and wish him many satisfying years of faithful service.

DAVID CAROLAN AND JOANNE POOLE

Federal Circuit Court of Australia

His Honour Judge Jonathan Davis
Her Honour Judge Jennifer Howe

Other Appointments

The Hon Dr Christopher Jessup QC—appointed as Inspector-General of Intelligence and Security

Kathleen Foley—appointed to the Victoria Law Reform Commission

Adrian Muller—Registrar County Court of Victoria

Dr Anna Parker—Senior Registrar and National Operations Registrar—Family Court of Australia and Federal Circuit Court of Australia

Rowena Orr QC—appointed Solicitor-General

Judy Benson—Judicial Registrar Children's Court of Victoria

Allison Vaughan—Judicial Registrar Magistrates Court of Victoria

Michael Gurvich—Judicial Registrar Magistrates Court of Victorian

Vale

Colin Lovitt QC

Bar Roll No 923

Australia has lost one of its best fighters for the underdog, Colin Lovitt QC, who died on 10 January 2021 at the age of 76.

Lovitt was admitted to practice in 1969 and called to the Bar in 1970, where he read with the late John Fogarty AM. Colin was a leader of the criminal bar, serving as chairman of the Criminal Bar Association, of which he was founding member and life member. Lovitt took silk in 1988 and retired in 2015.

Lovitt was a barrister with a heart of gold who was generous with his time. He helped and guided others, particularly junior barristers, including myself.

Lovitt conducted about 200 murder trials for the accused and was Australia's best known murder trial lawyer.

In 45 years, Lovitt notched up wins in some of the most high-profile cases. For example, he gained an acquittal on a murder charge against Mark "Chopper" Read and successfully defended Greg Domaszewicz when he was charged with the June 1997 murder of Moe toddler Jaidyn Leskie.

Lovitt successfully defended the sergeant-at-arms of the Gypsy Jokers motorcycle gang, who was accused of

the murder of Assistant Commissioner Donald Hancock. That case proved that Lovitt not only understood "reasonable doubt" better than just about anyone, but also knew when the victim had no sympathy with the jury, as was the case with a Western Australian jury and Hancock. Hancock had previously framed the Mickelberg brothers for the Perth Mint swindle, and was so feared by fellow Western Australian police that they would not tell the truth about police corruption in WA until after his death.

Lovitt and I shared many anecdotes and stories together about Western Australian police corruption, as we were two of the very few "wise men from the East", who had the temerity in the 1980s and '90s to challenge police corruption there, which was led from the front by Hancock.

On the day I was admitted in Western Australia, I was sitting in an empty Supreme Court courtroom when Hancock arrived, walked straight to me at the bar table, and pointed his loaded gun at my chest. Lovitt and I were both subject to many other threats in Western Australia, including the threat of being struck off the roll of counsel in disciplinary proceedings initiated by the Barristers' Board. The offence alleged against me was that I drew a notice of appeal which claimed that the Mickelberg brothers had been framed.

Lovitt generously assisted me for about two years while I fought off this charge, so that I could continue to act as Peter and Ray Mickelberg's barrister. When Lovitt too was threatened with being struck off, we used to joke about who would get struck off the Bar Roll first. But we never considered looking after our personal interests instead of our clients' interests. The prisoners were entitled to be represented in court, and Lovitt and I were the next cab off the rank.

Lovitt was also fined $10,000 in 2003 after calling Queensland magistrate Bruce Zahner a "complete cretin" during a case. He thought it lamentable that he couldn't use the defence of "truth and in the public interest", as he could have in a defamation case.

But perhaps he was joking. Very few people could tell if Lovitt was serious when in a social situation, as his court demeanour was often taken to the dinner table, where he was a great companion and a lover of fine food and wine. In fact, Lovitt's cooking was so good, he could easily have been one of the best chefs in Australia, instead of Australia's best murder trial lawyer.

Colin Lovitt is survived by his wife Margaret and sons Marcus and Zane.

PETER SEARLE

Lovitt's work as an advocate and humanist is best described in some of his own words from Foley's List oral history project.

"When I was a young barrister in the early '70s, I was at the Moonee Ponds Magistrates' Court in the first division of the main court. I heard there was in the second division a bloke who was a drug addict. I'd never seen a drug addict and I actually went around to the second division to see what a drug addict looked like. It sounds stupid, but we were all that naive then. Within a few years, more than 50 per cent of serious crime was drug-related in some way. Armed robbery ceased to be a crime motivated by that most noble of motives, greed, and became motivated to obtain money to buy drugs —plus robberies of chemist shops and so forth. Drug-related crimes against the person as well as property—none of that existed when I first came to the Bar.

I wasn't necessarily briefed in the hopeless cases—we've all been briefed in hopeless causes. When you win 'em, the media and the police act as though you'd interfered in them. That's how they acted in the Domaszewicz case and how they acted in Perth when a former head of the Perth CIB died from a bomb planted in the passenger seat of the car he was travelling in. The gut reaction of some was to say the jury must have been tampered with.

I've always thought that change is happening inexorably all the time. Take the criminal law. Four areas that I've said have changed enormously regarding the attitude of juries since I came to the Bar:

First of all—culpable driving. In the early days when I defended people in culpable driving, the jury's attitude was 'there, but for the grace of God, go I—the drunk in the dock. What's this bloody doctor doing saying two-to-three beers and I'm incapable of having proper control of a motor vehicle? What nonsense—I've been driving home from the pub for 15 years.' People had that attitude for a long time and it took a long time for the worm to turn. But now, they think 'there but for the grace of God go I—the body on the slab in the morgue.'

The *Herald Sun* did a great job with that Ten/Thirty-Four campaign when the death toll was 1034 people—nowadays it's less than 300 a year. It was three-and-a-half times what it is now. A lot of it was people's preparedness to tolerate drunk driving then, whereas there's no such preparedness now. Now if you're drunk and behind the wheel and you cause an accident—'you're guilty'.

Now, the second one is the area of commercial crime. This is where we get to the bottom of the harbour schemes and so forth. The High Court attitude to tax avoidance prior to the Costigan Commission was, 'Well, it's Australian to arrange your affairs so as to minimise your tax', encouraged by judgments of no less than the Chief Justice, Sir Garfield Barwick. But after the Costigan Commission and the publicity it generated, the attitude changed enormously—now people weren't as tolerant of anyone milking the system. We're currently going through that issue again.

The third one is sex cases. When I was a young fellow at the Bar, you were allowed to ask a woman who'd been allegedly raped in her own home, you were allowed to ask how often she'd had sex, who with—even if it was with her husband. Totally irrelevant issues, but calculated to embarrass her and blacken her name with a view to allowing an accused person to say, 'She must have wanted it—look at how she's been behaving'. You can't believe that those attitudes existed but they were laws when I was a boy at the Bar. We don't cop that sexism now. Juries are more prepared to convict now on less evidence than they once were. In the old days, with the all-male juries, they acquitted more easily. Today with all the television about what crooks the defence lawyers are and what heroes the police, investigators and prosecutors are, the defence have quite a bit of ground to make up. The laws have changed a lot; BUT there's still sexism, because old habits die hard.

The fourth one is drugs, and I've just told you that story about my naivety in the second division of the Moonee Ponds Magistrates Court.

Most people don't seem to have a grasp of the fact that a barrister in this state, this country, has no option but to defend in a case where he's available, not embarrassed by knowing a witness, an accused. It's an ethical offence to refuse a brief. If I'm available and it's a murder trial and I don't know the witnesses, then I'm bound to take the brief. I can't say, 'it's an unpopular cause, it's a sure loser and I won't do it'. My mother once said, 'are you in such-and-such a case?' I said, 'Yes,' and she said, 'I hope you lose'—she knew the mother of the victim. People get so cross; they always ask, 'how can you defend someone if you know they're guilty?' I got asked that all the time when I was a younger barrister… One answer is: you've got to—you don't have any choice legally and it's an ethical offence to refuse a brief.

I love the Bar. I'm retiring now, and I've probably just about had enough, frankly. I'm 70 and always vowed I'd retire at 70. I'm on the cusp of leaving. The first 40 years, I was addicted to this place—I'd come in on the weekends even when I wasn't working on a case.

People say to me, 'if you win a case what do you do?' I take my wife out to dinner. 'What do you do if you lose a case?' I take my wife out to dinner. Because life goes on—even if you're bleeding inside. There's been a few cases where I've been genuinely very disappointed—I believed I easily did enough for the juries to have at least a reasonable doubt.

I loved a good bloody fight, to be honest. I don't mean a nasty fight. I've got a reputation of arguing with judges. There were a few judges I'd had arguments with; quite often I overreacted and it was my fault. Sometimes, in my opinion, the judge wasn't giving us a fair trial, and I complained about it, sometimes a little incautiously. Most of the really good judges I've never had a problem with. Frank Vincent was the judge on the Domaszewicz trial for eight weeks and we didn't argue. We weren't going to—he's too-good-a judge. But I don't want to go without saying: people shouldn't do what I did. It's fair to say a lawyer's place is on his feet and not on his knees, but there were times when I was a little cheeky. It's in the nature of the beast, I'm afraid, and I wouldn't recommend it to my colleagues."

The Hon John Gilmour QC

Bar Roll No 2919

It was in the mid-1970s that the young John Gilmour, a Scot who had only a few years earlier graduated from the University of Dundee, found himself travelling near Kashmir and, because of some possible Indo-Pakistan conflict, having to quickly depart and find his next destination. He chose Western Australia. On arrival, he boarded a bus to Katanning, a town some 270km south-east of Perth, to visit a family to whom he had a distant connection. Rising on his first morning in Katanning, he looked out of his bedroom window and was overwhelmed by the shimmering fields and endless blue sky. He decided to stay.

Despite early thoughts of becoming a farmer, he embarked on what became a stellar legal career. He joined the law firm EM Heenan & Co in Perth and became a partner within a couple of years. He subsequently established Gilmour Solicitors, where he practised until 1989 when he was called to the Bar. He took silk in Western Australia in 1994 and in Victoria in 1996. In 2006 he was appointed to the Bench of the Federal Court. Over some 12 years on the Bench, he delivered more than 600 judgments, including *ABN Amro Bank NV v Bathurst Regional Council* in 2014 and the Nyikina Mangala native title determination, which he delivered amidst emotional scenes of celebration on the banks of the Fitzroy River in May 2014.

He also served as a Judge of the Supreme Court of the Australian Capital Territory, and of the Supreme Court of Norfolk Island.

He retired from the Bench in 2018 and returned to the Bar at Quayside Chambers in Perth. He quickly re-established a leading commercial practice as a barrister and arbitrator. For his colleagues at Quayside Chambers, he was valued as a leader, mentor and dear friend.

The law was one aspect of John's life. He had an unshakeable faith in Christ. He was a family man. He was devoted to charitable giving—in time, funds and resources.

At his Federal Court farewell three years ago, he recounted to the court that, at the time of his appointment in 2006, his eldest son Nic had come to see him and asked, "Dad, do you know what is required of you?" John responded, "Nic, what is required of me?" Nic replied, referring to the Book of Micah, "You are required to act justly, to love mercy and to walk humbly with your God". Addressing the Court, John then said, "Can I say to you, Nic, and to all here, that I have endeavoured to do just that". There is no doubt that John managed to do what was required of him.

John passed away at his home, surrounded by family, at the age of 69 on 6 February, 2021. He is survived by his wife, Marcia, and his children Tracy, Nic, Kathryn, Emily and Joshua.

It is hard to believe that John has passed. But the extraordinary example John set in his commitment to justice, faith and family, will not be forgotten.

TOM PORTER, QUAYSIDE CHAMBERS, PERTH

The Hon John Nixon

Bar Roll No 595

John Nixon was born on 18 July, 1935. At age 12, he won a full boarding scholarship to Geelong Grammar. Unsurprisingly, he was a school prefect, house captain, school librarian and cadet under officer. A member of the debating society of which RC Packer was secretary, he seconded the motion that the house would welcome the introduction of a state lottery into Victoria, which was prescient: his father, a bank manager, later won £100,000 in the first Opera House lottery. He had a leading role in the school play, won the school open tennis championship, the history prize, a Commonwealth Scholarship and a scholarship to Trinity College at Melbourne University.

John (universally known as Jack) was also president of the Pilgrims Society, who were engaged in church outreach in Geelong. There he developed his adversarial and social skills and was able to, in racing parlance, "back his own judgement". Thereafter he was an irregular churchgoer.

At Trinity College, he enthusiastically participated in all aspects of college life, receiving a university blue in squash and a half blue in tennis. He was a more than capable cricket player, rower and footballer. He was undefeated in tennis in the intercollege championships over his years in college, not losing a set. He also excelled in law at university, obtaining the exhibition in contract law and graduating with honours. Articled to Allan Lobban of Blake & Riggall, he was admitted to practice on 2 March, 1959, signing the Bar Roll on 3 April that year.

His reading period was cut short after a month as Tony Murray (later his Honour Justice Sir Basil Murray) took silk. So, Jack left for England. He read with Peter Webster (later his Honour Justice Webster of the High Court) in the chambers headed by Lord Scarman in the Middle Temple. Jack then returned to Australia where he commenced reading with John Mornane (later Judge Mornane of the County Court). He read for 18 months in Selbourne Chambers.

He developed a substantial matrimonial causes and personal injuries practice, in particular on circuit. He went to many circuits including Horsham, Wangaratta, and Geelong. His Honour had a very large circuit practice at Wangaratta, to which he regularly travelled at speed. Caught by an unmarked police car 20 miles south of Wangaratta, in an extraordinary display of persuasiveness, he explained to the police officer that in his new Mercedes, which was turbo charged with power steering and hydraulically controlled bucket seats, it was hardly possible to do less than 140 kilometres an hour. So, John spent the last 20 kilometres into Wangaratta behind the wheel of the police car, while the constable had a go at the Mercedes.

As a barrister, Jack was very highly regarded. He never applied for silk, wishing to be judged on his ability as an advocate. Appointed counsel assisting Sir Esler Barber's Board of Inquiry into the Occurrence of Bush and Grass Fires in Victoria after a particularly disastrous fire season in January and February 1977, he faced 10 parties with four of the leading common law silks of the day.

In "The Man from Wangaratta", ED (Woods) Lloyd QC, who appeared on behalf of the CFA, described (to the metre of "The Man from Snowy River"):

One was there, a junior, John Nixon
was his name.
Built something like a racehorse
over size.
With a touch of Lanark Clydesdale
in his formidable frame,
A counsel as rich respondents prize.
He was big and tough and ugly,
just a sort that won't say die.
There was courage in his quick
ungainly tread,
And he bore the signs of courage
in his mildly bloodshot eye
And the dull persistent throbbing
in his head.

Jack was appointed on 5 March, 1981 to the County Court of Victoria, where he remained for 29 years until his retirement in June 2010. At his welcome ceremony, he was disappointed that his two eldest were unable to attend and amused that his youngest had permission from school to attend his father's "christening". His secretary, Fran Merrington, became his associate, the first female associate in the County Court. She remained throughout Jack's tenure and remains still at the County Court. Jack's handwriting was so poor he wrote his judgments in longhand in capitals on the kitchen table so Fran could type them.

A meticulous, careful and sound judge, reinforced by common sense, he was prepared to back himself. Rarely was he successfully appealed. In *Dietrich v R (1992) 177 CLR 292*, his Honour refused to adjourn a criminal proceeding as the accused had failed to obtain legal aid. The trial went 50 days. An appeal against the failure to adjourn to the Court of Criminal Appeal was unsuccessful with three judges refusing leave. However, in a majority decision, the High Court upheld the appeal five to two. No complaint was made about his Honour's conduct at the trial.

A gregarious but not clubby man, his joie de vivre was legendary. Circuit dinners were a highlight; stories were legion and have passed into legend. Popular, with a quick wit and turn of phrase, he enlivened many a circuit, especially Geelong from where he commuted from his beloved Anglesea.

His vast experience and knowledge meant that fellow judges often called on him for advice and a queue could be seen outside his door of a morning. On his retirement, Judge (Peter) Gebhart composed a poem: "A Stayer"

Ah, you have reached the winning post,
And the jubilant crowds toss hats
and hands
Into the air in approbation.
Bookies weep.
It's been a long race, longer than
most of us
Can recall, but that's your style,
To outdistance distance, to keep on going
When many would have given up,
many did.
Mostly the tracks were firm, the air fair.
You were at trackside
Morning and night, gallop after gallop.
Rough periods were ridden out.
You weren't, as far as we can tell,
to be nobbled,
Not even by the Malvern pub mob,
And so you have checked in
"correct weight".

His readers were Douglas Tucker, William O'Dea, Bruce McTaggart and David Martin.

His Honour was a very keen racing man and he and his great friend Judge Bruce McNab regularly attended the races. His Honour appeared many times as an advocate on behalf of the stewards. He was chairman of the Racing Appeals Tribunal. Upon his retirement in 2010, he became a senior sessional member of VCAT principally to hear racing appeals

His body failed him but his mind did not. He died on 11 March, 2021 after drinking one last glass of white, surrounded by his family in good spirits.

We offer our condolences to his friends, family and his son James who, like his father, is a senior junior at our Bar.

BILL GILLIES

Michael James Ruddle

Bar Roll No 961

Michael Ruddle passed away on 20 March, 2021, one day shy of his 80th birthday and only a few months from becoming a 50-year Legend of the Bar.

Michael was one of Rose and Jim's six children. Educated at St Kevin's College, he there established lifetime friendships with Bill White, Peter ("Gol") Golombek and Dennis ("Den") Davies—all of whom went on to study law at Melbourne University and become legal luminaries. Given Michael's non-pugilistic, gentle and caring nature, it remains a mystery why St Kevin's appointed him, as a cadet, to be sergeant in charge of the mortar squad. The abovementioned comrades in arms uncharitably reminisce that, at Puckapunyal, Michael spent more time playing cards with them than attending to the armoury.

Michael was, however, imbued with a non-showy competitive streak and was a skilful sailor, representing Victoria in interstate regattas. He was also first onto the dance floor and could do an extraordinary rendition of line dancing to Chubby Checker's "Do the Huckleback".

Michael's university years were financed with the aid of a Commonwealth Scholarship, supplemented by vacation jobs such as driving a Coca Cola truck. Upon graduating, he completed Articles in Wangaratta and was admitted to practice in 1968. He then returned to Melbourne and practised as a solicitor for a short time with Minter Ellison. Michael came to the Bar in July 1971 and read with the Hon Sir Norman O'Bryan QC.

When Michael joined Foley's List, Jim Foley and his son Kevin quickly appreciated that Michael would willingly and capably take on multiple daily briefs. It was not uncommon for Michael to simultaneously juggle half a dozen or more briefs, acting 50:50 for the defence and the prosecution in criminal cases. In later years Michael increasingly embraced the common law jurisdiction and quickly became the go-to barrister of choice for an array of personal

BACK OF THE LIFT

injury law firms. As one of his three readers, I never ceased to be amazed by Michael's work capacity. Every afternoon around 4.30pm, Michael would return to his bolt-hole on the 9th floor of ODE, with his wreck of a wig (bettered only by Jack Keenan's threadbare toupee) skewed sideways on his ginger-haired pate, and his frayed and tattered gown falling perilously off one shoulder. There he would cheerily greet the waiting throng of maimed clients and accompanying interpreters (usually Frank Manier or Anna Paraskeva) before being updated on the plethora of messages taken by his beloved wife Dimity, who was busily clattering away on her overworked Remington typewriter. Michael would then thread his way through the mountains of briefs that occupied every possible surface of his unassuming chambers and unearth his desk before welcoming in a client. When conferring was over, Michael would religiously take home six or so requests for pleadings and other interlocutory paperwork and work long into the night at his dining table. His capacity for work was truly phenomenal.

Michael was very much the plaintiffs' champion and strove to secure the best possible result for his clients. He would always consider a sensible settlement proposition, but if this wasn't forthcoming he proved to be a formidable advocate and it was "game on" once he rose to address the judge or jury. Michael was also likened to St Jude in that he would take on and doggedly fight cases that other counsel considered unwinnable and hence unprofitable.

Radical legislative change saw the concise and perfectly functional *Worker's Compensation Act* 1958 replaced by a 748 page tome of largely incomprehensible statutory gymnastics. The wholesale changes to both practice and procedure no doubt prompted Michael to pull up stumps and relocate to Noosa for several years. However he eventually tired of being the honorary moderator of Noosa Surf Club's one-man disciplinary committee and returned to Melbourne, resuming practice as if there had never been an interruption.

Regardless of whether he was in or out of court, Michael was never ruffled. He was a true gentleman and never had a bad word to say about anyone.

Away from work, Michael loved to join his colleagues at Num Fong, C II, or Oriental Teahouse—wherever the white wine was priced moderately—and he was always great company. He was also an astute investor and was often seen in Foley's with his head buried in the Fin Review. With his friend and business partner, Vincent Verduci, Michael is thought to have owned more hotels than are on a Monopoly board. Then there was his love of the mighty "Tiges", with Michael residing within walking distance of The "G" so he could stroll across to see "Hungry" KB take a screamer. And let us not forget Michael's appreciation of the ancillary benefits of attending legal conferences, no doubt to quench his thirst for continuing legal education. Indeed, if a hotel in Positano or a cruise ship on the Adriatic offered a swimming pool and low-priced white wine Michael would usually become a regular and returning guest. At one such conference (Chicago, 2007) Michael and Dimity, together with Barbara Phelan and Jim Parrish, formed the "Chicago 12". The six-couple group still reunites periodically to ponder what others who attended the conference sessions might have learned. One can only guess the extent to which Michael regaled the Chicago 12 delegates with his profound and intriguing knowledge of the American Civil War.

Above all Michael was devoted to his family. His wife Dimity (who passed away in 2011) was his one true love, and Michael's last words to me were how much he looked forward to reuniting with "Dims". Then there were his "boys", Campbell and Fergus, of whom he was immensely proud. And, in more recent years, Michael always had a sparkle in his eyes when setting off to babysit his grandchildren Felix and Matilda.

A celebration of life was held in Michael's honour on 16 April. Covid severely limited the number of people who were allowed to attend, but those who could paid tribute to a truly exceptional father, brother, colleague and friend. Michael is sadly missed but no doubt joyously reunited with Dims.

TIM RYAN (VICTORIAN BAR 1984–2019)

Jacqui Katsivas

Bar Roll No 5061

Jacqui Katsivas passed away, aged 36, on 31 March 2021 after a battle with breast cancer.

Jacqui was born on 15 November, 1981 in Adelaide. Jacqui's parents, Kay and Sam, recall that from the outset, Jacqui was fearless, and would never shy from doing things contrary to what people might expect, or "her way".

This approach put her in good stead to become an outstanding person—and lawyer—and to lead a rich life, despite its cruel shortness.

In Jacqui's formative years, she developed a keen passion for creative pursuits including theatre, art and crafts, and music. These passions followed her to the University of Adelaide, where, while undertaking her law studies, she participated in the Law Revue as an actor, prop designer and, later, director.

Paired with Jacqui's creative streak was a formidable legal mind. Across the first decade or so of her legal career, Jacqui worked as a commercial lawyer at DLA Piper and Meridian Lawyers in Brisbane, and also spent time volunteering at the Queensland Public Interest Law Clearing House. She developed a particular penchant for insurance law and was renowned for her incisive pleadings and expertise in procedure.

Whilst living in Brisbane, Jacqui was diagnosed with breast cancer. With the enduring love and support of her husband and soulmate, Nigel, she adapted to life's new challenges, and together they continued to make plans for their future.

After Jacqui's cancer went into remission, the pair moved to Melbourne. Inspired by the sea change and her own fearless drive for new challenges, Jacqui pursued a career at the Victorian Bar.

Within weeks of finding out that she had passed the Bar exam, Jacqui learned that her cancer had returned. Undeterred and in somewhat superhuman fashion, Jacqui set about the task of battling her cancer, whilst completing the readers' course and commencing her career as a junior barrister under the mentorship of Georgina Costello QC. Whilst balancing the demands of her health and her legal pursuits, she also managed to make time to meaningfully build friendships with her Bar colleagues, bolstered through her many donations of home-grown vegetables and baked treats, and hilarious stories of her beloved dog, Pepper!

Jacqui's colleagues looked to her as a friend and mentor. When it came to helping others, Jacqui was ever patient and unerringly generous. She enriched the lives of many, and it is bittersweet to think of what Jacqui could have accomplished in her career, with more time.

She will be greatly missed.

LUCY DAWSON AND ANNA O'CALLAGHAN

Dan Christie

Bar Roll No 3040

Our Bar has had its share of larger-than-life characters. Daniel John Christie—"Dan" to all—fitted that bill.

Dan's path to the Bar started at Yarra Valley Grammar School. He was an excellent student and attended Melbourne University from 1985 to 1989, graduating with degrees in law and commerce. For much of his time at University, he lived at Queen's College, where he made many friends and was a full participant in college activities, representing Queen's in football and cricket and loving the social side of university life. He also played football for University Blues in the VAFA.

Dan the barrister was a fighter. He was exceptionally hard-working and had a strong courtroom presence.

At Dan's funeral, one of the eulogies was given by Justice Michael Osborne. His Honour, who worked with Dan at Purves Clarke Richards in the 1990s, relayed a story about Dan basking in the glory of being described, by a then senior partner of PCR, as an "unpolished diamond". While the diamond may have undergone a certain amount of buffering over the years, the description remained apt to the end.

In April 2020, Dan was diagnosed with pancreatic cancer. Almost a year later, he passed away at the age of 54. In the interim, many of us were lucky to learn about Dan the writer. He penned email updates, roughly monthly, to a close circle. His last poignant message reminded us of Dan's gentle side and his ability to unflinchingly, and sometimes beautifully, call it as it was:

> Have you ever wondered the difference between 'twilight' and 'dusk'? No? Not surprising, neither have I...until just now. Interestingly, they are not synonyms as I expected. Dusk is in fact a stage of twilight.
>
> Twilight is defined as: "the soft glowing light from the sky when the sun is below the horizon, caused by the reflection of the sun's rays from the atmosphere" (a very emotive definition). While dusk is defined as "the darker stage of twilight". The point of all this, I feel that I have now moved into my twilight (not dusk just yet, but I regret to say it feels a lot like twilight)...

It was not surprising that Dan had a finely tuned sense of the stages of twilight. Fishermen have a finely tuned sense for the period after sunset, and Dan was an avid fisherman. He loved his fishing so much that he may, on a particularly beautiful day during the 2020 pandemic crisis, have appeared in the County Court via Zoom from the cabin of his boat, having to mute himself at one point when a particularly noisy two-stroke tinny went past. The whiting and calamari have breathed easier knowing that Dan is no longer plying the waters off Queenscliff.

Dan was loved and will be sorely missed.

VBN

Jeffery Gyles

Bar Roll No 1261

On 15 April 2021, Jeffery Arthur Gyles passed away from advanced Parkinson's disease and Lewy body dementia. The community of the Victorian Bar, his family and many friends lost a good and gentle man.

Jeff was born on 13 October, 1937. His secondary education was at Box Hill High School and Longerenong Agricultural College, which he attended with his twin brother. He matriculated from Longerenong and briefly studied agricultural science at Melbourne University. Finding ag science not to his liking, Jeff quickly transferred to the law faculty. Whilst at university he lived at Trinity College, where he was a full participant in college and university athletics activities as

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well as off campus running with the East Melbourne Harriers. Jeff was a talented runner and with the late Stanley Spittle formed a duo that won many championships.

He completed articles at Arthur Robinson and was admitted to practice on 1 April, 1966. From 1967 until 1970, Jeff was a legal officer with the RAAF with the rank of flight lieutenant. In 1970 he left the RAAF and moved to the UK for six years, working as a solicitor prosecutor with the Thames Valley Police based in Oxford. Jeff loved his work, loved travelling to country courts in his blue MGB, which he brought back to Australia, and he loved pub lunches.

On returning to Australia, Jeff signed the Bar Roll on 8 April, 1976. He read with Joseph Meagher (later a County Court judge), accepting briefs in both criminal and civil jurisdictions. Over time, Jeff developed a largely civil practice with several loyal instructing solicitors. Jeff never sought the limelight or appointment to high office. He was content with his loving family: his wife Deborah (associate to Judge Wilmoth), his sons Hugh, Lachlan and Alex, their families and ultimately, his five grandchildren. His sons are respectively a lawyer, a builder and a post-graduate student.

On 1 June, 2003, Jeff retired from the Bar to pursue his passion for World War II military history, especially aviation. He was equally passionate about all things Scottish, Lawrence of Arabia, Winston Churchill, the Essendon Football Club and John Coleman.

Over the last three years, Jeff's health progressively deteriorated. Jeff passed away surrounded by his family. He will be sadly missed.

PETER CHADWICK QC

Margaret Virginia Collis

Bar Roll No 2869

Margaret Collis died on 24 April, 2021. Margaret was the widow of Brian Collis QC (Bar Roll No 839) who predeceased her on 29 March 2018 (*Bar News*, No 163). Margaret died of complications of dementia, which she had suffered for some years and which saw her enter into care after Brian's death.

Margaret was born in San Francisco on 29 July, 1944. Both her parents served in the US Navy in the Second World War. Margaret's father was a Mustang fighter pilot who was injured in action and died of complications from his injuries when Margaret was only seven years old. Margaret's mother later remarried and a sister was born in 1956.

Margaret took an Arts degree and qualified in teaching, graduating from Ohio State University in June 1966, and thereafter taught at schools in Ohio and Idaho before, in 1971, teaching in Cartagena, Colombia.

Margaret was holidaying in London in 1972 when, as fate would have it, a young Victorian barrister was staying at the same hotel. When she left to return home, Margaret intimated that if Brian ever travelled to the US, he should look her up. Margaret used to tell the next chapter in the story: "Well, the next minute there he was on my doorstep—in San Francisco".

Margaret decided to move to Australia, arriving in December 1972, and married Brian in November 1973. They lived in Mt Eliza throughout their marriage and both were prominent in the local community. They had two children: David, who died in tragic circumstances in 1993, and Andrea, who qualified in law and practised as a solicitor, but now farms in the western district with husband Nick Armytage and their young children Henry and Audrey.

At the time I met Margaret in 1988, she had decided to study law as a mature age student at Monash University. She completed her degree with First Class Honours. Brian moved her admission to practice on 1 June, 1993. Margaret read with Richard Boaden and signed the Bar Roll on 25 November, 1993. Whilst Brian practised in the cut and thrust of common law, Margaret found a niche practice in acting for the large plaintiff law firms in procedural matters, particularly in the Major Torts List.

Margaret retired from practice in June 2000 but she did not depart from the life of the Bar. She kept a small room in Seabrook Chambers and took over the administration of the chambers.

Upon arriving in Australia, perhaps because of Brian's long service on the VFA and AFL Tribunals, Margaret—somewhat unusually for an American—became a fervent devotee of Australian rules football. This devotion continued until it was supplanted by an even greater passion which Margaret developed, in approximately 2000, for horse racing and all things equine. She joined all the Melbourne racing clubs and attended virtually every city race meeting. She learned to ride and enjoyed going to muck out the stables even when she was not riding.

As the sun set over Port Phillip Bay on a beautiful autumn afternoon on 30 April 2021, a number of her former Bar colleagues and many friends reflecting the varied strands of her life gathered to farewell Margaret, to listen to "If you're going to San Francisco" and reflect on the many happy friendships she and Brian shared.

ANDREW INGRAM QC

SPECIAL TRIBUTE

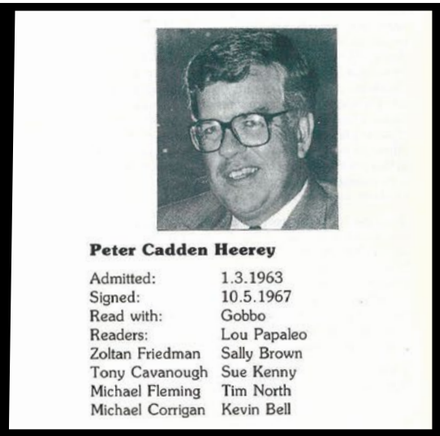
The Hon Peter Cadden Heerey AM QC

Bar News' *editors farewell one of their own: the Hon Peter Cadden Heerey AM, QC*

As *The Mercury* reported under the byline, "'Proud and passionate' judge" (May 10, 2021), Peter was a Tasmanian barrister and solicitor, a Victorian barrister, and a nationally respected judge of the Federal Court of Australia. He returned to the Bar in 2009 on his retirement as a judge, continuing to contribute both professionally and to the life of the Bar. In 2012, Peter was made a Member of the Order of Australia. He died on 1 May 2021.

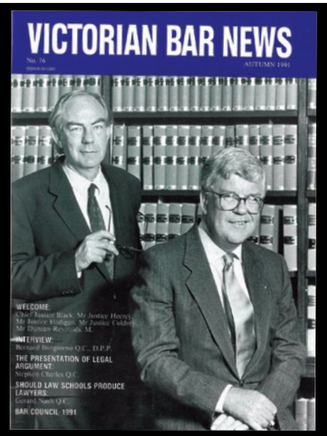
Peter was the unofficial patron of *Victorian Bar News*, which he co-founded in 1971 with the late Richard McGarvie QC. Peter once claimed that *VBN* is the oldest professional publication of a separate Bar in the common law world. In his memoir *Can You See the Mountain*, Peter gave his account of a university lecturer who would mark essays with comments like "factually correct, but lacks colour and amusing anecdotes"—this has become de facto *VBN* editorial policy.

Given Peter's long and continuing association with *VBN*, it is striking that Peter kept private that most relevant of matters, his own cancer diagnosis two years previously. In the meantime, Peter remained a lively part of our small publishing community. We received regular emails, phone calls and contributions from him. Last year, when we were considering going digital during COVID, Peter wrote, "It would be a great pity if one issue disappeared into the vast wastes of the Internet". Peter's review of the Hon Robert French's *The Tuning Cymbal* is published posthumously in this issue.



Peter Cadden Heerey

Admitted:	1.3.1963
Signed:	10.5.1967
Read with:	Gobbo
Readers:	Lou Papaleo
Zoltan Friedman	Sally Brown
Tony Cavanough	Sue Kenny
Michael Fleming	Tim North
Michael Corrigan	Kevin Bell



LEFT: Peter Heerey answering the requisite *Bar News* Quiz after taking silk in 1985. RIGHT: Featured on the cover of VBN Issue 76 when welcomed as a judge (with the Hon Michael Black AC, QC on his appointment as Chief Justice to the Federal Court).

Born in Hobart on 16 February, 1939, Peter graduated with first class honours in law from the University of Tasmania in 1961. He was admitted as a barrister and solicitor of the Supreme Court of Tasmania. After winning a scholarship in company and industrial law, Peter pursued post-graduate studies at the University of Melbourne and worked as a solicitor in Melbourne for a time at Corr & Corr. He then practised law in Tasmania, becoming a partner of a Hobart law firm, Dobson Mitchell & Alport.

The lure of the Victorian Bar proving irresistible, Peter signed the Victorian Bar Roll in May 1967. He took silk in 1985—his companions that year included Bernard Bongiorno QC, George Beaumont QC and Robert Richter QC. Peter's contributions to the Bar were many and varied. He was a member of the Victorian Bar Council from 1969 to 1973 and was co-editor of *Victorian Bar News* from 1971–1974, and then from 1986–1990.

During his time as a barrister, Peter also served as a councillor on the Hawthorn City Council (1973–1979), as chairman of the Victorian Psychological Council (1984–1990) and as honorary secretary of the Australian Institute of Judicial Administration (1981–1986).

In December 1990, Peter was appointed a judge of the Federal Court of Australia, based in Melbourne, a position he held until his retirement in February 2009.

The first 1991 issue of Bar News contained its traditional Welcome, featuring Peter on the cover. This referred to his family, of paramount importance to Peter throughout his life. As was noted, he married Sally Macdonald in 1969. They had three boys—Edward and twins Charles and Tom, "well-known for helping his Honour's Bar colleagues consume appropriate amounts of alcohol on festive occasions".

As was recorded for posterity in that issue, Peter had many extra-curricular activities and skills. They extended to royal tennis, skiing, cycling, wine appreciation, lunching, photography, cricket and a remarkable memory for poetry demonstrated by his instantaneous rendition of "Clancy of the Overflow" to the Irish Bar in Dublin in 1989. Indeed, as friends and colleagues will know, Peter's interest in poetry extended to writing and publishing many such poems collected in the slim volume *A Moment's Delight*.

At a moving and packed service on 14 May, 2021 at St Patrick's Cathedral, his son, Ed Heerey QC, gave tribute to his father's personal qualities as a generous and accomplished husband, a loving father and grandfather, who had a great capacity to make connections with people, many of whom visited Peter during his last months. As Peter contemplated the big metaphysical questions in his final days, Ed consoled him with a legal analogy based on contractual certainty. Ed put to his father that if, at the start of his life, he had been offered the option of signing a contract to live the wonderful life that Peter had lived—filled with family, friendship, meaning and success—he definitely would have signed that contract.

Peter was a tremendous supporter to successive editors of *Bar News*. He was warm, welcoming, and generous with his time, often sharing his interest in history and literature, wisdom, and deep understanding of the culture of the Bar. Peter was a stalwart supporter of our informal launch events, raising a glass to the next issue and offering his compliments. It is now our turn to raise a glass to him.

THE EDITORS, *VICTORIAN BAR NEWS*

A judgment surely should not bore.
The judge can postulate the law,
Adjudicate on points of fact,
And do so with finesse and tact.
But still engage in modest fun—
A quip, a joke, a harmless pun.
It's rather nice if judgment draws on
Shakespeare, Pope or Henry Lawson.
And why should critics get all snooty
At metaphor from sport, like footy?
So I don't think that one should curb
Adventurous use of noun and verb.
And why not play up to the gallery?
At least have fun, if not much salary.

Justice Anon, described by Peter Heerey as his "mysterious friend".
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Victorian Bar Readers
MARCH 2021

BACK ROW (LEFT TO RIGHT): Peter Turner; Shawn Rajanayagam; Christopher Fitzgerald; Nicholas Petrie; James Page; James Penny; Conor O'Bryan; Andrew Sprague; Shane Dawson; Luke Perilli;
SECOND ROW: Christian Farinaccio; Michael O'Haire; Emile Goldman; Cal Viney; Christin Tom; Minh-Quan Nguyen; Julia Wang; Sophie Molyneux; Manu Chaudhary; Ahmed Terzic
THIRD ROW: Vanessa Bacchetti; Phoebe Prosser; Nicholas Boyd-Caine; David De Witt; Tim McCulloch; Lachlan Hocking; Ben Thompson; Charles Pym; Nicholas Baum; Liam McAuliffe: Lisette Stevens; Kate Lyle; Ella Zauner; Sophie Stafford; Raymond Elishapour; Zoe Anderson;
SEATED: Georgina Rhodes; Amanda Storey; Anabelle Tresise; Jacqueline Fumberger; Lara O'Rorke; Monique Hardinge; Nadia Deltondo; Andrea Tate; Mietta McDonald; Sophie Kearney; Julia Nikolic

Victorian Bar Council
2020–2021

BACK ROW STANDING: L-R Robin Smith (Assistant Honorary Secretary), Paul Kounnas, Nicholas Phillpot, Lana Collaris, Darryl Burnett, Suzanne McNicol AM QC, Lachlan Molesworth, Paul Hayes QC, Joel Silver (Assistant Honorary Secretary), Nawaar Hassan, Ben Murphy, Peter Chadwick QC, Paul Holdenson QC, Ian Freckelton QC, Amy Wood, Roshena Campbell
FRONT ROW SEATED: L-R Robyn Sweet (Assistant Honorary Treasurer), Roisin Annesley QC (Senior Vice-President, Christopher Blanden QC (President), Helen Rofe QC (Junior Vice-President), Mary Anne Hartley QC (Honorary Treasurer).
ABSENT: Eugene Wheelahan QC, Ben Jellis, Eddy Gisonda (Honorary Secretary)

Boilerplate

RED BAG, BLUE BAG

Red Bag

Dear Red Bag,

During Covid I let myself go. I grew my beard until I looked like the Unabomber in Webex hearings. I watched my Millennial opponents looking like touched up television presenters flourish with their vastly superior PDF skills, adapting effortlessly to the online environment. When Dan Andrews announced the extension of Stage Four lockdown I treated myself to a Father's Day slab of mixed hipster NEIPAs from my local brewery. I watched my son learn vital home schooling skills—like how to split his screen so he could watch some belligerent YouTuber while his teacher observed him listen attentively. I descended into a dark place. Now, when I go to a Commbar speed networking event, I don't have any social stamina left. I can't face the extroverts of the Victorian Bar anymore, let alone corporate counsel. I just want to crawl back into my Covid hole. How can I reposition myself, and orchestrate my re-entry, post-Covid?

Blue Bag

Blue Bag

Dear Blue Bag,

So good to hear from you. It has been a while.

Yes, I'm still alive and (unlike over 800 other Victorians who tragically passed away from Covid last year) thankfully I did not succumb to the dreaded virus, the WuFlu, the absolute beast, or whatever else Dan, Donald, Brett or Jeroen call it these days. Unlike the rest of Australia, 2020 was a needlessly tough year for many here in Victoria. And no, I did not relocate to Sydney and move into chambers with Bret and Noel. I'm still here in chambers in Melbourne standing strong with you and quietly hoping for a litigation led recovery of the Victorian economy.

Blue Bag, I am somewhat concerned for you. I fear that you have developed poor habits during Covid which are not good for your physical and mental health and wellbeing and that you have possibly become anthropophobic! At the time of writing (in the middle of Lockdown 4.0), I suspect you are still buried beneath the duvet in the comforts of your fashionable inner-city abode.

> "Don't "get on the beers" at home on your own just because we're in lockdown again. Try and cut back for a while as you try and rebuild new, good habits."

While I am sure there has been a pick up in the mid-week mid-morning coffee trade in North Fitzroy and Brunswick (or perhaps in Queenscliff or Lorne for some of our Silken colleagues), there has been a pleasing number of barristers quietly and responsibly working in chambers during the current "circuit-breaker restrictions" undertaking "Authorised Work" in accordance with the current state government directions.

It shouldn't be long before schools are back open again, so once that happens, you should be able to more easily return to chambers to undertake work which you are not able to do from home under the current restrictions (your call on this one), or go back to work once restrictions ease (if that ever happens again).

Humans are herd animals, social beings. We like to and need to be around each other. Life is so much better in the company of others than struggling in monastic solitude. Plainly, Blue Bag, you need to bounce back from your Covid malaise and rejoin your colleagues here in chambers, most of whom having figured out during Lockdown 2.0 that working from home wasn't all that it was cracked up to be and returned to chambers well before the latest lockdown.

Thus, might I suggest you positively undertake the following steps (in this order) for you to rejoin the widely renowned and admired community of advocates that is known as *The Victorian Bar*, of which you remain a proud member:

Don't "get on the beers" at home on your own just because we're in lockdown again. Try and cut back for a while as you try and rebuild new, good habits.

Trim your beard (only His Honour Judge Smallwood can really get away with the long flowing Ned Kelly look).

Find yourself a pair of trainers and possibly a bicycle too and start walking or cycling to chambers. Sit mens sana in corpore sano!

Make a commitment to come in to chambers three-to-four days per week.

When you are in chambers, (if you are not in Court), resolve to meet up for coffee each day with one or two colleagues whose company you enjoy and have missed.

While working on Briefs in chambers, discuss your thoughts on cases with your peers or those on your floor—this is in the finest traditions of the Bar and your colleagues' input will be subtly and positively reflected in the quality of your work.

If you are still struggling, then do access the Bar's health and wellbeing services which are detailed at vicbar.com.au/public/community/health-and-wellbeing. We are very fortunate to have very good discreet resources to confidentially support our colleagues in need. So, if it is all a bit hard, don't be shy in reaching out to your colleagues or any of the services the Bar offers.

The above steps should do the trick, Blue Bag, however I really do wish you had written sooner. Had you have done so, my advice would have been really simple, "Go to the Bar Dinner!!!". This year's Bar Dinner was one of the best ever. Had you have been one of the lucky 573 barristers who managed to jag a ticket to the sold-out event, you would have: drank good wine (much more enjoyable than a slab of hipster beer en solo), dined well on tasty fare, and enjoyed the magnificent company of your colleagues from all sectors of the Bar. It was fabulous night which after a difficult year, brought us all together. As for re-engaging with your colleagues post-Covid, I could not think of any better alternative!

Yours ever,
Red Bag

A BIT ABOUT WORDS

Quotations

JULIAN BURNSIDE

The redoubtable (but flawed) F.E. Smith (1872–1930) was the subject of a few biographies: *FE* (hagiography, by his son); *Lord Birkenhead* by "Ephesian" (Bechofer Roberts); and *The Glittering Prizes* by William Camp—distinctly *not* hagiography. The phrase "the glittering prizes" is a quotation from F.E. Smith, who said in a rectorial address in Glasgow in November 1923:

> The world continues to offer glittering prizes to those with stout hearts and strong swords.

Incidentally, in 1976 *The Glittering Prizes* was the name of a six-part TV mini-series with Tom Conti. That is, arguably, the best form of quotation, although I do not think the author of the expression was identified: possibly because it was set in Cambridge, and Smith went to Oxford.

The most recent biography of F.E. Smith is by John Campbell, published in 1991.

Given that our trade is words, lawyers are significantly under-represented in the matter of quotations. Perhaps the best remembered is the exchange between Judge Willis and F.E. Smith in a case in which the plaintiff, a young boy, had been blinded because of the alleged negligence of the tramways company for whom Smith was acting. When the judge heard that the boy had been blinded he suggested that the boy stand up, so the jury could see him better. Smith did not like the idea. This exchange followed:

> FE: Perhaps Your Honour would like to have the boy passed around the jury box.
>
> Judge: That is a most improper suggestion.
>
> FE: It was provoked by a most improper suggestion.
>
> Judge: Mr. Smith, have you ever heard of a saying by Bacon—the great Bacon—that youth and discretion are ill-wedded companions?
>
> FE: Indeed I have, Your Honour; and has Your Honour ever heard of a saying by Bacon—the great Bacon—that a much-talking judge is like an ill-tuned cymbal?
>
> Judge: You are extremely offensive, young man.
>
> FE: As a matter of fact we both are; the only difference between us is that I am trying to be and you can't help it …

It is hard to know whether the exchange has been polished up after the event, but it appears in substantially identical form in the biographies by Bechofer Roberts (1926) and Campbell (1991).

In a later case, Judge Willis and FE had this shattering exchange:

> Judge: Whatever do you suppose I am on the bench for, Mr Smith?
>
> FE: It is not for me, M'lud, to attempt to fathom the inscrutable workings of Providence.

My favourite legal quotation of all time was made by John Clerk. He was a very bright barrister from Edinburgh later appointed to the Supreme Court as Lord Eldin—*Eldin* not *Eldon,* although Lord Eldon's name before he was elevated to the peerage was John Scott).

Anyway, he was so bright that he was sent to London, as junior counsel, to argue a House of Lords appeal *by himself*—not led by a silk.

It was an appeal which involved the Water Act, so he used the word *water* quite a lot, and fairly distinctively because of his Scottish accent.

At one point, one of the Law Lords (who should have known better) said to him:

> Tell me Mr Clerk, in Scotland do you spell water with two t's?

His reply was quick and dangerous, but brilliant:

> No my Lord, we do not. But we still spell manners with two n's.

It's the sort of reply which might only occur to most people a couple of weeks later.

But it is also the sort of reply which most of us would be proud to think up on the spot and have the courage to say.

There are very few advocates who are the subject of biographies published decades after their death. The only other who comes to mind is the dazzling, but imperfect, Clarence Darrow (1857–1938), who was also the subject of a few biographies, the first in 1943 and the latest in 1980. It was Darrow who devised and ran the famous Scopes case, also known as the Monkey Trial, and he acted for Dickie Loeb and Nathan Leopold in their famous death penalty case in Chicago in 1924. Darrow once said:

> I do not pretend to know where many ignorant men are sure – that is all that agnosticism means.

Darrow was famous for his opposition to the death penalty. He is, for obvious reasons, referred to extensively in *Life Plus Ninety-nine Years* by Nathan Leopold (Greenwood Press 1957). He is quoted as saying:

> I have never wanted to see anybody die, but there are a few obituary notices I have read with pleasure.

There are many books of quotations. My favourites include: *The Book of Insults and Irreverent Quotations* (Hook and Kahn); *The Dictionary of Musical Quotations* (Wordsworth Library); *The Wordsworth Dictionary of Musical Quotations* (Watson); *Cassell's Book of Humorous Quotations*; *Collins Dictionary of Literary Quotations*; *Magill's Quotations in Context*; *The Thesaurus of Quotations* (Fuller); *Brewer's Famous Quotations* (Rees); *History in Quotations* (Cohen and Major); *The International Thesaurus of Quotations* (Tripp); *The Oxford Dictionary of Modern Quotations* (ed. Knowles); *The Oxford Dictionary of Quotations* (4th ed); *Simpsons Contemporary Quotations* (Simpson and Boorshin); *The Dictionary of Australian Quotations* (Murray-Smith); *The Dictionary of Biographical Quotations* (Winke & Kenin); *The Dictionary of Insulting Quotations* (Green).

> "It has always struck me as odd that a comment so famous that it was inscribed on an English coin was originally intended as an insult."

It is not easy to find quotations by lawyers. In the books noted above, there are a few quotes by F.E. Smith (later Lord Birkenhead), but in 1985 *The Quotable Lawyer* by Shrager and Frost was published by New England Publishing. And books of anecdotes are common enough in the legal profession (I have 47 of them). If a lawyer is important enough to be the subject of a biography, that book will inevitably include some quotations by the subject of the biography. Even then, it's thin pickings.

This lengthy nod to clever quotations from lawyers is by way of introducing one of the most famous quotations of all time: not by a lawyer, but by the famous physicist Isaac Newton. In a letter to Robert Hooke on 5 February, 1676, he wrote:

> If I have seen further it is by standing on the shoulders of giants.

The quotation is so famous that the phrase "the shoulders of giants" was recently inscribed on the English two-pound coin.

But there is more to it. Isaac Newton is arguably the most famous scientist of all time. He published the laws of motion and universal gravitation in his famous book *Philosophiæ Naturalis Principia Mathematica* (Mathematical Principles of Natural Philosophy, 1687), which is generally referred to simply as "Principia Mathematica".

Much of Newton's adult life was spent pursuing what would now be considered mysticism.

What is less commonly known in connection with Newton's famous observation is that Robert Hooke (1635–1703) was a very famous scientific rival of Newton (1643–1726) and, like Newton, had developed many significant scientific principles. He was a polymath (like Newton) and in 1996 was described by Alan Chapman as "England's Leonardo". He built the earliest Gregorian telescope, and observed the rotations of the planets Mars and Jupiter. In 1665 he published *Micrographia*, which prompted microscopic investigations. His observations of microscopic fossils led him to endorse biological evolution: several centuries ahead of Charles Darwin.

Hooke proposed that gravity heeds an inverse square law, and first hypothesised such a relation in planetary motion, too: a principle which Newton propounded in his law of universal gravitation. That was the underlying cause of the rivalry between Newton and Hooke.

In addition to their notorious scientific rivalry, Robert Hooke was very short, so he could not have been considered a "giant".

It has always struck me as odd that a comment so famous that it was inscribed on an English coin was originally intended as an insult. At least John Clerk did not try to hide his purpose.

Quotations by Hooke are hard to find, and quotations by Newton are relatively rare (apart from the "shoulders of giants" quote). And most books of quotations ignore some of the best observations by lawyers.

(For those who are interested in gathering quotations by lawyers, R.E. Megarry wrote *Miscellany At Law* (1955), *A Second Miscellany At Law* (1973) and *A New Miscellany At Law* (2005). Although they do not contain any of the quotations above, they contain many excellent legal stories, across hundreds of years.)

LANGUAGE MATTERS

I'll crack you across the jaw, bro

PETER GRAY

In writing on "Language Matters", Professor Peter Gray's aim is twofold. The first aim is to focus the thinking of barristers on issues related to language in the law. There has been an enormous amount of work done in the field of forensic linguistics in recent decades. Because lawyers are prolific users of language, many believe they are experts on language. Peter wants to challenge that kind of thinking. The second aim is to inform barristers that such a thing as expertise in language exists, and that they can call upon it when it would help. Speech act theory, conversation analysis and politeness theory are examples of frameworks through which to view, and by which to explain, the dynamics of an event.

The incident

On 1 June, 2020, at about 5pm, an incident occurred in Surry Hills, an inner suburb of Sydney. The incident involved five Aboriginal teenagers and three police officers. A policeman kicked the legs from under an Aboriginal boy, aged 17. The policeman was holding the boy's hands behind his back. The boy fell onto his face, on brick paving. Another teenager video-recorded the incident on a mobile phone.

The boy was arrested and taken to Surry Hills police station. From there, he went by ambulance to hospital. The police issued a statement to the effect that the boy had been arrested after threatening the policeman. The video records the boy saying to the policeman, *I'll crack you across the jaw, bro* ("the utterance").[1]

The question is whether the utterance, in the context in which it was uttered, constituted a threat of violence? Its semantic meaning (the words themselves) did. Applying some tools of linguistic analysis, such as speech act theory, conversational implicature, conversation analysis and politeness theory, may lead to a different conclusion. This is especially so when the incident involved intercultural communication, both generational and ethnic.

Threats as speech acts

A speech act occurs when what is said constitutes the doing of something. When a judge pronounces orders in court, he or she performs the act of making the orders. When a celebrant pronounces a couple to be married, they are married at that moment.

A speech act has three elements: what is said (the locutionary act), the intention of the utterer (the illocutionary force) and the effect on the listener (the perlocutionary effect).[2] Promises, warnings and threats are all speech acts. They all assert that something will happen in the future. They may be explicit or implicit, direct or indirect, conditional or unconditional. While we might say, *I promise you that…* or *I warn you that…* we do not use *threaten* as a performative verb. Thus, some element of interpretation is always involved in deciding whether something said is a threat. It seems to be essential for a threat that the perlocutionary effect be that the utterance is a threat, i.e. that the hearer feels threatened, even if the illocutionary intent is not to threaten. For the criminal law, however, intention to threaten will usually be an essential element of any offence involving the making of a threat. For that purpose, there must also be the necessary illocutionary intent.

Whether an utterance can be regarded as a threat depends heavily on the context in which it is made and received. Thus, we can accept that in the play *Twelve Angry Men* there was no actual threat in a young man saying to his father *I'm going to kill you*, or in a juror saying in reference to another juror *Let me go. I'll kill him*.[3] In each case, the context demonstrated that there was neither intent to threaten, nor perception by the hearer that he was threatened. We can also believe that in the movie *In the Name of the Father*, the question *Can I have a word about 54 Halsey Road?*[4] was a threat. The words themselves are innocent, but the character speaking them intends them as a threat, and the hearer perceives them as a threat.

BOILERPLATE

Was the utterance a threat?

The obvious issue here is the addition to the threatening words of the word *bro* as a form of address. We need to look at whether the use of *bro* might take its meaning from the variety of Aboriginal English spoken in inner-city Sydney, and whether it might take its meaning from urban youth culture.

Bro is derived from *brother*. It is used in Aboriginal English to connote equality and solidarity between males.[5] Some years ago, I felt very honoured to be addressed as *bro* by the late Aboriginal musician Peter Rotumah. There is also evidence that *bro* has a similar connotation in youth culture,[6] among African American males,[7] among male speakers of New Zealand English, especially Maoris[8] and among police officers.[9] For a boy in Surry Hills to address the non-Aboriginal policeman as *bro* is consistent with usage within and beyond Aboriginal English.

How does *bro* compare with *mate* as a form of address? A complete stranger can be addressed as *mate*, without signifying equality and solidarity (*what are you doing, mate?*). *Mate* can even express hostility (*you'd better watch yourself, mate*). I can find no evidence of *bro* being used in this hostile sense. Its most likely effect is as a mitigating device in the locutionary act, softening the otherwise hostile words.

To conclude that the boy intended to threaten violence would involve several assumptions. The boy would be disregarding the history of oppression of Aboriginal people by police, knowing that he is inviting violence by the policeman. He would be meaning to start a physical fight with an opponent who is clearly physically stronger and carrying a firearm. He would be introducing overt hostility into a conversation from which it has been absent. Each of these assumptions is questionable. Prior to the utterance, the conversation is innocuous. It is about whether the policeman did or did not say something, and whether the boy needs to *open up your ears*. In terms of conversational implicature, the utterance violates Grice's maxim of relevance; in terms of conversation analysis, it does not form an adjacency pair with anything said by anybody else. In addition, the boy makes no attempt to carry out any threat when the policeman comes close. He is passive, putting his hands behind his back as the policeman instructs.

If we are to reject the idea that there was an intention to threaten violence, what can we make of the illocutionary force of the utterance? The obvious answer is that the boy intended to convey a message to his fellow teenagers, not to the policeman. It was an exercise in bravado. It was designed to raise his status among his peers by demonstrating that he could say something outrageous to the policeman, while at the same time representing that he saw himself as a peer of the policeman. It was immature and ill-judged, but maturity and good judgment are not necessarily what we expect of someone who is 17 years old.

The circumstances are also inconsistent with the policeman

perceiving the utterance as a threat. His immediate reaction was to approach the boy, without taking steps to protect his jaw from any possible blow. He was not expecting an attempt to strike his jaw. At the same time, he questioned the nature of the utterance, saying *What was that? What? What was that?* His questioning can be explained in more than one way. He may have felt that he had not heard the utterance completely. He may have been issuing a challenge to the boy to repeat the utterance, if he was game. Most likely, the policeman's questioning was an attempt to make sense of the utterance. So gross was the violation of Grice's maxim of relevance, and so incomprehensible was it for the policeman to accept that a threat of violence was being made, that he needed to search for some implication from the utterance that he could understand. The perlocutionary effect of the utterance was not that it was a threat of violence. Rather, the effect was consistent with the message the boy attempted to send to his companions.

The policeman's actions can be explained by politeness theory. This is based on the proposition that we all have face that we feel we need to protect. Our positive face is our desire to be seen by others in a particular way. In this case, the policeman needed to be seen as a figure of authority in the community. Thus, the utterance was a face-threatening act for the policeman. His authority was challenged and the boy was asserting equal status with him, by the use of *bro*. He acted to punish the boy for this insult.

Conclusion

While the utterance as a locutionary act contained an overt threat, the illocutionary force was not a threat of violence to the policeman, but an attempt to impress the boy's friends. The perlocutionary effect was not that the utterance was a threat of violence either. This sorry incident was the result of a misguided face-threatening act.

Expert evidence from a linguist might help to defeat any charge against the boy of using threatening language, or to refute a defence of self-defence if the policeman were charged with assault.

The Hon Professor Peter Gray AM was a judge of the Federal Court of Australia from 1984 until 2013. Peter's long-term interest in language and communication was enhanced by his experience as an advocate and a judge. His work among Aboriginal Australians sparked a particular interest in cross-cultural communication, particularly in the legal system. This interest has led him to forensic linguistics, and to membership and roles on the Executive Committee of the peak body, the International Association of Forensic Linguistics, since 2003. Peter is an Honorary Professor at Monash University.

1 This summary is taken from the video, available from SBS News: https://www.sbs.com.au/news/video-of-indigenous-teen-being-slammed-into-the-ground-by-nsw-police-prompts-internal-investigation, or more clearly from Twitter: https://twitter.com/MissAshlee__/status/1267417766912376833.

2 Crystal, D. (2008). A Dictionary of Linguistics and Phonetics (6th ed.). Oxford, UK: Blackwell Publishing, p. 46.

3 Rose, R. (1955). *Twelve Angry Men*: *A Play in Three Acts*. Woodstock, Illinois, USA: The Dramatic Publishing Company: https://hieberj.weebly.com/uploads/1/1/0/3/110398915/12angmen.pdf, pp. 35 and 43.

4 Sheridan, J. (Producer, director and co-writer) & George, T. (co-writer). (1993). *In the Name of the Father* [Motion picture]. Dublin: Hell's Kitchen International Ltd: https://www.youtube.com/watch?v=jchuUKxlW5U.

5 *Macquarie Dictionary* (7th ed. 2017), pp. 192 (bro) and 195 (brother); Arthur, J. (1996). *Aboriginal English: A Cultural Study.* Melbourne, Victoria, Australia: Oxford University Press, p.72 (brother); Victorian Aboriginal Community Controlled Health Organisation (VACCHO) & La Trobe University. (2014). Koorified: Aboriginal Communication and Well-Being (bro): http://www.vaccho.org.au/vcwp/wp-content/uploads/2011/03/Koorified-Aboriginal-Communication-and-Well_Being.pdf.

6 Urban Dictionary (2020): https://www.urbandictionary.com/define.php?term=Bro.

7 *Macquarie Dictionary* (7th ed. 2017), pp. 192 (bro).

8 Barlow, L. (2017). New Zealand Language: https://nomadsworld.com/new-zealand-language/; Dalton, T. (2018). Boy Swallows Universe. Sydney, NSW, Australia: HarperCollins Publishers Australia Pty. Ltd. pp. 129-131.

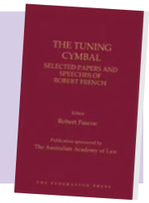
9 Mills, T. & Houston, C. (2020, August 13). Policeman faces investigation over alleged privacy breach. The Age, p. 3.

BOOK REVIEW

The Tuning Cymbal; Selected Papers and Speeches of Robert French

PETER HEEREY

The Tuning Cymbal; Selected Papers and Speeches of Robert French, **Federation Press, 2020, pp xxv, 434**



In 1612 Francis Bacon observed that, "Patience and gravity of hearing is an essential part of justice, and an over speaking judge is no well-tuned cymbal".

When the Australian Academy of Law was preparing this collection of papers and speeches, former Chief Justice of the High Court, Robert French, modestly rejected "A Well Tuned Cymbal" as the title, on the ground that it might convey the idea that he had 'arrived' rather than being still on a journey of learning.

Certainly, it has been a long and impressive journey, both in terms of the disparate subject matter, and geographically. As well as papers given in the Australian capitals, the collection includes papers given in Wellington, Singapore, Hong Kong, London, Cambridge and Tuscaloosa in Alabama.

His Honour served as Chief Justice of the High Court from 2008 to 2017. Previously, he had been a judge of the Federal Court of Australia from 1986, having been appointed at the age of 39. While on the Federal Court he presided over the Native Title Tribunal, established after the Mabo case.

Untypically for a lawyer, his Honour's first degree at the University of Western Australia was in science, majoring in physics. He is currently Chancellor of that university. In 2019 he was commissioned by the Commonwealth Government to review the state of free speech in Australian universities.

The present collection has 29 papers, divided into 10 parts (Indigenous Issues, Human Rights, The Profession etc.) each with an introduction by a distinguished commentator, such as Chief Justice Bathurst, the Hon Kevin Lindgren and Professor Cheryl Saunders. The editor, Professor Robert Pascoe, has successfully met an organisational challenge of D-Day proportions.

Inevitably there are some overlapping topics, but there is nevertheless a wide range of thoughtful and thought-provoking comments.

One decision frequently mentioned in the papers is *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. It is an important decision concerning the exact boundary between community safety and personal liberty. Gregory Wayne Kable was convicted of the manslaughter of his wife and was sentenced to imprisonment. During his imprisonment, Kable sent threatening letters to his late wife's relatives. The authorities were concerned over what he might do to those relatives after his release. Legislation was passed before Kable's release. Its object was stated to be the protection of the community. Originally intended to be of general application, in the course of its progress through the New South Wales Parliament the statute was limited to apply to Kable alone. If the Supreme Court determined Mr Kable was likely to commit an act of serious violence it had to order his detention for up to six months.

The High Court struck out the statute in so far as it was directed at Mr Kable (and nobody else). From the decision, there has evolved what is commonly known as the "Kable Doctrine", by which it is implied that the Constitution provides for an integrated Australian system of courts of which the State Supreme Courts form an essential part, with the result that it is inconsistent with Chapter III of the Constitution, and therefore impermissible, for their institutional integrity as "courts" to be impaired by state legislation.

The majority judgments in *Kable* prompt continuing discussion. "Public confidence in the judicial system", a concept relied on heavily by the majority (see McHugh J at 124 and Gaudron J at 107), leads to questions as to what the public's view might actually be. The argument was not raised by members of the Court of Appeal below.

His Honour is particularly interesting in his thoughts on science in the courts. He points out that the intersection between law and science has become "wider and deeper since 1933" when the famous case of *Grant v Australian Knitting Mills* (1933) CLR 387 was decided (a long forgotten fact: the plaintiff, a well-regarded paediatric physician in Adelaide, wore underpants made by the defendant for a week without washing them,

something described by the Chief Justice of South Australia at the time as "the ordinary custom of ordinary people").

His Honour refers to his experience with the concept of obviousness in patent law: whether the alleged invention, even if novel, would have been obvious to a person skilled in the relevant art in the light of the common general knowledge at the relevant time. The case was *Pfizer Overseas Pharmaceuticals v Eli Lilly & Co* (2005) 225 ALR 416. It concerned the drug Viagra. The Full Court upheld the decision of the trial judge (the present reviewer) rejecting the challenge to the patent. One could say the decision stood up to the test.

His Honour refers to procedural innovations such as hot-tubbing (of experts) as useful. However, he plainly does not consider that the availability of experts should supplant a judge's pursuit of continuing education. He goes on to say that judges should try to keep up with "an intelligent layperson's understanding of scientific developments in areas relevant to their work."

A pursuit of continuing education is to be lauded. The problem is, though, that the relevant areas are limitless. In a recent paper, Justice Rares of the Federal Court noted that he had been involved in cases concerning accounting, quantity surveying, fire protection, wildlife paths, metallurgy, naval architecture, navigation of 230m container shops in a gale, mechanical engineering, the appropriate flooring for elephant enclosures in zoos and the mating of those animals.

There would not be much time left for trashy novels.

All in all a valuable and highly readable collection.

BOOK REVIEW

Play by the Rules. The short story of America's leadership: From Hiroshima to Covid-19

By Michael Pembroke

TREVOR MONTI

Earlier this year, Peter Conrad, writing for *The Guardian*, identified Michael Pembroke's latest work as that publication's "Book of the Day", entitling his review, "America in Retreat … grisly history of a bully-boy nation".

Play by the Rules. The short story of America's leadership: From Hiroshima to Covid-19
By Michael Pembroke

For those unfamiliar with Michael Pembroke, he studied History, French and Politics at university, intending to become a diplomat. Instead, as he puts it, he turned to the law and became a judge, undertaking a writing career in his spare time. Born in Australia, he was educated in the United Kingdom, including at the University of Cambridge.

In this book, Michael Pembroke records the slow decline of the USA as the leader of the world, following World War II. The book is well resourced and detail is not spared as Pembroke takes the reader essentially from 1945 through until 2020. He delves into events in the USA which occurred prior to the end of World War II, identifying them as the catalyst for the future.

Pembroke has drawn on his extensive travels, including in Trump's America. He was in Washington DC at the time of Watergate; Chicago when the Obamacare legislation was passed; New York city shortly before 9/11; and New Jersey during the first year of the Trump residency. He now lives in Sydney and the Blue Mountains.

Pembroke compares American domination of the world by countless military attacks, assassinations, CIA inspired coups, clandestine operations and countless military interventions to the role of China. He notes, by contrast, the vast spread of Chinese influence across the world by economic means, investment and development projects in every continent, bar North America.

Pembroke refers, on the one hand, to the massive spending by the USA on armaments and its war machine and notes the history of direct involvement by the US since the end of World War II in places such as Korea, Iran, Guatemala, Vietnam, Chile, Iraq, Cuba, Afghanistan and many other countries. On the other hand, he observes the absence of Chinese military interventions and quotes the former Singaporean diplomat and author Kishore Mahbubani:

> China is the only major power in the world which has not gone to war in forty years and has not fired a single bullet in thirty years. In contrast, in the last year of former US President Barack Obama's Presidency, the US dropped 26,000 bombs on seven countries.

For good measure, Pembroke then goes on to quote Indian American political scientist, Fareed Zakaria who wrote to similar effect:

> China has not gone to war since 1979. It has not used lethal military force abroad since 1988. Nor has it funded or supported proxies or armed insurgents anywhere in the world since the early 1980s. That record of non-intervention is unique among the world's great powers. All the other permanent members of the UN Security Council have used force many times in many places over the last few decades—a list led, of course, by the United States.

Pembroke's review of American involvement in world affairs takes the reader right up until the present time. He noted an increased unilateralism by the USA; it has refused to ratify a single UN convention or treaty since 1994. These include its failure to ratify the Convention on the Rights of the Child (it is the only country which failed to do so), its failure to ratify the international covenant giving legal effect to the Universal Declaration of Human Rights, its withdrawal from the jurisdiction of the International Court of Justice, its opposition to the International Criminal Court and more recently, its withdrawal from the Paris Climate Agreement and the UN Human Rights Council. Of course, since the book went to print, the Biden administration has changed course in some material respects, particularly with respect to climate change.

Pembroke cites an outstanding example of American aggression and clandestine operation designed to bring about regime change in Guatemala in 1954. Back then, the powerful American corporation United Fruit Company was Guatemala's largest land holder and had grown accustomed to conducting its business "free of such annoyances as taxes and labour regulations". It had many powerful connections in Washington including both Dulles brothers and Henry Cabot Lodge, the staunch Republican strongman and Ambassador to the United Nations. The Guatemalan National Assembly established the country's first social security system, guaranteed the rights of trade unions, fixed a 48-hour working week and levelled a modest tax on land holders. Contrary to American propaganda, the Government of Guatemala was not a communist Government. In fact, only four seats in the 61-member National Assembly were held by the Communist Party.

> "Contrary to American propaganda, the Government of Guatemala was not a communist Government. In fact, only four seats in the 61-member National Assembly were held by the Communist Party."

Dulles initiated a secret CIA operation to overthrow the Government. It was known as "Operation Success". Funds in the sum of $4.5m were made available, a former Guatemalan army officer (Castillo Armas) was selected and groomed as a rebel leader; fighters were hired; aircraft requisitioned and bases prepared. New York's fiercely anti-communist Catholic Cardinal Spellman was persuaded to provide support. Soon CIA agents "were writing scripts or leaflets for the Guatemalan clergy". On the 9 April, 1954, a pastoral letter was read in every Catholic church in Guatemala warning the faithful against a "demonic force called communism that was trying to destroy their homeland".

In June 1954, US-trained rebel troops crossed into Guatemala with lists of left wingers marked for elimination. US piloted fighter bombers strafed the capital. Air raids continued for several days and a clandestine "voice of liberation" radio station operated by the CIA out of Florida broadcast a stream of false reports.

The Americans arranged for Castillo Armas to proclaim himself as president. A succession of military juntas supported by the United States followed. They revoked most of Guatemala's democratic and social reforms.

Turning to more recent times, Pembroke analyses the Chinese "Belt and Road Initiative" which has been the subject of fierce attack and criticism by the Australian Government and the Liberal Party, particularly in relation to the Victorian (Labor) Government's decision to sign up to it. He notes that the BRI led to major improvements in the construction, coordination and harmonisation of infrastructure across Asia including the Central Asian States, as well as in Africa, Latin America and parts of Europe. He points out that China is building a monorail in Mecca, cement factories in Iraq and a new industrial zone in Suez, laying fibre optic cables in Afghanistan, equipping African ports with defences against piracy, establishing wind farms in Brazil and renovating the Portuguese electricity grid, amongst other investments in other countries.

Pembroke's analysis provides a suitable backdrop for recent calls by experts and former diplomats for a shift in strategy by Australia in its dealings with China. As Philip Flood AO, Secretary of the Australian Department of Foreign Affairs and Trade from 1996 to 1999, has recently said, "Australia needs to approach China with somewhat more nuance and be wary of being drawn into a US policy of confrontation with China".[1]

1 *Sydney Morning Herald*, Former DFAT boss urges government to adopt 'more nuance' in China dealings, 31 January 2021.

BOILERPLATE

Verbatim

A *Bar News* tradition

THE EDITORS

In 1988, the Victorian Bar Council published *Order in the Court – the Lighter Side of the Law*. The book had a single purpose: to publish a collection of Verbatim entries which had appeared in *Bar News* in the 1970s and 1980s. Peter Heerey QC wrote the foreword in his then capacity as joint editor. He explained the context:

> 'Verbatim' means, literally, literally.
>
> In 1971 Victorian Bar News commenced publication under the editorship of Richard McGarvie QC (later to become a judge of the Victorian Supreme Court). At a very early stage, members of the Bar started to send in reports of lighter moments which occurred in court. These became the subject of a regular feature known as Verbatim. The title suggests literal accuracy, something which successive editors of *Bar News* have striven to achieve for a number of reasons—not least of course the importance which the law of libel places on the accuracy of reports of court proceedings.
>
> Actually "send in" is something of a euphemism. An occupational hazard of editorship of *Bar News* is the buttonholing by colleagues who enthusiastically recount some hilarious episode in County Court Juries or the Practice Court—"I've got a great Verbatim" they say. Sometimes these elusive gems can be tracked down. More often than not, they remain unrecorded.
>
> Some entries are meticulously documented and yet fail to win editorial acceptance. Some create a reaction not even approaching mild amusement. Others lack that essential spontaneity; the contributor is recounting some carefully crafted bon mot which he (or she) has dropped on an unsuspecting magistrate. As a rule of thumb, editors have learned to treat with caution proffered Verbatims in which the contributor plays the starring role.

In recent years, Verbatim has become a more ad hoc tradition. It is time to revive it! To inspire, in this "Verbatim Special" we provide for your amusement new entries, as well as those from the archives of *Order in the Court*.

Contact us at *vbneditors@vicbar.com.au* with your entries. Before doing so, please make sure you have cleared any consent or publication issues.

Former Williamstown President Trevor Monti displays his interest in Ned Kelly

PHOTO COURTESY OF DAVID CAIRD

2021 With thanks to John Barbaro, who forwarded the attached transcript to VBN. Trevor Monti QC had sent it to him under the caption, "See, I told you Ned played for Williamstown!"

Cross-Examined by Mr Monti:

Mr Allen, I will remind you that you're on your oath, okay? --- Yes.

I want to ask you a very serious question? ---M'hmm.

Do you accept the fact that Ned Kelly played football for Williamstown? --- You're an idiot. Yeah, I played alongside of him. I think one day I kicked 15 and he kicked eight.

To come back to the case, you told His Honour that you thought—you just said to His Honour, "I thought Garry was ok". Is that so? --- That's correct.

2020 On a Voire Dire over Webex before his Honour Judge Trapnell of the County Court.

MR WHEELHAN (to witness): So you cite Salovey and Turk, which is at the end of that article

... Now, you've read that literature, I take it, if it's been cited? Or perhaps your colleagues read that literature?

WITNESS: Um, I—it's going back a long time, but I think, um, Tony wrote that part and maybe he wrote that paragraph. So I don't remember reading that article, that article that's referenced there. All right?---

WITNESS: But—yeah, sorry, go on.

MR WHEELHAN: It goes on to Salovey and Turk ...

WITNESS: Someone is making an awful racket there, I'm not sure who it is. It is you, Your Honour?

HIS HONOUR: It could be me. I'll go on mute.

MR WHEELAHAN: Sorry, Your Honour.

HIS HONOUR: No, no, don't worry. That's all right.

2019 *Directed v OE Solutions & Ors* before Justice Beach of the Federal Court. Re-examination by Michael Wise QC.

MR WISE: Yes. Now, you were also cross-examined by Mr [Peter] Wallis for Mr Meneses about what occurred on or about 11 October, 2017. Do you recall that? Particularly Mr ---?

WITNESS: Sorry, who is Mr Wallis?

MR WISE: That handsome gentleman there is Mr Wallis.

WITNESS: Sorry, yes.

HIS HONOUR: Relative to everybody else in the room.

2020 *Gartmann v Dominion Holdings* before Judge Parrish of the County Court. Cross-examination of female witness by Zoom (day 15)

It looks like the girls are off to Eminem? --- Yeah.

And you can recall that concert? --- Yeah.

You can recall Luzinda attending? ----Yeah. And ---

HIS HONOUR: Can I just ask, one thing I've been meaning to ask, and I know I'm probably going to regret asking this, Eminem is what? --- A white rapper.

MR STANLEY: A white rapper? --- Yeah, a rapper.

HIS HONOUR: Right. That's the name—I see, that's his name, is it? ---Eminem, yeah, you don't know who Eminem is?

MR STANLEY: Your Honour ---? --- That's a worry.

HIS HONOUR: No? --- That's a worry. He's almost like Tupac—do you know who Tupac is?

Two Park? --- Tupac.

No? --- Wow, okay. Well, let's just move along then.

[Eds: Yes, it was the witness who suggested it was time to change topics.]

Eminem

IMAGES ON THIS PAGE COURTESY OF BIG STOCK

2017 Attached is a transcript extract from a case before Vickery J. The decision is found at *COI Building Group Pty Ltd v 100 Percent Plumbing Ltd* [2017] VSC 418. The transcript is between Vickery J and Dan Christie. This is classic Dan. Having so sadly passed away on 14 April, I think it would be the perfect tribute to include this transcript in the next edition.

Tony Horan

MR CHRISTIE: Yes, Your Honour, a couple of preliminary matters. First I wanted to congratulate your Honour on the appointment to VCAT as a judicial member.

HIS HONOUR: Yes.

MR CHRISTIE: It's very good news.

HIS HONOUR: It's going on the CV immediately.

MR CHRISTIE: Yes. And the second preliminary point is, I know from Your Honour's judicial writing that Your Honour does have something of an interest in movies, and when I sat down to ---

HIS HONOUR: Amongst other things, yes.

MR CHRISTIE: --- do these submissions, I was reminded of the 1989 romantic comedy of, *When Harry met Sally.*

HIS HONOUR: Yes.

MR CHRISTIE: And there was a scene in Katz's café in Houston Street in New York ---

HIS HONOUR: Yes.

MR CHRISTIE: --- that Your Honour, I'm sure, would be familiar with where Meg Ryan was behaving in an unusual way in the café opposite Billy Crystal.

HIS HONOUR: Yes.

MR CHRISTIE: And at the end of—or towards right at the end of that scene, the diner sitting next to them said to the waitress, "I'll have what she's having."

HIS HONOUR: Yes.

MR CHRISTIE: That is what Mr Klotz is seeking to do here.

HIS HONOUR: Well, that's a graphic description. How does it advance your case?

MR CHRISTIE: Could I just—I just want to ---

HIS HONOUR: And I might say, an entertaining allusion to that great film.

MR CHRISTIE: I hope the metaphor wasn't too overbearing.

HIS HONOUR: No it was colourful and useful and entertaining.

MR CHRISTIE: If Your Honour pleases.

HIS HONOUR: All to be encouraged.

1987 Cross-examination of witness:

GULLACI: You are known, are you not, as Animal Steve?

WITNESS: No.

GULLACI: You are not?

WITNESS: I used to be.

GULLACI: You used to be Animal?

WITNESS: No, they call me Mudguard now.

GULLACI: Mudguard.

WITNESS: Shiny on top and shit underneath.

1986 The last Privy Council appeal from Victoria was heard in November 1986. Those appearing were (as they were then) Garth Buckner QC, Graeme Uren QC, Michael Wright and Paul Lacava. Lord Bridge was kind enough to invite counsel to his London flat for drinks to mark the occasion. Michael Wright was the first to arrive, whereupon the following exchange took place.
M WRIGHT: Good evening, my Lord.
LORD BRIDGE: Come in Wright. Don't stand on ceremony. Call me Lord Bridge.

1985 The police witness was shown, in front of Judge O'Shea and jury, two statuettes:
TOAL: Now, one appears to be the bust of a female and one the bust of a male. That would be a fair description?
DETECTIVE: I don't know about the bust but from the head one looks like a male and one like a female.

1984 Stott QC was taking Mr J Bryant Curtis through his evidence-in-chief:
Q: Did you form an opinion, doctor ...?
A: Were you going to say something else?
Q: As to what injuries the plaintiff suffered as a result of the collision?
A: Well, I wasn't going to give a philosophical opinion on the meaning of life nor was I about to express an opinion on the outcome of the American Presidential Elections.

1983 Scene: High Court hearing in Canberra. During argument a large crackling reverberates through the courtroom.
WILSON J: Mr Goldberg, I think you are knocking your papers against the microphone.
MASON J: It sounds like thunder.
GOLDBERG QC: I thought it was approval of my argument.

1981 Cross-examination of de facto husband of custody applicant before Frederico J in the Family Court:
E C S CAMPBELL: Have you had any experience raising a 15-year-old girl?
HUSBAND: Are you out of your mind?
HIS HONOUR: I take that answer as being, "No".
CAMPBELL: To both questions, Your Honour.

1974 *Marks v Swan Hill Shire Council* (1974) VR 896 at 901: "It was further submitted by Mr Adams that the Plaintiff was precluded from obtaining equitable relief because, seeking equity, he did not come with clean hands since he had cleaned septic tanks without the consent of Council and despite the fact that he had been warned not to do so."

1971 Eleven-year-old boy giving evidence about 12.30pm starts to speak faster and faster. The shorthand writer can't keep up:
JUDGE READ: Now, don't hurry ... there's plenty of time.
BOY WITNESS: Yeah well ... I'm getting pretty hungry.

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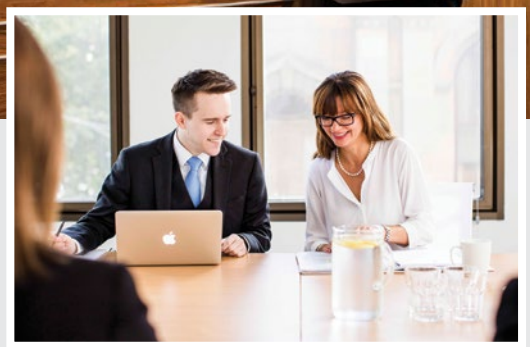

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