ISSUE 170 SUMMER 2021/22

VICTORIAN BAR NEWS

OUR INTERVIEW WITH THE CHIEF JUSTICE OF THE SUPREME COURT OF VICTORIA

BANKSIA AND THE BAR

AND SO MUCH MORE!

Happy 50th Birthday VICTORIAN BAR NEWS

WE LOOK TO THE PAST… AND THE FUTURE

PLUS: TRUE GRIT FROM OUR SEPTEMBER 2021 READERS

ISSUE 169 WINTER 2021
VICTORIAN BAR NEWS

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Front row L-R John Tesarsch, Shanta Martin, Campbell Thomson, Annette Charak **Absent:** Justin Whelahan

An Overflow of Content

NATALIE HICKEY, JUSTIN WHEELAHAN, ANNETTE CHARAK

Some time ago, ideas for our third 'pandemic issue' of *Bar News* looked thin on the ground. The Bar News Committee resolved to live with fewer pages. However, within days of sending an email around the Bar calling for contributions, content started pouring in. It's been delightful, somewhat remarkable and even a bit stressful, pulling it all together as we thaw out from lock down. We have more pages of content than usual. There are wonderful tales of what everyone has been up to. There are numerous milestones to celebrate as well.

It is a great privilege to edit the written work from such a talented guild. Even more so as we celebrate 50 years of *Bar News*. A flood of content as we reflect on our purpose shows that the publication is in a healthy space.

What perfect timing for the Art & Collections Committee to launch *A History of the Victorian Bar*. In describing what we can expect when each of us receives a copy of the book early next year, Siobhan Ryan refers to the pink ribbon bookmark intended to remind us of the tradition of binding barristers' briefs in pink tape. We couldn't resist a display of pink tape on our birthday cover as well.

Crockett Chambers have celebrated 25 years, coinciding with Robert Richter's 50th anniversary of signing the Bar Roll. From the photos, it looks like it was quite a party.

The September 2001 readers recently enjoyed their 20-year reunion. Glen Pauline shares his memories of signing the Bar Roll and of how practice has changed over the years.

PHOTO COURTESY OF PETER BONGIORNO

Justin Wheelahan, 3rd right: 'Zig Zaggers' swim group members having a coffee at the Espresso, Albert Park' (*The Age*, 22 October 2021, Eddie Jim)

Glen's story dovetails with our feature about the September 2021 Readers. This was the first cohort who left the security of successful careers to pursue a career at the Bar fully appreciative of the risks during a pandemic. Sure enough, they found themselves experiencing the readers' course almost entirely online after Melbourne entered lockdown #6. The images of the readers' proud partners and families looking on during the virtual signing of the Bar Roll provides insight into the significance of their collective achievement. We encourage all barristers to get to know members of the September 2021 readers' group, with a view to sending some briefs their way.

Also leaping from the pages is the work of so many Bar committees during 2021. The show must go on, and so it has. For those seeking to engage with other barristers and to pursue common interests, the work of our committees will provide some inspiration.

We don't wish to spoil the surprise of what lies within these pages for our 50th anniversary edition. However, Stephen Charles recounts *Victorian Bar News*' unintentional Ern Malley moment in 1984. Julian Burnside reflects on writing bits about words since 1980, and Julian McMahon has written a gentle reflection examining what it means to be a barrister, what we owe to the institution of the Bar, and how it might be improved.

> "For those seeking to engage with other barristers and to pursue common interests, the work of our committees will provide some inspiration."

We draw attention to Marcus Clarke's summary of *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666. He has managed to distil 2,142 paragraphs of judgment into two pages. Of itself a remarkable achievement, Marcus rightly notes that the summary is not intended to be a substitute for reading the Court's reasons for judgment in their entirety.

Michelle Sharpe has 'taken the bull by the horns' in her interview with the 'infamous' Meredith Fuller after receiving some negative press attention about the scheduled billing of Ms Fuller as a speaker a few months ago. As Michelle puts it so neatly, this is intended to help the reader 'decide for yourself'.

The last word of our issue goes to Fabian Brimfield, who has contributed an article about his 'other life' as a DJ. After Fabian submitted his article, the editors asked, "What's the typical last song you play when it's time for everyone to go home?" Fabian replied, "I rotate through a few final songs to close off a set, but it's usually a banger that everyone knows —*Blue Monday* by New Order, *Gimme! Gimme! Gimme!* by ABBA or *Moving on Up* by M People." As we head into the holiday season, we thought you too might like these ideas for the turntable!

Finally, Justin Wheelahan missed our editorial photo due to court commitments, but was captured by *The Age* on 22 October 2021 'letting his freak flag fly' after a swim in the bay. This was the historic 'Freedom Day' when 260 days of lockdown ended after Victoria hit its 70% vaccination target. We have used this in lieu of an official photo.

As always, 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.

Letters to the Editors

FUN STUFF

When the Earth moves

On 22 September 2021, Victoria was shaken by its biggest onshore earthquake in recorded history. The magnitude 5.9 earthquake struck near Mansfield. Bricks crashed onto Chapel Street when the parapet above Betty's Burgers collapsed. An eagle-eyed **James Samargis** noted the effects in the corridor between Owen Dixon East and West. As he observed, "I think the recent earthquake disturbed two of the artefacts from our ground floor exhibition ...The wig has fallen off its stand (quelle horreur!) and the rosette has probably moved slightly!". Judge for yourself by the photographic proof.

Kudos to Michael Stanton and Paul Smallwood

After eight years as a magistrate, Ms Patrick was appointed to the County Court in 2008 where she served for 10 years, specialising in crime. She has a longstanding passion for judicial education. In other words, she knows what she's talking about!

May I commend Michael Stanton and Paul Smallwood for their thoughtful article *Pause for Thought? The Case for Reversing the Abolition of De Novo Criminal Appeals*. On the basis of my experience as a former magistrate and County Court judge I can only heartily endorse their reasoning and conclusions.

Jane Patrick

Correction

In *VBN* 168 at page 83 (*History of the Victorian Bar, characters & vignettes*), Andrew Godwin referred to Australia's first Australian-Chinese barrister, William Ah Ket. After doing so, the sentence appears, "It was not until the 1970s that the next barrister of Asian origin came to the Bar". That statement is not correct. **Mervyn Kimm**, who is half Chinese, was called to the Bar almost a decade earlier, in 1963. His Honour was appointed a County Court judge in 1968, remaining in that position until 2002.

The Dreyfus and Pell Cases: False Equivalence?

'… 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' – RP Dalton QC, Michael Waugh and JX Smith, *VBN* 169, Winter 2021, page 9.

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 readers 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.

JURY TRIALS

Pell v The Queen

[2020] 94 ALJR 394

There can be no doubt that the first sentence in the passage quoted above is true. Captain Dreyfus was the victim of an infamous misuse of military discipline motivated by anti-semitism. But can it seriously be suggested that the Victoria Police, the Director of Public Prosecutions and the Courts were all motivated by anti-Catholicism in their pursuit of the case against Cardinal Pell? I will let the readers decide if there is any similarity between the two cases.

First, a little history. Captain Alfred Dreyfus was a Jewish officer in the French army when, in 1894, he was charged with offering to sell military secrets to the Germans. His first language was German. He had grown up in Alsace in Eastern France, a region from which his family fled to Paris after the Prussian occupation in the aftermath of the 1870 Franco-Prussian war.

We now know that the actual spy was one Major Walsin-Esterhazy, a ne'er-do-well gambler and French infantry officer. He posed as a count but had no title (see his entry in Brittanica.com for more information). Esterhazy provided the German embassy with a letter (the so-called bordereau*)* detailing the French military secrets that he was prepared to disclose. The letter found its way to Major Hubert Henry, a notorious anti-semite. Henry, assisted by his fellow anti-semite Colonel Sandherr, forged evidence against Dreyfus, who was convicted of treason and sentenced to deportation for life to Devil's Island, a penal colony off the coast of French Guiana.

What ultimately became known as the 12-year 'Dreyfus Affair' had begun. A number of high-profile citizens including the author Emile Zola, who famously wrote an open letter to the French President entitled '*J'Accuse*', shone a bright light on the terrible injustice. In 1906, the highest court in France found Alfred Dreyfus not guilty, whereupon he was re-admitted to the army, awarded the Legion of Honour and served in the First World War, ultimately dying in 1935.

In 2006, a national ceremony led by French President Jacques Chirac commemorated the centenary of the acquittal and acknowledged the anti-semitism that was at the heart of the case. The President publicly apologised to Captain Dreyfus and his descendants on behalf of the French State.

What about the Pell case? Cardinal Pell was charged because the Victoria Police had credible evidence that he had committed certain crimes. Cardinal Pell was convicted because a properly instructed jury accepted that the prosecution had discharged its onus. Cardinal Pell was sentenced according to law by Chief Judge Peter Kidd. The High Court ultimately overturned the convictions in an every-day example of the appeals process.

There was no fraud involved. The evidence was not concocted. The cardinal was not framed.

How then is it "open to conclude that Cardinal Pell was charged, convicted and imprisoned because he was a Catholic"?

Peter Rozen QC

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

Verbatim

THE EDITORS

Supreme Court online

***Emergent Solutions Pty Ltd & Ors v Penguin Random House* (Connock J)**

MS HICKEY: Sorry, if I might just interpose by way of apology. Some building works commenced a short time ago next door. I had the opportunity to go and have a conversation with the builders and to inform them that court was in session for the next duration. They said they would do their best and stop drilling.

HIS HONOUR: Well, thanks for that, Ms Hickey. I had a similar circumstance when conducting a hearing from home a little while ago. The response I got from the builders was more colourful and less helpful, but there we go.

Supreme Court online

***Noori v Majestic Plumbing PL & Anor* (Forbes J)**

MR HAYES: If we are replicating the matter as if we are in a courtroom, could Mr Sozzi please be directed to remove his cap?

HER HONOUR: All right, yes. Probably not a bad idea because its so big, bearing in mind that you sometimes put your head down and that just means we can't see you at all.

WITNESS: Are the glasses okay? I don't know if there's a reflection.

HER HONOUR: They are all right for me and you might need to read something on the screen.

Court of Appeal

***DPP v Vitale* [2020] VSCA 237, (Priest, Beach, and Forrest JJA) at [32]**

The appellant appeared unrepresented via audio-visual link from Barwon Prison.

Shortly after counsel commenced to address the Court, the appellant stood up from the table at which he had been seated, took down his trousers, bent over, exposed his buttocks to the camera and pulled his buttocks apart so as to expose his anus.

Appellant: You just copped a anus [sic], if you want to talk to him again, let me know.

Mr G Hughan, Counsel for the Respondent: That was not very helpful.

Supreme Court online

***In re Officar Pty Ltd; Petropoulos & Ors v Qiang Li & Ors* (Osborne J)**

MR MÖLLER: No, I understand, your Honour. Your Honour, I'm sorry. As I attempted to indicate, there is a smoke alarm going off in my house and my wife and children are running around the corridors outside.

HIS HONOUR: No, that's all right, Mr Möller. What I might do is, I might stand this matter down till 11.45….

HIS HONOUR: Thank you, Mr Möller.

MR MÖLLER: I've circulated some orders. Thank you for the time. My kitchen caught fire, your Honour, so everybody should have a fire blanket.

HIS HONOUR: Via toast or something more serious.

MR MÖLLER: No, no, literally the—there were flames three feet high.

HIS HONOUR: Really? Well, it's a good thing we stood down.

MR MÖLLER: A pot was left on and then somebody went to do something on Zoom and the pot was forgotten and—

HIS HONOUR: Sounds like it was your fault, Mr Möller.

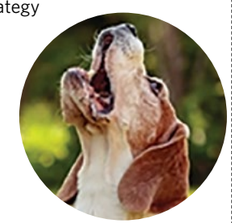
MR RIBBANDS: That's taking an excuse for being late to court to a whole new level.

MR MÖLLER: I've got an alibi…

Supreme Court online

***PacReef v Pacific Biotechnologies* (Osborne J)**

MR CRUTCHFIELD: …well just tell his Honour as best as you can recall the various ways you were seeking to assist the company to raise that money, and at various points in the engagement. So you were trying to get cornerstone investors in, what else were you doing, and how was this—what was your strategy for getting the money in the door?



WITNESS: Perhaps, whoever has the dog, they might go on mute for a minute.

MR CRUTCHFIELD: That's his Honour's dog, so that's not a good start for you, Mr Collett, but keep going.

HIS HONOUR: I'm fine…

PHOTOS COURTESY OF BIG STOCK

PRESIDENT'S MESSAGE

From the President

RÓISÍN ANNESLEY

The Riverine Herald has been the journal of record for the Echuca-Moama region since 1863. I'm not sure on how many occasions the Victorian Bar or any of its members have featured in the *Riverine Herald*. However, on 11 November 2021, the *Riverine Herald* asked its readers for their opinions on the Public Health and Wellbeing Amendment (Pandemic Management Bill 2021) [the Bill]. Sue Daldy said:

> We were just discussing the proposed Bill this morning, I listened to the commentary about the objections some of our sharpest legal minds have to its introduction. I agree with the barristers (Victorian Bar), there needs to be amendments made to the bill and refinements to the powers. They know the law better than anyone...

Ms Daldy's words, "they know the law better than anyone"struck a chord with me. This is our reputation. This is what the public expects of us. This is what the courts expect of us. This is what we expect of ourselves and of each other. The Victorian Bar is an association of 2200 highly qualified and talented advocates, striving every day on behalf of our clients for justice and excellence. In adverse times it can be easy to lose sight of what we do and why we do it. Yet it is out of the adversity of the past 18 months that the need for a cohesive college of barristers in Victoria has become more important than ever. In the year ahead I intend to focus my endeavours on the engagement of all members in Bar life and to continue to advocate for and assist the courts to achieve a return to in-person hearings in 2022.

Rule of law

Traditionally, the Bar has spoken out against attacks on the rule of law. Recently, immediate past President Christopher Blanden QC, along with a number of silks, were leading voices in the legal profession's response to the Bill. They decried its content and the lack of consultation by government. Other professional bodies soon followed suit. In recognition of the important public role the Bar can play in such debates, the Bar Council has established a new sub-committee to advocate on rule of law matters.

Changes to the Constitution

At a special general meeting of the Victorian Bar held in August, changes to the Victorian Bar Inc Constitution were passed. These changes related to the removal of the position of Chief Executive Officer; and the power to remove an Australian lawyer from the Victorian Bar Roll (in line with Recommendation 2 of the Royal Commission into the Management of Police Informants).

The most recent Bar Council election demonstrated the desire of members to elect non-silks in Category A, with three non-silks being elected to that category, an unprecedented result in modern times. It is anticipated that further changes will be made to the Constitution early in 2022. Members of more than 15 years call but who are not silk, represent approximately 70 per cent of Category A members, yet traditionally few are elected to Bar Council by dint of a voting order predicated on seniority. The intended changes will create a sub-set of Category A so that at least two places on Bar Council will be available to members of more than 15 years call, who are not silk.

Essoign Club

The Essoign Club is unique to the Victorian Bar and the envy of all other Bars in Australia. The Essoign plays a central role in the camaraderie of the Bar, not only is it where we gather to celebrate special events and achievements, but also to meet over coffee or lunch. In August there was much cause for celebration when the Bar entered into a long-term lease with BCL to secure its future. The lease negotiations saw a significant reduction in the rent charged by BCL to the Bar, enabling the Bar to pass on the savings to the Essoign. The Essoign is once again operating at full capacity, and I encourage members to catch up with colleagues at the club.

Plans for the year ahead

There has been a marked increase in the number of barristers in chambers since the end of Cup Week. The Calcutta lunch held on Cup Eve was the beginning of the return to social functions at the Bar. I expect that many of the Lists and Bar Associations will be holding end of year functions. Social events in the new year to be hosted by the Bar include the Bar Dinner (hopefully another sell-out), a return of the Legends of the Bar, and the thrice-deferred dinner to honour former Justice Nettle QC. Early February will see the long-awaited launch of the History of the Bar.

I look forward to welcoming all the new Readers who joined the Bar during the pandemic. In the new year, the Bar Council will look to implement a program to re-enliven the reading period for these new members, who have not had the advantage of a traditional reading period.

The Bar Council will aim to reduce or at least maintain the current reduced level of subscriptions for members.

Outgoing members of Bar Council

I acknowledge the service of the 2021 Bar Council members who did not seek re-election. Chris Blanden QC and Mary Anne Hartley QC, President and Honorary Treasurer respectively worked tirelessly for members at a time of uncertainty and with an agenda to effect change. I acknowledge the lengthy contributions of Sue McNicol QC and Paul Holdenson QC. I also acknowledge Ian Freckelton QC, Gina Schoff QC, Eugene Wheelahan QC, Paul Kounnas, Ben Jellis, Roshena Campbell and Lachlan Molesworth for their contributions to Bar Council this year.

Bring on 2022

The Victorian Bar is grateful for the tremendous efforts of the courts to keep the wheels of the administration of justice turning remotely. However, the need to be in court to truly utilise our skills as advocates; the need to be in chambers to discuss cases; to see persons other than our families; to have a laugh or a rant after court, has been heightened. I hope and pray that 2022 will be a year when all those needs are met, and the Victorian Bar's reputation as the leader of the legal profession in Victoria and Australia shines even brighter.

I wish everyone a happy and safe holiday. I hope all members have the opportunity to spend time with family and friends, to relax and to recharge their batteries. I look forward to seeing you all refreshed and renewed in 2022.

PHOTO COURTESY OF PETER BONGIORNO

Keeping calm and carrying on: An interview with The Hon Anne Ferguson, Chief Justice of Victoria

NATALIE HICKEY

Looking back on six lockdowns and a tumultuous period for members of the Bench and court generally, is there an example which comes to mind that gave you confidence that the court would be able to keep calm and carry on? If so, would you mind sharing it with us, and why it resonates when looking back on it?

If I'd been asked three years ago whether the court would be able to continue work during a pandemic, I probably would have thought that most work would likely stop. But when you find yourself in the situation, it's a completely different feeling: we all knew that the work had to continue and with the assistance of many (including the profession) that's what happened.

There was no single event that was akin to a lightbulb moment. It was the culmination of multiple moments—from every time a judge accidentally muted themselves to dogs barking in hearings, doorbells ringing, the inevitable frustration with new technology, and the patience—and humour—of those who had every reason to give up but didn't. It was clear in these moments that we would be able to get through whatever came our way.

Were you surprised that the court could adapt to the technological pivot of online hearings?

Initially, we didn't have the technological or user capability to work virtually across the court, but we soon adapted. We quickly trained judges, other judicial officers and staff on the use of Zoom and Webex, upgraded our hardware where required and adjusted our processes to account for a remote environment. There were some teething issues as people familiarised themselves with the technology and a new way of hearing matters. But we asked the profession to change the way they work, and they did so with patience and, sometimes, ingenuity.

I know of one barrister who needed to work out how to demonstrate something in a virtual mediation that would not have happened if it had been face-to-face. The barrister was working from home. He had a mediation about an industrial accident, but no pictures he could use. Taking a break and walking with his wife in the park he asked if they still had their children's Star Wars-themed Lego sets. She confirmed that they did.

Demonstration of Darth Vader not holding the ladder properly, via Lego

He rushed home to create his replica of the accident and share it on the screen during the mediation. As he explains it, Darth Vader failed to provide a ladder that was long enough to reach the manhole. He also failed to hold it as Luke descended the ladder. Luke fell and suffered injury. I'm reliably informed the matter settled.

To my mind, that is a strength of the courts and the profession. The current environment has enabled us to demonstrate our skill and agility to meet whatever comes our way.

Your message to the profession on 15 September 2021 made some perceptive observations about the challenges to the profession during lockdown, including that people's reserves were not as they were. Were judges facing similar challenges?

The changes we experienced were all-encompassing. Across the six lockdowns, the majority of judicial officers and staff worked from home. On some days, while the Supreme Court's daily list was full, not a single judicial officer, lawyer or litigant set foot in the court itself. This affected everyone who worked at the court, as well as the many people who interacted with us.

Like most people in other fields, we were not able to work in the way that was familiar and suited us best. Working remotely was challenging for some judicial officers, including those with school-aged children, and less so for others.

How did you manage them?

During this time, we stayed in touch with each other and found new ways to connect. It was important that we found a way to balance the need to continue delivering justice with our broader responsibilities to the community. I would often say to judicial officers that whatever their situation, they could be confident that collectively as a court we continued to ensure justice was served. I cannot thank them enough for their efforts, dedication and hard work.

Are there any take-outs about the experience which you would like to pass on so that, as barristers, we can assist the court going forward?

It has been a very trying time for the profession and the court. There are times when it tests our patience and levels of reserve. Robust and vigorous legal debate is common in the courtroom, but counsel must always be mindful to treat people, including opposing parties, witnesses and judicial officers, with respect and dignity. A cooperative approach is key. The court will continue to follow public health advice, which will likely include measures that will help to reduce the risk and spread of COVID-19.

A cooperative and patient approach will serve us all well in these circumstances. The court encourages the profession to have an open dialogue and to be realistic about what can be done and how long it will take. I would ask counsel to consider approaching other parties to seek their consent to extensions of time or other accommodations that might be made. Treat others as you would like to be treated. Put yourself in the shoes of that other person and ask, "How would I feel if that was said or done to me?"That won't be the whole answer, but it's a good start.

Gazing into your crystal ball, what do you think the functions of the Supreme Court will look like in 2022? What aspects of the past two years do you anticipate will remain in some way? What will return?

The pandemic caused us to rethink whether there might be some things we can do differently and better in the future. In responding through necessity, we accelerated longer-term improvement projects and continued to hone our focus on the needs of our court users. We will now draw from the lessons learnt and look at what changes might remain.

For example, before the pandemic the Supreme Court was already exploring remote hearings. This has significantly increased as a result of the move to online hearings. For instance, the first directions hearing in *Belinda Cetnar & Ors v State of Victoria & Ors* (a challenge to COVID-19 vaccine mandates), heard by Justice Melinda Richards, had around 1,900 people watching the live stream at its peak. In the matter of *Bolitho & Ors v Lindholm & Ors* (the remitter of the Banksia Securities Limited class action before Justice John Dixon), over 2,200 people watched the public video stream across the first nine days of trial and a directions hearing. The bail variation hearing for Monica Marie Smit (charged with two counts of incitement in relation to alleged breaches of public health orders) before Justice Elizabeth Hollingworth had 6,800 people watching the live stream at its peak.

Since the onset of the pandemic, the public live stream pages that were created for the court's website have had over 119,000 unique visits. More people than ever before have access to the work of the court. With the benefit of this experience, I expect that although there will be many more in-person trials, some remote and hybrid hearings will have an ongoing place in the court landscape.

What factors are driving you as priorities for 2022?

We are always looking for ways to improve, and 2022 is bound to bring a fresh set of twists and turns to navigate. Over the past 18 months, the court has sought feedback from the Bar. We want to know what is working, and what is not. The feedback is not always consistent and we may not always be able accommodate all that is asked of us. But we will continue to engage with the Bar to seek feedback about the experience of barristers to help us refine and improve our processes.

I remain very grateful for the co-operation and perseverance of everyone who worked so hard with us to keep our virtual doors open. The court will continue to follow public health advice and adjust our operations as required. The balance I spoke of earlier is also front of mind—ensuring that the standard of justice is not diminished, while we do all we can to protect the health, safety and wellbeing of our people, the profession and our many court users.

AROUND Town

A history of the Victorian Bar

SIOBHAN RYAN – ART & COLLECTIONS

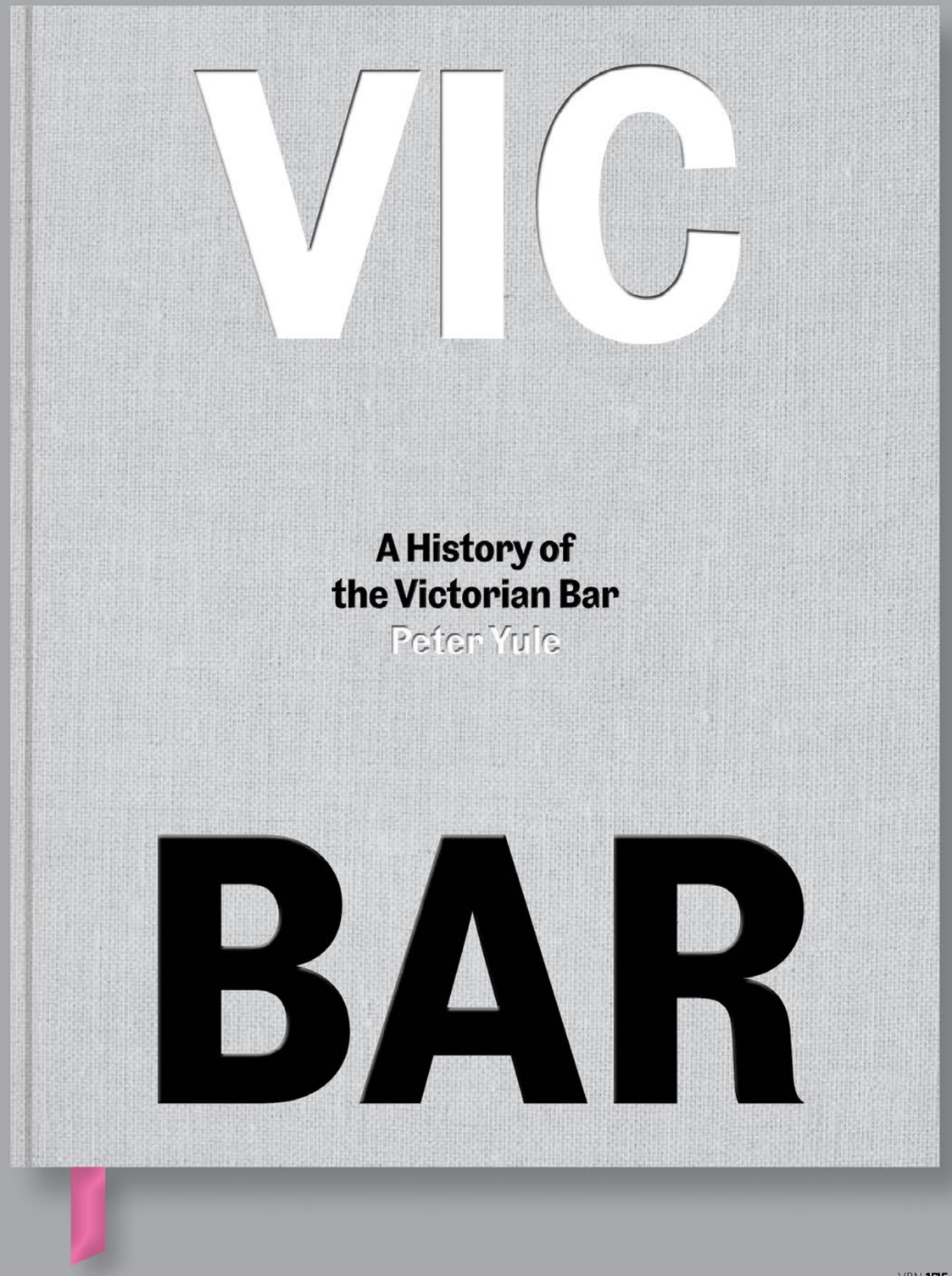
After six years and six lockdowns, *VIC BAR – A History of the Victorian Bar* is complete.

Thanks to a generous grant from BCL which enabled the Bar to commission the historian, a crowdfunding exercise to secure publishers and a last-minute salvation from the Bar Council to cover the inevitable costs blow-out, every Victorian barrister will receive a copy of the book in the first term of 2022—*gratis*.

What to expect? A superbly illustrated tome, in which the quality of the production does justice to Dr Peter Yule's stimulating prose. It is a hardback, over 350 pages long and includes a comprehensive list of the names and Bar roll numbers of every Victorian barrister since 1900. It also has a pink ribbon bookmark replicating the centuries old tradition of binding barristers' briefs in pink tape. These imaginative touches are the result of the novel coupling of an academic publisher, Nick Walker of Australian Scholarly Publishing with an award-winning designer, Michaela Webb of Studio Round. The end result is beautiful.

A feature which firmly plants the text in the 2020s is the illustrations in the last chapter, *The Modern Bar: 1980–2020.* The editorial cue was to break from the sepia images of the early chapters and populate these pages with lively photographs of the newest generation of barristers. For these, the publishers, aided by Bar members, mined that venerable archive, the *Victorian Bar News*. The layouts from Bar Dinners provided rich pickings, but they do not always have names attached. There followed days of releasing photos into the ether in hopes that someone, anyone, could identify the young man/woman third from the left. With the aid of the Collegiate Grapevine and with only days to spare, everyone was name-checked—we hope! In the final pages of the book, contemporary black and white prints from Garth Oriander's *Changing Faces of the Bar* series of 2018 show another side of Bar life and the rich diversity of barristers who make up the modern Victorian Bar.

It has been over 50 years since the last history of the Victorian Bar, *A Multitude of Counsellors*, was written by Sir Arthur Dean KC. We hope that the next generation of barristers won't wait so long. In the meantime, enjoy, *VIC BAR – A History of the Victorian Bar.*



The Crocketteers celebrate 25 years

PHILIP DUNN AND FFYONA LIVINGSTONE CLARK

In June 1999, Robert Richter, Con Heliotis, Philip Dunn, Remy van de Wiel and Terry Forrest decided to rename College House to William Crockett Chambers. The change came from their admiration for Justice William Crockett, who retired in April 1996, having been the longest serving member of the Supreme Court of Victoria.

As time marched on, new ideas developed into wider horizons and the possibility of expansion excited the group into relocating to 530 Lonsdale Street in 2005, and then to Level 17 of 460 Lonsdale in 2020—the ultimate purpose being to set up the finest criminal, quasi-criminal and public law chambers in the country.

Crockett Chambers has seen a lot over the past 25 years and, unfortunately, it has not been without controversy.

There are tales of a team of OHS and personal injury barristers undertaking a covert operation to move a three-metre-long red gum table up seven flights of stairs because no-one thought to measure whether it would fit in the lift before buying it.

There's also the story of a now judicial officer who used the common area at 530 Lonsdale for a game of indoor cricket the day before the furniture arrived. That allegation has been strenuously denied by his or her Honour ("it was actually golf").

Crockett Chambers has also not been without challenge, particularly recently.

The initial planning for our latest move began in the easy, breezy days before COVID-19, and as the country emerged from the first lockdown, we were all set to move to our new digs in July 2020. But no sooner had our furniture, boxes and bookcases arrived (one of the latter being carried up 17 flights of stairs because, once again, no-one thought to measure whether it would fit in the lift!), we were all thrown back into lockdown. Such has been the way of life since then that we are genuinely unsure whether we've had a day where all Crocketteers have been on the floor at the same time, and we are yet to have an official opening.

In spite of all of this, we have soldiered on. Trials have been won and lost (and vacated, but the less said about that the better), milestones have passed, appointments have rolled in, and we've managed to acknowledge and celebrate those with cake and champagne in a COVID-safe way.

This includes a couple of celebrations between lockdowns, including one for Robert Richter's 50th anniversary of signing the Bar Roll. Born in the former USSR, and having grown up in Israel, Robert arrived in Australia aged 13, where the only English words he knew were "yes", "no" and "Coca-Cola". He was admitted in 1970, signed the Bar Roll in 1971, and took silk in 1985. So far no one has been brave enough to tell him just how many current Crocketteers were born after he took silk, let alone after he signed the roll!

Another celebration in the past 12 months was to commemorate an integral member of our chambers, Lachie Carter, who tragically died shortly after being diagnosed with lung cancer. His memory lives on, with the large conference room at our new location being named, with unanimous agreement, "The Lachie Carter Boardroom".

Who are our intrepid Crocketteers? Across our 40 members, our heritage covers German, Greek, Indian, Italian, Malaysian, Polish and Scottish. Our backgrounds include commercial litigation, investment banking, youth work, social work, theatre and film. Nearly a quarter of us are members of the LGBTIQ+ community, and we have as many parents of children as we do of dogs. We've studied across Australia, and around the world, including in China, Germany, Mexico, the UK and the US. Crockett Chambers is as mixed in practice and experience as in background and identity.

And so here we are, ready to take on the next 25 years and whatever the future can throw at us … except perhaps more bookcases.

Crockett Chambers Honour Roll

Supreme Court: Terry Forrest, Michael Croucher and Amanda Fox.
County Court: Mark Taft, Gerard Mullaly, Greg Lyon, Carolene Gwynn, Michael O'Connell, Paul Higham, Trevor Wraight, Sarah Dawes, George Georgiou and Justin Hannebery; Magistrates' Court: Sharon Cure (Tasmania), Nahrain Warda, Michelle Mykytowycz, Cecily Hollingworth and Cynthia Lynch.
Coroners Court: Simon McGregor.

Crockett Chambers Members

Philip Dunn QC, Felicity Gerry QC, Daniel Gurvich QC, John Kelly SC, Peter Morrissey SC, Robert Richter QC, Remy van de Wiel QC, Karen Argiropoulos, Tim Bourbon, Amanda Burnnard, David Carolan, Megan Casey, David Cronin, David De Witt, Stephanie Joosten, Natalie Kaye, Sarah Keating, Julia Kretzenbacher, Rabea Khan, Ffyona Livingstone Clark, Carly Marcs, Liam McAuliffe, Jennifer McGarvie, Luke McPhie, Kestin Mildenhall, Simon Moglia, Nick Mutton, Andrew Norris, Patrick O'Halloran, Joanne Poole, Anthony Pyke, Martin Radzaj, Samantha Seoud, Jim Shaw, Paul Smallwood, Anthony (Tony) Thomas, Christin Tom, Antony Trood, Raphael de Vietri and Stephanie Wallace.

BELOW: Robert Richter depicted on the front cover of *VBN* No. 100, Autumn 1997, leading a protest against VLA funding cuts in a William Street rally.






September 2001 readers' 20 year reunion

GLEN PAULINE

On 19 November 2021, the Victorian Bar's readers of September 2001 celebrated 20 years since we signed the Bar Roll—a good moment for some reflection on the Bar as a career choice, an institution, and a way of life. We gathered at the Essoign Club, a most fitting place for such an event.

We were one week into the (face-to-face) readers' course in the Douglas Menzies Building when the September 11 attacks occurred. The world suddenly changed. It was an extraordinary and frightening time. When not preparing for our moots, we were horrified daily by reading newspaper reports of the tragedies in the US and watching footage of the events and damage that nobody could ever have imagined. We worried about what this would all mean for Australia and the world.

The *Tampa* case was being heard in the Federal Court, causing Julian Burnside QC to be absent from the readers' course teaching team as planned. We forgave his absence, noting that he was demonstrating what we were all about to be schooled in: the delicate, difficult and sometimes controversial role as, and independence of, counsel.

Mandatory detention of asylum seekers was a hot issue. Liberty and Australia's record in relation to international human rights were in the spotlight. The readers' course had a session about privative clauses in migration legislation, and pro-bono work was available for those who wanted to cut their teeth as budding barristers representing asylum seekers against the federal immigration minister in cases with little or no chance of success.

We lined up and signed the Bar Roll in Owen Dixon East and had our welcome dinner at the old Essoign Club on the 13th floor.

We commenced our practices as counsel in an uncertain and unstable time, at least as far as world events and Australian politics were concerned.

We plied our trade as junior counsel and then, in late 2008, the global financial crisis arrived, causing mayhem in financial markets overseas and here, and again it was an uncertain and challenging period in history—unprecedented for most.

We then had a long stretch of relative stability until COVID-19 caused the world and the Bar to change in ways that were previously unimaginable.

A major highlight for me in my two decades at the Bar was being led by Nicholas Green QC and later Richard Maidment QC in a large team of barristers, solicitors and investigators acting for the ABCC in obtaining four injunctions over four months against unions involved in unlawful picketing at the West Gate Bridge widening project, which resulted in record penalties a year later of over $1 million. The experience of working in a large team over 18 months, where the applicant regulator was being put to its proof of every allegation being made, was memorable and instructive in the gathering and tendering of admissible evidence necessary to satisfy the *Briginshaw* standard of proof in civil proceedings.

In 2012, I attended the World Bar Conference in London—an inspiring conference where I soaked up the glorious legal atmosphere of the Supreme Court of the UK, the Temple and the Houses of Parliament, and listened to fascinating and courageous stories of English, Irish and African silks and juniors, including some who put their safety in jeopardy in defending alleged IRA terrorists or others in politically unstable conditions. The conference reinforced my belief in the virtue and value of the independent bars of the world and gave me renewed enthusiasm for the role of counsel. I reported back to the Victorian Bar in a CPD session, together with the other attendees.

I also conducted my first mediation in 2012. I had 15 people in the room, including 10 plaintiffs bringing "disappointed holiday" claims against a travel agent due to the breakdown of their Northern Lights cruise ship before they set sail. I settled the cases and my mediation practice was born.

Practising as a barrister has changed over the past 20 years. I stopped using a hard covered fee book in favour of the electronic version in about 2015. Hard copy briefs and pink ribbons are far and few between. Wigs have largely faded into their place as relics of a bygone era and useful props in a Zoom background or a readers' course reunion speech! Appearing in court or at mediations from home, via video conferencing platforms, incredibly, now seems normal and has advantages—and undoubted disadvantages—for counsel. It is imperative that counsel is tech savvy enough to manage documents electronically and grapple with tech fails and security issues. Mediation is on the rise as an available, efficient and successful dispute resolution option.

The Victorian Bar has changed physically. Owen Dixon West grew taller, and Owen Dixon East got a facelift. Melbourne Chambers, where I spent seven years, came and went. BCL has renovated chambers owned by the Bar and provided new chambers such as Castan Chambers. The Essoign Club is a much-loved hub on Level 1, with a strong sense of history.

Some things were constant for me over the past 20 years. John Kelly of Foley's List, who retires at the end of this year, has been dedicated to supporting the practices of the barristers on the list and will be missed. Tim North QC has been a true master of the art of being a barrister and a superb mentor in law and life. My readers' course colleagues have become lifelong friends, through the regular fine lunches and dinners we have shared, where we talk law, life, colleagues, judges and opponents, laugh constantly, and remind ourselves how much we love being barristers at the Victorian Bar. Some have now left the Bar and are sitting in courts and tribunals—superb additions to the judiciary.

Many thanks to Allana Goldsworthy for organising our reunion and to those who made it. We are looking forward to celebrating our 30th anniversary in 2031!

Back Row: CHRISTOPHER PEARSON, DAVID GLYNN, ROBERT SADLER, CAREY NICHOL, CHRISTOPHER DURSTON, MICHAEL FALTERMAIER, DAVID LITTLEJOHN, GEORGE BAKER, DANIEL HARRISON, BERNARD CARR.
Centre Row: BARBARA WALSH, DIANA RASHEVA, DEBORAH SIEMENSMA, ANNABEL GLOVER, ANNA ROBERTSON, SARAH PORRITT, GEOFFREY AMBROSE, HELEN ROFE, NOEL HUTCHISON, JULIET FORSYTH, SAMANTHA CIPRIANO, BILL BAARINI, ALLANA GOLDSWORTHY, ELIZABETH RHODES, DEBORAH MORRIS.
Seated Row: PATRICIA JONES, MICHELLE EHRLICH, JOHN LOVE, HERMAN LEAHY, ARNOLD LOUGHMAN, GLEN PAULINE, LISA HANNON, SUZANNE JONES, PETER MURRAY, BART CAREW.
Front Row: PETER CROFTS, JUSTIN FOSTER, ROLAND ANTHONY, DANIEL PORCEDDU, PAUL STEFANOVIC, TONY BURNS, RICHARD CLANCY.

1. Patricia Jones, Helen Rofe QC (now Justice Rofe), Sarah Porritt, Lisa Hannon QC, Allana Goldsworthy 2. Peter Crofts and Daniel Harrison 3. Glen Pauline and Sarah Porritt 4. Helen Rofe QC (now Justice Rofe) and Glen Pauline 5. Sarah Porritt, Patricia Jones, Lisa Hannon QC 6. Richard Clancy (now Deputy President Clancy at Fair Work Commission), Anna Robertson (now Judge at County Court) and Carey Nichol 7. BACK ROW: Carey Nicol, Daniel Harrison, Richard Clancy, Helen Rofe QC (now Justice Rofe), Sarah Porritt, Patricia Jones, Peter Crofts, George Baker FRONT: Diana Manova, Anna Robertson (now Judge Robertson), Allana Goldsworthy, Lisa Hannon & Glen Pauline.

Tim Farhall, President Maxwell, Laura Hilly, Chris Blanden QC, Prof Bryan Horrigan, Meredith Schilling, Sally Anderson, Melissa Fletcher

Tim Farhall, Tessa Meyrick and Jessica Gillson working on a brief as part of the Open Justice Project

Willem Drent presenting at the launch of the OJP in March 2021

Open Justice Project—first year in review

LAURA HILLY, TIM FARHALL, WILLEM DRENT AND PRIYA WAKHLU

By the time of this publication, more than 500 hours of valuable pro bono assistance will have been provided to members of the Victorian Bar by students from Monash University faculty of law as part of the Open Justice Project pilot. These budding future lawyers invariably reduce the workload of barristers and also receive practical insights into the challenges and rewards of pro bono work.

The Open Justice Project is a collaboration between the Victorian Bar and Monash Law School, enabling later year undergraduate and postgraduate students to provide pro bono legal assistance (such as one-off or ongoing research or paralegal assistance) to barristers on pro bono matters.

The pilot was launched at a well-attended in-person event in March 2021. The launch included speeches from inaugural patron, Chris Maxwell AC, president of the Court of Appeal; the dean of Monash Law, Professor Bryan Horrigan; and Imogen Feder, a student participant in the Open Justice Project. In his keynote remarks, President Maxwell praised the initiative, emphasising the importance of pro bono work by the legal profession and the need for legal education to enable students to engage in this kind of work. Professor Horrigan echoed the president's sentiments, reinforcing the importance of collaboration between the Bar and law schools.

The Open Justice Project has run for the duration of 2021 (uninterrupted by lockdowns). Through two phases of the pilot, more than 30 requests for legal assistance were received, covering almost the full spectrum of state and federal courts and tribunals. Barristers reported that the Open Justice Project enabled them to do more pro bono work than they otherwise would have been able to do, with one colleague commenting that it was, a "brilliant and important initiative". Student participants have been described as "diligent and committed". Students were equally enthusiastic about their experience and valued the opportunity to "put theory into practice" and "be involved in social justice in a meaningful way". Both rounds of the pilot have been oversubscribed tenfold, demonstrating just how keen students are to take up opportunities to work with members of our Bar.

The open justice committee, comprising members of the Victorian Bar pro bono committee and student engagement committee, and staff of the Monash Law School, looks forward to embedding the Open Justice Project as an ongoing feature of VicBar life in 2022 and beyond.

If you would like read more about the Open Justice Project, or request the assistance of a student on a pro bono matter, please visit: https://www.vicbar.com.au/public/community/pro-bono-scheme/victorian-bar-monash-faculty-law-open-justice-project

The Victorian Bar Foundation

JOHN DIGBY, CHAIRMAN, VICTORIAN BAR FOUNDATION

The Victorian Bar Foundation was established as a charitable not-for-profit organisation in 2011. It is the prime vehicle through which the Victorian Bar is able to provide financial support and benefactions in accord with its objects and purposes, and contribute to the objective of progressing the interests of justice in Victoria, particularly through legal education.

The Victorian Bar Foundation is pleased and excited to announce that Justice Michelle Gordon AC has recently accepted an invitation to become the Patron of the Foundation.

The Foundation works to promote several causes in the community, including supporting the provision of legal education and providing information about the legal system, the role of barristers in the legal system and the role of law in society. The Foundation has made donations to a number of causes, including the John Gibson Newcomers Scholarship Program though Trinity College at Melbourne University, the Monash University Refugee Scholarship Program and the Indigenous Barristers' Development Fund, a fund administered by the Bar's Indigenous Justice Committee, to assist in the retention and development of Indigenous Barristers at the Victorian Bar.

One of the Foundation's primary purposes is to benefit young adults from diverse backgrounds who require financial support, often due to disadvantage, to pursue legal education. To fulfil this objective the Foundation has recently supported a young woman who came to Australia from Afghanistan as an orphan refugee in 2010. A decade later, she is now undertaking her Juris Doctor at the University of Melbourne and hoping to eventually build a career as a lawyer. When thanking the Foundation, this young woman recently said:

> It is only because of generous and kind people like you, who have gone above and beyond to have given me the opportunity to get a world class education and follow my dreams. As a result of all the people who have contributed towards my success I can now hope to further my study in Juris Doctor and build a career as a lawyer in the near future.

The Foundation aims to encourage young adults from diverse and disadvantaged backgrounds to consider a career at the Bar. Currently there are over 2,000 barristers at the Bar, and there are a growing number of people from diverse backgrounds and cultures. For example, over 18 languages are spoken by those barristers. Approximately 15 per cent of barristers were born overseas and they come from 33 countries other than Australia. Five current barristers are Aboriginal peoples. Over 40 per cent of all junior barristers are female.

The Foundation wants to ensure that the Bar continues to grow to reflect the diverse communities and people who barristers and judges act for, serve, and work with. The Foundation would like to encourage future generations to consider a career at the Bar, or otherwise in the law, and convey the message that a career at the Victorian Bar is open to all on merit.

Cr Joseph Haweil – Mayor of Hume, Justice Gordon and John Digby QC with the prize recipients at the most recent ceremony held on 21 May 2021

As a way of promoting this message, the Foundation has created a student achievement award and mentoring program. For each of the past few years, the Foundation has awarded 15 of the highest-ranking year 11 legal studies students from schools in the City of Hume with a $1,500 prize in recognition of their academic excellence in the area of law.

Each of these approximately 45 students have attended a prize ceremony for the award where senior members of the profession, including judges and barristers, met with the students and their families, to hear about the students' career aspirations.

At the prize ceremony, the Foundation conveyed to those students that it hoped that the prize encouraged them to continue with their legal studies and the award encouraged them to keep a career at the Bar in mind as they progress through secondary school and tertiary education.

The students are encouraged to remain in touch with those members of the profession whom they meet at the prize ceremony, which provides an invaluable networking opportunity for those students interested in a legal career.

The recipients of the award are also paired with and mentored by a junior barrister from the Victorian Bar. Unfortunately, the mentorship element of the program has been impeded in recent times by the COVID-19 restrictions.

The Foundation is seeking to build upon this initiative. Given the existence of disparities of opportunity between metropolitan Melbourne and regional areas, the Foundation wishes to extend the Student Achievement Award and mentoring program to reach students in regional areas such as Gippsland and Shepparton in future years.

If these bright young adults choose to enter our profession, we will all benefit from their contribution to progressing the interests of justice in Victoria.

Momentum in the COVID-19 moment: the equality and diversity committee, 2021

JENNY FIRKIN, ASTRID HABAN-BEER & CHRISTOPHER MCDERMOTT

The call for contributions from Bar committees to share their achievements made us think. Despite the "lockdown blues" afflicting us all, many have done a lot throughout 2021. Looking back, the equality & diversity committee (EDC) and its working groups have had an extraordinarily productive year, brimming with innovative ideas, enthusiasm and dedication.

The LGBTIQ working group delivered three cutting-edge continuing professional developments (CPDs):

» *LGBTIQ Awareness for Barristers CPD*, a training session by Pride in Diversity on how to be an effective ally;
» *Equal Opportunity and the Law: LGBTIQ Developments and where to from here?* CPD, a dynamic panel discussion on LGBTIQ legislative reforms and recent developments in the approach of the Courts to gender affirmation surgery; and
» a very popular *Wear it Purple Day* CPD (to become an annual event) on legal challenges faced by trans and gender diverse communities.

These sessions were expertly chaired and presented by members of the Bar—Elizabeth Bennett, Christopher McDermott, John Heard and Gemma Cafarella—and special guests Andrew Georgiou (Pride in Diversity), Ghassan Kassisieh (Equality Australia), Maddison Harrington (Gilchrist Connell) and Elouise Casey (Dentons). A WhatsApp group was also created to share information, provide collegiate support and engage in lively discussion (not least about *RuPaul's Drag Race*!). A brochure for non-LGBTIQ barristers on *How to Support and Encourage LGBTIQ People (Being an Ally)* was also launched.

The EDC, through its disability and accessibility working group, developed a strategic submission to the Law Council of Australia: *Facilitating a more diverse legal profession (persons with disability)*, as well a *Statement of Principles on Disability*, which captures the Bar's commitment to working towards greater participation by barristers with disabilities, and the elimination of barriers for them. The EDC plans to advocate for disability and accessibility liaison officers within courts and tribunals, to support barristers navigating their appearance work. These initiatives are the efforts of Malcolm Harding SC, Marc Felman, Carl Möller and John Maloney.

The EDC sponsored the article by Mark Irving QC featured in this edition of *Victorian Bar News*, which analyses the cultural diversity data collected in the practising certificate renewal process by the Victorian Legal Services Board and Commissioner. It co-hosted the Victorian Bar's Annual Iftar Dinner in partnership with the Australian Intercultural Society, which was presented by members of the Bar—Dr Ian Freckleton AO QC, Miguel Belmar, Astrid Haban-Beer, Rutendo Muchinguri and Daye Gang—as well as Magistrate Urfa Masood.

It facilitated the Bar's sponsorship of the Asian Australian Lawyers Association 2021 National Cultural Diversity Summit as an industry partner. Next year, the EDC will finally introduce its cultural diversity internship for law students (suspended in 2021 due to COVID-19), offering a paid opportunity to work for a week at the Federal Court, Supreme Court and the Bar.

Last year, the EDC recommended targeted education programs for different milestones at the Bar to address and prevent sexual harassment. This year, the following programs were introduced:

» a readers' course session designed for readers to know how to identify and avoid engaging in sexual harassment, where to get to support if they are subject to it and how to support their colleagues;
» a mentors' session, including facilitated discussion on how to support readers in relation to sexual harassment; and
» a leadership CPD, open to all silks and junior counsel of 10+ years, with practical advice for taking the lead in stamping out sexual harassment, as well as presentations on the courts' expectations of senior members and the important role of leading junior counsel.

The committee also drafted the Bar's submission to the Australian Bar Association about expanding the prohibition on sexual harassment under the *Legal Profession Uniform Conduct (Barristers) Rules* to include all sexual harassment in connection with a barrister's profession. There were many skilled contributors involved: Chief Justice Anne Ferguson, Justice John Middleton, Kenneth Hayne AC QC, Christopher Caleo QC, Rachel Doyle SC, Michelle Britbart QC, Sally Flynn QC, Jenny Firkin QC, Dr Michael Rush QC, Malcolm Harding SC, Chris McDermott and Natalie Campbell.

With the WBA and LegalSuper, the EDC hosted *Pathways to financial security for women barristers*, deftly chaired by Jennifer Batrouney AM QC and Natalie Campbell. The EDC also represented the Bar in its partnership with the Victorian Women's Legal Service for *Starts with Us,* a gender inequality and justice action project for preventing violence against women. This important work was led by Helen Rofe QC, Clare Cunliffe and Natalie Campbell.

The Committee held its annual "re-engagement" lunch for barristers with parental responsibilities who have taken, or are planning, time away from the Bar, hosted by Andrea de Souza and Lee Ristivojevic. Natalie Campbell and Andrea de Souza also secured renovations to the Owen Dixon Chambers parents' room.

Now embedded in the readers' course is a two-part session *Discrimination, equality and diversity at the Bar: Looking In, Looking Out*. The EDC teamed up with Timothy Goodwin, whose *Looking Out* session is a longstanding and popular part of the course, in which he leads a discussion about the nature of privilege, with a focus on cultural diversity and the unique position of Australia's First Peoples. *Looking In* is a panel discussion highlighting experiences and supports for diversity at the Bar, incomparably chaired by Chris McDermott, this year joined by Helen Rofe QC, Georgina Schoff QC, Malcolm Harding SC, Jonathan Wilkinson, Astrid Haban-Beer, John Maloney and Shanta Martin.

To all of the members of the EDC and its working groups, and to everyone who has volunteered to help us, we say thank you for busting through those lockdown blues and contributing to a vibrant year of promoting equality and diversity at the Bar.

If you have ideas about how to promote equality and diversity, or develop initiatives in different ways in 2022, we hope you take part.

Astrid Haban-Beer, Rutendo Muchinguri and Daye Gang

Reverse mentorship scheme for the Victorian Bar: technology and digital tools

EMMA POOLE, INNOVATION & TECHNOLOGY COMMITTEE

The idea is simple and familiar—pairing a more senior barrister with experience of practice in a particular area with a barrister under five years call.

The difference? The more junior barrister is the mentor.

The past year has brought many diverse challenges to every member of the Bar. However, we have all shared two challenges in common: missing the collegiality of chambers, Bar events and court appearances and learning (with little training and less notice) to master digital tools and online appearances.

The innovation and technology committee has developed the reverse mentorship scheme with the aim of addressing these challenges. This article aims to briefly introduce the scheme and the potential benefits to both the mentors and the mentees.

Reverse mentorship

Reverse mentoring is increasingly commonplace in a variety of businesses and institutions. Informally, many of you will already have encountered it. At its heart, reverse mentoring allows people with more seniority in a given environment to benefit from the experiences, insights and skills of those who are more junior to them.

The scheme: technology and digital tools for barristers

The scheme is run by the Victorian Bar's innovation and technology committee. Potential participants complete an online form which allows them to indicate the general practice areas in which they work (or, for the mentors, in which they would *like* to work). The aim is to link barristers in similar practice areas so that mentors and mentees can develop solutions and systems together that are useful to them both.

The online form also allows participants to indicate digital tools or technology with which they are familiar (for the mentors) or about which they would be interested in learning more (for the mentees).

Participants in the scheme will meet at least three times, with the mentee (the more senior barrister) initiating the first meeting. Together, the participants can negotiate the frequency and manner of meeting. They may, for example, wish to attend CPDs delivered by the innovation and technology committee on the use of technology, or the meetings may be more informal or specific.

At the end of the three meetings, the mentor and mentee may consider whether they wish to extend the mentoring relationship.

Possible goals of the mentoring relationship

In addition to setting more specific goals, the mentor and mentee could aim to develop or improve the following skills by the end of the three meetings:

- Managing matters and briefs by email.
- Accepting electronic briefs.
- Using digital documents in court hearings.
- Editing PDF documents: mark ups, highlights, tabs/bookmarks etc.
- Formatting Word documents: headings, tables of contents, bullets and numbering etc.
- Using all main video conferencing platforms relevant to the practice area.
- Planning for cybersecurity and digital document security.
- Risk management planning: including working from home, internet outages, damage to devices and losing files.
- Establishing which devices, tools and software may be relevant and useful to the practice area.

Benefits for mentors (barristers under five years call)

For many at the junior bar the 'Great Pause' has been a time of limited opportunities. At the same time, some senior juniors and silks have never been busier. The scheme should help junior barristers to get exposure to busy practices and more complex briefs.

The mentors will not be IT experts (though some may be). They will have the opportunity to explore how the skills and experiences they have developed may be used in the practice areas they work in, or are interested in working in.

They will also meet at least one more senior barrister!

Benefits for mentees (more senior barristers)

The transition to digital courts, online appearances and electronic briefs has been very sudden. Senior barristers with established practices were thrown into situations for which they had little training or preparation. The members of the Victorian Bar rose to this challenge and continued to advocate for their clients and support the courts even in the most difficult of circumstances.

More senior barristers have an opportunity to learn how to take fuller advantage of technology and digital tools, whether it be by improving their digital literacy or building on their existing skills to develop more efficient solutions to problems.

The innovation and technology committee looks forward to receiving your application (as well as seeing you all in person, soon). Further information on the scheme is available on the innovation and technology page on the VicBar website (accessible via the 'Community' drop-down menu).

Why keeping a record is good risk management

LEGAL PRACTITIONERS LIABILITY COMMITTEE

LPLC's *Good Counsel Practice Risk Guide for Barristers* highlights the nature of claims made against barristers and the risk management steps they can take to minimise the risks of a claim. Mistakes can occur at various stages throughout a barrister's involvement in a matter, but one of the consistently costly areas LPLC sees is the failure to advise on the strengths and weaknesses of a claim or defence.

While some of the claims do involve the barrister wrongly assessing the case, in many instances it is more about failure to communicate the barrister's view of the strength of the case or appropriate record-keeping of the advice given.

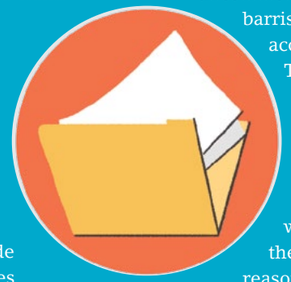
In many claims there is often a combination of circumstances that leads to the opportunity for allegations to be made that proper advice was not given. Sometimes the barrister is only asked for informal preliminary advice before being formally briefed to draw the pleadings. That advice is usually given over the phone and is often prefaced on the client's assertions that evidence can be found. It is easy for such informal advice to be misinterpreted. It is good risk management to make a written record of your advice, otherwise it is hard to refute any allegations later that your advice was wrong.

Even if not formally briefed to advise it is important for counsel to understand their instructor's and client's views on prospects when briefed in a matter. LPLC has seen claims where barristers' failures to correct their instructing solicitors' overly optimistic advice was alleged to be tantamount to agreement. While there can be arguments about whether or not a barrister is liable in these circumstances, it does leave an opening for the argument to be raised.

Understanding the client's and instructor's views on prospects of success also puts you in a position to meet your obligations under the *Civil Procedure Act* 2010 (Vic) and the administration of justice by proactively raising concerns with your instructor where there is a divergence in opinion. These concerns should be confirmed in writing.

When briefed to advise, a common request is that the barrister not worry about putting advice in writing, ostensibly as a cost saving measure. Often barristers rely on their instructing solicitors to make file notes of in-conference discussions, but LPLC has seen claims when those notes are not taken or not taken accurately. The best risk management practice is for all parties to keep a contemporaneous written record of the advice given.

In some claims, the solicitor was not present and the barrister did not make a note of what was said but sent a confirming email after the meeting. Unfortunately, those emails are often not as clear and forthright as the oral advice, leaving the barrister exposed to allegations of not having advised appropriately. It is not uncommon for clients to misunderstand what the barrister might think was clear advice or not accurately remember later what was said. This is particularly so where clients want to proceed 'as a matter of principle' in the face of clear advice to the contrary. This scenario should put barristers on high alert and careful attention needs to be made in confirming the advice in writing to ensure it reflects the strength of the advice given and the client's articulated reasons for rejecting the advice.



Risk management

Many barristers say that they don't keep file notes, and it is certainly not negligent to take that stance. It is however a risky stance to take, as barristers more than anyone should know the perils of running a case based on oral evidence alone. As one barrister pointed out recently these claims can be issued many years after the conversations occurred and it is difficult to recall exactly what was said, and when, as the intervening years are full of similar discussions. The client on the other hand will have far fewer such discussions and say they recall it well. Who will the court believe in the absence of documentary evidence?

Many barristers do, however, make notes. Some create a written record and email it to themselves. Others keep a book of meeting notes. Don't wait to be subject to a claim where there is no accurate record of the advice you gave before you start taking notes. What method do you use or do you think would work for you?

For more risk management information and recommendations please see our:

- *Good Counsel Practice Risk Guide for Barristers*
- *Barristers checklist for safe practice*
- *Checklist for terms of settlement*

Available on our website under Risk Advice—litigation

LPLC LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Australian Bar Association

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


Conversation Quarter, SLV

SLV IMAGE REPRODUCED WITH PERMISSION SHOWTIME EVENTS GROUP

2022 National Conference RE-EMERGE 2022

We are as confident as can be, now, that we are *truly* re-emerging.

The ABA National Conference, having been postponed because of lockdowns in September 2021, has been re-scheduled for April 2022. The ABA is proud to have as its major partners for RE-EMERGE 2022 the *Australian Financial Review* and Legal Home Loans.

RE-EMERGE 2022 will be the first opportunity for members of the Australian Bar to come together for almost three years. It will be a forum to re-engage with colleagues, reflect on the momentous years of COVID, and participate in important discussions about the future of the Bar, the profession, and how justice is delivered in our community. The program will bring together leaders from the judiciary, the Bar, the profession, politics, academia and the media, from across Australia and internationally.

The ABA has secured the State Library of Victoria for the three-day conference, the Old Melbourne Gaol for the welcome drinks, and new W Hotel for the gala dinner.

Stephen Gageler, Justice of the High Court of Australia, will open the conference on the afternoon of Thursday 28 April in the Conversation Quarter of the State Library. He will be followed by legal futurist, Professor Richard Susskind OBE, who will beam in from the UK and provide his reflections on access to the law, remote courts, and how accelerated innovation is re-imagining the provision of justice. James Allsop, Chief Justice of the Federal Court of Australia, will respond with an Australian perspective on how to effectively integrate technology into the justice process, despite the intensely human nature of conflict resolution.

Welcome drinks in the iconic Old Melbourne Gaol will be followed by a number of Victorian Bar Association dinners to welcome interstate colleagues.

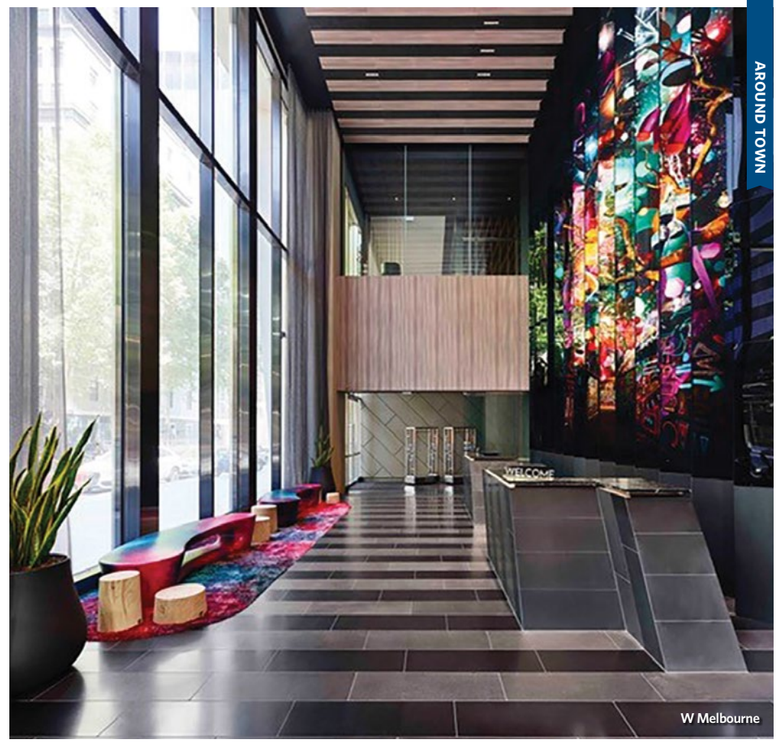

The Old Melbourne Gaol

Anne Ferguson, Chief Justice of Victoria, will open the second day of the conference on Friday 29 April, followed by plenary panel sessions discussing the impact of the pandemic on the Australian federation—both politically and constitutionally—with participants drawn from the media, politics and the law. There will then be panels on the long-term effects of dealing with the uncertainty and disruption of lockdown, and on ethical and cultural issues currently confronting the judiciary and the Bar. Specialised breakout sessions for the criminal and common law, commercial and tax Bars in the afternoon will drill deeper into issues of law and practice. Friday will conclude with sessions addressing reconciliation with Australia's First Nations peoples and the proposal for an Indigenous Voice to Parliament enshrined in the Constitution, and the implications for judges, advocates and the administration of justice in live-streaming court cases.

The Gala Dinner at the W Hotel in Melbourne on Friday evening will crown a day of provocative and challenging discussions.

Subject to the vagaries of federal election timing, the morning of Saturday 30 April will bring together a "National Cabinet of Attorneys-General". This is followed by a judges' panel, in association with the Australasian Institute of Judicial Administration, which will discuss the view of remote advocates and remote advocacy from the perspective of the Bench. There will also be a session focused on the lived experience of disability in our profession—perhaps a forgotten diversity boundary. William Alstergren, Chief Justice of the Federal Circuit and Family Court of Australia, will chair a plenary session about the enduring legacy for the courts and the profession of the years that have just passed.

During the conference, participants will hear from chairs and panellists including Justices Gordon, Keane and Steward of the High Court; Justice Andrew Bell, President of the NSW Court of Appeal; Patricia Bergin SC, Kenneth Hayne QC and Margaret McMurdo; Peter Kidd, Chief Judge of the County Court of Victoria; Prof Sharon Lewin, Director of the Doherty Institute; Fiona McLeay, the Victorian Legal Services Board CEO and Commissioner; Sarah McNaughton, Director of the CDPP; Ken Adams, General Counsel of ANZ Bank, and many other panellists, including sitting and retired judges and barristers.


W Melbourne

RE-EMERGE 2022 concludes with a panel "War Room", presented by Dr Matt Collins QC. *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 challenged, provoked and entertained at RE-EMERGE 2022. Capture the energy innovation and endurance of the Australian Bar.

ABA National Conference RE-EMERGE 2022

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

Thursday 28 April 2022
Welcome and keynote speakers from 2.15pm, State Library of Victoria.
Welcome drinks from 5.30pm, Old Melbourne Gaol. Victorian Bar Association dinners from 7.45pm, venues to be announced.

Friday 29 April
Full-day program from 9am, State Library of Victoria.
Gala Dinner from 7.30pm, The W Hotel Great Room.

Saturday 30 April
Morning program from 9am, concluding at 1.50pm, State Library of Victoria.
For more information and to register, visit re-emerge2022.com.au.

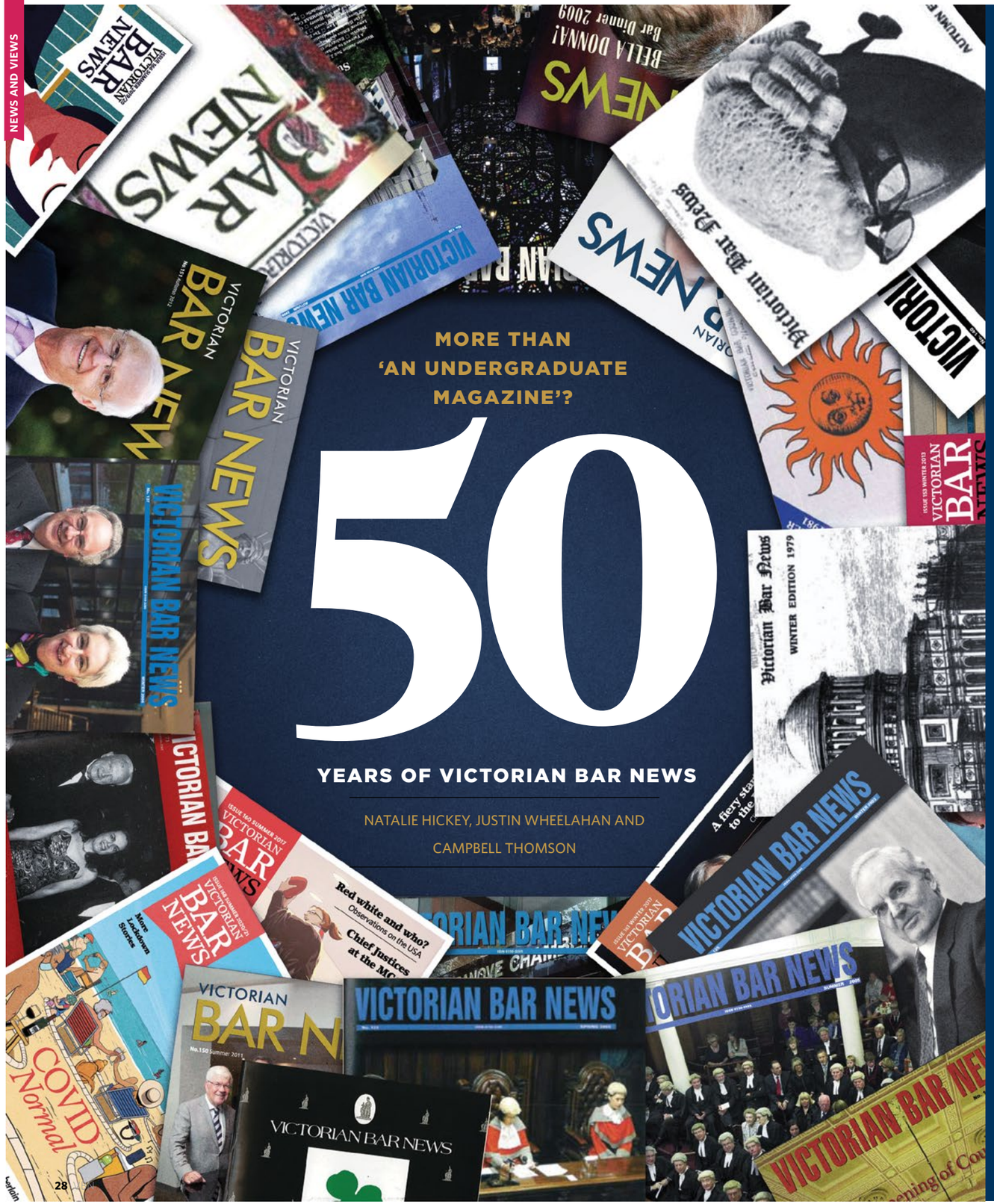
Major Partners of RE-EMERGE 2022

FINANCIAL REVIEW

Legal Home Loans

OLD MELBOURNE GAOL IMAGE REPRODUCED WITH PERMISSION SHOWTIME EVENTS GROUP

W HOTEL IMAGE REPRODUCED WITH PERMISSION OF W MELBOURNE



News & Views

"The Bar News *is just an undergraduate magazine"*

J. KENNAN M.L.C.,

Attorney-General of Victoria,
October 1983, as published in *Verbatim*.

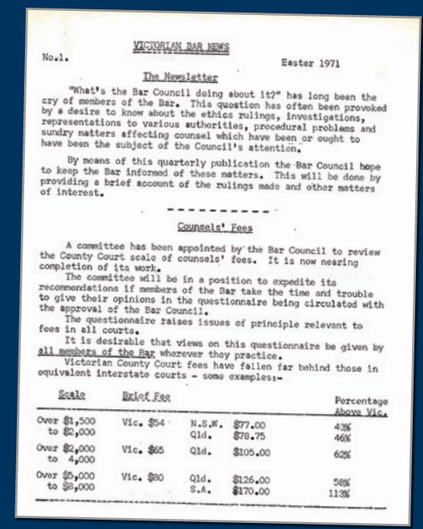
WHERE IT STARTED

In 1971, two members of the Bar Council, Richard McGarvie and Peter Heerey, announced a new quarterly newsletter. They called it Victorian *Bar News*. Printed on four roneoed pages (a roneo being a stencil copying machine), the copy commenced with a stark question: "What's the Bar Council doing about it?" This "has long been the cry of members of the Bar", they wrote. The newsletter's purpose was largely open-ended, to report on "matters of interest".

The make-up of the first newsletter was a sign of things to come. A committee had been appointed to review the County Court scale of counsels' fees. The brief fee of $54 in Victoria for a matter worth between $1500 to $2000, was lower than in New South Wales ($77) and in Queensland ($78.75). Short paragraphs entitled 'Time for Payment', 'Civil Juries', 'Law Reform' and 'Legal Education' followed.

The first recorded obituary in *Bar News* was for Maurice Ashkanasy CMG LLM QC, a former chairman of the Bar. "The rule of law was basic to his philosophy", it stated. His concern for the welfare of juniors was remarked upon. At the time, most barristers were in Selborne Chambers which ran from Bourke Street to Little Collins Street. Many juniors languished in the corridors of Selborne Chambers without a room. 'Ash' spent his lunch hours searching for accommodation for them.

There was a list of those who had signed the Bar Roll in 1971. Promoted activities included the Bar Dinner and the Bar Revue. The feasibility of a liquor licence "on the thirteenth floor" was also to be investigated.



VICTORIAN BAR NEWS

No.1. Easter 1971

The Newsletter

"What's the Bar Council doing about it?" has long been the cry of members of the Bar. This question has often been provoked by a desire to know about the ethics rulings, investigations, representations to various authorities, procedural problems and sundry matters affecting counsel which have been or ought to have been the subject of the Council's attention.

By means of this quarterly publication the Bar Council hope to keep the Bar informed of these matters. This will be done by providing a brief account of the rulings made and other matters of interest.

Counsels' Fees

A committee has been appointed by the Bar Council to review the County Court scale of counsels' fees. It is now nearing completion of its work.

The committee will be in a position to expedite its recommendations if members of the Bar take the time and trouble to give their opinions in the questionnaire being circulated with the approval of the Bar Council.

The questionnaire raises issues of principle relevant to fees in all courts.

It is desirable that views on this questionnaire be given by all members of the Bar wherever they practice.

Victorian County Court fees have fallen far behind those in equivalent interstate courts - some examples:-

Scale	Brief Fee			Percentage Above Vic.
Over $1,500 to $2,000	Vic. $54	N.S.W.	$77.00	43%
		Qld.	$78.75	46%
Over $2,000 to 4,000	Vic. $65	Qld.	$105.00	62%
Over $5,000 to $8,000	Vic. $80	Qld.	$126.00	58%
		S.A.	$170.00	113%

The first edition of *Victorian Bar News*, Easter, 1971

THE EARLY YEARS

In 1972, *Bar News* reported on a rise in Bar Subscriptions ranging from $20 for those of 1-3 years call to $100 for QCs.

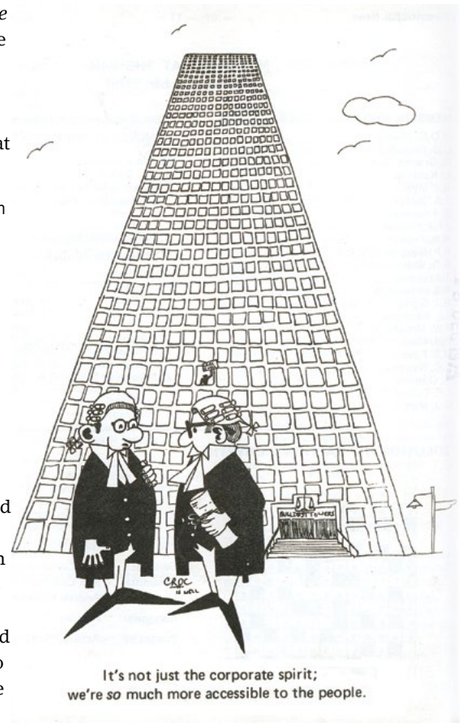
The fifth issue contained a crossword by David Ross. He continued this tradition for the next 16 years with his 'Captain's Cryptic' The next issue then contained the first cartoon by 'Croc' (later Judge Graham Crossley). He also designed the 'Dancing Barristers Logo' for the Essoign Club.

In 1979, the first photos appeared. It was Julian Burnside who took most of the photographs appearing in *Bar News* for the next decade. The early eighties ran articles on the 'Xanadu' of a projected building which would become Owen Dixon West, and summaries of unreported judgements of interest to the profession — available to be read in a nominated member's chambers. During the 1980s, Jim Kennan also contributed an Attorney-General's column.

Back-issues from the 1980s reveal prescient descriptions of now timeless issues. David Ross wrote an article called, *'I put a trial on Computer (and vice versa)'*. In it, he described his experience hiring an Osborne personal computer (the first commercially successful portable computer) to index a complex drug conspiracy brief. He explained what was required to operate it:

> Slowly and painfully, it took one through a simple course which seemed to be aimed at how to develop a mailing system with names. Of course, you never know when you will want a list of people whose letter boxes you want to have filled with junk. I can think of a few people right now. I wonder if the computer can arrange to have wet newspapers blowing across their gardens as well.

In 1988, advertising was introduced and led to a larger publication. This was followed by the first full colour issue in about 2001. Glossy multi-page spreads of barristers in their glad rags at the Bar Dinner, and muddily crouching and smiling on playing fields after losing to solicitors, have been a common feature since then.



It's not just the corporate spirit;
we're *so* much more accessible to the people.

LONG-STANDING EDITORS

Some of *Victorian Bar News*' former editors, David Ross, Paul Elliott and Judy Benson

Some of the longest standing editors are from 'the early days'. David Ross and David Byrne co-edited from 1975 to 1985. Paul Elliott was an editor for a remarkable 23 years between 1986 and 2009. Gerry Nash became co-editor in 1991. Judy Benson joined the two men as the first female editor in 2002. *The Australian Financial Review* considered Judy's appointment notable:

A *woman has at last got a hands-on editing role at Victorian Bar News.*

> Hearsay finally caught up with barrister Judy Benson this week to ask why she had been picture sandwiched between the two *Bar News* editorial stalwarts, Gerard Nash QC and Paul Elliott QC, in the last edition with no word of explanation. (AFR, 13 December 2002)

Some editors were arguably gluttons for punishment! Peter Heerey, Paul Hayes and Georgina Schoff had multiple stints at the helm. There have also been other editors of course. We won't publish a list for fear of leaving people out, although there are not as many names as people may think.

Very important to the increasing professionalism of the publication was David Wilken, the editorial consultant between 1988 and 2007. The last decade also owes much to Guy Shield's illustrations, design and production. His covers have been outstanding.

THE ESSENCE OF BAR NEWS REMAINS UNCHANGED

In truth, the essence of *Bar News* has not changed very much since the first newsletter, although it has gradually evolved to the high quality, professionally published magazine that exists today.

First and foremost, *Bar News* remains a publication about matters of interest to Victorian barristers. Our readership is predominantly targeted to the Bar's 2000+ members and includes alumni, members of the judiciary, some solicitor firms, and others.

We try to be mindful that our barrister community includes barristers barely hanging on, who may struggle to pay their rent, who work in practice areas where income return is low and who may struggle to be engaged in the Victorian Bar's activities, along with the high profile and economically successful barristers we read about in the papers. We seek to produce a magazine that is relevant to and representative of all members.

Secondly, barristers are self-employed. *Bar News* is an important reminder that barristers are part of a wider community. Paul Hayes wrote compellingly on this topic in a memorandum to Bar Council in 2011, remarking, "It also fosters collegiality amongst members of the Bar which is becoming increasingly important as the Victorian Bar becomes more fractured geographically by chambers and by speciality." In 2021 we might add, and by working from home.

Thirdly, *Bar News* chronicles life at the Victorian Bar. Just like people who take selfies to prove something has happened, *Bar News* records the happenings around our Bar – as it has done for the last 50 years. Back copies are kept in the Supreme Court and High Court libraries.

One of the most popular sections in *Bar News* is 'Back of the Lift'. This records the comings and goings of members and past members of the Bar, such as appointments. Every member gets an obituary. The level of feedback for this section (positive and negative) demonstrates its importance to our readers, the community of the Bar, and to the wider legal community.

Fourthly, we seek to foster a robust exchange of ideas, and not to be a 'trade magazine'. The term 'trade' publication was used pejoratively by Paul Elliott, Gerry Nash and Judy Benson in an editorial to describe what *Bar News* is not. Perhaps the negative use of the term derives from its dissonance with the essential traits of barristers: fundamentally independent, trained to engage in critical thinking and sceptical about what they read. It follows that credibility of the publication with members rests on its ability to respect and engage with these essential traits.

I shouldn't worry if I were you.
It's been going on like that here for quite some time

Challenging topics covered in Bar News in recent years have included:

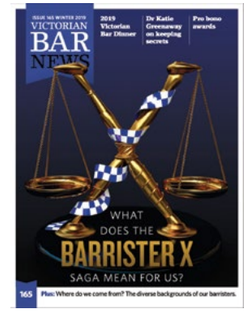
- the 'Barrister X saga and what it means for us';
- the Pell High Court decision;
- an interview with the Chief Magistrate addressing work done within the Magistrates' Court to improve work conditions following the suicide of two magistrates;
- issues related to gender and cultural diversity;
- the Charlie Hebdo murders in Paris, including the publication of some of its controversial cartoons (to the Australian sensibility anyway);
- the improvement of barristers' mental health;
- stress caused to LGBTI members by reason of the vote for marital equality; and bullying by the Bench.

This is intended to fulfil the Charter of *Bar News*, which is to:

- represent the breadth and diversity of Victorian barristers;
- contribute to our sense of identity;
- provide a forum for respectful, intelligent discourse and debate;
- inform and entertain members;
- be a repository for 'good writing' on all manner of topics; and
- foster an awareness of the tradition and culture of the Victorian Bar.

Autumn 1980

Spring 2002



Winter 2019

> "Just like people who take selfies to prove something has happened, Bar News records the happenings around our Bar – as it has done for the last 50 years."

PERHAPS WE ARE 'JUST AN UNDERGRADUATE MAGAZINE'

The Victorian Bar is like a university in some ways. To be likened to an undergraduate magazine therefore makes sense. Our culture is much more opt-in than top-down. We can choose to join committees, come to chambers, have drinks at the Essoign Club or attend seminars. We have autonomy and self-determination in our careers. We are answerable to judges, instructors, clients, and the demands of our practice — but not to an employer.

The experience of being a barrister is therefore not that different from university life, although advocacy has more concrete consequences. We come from varied practice areas, interests and friends. We gravitate towards each other often by choice rather than by design. We are not the product of a human relations resourcing paradigm based on hiring people with specific similar traits. We may have little in common with many others, save for our decision to sign the Bar Roll.

The pages of our magazine are a mirror of Bar life, and of our culture – we do not aim to be 'corporate' in our approach.

> "As the pages of *Bar News* reveal, change has sometimes involved confrontation, not just diplomacy."

THE EVOLUTION OF SOCIAL ISSUES FROM THE PAGES OF *BAR NEWS*

Because we are not employees, cultural change on pressing social issues must evolve without being simply told what to do (unless the topic is legally regulated or falls under the Bar rules). As the pages of *Bar News* reveal, change has sometimes involved confrontation, not just diplomacy.

For example, by the winter of 2001, tension emerged between those who regarded themselves as advocates based on court appearances, and the "new breed of barrister" described in somewhat unflattering terms in the editorial as the "TIP TAP VARIETY … permanently fixed to a screen". Some might say this was a premonition of an unfortunate future. Others felt the criticism was unfair. This apparent feud between different sectors of the Bar garnered some publicity at the time.

The issue of victims' rights led to controversy in a criminal context in the late 2000s. Justice Cummins was moved to make a statement at the conclusion of a case on the topic, prompted by a *Bar News* editorial with which he disagreed (reported in the Sydney Morning Herald, 6 June 2008).

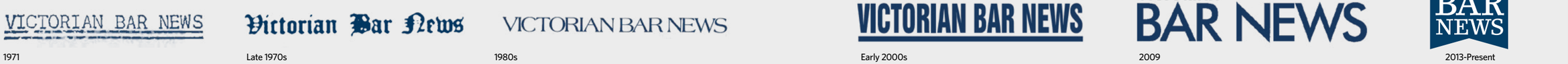
In 2010 the Women Barristers' Association wrote to the editors of *Bar News*, expressing their disappointment in the satirical portrayal of a fictional character called 'Portia Woods' which had appeared in a couple of issues. To their credit, the editors printed the letter and the character did not appear again.

These controversies, along with others, no doubt led to discussion and debate at the level of Bar Council, within the editorial committee and around the water-cooler. As there should be. As barristers we stress-test ideas, resisting taking them for granted. It's our job. It's important to have a forum for debate, even if the topics are sometimes divisive. We hope that debate serves as a catalyst but maintain that it should be respectful.

As we move to the present day, there are numerous issues discussed at committee level, sometimes leading to different viewpoints being expressed. Gender remains a relevant topic, and cultural diversity a growing and important concern. We endeavour to represent our Bar inclusively, in our content, topics and images. We have not always got it right.

As we look back, and look forward, we feel great pride in *Bar News* – described by some as 'one of the pillars of the Bar'. The publication is a testament to our ever evolving and resilient community, and to the depth and breadth of everyone's contributions. Thank you!

AN EVOLVING MASTHEAD



Bolitho v Banksia Securities Ltd (No 18) [2021] VSC 666

MARCUS CLARKE

Many practitioners will be aware of the significant decision handed down in *Bolitho v Banksia Securities Ltd* (No.18) (remitter) [2021] VSC 666 by the Honourable Justice John Dixon on 11 October 2021 in which His Honour found that a litigation funder and five lawyers, including two members of counsel, engaged in egregious conduct in connection with a fraudulent scheme intending to claim more than $19 million in purported legal cost and commission from a settlement sum. Some members of the Bar may have read the summary of the judgment published by the Supreme Court, and the letter to members written by the President, Christopher Blanden QC. However, very few of us will have read all 2,142 paragraphs of the judgment. A reading of the detailed findings of facts is instructive in understanding the nature of the breaches of duty to the Court, to clients and to other practitioners including the obligations imposed by the *Civil Procedure Act* 2010 (Vic) and identifying the lessons to be learned for all counsel from the Court's judgment.

A chronology of relevant events is below.

The particular duties and obligations breached by Mr O'Bryan SC and Mr Symons of Counsel were:

1. The paramount duty to the Court to further the administration of justice under s.16 of the *Civil Procedure Act* 2010;
2. The obligations under s.17 of the *Civil Procedure Act* 2010 which provides:

> "**Overarching obligation to act honestly**
>
> A person to whom the overarching obligations apply must act honestly at all times in relation to a civil proceeding".

3. The obligations under s.21 of the *Civil Procedure Act* 2010 which provides:

> "**Overarching obligation not to mislead or deceive**
>
> A person to whom the overarching obligations apply must not, in respect of a civil proceeding, engage in conduct which is—
> (a) misleading or deceptive; or
> (b) likely to mislead or deceive".

4. The obligations under s.24 of the *Civil Procedure Act* 2010 which provides:

> **"Overarching obligation to ensure costs are reasonable and proportionate**
>
> A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—
>
> (a) the complexity or importance of the issues in dispute; and
> (b) the amount in dispute".

His Honour made many factual findings of dishonesty and of misleading conduct by the legal practitioners to clients, experts, opponents and the court including:

1. Mr O'Bryan SC fabricated invoices not just for his own financial benefit but for the benefit of AFP and the legal team [421];
2. Mr O'Bryan SC engaged in the practice of issuing invoices in his own name and not through his clerk, a practice inconsistent with the usual billing practices of barristers in Victoria [405];
3. Mr O'Bryan SC and Mr Symons:
   (a) did not keep contemporaneous records of the time spent or the work done, nor did they issue regular accounts;
   (b) agreed with AFP not to issue regular interim invoices or interim statements of the cost they have incurred, to enable a clean documentary trail to be created after the Settlement Deed was signed that disguised the unlawful contingency fee arrangement;
   (c) manipulated their invoices to charge fees in a sum predetermined by AFP which was unrelated to the time spent or the work done; and
   (d) generated their invoices in a way to make it appear falsely that they had been paid regularly throughout the litigation when they had not been [1504];
4. Opponents in the litigation (and consequently the court) were deceived by being induced to understand that the conflicts of interest identified in the ruling of Ferguson JA had been addressed but in fact Mark Elliott and Mr O'Bryan SC continued to act as solicitor and counsel in the proceeding whilst maintaining their financial interest in the funder [1448];
5. The expert cost consultant was briefed with Counsel's contrived costs agreement, invoices and fee slips inducing him into a false belief that:
   (a) the enforceable cost agreement had been entered into;
   (b) proper cost disclosures had been made;
   (c) invoices had been issued for work legitimately performed and contemporaneously recorded [597];
6. Mr O'Bryan SC commented on the draft expert report to the expert knowing it contained misleading information [582];
7. AFP, Mr O'Bryan SC and Mr Symons had deliberately misled the expert costs consultant expert about their fees. They intended the expert would accept them as true on the false basis that the cost had been paid by the funder [1535];
8. The administration of justice was corrupted by the lack of candour with an opponent in respect to the Settlement Deed by engaging in misleading and deceptive conduct [1498] – [1500];
9. Mr O'Bryan SC and Mr Symons had misled the Court about their two opinions provided to the Court [1570]. Drafts of the opinions had been sent to the funder and had been reviewed (settled) by the funder when the court sought counsel's independent opinion [1581];
10. Mr O'Bryan SC and Mr Symons did not act in the interest of group members. Their opinions were prepared to advance their interest and the interest of AFP at the expense of their own clients [1584];
11. The primary judge was misled and did not reach a proper conclusion on the deductions sought by AFP. In pressing those matters to appeal, it further sought to mislead the Court of Appeal [1619].

Importantly, John Dixon J made the following observations (at [1337]) in relation to the members of a legal team acting for a party in civil litigation:

> Having regard to the context and purpose of the *Civil Procedure Act*, it is erroneous to contend that a legal practitioner who was a member of a team acting for a party in a civil proceeding, can sit in silence and watch other practitioners in that team further the objectives of the team (or, for that matter, the client) in the litigation in breach of an overarching obligation. The determination of whether a person 'engaged' in conduct if that person was not the actor but, rather, failed to act, requires a careful analysis of the circumstances of the actions of others and the inaction of the person, including the context in which the obligation to the court arises.

This summary is not intended to be a substitute for reading the Court's reasons for judgment in their entirety. Hopefully this summary has identified some of the Court's adverse findings to assist us all in our continued learning and the practice of law at the Bar.

Marcus Clarke QC

Chronology of key events

October 2012
Banksia Securities Ltd, a non-bank property lender collapsed owing $663 million to more than 16,000 debenture holders. Receivers were appointed.

December 2012
Mark Elliott commenced proceedings on behalf of debenture holders against Banksia Securities Ltd.

24/1/2014
Mark Elliott, solicitor, incorporated Australian Funding Partners (AFP) to act as a litigation funder. Shares were held equally by entities controlled by the Elliott family and the O'Bryan family.

26/11/2014
Ferguson JA ruled that the proper administration of justice required that Mark Elliott and Mr O'Bryan SC be restrained from acting for Mr Bolitho by reason of their financial interest in AFP.

15/12/2014
At a directions hearing, Ferguson JA concluded that there was no utility in making formal orders but noted in other matters that Mr O'Bryan's wife had divested her shareholding in the litigation funder. (John Dixon J found that the transfer was a paper transaction implementing an arrangement between Mark Elliott and Mr O'Bryan SC designed to feign compliance with Ferguson JA's conclusion.)

1/12/2017
A settlement deed was entered into.

30/1/2018
The settlement approval hearing was heard before Croft J. Mr O'Bryan SC tendered a third expert cost consultant report and two opinions of himself and Mr Symons of counsel, in support of the approval application.

16/2/2018
The settlement was approved by Croft J having been satisfied on the material in support of the settlement that the legal fees and funding commission were fair and reasonable. Croft J declined to appoint a contradictor sought by Mr Pitman, and Mr and Mrs Botsman.

1/11/2018
The Court of Appeal allowed in part an appeal by Ms Botsman against the approval of the settlement. The Court of Appeal was satisfied that the settlement sum of $64 million represented all funds available from all relevant policies of insurance but did not approve AFP's funding commission and legal cost claims from the settlement sum and remitted those claims to a different judge in the trial division.

27/7/2020
The trial of the remitter commenced before John Dixon J. The contradictor's opening address was completed on 3/8/2020.

3/8/2020
At the conclusion of the opening address, Mr O'Bryan SC by his Counsel, announced to the Court that he did not maintain any defence to the allegations and consented to the entry of judgment against him, abandoned all claims to unpaid fees and accepted that his name should be removed from the role of persons admitted to the legal profession by the Court.

13/8/2020
Mr Symons of Counsel, by his Counsel also made an announcement to the Court in similar terms. AFP abandoned its claim for a funding commission and most of the claim for reimbursement of legal costs and disbursements.

Blind Trusts

STEPHEN CHARLES

Blind trusts are sometimes used as a device by parliamentarians, particularly cabinet ministers, and holders of significant public offices, to create a trust which holds their assets at arm's length, supposedly out of their control, while they are participating in ministerial life. It is said that such trusts avoid conflicts of interest. But to what extent?

The Bowen Committee established by Prime Minister Malcolm Fraser in 1978, concluded in its Report on Public Duty and Private Interest that blind trusts could be ineffective and could be a façade behind which the conflict of interest would survive. The Committee said (para 5.36-5.38) that:

> ... it can see no effective way by which a trust could be rendered completely 'blind'. Unless the assets were diversified the officeholder could easily ascertain whether the trustee still retained them and in practice, might find it nearly impossible to avoid knowing. If a public official were designated the trustee for such purposes, there might be greater confidence in the 'blindness' of the arrangement than if the officeholder were allowed to select a relative or former business associate.

In 1996, a further paper was prepared for the Australian Parliamentary Library on the Role of Blind Trusts by Bernard Pulle. He also concluded that there were limits to the benefits derived by the establishment of blind trusts, quoting at length from the conclusions of the Bowen Committee. However, Mr Pulle drew attention to the system of blind trusts under supervision used in the United States, where certain assets are required to be disclosed, and a blind trust of others under official supervision was permitted. He nonetheless concluded that a blind trust by itself proved nothing, as it could give no guarantee that wealth accrued by the improper use of political influence and public position during the politician's career as a Minister had not been retained.

In September 2021 controversy arose from Mr Christian Porter's admission that an entity known as the Legal Services Trust had been set up and had made a contribution to his legal fees for his (now discontinued) defamation proceedings against the ABC and journalist Louise Milligan. Mr Porter has said that he has "no access to information about the conduct and funding of the trust," and no information about the identity of those who contributed to the funds held in the trust. The result is that the public has no information as to who Mr Porter's benefactors are, who the trustees are, who is managing the fund, and how much money has yet been paid to Mr Porter's benefit in reduction of his obligations in payment of his costs.

These events have generated substantial criticism from Malcolm Turnbull who said that Mr Porter's decision to accept money without knowing the source was "an extraordinary abrogation of responsibility", and that it was "a shocking affront to transparency."

Transparency International Chief Executive Serena Lillywhite said that it was "staggering" that Mr Porter had accepted the money without checking the credentials of the donors. On the other hand Mr Porter has been defended by Chris Merritt (*The Australian* (24/9)) on the ground that the blind trust avoids "conflicts of interest." He said:

> Porter's mystery donors contributed to a blind trust whose entire purpose was to prevent conflicts of interest by ensuring Porter never knew who helped his legal battle with the ABC. Withholding that information served the public interest by eliminating any possibility that his donors would receive favoured treatment from the government.

Mr Merritt is, of course, the only journalist who received Mr Porter's proposal for an Integrity Commission with undiluted, even extreme, enthusiasm.

Ministerial Standard 2.21 deals with Gifts. It includes the statement that ministers may accept customary official gifts and tokens of appreciation, "but must not seek or encourage any form of gift in their personal capacity."

Some of those who set up the Legal Services Trust may, as Mr Merritt argued, have intended to prevent conflicts of interest. But

"If the sources of the payment to Porter are unknown, how can the potential for conflict with his public duty possibly be known?"

there is no evidence as to who they were, what their intentions were, and whether Mr Porter was privy to their discussions and purposes in setting up the Trust. As the previous comments on real blind trusts show, even they are usually ineffective and often merely a façade behind which the conflict of interest would survive.

Mr Merritt has no evidence to permit him to conclude, as he naively does, that the entire purpose of the trust was to "prevent conflicts of interest by ensuring Porter never knew who" had helped him. And there are at least two other possible explanations for the establishment of the Trust. First it may well be the case that those who were helping Mr Porter did not want their identities known. Secondly, Mr Porter was at that time still a member of the Coalition's frontbench. There may have been among the donors those who hoped to benefit from their largesse by being in a position to remind him later of the help that he had received from them. Mr Porter's disclosure that he had no idea of the identity of his donors makes a mockery of the purpose of the Register of Members' Interests, which exists to place on the public record members' interests which may conflict—or be seen to conflict—with their public duty. If the sources of the payment to Porter are unknown, how can the potential for conflict with his public duty possibly be known?

At a time when the Opposition and the Greens in Parliament, and most of the cross-benchers, are vigorously pressing a number of reforms to the current donations disclosure regime, it would be understandable that anyone hoping for a favour to be returned might choose a method of donation for the benefit of a frontbencher which left his, her or their identity undisclosed.

While the contribution made to Mr Porter's legal fees does not constitute a relevant payment for the purposes of electoral donations law, his acceptance of funds from a trust about whose "conduct and funding" he not only claims to have no information, but appears to assume that voters have no reason or entitlement to *want* any information, is reflective of a culture of hidden money in Australian politics. This culture has culminated in a situation where political parties' declared income of unexplained origin ("hidden money") amounted to almost $1.5 billion—or some 34 per cent of total party income—over the period from 1998–99 to 2019–20.

This most recent controversy evidences yet again the gaping inadequacies of the Coalition's proposed Integrity Commission. Under its widely derided model, payments to Mr Porter's costs would not meet the threshold required for investigation. Even if they did, there would be no public hearing and no public report in relation to them.

Mr Porter's mystery donation underscores also the weaknesses of existing systems that supposedly apply to facilitate transparency and accountability. The possibility that a sitting cabinet minister could accept funds from an unknown source, and that this might not constitute a breach of the Ministerial Standards, reminds us of the significant work that remains to be done if we are serious about transparency and accountability. Without reform, we have neither.

The Hon Stephen Charles AO QC served on the Supreme Court of Victoria Court of Appeal between 1995 and 2006. Appointed an Officer of the Order of Australia in 2017, he is a board member of the Accountable Round Table and the Centre for Public Integrity.

NEWS AND VIEWS

An interview with the 'infamous' Meredith Fuller

DR MICHELLE SHARPE

Michelle Sharpe is a founding member of the Victorian Bar's health and wellbeing committee. In 2015, the program she helped establish—which included a 24/7 counselling services for barristers—was a finalist for the Australian Psychological Society Health and Wellbeing Award. During the pandemic, Michelle has helped schedule a program of talks in the health and wellbeing context. One of them never made it to the light of day due to negative feedback, including some publicity… Taking the bull by the horns, she has conducted a short interview with the proposed speaker. As Michelle puts it so neatly, this is intended to help the reader to 'decide for yourself'.

Meredith Fuller has been a vocational and counselling psychologist for over 40 years. Her clients include mostly professional women working in banking, medicine or law. Organisations (including several top tier law firms) regularly engage Meredith to provide advice on improving interpersonal communications between staff and training on inclusivity and diversity. But Meredith's particular area of research and expertise is the insidious conflict that can sometimes occur between women in the workplace and how it can derail career development. Meredith's work features in articles published by the *Australian*, *The Wall Street Journal* and *New York Post* (among others).

Drawing on this research and expertise, Meredith has published two books with the eye-catching titles of *Working with Mean Girls* and *Working with Bitches*. A reference to these book titles in social media posts promoting a seminar with Meredith for the Bar's health and wellbeing committee provoked a spirited response from some quarters of the Bar. It was claimed that her work, and the proposed seminar, was anti-feminist and not a suitable topic for a wellbeing seminar. There were calls for the seminar to be cancelled. And it was. But should it have been? Here I ask Meredith about her work, and you can decide for yourself.

Do women bully women?
Some do, whether consciously or unconsciously. I have observed this nasty behaviour in my practice over 40 years. I have seen many professional women, from banking, medical and legal fields, struggling with bullying by other women in the workplace. And this has been backed up by empirical research. Most recently, in March 2021, the Workplace Bullying Institute, in the United States, published its "Workplace Bullying Survey Report"which recorded that 65 per cent of female respondents reported being bullied by a woman. When women bully, they disproportionately target other women.

But why would women, who often experience discrimination in the workplace, want to make the lives of other women harder?
It's complex but, in part, I think that women who bully may have internalised oppression. How they have experienced power (or powerlessness) now guides how they exercise power. Think of it this way: if you didn't have a particularly nurturing parent growing up, you don't have a very good template to be a nurturing parent yourself. And, in an organisation without transparent communication or concern for their human capital, they can resort to survival patterns learned in their family of origin or school.

Given the many other challenges that women face in the workplace, why dedicate yourself to this issue?
My clients were in great distress and dreaded going to work each day. Some were so distressed that they left workplaces and even professions. Others modified their career expectations: "If this is how it is, I am not interested in applying for partnership", they would tell me. They received no help in the workplace. Senior men adopted an approach of, 'sort it out yourself.' And senior women typically didn't want to know about it, rebuffing complaints with, "women aren't like that",or, "don't be silly; get over it".Those complaining about the behaviour didn't receive any support to help them process their experience or offer them protocols to manage the situation. And, aside from the psychological damage that bullying can do, an opportunity is lost to develop key management skills which are vital to a high performing workplace: of how we can get the best out of each other.

What advice would you give to women who may be being bullied by another woman?
Meredith: You need to rule out the possibility that you may be misinterpreting the behaviour.

> "Get evidence. Keep a diary. Carefully observe both how you and others are treated, get a comparison. Then try to understand what is behind the behaviour."

PHOTO COURTEY OF MEREDITH FULLER

Get evidence. Keep a diary. Carefully observe both how you and others are treated, get a comparison. Then try to understand what is behind the behaviour. Reasons for the behaviour may include pressure, perfectionism, unreasonable expectations that trigger fear, or a triggering event. Often, underlying the problematic behaviour, is a lack of self-awareness; they really don't know. No one has ever confronted them on their inappropriate manner or methods, and they lack resources to employ a more effective way to get their needs met. And, sometimes, it is the person complaining who may have to re-examine their own perception and even biases. It may be that the impugned behaviour is perfectly appropriate but jars with the complainant's appreciation of their skills deficit or stereotype of how a woman should exercise power. In my book, I draw on some 2,000 cases to sketch out several archetypes and offer tips on how to manage your reaction to the behaviour within each archetype.

When (or if) I am feeling brave enough to try again, would you be willing to give a seminar on this work to the Bar?
Of course. I am passionate about supporting women being heard and understood in the workplace. And the reaction to the proposed seminar indicates, I think, that this is still very much a problem for women and a taboo topic for discussion. But if we don't talk about these issues then women's suffering is compounded by silence. Often women will push their pain into their own bodies and get sick.

An incomplete picture: data about cultural diversity at the Bar

BY MARK IRVING, ON BEHALF OF THE EQUALITY AND DIVERSITY COMMITTEE

In 2020, the Legal Services Board and Commissioner collected and published data about cultural diversity within the legal profession in Victoria.[1] This was the first time this occurred within the practising certificate application and renewal process. The collection of this data was a step—albeit a small one—in revealing who we are as a Bar and the make-up of the legal profession. The purpose of this article is to highlight why more meaningful data should be collected.

Currently, data about cultural diversity in the Victorian legal profession is collected from practitioners who answer three questions about their country of birth, their ancestry and the languages they speak. This data gives a simple snapshot of the Victorian Bar: 84 per cent of us were born in Australia, with a further 7 per cent born in white majority countries. Our ancestry data is slightly more revealing. Participants (who were able to identify up to two countries) predominantly identified Australia (52 per cent), England (25 per cent), Ireland (17 per cent) and Scotland (12 per cent). Twenty-one per cent identified ancestry from other countries, including Italian (6 per cent), Greek (5 per cent), Indian (2 per cent), Chinese 2 per cent). The ancestry of 0.7 per cent of the Bar is Aboriginal or Islander.[2]

The data collected in 2020 about the Bar and solicitors, when compared with census data, is revealing.[3] In Victoria, 30.7 per cent of the population is born overseas, compared with 16 per cent of the Bar and 22 per cent of solicitors. The contrast between the Bar and solicitors is also revealing. About 2.8 per cent of Victorians were born in China and 1.3 per cent of solicitors were born in China, compared with 0.4 per cent of barristers. Similarly, about 2.9 per cent of Victorians were born in India and 0.9 per cent of solicitors were born in India, compared with 0.3 per cent of barristers. A similar gap between the population, the Bar and solicitors appears for those born in Hong Kong, Singapore, Malaysia, Sri Lanka and Vietnam. The percentage of solicitors with Chinese, Greek, Indian or Italian ancestry is at least double, and often triple, the percentage of members of the Bar with that ancestry. Victorians born in Australia, New Zealand, the US or the UK make up 75 per cent of the population, 83 per cent of solicitors, and over 90 per cent of the Bar.

The data shows that the legal profession is not a reflection of the cultural diversity of the Victorian population. It also reveals that the Bar is considerably less diverse than the rest of the legal profession. The data reveals that those born in white majority countries have far greater representation amongst the ranks of the Victorian Bar than within the community we serve. Just over 70 per cent of barristers and just under 70 per cent of solicitors responded to the questions. A higher response rate would enable a more accurate picture to appear.

But the answers to the three questions posed by the Legal Services Board and Commissioner, although interesting, do little to answer important questions like: How is the profession changing? To what extent are lawyers from non-Anglo backgrounds reaching higher levels in the profession? Is the profession (as it aspires to be) becoming more culturally diverse? Further, are the Legal Services Board and Commissioner questions as wide-ranging as they should be? Are they the best metrics by which to assess the makeup of the profession?

Representative and governing bodies in the legal profession in Australia, and overseas, have policies to promote diversity. The Law Council of Australia, the Australian Bar Association and the Victorian Bar have such policies, as do the Canadian, New Zealand and English Bars. The Victorian Bar's commitment is contained in our Equality and Diversity Policy.

The reasons for our commitment are manifold. The Bar should reflect the community it seeks to serve. Promoting diversity increases the profession's legitimacy in the eyes of the broader public. Removing barriers to entry and progression enables the best in the profession to flourish, serve and lead. Greater diversity attracts a greater range of perspectives: having people from diverse backgrounds with different ways of looking at issues assists in reaching the best solutions.

The Bar's commitment to diversity is sought partly to be achieved by the elimination of discriminatory impediments on the basis of identified attributes: ethnicity, gender and gender identity, sexual orientation, religion, race, colour, nationality, age, disability, pregnancy, and marital, carer and parental status. The elimination of such barriers is an important step in achieving a more diverse Bar.

Yet the Victorian Bar's commitment to diversity goes further than establishing formal equality. It is a commitment to promote, to foster, and to enhance diversity. Bar associations throughout the common law world have made similar commitments.[4]

Collecting data is a key step in achieving this end. Data allows us to draw a more accurate picture of who we (currently) are. It allows for change and progress to be measured. Data allows demographic trends to be identified and for targeted programs and initiatives to be developed. It means governing bodies can be held accountable. Data enables a deeper analysis of where problems lie.

In Victoria and a number of other Australian jurisdictions, data about cultural diversity is collected in accordance with a Law Council of Australia initiative that began in 2020. The initiative involves answering the three questions identified above. Collecting this data is an important first step. Our Bar now has an opportunity to consider next steps.

In the UK, extensive data has been collected about the characteristics of the legal profession over a long period. That data enables the UK Bar Standards Board to produce an annual report about diversity within the Bar.[5] The data is detailed enough to allow analysis of the number of years' call of barristers with different ethnicity, as well as their status (pupil, junior or silk). Similar data allows a more accurate portrait of the profession as a whole to be drawn. For example, in the past 40 years, the UK legal profession has become more broadly representative of the overall UK population. Solicitors from a black, Asian and minority ethnic (BAME) background (17 per cent) now exceed their proportion of the working population (13 per cent). In 1982, BAME solicitors made up only 0.25 per cent of all solicitors in the UK.[6]

As noted earlier, just over 70 per cent of Victorian barristers responded to the voluntary questions about aspects of ethnicity. In the UK, the Bar Standards Board collects data on a voluntary basis about the gender, gender identity, ethnicity, disabilities, age, religion, sexual orientation, schooling and family responsibilities from members of the Bar. In its most recent report, there was a response rate of over 94 per cent to questions about ethnicity, an increase of more than 5 per cent over the previous six years. Responses about the other characteristics have increased year on year and now stand at over 50 per cent to questions about all other characteristics, other than gender identity.[7]

The detailed data collected about practitioners in the UK also enables a deeper analysis to understand the role of gender and ethnicity within the profession. Analysis in the UK has found that, notwithstanding the increased diversity over the past 25 years, the profession there remains heavily stratified by class, gender and ethnicity. The upper ranks of large law firms undertaking the highest-paying legal work are dominated by white men, women are less likely to work in senior roles in large firms and other high-income areas of the profession, and minority ethnic women face a double disadvantage. The prospects of becoming a partner are markedly higher for white males than any other group across all firm profiles.[8] This is apparent when one collects and analyses data about the different types of firms in which solicitors are engaged and the level of seniority within the profession. At the UK Bar, 15.1 per cent of barristers are from a BAME background, and they make up 8.8 per cent of silks, up from about 11 per cent and 3.8 per cent five years ago. In New Zealand, data is also collected about the level of seniority, length of time since admission and type of firm in which employees with diverse ethnicities work.[9]

The collection of some data about the ethnicity of barristers is a laudable step in the right direction. Even the publication of data about when counsel joined the Bar and the seniority of counsel will further assist in identifying and addressing problems. For example, collecting data about ethnicity will reveal whether counsel from non-white backgrounds are leaving the Bar after a few years, or are underrepresented in silk appointments.[10]

1 Legal Services Board and Commissioner Annual report, https://lsbc.vic.gov.au/about-us/board-and-commissioner/legal-profession-demographics

2 Statistics in this paragraph are based on the more recent 2021 data released by the Legal Services Board and Commissioner, but not yet published on its website.

3 See Australian Bureau of Statistics, *State and territory populations by country of birth,* April 2021, https://www.abs.gov.au/statistics/people/population/migration-australia/2019-20

4 See, for example, the Canadian Bar Association's Cultural and Inclusion Policy and the New Zealand Bar Council's Diversity Policy.

5 The reports for the past five years can be accessed at https://www.barstandardsboard.org.uk/news-publications/research-and-statistics/bsb-research-reports/regular-research-publications.html

6 S Aulakh et al, *Mapping advantages and disadvantages: Diversity in the legal profession in England and Wales,* Final Report for the Solicitors Regulation Authority October 2017 at 11, 19, and *The Law Society Annual Statistics Report*, 2019 and *The Law Society Diversity Profile of the Solicitors' Profession* 2019, accessible through https://www.lawsociety.org.uk/topics/diversity-and-inclusion/

7 Bar Standards Board, *Diversity at the Bar 2020*, at 8-9 and Bar Standards Board, Report on *Diversity at the Bar 2015*, at 4-5. S Aulakh et al, *Mapping advantages and disadvantages: Diversity in the legal profession in England and Wales,* Final Report for the Solicitors Regulation Authority October 2017 at 11, 19, and *The Law Society Annual Statistics Report*, 2019 and *The Law Society Diversity Profile of the Solicitors' Profession* 2019, accessible through https://www.lawsociety.org.uk/topics/diversity-and-inclusion/

8 See for example, H Sommerland et al, *Diversity in the Legal Profession in England and Wales: A Qualitiative Study of barriers and individual Choices*, London Legal Services Board, accessible through https://legalservicesboard.org.uk

9 G Adlam "Diversity in the New Zealand Legal Profession", *Lawtalk*, Vol 932, September 2019, 61 at 65.

10 See J Hinde et al, *Race for inclusion: the experiences of Black, Asian & Minority Ethnic solicitors*, The Law Society of England and Wales, 2020.

Why Victoria is right on decriminalising sex work and wrong on criminalising victims of modern slavery

FELICITY GERRY, SUZAN GLENCAY, JENNIFER KEENE-MCCANN AND CATE READ

In August 2021, the Victorian Government announced its intention to decriminalise sex work.[1] Sex work is the consensual provision from one adult to another of sexual services, in return for payment or reward. The decriminalisation of sex work is typically understood to mean the removal of criminal laws relating to consensual adult sex work and the regulation of sex work through standard business laws.

Readers of the *Victorian Bar News* will recall our article in the 2020 summer issue which explained why decriminalisation of sex work was sorely needed to reduce discrimination, improve safety, and generate better health outcomes for sex workers.[2] The good news is that the Parliamentary Review in this area resulted in the *Sex Work Decriminalisation Bill 2021* (Vic) (Bill), which is now before the Victorian Parliament. The purpose of this Bill is to decriminalise sex work and provide for the reduction of discrimination and harm towards sex workers.

Whilst the Bill is welcome, there remains a lacuna in Victorian law that risks failing to provide frameworks for victims of modern slavery, which include victims of human trafficking who commit crime. A program to decriminalise certain conduct is an opportunity to consider other areas where criminal responsibility is lacking. A modern slavery defence for Victorian offences could take a victim-centred approach and assist investigators, prosecutors and defence advocates to determine how such matters should be handled. This is not specific to exploited sex workers but to all those caused or compelled to commit crime by the means and purposes of others. Such a solution has been implemented in other jurisdictions and is discussed at greater length in our recent submission to the Legal and Social Issues Committee Inquiry into Victoria's Criminal Justice System.[3]

Modern slavery includes forced labour and sexual exploitation–but must be understood separately from sex work. If sex occurs in the context of slavery or slavery-like practices, this is not sex work, as it is not consensual and denies victims autonomy. It follows that sex work, as defined in the Bill, is not—and cannot be by law—synonymous with exploitation.

For a long time, the law made assumptions about how to regulate the sex industry. By criminalising the occupation of sex workers, opportunities were lost to provide frameworks for sex workers who were coerced or compelled, including to commit other crimes. If we conflate sex work with exploitation, we miss the opportunity to see the worker as a person with agency and to provide proper safety nets when such agency is compromised.

A recent United Nations Office on Drugs and Crime report found that women and girls classified as victims of human trafficking are often subject to sexual exploitation by criminal gangs. Victims have been prosecuted and convicted for crimes that they had been compelled to commit in the course of such exploitation. The UNODC's findings include that:

> "If we conflate sex work with exploitation, we miss the opportunity to see the worker as a person with agency and to provide proper safety nets when such agency is compromised."

> These victims often have no alternative but to obey an order. Some hope to limit their own exploitation or escape poverty by playing a role in the criminal process. Yet at the same time, the traffickers use the women and girls as a shield to protect themselves from being punished for their crimes.[4]

The new provisions inserted by the Bill will commence in two stages:

- Stage one will commence no later than 1 March 2022 and will remove offences for participating in consensual sex work.
- Stage two will commence no later than 1 December 2023 and will include the transfer of criminal offences from the *Sex Work Act 1994* (Vic) into the *Crimes Act 1958* (Vic).
- "Commercial sexual services" will be defined to mean "services involving the use or display of the body of the person providing the services for the sexual arousal or sexual gratification of others for—(a) commercial benefit; or (b) payment; or (c) reward … whether or not the commercial benefit, payment or reward accrues to, or is given to, the person providing the services or to another person." For the purposes of the definition, a person may provide services on a single occasion or on multiple occasions.
- Criminal offences rightly remain for the following:
  - causing or inducing a child to take part in commercial sexual services;
  - obtaining a commercial benefit, payment or reward for commercial sexual services provided by a child;
  - agreements for the provision of commercial sexual services by a child;
  - allowing a child to take part in commercial sexual services;
  - forcing a person into or to remain in commercial sexual service;
  - forcing a person to provide financial support out of commercial sexual services; and
  - living on the earnings of a person providing unlawful commercial sexual services (as described above).

The attempt to balance decriminalisation generally with maintaining criminal liability for forms of exploitation is good. However, what of people who are forced or exploited to commit other

NEWS AND VIEWS

> “From July 2015 to June 2017, there were up to 1,900 victims of modern slavery in Australia.”

crimes? The Bill, we suggest, is an opportunity to consider wider issues of decriminalisation:

Modern slavery encompasses those who are victims of human trafficking, servitude, forced labour, and deceptive recruitment for forced labour. Modern slavery is an issue for Australia. It is criminalised by ss 270 and 271 of the Commonwealth Criminal Code, most recently the subject of the *Kannan* trial in the Victorian Supreme Court.[5] Modern slavery is also the subject of a National Action Plan to Combat Modern Slavery 2020–2024 (NAP), which builds upon an earlier plan and a parliamentary inquiry. Corporate reporting of slavery in the supply chains of multinationals is regulated to some extent by the *Modern Slavery Act 2018* (Cth). However, unlike many other countries, there is no legislative framework recognising the lack of criminal responsibility for victims of modern slavery who commit crimes.

The scale of the problem is unknown. However, the Australian Institute of Criminology and the Walk Free Foundation estimate that, from July 2015 to June 2017, there were up to 1,900 victims of modern slavery in Australia. Historically, a significant proportion of trafficked people identified by Australian authorities have been women from Asia who have been exploited within the sex industry.[6]

Modern slavery is a Victorian concern as much as it is a Commonwealth concern. If we fail to recognise and address victims of modern slavery in the Victorian criminal justice system, then we fail to provide a legal framework that targets slave masters and those who exploit vulnerable people, including sex workers trafficked to commit crime.

Non-punishment and non-prosecution of such victims is enshrined in international law, EU and ASEAN conventions, US legislation, and a range of other measures that follow the Protocol to the United Nations Convention against Transnational Organized Crime, to which Australia is a signatory.[7] A defence for victims of modern slavery who commit offences related to, or because of, their exploitation provides an incentive for them to come forward and exercise their rights, as well as providing Victorian authorities with an opportunity to pursue those ultimately responsible. The creation of such a defence—which would enable Victoria to demonstrate international best practice in this area—plays an important role in establishing a victim-centred approach to addressing modern slavery, sexual exploitation and the provision of forced commercial sexual services.

The defence created by the *Modern Slavery Act 2015* (UK) (MSA) provides a useful example of how a Victorian defence might be modelled and improved. Section 45 of the MSA introduced a statutory defence for adults and children compelled to commit certain offences as a result of being a victim of modern slavery. The statutory defence is designed to provide further encouragement to victims of modern slavery to come forward and give evidence without fear of being convicted for offences connected to their slavery or trafficking situation. [8] It comes with extensive non-prosecution policies.[9]

It follows that stage one and stage two in the Victorian legislative program for decriminalisation of sex work, and recognition of child exploitation and forced labour within the sex industry, is a very good opportunity to also implement modern slavery defences to all crimes committed through the means and purposes of others as a broader ‘stage three’. The continued criminalising of forced commercial sexual services and the sexual services of children will only be effective if there are protections for victims of modern slavery generally. This would have the effect of strengthening the referral mechanism which already exists through the AFP and thus have a knock-on effect across Australia as envisaged by the NAP.[10] Victoria is in a position to take the lead on modern slavery defences by implementing Recommendation 22 of the Senate Modern Slavery Parliamentary Inquiry, which was that the Australian Government should follow and improve upon the UK approach.[11]

1. https://engage.vic.gov.au/sex-work-decriminalisation
2. https://www.vicbar.com.au/sites/default/files/VBN168-Web.pdf
3. https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Submissions/075._Gerry_Keene-McCann_Read_Pagano_Ferguson_Redacted.pdf
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The Monkey Trial: The State of Tennessee v John Thomas Scopes

DANIEL AGHION

In “A Bit About Words: Quotations” (*VBN* 169), Julian Burnside QC refers to court insults and “the dazzling, but imperfect Clarence Darrow”. Burnside mentions that Darrow devised and ran what was later known as The Scopes Monkey Trial. Darrow’s devastating ability to wound with words was on full display in what became a trial of the century.

The Scopes trial was a circus in every sense of the word. Darrow played the role of lion tamer, and the prosecutor William Jennings Byron was the lion he was seeking to tame. The scene was 1925 Tennessee.

Setting up the trial

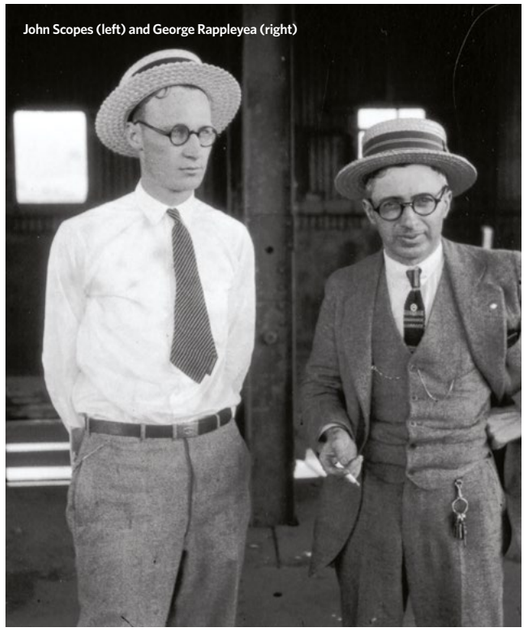
Robinson’s Drug Store in Dayton, Rhea County, Tennessee was a place where the local professionals—all male—would gather after work. On May 5 1925, when they met as usual, discussion turned to the recently passed Butler Act. It was now an offence to teach evolution in Tennessee public schools. The science textbook prescribed by the Rhea County School Board, however, contained a chapter on evolution. The School Board required teachers to commit a crime. The irony was not lost on those drinking their sodas at Robinson’s.

Robinson's Drug Store taken the month before the trial

The American Civil Liberties Union had offered to defend anyone accused of contravening the Butler Act. The ACLU hoped to take the case to the United States Supreme Court and challenge the law on constitutional grounds.

George Rappleyea, a coal manager, and Sue K. Hicks, an attorney,[1] who were gathered at the drug store sensed an opportunity. If they could create a test case, their town of Dayton would profit from the publicity the case would generate.

But who was to be the accused? The local biology teacher, W.F.Ferguson, declined. They then approached John Thomas Scopes who was Hicks’ friend. Scopes was the local sports and maths teacher. He had occasionally substituted Ferguson’s biology class when Ferguson was sick. Scopes could not be sure that he had in fact taught evolution. He was prepared to assist though, on the basis that he had read the impugned chapter in the textbook.


John Scopes (left) and George Rappleyea (right)

Bringing in the heavyweights

Williams Jennings Bryan offered his services to lead the prosecution of Scopes for free. Bryan was a former lawyer and Southern Democratic politician. He had represented Nebraska in Congress, was a three-time nominee for president, and a former secretary of state to President Woodrow Wilson. He had not practised law for more than 35 years. By the 1920s, Bryan had become active in anti-evolutionist movements. He considered the Darwinian theory of evolution to be immoral and directly contrary to the Biblical account of creation.

PHOTOS COURTESY OF THE SMITHSONIAN INSTITUTE

Outdoor proceedings on 20 July 1925 with William Bryan (seated) being cross examined by Clarence Darrow

Clarence Seward Darrow offered his services to the defence for free. By 1925 he was reputed to be the best American trial attorney of his generation. The American journalist and satirist H.L. Mencken had decided to cover the Scopes trial. He urged Darrow to take the case for the defence who, after some initial resistance, decided to do so. Darrow's trial strategy was to make the case about the prosecution, not the schoolteacher, and in the process make a fool out of Bryan.

Commencement of the trial

The next eight weeks were given over to trial preparation. The city of Chattanooga put in a bid to run the trial but was unsuccessful. It was to remain at Dayton, before Judge John Tate Raulston.

The trial itself commenced on July 10, 1925. In anticipation, Dayton's population increased from about 1,800 to 5,000. There were over 100 reporters, including Mencken. There was even a trained chimpanzee performing on the lawn in front of the courthouse.

Conduct of the trial

The trial lasted eight days. Apart from the last two days, most of that time involved technical arguments, motions and objections. The evidence itself was largely irrelevant. The jury spent most of the trial bored whilst legal technicalities were debated. The prosecution case was simple. Teaching evolution at school was illegal and Scopes had helpfully made the necessary pre-trial admissions. Whether or not Scopes had actually taught evolution had become irrelevant. For the defence, Scopes was not on trial. Instead, it was the *prosecution* on trial for interfering with Scope's constitutional right to teach scientific theory.

By the sixth day, the media became bored and started to drift away. This was a shame, because the last two days were without question the most entertaining of this drawn-out farce.

Darrow had by now concluded that Judge Raultson was biased.[2] He complained about this. The Judge asked, "I hope you do not mean to reflect upon the court?". Darrow's response was cutting, "Well, your Honor has the right to hope". Judge Raulston cited Darrow for contempt.

On the seventh day, the trial moved outside. The heat of a Tennessee summer was oppressive. The daily crowds had also caused the ceiling to crack. Judge Raulston was concerned the courthouse would collapse.

Under the shade of a walnut tree, the defence announced their big move—they called prosecutor Bryan as a witness for the defence. The defence justified this on the ground that Bryan was an 'expert' on Biblical interpretation. This was flimsy at best, but Bryan consented to being examined. The Judge decided not to interfere.

The stage was therefore set for a contest between the two heavyweights in the most public of ways. True to his plan, Darrow put the prosecution on trial.

Darrow v Bryan

Darrow's strategy was to demonstrate that Bryan's creationist belief was a fantasy. Bryan's response was to paint Darrow as a heathen. They circled each other for two hours, each trying to outwit the other. The examination concluded with the following tense exchange:

> **DARROW** I will read it to you from the Bible: "And the Lord God said unto the serpent, because thou hast done this, thou art cursed above all cattle, and above every beast of the field; upon thy belly shalt thou go and dust shalt thou eat all the days of thy life." Do you think that is why the serpent is compelled to crawl upon its belly?
> **BRYAN** I believe that.
> **DARROW** Have you any idea how the snake went before that time?
> **BRYAN** No, sir.
> **DARROW** Do you know whether he walked on his tail or not?
> **BRYAN** No, sir. I have no way to know. (Laughter in audience).
> ...
>
> **BRYAN** Your Honor, I think I can shorten this testimony. The only purpose Mr. Darrow has is to slur at the Bible, but I will answer his question. I will answer it all at once, and I have no objection in the world, I want the world to know that this man, who does not believe in a God, is trying to use a court in Tennessee ... to slur at it, and while it will require time, I am willing to take it.
> **DARROW** I object to your statement. I am [examining] you on your fool ideas that no intelligent Christian on earth believes.

Aftermath

The courtroom is an imperfect place for philosophical debate. So it was in this trial. The jury took less than 10 minutes to deliberate. A verdict of guilty was returned. They had no choice. Neither side led any relevant evidence, and both had proceeded on the basis that Scopes had committed the offence as charged. Judge Raulston imposed a fine of $150 (about AUD$3,000 in today's money).

The defence appealed on various constitutional grounds, all of which failed. Nonetheless, the Tennessee Supreme Court set aside the conviction. In his eagerness to sentence, Judge Raulston forgot to leave the question of the fine to the jury.[3]

NEWS AND VIEWS

By this time, Scopes was no longer employed as a teacher by the State of Tennessee. The Tennessee Supreme Court declared the case to be "bizarre". It recommended a nolle prosequi[4] instead of a retrial. The Tennessee attorney-general complied with this, and the proceeding ended.

Bryan did not live to see the conviction set aside on appeal. He suffered a stroke and died on 25 July 1925, five days after the trial ended.

Because of the way in which the case ended, there was no constitutional challenge in the US Supreme Court.

Dayton gained some publicity, but it was not positive. Mencken wrote that the town was pleasant, but harshly and unfairly described the townspeople as "morons" and "gaping primates". Like many other journalists, Mencken left the trial early. This was fortunate for him, because a local group had planned to run him out of town on the next train.

In the end, no one got what they wanted.

The last word is perhaps best left for Scopes himself. The accused did not give evidence. Indeed, due to yet another mistake of Judge Raulston, he might not have been heard at all. After the Judge imposed a fine, one of the defence attorneys pointed out that the defence had not been heard on sentencing. Scopes was then given an opportunity to speak, and said the following:

> Your Honor, I feel that I have been convicted of violating an unjust statute. I will continue in the future, as I have in the past, to oppose this law in any way I can. Any other action would be in violation of my ideal of academic freedom—that is, to teach the truth as guaranteed in our constitution, of personal and religious freedom. I think the fine is unjust.

Scopes' heartfelt response points to the flaw at the core of this trial. The dispute was about academic freedom, but the trial was not. It was not until more than 40 years later that the US Supreme Court held that such legislative bans contravene the First Amendment prohibition upon the establishment of religion.[5] By that time, the Butler Act had already been repealed.

1 A pierce of trivia unrelated to the Scopes trial: Sue Hicks was named after his mother, who died in childbirth. His name was the likely inspiration for the Johnny Cash hit song *A Boy named Sue*.

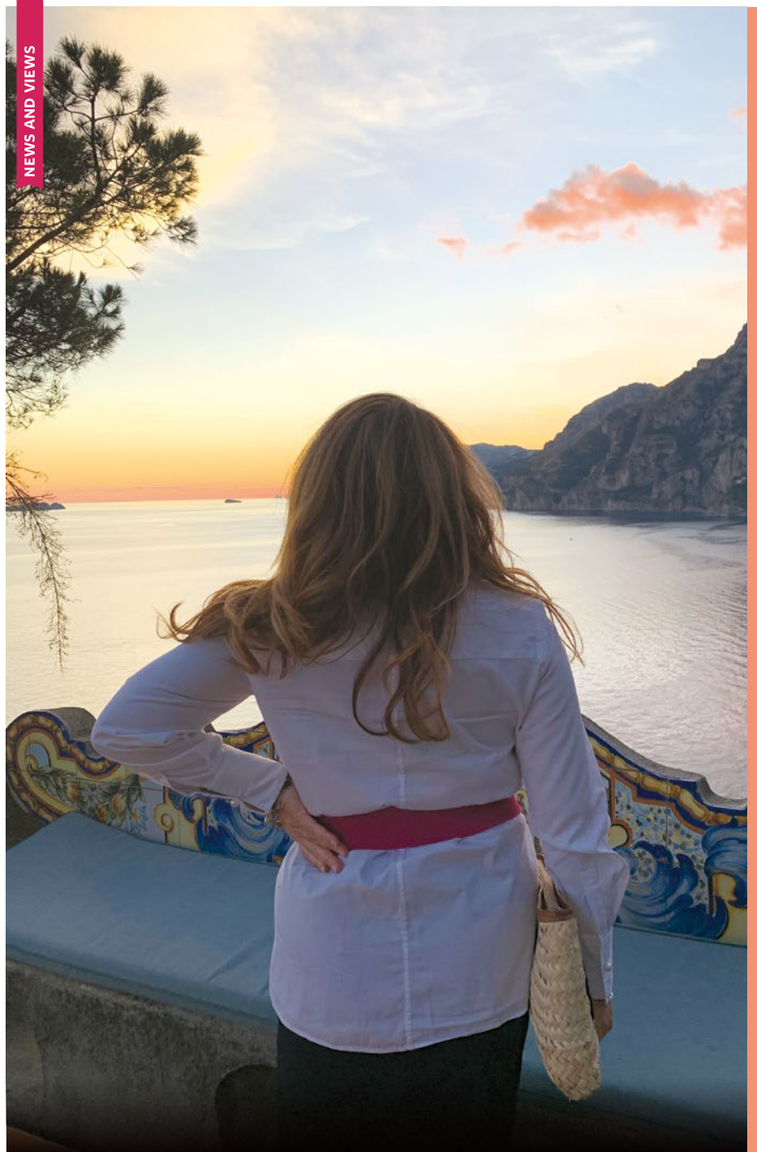
2 The prosecution took a different view of Judge Raulston's abilities. After the trial, Hicks wrote that the judge was incompetent.

3 Although the Butler Act mandated a minimum fine of $100, Tennessee law limited a judge's power to a maximum fine of $50.

4 A prosecutor's formal declaration that they will not proceed with the charge.

5 *Epperson v Arkansas* 393 U.S. 97 (1968).

PHOTOS COURTESY OF THE SMITHSONIAN INSTITUTE



A SeaChange for one former barrister … to the Amalfi Coast, Italy

NATALIE HICKEY WITH NICOLA HOOBIN

Glass in hand, the 1995 March Readers photo reveals faces familiar to many. One can see a young Stuart Wood, Kevin Lyons, Garry Fitzgerald, Gina Schoff, Richard Niall, Nick Hopkins, Dermott Dann, Christine Clough and many more toasting their future barrister careers. One fresh face in the photo, however, chose to tread a different path. Barely three years after signing the Bar Roll, and after appearing as junior in international law matters as well as regular appearances in Magistrates' Courts in Victoria, Nicola Hoobin put life as a barrister behind her to pursue a legal career different from life at the Bar. Now, she finds herself living la dolce vita on the Amalfi Coast in Italy.

Asked what led her to the Amalfi Coast, Nicola says she was looking for a much-needed change of pace and atmosphere. "I started studying law when I was 17 years old. After 30 years, I needed a change of tempo and experience." In 2017, Nicola travelled to Europe for three weeks. It had been over two decades since she was there. As soon as she touched down in Italy, she made the decision then and there to find her way back to Italy on a more regular basis.

On returning home to Australia, she researched and then applied for postgraduate summer school at an English-speaking university in Florence. Accepted to study in 2018, Nicola left for a six-week working and study vacation, traveling solo and taking two laptops with her to juggle her practice running her own law firm from Daylesford.

Halfway through her studies, Nicola arrived in the Amalfi Coast for a three-day long weekend. "Crystal blue sea views are everywhere here in the Amalfi Coast; the mountains the towns are built on look directly out to the Tyrrhenian Sea," she says. She decided to make it her new home.

Living at least part of the year in Italy (whilst also maintaining her Daylesford base) took steps to organise and implement, she says, but "it's possible". Nicola had to obtain the Elective

Back row : Elizabeth King, Jane Hendtlass, Dominic Lay, Trevor Wraight, Alan Hebb, Christopher Gamble, Gregory Connellan, Matthew Barrett, Gregory Meese, James Watson, David Ewart, Ian Porter, Dermot Dann, Nicholas Frenkel.

Centre row : Peter Nugent, Christine Clough, Stuart Wood, Kevin Lyons, Garry Fitzgerald, Peter Clarke, John Selimi, Richard Niall, Noah Eidelson, John Buxton, Gavan Meredith, Shaun Le Grand, Kim Pettigrew, Gerard Butcher, Joanne Piggott, Georgina Schoff.

Residence Visa to live in Italy longer than the maximum 90 days. It was also hard to find an available house and office, particularly on the Amalfi Coast. It's an extremely popular destination during the long, seven-month summer season. Any available houses are usually rented out at a daily rate via Airbnb. And there were different language and administrative practices to navigate.

However, Nicola learnt important things about herself. "When we travel, we are forced to learn things about ourselves in the world and this naturally means that we not only grow and learn new skills but we also become, in part, a mystery to ourselves again. I'll explain what I mean: as we try vastly new and different skills as an adult, we can observe how we handle such things and, hopefully, realise that we are much more resilient and adaptable than our relatively comfortable adult selves may have believed."

Nicola also became used to and enjoyed a different way of living. "For example, here, in the ssouth of Italy, lunchtime is never a rushed sandwich on the go but a fully cooked and prepared meal where the family return home to eat and unwind together, for several hours, including for a post lunch "riposo" siesta (whether rest or sleep) before returning to work until around 8pm.

She has also made friends, although it took time. "If you live here outside of the tourist season, you make lasting friendships and are welcomed into a way of life which is very centred around nature and organic food, outdoor activities, family, cooking, a mix of hard work and total relaxation and in living day by day. It's a simpler way of life here that, for me, is good for the soul. At this stage in my life, this is what I was looking for."

Nicola wants to encourage others that it is possible to pursue such a life change and still maintain a practice in Australia. When in Italy she continues to work remotely as principal lawyer of her Australian law firm, Nicola Hoobin Legal. Before the pandemic, she returned regularly to Australia for face-to-face meetings and trial work, the latter with Counsel briefed to appear.

"Setting up practice here was surprisingly easy. My clients were happy for me to have this experience. Counsel were equally supportive and accommodating.

I continue to do court appearances via telephone. I brief counsel for interim hearings and trials. I usually work from 6am here, which is early afternoon in Australia. If I am required outside of these hours (for example a 9am appearance in Australia is between 11pm-1am in Italy), I prioritise work. This has become the norm for me.

Asked about the impact of the pandemic, Nicola says: "The pandemic stopped us all from rushing around

and, for me, it was an opportunity to consider where to from here and to update and diversify my legal business." She adds:

> Once lockdowns ended in Italy, I was able to travel within the Amalfi Coast and to places like the island of Capri, Rome and Venice and to experience and explore these remarkable cities without crowds, like my parents had done before me when they were younger.

Her legal firm continues to do business as usual. Nicola also looks forward to returning to Australia herself for the summer now that Australia is open to international travel again.

Not content to sit still, Nicola has added a new arm to her business, Luxury Travel Italy and Luxury Travel Amalfi Coast. Nicola had been helping business-travelling clients with the required and ever-changing international travel documents for entry and exit requirements, particularly during the pandemic. This experience lends itself also to helping Australians plan their travel to and within Italy. "I collaborate with trusted and talented Italian colleagues to provide authentic, immersive and unforgettable local experiences whether on land, sea, train, countryside or in historical and modern cities." (If interested, please contact Nicola by email: nicola@nicolahoobinlegal.com.)

There is no time like the present to travel to Italy, according to Nicola. "To say that Italians are excited at the prospect of Australians being able to return to Italy, would be an understatement. Aussies have been greatly missed here and their return is a hotly discussed topic as we head into Australia fully reopening to international travel and return home."

For those wondering whether there is life beyond the Bar, for Nicola, it is a resounding 'yes'.

A reflection on being a barrister

JULIAN McMAHON

In his defence at trial, Socrates said that the unexamined life is not worth living. Recently, I heard a new judge say that he owed a great deal to the institution of the Bar. It made me ask what matters about this institution. What would I say about it, to encourage a new barrister?

The work of barristers often calls for hard work and stamina. We know that justice is sometimes found, or lost, only at the end of a long, lonely, stony road. Barristers need to be tough yet calm in difficult situations, to take responsibility and to lead. We are also part of something rich in history, a profession with ideals of honesty, integrity, scholarship, camaraderie and public service. We participate in the development of the law, of justice, of what makes society work better. These ideas are old, and essential to what we are. But just as the Bar is steeped in tradition, to succeed it must also welcome talent in all its diversity, be ambitious for improvement, and lead where change is needed.

Independence

A barrister must be independent. The English Bar developed significantly at the time of revolutionary events in the United States and France. One who strode those stages was Thomas Paine. He demanded a new constitution for Britain, declaring its monarchy was tyranny. In May 1792, Paine was charged with seditious libel. In accepting the brief to act for Paine, Thomas Erskine forfeited his coveted sinecure as attorney-general to the Prince of Wales. A lesser person would have kept the post and refused the client. But Paine's speech to the jury said otherwise:

> I will forever, at all hazards, assert the dignity, independence, and integrity of the English Bar, without which impartial justice … can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in court where he daily sits to practice, from that moment the liberties of England are at an end.

ILLUSTRATION BY GUY SHIELD

And there is the cab rank rule—on which the liberties of England depended.

Independence is critical to our role. Then Justice Kiefel said in 2009 that independence is the central characteristic of a barrister. I once saw an inspiring barrister quietly lose a significant part of their practice overnight, knowing it would be the consequence of complying with the cab rank rule.

This independence allows each of us more easily to be an officer of the court: bound to be honest, to correct any misleading statement once alerted, to provide authorities which may be harmful to our case. Without independence, we fail the court. If we make mistakes, as we surely do, we determine to fix them in accordance with such principles.

History and development

Looking back, the Bar has had courageous advocates who stood between the State and the client. Think of Ted Hill in the '50s defending the Communist Party as the government sought to outlaw it; or Phil Opas in the '60s defending the soon to be executed Ronald Ryan, at one point fighting the ethics committee and risking his career; or those in the '70s who fought for Aboriginal defendants in the NT, or those fighting for Eddie Mabo over many years into the '90s, to name but a few. These and many others educate and inspire us.

We can look much further back. The common law's heritage includes Justinian's 6th century compendium of all Roman law, but the art of advocacy as we know it is older again. Any barrister reading the speeches of Pericles in Thucydides, or Cicero's prosecution speech against the corrupt Sicilian governor Verres, will immediately be on familiar ground. The art of marshalling the material and making an argument is the stuff of great moments in history.

We stand on the shoulders of giants, ancient and recent. We are part of a living tradition, nurtured for centuries by barristers and judges. Our role is to maintain what is valuable, build on it, and pass it on in better shape. The same is true for much that matters in society; however, the very fabric of our society hangs on the courts doing their job well. Where the rule of law is weak, society disintegrates, wallows in corruption or is bound only by brute force and fear. To protect the rule of law, which is part of our purpose, we must engage in a constant critique of the law. Part of our doing a good job is also surely to challenge unjust laws and decisions, no matter how hard the fight. Do we do that enough? How would the lawyers at various Aboriginal, or asylum seeker, or women's refuge legal services, answer that question?

Words

So much of our work hangs on our words. One of my favourite examples is the case of Ronald Tait.

The common law does not allow an insane person to be executed. Tait was a killer, but was he mad enough to escape execution? The High Court heard urgent applications on 31 October 1962, the day before Tait was to be executed. Henry Winneke QC appeared for Victoria. The applicants successfully argued for a stay until a mental health assessment could be completed. The court observed that the incidental powers of the court "would preserve the subject matter", pending a decision. There was a fear the fuming Premier Bolte might order the execution to be carried out. The court then asked Winneke, "May we then have your undertaking that that will be enough?" Winneke said, "I feel I cannot give an undertaking, not being instructed. Perhaps it might be better if your Honours would make a complete order…".

The events tell us much about the Bar and our overarching duty to the court. Winneke served his client, arguing for execution, but then served the court, by not giving an undertaking. His words reflected the value his undertaking would have had—if given, the prisoner should not be hanged. The mere words of counsel would have been enough for the High Court. But Winneke could not bind his client, or the sheriff, and thus sought orders. As it turned out, Tait was found to be mentally ill and never executed.

Our defining task is appearing in court proceedings. Courts rely on our words. The reasons our words can carry such weight is because of the ethics of our profession: the demand for honesty, integrity and professionalism.

Diversity

Despite our ideals, we certainly have flaws. The first woman to sign the Victorian Bar Roll was Joan Rosanove QC, in 1923. She was also our first female silk, in 1965. But when she first tried to get a room, a committee said no. She eventually left a successful practice at the Bar and ran a solicitor's practice while raising a family. When she returned, she had a huge practice, but had to wait 11 years after first applying before getting silk. She was a pioneer and has been followed by generations of courageous women. Yet, even in 2021, the Bar needed to hold a seminar on calling out sexual harassment. How many problems beyond sexual harassment remain unacknowledged?

A judge is not appointed to represent any one group, but to be impartial. Yet who would doubt that the increasing number of women at the Bar and on the Bench has improved the law and its practice in innumerable ways? If appointment is based on skill, experience and integrity, are we doing enough to foster those in minority groups with the talent, but who are far removed from centres of privilege?

> "Ethics are not what a lawyer knows, ethics are what a lawyer does."

In an increasingly diverse community, the Bar and courts must foster diversity, or risk jeopardising their legitimacy. If entire groups in the community feel disconnected from the courts, then justice is undermined.

Service

Part of professional life is doing pro bono work. Former Justice Sue Crennan said in 2013, "To appreciate that pro bono work should have a place in your professional life is to be part of one of the continuities of the Victorian Bar, of which we are entitled to be proud." Many of our best experiences as barristers are found in such work.

Do we have individual public responsibilities beyond the Bar? I for one am glad to see our members and former leaders argue for better anti-corruption commissions, for refugees, for the environment. Yet most public service will not be political. School councils, charities, community groups, the arts—all are vital to a well-functioning community and need experienced advisors. It is a privilege (and an obligation) for professionals to take on such responsibilities. And in every part of our public life, because we are officers of the Court, we should maintain the same standards we adhere to in court.

I am grateful for the work of our Bar Councils and committees. Ever since coming to the Bar, I have admired their work. From working on our insurance, our Benevolence Fund, the *Bar News*, the Readers' Course, to name but a few areas, year on year so many counsel keep the Bar functioning, aiming to make it better. One of our greatest achievements is offering access to affordable chambers through monthly tenancies, thereby opening the door to new counsel who have few resources.

Ethics and Morality

Chief Justice Kiefel said earlier this year that ethics understood and applied in the practice of law is a felt commitment to honesty and integrity. Ethics are not what a lawyer knows, ethics are what a lawyer does.

The *Royal Commission into the Casino Operator and Licence* report was published in October. Commissioner Finkelstein QC wrote that the lawyer is part of the system charged with upholding the law.

> That is the reason why the lawyer should have some obligation, perhaps best characterised as a moral obligation, to see that their client obeys the law…[R]ather than a lawyer simply advising a client whether a given course of action is completely legal, in an appropriate case… the lawyer could ask their client of the proposed conduct: "Is it right?", "Is it honest?" and "Does it thwart the purpose of the law?"

He also noted that "to give moral advice is not to impose it. It may be nothing more than a trigger for a useful… reconsideration of a course of action.

These ideas are part of the history of what it means to say we are members of a profession. We are obliged to bring honesty and integrity to all our dealings with clients, solicitors, other counsel and most importantly the court. That is how, as John Dixon J wrote in *Bolitho v Banksia*, we instil public confidence in the administration of justice.

Balanced life

Paradoxically for a job which demands so much, barristers have the freedom to lead balanced lives. One colleague recently told me it was about discipline. We can arrange to have school holidays off, take long breaks, work from home, swing in and out of part- and full-time work. The Bar is learning such choices are to be respected, not criticised.

The future

Three years ago, Allsop CJ, of the Federal Court, spoke of the future of the Bar: of how we are a profession, not a business; that the job involves expertise and scholarship, which foster the confident independence of mind necessary for the difficult tasks involved; that properly being a barrister is very much an attitude of mind, a state of being, a way of behaving towards the problems and people presented. His Honour spoke of upholding independence, of the need for fiduciary service to our clients, of our duty to the court, of keeping chambers of supportive individuals. He said that to succeed, the Bar must have devotion to these things.

What barristers do matters because the rule of law matters. The proper functioning of the courts is of the utmost importance. I have little patience for some of the stuffiness of the old Bar, or stories of legendary rudeness of famous learned judges. As Dixon CJ wrote, the court's work is too important for such conduct. The rule of law is the framework on which society depends. Essential to it is an independent judiciary. For independent judges to adjudicate fairly, to protect the dignity of every person, to protect the liberties of the subject against the state or an oppressor, they need barristers who understand what they are doing, and who are able to do it well. We are fortunate to be part of it.

Author's note:

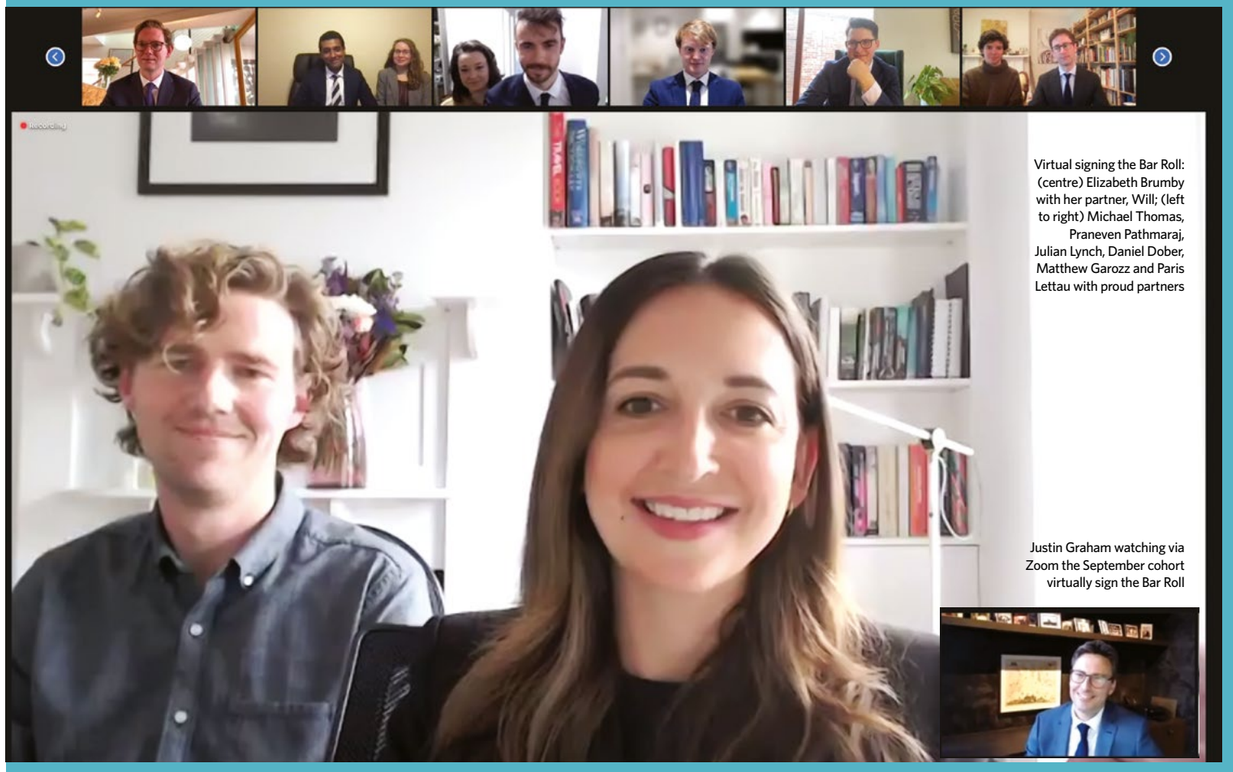
I owe a large debt here to published papers by current and former judges, especially those of Kiefel CJ, Allsop CJ, Lasry J, and former justices Gaudron, Brennan, Kirby, Crennan. See also *Jesting Pilate*, 3rd ed; *Law, Liberty and the Constitution*, by H Potter, 2015; and both the decision and wealth of sources in the footnotes of John Dixon J's decision in *Bolitho v Banksia* [2021] VSC 666.

NEWS AND VIEWS

True. grit

READERS DIGEST
SEPTEMBER 2021

By September 2021, Melbourne was in the throes of its sixth lockdown. Many, if not most, readers left behind solid careers for the uncertainty of barrister life. Perhaps this was the first cohort that had eyes wide open as to the upending nature of COVID-19. They were, however, called to the Bar anyway. Indeed, whilst the term 'called to the Bar' may seem anachronistic to some, it certainly applies to this group. Why did they decide to do it? What careers did they leave behind? What was the readers' course like? How do they feel about the future? At *Bar News*, we decided to find out. Here are their stories.



Virtual signing the Bar Roll: (centre) Elizabeth Brumby with her partner, Will; (left to right) Michael Thomas, Praneven Pathmaraj, Julian Lynch, Daniel Dober, Matthew Garozz and Paris Lettau with proud partners

Justin Graham watching via Zoom the September cohort virtually sign the Bar Roll

Message from Justin Graham QC—chair of readers' course committee

The September 2021 readers group was not the first group to do the readers' course entirely online (the September 2020 cohort share that distinction). However, they had to do it at the end of an arduous 18 months when any novelty around lockdowns and Zooms had well and truly abated. It is a real credit to the September 2021 readers that they accepted the hand with which they were dealt. They threw themselves into the course, showing great engagement in all the sessions and considerable ability in their practice moots and other assessments. I hope the readers enjoyed the online "signing" ceremony at the close the course, and that they can now begin to experience chambers life in earnest as we return from our homes in greater numbers.

Undertaking the Readers' Course Virtually

With word that Lockdown 6.0 would be imposed imminently, members of the September 2021 readers' group flocked to the Mint bar, where reader Rhiannon Saint had alerted us via our already active WhatsApp chat that she had booked several tables. Once there, we put names to faces, exchanged a few stories (my favourite being a reader who had sat the Bar Exam despite discovering his home had been burgled hours earlier) and left before falling foul of the new curfew. It dawned on many of us then that the Readers' Course would be conducted entirely on Zoom, and that our opportunities to interact over the next three months would be largely confined to the private worlds as revealed by our 46 cameras.

A week later, the course began with a series of lectures. In some, presenters posed Socratic questions to unwary readers ("your clerk messages you about an urgent brief to appear in 20 minutes – what do you do?"). In others, they offered practical wisdom ("this is how a bail hearing works…") or encouraged us to confide our concerns about starting at the Bar. An entertaining highlight was Richard Lawton's "Speak Out"session, where we were compelled to sing Beethoven's Ode to Joy (Symphony No 9) (i.e "the German Opera song") as loud as we dared, much to the bemusement of our housemates and neighbours.

And then the assessments began.

Despite our busy schedule, the readers made every effort to connect with each other. Katherine Brown developed a helpful spreadsheet where we could record our addresses to find others within our 5km radius.

Also well received was the "speed dating" on Friday nights (hosted by Michael Wyles and John O'Halloran), where groups of five or so readers were assigned to Zoom breakout rooms for 15 minutes to mingle, before being shuffled into new groups. The course assessments also provided good opportunities to socialise. A five-minute consult with a colleague frequently evolved into a rich exchange of stories and personal reflections. For the more outgoing readers, lockdown was no great barrier to forming strong friendships. For those more introverted, the inability to connect in person was undoubtedly hard.

There were plenty of other challenges in the online environment. Some, including "zoom fatigue" and technical issues, were swiftly dealt with by Nina Massara and Nikki Walker. Others weren't so easily dismissed, including noisy neighbours (one reader reported a large bootlegging party on their rooftop) separation from families (another reader was stranded in a fishing village in Tasmania during lockdown) and parenting duties. The culmination of this occurred when, during Dr Sue McNicol's lecture on September 22, The Earthquake struck, forcing readers to abandon their computers and flee.

Despite all this, the readers displayed grit, humour and empathy. Those of us who knew how to draft pleadings, fire a shotgun or pronounce "Szynkiewicz" willingly shared their insights with others to assist with assessments. The cohort worked long and hard, and the fruits of our labours showed in impressive advocacy performances (some readers equally took delight in embracing their creative side as witnesses—for example one reader displayed a frighteningly convincing performance as a foul-mouthed old man). Our WhatsApp chat became filled with an array of cathartic wisecracks (e.g. "It actually reduced my anxiety to know that humiliating myself in this course is (i) a given (ii) not entirely within my control") and memes (particularly those of David Barton). The spirit of the readers was best captured in the immortal words of Stephen Bunce who, in the middle of The Earthquake, cool-headedly and cheerfully quipped "*Hi Sue, sorry to interrupt you. There's an earthquake happening ... we might be a little distracted for just a minute*".

And then, suddenly, the end was near. Our final assessments were complete. Our lectures finished (a highlight being a musical homage to VCAT). And it was then our turn to sign the Bar Roll. The online ceremony conducted that night was particularly special. Not only could we accept our Bar Roll number with our families by our side, but come midnight, our celebrations could break out into the streets as lockdown had finally lifted.

For many readers, the course was as much about developing skills/ironing out our weaknesses as it was about being inducted into the community of the Bar. We were privileged to have senior practitioners critique our work and offer support (the handwritten letters congratulating each of the readers at the end of the course were particularly special). It wasn't lost on us that one day, it will be our turn as teachers and custodians of the Bar to guide a new generation of readers. In the meantime, there is plenty to learn, and it is lovely to properly catch up with the readers in person and make up for lost time.

Julian Lynch

Ashlea Patterson

"For many of us, the decision to come to the Bar was made long before the pandemic hit! This was certainly the case for me, as it had been a long-standing personal goal. Once I made the decision, that was it. So, whilst the timing was unfortunate, it was just an additional hurdle that had to be overcome. I think the knowledge that the period would pass and work would start to pick up certainly helped."

Just prior to the Bar, Ashlea was a Solicitor Advocate with the OPP. She had started out in criminal defence, then 'switched-sides' for a period. "The experience was certainly worthwhile", she says. Ashlea is looking for opportunities in criminal law and public law. She is reading with Diana Price. Christopher Carr QC is her senior mentor.

Chris Brydon

"In mid-2020 the pub was shut and I was stranded alone in Melbourne's lockdown. I thought to myself, 'This is the perfect opportunity to study for the bar exam without any distractions. And surely the pandemic will be over by the time I sign the Roll ... surely, right?' Despite my woefully inadequate estimate of the pandemic's resilience, I have enjoyed getting started at the Bar."

Prior to the Bar, Chris was a criminal solicitor. He is looking to work in crime, "and everything else". Chris is reading with Dr Theo Alexander. His senior mentor is Theo Kassimatis QC.

Annette Gaber

"The pandemic gave me an opportunity to reflect and come to the realisation I was ready for my next professional challenge; one which gave me more independence and the opportunity to diversify my practice. I took the leap despite being in the middle of a pandemic because, once I set my mind to something, it's full steam ahead. The readers' course certainly delivered on its promise to be challenging and rewarding. Having now signed the Bar Roll, I'm looking forward to building my practice and expanding into new areas."

Prior to the Bar, Annette was a partner in the litigation team at Gadens. Her area of specialty as a solicitor was banking and finance litigation, but she is looking to broaden her practice to a general commercial practice. She is reading with Sam Rosewarne and her senior mentor is Hamish Austin QC.

Elizabeth Brumby

"Although I'd always planned to come to the Bar, the pandemic provided an opportunity for uninterrupted study for the Bar Exam that was too good to pass up. And while it's been a little surreal entering the profession virtually, I feel incredibly fortunate to be joining such a supportive group of colleagues."

Prior to the Bar, Elizabeth was an associate to a justice of the High Court. Before that, she worked as a solicitor in commercial litigation at Herbert Smith Freehills. She is looking to work in commercial and public law, including regulatory matters, contract disputes, consumer protection, competition, constitutional and administrative law, as well as major torts and employment and industrial relations matters. She is reading with Caryn van Proctor. Her senior mentor is Alistair Pound SC.

Cheryl says she found it a very special experience having her family around her for the ceremony.

Cheryl Richardson

"It was always my goal to become a barrister but between kids and work it seemed out of reach. During the long lockdown last year, I made use of the extra time in my day, normally spent commuting, to study for the Bar exam. I always imagined attending the readers' course in person but, even though it didn't turn out that way, I don't think it affected my experience. I found the course challenging, engaging and relevant to our circumstances. It was obvious that a lot of thought had been put into the content. Online delivery meant my kids could see what I was doing and encourage me along the way. They would sometimes sit and listen to my moots telling me it was 'very exciting'. I was able to connect with the other readers via Zoom and many, many WhatsApp chats and I'm really looking forward to meeting them face-to-face. Overall, I would say my journey to the Bar was a great experience and I'm so pleased I made it!"

Prior to the Bar, Cheryl was a Senior Legal Adviser at Comcare, the federal work health and safety regulator. She provided advice on a wide range of matters including regulatory activities, reviews, investigations, and criminal prosecutions to name a few. Cheryl has practised in common law, criminal law, and public law but she is open to taking briefs in other areas. Cheryl is reading with Peter Matthews. Her senior mentor is Dr Ian Freckelton AO QC.

Nick Dodds

When asked for his feelings about being called to the Bar in the middle of a pandemic, Nick responds, "Poor timing! When nominating for the September readers' course intake at the start of 2021, I thought, 'Surely we'll have all forgotten about the pandemic by then,' and I could not have been more wrong! That said, the experience has been great—the instruction and content in the readers' course was outstanding (although I've had enough Zoom to last a lifetime), and it's great to finally be in chambers now restrictions are easing."

Prior to the Bar, Nick was a senior associate in the tax team at Thomson Geer, doing a wide range of advice and dispute work for a variety of clients. Tax is his "bread and butter", but at this early stage of his time at the Bar he is up for anything. Nick says, "I'm interested in anything commercial, corporate or regulatory, and in my past life as a solicitor I did the odd secondment on matters completely unrelated to tax, so I'm more than happy to branch out." Nick is reading with Melanie Baker. His senior mentor is Eugene Wheelahan QC.

Nick Dodds, right, with partner Emily enjoying a gig at the Sidney Myer Music Bowl between lockdowns.

Stephen Bunce

"I always wanted to be a barrister. My career deviated into management roles which kept me occupied for a decade, so I had waited long enough. My wife had just completed her medical fellowship exams and the time was right for us. After completing the readers' course entirely on Zoom, I am now very much looking forward to being in chambers."

Prior to the Bar, Stephen was the CEO at a national medical research non-profit and primary healthcare clinic group. He is looking for opportunities primarily in general commercial, corporations, and employment law. He is also interested in tax and other related areas if the opportunity arises. Stephen is reading with Tyson Wodak. His senior mentor is Stuart Wood AM QC.


Me with my two cheeky boys, Oliver (7) and Hugo (5) at Pt. Leo Estate

Rebecca Aoukar

"Studying for the Bar exam during Victoria's second lockdown in 2020 and then undertaking the readers' course during our sixth lockdown was bizarre but memorable. The highlight of doing the readers' course from home was when I had to sing Beethoven's Ode to Joy as loud as I possibly could as part of Richard Lawton's 'Commanding the Room Voice & Presentation Skills' session—while my seven-year-old was remote learning in the kitchen and my husband was working upstairs. They found it very entertaining. I thoroughly enjoyed that session—despite the embarrassment!"

Prior to coming to the Bar, Rebecca worked with the Child Protection Litigation Office (CPLO) for seven years and then with Seoud Solicitors for three years. At Seoud Solicitors she worked as a solicitor advocate representing the DFFH in child protection matters. Over the past two decades, she has volunteered in various organisations advocating for refugees, including Amnesty International and ASRC. She was also inspired to co-found her own charity, Hope for Nauru Inc. Rebecca is accepting briefs in crime, family law, administrative and migration law as well as Children's Court matters. She is reading with Rob Barry. Her senior mentor is Georgina Costello QC.

Sergio Zanotti Stagliorio

"I came to the Bar because of my passion for court work and legal submissions. The COVID crisis made the transition to being a barrister all the more challenging, but equally rewarding. The experience and collegiality at the Bar far exceeded my expectations."

Prior to the Bar, Sergio was a solicitor advocate working with migration matters before the Federal Court, Federal Circuit Court and AAT. He remains a CPD lecturer in the field and editor of migrationlawupdates.com.au, having summarised about 800 court decisions related to migration law and administrative law more generally. He also writes articles for LexisNexis from time to time and used to teach migration law at two universities in Australia. Sergio intends to continue to practise in migration law, but also expand into other areas of administrative and public law. He is reading with Fiona Spencer. His senior mentor is Chris Winneke QC.

Justin Trevelein

"Pandemic or no pandemic, I wanted to come to the Bar because barristers get to do all the fun stuff! Doing the readers' course online had its challenges, but we have opened up at the right time and I am excited about starting my new life at the Bar."

Prior to the Bar, Justin was a senior associate in a boutique practice in Hamburg, Germany. He is looking to work in commercial, construction and projects, shipping, banking and finance, property and arbitration. He is reading with John R Gurr. His senior mentors are Rob Heath QC and Charles Shaw QC.

David Barton

As to why he came to the Bar: "It seemed like exactly the right time. I'd been working in government investigative bodies for several years and I was looking to get back into legal work. I'd always wanted to come to the Bar—the work is complex, challenging and rewarding. Plus, you get to argue for a living! Having been out of legal practice for quite a while, the course presented a very steep learning curve. Thankfully, the contributors and assessors were extremely generous with their time, knowledge, experience and patience for questions. There was also a fantastic camaraderie within the readers' group. You could always reach out for help and it'd always be available. I suspect we'll be sharing questions, war stories and memes for a long time to come."

Prior to the Bar, David held the position of Senior Investigator at the Victorian Ombudsman. He is reading with Justin Wheelahan. His senior mentor is Peter Rozen QC.

Chong Tsang

"The challenge of becoming a persuasive advocate drew me to the Bar (even during a pandemic). Ironically, the pandemic provided a rare opportunity to think about what came next and accelerated my decision to come to the Bar (one of the few silver linings from the last two years of lockdown). My experience so far has been incredibly positive. The readers' course was incredibly well-run and practical. The judges, barristers and other professionals who gave their time to the course were exceptional, and their willingness to share their experiences and learnings reflected the collegiality of the Bar."

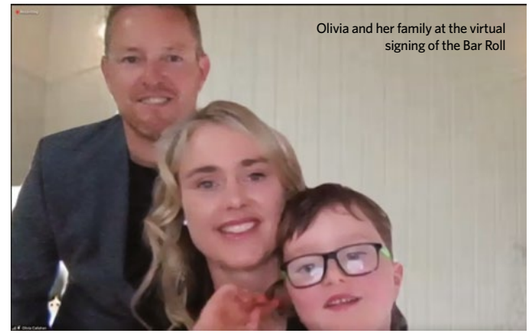
Before coming to the Bar, Chong was a senior associate in the dispute resolution team of King & Wood Mallesons. His plan is to develop a broad practice, so opportunities in commercial, public, and common law would all interest him. As a solicitor, Chong practised in a range of areas including in contract, insolvency, property, and corporate law. He is reading with Paul Liondas. His senior mentor is Philip Solomon QC.

Bryn Overend

"Coming to the Bar has been a long held goal. Doing the readers' course via Zoom has had its challenges, but meeting my fantastic cohort of readers and all the other wonderful people throughout the course has made it worth it."

Prior to the Bar, Bryn held the position of Principal Lawyer, Social Security Rights Victoria. Bryn is keen to practise further in public and administrative law and is "interested in stepping back into criminal law, an area that I have previously practised extensively within." Bryn is reading with Nick Wood. Bryn's senior mentor is John Kelly.

Olivia Callahan


Olivia and her family at the virtual signing of the Bar Roll

"I had always aspired to come to the Bar. I came to the Bar open to whatever would be thrown at me under the challenging circumstances of the pandemic. The silver lining was that it provided me with the opportunity to sit the exam and undertake the readers' course."

Prior to the Bar, Olivia held the position of Senior Policy Officer in Grants, Quality and Assurance with Victoria Legal Aid. She is looking for work opportunities in general commercial law, criminal law, planning and environmental law, common law and appellate law. Olivia is reading with David R J O'Brien (Moya O'Brien). Her senior mentor is Tim North QC.

Paris Lettau

"The independence and collegiality of the Bar called me, as well as what I foresaw to be the fulfilling challenges of practising as a barrister. The Bar's collegiality has exceeded my expectations and is very encouraging, reaching from the readers all the way to senior counsel."

Prior to the Bar, Paris was an in-house lawyer. At this stage, Paris is looking for general commercial work, but is especially interested in opportunities in industrial relations and employment law. Paris is reading with Kate Burke. His senior mentor is Rachel Doyle SC.

Julian Lynch

Julian Lynch and his partner, Claire, at the virtual signing of the Bar Roll

Julian says in response to why he was called to the Bar: "A love of advocacy and writing, a commitment to social justice, and a desire to establish a practice before starting a family. And studying for the Bar was an ideal way to spend time in lockdown too. I thought the online readers' course was a success. While it was a little harder to develop strong relationships with colleagues remotely, it's been wonderful to catch up with them in person now that Melbourne has re-opened."

Prior to the Bar, Julian worked at an engineering consultancy as an in-house lawyer, structural engineer and project manager. He says that "teamwork and camaraderie were highlights of the role." He is looking for commercial and public law briefs, particularly in relation to construction and ADR. He's also curious to explore other areas of commercial law (including intellectual property or tax) and would like to be involved with a few criminal and pro bono matters as well. Julian is reading with J M Shaw. His senior mentor is Albert Monichino QC.

Kate Ottrey

"Now was the right time in my career to come to the Bar, pandemic or none. We had our first child last year, so for us this was a bigger juggle with the Bar Exam and the Readers' Course than the lockdowns have been. I found doing the Readers' Course over Zoom to be a positive experience – learning something new every day and meeting a great bunch of Readers. I could not think of a better way to pass your time during lockdown."

Prior to the Bar, Kate held the position of Senior Solicitor, Office of Public Prosecutions. She is looking for work opportunities in Criminal law – defence and prosecution, employment and IR – especially sexual harassment, bullying and discrimination, and common law including institutional liability and insurance. Kate is reading with Karen Argiropoulos. Her senior mentor is Jenny Firkin QC.

Hamish McAvaney

"Coming to the Bar was a long-held ambition of mine and the lockdowns gave me the time and space to realise that the moment was right to take the plunge—and study for the exam. Coming to the Bar always involves a degree of uncertainty, so why not do it during the middle of a pandemic?"

Prior to the Bar, Hamish was a senior associate at Allens, Melbourne. Before then, he was an associate at Linklaters in London. At the Bar, he is looking to practise primarily in general commercial law and public law. He practised in climate change and environmental law whilst in the UK, so he would be interested in opportunities to rekindle his experience in that area. Hamish is reading with Tom Warner. His senior mentor is Claire Harris QC.

Kate, her daughter Isabelle and partner Dan

Scholarship for the Legal Community

KERRYN COCKROFT (JUDICIAL COLLEGE OF VICTORIA)

AND SARAH ZELEZNIKOW (BARRISTER)

Scholarship for the Legal Community is a project which aims to foster engagement between the legal profession, the judiciary and academia by providing an online platform to access recent pieces of doctrinal academic research. The platform provides short summaries of relevant articles from local and international journals. The platform is intended to help lawyers access the latest academic research, so that they may incorporate that research into their work, including submissions, and, by doing so, support judicial decision-making.

The idea dates back to May 2019. President Chris Maxwell of the Court of Appeal and Professor Matthew Harding of Melbourne Law School had convened a workshop attended by judges, academics, and barristers from Victoria, New South Wales, Queensland and Tasmania, to discuss ways in which the contribution of legal academics to the development of Australian law could be enhanced.

The participants observed that little academic writing reaches the judicial audience; academic writing is rarely relied upon by counsel or cited in judgments. The judges agreed that legal scholarship is indispensable to understand the informing principles of an area of law, and that most judges are receptive to having academic work cited in court. Some barristers spoke about their reluctance to refer to the conceptual framework of the law in their submissions, preferring to take a narrower focus.

The consensus of the workshop was that bridging the divide between the work of the courts and the output of legal academics would benefit both courts and the profession. One solution, proposed by Professor Jason Varuhas, was to create a digital platform which would feature a curated selection of recent academic work in a format easily accessible to judges and legal practitioners.

A 'working group' comprising Justice Maxwell and Professors Harding, Varuhas and Katy Barnett, spent some time searching for funding for the platform. In late 2020, the Judicial College of Victoria offered to host the platform on its website, and Kerryn Cockroft assumed the role of managing editor.

Judicial College of Victoria

Resource/ Scholarship for the Legal Community updated.

Welcome to the latest update in Scholarship for the Legal Community: a selection of curated summaries of recently published academic writing from local and international journals.

Ten new pieces of research across a wide range of legal areas have been added to the collection.

Among this month's highlights:

- read about fiduciary accountability – should the focus be on conflict management rather than conflict avoidance?
- find an analysis of controversies and concerns about the boundaries of stepping stones liability under the *Corporations Act*.
- explore new research on how judges can be misled by unreliable transcripts of indistinct forensic audio.

In the first half of 2021, seven more board members joined the project: Justice Melanie Sloss, Judge Douglas Trapnell, Laurie Atkinson (Director of The Law Library of Victoria), Professor Andrew Lynch (Dean of UNSW Law School), Dr Natalia Antolak-Saper (Monash Law School), and Michael Rush QC and Sarah Zeleznikow of the Victorian Bar.

The platform was launched in early September 2021, and can be accessed at www.judicialcollege.vic.edu.au/resources/scholarship-legal-community. Readers may also email info@judicialcollege.vic.edu.au to subscribe to receive updates from the platform. The platform provides direct access to articles from freely available journals, and subscription journals are accessible through the Law Library of Victoria website for users with a Library account.

While the boundaries of the platform continue to evolve, articles are selected for summary based on their likely utility in assisting advocacy and adjudication, principally due to their doctrinal application. To be eligible for selection, an article needs to have been published in the preceding two calendar years and be of relevance to the work of Victorian courts.

Feedback on the resource and article suggestions are welcomed; please email info@judicialcollege.vic.edu.au.

IMAGES COURTESY OF SBS/ GOALPOST TELEVISION

BAR Lore

Mining for history in

New Gold Mountain

CATHERINE HANNEBERY*

"You are like gods", defence barrister Richard Sewell told a Melbourne jury in 1857, "having the issues so to speak, of life and death in your hands." Sewell was pleading for the life of his client, Hang Tzan, one of two men on trial for the murder of Englishwoman Sophia Lewis (the Lewis case). "The man has a human heart and feelings, and a human soul as precious as the soul of a prince", he implored the jury. And yet.

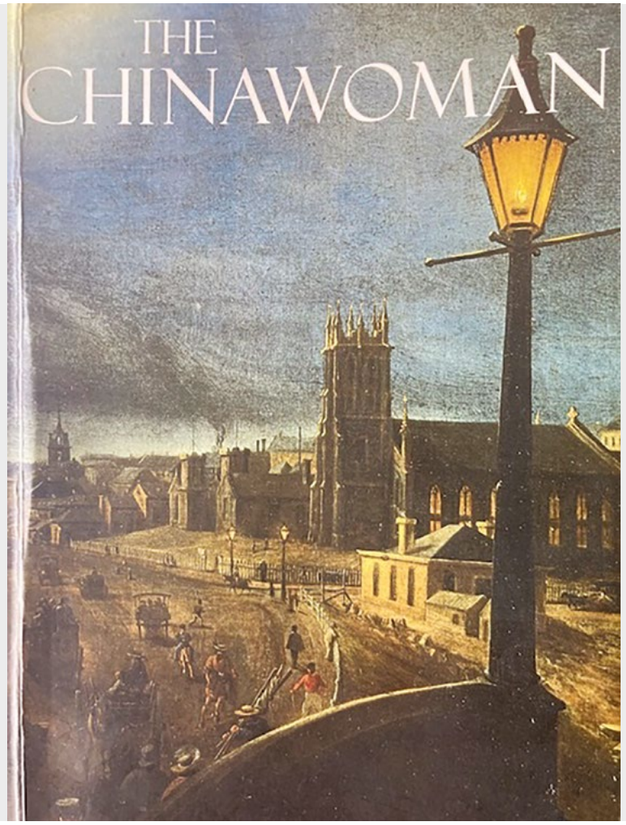
Richard Sewell's defence presents a powerful dissenting voice against populist anti-Chinese hysteria of the day. His rage is palpable as he begs the jury to judge his client by the evidence and to cast prejudice aside. Despite Sewell's best efforts to attack unreliable confessions and the highly circumstantial evidence, the jury returned a guilty verdict against both accused men, Chong Sigh and Hang Tzan.

Richard Sewell and a coterie of other colonial defence barristers did not meet the casting call for *New Gold Mountain*, the new SBS Australian drama. It rankles that their powerful dissenting voices did not make the cut. The series represents a missed opportunity to discern what is different about this period and to distil universal truths.

Intriguing questions about why tainted evidence was led to secure convictions in this case is explored in *The Chinawoman* by Ken Oldis. The book's title refers to the term of abuse applied to the victim, Englishwoman, Sophia Lewis, a demi-mondaine who catered to an urbane Chinese clientele. Her enterprise reflected her interest in Chinese culture, though she was disparaged for monetising this provocation against the status quo.

Ken Oldis, a member of the Victorian criminal Bar (Bar Roll No 3257), died in 2016. His book was reviewed in the Summer 2008/9 issue of this publication. It was awarded the 2009 Victorian Community History Prize. Part thriller, the work examines the intersection of criminal justice and systemic racism against the Chinese community in Victoria in 1857. Containing extensive notes and references, it is a scholarly work exploring the political, socio-economic, cultural, ethnic and legal circumstances under which the Chinese lived and worked in colonial Australia. *The Chinawoman* was also published as an e-book in both Simplified Chinese and Traditional Chinese in November 2012.[1]

The mid-1850s was the moment when the colony of Victoria was poised to double down on an aggressive anti-Chinese legislative program. The murder of Sophia Lewis gave an incendiary charge to the



anti-Chinese sentiment building in the colony. Chinese leaders delivered over two candidates for prosecution, likely in the interests of damage control. They were under pressure of further punitive anti-Chinese legislation at the time.

At the trial, the evidence was murky enough for Justice Redmond Barry to express doubts from the Bench about why two of the prosecution witnesses were not also in the dock. Richard Sewell's full address to the jury, transcribed by the court reporter in *The Age,*[2] is compelling reading for those interested in the shenanigans around the evidence led and admitted in the Lewis case. Hang Tzan and Chong Sigh were sentenced to hang. The appeal petition failed with some finagling by Charles Hope Nicholson, Chief of Detectives.

The confessional evidence engineered by Nicholson against Hang Tzan, lies at the heart of this gothic tale. The man hand-picked for the task was Bendigo headman, Fook Shing. Fook Shing was the detective's star witness, whose evidence was central to the convictions obtained. The tainted evidence appears to have been a collaborative effort between Chinese middlemen and the colonial police—with blood on many hands, the book examines the underpinnings of this miscarriage of colonial justice.

This true-crime inspired a heavily fictionalised goldfields drama in the *New Gold Mountain*, described as an "as-yet untold true story". The series applies the Chinese point of view to the murder of an Englishwoman in 1857 at the height of racial tensions against the Chinese community. The series aim is to "flip the script" on "whitewashed histories" of Chinese gold-seekers. The villains and truth-tellers have been re-cast to match 21st century sensibilities with the effect that history's lessons from this episode are largely obscured. Ultimately, the series averts its gaze from complicated truths and sidesteps the interesting reasons underpinning Chinese collaboration.

The role of Fook Shing in the case exemplifies the problem. Wei Shing, his on-screen persona, is the protagonist of the series. His real-life counterpart was an interesting character with a foothold in both English and Chinese worlds. He served the colonial government as a local "headman." Fook Shing was cornered by Chief of Detectives, Charles Hope Nicholson, into making Faustian choices that cost the lives of two of his countrymen. Later, Fook Shing's appetite for compromise led him to secure the role of Chinese detective in the Victorian Police force. For many decades, he settled for the part of police factotum, Detective third class—alienated from many of his countrymen. Beyond his role in the Lewis case, Fook Shing's story has been examined in scholarly works by Dr Benjamin Mountford.[3]

The television series adheres to the challenges Fook Shing confronts in straddling both worlds in his early career. It positions him as the swaggering anti-hero in the motif of the revisionist western. But his moral ambiguity on television hinges largely on greed. In truth, he was not quite so venal. On screen, his shady dealings with English law enforcers and Chinese comrades reduce him to a hustler.

In a theatrical display at the Lewis committal, Fook Shing ascended to the witness box with his cap on his head and took the Chinese oath: "I am Fook Shing, I must tell the truth. If I do not tell the truth, may thunder kill me and fire come from heaven to burn me up." With this he swept the cap from his head, flinging it across the court to the gallery benches where his comrades caught it.

How and why Fook Shing grassed up his countrymen lies in interesting and nuanced territory. Significantly, the accused men did not belong to his own secret society. His co-operation to secure a suspect confession at Inspector Nicholson's behest, was preceded by collective decisions already made among the secret societies.

Richard Sewell's address to the jury portrayed Fook Shing reductively, as a police jackal. This was an astute pitch to the jury for the purpose of discrediting his evidence, but Sewell knew that the situation was not this simple. Sewell and his learned friend, Charles Dawson, were being paid by a Chinese defence fund—a crowd-funded affair. Curiously, at least one of the witnesses for the prosecution, Lean Appa, a young merchant commissioned by the police to secure admissions, contributed to the defence fund. Sewell quipped in his address to the jury that the chief benefactor behind the defence fund was probably the best-placed person in the colony to testify to Hang Tzan's innocence: "And I repeat, that the man who took the most prominent part in providing for the defence of these unhappy men, is the only one upon whom the slightest reliance can be placed". Sewell was aware of the collective Chinese decisions underlying the result that only two candidates had been delivered up to be tried and that false evidence had been led against them to shield other guilty parties.[4]

There are intriguing aspects to the Lewis case concerning the police use of informers and the application of legal professional privilege that resonate in the recent aftermath of the Lawyer X scandal. Richard Sewell made a vigorous case for excluding some evidence of John Alloo, an 'interpreter' appointed by Inspector Nicholson. Nicholson had arranged to attend the police cells with John Alloo to eavesdrop at Hang Tzan's cell door while he conferred with his defence barrister via an interpreter. Justice Barry listened to the evidence about this trap and agreed with Sewell that his client's legal privilege had probably been compromised. What no-one knew during the trial, was that John Alloo was on Nicholson's secret payroll as police informer.

The case raises other interesting questions about trans-national cultural norms in the administration of English justice. In the end, Sewell was unable to persuade the court that Hang Tzan's first confession had not been given freely. He accounted to the court cultural reasons why Chinese accused may 'confess' instinctively at the earliest opportunity.[5] Sewell's arguments about the unreliability of confessions motivated by culturally ingrained fears fell on deaf ears.

In the end, the prosecution case left the confessional evidence alone and placed reliance on the circumstantial evidence. This was highly inconclusive, some of it unsafe on account of 'planted' evidence incriminating Hang Tzan. With a clinical review of all the evidence led, it strains credulity that guilty verdicts were possible. And yet.

If we are inclined to cast judgement about the deeds of the past, the question arises: how do we understand individual misdeeds and individual acts of betrayal when the guilty verdicts were effectively pre-determined by players higher up the chain of command? Perhaps all we can do is to situate them truthfully in their peculiar individual colonial circumstances. Cherry-picked evidence can never make a claim to authenticity, historical or otherwise.

The British historian, RG Collingwood, said that we study *what man has done* in order to discover *what man is*. It's a deceptively simple idea—to cast an uncensored lens over the past to understand the authentic sum of us, then and now. The object lesson of history is to understand. When we avert our gaze from the whole unvarnished truth and sanitise history to match modern sensibilities, we don't get the benefit of understanding what really happened and why, or reach Collingwood's holy grail, discovering what we actually are, in a collective historical sense, or at all.

The route to understanding this episode in Chinese-Australian history requires a forensic gaze, faithful to the evidence. Television historical fiction needs to square up with historical realities if it is to stake a claim as something more than costume drama.

Richard Sewell's powerful, emotional and ultimately unsuccessful address to the jury lasted an exhausting hour and twenty minutes. In the circumstances, perhaps the last words should belong to him:

> When I consider that one word wrongly spoken, one fact omitted, or one argument wrongly revealed may cost this unfortunate man's life, I confess I am overwhelmed with the weight of the responsibility which has been thrown on me. It is, indeed, my gentlemen, a most painful task for me when I look upon those two creatures [pointing to the dock], in seeing them as they are, and knowing the prejudice which exists against their nation—aliens in language and in heart, in hostility to the Crown, and proscribed by the whole colony—loaded with guilt, or imputations of guilt, which are preferred against their whole nation.

**Catherine Hannebery is a Melbourne Lawyer with an MA in history from the University of Melbourne and the wife of Victorian barrister, Ken Oldis, author of* The Chinawoman.

1 Yunn-Yu Sun, C., Christinesunflower.com (see book review).

2 MELBOURNE CRIMINAL SESSIONS. Saturday, 22nd August, 1857. (Before His Honour Mr Justice Barry.) MURDER OF SOPHIA LEWIS. Trial of the Chinese Murderers. Second Day: The Age, 24 August 1857, p 5. The text is available on the Trove website.

3 See for example, Wilson Mountford, B., *The story of Fook Shing*, https://www.latrobe.edu.au/news/articles/2018/release/the-story-of-fook-shing.

4 Oldis, K., The Chinawoman, Arcadia 2008, pp125-126.

5 In China, confessions at the time could be lawfully obtained by torture: See Note, The Death Penalty in Late Imperial, Modern, and Post Tiananmen China, Alan W. Lepp University of Michigan Law School, Michigan Journal of International Law, Vol 11 Issue 3 1990.

The missing codicils of Dr Samuel Johnson's Dictionary:

A handsome gift from the Inns of Court to honour the Victorian Bar Centenary

STEPHEN CHARLES

1984 was a considerable year in the annals of the Victorian Bar. There had been a running dispute since the 1970s as to when the Bar's Centenary should be celebrated. The decision for 1984 was made after an opinion was obtained from Hulme QC and Merralls QC. They advised that 1884 was the most significant date for the Bar's origin, since on 10 July 1884 there were adopted Bar Regulations governing the conduct of "members of the Bar of Victoria".

1860 and 1871 were discarded, although both years had supporters. The Bar Council decided to act on the joint opinion, disregarding a disgruntled faction which complained that the opinion contributed more to oenology than to the correct identification of the Bar's origins. The Hulme-Merralls opinion will be found quoted in full in the centenary edition of the *Bar News*, published in 1984.

The event was duly celebrated on Monday 5 November 1984, with a dinner at Moonee Valley Racing Club, and was the largest Bar Dinner ever, partly because, for the first (and only) time, partners were invited. The Chief Justice of Australia, Sir Harry Gibbs, spoke, the only element of his admirable speech requiring comment now being that he pronounced the word "centenary" (*sɛntənɛri*) with the stress on the first, not the second, syllable, which was also spoken as 'tin', not 'teen'.

Many in the audience assumed that this was a solecism permitted to a chief justice, and anyway he was a Queenslander. I spoke next, as chairman of the Bar Council. Earlier that day I had actually checked the pronunciation of "centenary", only to find that Sir Harry's was the version preferred by the OED. When I copied his usage several times in my speech, I was subjected to a deal of vulgar abuse from some of the more bibulous elements of the audience, the canard being that I was cravenly attempting to curry favour with the High Court.

One week later a new justice (John Harber Phillips) was first appointed to the Supreme Court later becoming chief justice. Neil McPhee QC was to speak for the Victorian Bar at his welcome, which was fixed on the appointed day for 10am. At 9.58 that morning, there was no sign, in or out of court, of McPhee and the judge's associate was sent to delay the arrival of the judge.

The senior member of the Bar Council present was Alex Chernov QC, who, at 10.10, on the spot and off the cuff, made so admirable a speech that the new judge was said not to have known that anything was amiss, or how near to catastrophe his welcome had come. Our former governor still regards this performance as his greatest, under extreme pressure, but on balance prefers not to be reminded of the occasion. McPhee, who may then have been concentrating on one of those interrogations which gained him the reputation of possibly Australia's foremost cross-examiner, later asserted that (a) he was stuck in a traffic jam on the freeway, and (b) anyway, the welcome was supposed to be at 10.30.

None of these amiable diversions would have merited mention in the *Bar News* at this time were it not for the fact that they provoked Michael Crennan QC into writing (with some assistance from *Hamlet* and *Gerontion*) the following piece (see insert), which appeared at page 36 in the Summer 1984 edition of the *Bar News*.

INNS OF COURT HONOUR VICTORIAN BAR CENTENARY

The absence of representatives of the English Bar at the recent Centenary (sic) Dinner of the Bar caused some adverse comment. In what may be perceived by some as a gesture of reparation, the Inns of Court have presented the Victorian Bar with a handsome gift, described below.

The subject of the donation came to light during excavation of the Gough Square area, north of Fleet Street where, it will be remembered, Samuel Johnson and his team of assistants worked on the great Johnsonian Dictionary. It seems that the Inns of Court have obtained on advantageous terms the financial support of a Saudi Arabian group to erect for an undisclosed figure a new and spacious building on the site of inter alia 17 Gough Square in order to replace the cramped and outmoded accommodation available heretofore to the Bar.

In the course of levelling the site, workmen came across a metal strong-box containing the archaeological lexicographical find of the century: several as yet unpublished sheets of the Dictionary. Whether these sheets form part of Johnson's contemplated but abandoned third supplement or were merely misplaced it is impossible to say. The Syndics of the Oxford University Press have agreed to publish the sheets in facsimile, together with an amended version of each entry with modern examples of usage. The gift referred to above is a handsomely mounted diptych of two of the leaves together with an individually numbered copy of the Press's modern version. The diptych is available for inspection by all members of the Bar in the office of Barristers' Chambers Limited, by appointment. The modern entries are reprinted herewith.

McPHEE (*Makfee*) (origin obscure, possibly Gothic Macfeoan to squat, or Sanskrit maccveeion, a water course).

A. Substantive

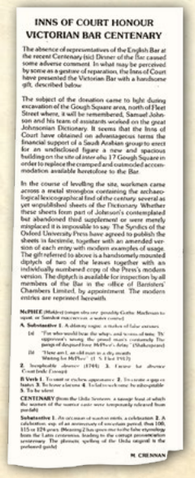
1. A dilatory rogue, a maker of false excuses.
   (a) "For who would bear the whips and scorns of time, Th' oppressor's wrong, the proud man's contumely. The pangs of despised love, McPhee's delay." (Shakespeare)
   (b) "Here am I, an old man in a dry month, Waiting for McPhee". (T.S. Eliot 1917)
2. Inexplicable absence (1744); 3. Excuse for absence Court (vide Essoign).

B. Verb 1. To omit or eschew appearance. 2. To create a gap or hiatus. 3. To leave a lacuna. 4. To fail to welcome, be inhospitable. 5. To be silent.

CENTENARY (from the Urdu Sentenri, a savage feast at which the women of the warrior caste were temporarily released from purdah).

Substantive

1. An occasion of wanton mirth, a celebration. 2. A celebration, esp. of an anniversary of uncertain period, thus 100, 115 or 124 years. (Meaning 2 has given rise to the false etymology from the Latin centennius, leading to the corrupt pronunciation senteenary. The phonetic spelling of the Urdu original is the preferred guide).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M. CRENNAN

The exquisite perfection of Crennan's work was not fully appreciated until the March part of the 1985 *Australian Law Journal* hit readers' desks. At page 129, under the heading "Current Topics", the journal recorded that two centenaries had occurred in 1984, those of the Victorian Bar and the Law Society of New South Wales.


The Australian Law Journal

Volume 59 March, 1985 Number 3

Current Topics

After some laudatory comment on the centenary edition of the *Victorian Bar News*, the editorialist continued:

> The English Inns of Court handsomely honoured the ccentenary by presenting the Victorian Bar with a mounted diptych of two unpublished sheets of a recently discovered set of unpublished sheets of Dr Samuel Johnson's 18th century dictionary, together with an individually numbered copy of the publication by the Oxford University Press containing the facsimiles of the set of unpublished leaves. Having regard to Dr Johnson's close relationship with English and Scots law and lawyers, as described in the note in 58 ALJ 628, this is a wonderful gift to the Victorian Bar. One of the sheets in the diptych contained appropriately the word "centenary", defined as "an occasion of wanton mirth, a celebration".

The generosity of the Inns of Court to the Victorian Bar was happily not exhausted. Michael Crennan's excellent channels of communication with the Oxford University Press resulted in the publication, at page 23 of the Winter 1985 edition of the *Bar News,* of the following, this time aided by *Macbeth* and *Troilus and Cressida*.

AUSTRALIAN LAW JOURNAL ACCOLADE

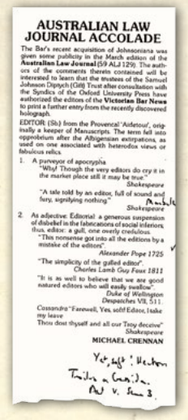
"The Bar's recent acquisition of Johnsoniana was given some publicity in the March edition of the *Australian Law Journal* (59 ALJ 129). The authors of the comments therein contained will be interested to learn that the trustees of the Samuel Johnson Diptych (Gift) Trust after consultation with the Syndics of the Oxford University Press have authorised the editors of the *Victorian Bar News* to print a further entry from the recently discovered holograph.

EDITOR: (Sb.)

From the Provencal "Aidetour" originally a keeper of Manuscripts. The term fell into opprobrium after the Albigensian extirpations, as used on one associated with heterodox views or fabulous relics.

1. A purveyor of apocrypha
   "Why! Though the very editors do cry it in the market place still it may be true."
   — Shakespeare
   "A tale told by an editor, full of sound and fury, signifying nothing."
   — Shakespeare
2. As adjective: Editorial: a generous suspension of disbelief in the fabrications of social inferiors; thus, editor: a gull, one overly credulous.
   "This nonsense got into all the editions by a mistake of the editors".
   —Alexander Pope 1725
   "The simplicity of the gulled editor".
   Charles Lamb Guy Faux 1811
   "It is as well to believe that we are good natured editors who will easily swallow."
   — Duke of Wellington, Despatches VII, 511

Cassandra "Farewell, Yes, soft! Editor, I take my leave
Thou dost thyself and all our Troy deceive."
— Shakespeare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Shakespeare

MICHAEL CRENNAN

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

Back of the lift

Adjourned Sine Die

The Hon Kim Hargrave QC

Bar Roll No 1586

Kim Hargrave, who resigned from the Court of Appeal in October 2020, is the epitome of a fine judge.

Kim's work at the court evidences, and highlights for us all, the importance of integrity, learning, impartiality and diligence in the role of a judge. His work also illustrates the importance of a practical appreciation of the law: in the way proceedings are managed and conducted, and in the development of legal principle.

From his appointment as a judge in 2005, Kim was consistently fair, thorough and courteous. Every party left the court knowing that Kim had carefully considered all the arguments advanced. More importantly, because his reasons for judgment are so logical and clear, every party also understood the basis for the decision he reached—even if every party did not agree with the outcome.

Indeed, his reasons are a model of how judgments should be written. They are considered and crisp, never longer than they need to be. They are expressed in simple terms. They rarely contain quotes from other judgments. Rather, they seek to synthesise and summarise legal principles. Kim's reasons reflect his awareness that legal principles must not only be stated simply but must also be capable of practical application in the case being determined, and more generally. As a result, his judgments are often adopted by appellate courts.

Kim also made an enormous contribution as the principal judge of the Commercial Court from 2013 to 2017. In undertaking this role, Kim was keenly aware that the litigants and their lawyers want commercial disputes to be managed and determined as quickly and efficiently as possible. As a result of his leadership, the Commercial Court became known for its practical and focused approach to the key factual and legal issues for determination. Kim is the first to acknowledge the contribution of James Judd and the other commercial judges to the development and achievements of the Commercial Court.

Notwithstanding his many talents, Kim is both humble and unassuming. Among his judicial colleagues, he has always been considerate and generous in sharing his knowledge and practical experience. He also devoted much time to judicial education, both at a state and national level, focusing on judgment writing. In addition, he played a key role in drafting aspects of the Civil Procedure Act, in particular the expert evidence provisions which allow for more flexible and efficient procedures to be adopted.

In short, Kim Hargrave's contribution as a judge has very much enhanced the development of the law in the state. In doing so, he has also enhanced the standing and reputation of the Supreme Court of Victoria. As a result, he will be very much missed by his judicial colleagues, the legal profession and the community.

THE HON JUSTICE KEVIN LYONS

Silence All Stand

Federal Circuit and Family court

Her Honour Judge Catherine Symons

Bar Roll No 3815

Catherine Symons was appointed to the Federal Circuit Court (now the Federal Circuit and Family Court) on 26 July 2021. She started her career as a solicitor at Russell Kennedy in 2000. In 2004, she was associate to Justice Marshall in the Federal Court.

Judge Symons was born in Melbourne and grew up in Surrey Hills. Her Honour attended Monash University. She completed her masters degree in Florence (and wrote her thesis in Italian) before returning to Melbourne and starting her law degree. Her Honour is also a talented pianist and an accomplished singer. Of course, her Honour is far too humble to tell people any of these things herself.

Judge Symons signed the Bar Roll in 2005, where she read with Melanie Young in Joan Rosanove Chambers. There, her Honour was surrounded by leaders of the public bar, including Justice Debbie Mortimer and Justice Richard Niall. While Judge Symons distinguished herself in administrative and employment law matters, her Honour was ever willing to challenge herself by taking briefs to appear in unfamiliar jurisdictions. From the Supreme Court of Nauru to private statutory tribunals and the High Court, Judge Symons was dauntless. In an era of increasing specialisation at the Bar, Judge Symons' practice was richer for its breadth, not just its depth.

Judge Symons served the Victorian Bar throughout her career. Whilst her Honour will speak to her bemusement at being approached by readers, the fact is she was a sought-after mentor. She was a member of the Industrial Bar Association and ultimately served as its senior vice president. She was also secretary to the Migration Bar Association, a practice area where Judge Symons made a substantial contribution. Judge Symons' great skill as an advocate was in the measured and logical building of an argument. Judge Symons was a model of contemporary practice: precise, efficient and courteous. Her Honour saw every brief as an honour and her commitment to accuracy and authenticity won her the respect of her peers, the confidence of the decision-makers she appeared before, and the loyalty of her instructors. Judge Symons' advocacy style was direct and insightful.

Judge Symons is a fiercely loyal friend. Her Honour does not make acquaintances, only lifelong friends. Her Honour is sincere. Her Honour is compassionate. Her Honour listens deeply and is incapable of making assumptions or rushing to conclusions.

Judge Symons' courtroom will be welcoming and gracious, as her Honour always is. The Federal Circuit and Family Court will be enriched by her Honour's contribution, which will be enduring and substantial. Her Honour's family and friends are elated at this most worthy appointment and wish Judge Symons satisfaction in service as a judge of the Federal Circuit and Family Court.

EMILY LATIF

His Honour Judge Jonathan Forbes

Bar Roll No 3678

Jonathan Forbes was appointed to the Federal Circuit Court (now the Federal Circuit and Family Court) on 23 July 2021. He brings to the role considerable experience both as a member of counsel and as a solicitor in employment and industrial law, and his appointment has been warmly welcomed.

His Honour grew up in Mt Waverley and attended a local primary school, before attending Wesley College, where he became school captain.

He attended Monash University to study law and on graduation, he was articled at Phillips Fox.

In 1987, he took up employment as a solicitor in the employment law team at Freehill Hollingdale and Page, which was then the leading firm representing employers in industrial disputes. He became a partner at the age of 29. Whilst working at Freehills, he managed teams dealing with major industrial cases, including the Airline Pilots' dispute in 1989. Many of the younger lawyers that he mentored have gone on to successful careers as counsel .

His Honour took a considerable step and risk in leaving an established partnership and going to the Bar in 2003, where he read with Tim Ginanne (now Justice Ginnane) and Marcus Clarke (now QC).

His Honour had a busy practice at the Bar, being briefed in all facets of industrial and employment law, including discrimination law. He appeared regularly in the Fair Work Commission and its predecessors, Federal and State courts and VCAT. He acted as counsel for some of Australia's largest public and private employers. In 2020, he was named in the *Australian Financial Review* best lawyers list as the leading Melbourne lawyer in labour and employment law.

A passionate interest in motor cars (including racing them) led to his Honour becoming a member of the Australian Motor Sport Appeals Court. Passionately interested in sport, he was also a chairman of the Swimming Australia Integrity Panel Tribunal, a role which arose from his three children's participation in swimming at an elite level. He was also a member of the Football Federation Victoria Appeal Tribunal.

As if all that was not enough, his Honour completed a Master of Business Administration at the University of Melbourne in 2010.

In addition to his interest in motor sport, his Honour is a keen road cyclist and the owner of numerous bikes, each of which apparently has unique and indispensable properties. He has followed his interest by riding extensively in Europe.

His Honour brings a wealth of legal and life experience to the court. That, combined with his calm and modest demeanour, means that he is well suited to take up the challenges presented by a court exercising broad jurisdiction, including family, migration, bankruptcy and employment law. Clearly, his Honour enjoys a challenge and, based on past experience, is certainly up to this one.

HIS HONOUR JUDGE ALISTER MCNAB

His Honour Judge Patrick O'Shannessy

Bar Roll No 2626

Judge Patrick O'Shannessy's appointment to the Federal Circuit Court in September 2020 after a distinguished career as a family law barrister appears to be conventional. But there is nothing, in reality, that is conventional about Patrick O'Shannessy.

Born in 1957 and raised on a wheat farm on the flat plains surrounding St Arnaud in Victoria's Wimmera, Pat attended local schools by school bus then Salesian College as a boarder and finally did his HSC at St Arnaud High School.

Although the study of law and economics at Monash University was of some interest to Pat, at this point he had more pressing distractions, including socialising at the Notting Hill Hotel, antique and classic cars, the Geelong Football Club, and his wife to be, Keryn.

Pat's heart still lay in the country, so he returned to St Arnaud after completing his degrees to work as an articled clerk, and then solicitor, with the law firm of Rolf W Breisch. Two events unfolded during this time that saw Pat grab the attention of the St Arnaud townsfolk. The first was Pat's involvement as solicitor in what was to become a landmark occupier's liability case that went on appeal to the High Court of Australia. The second was the casting of Pat as the central character "Dave" in the St Arnaud Theatre Company's production of "On Our Selection" by Steele Rudd. Suffice to say, there were rave reviews about the performer playing the lead role.

Venturing back to Melbourne, Pat joined David Grace and Sue Macgregor at Grace and Macgregor Solicitors and narrowed his legal focus to criminal law and family law under their combined tutelage. He continued this focus when called to the Bar in 1991, reading with David Brown (now David Brown QC).

In 1997, Pat took leave from the Bar for six months to work for the Western Desert Land Council in Port Hedland, Western Australia, with his wife Keryn and their four children. Pat was greatly moved by the Indigenous people he met and worked with during this time and believed strongly in their land rights cause. Pat kept his hand in with family law though, flying back from Port Hedland to each Albury circuit of the Family Court.

Returning to Melbourne, Pat resumed his practice at the Bar and took it to the next level. He enjoyed a reputation amongst his peers for meticulous preparation, extraordinary knowledge of case law and superior advocacy skills. It was no wonder then that he commenced receiving briefs in some of the most complicated and longest running trials being held in the family law jurisdiction at that time and was appointed silk in 2018.

Pat was also well known amongst his colleagues for his approachability and willingness to assist and support. Junior members of the family law Bar, in particular, were the beneficiaries of this largesse. Pat mentored 12 readers during his time at the Bar and all attest to his warmth and generous spirit.

Mind you, after a detailed discussion with Pat, you not only walked away with some focused legal analysis and relevant cases to support your argument, but you also had amongst your notes the top price paid for a Merino ewe lamb at the most recent Wycheproof sheep sale, the outlook for this year's Wimmera wheat harvest, and the distinguishing features of the 1961 Studebaker Lark motor vehicle.

There is no doubt that Pat will make an immense contribution to the Federal Circuit and Family Court as his knowledge, passion and approach to life are far sighted and in no way limited by convention.

Pat has always been supported in his work and endeavours by Keryn and their four children, Aidan, Tristan, Bridie and Xavier. He is also the proud grandfather of five grandchildren.

BRUNO KIERNAN

Federal Court

The Hon Justice Helen Rofe

Bar Roll No 3496

On 12 July 2021, Helen Rofe was appointed to the Federal Court.

Justice Rofe graduated from the University of Melbourne with a Bachelor of Science in 1988, a Bachelor of Laws (Hons) in 1992 and a Master of Laws in 1995. Justice Rofe was admitted as a legal practitioner to the Supreme Court of Victoria and the High Court of Australia in 1993 and began her career as a solicitor at Sly & Weigall (now Deacons). She practised as special counsel at Arthur Robinson & Hedderwicks (now Allens) from 1994 and commenced as a senior associate at Blake Dawson Waldron (now Ashurst) in 2000.

She was called to the Bar in 2001, where she read with Bruce Caine QC, and took silk in 2014. She had two readers: Clare Cunliffe and Campbell Thompson. In her time at the Bar, she specialised in science- and technology related matters. She has significant experience in representing clients in government and in the pharmaceutical, agricultural, mining and manufacturing industries.

Of particular note, in her time at the Bar, Justice Rofe appeared in *Ariosa Diagnostics, Inc v Sequenom, Inc* (a case which tested the limits of patentability in relation to genetic diagnosis), the long running *Sigma v Wyeth* litigation (which resulted in the first assessment of damages on an undertaking for damages in the context of pharmaceutical patent litigation, changing the landscape of patent litigation), *Multigate Medical Devices Pty Ltd v B Braun Melsungen AG* and *Pfizer Overseas Pharmaceuticals v Eli Lilly Company & Ors*.

Her excellence was recognised by Chambers, Best Lawyers and Doyles Guide.

Justice Rofe was junior vice president of the Victorian Bar Council in 2021 and was the president of the Intellectual Property Society of Australia and New Zealand from 2007 to 2009, as well as heading List A.

Justice Rofe was one of the founding members of Emmerson Chambers, the first intellectual property specialist floor at the Bar, and she helped to establish its culture as an inclusive and diverse centre of excellence.

As a practitioner, Justice Rofe was notable for her intellectual rigour, forensic skills, grace under pressure and good humour, and for her ability to engage with all perspectives of every issue in a fair and open-minded manner. She was also notable for her longstanding friendships with the solicitors she had worked with before she came to the Bar, the solicitors who briefed her, and the barristers she worked with. She was a wonderful mentor not only to her two readers but also to other junior barristers and junior solicitors, and was extremely supportive to all those who worked with her. She also modelled work life balance, with her ability to raise two children, run and paddleboard, and sit as a board member, despite her demanding work schedule. Justice Rofe was also a strong advocate for diversity, as a member of the Bar's Equality and Diversity Committee and in her own practice.

As Justice Rofe's first reader, I was privileged to learn an enormous amount from her, not only about the essential skills involved in being a barrister (drafting pleadings, preparing witnesses, cross-examination and crafting submissions), but also about the usefulness of maintaining serenity, the importance of collegiality, the value of a strong work ethic, and the emollient powers of kindness. She was a wonderful role model and embodies the best qualities of the Bar.

Justice Rofe will be much missed at the Bar but is a welcome addition to the Bench.

CLARE CUNLIFFE

Supreme Court of Victoria

The Hon Justice James Peter Gorton

Bar Roll No 3058

James Gorton grew up in Hawthorn in a loving and successful family. His mother, Sue Gorton, was a family lawyer for many years and his father, Robin Gorton QC, was a leader of the Common Law Bar until his retirement in 2015.

His Honour is naturally gifted at many things. He attended Trinity Grammar, and his early life was dedicated to sport, excelling in cricket, football, basketball and athletics. While at Trinity College, at the University of Melbourne, he was awarded the intercollegiate sportsman of the year. He excelled academically both at school and university. He still plays competitive A-grade open basketball but is, he says, "hanging on by the skin of my teeth".

In 1992, his Honour commenced articles at Blake Dawson Waldron (now Ashurst). We met on the first day of articles and shared a room. I quickly became familiar with his deadpan sense of humour. It was on full display in the articled clerk video, in which he had a starring role, including when he stuck his head into a bookshelf in the library and declared: "I've had my head in these books for ages!" He subsequently specialised in commercial litigation, working closely with the erudite partner Geoffrey Gibson (who later returned to the Bar).

In 1995, he left Blake Dawson Waldron and went to England. He worked for the government corporation British Nuclear Fuels Limited, managing and instructing English and American lawyers in an international bankruptcy.

He was called to the Bar in 1996. We were in the same Bar readers' course. He read with Robin Brett QC. His Honour initially undertook a broad range of commercial work. He then quickly developed a substantial common law practice. Apart from his tremendous forensic skills, this was also due to the promotion by his clerk, John Dever: "Brief Jamie, he's Robin's son!"

He was regularly briefed by TAC and WorkSafe and also appeared in cases against them. He had a broad trial, advice and appellate practice and became a counsel of choice in the Court of Appeal. He advised and acted for the Commonwealth in cases of injury sustained in immigration detention. He had a reputation for honest and fair dealing. He had two readers, Melanie Baker and Megan Fitzgerald. He was appointed a silk in 2011 and, like his father, became one of the leaders of the Common Law Bar.

His Honour's written submissions were succinct and carefully drawn. His oral submissions were direct and to the point. He always found a compelling point to make. He was courteous and never rude or

overbearing. His sporting prowess continued at the Bar, playing in various teams, including the Bar football team. He was awarded best player twice.

His Honour did not work late in chambers, preferring to go home so that he could engage in all of the family activities with his wife Nicole Nabout, an actor, and twins Jones and Lola. He often then worked late at night. His Honour has many interests, but his love and commitment to his family is paramount.

He very much enjoyed the Bar, especially the times he spent with his father and with his close colleagues, including Neill Murdoch QC, Chris Winneke QC and Andrew Clements QC. Lunchtime was never wasted; he enjoyed hearing about his colleagues' cases and vigorously exploring them in detail.

Upon his appointment to the Supreme Court of Victoria on 15 December 2020, his Honour moved into his new chambers at the court and then promptly took a break over January. During this well-deserved break, he was diagnosed with Hodgkin's lymphoma and immediately began an intense course of treatment. This was obviously a great shock to his Honour and his family, friends and colleagues. During this time, he continued to work when he could and delivered his first judgment on 19 March 2021. Happily, he has responded very well to the treatment.

Due to the COVID-19 pandemic, his Honour's swearing in at Government House was delayed. We were sworn in on the same day on 19 May 2021 (just over 29 years from the day we first met as articled clerks) together with the Hon Justice O'Meara.

His Honour will make a substantial contribution to the work of the court. He is clever and knowledgeable and has a keen sense of justice. I wish him much success and enjoyment!

THE HON JUSTICE RICHARD ATTIWILL

The Honourable Justice Mandy Fox

Bar Roll No 3154

The journey from Spain to Timbuktu in an old Pajero is long and arduous, far more so than the journey across Lonsdale Street from the County Court to the Supreme Court, but they are both trips that Justice Mandy Fox has undertaken, the latter most recently on her Honour's elevation to the Supreme Court on 13 August 2021. That journey may be short, but it has come after a long and successful career as a barrister, silk, and judge of the County Court.

Having completed her secondary schooling at Mac.Robertson Girls' High School, and having 'got the marks', her Honour studied law and arts at Monash University, finishing with honours in both. Her childhood ambitions of being an architect had been left behind. Not a big fan of moots and public speaking, she was at first ambivalent about a career in the law, and very occasionally reflected on that distant prospect while spending a year after graduating travelling in India, Nepal and the Middle East. Her Honour came back to articles at Phillips Fox (now DLA Piper) and discovered that the practice of criminal law suited her best.

Her Honour was admitted to practice in April 1995. She was then employed as a County Court judge's associate and experienced the inconveniences of the old County Court building, as well as the patience, common sense and kindness of Judge Duggan, who has always been a good mentor. His Honour attempted to dissuade his associate from taking six months off for another stint in India with only $1,300 in the bank, but on her Honour's return (still with $300 in her pocket) he was the grateful beneficiary of some fine Indian cooking (vegetarian) on circuit.

On signing the Bar Roll in November of 1997, her Honour was fortunate to be mentored by the legendary Brian Bourke, one of the finest criminal law advocates of any generation. Under his guidance she was in demand immediately and appeared regularly in contests in the Magistrates' Court, impressing with her thoroughness and attention to detail. Her Honour was briefed to appear with Stephen Kaye QC in the Linton Bushfire Inquest and ended up with two clients of her own in that proceeding, as well as being briefed in a large discovery exercise for a tobacco company, cooped up with Matt Collins and others in a demountable above the floor of their client's Moorabbin factory, waiting for Thursday which was menthol day.

Her Honour was diligent and hard-working at the Bar and appeared both for the prosecution and the defence in criminal trials in the County Court and Supreme Court. She was in demand as a junior to the leading criminal silks because of her work ethic and also because she was (and still is) very good company. She appeared in royal commissions and coronial inquests, and once remained briefed while her leader Phil Priest QC was sacked. Her Honour won the trial without him.

Justice Fox enjoyed her time at the Bar. She contributed in many ways to its life. She taught advocacy in the Solomon Islands and Port Moresby and was on a number of committees, including the Ethics Committee. Her Honour had three readers: Evelyn Goldberg, Lucy Line and Adam Chernok and mentored many other younger (and sometimes older) barristers.

Her Honour also enjoyed her time away from the Bar, travelling on a shoestring, adventuring, or skiing wherever she could, often in Japan. She took a year off in 2006. She has always been able to balance her life, rspective and her sense of humour.

Her Honour was appointed to the County Court in May of 2018 and enjoyed her time there with many judges with whom she had shared chambers and worked closely over her time at the Bar. The same is now true of the Supreme Court, where her Honour will be warmly welcomed.

COLIN MANDY SC

The Hon Justice Catherine Button

Bar Roll No 3986

Catherine Button QC was appointed to the Supreme Court of Victoria on 27 June 2021.

Catherine graduated from Melbourne Law School in 1997 and was awarded a Rhodes Scholarship to undertake postgraduate studies at Oxford University. There, she completed a BCL and a PhD. She worked for the Law Commission in London, before returning to Minter Ellison where she had previously completed her articles. She then signed the Bar Roll on 24 May 2007 and read with the late Peter Fox. He is said to have claimed that he was best known for Catherine having read with him. She had four readers herself: Roshena Campbell, Tom Barry, Laura Hilly and Andrew Roe.

Catherine developed an enviable practice at the commercial bar. She took silk in 2018 after only 11 years, and after doing so promptly gave the lie to observations about leading juniors becoming junior silks at the bottom of the pile. That was not her lot. She transitioned from leading junior to trusted silk with ease; and from being a safety net for her popular and busy silks to being a safety net for her juniors.

Being briefed as one of her juniors could be sobering. Catherine had the knack for asking questions about the very issues that you felt that you hadn't quite worked out or, even worse, paid less attention to than you know you should have. Juniors and instructors would sometimes give each other a heads up that Catherine was going to call in order to get into the right headspace for it. Similar techniques to maximise the prospects of navigating her questions from the bench will need to be developed.

But if you needed anything of her she'd always give you her time. She would notice if you were going through a rough patch, and be understanding about it. And she could banter with the best of them.

Catherine had high standards and instilled them in others by her example. She was an excellent barrister. She might still prove to be an excellent farmer (slightly outdated, but the last report received was that she had over 20 head of cattle). She will be an excellent judge.

CHRISTOPHER TRAN

The Hon Justice Stephen O'Meara

Bar Roll No 3194

Justice Stephen O'Meara was not the captain of his school, Norwood High School. He was not captain of rugby. He was not a Cadet Under Officer. He did not even win the scripture prize. But he was a top debater and participated in an Australia-wide debating team in the ACT with Richard Attiwill, now Justice Attiwill.

The team bombed, but his Honour did not.

His Honour commenced his legal career as an associate to Justice John Keely of the Federal Court of Australia. He then undertook articles at Sly & Weigall before working as a solicitor at Arthur Robinson Hedderwicks (now Allens Linklaters).

His Honour came to the Bar in 1998, reading with Mark Dreyfus QC, now Shadow Federal Attorney-General. His Honour practised primarily in common law, coming under the dubious influence as junior to such barristers as J.L. Sher QC, R.J. Stanley QC, Jeremy Ruskin QC, David Beach QC (now Justice Beach of the Court of Appeal) and Michael Wheelahan QC (now Justice Wheelahan of the Federal Court).

As a trial junior, his Honour's cross-examination style was usually mild but always penetrating. It is amazing to think that on one occasion his leader, R.J. Stanley QC (himself one of the great common law cross-examiners), had to restrain his Honour, who was cannibalising a witness, with the words "steady on now".

His Honour took silk in 2011.

His Honour was a brilliant and persuasive advocate, frequently appearing in the Victorian Court of Appeal, often for institutional defendants such as the Victorian Workcover Authority and the Transport Accident Commission, but also on behalf of injured plaintiffs.

His Honour appeared in the Kilmore and Murrindindi class actions, which followed the Black Saturday bushfires. He was counsel assisting at the coronial inquest into the 2017 Bourke Street events and the Victorian royal commission into mental health.

His Honour acted for Premier Daniel Andrews at the Victorian Hotel Quarantine Inquiry conducted by Justice Jennifer Coate.

His Honour had a number of forays into the High Court, in such cases as *Stuart v Kirkland-Veenstra*, *CAL (No. 14) Pty Ltd v MAIB*, *Maurice Blackburn Cashman v Brown* and *TAC v Katanas*.

His Honour was appointed a judge of the Supreme Court of Victoria in May 2021 to the acclamation of the profession and especially those who practise in common law. His Honour confessed that for the first two or three weeks as a judge he suffered an identity crisis, although not sufficient to warrant the granting of a certificate for serious injury, pursuant to the relevant section of the *Workplace Injury Rehabilitation & Compensation Act* 2013.

Thereafter, and unsurprisingly, his Honour has transmogrified into an excellent judge, already delivering lucidly written and very firm judgments such as *Shahid v Alpha Trading Engineering Pty Ltd* and *PCB v Geelong College*.

Alas, it is clear that the usual tricks that barristers try out on judges will not work on Justice O'Meara.

We congratulate his Honour on his richly deserved appointment.

JEREMY RUSKIN QC

BACK OF THE LIFT

The Hon Justice Richard Attiwill

Bar Roll No 3039

Justice Richard Hugo Muecke Attiwill was appointed a judge of the Supreme Court of Victoria on 18 May 2021. He is a terrific appointment. He is energetic, clever, hardworking and practical. His work ethic and strong values are no doubt due in part to his parents, Professor Peter Attiwill AM, who was, until his retirement, a botanist at the University of Melbourne, and Judy Attiwill OAM, who has long been involved in supporting programs for survivors of family violence. He is married to Andrea, a wine merchant, and is father to Thomas and Harry.

Richard has always embraced life with energy. I first met him in 1992 when we shared an office as articled clerks at what was then Blake Dawson Waldron. Richard at the time was living in a room at the All Nations' Hotel in Richmond and was a big presence in a small office. He filled it up with statues and other artworks that managed to be both unconventional, yet also unstylish. That takes a rare eye. You see that still in his chambers today. Richard's enthusiasm and good humour ensured that all the articled clerks had a wonderful time. He, along with a much-missed colleague Peter Nugent, created, for the first time, an articled clerks' video for the Christmas function, thereby imposing that additional burden on each generation of articled clerks for the following decades.

Before articles, Richard was educated at Mullum Mullum Primary, Yarra Valley Grammar, Melbourne Grammar, and then Monash University. He debated at school and then for Monash, where his team competed with great success at multiple Australasian and world debating championships, including making several finals.

Richard, after some work in medical negligence at Blake Dawson Waldron, moved in 1994 to what was then Allens Arthur Robinson, where he practised in commercial litigation. We then did the Bar readers' course together in 1996. Richard read with David O'Callaghan, now of the Federal Court. Richard was, immediately, very successful and developed in the subsequent years an extremely broad practice across commercial and public law. His industry and friendly demeanour assured that this was so. His attention to detail was second to none. He also found time to volunteer at community legal services, and to perform significant public interest matters, such as the Heather Osland case that went twice to the High Court.

Throughout, Richard also contributed to the broader Bar. He became the acting assistant honorary secretary of the Bar in 1998, and subsequently the honorary secretary, and signed the various letters that that job required with distinction for several years. He then served on numerous other committees, and even spent some time as the editor of this publication, where he had previously appeared as the anonymous restaurant reviewer 'Schweinhaxe'. He was mentor to Bruce Cohen, Nigel Evans, Andrew Downie, Daniel Bongiorno and Fiona Spencer. After taking silk in 2013, he was often retained by the government (or one of its component parts) in significant inquiries such as the bushfire royal commission, the Hazelwood mine fire inquiry and the recent quarantine inquiry.

Richard also contributed heavily to Dever's List, where he will be much missed.

Richard and I shared chambers for several years at Aickin Chambers. He is a very good friend with a wonderful sense of fun, but also has an appreciation of the importance of the work that he does. He will make a wonderful judge.

THE HON JUSTICE JAMES GORTON

County Court of Victoria

Her Honour Judge Angela Ellis

Bar Roll No 3853

These reflections were provided by Magistrate Tara Hartnett, a close friend and colleague of Angela Ellis, as recorded by Mark Gibson.

As a teenager, Angela had her heart set on studying law. She was fascinated by courtroom dramas on television and in the movies. She also had a flair for history and languages. She studied Arts/Law at Monash University, majoring in Italian.

In 1998, she attended the Leo Cussen Institute in lieu of articles. During this time, she worked as a paralegal at Slater & Gordon. Angela was admitted to practice on 4 November 1998.

Once admitted, she worked at Galbally & O'Bryan, under the watchful and caring eye of Peter Ward. This gave her the opportunity to witness courtroom dramas first-hand. One such case was the 1999 Boris Beljajev trial, instructing Nick Pappas QC and Julian McMahon (now QC). The brief consisted of hundreds of lever arch folders. Not only did Angela get on top of the material but Julian McMahon recalls the helpful analysis Angela performed of all the evidence and the detailed charts Angela prepared, some of which went to the jury and were referred to in the closing address. Angela felt it a privilege to be able to observe counsel at both ends of the Bar table perform at such a high level.

This 18-month trial provided a steep learning curve for Angela and was the springboard for other notable cases to come. Between November 2000 and August 2005, Angela worked for the Commonwealth Director of Public Prosecutions, first as a legal officer, then as a senior legal officer. This change in professional perspective—from defence work to prosecuting tax and social security frauds—helped her develop a well-rounded legal skill set. Her ability to process complex legal problems and expeditiously provide a well-reasoned and correct answer was a skill that had well and truly developed by this stage. Her ability to solve problems quickly and efficiently was a trait which influenced her decision to become a barrister.

Angela came to the Bar in 2005, signing the Bar Roll on 10 November. She read with Jim Montgomery who went on to become Judge Montgomery, a former judge of the County Court. This was a special time for Angela and she learned much from Jim about the art of advocacy. Her clerk Paul Holmes ably supported her throughout her career at the Bar. She joined Gorman Chambers and enjoyed the collegiate atmosphere of those chambers. Angela and Tara shared chambers together for approximately 10 years, beginning in 2007 up until Tara's appointment as a magistrate for the State of Victoria in 2018. During those years, despite Tara doing mostly defence work and Angela doing a lot of prosecuting, they were opposed only once.

Tara had the opportunity to observe Angela at close quarters over a long period. Tara was impressed with Angela's ability to juggle her domestic life that included two young children at home as well as the rigours of complex voluminous trial briefs. This meant many early mornings and late nights after the children had gone to bed, preparing for court the next day. Preparation was her weapon. Family was her mainstay. Chocolate and diet coke her saviour.

Tara describes Angela as a wonderful person with whom to share chambers. She never complained about her work and simply found a way to get things done efficiently and productively. Most of all, Angela's sharp wit and self-deprecating manner provided welcome relief at the end of a hard day in court. In 2018, Angela was appointed a crown prosecutor for the State of Victoria and joined Crown Chambers. This gave her the opportunity to spread her wings by appearing in the Supreme Court, the Court of Appeal and the High Court, where she excelled and really came into her own.

Angela is a passionate Essendon barracker and an avid race goer. She revels in going to the football and the races when she can. It is the social side of both recreational pursuits that she enjoys the most. Before COVID-19, she was an avid traveller, with the swimming pool of one popular Singapore hotel being a regular favourite for Angela and her family.

Angela has many qualities as a person. Those qualities include her humility, as she tends to understate her profound abilities, her loyalty to those for whom she cares, her work ethic, her ability to multi-task, her common sense and no-nonsense attitude, and her ability to 'read the room'. These qualities will stand her in good stead as a County Court judge. Above all Tara and Angela are and always have been good mates. Tara encapsulates Angela Ellis in three words: a "bloody good woman".

MAGISTRATE TARA HARTNETT AND MARK GIBSON SC

His Honour Judge Marcus Dempsey

Bar Roll No 3526

When I first came to David Ross Chambers from the reader's course, I read with David Hallowes SC. From the first day, however, Marcus also took me under his wing. I remember Dave saying it seems similar to having a village raise a child; perhaps it takes a chambers to raise a barrister?

I don't know about that, but I do know that I was not the only barrister to be taken under his wing. Marcus had three-and-a-half readers: James Anderson, Mark Sturges, Jonathan Barreiro, and Christin Tom. But he had a huge coterie of young barristers and solicitors he mentored, assisted, advised and just encouraged. I know, because they would troop through the room I came to share with him with pleasant regularity.

The members of David Ross Chambers would stop by to run things past him several times every day. All of them could expect his trademark precision and insight. And younger barristers from other chambers would make time to come and see him, meet him for coffee to discuss something or make the trek up to test their thoughts a final time.

One lawyer who used to instruct him when he was in VLA Chambers told me he really valued the way Marcus would talk to him about the forensic decisions he had to make and discuss the difficulty of the call. It was only much later he realised that Marcus had long before made the decision; he just wanted to show him how to think through a problem.

It's perhaps no surprise that Marcus took such an interest in mentoring. He came, fresh off the boat from Tasmania, and got a job in the 'snakepit' at the back of the Pica and Clareborough office in St Kilda. With this sudden introduction, and the right amount of benign neglect from his employers, he quickly took to the job with real aptitude. He moved to work for Simon Northeast, then the Victorian Aboriginal Legal Service and Victoria Legal Aid. Along the way, he found himself mentored by eminent members of the criminal bar, like Duncan Allen, who moved his admission to practice, and Mark Gamble, with whom he read in 2002. He now joins both of them on the Bench.

As an advocate, Marcus combined the most important attributes a criminal barrister can hope for: painstaking preparation; a clear-eyed and unshakeable grasp of the real centre of gravity of a case; and compassion and empathy.

BACK OF THE LIFT

Marcus did the hard work on hard cases. More than most, he dealt with some of the most heart-rending cases we see through the courts. He did it with sensitivity, skill, courage and diligence. And the results he achieved for some of the most marginalised members of society were always the right ones —or better. On a suitable day, he would obtain astonishing results.

Marcus' diligence, however, has not always been a source of admiration from his fellow criminal lawyers. His written work was always impeccable, and he formed the habit early on of collating and organising folders of submissions and materials for County Court plea hearings. 'Dempsey folders', as they became known, found much favour with the court. As best as can be determined, Marcus appears to have been the patient zero of the written outline of County Court plea submissions, since enshrined in the relevant practice note.

Out of court, Marcus had an entirely different set of characteristics. Besides his generosity to younger barristers, there was always a scandalously irreverent sense of humour that revealed itself with Saharan dryness. His effortless satire of any legal figure who crossed his way was uncanny and all the more impressive for his John Clarke-ian ability to distil and channel the amusing (or demented) about a person without attempt at mimicry.

Marcus's qualities and idiosyncrasies will make him a truly excellent judge. His skill, diligence, compassion and courage will all be brought to bear to the benefit of the community and the justice system. Most judges, of course, have most of these in some measure. The secret ingredient that will make Marcus a particularly good judge is a little rarer: humility. Marcus will worry about getting things right. A lot. That's why he probably will.

David Ross Chambers will miss him, but we take pride in his appointment. He will be a wonderful judge.

LUCIEN RICHTER

Her Honour Judge Kellie Blair

Bar Roll No 3527

Kellie Blair was one of the hardest working, gutsiest and most talented trial advocates at the criminal Bar. She tirelessly fought trial after trial, for clients mostly from VLA or VALS. Ever humble, unbelievably lovely, but a fierce advocate for the rights of her clients, who were often people who had had few people in their corner before Kellie. She saw the humanity in every client and the need for courageous defence counsel in every matter she did, regardless of the sadness or horror that a case might reveal.

Kellie grew up on a sheep and wheat farm in the Wimmera, where the paddocks are large, the seasons are often too dry, and the work is hard. In primary school she decided she would be a barrister.

Kellie graduated from Monash University in 1989 and went to work for Pat Dwyer. Until her appointment, she had regular clients who were subsequent generations of clients she had represented at Pat's office.

By the early 1990s, Kellie became an advocate appearing daily in courts all over the State. She was one of those rostered on as a duty solicitor at Preston, Heidelberg, and Broadmeadows. On one busy day, she noted seeing 25 clients and doing 16 pleas.

In the 1980s and '90s, there were few female solicitor advocates. Kellie was following in the tradition of criminal defence legends such as Liz Gaynor and Julie Sutherland. After Pat's, Kellie worked at firms in Bendigo before joining VLA in 1994 and then in 2000 (along with Nola Karapanagiotidis) moved to Leanne Warren's firm.

Kellie and Nola came to the Bar together in 2002. Kellie read with Len Hartnett in Gorman Chambers (then in the old Equity Trustees building). In those days, there were few women in criminal chambers. By the time Kellie was appointed, she had been quietly leading from the front as a solicitor advocate/barrister for 30 years. She leaves a much larger Gorman Chambers, now with over 30 female barristers—all of whom have looked up to Kellie, many of whom have directly learned from her.

Kellie has not just set the example in her dedication to the law and her clients, but also in her commitment to striving for balance with her life outside the law. Notably, together with her partner Enzo (when they are not making their famous salamis!), Kellie has for many years pursued a regime beyond the limits of mere mortals. Kellie can run vast distances and cycle endless kilometres, all in a morning's exercise.

Kellie will bring to her position as a judge a deep understanding not just of the law but also of the great difficulties that many people face in our community. Gorman Chambers will miss her terribly, but Kellie's combination of intellect, experience, calmness and compassion will ensure she is an exceptional judge.

JULIAN MCMAHON AC SC
RUTH SHANN SC

His Honour Judge Stewart Bayles

Bar Roll No 3308

Stewart Bayles built a career that saw him become one of the most well-loved and respected members of the Criminal Bar. He regularly appeared in the Supreme Court as leading or sole counsel in murder and other homicide trials, and in conviction and sentence appeals before the Court of Appeal. Many appearances were for people who could not afford private legal representation.

He studied arts at the University of Melbourne, with honours in classics and archaeology, and then completed his law degree at La Trobe University. After completing the Leo Cussen practical training course, he went straight to the Bar, during which time he also obtained a Master of Laws from Monash University.

Stewart was an incredibly persuasive jury advocate. He always respected the intelligence and wisdom of the jury. He engaged jurors through a style that was simultaneously empathetic, analytical and conversational. He had a very powerful quality as a criminal defence barrister: juries liked him. He always treated his opponents with courtesy and respect. For those reasons alone, he will make an outstanding judge.

He developed a particular skill at cross-examining expert witnesses, founded by his intellectual curiosity and critical thinking. He was also deeply valued by instructors, due in no small part to his openness, calmness, and collaborative approach. He has always valued the opinions of others and listened carefully before reaching his own decision on how to best run a case.

Stewart was a valued member of Equity Chambers and Coldrey Chambers, and then a co-founder of Brian Bourke Chambers. He was always an amiable, kind, and patient presence in chambers, with a seemingly effortless leadership style. Throughout that time, he mentored countless barristers, including four readers. No matter how busy, whether appearing in a murder trial or a conviction appeal, he would always make time for junior members of the floor.

Stewart was involved in several important Court of Appeal judgments. In *CNK v The Queen*, Stewart appeared as Lachlan Carter's junior, where they successfully submitted that the sentencing consideration of general deterrence does not apply to child offenders. That principle continues to apply to this day, including in sentencing for Commonwealth offences, and has contributed to innumerable children receiving sentences primarily focussed on their rehabilitation, which has been described by the Court of Appeal as one of the great objectives of the criminal law.

Stewart appeared at the trial in *Bray v The Queen*. The accused was convicted, and Stewart unsuccessfully argued on an interlocutory appeal that the representations of a deceased complainant were inadmissible where she could not be cross-examined at trial. However, Stewart then appeared on the appeal and the conviction was quashed in *Omot v The Queen*. This was on the basis that while the evidence of the complainant was admissible, the prosecution had failed to exclude a reasonable doubt and the conviction was unsafe.

Those judgments demonstrate, not only Stewart's dedication to the rule of law and fairness, including the right to a fair trial of persons accused of serious crimes, who attract little public sympathy, but also his deep commitment to his clients and willingness to see cases through to their conclusion.

Stewart was also involved with Liberty Victoria, including as a supervisor with what was then known as Young Liberty for Law Reform, which saw him impart his knowledge and enthusiasm for the criminal law to students and young professionals engaged in law reform projects. He has always made time for others.

Stewart is a loving partner to Anusha and an adoring father to Mala. Despite his busy practice, he has maintained wide interests in visual art, music, and literature. And while there is a tinge of sadness that Stewart's door in chambers will no longer be open to his friends at the Bar, he will enter judicial office and this new phase of life with the deep admiration and support of his colleagues.

MICHAEL STANTON

Her Honour Judge Sharon Burchell

Bar Roll No 3686

How best to sum up the indomitable Sharon Burchell, who was appointed as a judge of the County Court on 22 June 2021?

There is her razor-sharp intellect. Amongst other accolades, her Honour was the recipient of a scholarship to study at Murdoch University and the winner of the Sir Ronald Wilson Prize in Law and the Vice Chancellor's Commendation in Academic Excellence Award. During her time at the Bar, her Honour excelled as an advocate and developed an extremely busy practice in administrative and commercial law. It is said that the transcript of one particularly effective cross-examination of an expert witness later formed part of the Mallesons training materials for junior lawyers. In 2014, her talent was recognised with the *Lawyers Weekly* Women in Law Junior Counsel of the Year award.

Since her appointment as a judicial registrar and now a judge, her Honour has used that razor-sharp intellect to slice straight through to the core of issues. Many a barrister has learnt to their peril that yes, her Honour has pre-read all the material and yes, her Honour has formed some preliminary views and yes, her Honour does have some curly questions to ask about the prospects of success of that prevention defence.

There is her Honour's phenomenal work ethic, which frequently sees her sending emails at 5am, working through lunch and juggling multiple cases at once. Her Honour is best described as indefatigable. As a barrister, such was her dedication to her cases that she was known to sleep on the couch in chambers. In court, counsel may find they barely have time to sit down after concluding closing submissions before she delivers a no nonsense, crisp and perfectly structured ex

tempore judgment. If she reserves her decision, judgment will be delivered within days, weeks at most. On a recent occasion, evidence and submissions were filed on a Friday, judgment was delivered the following Monday.

A quick search reveals that in the four months since she was appointed a judge, she has published no fewer than 14 written decisions. She has taken over the running of the Building Cases List and is not only reforming Commercial Division procedures, but is also working on protocols to assist VCAT to address the backlog of building cases. Her prodigious, no-nonsense work ethic has given rise to a new nickname. Around court, she is simply known as "the Hammer".

There is her grace and poise in court, punctuated by the occasional funny comment (apparently she sits through lunch not because she is a workaholic, but to "keep her figure"). All delivered deadpan, while her poor associates struggle to resist the urge to roll around on the floor laughing.

There is her raised-in-Perth toughness, which saw her leaping between two tow truck drivers about to come to blows in a particularly heated mediation. After that, those two tough men of action were putty in her hands. Respect.

There is her down-to-earth nature. Her Honour can relate to anyone, from tow truck drivers to High Court judges. She is an ardent follower of pop culture, particularly TV, and likes nothing better than yarning about the instant noodles on *MasterChef* or the latest episode of *The Voice*. She is the type of person who knows everyone who is anyone—although sometimes she perhaps doesn't know them quite as well as she thinks, as was demonstrated when she proudly boasted that she knew Justice Kevin Bell, the owner of the winery she was visiting … to Justice Kevin Bell.

But the true essence of Judge Burchell is as a generous, kind and loyal friend and mentor to so many people, myself included. That couch in chambers—which gave her Honour much-needed rest as a barrister—is still in her chambers in court and has borne witness to many warm chats with colleagues, associates and friends in need of a supportive ear, or advice about their career or personal life. Her Honour's door is always open and her generosity in her support of her friends is legendary. Her Honour also has an uncanny ability to seek out treats in court to facilitate those warm chats. If there is a morning tea anywhere in court, her Honour's associates will be sent with a plate to surreptitiously spirit away any spares. There is nothing more special than sitting chatting with her Honour in chambers, her with a glass of prosecco or Veuve, sharing a plate of her ill-gotten gains.

Welcome to the Bench, Judge Burchell. Here's to the next 20 years.

HER HONOUR JUDGE MY ANH TRAN

Her Honour Judge Anna Robertson

Bar Roll No 3501

Judge Anna Robertson is universally known as a kind and generous person, invariably good humoured and always with a huge smile on her face. Her Honour has a wicked sense of humour and an infectious laugh. She was an excellent barrister: incredibly dedicated to her clients and diligent in her preparation. She is calm and composed, and always conducts herself with great dignity—except when it comes to maintaining her balance.

On one notable occasion, Anna was talking to a partner at the law firm where she then worked, doing her best to impress with her knowledge of the issues in the case at hand. Gaining in confidence as the conversation progressed, she went to lean on the door of the partner's office—but missed the door frame completely, collapsing in dramatic fashion onto the floor of the office, blaming the shoes she was wearing. But no one was fooled.

Her Honour has fallen over other places—notably into a pothole in William Street while walking with some silks to a celebratory lunch. Alarmingly, she even overbalanced while at the Bar table—slipping from view while delivering a closing address, causing the judge at the time to enquire if she was still there. It's not surprising that her close friends have confided that she is not very adept at disco dancing.

Any job description for staff for her Honour will need to include the fact that they must have the skills to help her navigate uneven ground, holes in the road, wayward cords, steps, all types of furniture, the Bar table and moving door frames. Thank goodness the old court at Bendigo is being remodelled!

Her Honour always had a tendency to speak her mind and to be vocal about injustice. As a young Catholic schoolgirl at St Augustine's primary school in Kyabram, she was an early trailblazer for women's rights. Her Honour couldn't understand why only boys were allowed to be altar servers. She decided to take matters into her own hands and petitioned the archbishop by writing a letter to plead her case to be able to join the boys on the altar. To her Honour's great irritation, her letter fell on deaf ears. However she was very pleased when, about a decade later, the Church finally allowed women to be altar servers—no doubt in part because of the efforts that young women like her made to draw attention to these issues.

Her Honour has been described as an adventurer; as the eldest of six children, she was the leader of the pack, an organiser of everything. She lived her early years like a character from Enid Blyton's Famous Five: organising camps, bike hikes, picnics, treasure hunts and games with all the neighbourhood children. She was an accomplished swimmer and achieved great success in the pool, especially at backstroke. It is reported that in the pool she was very fond of dunking her friends under the water and nearly drowning them—a kind interpretation may be that she was conducting an experiment to see how resilient they were.

She was also a terrific tennis player and used to travel across the state as a junior to social tennis tournaments with friends during school holidays, taking to the court in places such as Kyabram, Deniliquin and Euroa. It helped that her childhood home featured a spectacular manicured grass tennis court to rival the lawn courts at Kooyong!

Her Honour was a Monash mooting champion, with her mooting partner, Charles Thompson. As a result of her success, she and Charlie were chosen to represent Monash in the Australian Law Students Association mooting competition in Canberra.

To arrange some accommodation, Charlie called his dad who lived in Canberra. He told him that Anna was coming to Canberra representing Monash in a prestigious mooting competition. Charlie's dad, not being familiar with competitions involving mock court, thought that Charlie had mentioned an activity involving two people that rhymed with "mooting" and said, "I assume that means you'll be needing the double bed."

Her Honour was part of an inseparable foursome while growing up. Katie O'Brien, Aly Purdy and her younger sister Genevieve were most helpful with providing some little known stories about her Honour's escapades. Katie said that her Honour was the smartest kid at school "without any doubt." Katie says she spent a lot of time trying to be better than her Honour academically, but never succeeded. Katie has thanked her Honour, however, for improving Katie's own academic performance by osmosis, merely because she sat next to Anna at school.

The other three in the foursome have all confirmed that Judge Robertson is known for being a gentle and kind person, but that she does have some faults, including a highly competitive streak. It can be revealed that this was never more evident than in her quest to crush Michael Sivarella, who was her academic nemesis in primary school. She made it her mission never to let poor Michael win at anything, and he never did.

Her Honour was so obsessed with school that she used to gather with her friends and siblings after school to play a game called "School". She was the teacher. No one else was allowed to be the teacher. She was the boss and the rule maker. For some reason—perhaps because it was all done with such good nature—everyone put up with her. She was reportedly very strict and would make the others do activities—including actual school work—after which she would discipline them, including by handing out detentions. She is said to have marched around with a ruler. Her Honour used to threaten that badly behaved children would be put into the rubbish bin in the incinerator area at school. It's clear from this experience that her Honour will have no trouble dealing with recalcitrant litigants.

Enquiries did not reveal whether Michael Sivarella has recovered from being the target of her Honour's competitive streak. However, her Honour now seems to be at it again, this time wanting to be the judge who hears the most cases in one week. The common law judges at the County Court are very concerned that her Honour is going to insist they participate in a game called "Court" after work. No one is sure whether her Honour still marches around regularly with a ruler. However, one thing that is sure is that her Honour's judicial colleagues are unlikely to be quite as compliant as her poor friends and siblings were, all those years ago.

HER HONOUR JUDGE SARA HINCHEY

Judge Pardeep Tiwana

Bar Roll No 4226

Pardeep Tiwana was appointed a judge of the County Court of Victoria on 22 June 2021.

His Honour hails from the United Kingdom, graduating in 1992 with first class honours from the University of Wolverhampton. He was awarded the Sweet and Maxwell prize for the best law graduate and the Cassell Scholarship and Hardwicke Scholarship to study for the Bar at Lincoln's Inn in London. He was admitted to the Bar of England and Wales in 1994. His Honour's mentor, Patrick Thomas QC, now Judge Thomas says that his Honour is "decent, principled, hard-working, sensitive, highly intelligent, and gifted with good judgement", and "They couldn't have chosen better".

At the Bar in England, his Honour appeared regularly for the Crown and defence in trials, a testament to his impartiality and fairness. A highlight of his early days as a junior was an acquittal in a 'three header' murder, for which his Honour was bestowed with a 'red bag', the traditional award for the junior who contributes above and beyond the call of duty in a serious case. The bag was inscribed with the word 'Assassination' on the outside, hardly befitting his Honour's gentle, courteous and gracious demeanour, yet an apt description of his Honour's advocacy skills and intellect.

In 2006, he took a leap of faith, leaving a highly successful practice in Birmingham to migrate to Australia with his young family. His Honour made his mark with dignity, humility, sheer hard work and natural acumen.

After signing the Victorian Bar Roll, he was soon recognised for his strong, engaging advocacy and swiftly became a specialist in sexual offending. 'Acquittal' became his second name.

Friday, 11 September 2015, was an auspicious day. His Honour appeared in *R v Dalgliesh*. Life would never be the same for sentencing in this country or for his Honour. Against the backdrop of Dalgliesh's horrific crimes, the court was transfixed by his Honour's enchanting plea in mitigation beginning with the loss of everything Dalgliesh possessed in the tragic 2009 bushfires. His Honour led the late James Westmore in the Court of Appeal where the sentence was upheld and subsequently fought

an epic battle, as junior to Paul Holdenson QC, in the High Court. The Director's appeal was allowed. *Dalgliesh* remains a landmark decision for sentencing in Australia, propelling his Honour's reputation and leaving an indelible mark on the criminal law landscape.

He subsequently appeared in the Royal Commission into Aboriginal Deaths in Custody in Darwin, before being swept to the Bench.

At the Victorian Bar, his Honour was highly regarded for his encyclopaedic knowledge of the law, meticulous preparation and willingness to impart his knowledge and time to barristers and law graduates, including lawyers from Papua New Guinea and Samoa.

His Honour's reader Cameron Gauld speaks poignantly of an occasion which aptly exemplifies his Honour's character. Cameron faced the unenviable situation of his client being re-arrested the same night that his client was released from custody following a successful day in court. Cameron inadvertently became a possible witness and promptly rang his mentor 'in a spin'. His Honour calmly advised him how to address his predicament, assured him that his actions were sound and said, "And if that doesn't work, I will take over and represent the client pro bono for as many appearances as it takes". His Honour is calm, considerate, and sensitive to the plight of others. His compassion knows no boundaries and he exceeds the call of duty to assist others.

His Honour was a long-standing, respected member of the Criminal Bar Association committee—instrumental in chairing numerous continuing professional development seminars, a member of the diversity and equality committee of the Victorian Bar and an accredited advocacy coach who regularly taught during the Bar readers' course.

His Honour is proud and humbled to be celebrated as the first Sikh judge in Victoria. His Honour said, "I think my appointment should be looked at as an inspiration to migrants from diverse backgrounds: if you work hard, you can excel in your chosen fields".

His Honour has a great love of cricket, umpiring in the Box Hill Reporter District league, and a penchant for snooker. His love for the law and cricket is only exceeded by his devotion to his Sikh faith and his family. Indeed, on the day of his Honour's appointment, the celebrations spanned Africa, Australia, England and India commencing with festivities in Kot Kalan Village near Jalandhar Cannt, Punjab, his ancestral home, where the villagers distributed sweets.

May his Honour delight in his appointment and have a long, satisfying, distinguished service as a judge of the County Court.

SHIVANI THAMOTHERAMPILLAI (PILLAI)

Her Honour Judge Nola Karapanagiotidis

Bar Roll No 3541

On 10 August 2021, Judge Karapanagiotidis, the first Greek Australian woman to be appointed as a judge of the County Court of Victoria, was sworn into office.

Her Honour was admitted to practice on 3 May 1999 and signed the Bar Roll in 2002. By that time, she had already acquired hard earned experience in the practice of criminal law, having worked as a solicitor at Leanne Warren and Associates, and at Victoria Legal Aid. She had also volunteered at the HIV/AIDS Legal Centre, Darebin Community Legal Centre, the Tenants Union and the Refugee Immigration Community Legal Centre and had worked at the Coburg Community Legal Centre.

Her Honour had practised in migration/refugee law and administrative law as part of her volunteer work with the Asylum Seekers Resource Centre, an organisation founded by her brother Kon.

Diligent preparation, close attention to detail and keen insight into the issues were immediately apparent in her Honour's practice. Compassion for all and a determination to achieve a fair outcome marked her Honour's treatment of clients and other participants in the courts.

By 2007, her Honour's strengths in conducting challenging cases saw her briefed for one of the accused in the committal and trial of *R v Benbrika and ors*, where a number of accused were tried for being members of a terrorist organisation. Her Honour conducted a meticulously prepared and impassioned defence on behalf of her client.

In the years that followed, her Honour went on to appear in the County Court, Supreme Court and Court of Appeal in numerous cases on trial and appeal, both alone and with leaders.

Obviously not every case can be won. In one particularly difficult and distasteful multiple count child sex trial, her Honour, after a taxing day in court, was de-briefing with her former mentor who, upon hearing the state of the evidence, unwisely predicted that the jury would not return an acquittal on a single charge. Although the accused was convicted of several of the charges, her Honour's conduct of the case saw the jury allow the accused the benefit of the doubt in respect of the others. That case served as a reminder to never underestimate her Honour's ability and determination.

Whilst conducting her successful and busy criminal law practice, her Honour continued to provide extensive pro bono assistance for refugees and asylum seekers in her ongoing work at the Asylum Seekers Resource Centre. There are many refugees now living in Australia who successfully navigated the administrative and legal hurdles for those seeking visas or residence and citizenship thanks to her Honour's assistance.

Obviously, her Honour possesses thorough knowledge and understanding of the principles of administrative law, and this together with her formidable advocacy skills saw her appearing successfully in the Federal Court as well as the High Court in cases such as *Plaintiff M 13 v Minister for Immigration* and *Citizenship, FTZK v Minister for Immigration and Border Protection* and *M7 v Minister for Home Affairs*. In 2010 and 2013, her Honour was awarded the Sue Crennan prize for pro bono work and in 2015 she was awarded the John Gibson Award. In the same year she took up a position on the steering committee for the Law and Advocacy Centre for Women. She also served two terms on the Bar's human rights committee.

Her Honour has always been generous with her time. Angela Sharpley, who read with her, remembers the dedication her Honour showed as her mentor and recounts her Honour's efforts in helping in the preparation of her early appearances.

As her Honour embarks on this next chapter of her career, the qualities which distinguished her as counsel are sure to stand her in good stead. Those who appear before her will experience her knowledge and insight and understanding of the law. The community will be the ultimate beneficiaries of her Honour's patience, diligence, and respect for all.

JOHN LAVERY

Federal Circuit and Family Court of Australia

Her Honour Judge Jennifer Howe

Bar Roll No 4277

Jennifer Howe was appointed to what is now the Federal Circuit and Family Court of Australia on 6 April 2021. Her welcome, on 23 April, fell between Melbourne's lockdowns, and was notable for the large numbers that attended and the warmth with which her Honour was celebrated. Among those who attended were her father, most of her eight siblings, her beloved husband Dave and all four of her children. The pride that her family took in her appointment was clear for all to see.

After her admission to legal practice in 2005, Judge Howe worked in the commercial dispute resolution team at what was then Phillips Fox. Commercial law was not to her taste, and she changed tack to become a lawyer in the family violence pilot program at Heidelberg Magistrates' Court. That very demanding position whetted her appetite for advocacy, and she signed the Bar Roll in 2010.

For the next 11 years, her Honour developed a splendid reputation amongst both barristers and solicitors for her ability to manage the most psychologically and factually complex cases. She was admired by her instructors for her ability to show compassion and understanding for even the most demanding client, and by judges for her ability to identify what was at the heart of each dispute and craft a solution. She developed a strong regional practice and understanding of issues facing clients in rural areas, and relished the experience of the busy circuits in Bendigo and Mildura. Unsurprisingly, she excelled as a mediator.

Her Honour was the long-standing secretary of the Family Bar Association, a role in which she was described by Geoff Dickson QC as "truly brilliant, devoted and tireless". Preparing the minutes of meetings was not her forte, to the extent that when minutes were circulated, committee members assumed that her email had been hacked and contained a virus. However, she excelled at arranging events that brought all the branches of the profession together, particularly the Barefoot Bowls, which are attended by judges and solicitors as well as barristers, and which are now a fixture in the family law calendar. Her presence on the committee is much missed.

She also became the person to whom the whole family law Bar would go with concerns, requests, news of someone needing support or having fallen ill, or just when they needed a shoulder to cry on or a good laugh. One colleague found that anxiety about an appearance before the Full Court was marked by a bottle of whisky left on their desk labelled "Open in case of emergency". Somehow, her Honour also managed to find the time to sit on the board of two local schools as well as teaching regularly at the Leo Cussen Institute.

News of her Honour's appointment was met with mixed emotions from her colleagues. She will be an exceptional judicial officer, which is some comfort to those of us who are sad to see much less of her than when she was based in Owen Dixon East. Her friends and colleagues wish her a long, rewarding and interesting career as a judge.

VBN

His Honour Judge Jonathan Davis

Bar Roll No 2833

Jonathan Davis QC was appointed to the Federal Circuit Court on 1 April 2021.

Judge Davis was born in Edinburgh. His family moved to Adelaide when he was a young boy and subsequently to Melbourne, where he undertook his secondary schooling at Wesley College. It is no wonder that he developed a lifelong love of travel.

At Wesley, his Honour distinguished himself in arts, and in debating, as he did at law school, successfully representing the University of Melbourne in national and international debating competitions.

His Honour completed his articles at Corrs Chambers Westgarth and then worked as a solicitor at that firm

for around two years before being called to the Victorian Bar in 1993, reading with Simon Whelan QC.

Judge Davis quickly developed a broad and busy practice at the Bar, practising especially in commercial litigation, professional negligence, and employment and industrial law. Even in his early years at the Bar, he regularly appeared, unled, in trials opposed to senior silks.

During his time at the Bar, his Honour appeared in a number of high profile and complex cases, perhaps most notably *CFMEU v Boral Resources (Vic) Pty Ltd*, in which he appeared in the High Court as leading counsel for the attorney-general for the State of Victoria, in a case concerning whether a corporate party accused of contempt of court can be ordered to provide specific discovery.

For his last 10 years or so at the Bar, Judge Davis and I both had rooms on level 32 of Aickin Chambers, and I greatly enjoyed his companionship in chambers. The most triumphant that I ever saw him in chambers was not after one of his court victories, nor after his appointment as senior counsel in 2015, rather it was on the day his hero, Bob Dylan, was awarded the 2016 Nobel Prize for literature. For several days after that announcement, a verse from *Idiot Wind*, which he had typed out, adorned the door of his Honour's chambers (from the *Blood on the Tracks* album).

It was clear to me in chambers that his Honour had both a brilliant legal mind and a prodigious work ethic, both of which I am sure will serve him well in the next chapter of his career, as a judge.

ANDREW CLEMENTS QC

Other Appointments

Deputy President Richard Wilson

Head of Civil Division of VCAT
Bar Roll No 3232

Deputy President Richard Wilson was appointed as Head of Civil Division of the Victorian Civil and Administrative Tribunal on 27 July 2021.

Richard was a member of the Victorian Bar for almost 24 years, having joined in January 1998 after periods working as a commercial litigation solicitor with Freehills and Arthur Robinson & Hedderwicks. He studied law at the University of Adelaide and gained a master's in law from the University of Melbourne in 2006.

As a barrister, Richard practised in business, company and human rights law, appearing in a wide range of matters covering corporations law and regulation, directors' duties, banking and finance, insolvency, contracts and commercial tenancies. He was also often engaged to advise clients and act in cases involving the Victorian Charter of Human Rights.

Richard's contribution to the legal profession, however, extended well beyond his professional role as an outstanding advocate and was defined by his long-standing and deep commitment to human rights and access to justice.

During his time at the Bar, Richard was a notable member of various committees. He was the chair of the Victorian Bar pro bono committee, a member of the Bar's health and wellbeing committee, Indigenous justice committee and human rights committee, and the secretary of the Commercial Bar Association (public law section) and International Commission of Jurists.

Concurrently with those roles, Richard was the driving force behind many initiatives at the Law Institute of Victoria. He served as a member of LIV's administrative law and human rights section executive committee (chair, 2013–15); charter of rights committee (chair, 2011); reconciliation and advancement committee (chair, 2011–13); reconciliation action plan working group (co-chair, 2010–12); human rights committee; and access to justice committee.

In 2012, Richard was awarded the LIV president's honorary award in recognition of excellence and outstanding contribution made within the legal profession, and for his commitment to human rights and administrative law. In particular, he was honoured for his work in community consultation as co-chair of the LIV's reconciliation action plan and chair of the Indigenous issues and Aboriginal reconciliation committee, as well as for his work in shaping the legal profession's approach to mental health. Announcing the award, then LIV president, Michael Holcroft, said: "Richard embodies the highest ideals of service to the law and giving back to the community". Richard was also a recipient of a certificate of service at the 2014 LIV awards.

Richard was a board member of Justice Connect (formerly known as PILCH) from 2012 to 2021 during which time he chaired its finance audit and risk committee. He was also an inaugural director of List G Pty Ltd.

As a barrister, Richard viewed pro bono work as a professional responsibility. He was committed to the organised delivery of pro bono legal services as a means to link clients in need to the capacity existing throughout the legal profession.

As chair of the Victorian Bar pro bono committee from 2018 to 2019, Richard led the development of protocols governing the provision of direct pro bono services to the Supreme Court of Victoria, the Court of Appeal and the County Court of Victoria. This work streamlined the provision of direct pro bono services by Victorian barristers, leading to improved access to, and administration of, justice for members of the Victorian community and the courts. Richard's work, and the referral models he developed, have provided the foundation for the development of further direct pro bono schemes with other jurisdictions.

As a leader and mentor, Richard was unfailingly generous with his time and constructive in his advice and guidance. Richard's new role at VCAT will provide him with many opportunities to continue to advance access to justice for unrepresented litigants. We have no doubt that he will be a great asset to the tribunal, and we wish him all the best for this next stage of his legal career.

MEREDITH SCHILLING

Jack Rush

Bar Roll No 1286

Rear Admiral the Hon Jack Rush RFD QC RAN was appointed to the position of Judge Advocate General of the Australian Defence Force (JAG) in July 2021, beginning the next stage in an already long and memorable career.

Jack grew up in Elmore in Victoria's north-east, the son of a bank manager and a secondary school teacher, attending Xavier College and then Monash University. His gift for argument and advocacy was evident early, being made captain of debating at Xavier and named the 1969 best debater in the Victorian Independent Schools. However, his sporting ability was not of the same calibre, playing both cricket and football at school, but not getting close to either the first XI or the XVIII.

After articles, Jack went straight to the Bar, reading with Brian Bourke. Bourke was apparently reluctant to take on Jack as a reader, having just finished with his third reader. However, Jack persisted and the two went out to lunch to celebrate. Over lunch, Jack asked Bourke whether he had any interest in politics. Bourke said that he had run for pre-selection for the Labor Party in 1964. Jack responded, "Well that's very interesting. I ran against Clyde Holding for the Liberal Party. My slogan was 'Rush for Richmond'."

"Christ," Bourke is said to have responded. "If I'd known that, I would never have taken you as my reader." However, the pair got over this, and have been the best of friends ever since.

Jack signed the Bar Roll on 2 September 1976. A proud Irishman, that he signed the Bar Roll the day after the Republic of Ireland lifted its state of emergency that had been in force since 1939 is likely to be a coincidence. He began his career at the Bar with a mix of Magistrates' Court matters. He also picked up some serious criminal briefs before the County Court. As Jack's career progressed, he began to receive more civil work, and was a staple of the Warrnambool and Hamilton Circuits.

His time at the Bar was marked with distinction, with one of his instructors describing him as the finest trial lawyer he had ever instructed, noted for his impeccable preparation, often in the form of incredibly detailed notes, made in very tiny handwriting. Jack was able to distil complex concepts into simplified elements such that juries could easily understand the issues. To some, it was known as 'the Jack factor'.

In 1987, he appeared with David Ashley in the *Simpson v Midalco Pty Ltd* asbestos mesothelioma case in the Supreme Court of Western Australia. Simpson was the start of a number of cases which saw an award of damages to plaintiffs in asbestos cases.

In 1990, he appeared in *PQ v Australian Red Cross Society, Commonwealth Serum Laboratories and the Alfred Hospital*. In that case, the plaintiff had contracted the HIV/AIDS virus from contaminated blood plasma. The case was hard fought. It was one of the longest civil jury cases in Victoria. The cross-examination of the Commonwealth Serum Laboratories expert witness, a Swiss professor, was undertaken by Jack. He came out of the gate quickly, "Who paid for your fare to come to Australia?"

Solicitors have described him as a calm man, never losing his temper, even urbane. But then, in *PQ*, Jack Forrest noted that those seated behind Rush could observe his anger rising through the redness at the back of his neck, dubbed the 'Rushometer' by those watching. Sher QC, following one interruption, turned to Dick Stanley and told him to "Put a muzzle on your junior!" Dick Stanley responded quickly, "Mr Rush is not a dog!" It became a consistent theme. Rush was described as "nipping at the heels of the Swiss expert", "barking objections" and "coming back and back to this same point like a terrier". Indeed, at one point, a sketch of a can of dogfood with the caption 'Jack's Lunch' was passed around the Bar table. Later in the week, a cartoon of Jack as a cross between a boxer and a poodle appeared on the Bar table.

He was bestowed a red bag for his work in *PQ*.

Jack took silk in 1992. On the day this was announced, he was given his silk gown by Justice Ashley. Jack wore the gown until his own judicial appointment.

From 1994 to 2000, he worked on the 'Stolen Generation' case, a trial that ran ultimately for 106 sitting days. There were some 700 claimants. Jack prepared in his usual dedicated fashion. He took the time to inform himself about Aboriginal customs and traditions, and organised a workshop so the entire legal team could be informed.

Jack took an active role in the legal profession, serving at various times on the Bar Council, the Law Council of Victoria, and the Australian Bar Association Council. He first served on the Bar Council in 1981 in the junior category. He served for another two years in 1989 in the middle category. In 1993, he began an impressive 13-year run on the Council, with 10 of those years on the executive committee. He was also chairman in 2003, and during that time, he had the single privilege of opening the new Essoign Club.

As a silk, his juniors recall that he gave them substantial responsibility, but was always there to support them. In 2009, he assisted the Bushfire Royal Commission. Rachel Doyle, one of his juniors, recalled that:

> Every time one of us was leading a tricky witness, Jack would appear with his own work in his arms and silently slide into the seat next to you while you were on your feet. He did not say a word unless you sought help or seemed to be floundering. And then he would assist with a word or a note —maybe a nod of encouragement— or a quick smile.

So too did Jack mentor his young instructing solicitors, ensuring to involve them with the work, teaching them, and praising their work. To all, he was known for his good sense of humour.

Jack was appointed to the Supreme Court of Victoria in 2013, at that point having been a member of the Victoria Bar for 37 years, including 21 years as Queen's Counsel.

Rush took an active role as a member of the Royal Australian Navy Reserve. He appeared in a 2005 inquiry into the crash of an RAN Sea King Helicopter in Indonesia that ran, on and off, for about 12 months. He similarly appeared in the 2007 inquiry into the crash of a Black Hawk on HMAS *Kanimbla* that ran for about four weeks. In 2008, he participated in the inquiry into the 1941 loss of HMAS *Sydney*.

One of his old instructing solicitors put it best: "there is only one Jack Rush".

PAUL PANAYI

Other Appointments

Magistrates' Court of Victoria

His Honour Magistrate Rohan Lawrence
Her Honour Magistrate Cecily Hollingworth
Her Honour Magistrate Cynthia Lynch

Vale

The Hon Francesco (Frank) Saccardo QC

Bar Roll No 1738

Frank was born on 24 March 1955. He died on 16 September 2021 at the age of 66.

Frank's parents immigrated to Australia from Italy shortly before the outbreak of the Second World War. At that time, they were both children. Frank's mother was able to further her education in Australia and undertook that education to intermediate level. However, Frank's father, like so many migrants at that time, did not have such an opportunity. He joined the workforce at age 14. He worked most of his adult life as a waiter, working for some 40 years at The Latin restaurant. Frank's mother found employment as a secretary.

Frank was incredibly proud of his Italian heritage. He was actually born "Francesco" but his parents called him Frank. In his later years, he changed his name on various legal documents to ensure they accurately reflected his true name and his Italian heritage.

Frank's parents wished him to have every available opportunity in life. That meant, in their view, the pursuit of a private education. Although the family was placed under financial pressure in doing so, Frank was sent to the best school which his parents could afford, St Patrick's College in East Melbourne. It was a small Jesuit school with an outstanding academic record.

When Frank was in year 8, the school announced, at very short notice, that it was to be closed. Indeed, the year of the announcement was the last year of the school's operation. To deal with the outcry that arose from the decision, which inevitably displaced children from their chosen path of education, the school created a fund that enabled parents to choose any Catholic school in Victoria to which they could send their children. The fund would then pay the difference in fees between the fees that would have been paid at St Patrick's, and those that would be charged by the new school for the balance of the student's school life. So it was that Frank transferred to Xavier College to complete his secondary education.

Frank was an outstanding sportsman at school, excelling in rowing and Australian Rules football. At his judicial welcome on 13 February 2009, Frank reflected on his sporting pursuits and academic endeavours while at Xavier College. He said:

> When I got to Xavier, I applied myself with great diligence to every sporting opportunity and not so diligently to my studies. I would come home with report cards that said 'A' for rowing, 'A' for football, and 'D' for everything else.

Fortunately for the legal community and the vast number of clients whom he represented during his outstanding career at the Bar, Frank turned his mind more diligently to his studies during his HSC and was accepted to law and commerce at the University of Melbourne.

Frank continued his sporting endeavours after leaving Xavier. He was actively and successfully involved in rowing and the coaching of rowing at university at an elite level. He was awarded a University Blue in rowing and rowed successfully in the Australian championships. He also coached a lightweight crew which dominated the national championships sweeping all before it.

Frank competed in triathlons, open water swim classics and cycling. He competed in the Noosa Triathlon six times over the period from 2000 to 2005 with his close friend Michael Wilson QC. Each of these events was an Olympic distance triathlon. Frank later actively pursued cycling, involving three overseas trips tackling the Pyrenees and the Dolomites. Frank, again with Michael Wilson, completed world famous cycling climbs such as the Stelvio Pass in Italy and Mount Ventoux in France.

Frank also engaged in open water swimming. He competed 10 times in an annual swimming race known as the Pier to Perignon, which is a 4km swim between the Sorrento and Portsea piers. He returned to rowing in his latter years, winning a bronze medal in the coxed four in the World Masters Games in Turin, Italy in 2013.

While Frank demonstrated outstanding success in all manner of sporting pursuits, that characteristic did not necessarily feature in all aspects of his life. When he began university, Frank would travel from home on a Suzuki 250 motorbike. In the early part of his university career, he parked his motorbike near North Court in the zone designated for motorcycle parking. It would appear that Frank did not pay sufficient attention to the security of the stand on which he placed his motorbike. He leaned on the motorbike and it fell, knocking over an entire line of motorbikes like dominoes. He then dutifully picked up all the relevant motorcycles, leaving notes on each one with his contact details. This was an event which dented not only his hip pocket, but also his pride.

Not surprisingly, at Frank's judicial welcome, John Digby QC (as he then was) drew an appropriate analogy when he said:

> It has been said that your Honour is James Tomkins, Mark McCormack, Kieran Perkins, Cadel Evans and Peter Galbally all in one. Like all those larger-than-life figures, your Honour has excelled as, respectively, a rower, a triathlete, a swimmer, a road cyclist and, of course, as a leading plaintiff's barrister in medical negligence, particularly obstetrics cases.

Frank's legal career began as an articled clerk at Galbally and O'Bryan. Frank was officially articled to Frank Galbally. However, he primarily worked under the direction and supervision of Peter O'Bryan, a highly competent and successful solicitor working in personal injuries.

In April 1979, Frank was admitted to practice and he signed the Bar Roll in September of 1982. He read with Dyson Hore-Lacy (later Hore-Lacy SC). During Dyson's absence running trials in the Northern Territory, Frank spent a significant part of his reading period in the chambers of Peter Galbally QC, who greatly influenced him in his legal career and personal development.

On signing the Bar Roll, Frank joined Dever's List and embarked on a highly successful personal injuries career as both a junior and subsequently senior counsel. He represented both defendants and plaintiffs in personal injury actions. For approximately five years, he had a strong defendant's practice on the Ballarat circuit and there did battle with John Jordan QC in numerous hard-fought proceedings.

As a senior junior, he mentored four readers: Ms Amber Harris, Ms Niki Wilson, Mr Robert Harper and Dr Sharon Keeling.

Frank was appointed senior counsel on 30 November 2004, subsequently becoming Queen's counsel. He specialised in cases involving medical negligence. Such was the level of his expertise and the demand for his services that the vast majority of major medical negligence cases in Victoria, particularly obstetric cases, were conducted by him predominantly on behalf of the plaintiff.

Frank, with Michael Wilson as his junior, conducted one case in particular in the ACT. It was a proceeding in which medical negligence had been alleged against the treating obstetrician and the hospital in which the child was born. The proceeding was incredibly hard fought. Frank and Michael travelled overseas to interview expert witnesses in both Scotland and England. The case proceeded with the plaintiff calling all the evidence available to him. The defendants' case had not concluded when, unfortunately, the trial judge died. This resulted in the entire proceeding having to recommence before a new trial judge. The case, again, proceeded with the plaintiff calling all his evidence. The matter only finally settled towards the end of the defendants' case.

This proceeding, in particular, exemplified the dedication and loyalty that Frank applied to his clients. He demonstrated great empathy and compassion for each of them and in particular for children who had been affected by cerebral

palsy and were consequently often significantly disabled.

In another case led by Peter Galbally QC, Frank acted for a young boy who claimed damages arising out of obstetrical mishap at a Canberra hospital. In preparation for this case, and at his own expense, Frank went to the UK to confer with the experts and prepare the essential groundwork for the trial. Naturally, it was a no-win no-fee case. Ultimately, the plaintiff succeeded against one of the defendants—another example of Frank's self-sacrifice and compassion for a child who had been affected by cerebral palsy.

Frank was a skilled tradesman whose exotic tools and equipment were extensively displayed in his garage. His workmanship was meticulous, and he was always prepared to help others, like Jeremy Ruskin QC—who was completely incompetent in this area. In recent years, he undertook an advanced welding course with his clerk, John Dever, to add to his vast array of skills.

On the leisure side, there were wonderful holidays over many years at Mount Martha where the Saccardo/Ruskin families enjoyed Christmas holidays in adjoining boat sheds, the high point of which was celebrating the turn of the century on the beach with large tables in the boat sheds, climaxing with fireworks controlled by Frank—of course.

Frank was appointed a judge of the County Court on 2 February 2009. He sat in both the civil and criminal jurisdiction. He conducted the self-represented litigants list, a task that required great empathy and understanding, which he displayed in abundance in dealing with those litigants.

Unfortunately, in 2019, Frank was diagnosed with MND. He faced the diagnosis and the consequences of that diagnosis with courage and stoicism. Typically, he was not concerned for himself nor bitter about the fact that he had been affected by this dreadful disease. Rather, his concern was for the impact that these events would have on others, most importantly his wife Jill and his children, Nadia, William and Alexander, and his only grandson, Francesco (his namesake), to all of whom he was entirely devoted and to whom we extend our sincerest condolences.

This selfless approach exemplified Frank as a person. It typified the way in which he practised at the Bar, his career on the Bench, and the way in which he led his life. His concern for others was always paramount in his thoughts and in his actions.

He was a man of the highest integrity. To his friends, his loyalty was steadfast. To his family, his devotion was unconditional. He is missed. He will continue to be missed by all members of the Bench, the Bar and the legal fraternity generally, and by all who knew him. The loss is enormous.

JOHN NOONAN QC, STEPHEN MARANTELLI, JEREMY RUSKIN QC, MICHAEL WILSON QC

The Hon Frank Patrick Walsh AM QC

Bar Roll No 579

It was a Thursday, Oaks Day, sometime in the '90s, when I first met his Honour Frank Walsh. I was standing outside the lifts in the foyer of Owen Dixon East in full Oaks Day attire. Frank stopped to chat and admire my hat. That chance meeting was the start of a long friendship. Frank loved the races and over the years I enjoyed many race meetings at Moonee Valley and Flemington with Frank and his wife Mary. Frank was devoted to Mary and their nine children, all of whom I came to know, including Matthew of this Bar.

Frank would talk with love and pride of his children and their attributes and of the sporting achievements of his 14 grandchildren. A great-grandchild was a later addition. I always marvelled at how he and Mary managed such a large family, particularly with all the other aspects of their life.

Frank was devoted to his Catholic faith. He was educated by the Marist Brothers at Kyneton and at St Patricks College in Ballarat. He had a lifelong commitment to the Salesians through his volunteer and charity work.

Frank would often talk of his early days in Trentham where he was born. He contracted polio aged seven and went to the renowned Sister Kenny in Sydney for treatment. He remained separated from his family for two years so he could learn to walk with the aid of a calliper. No doubt these years had a lasting impact on him, but I never heard him complain. On his return to Trentham, not being able to work on the farm, he turned to music. His much-loved saxophone and piano accordion featured at Bar social occasions at the Essoign Club and at my mother's 80th birthday party.

Frank graduated from Melbourne University with Honours and signed the Bar Roll in 1958. He loved life at the Bar and was tirelessly committed to his work on the Bar Council. He was instrumental in establishing the Essoign Club and was made the first honorary member of the club in 1982.

Frank had three readers. The second in 1973 was the late Lillian Lieder QC. I read with her in 1986, making Frank, as I would later joke, my grandfather at the Bar. Frank took silk in 1977. When I took silk in 2005, Frank presented me with his rosette, which I was honoured to wear throughout my career.

Frank was appointed a County Court Judge in 1982. He presided over many Common Law and Criminal Jury trials having had, not unusually at the time, a mixed practice.

He would talk to me about his cases. As I gained experience, we would discuss mine. As a Judge, Frank was compassionate. He spent much time considering and carefully writing out in long hand his reasons for sentence. He would talk to recidivists with patience and understanding. He was my mentor. I learnt much from him, although perhaps those latter qualities evaded me.

Frank had a long and illustrious career on the Bench. He was respectful to all who appeared before him. He appeared to have a tireless energy. He retired in 2003 but came back as a Reserve Judge and served in that capacity until he turned 75 on 1 February 2006.

Frank continued to enjoy life at the Bar. He loved lunches at the Essoign. He attended Bar dinners, Criminal Bar dinners, St Patricks Day celebrations and indeed any occasion where he could have the company of colleagues and friends and share stories.

His 70th birthday was celebrated with a party at the old Castlemaine jail, where he was put on trial before a jury of his peers. Judges, family members and colleagues, including myself, all took part. He loved it, as did all who attended.

Frank and the family lived in Essendon, where many parties and celebrations took place. Sadly, his beloved Mary passed before him. Frank retired to their property at Barwon Heads.

Frank lived a full and meaningful life. He was a man of honour and substance. The Spring Racing Carnival is once again upon us and I look back and remember him, grateful that he was my friend and mentor.

MICHELE WILLIAMS QC

The Hon Leonard Sergiusz Ostrowski QC

Bar Roll No 807

Len Ostrowski, nicknamed the 'Count' because of his aristocratic bearing, enduring courtesy and enviable command of every situation, died on 30 May 2021 at the age of 85. He was born in Wolomin, near Warsaw, in 1935. His father was, as he described him, from the Polish landed gentry, with estates near Minsk, in Belorussia. So his nickname was not altogether undeserved. The story of his life in Russian, and later German, occupied Poland before and during the Second World War, his flight with his elder sister and brother-in-law to Switzerland and then, as a 15-year-old 'displaced person' to Australia in 1950 was told by him for the first time at his farewell as a judge of the County Court of Victoria on 6 September 2007, published in the Summer 2007 issue (No 142) of the *Victorian Bar News*. This story of his early life is incredible and inspiring. Please read it. If you do not shed a tear, you are heartless.

He came to Australia with nothing. He spoke barely a word of English. He attended St Augustine's Christian Brothers College, Yarraville for two years. Brother ES Crowle, who taught Len at CBC Yarraville, encouraged him to matriculate. When Brother Crowle become principal of St Joseph's CBC North Melbourne, Len followed him for the matriculation year, where, remarkably, he topped his class in English.

He studied law at the University of Melbourne whilst articled to Mr Tom Butler of Heffey & Butler, where he met his wife to be, Maureen Lynch, who was a legal secretary. After his admission, he became an associate of that firm in 1959 and then moved to Rylah & Rylah, where he was a partner from 1962 to 1966.

Len signed the Victorian Bar Roll on 13 April 1967 and read with Richard (Dick) G De Burgh Griffith, later QC and Justice Griffith of the Supreme Court, a quintessential equity lawyer of the day and the author of the first edition of Griffith's *Probate Law and Practice in Victoria*. Len had two readers: Barbara Hocking (mother of Jenny Hocking) and me.

He was, as I knew him, the king of the testators family maintenance (or now family provision) jurisdiction, then wholly conducted in the Supreme Court. His opinions and pleadings were a model of brevity, lucidity and learning. I still retain some. They were typed by his wife Maureen, as was all his paperwork. He was a consummate advocate. His practice was, however, much broader than the TFM jurisdiction, equity and commercial matters. He appeared, for example, for Marilyn Warren, later Justice and Chief Justice Warren, in a seminal matter before the Full Court of the Supreme Court (*Re Warren*) and in the first reported case in Victoria on liability for margin calls on futures contracts (*Option Investments (Aust) Pty Ltd v Martin*). Before concentrating his practice in the equity jurisdiction, he practised extensively in the 'running down' (personal injuries) jurisdiction, particularly on several country circuits. He relished fighting for the little person against the big and powerful, and winning.

He took silk in 1981 shortly after I finished reading with him. Whilst at the Bar, he was an editor of Vickery's Motor and Traffic Law, a member of Amnesty International and legal advisor to the Senate Standing Committee on Regulations and Ordinances, an Honorary Irishman and a member of the Celtic Club.

Len practised as junior and senior counsel for 17 years. He was appointed to the County Court in 1983 and served with great distinction for 24 years, retiring on his 72nd birthday. He sat in every jurisdiction, but the civil jurisdiction was his home. He made an outstanding contribution to the work of the County Court and the administration of justice in Victoria.

At his welcome to the County Court in 1983, there was comment on his ability in the English language, given that when he arrived in Australia at the age of 15 he spoke almost none. His observations in this regard bear repeating:

> Still on the basis of amusement and antecedents, you have made some remarks about my ability to learn English. Well, of course there were some difficulties in that respect. I mean, one of the parts of the culture shock which I experienced when I arrived here was the difficulty in finding out what actually was the language that was being spoken in this country. On the ship we were assured that we were coming to an English-speaking country. Within months of arriving here, I took my first school-holiday job, building roads for the Werribee Shire. To this day I don't quite know why we were building those roads, because it was only the tiger snakes that seemed to use them up on the stony western plains west of Melbourne. But it became perfectly obvious to me very, very quickly that the official language was Italian. Unless that language was used, nobody did any work and nobody knew what to do.
>
> It wasn't all that long afterwards, of course, that I became articled to Messrs Heffey and Butler, and I moved

BACK OF THE LIFT

into an office in Lonsdale Street and the error, under which I was then labouring, was corrected and I found that the official language of this country wasn't Italian at all but, of course, it was Greek.

Len's life partner was Maureen Louise Lynch, daughter of Dorothy and Reginald Lynch and sister of Sir Phillip Lynch. They had six children—Lauren, Paul, Camille, Damian, Maree and Luke—and 12 grandchildren. Maureen died just about a week before Len. May they rest together in peace.

A funeral service for Len and Maureen was held on Friday 17 August 2021.

THE HON MARK DERHAM

Master Tom Bruce AM

Thomas Peter Bruce AM was born in Milan, Italy on 7 March 1934. Tom's life was one of courage, persistence and tragedy, although he always considered himself fortunate. He rose to the top of his profession and served the community with generosity and dedication throughout his life.

Tom (then known as Peter Bruchsteiner) was the oldest of three children. The family remained in Milan until 1939 but due to newly introduced racial laws in Italy, the family returned to their home city of Budapest. In 1944, Tom's father was hospitalised with advanced tuberculosis. One morning, the Hungarian equivalent of the Gestapo arrived at the family home looking for Tom's father. Tom's mother made excuses to put them off. Later that day, she went to the headquarters herself but did not come home. A few days later, an uncle saw her on a train headed for Auschwitz. The three children remained at home until they were marched to a ghetto by the Nazis. They barely survived in the ghetto. It was only after their liberation in January 1945 that the children learned of the death of their parents.

After liberation, the children lived in various locations until arrangements could be made by their extended family for them to live in Melbourne with relatives, Paul and Mizzi Bruce, and their son, Peter. Upon their arrival in 1948, none of them spoke a word of English, and Tom's name was changed to Thomas Peter Bruce.

Tom's first school in Melbourne was St John's Parish School in Hawthorn. In 1949, he was enrolled at Brighton Grammar. He was quick and keen and an avid learner. By the middle of 1949, he topped his class in English. By 1952, he had progressed to year 12 (having skipped second and third forms) and was dux of Brighton Grammar. Although his first choice was to study law at university, the family thought a legal career was unlikely to be suitable for a migrant with an accent. He subsequently enrolled in an arts degree at the University of Melbourne with a view to teaching. He then suffered from tuberculosis and was advised by his physician not to associate with students. In 1955, he decided to pursue his career of choice and transferred to the law faculty.

Tom completed his law degree in 1959 and then served articles with Ralph Wheeler Lloyd, at Russell, Kennedy & Cook. In 1967, he became solicitor to the University of Melbourne and legal advisor to the Vice-Chancellor.

On 15 July 1973, he was appointed Taxing Master of the Supreme Court of Victoria. On 20 July 1993, he was appointed a General Master. From 1997, he ran the litigation support group, as well as conducting 1,000 to 1,500 taxations each year. Tom was widely recognised as an expert on the law of costs, with Justice Ormiston describing him as "one of the most experienced taxing officers in the common law world".[1]

On his retirement on 2 March 2006, he was the third longest serving judicial officer of the Supreme Court and the longest serving Taxing Master, having served for 32 years, seven months and 20 days.

In June 2005, Tom was appointed as a member of the Order of Australia "for service to the law, particularly in the area of assessment of costs of litigation, and to post-secondary education".

As well as recognising Tom's professional career, his appointment recognised his dedicated service to the University of Melbourne and education in Victoria. He had served as a member of the Committee of Convocation for more than 10 years, as well being the president of the committee for seven years. In 1980, he was elected to the University Council and re-elected in 1986 and 1989. He also served on many university committees, with lengthy terms as chairman of the University Discipline Committee and the Legislation Committee, in addition to serving on committees on policy, staffing and staff salaries, and on ad hoc committees on governance, student and graduate student relations, and intellectual property.

Tom also served on the councils of Swinburne University of Technology and the Prahran, Footscray and Flagstaff Colleges of TAFE, and was a member of the State Training Board of Victoria and an executive of the TAFE College Councils Association of Victoria. He was also a member of the Board of the Children's Welfare Association for five years and vice-president of the Board.

Tom and his wife, Beth, were avid art collectors and strong supporters of the arts. They have been generous donors to, and patrons of, numerous cultural and artistic bodies and groups, such as the Victorian Centre for the Arts, the Melbourne Theatre Company, the Malthouse Theatre, Musica Viva, Orchestra Victoria and the Townsville and Adelaide Festivals.

Tom is survived by his beloved Beth, his children, Biddy, Adam and Phoebe, and stepchildren, Simon and Rebecca.

THE HON JUSTICE KATE MCMILLAN

1 *Dimos v Willetts* [2000] VSCA 154.

Victorian Bar Readers

September 2021

TOP ROW L-R David Barton, John O'Halloran, Julian Lynch, Hamish McAvaney, Jack Maxwell, Andrew Blunt, Nussen Ainsworth, Chong Tsang **SECOND ROW L-R:** Rebecca Aoukar, Patrick Santamaria, Michael Wyles, Stephen Bunce, Justin Tevelein, Paris Lettau, Leo Seward, Amara Hughes, Nicholas Dodds, Sai Ranjit **THIRD ROW L-R** Pinar Tat, Cheryl Richardson, Annette Gaber, Olivia Callahan, Alyse Mobrici, Madeleine Salinger, Liliana Dubroja, Katherine Brown, Rhiannon Saint, Erin Byrt, Natasha Freijah **FRONT ROW L-R** Rebecca Ayres, Matthew Garozzo, Joseph Acutt, Daniel Dober, Christopher Brydon, Ashlea Patterson, Winnie Wong, Elizabeth Brumby, Jade Ryan **ABSENT** Amrita Malik, Bryn Overend, Hannah Douglas, Kate Ottrey, Luisa Frederico, Michael Thomas, Pranaven Pathmaraj, Sergio Zanotti Stagliorio

Victorian Bar Council

2021–2022

BACK ROW STANDING L-R Robin Smith, Sam Hay QC, Raini Zambelli, Lana Collaris, Ben Murphy, Michelle Sharpe, Robert Hay QC, Nicholas Phillpott, Daniel Nguyen, Amy Wood, Peter Chadwick QC. **FRONT ROW SEATED L-R** Marylyn Smallwood SC, Maria Pilipasidis, Robyn Sweet (Assistant Honorary Treasurer), Darryl Burnett (Vice-President), Roisin Annesley QC (President), Charles Shaw QC (Vice-President), Mark Robins QC (Honorary Treasurer), Nawaar Hassan **ABSENT** Paul Hayes QC, Andrea Skinner

NEW SILKS Q&A

BACK ROW OF 2 L-R Charles Parkinson SC, Daniel Aghion SC 2ND ROW DOWN OF 5 L-R Patrick Doyle SC, Graeme Hill SC, Nicholas Wood SC, Angus Macnab SC, Barbara Myers SC 3RD ROW DOWN L-R Marc Felman SC, Fiona Ryan SC, Meg O'Sullivan SC, Elizabeth Bennett SC, Ruth Shann SC BOTTOM ROW L-R Emily Porter SC, Siobhan Ryan SC, Kathleen Foley SC, Lisa Hespe SC

Siobhan Ryan SC

How did you celebrate the news of your appointment? Reading and re-reading the Chief Justice's letter over and over; and later crashing a family dinner to surprise my parents with the news.

Who has been a legal idol or mentor of influence to you? Joan Rosanove QC.

Who would play you in a movie, and why? Patty Duke. The picture [right] speaks for itself.

If someone asked you (i.e. us!) 'what do you like most about the Bar' how would you respond? Independence.

If you had to offer one tip to new barristers at the Bar, what would it be? Oscar Wilde said it best—"Be yourself. Everyone else is already taken."

Graeme Hill SC

How did you celebrate the news of your appointment? I had an impromptu drinks and dinner with some people from my floor. My older son finished high school the day before, so he's been pulling a little focus at home.

Who has been a legal idol or mentor of influence to you? I was very fortunate to read with Richard Niall, and to work as an associate for Ken Hayne. Both have been incredibly generous, and they've continued to offer helpful advice right up to my application for silk. I also owe a great deal to David Bennett (former Commonwealth solicitor-general), Peter Hanks and Debbie Mortimer. My mother-in-law Margaret Stone was pretty good too.

Who would play you in a movie, and why? The balding doctor with glasses from ER—I think the actor's name is Anthony Edwards.

What do you like most about the Bar? I enjoy most chatting about the law with my colleagues on Level 22 Owen Dixon West over the lunchtime quiz.

If you had to offer one tip to new barristers at the Bar, what would it be? Careers are long. There's plenty of time to get to where you want.

Angus Macnab SC

How did you celebrate the news of your appointment? Patting my dog after he had surgery on his cruciate ligament with one hand, with a glass a champagne in the other.

Who has been a legal idol or mentor of influence to you? Judge John Jordan SC.

Who would play you in a movie, and why? Bruce Lee … all I ever wanted to be was a Kung Fu action movie star.

What do you like most about the Bar? Negroni.

If you had to offer one tip to new barristers at the Bar, what would it be? Lean in.

Lisa Hespe SC

How did you celebrate the news of your appointment? Lunch with my husband and sister.

Who has been a legal idol or mentor of influence to you? The late Brian Shaw QC. He could make the most complex concepts sound simple.

Who would play you in a movie, and why? According to my nine-year-old niece, it would be Lola (from *Charlie and Lola* on ABC Kids) because I am short, annoying and have messy hair.

If you had to offer one tip to new barristers at the Bar, what would it be? Challenges are much easier to face if you are prepared. Never underestimate the benefits of preparation.

Daniel Aghion SC

How did you celebrate the news of your appointment? Over a home-made macaroni cheese, with our youngest child telling me something incredibly important to him about a computer game. Family have always kept me grounded in reality, and they still do.

Who has been a legal idol or mentor of influence to you? My mentor Joseph Tsalanidis, who taught me how to make it fun. Also the late Brendan Griffin QC whom I sorely miss.

Who would play you in a movie, and why? Owen Wilson for the nose, the relaxed humour, and the connection to Wes Anderson in the hope that he would agree to direct.

What do you like most about the Bar? That so many are prepared to give back to the Bar to assist younger barristers to learn and succeed.

If you had to offer one tip to new barristers at the Bar, what would it be? Know your judge; know the facts; know the law—in that order. It is often said, and it is entirely correct.

Marc Felman SC

How did you celebrate the news of your appointment? There are very strict guidelines on Jewish barristers getting silk—they need to ring their mothers first. After that, I just celebrated with family, friends and colleagues on my floor.

Who has been a legal idol or mentor of influence to you? Justin Bourke QC, Stuart Wood QC and Rachel Doyle SC.

Who would play you in a movie, and why? People say that Bradley Whitford would play me in a Netflix series. He plays Josh Lyman, a Jewish White House attorney in *West Wing*. I would prefer Tom Cruise but realistically I will have to live with Bradley Whitford I think.

What do you like most about the Bar? The collegiality. And the Coffee.

If you had to offer one tip to new barristers at the Bar, what would it be? Be the three As: Ability, Availability, Affability.

Meg O'Sullivan SC

How did you celebrate the news of your appointment? With family and champagne, in front of a roaring open fire (yes, it was a very cold night!).

Who would play you in a movie, and why? Keri Russell (without the straightening irons).

What do you like most about the Bar? The advocacy, both written and oral, including argument, persuasion and story-telling.

If you had to offer one tip to new barristers at the Bar, what would it be? You have more agency than you think you do. Use it well.

Nicholas Wood SC

How did you celebrate the news of your appointment? I had a lovely dinner at home on the Friday night with my family, my parents, my sister and her husband.

Who has been a legal idol or mentor of influence to you? Justice Gageler, and Stephen Donaghue. I was "counsel assisting" the solicitor-general when his Honour was appointed to that role in 2009; I read with Stephen and have been his junior (and occasional opponent) in a number of cases. I have been extremely fortunate to have had these opportunities to work with (and try to learn from) such masters of their craft.

Who would play you in a movie, and why? Someone did once suggest that I bore a resemblance to Stephen Merchant. (I think I wore thick glasses at the time.) But I'm going to say Meryl Streep: she can play anyone.

What do you like most about the Bar? The intellectual challenges, the opportunity to perform, the opportunity to help people, and the collegiality of the Bar.

Fiona Ryan SC

How did you celebrate the news of your appointment? Quiet celebration with family and then a more raucous celebration with two good mates who were also on the list.

Who has been a legal idol or mentor of influence to you? Paul Scanlon QC, Andrew Clements QC, Justice Richard Niall, Dyson Hore-Lacy SC.

Who would play you in a movie, and why? I don't know who the actress would be but according to my husband it is Anne of Green Gables meets the Predator. I am not sure whether that is a compliment…

What do you like most about the Bar? The friendships I have made. Working with brilliant people on tough cases.
If you had to offer one tip to new barristers at the Bar, what would it be? Have a life outside the Bar!

Kathleen Foley SC

How did you celebrate the news of your appointment? I made a pile of snacks for my seven-year-old who was home sick from school, while getting ready to start day-three of a trial (appearing from home). I told him the news and he said, unimpressed: "I don't see what changes".

Who has been a legal idol or mentor of influence to you? Legal idol—Elsbeth Tascioni from *The Good Wife*. She is whip-smart and strategic but presents as a scatterbrained oddball. She is constantly underestimated by her opponents—to their peril!
What do you like most about the Bar? I like the freedom, I like the diversity of work, I like being able to take on as many public interest cases as I can manage without a law firm partner worrying about my billable hours, I like my colleagues—and in particular my fellow women barristers, who rock.
If you had to offer one tip to new barristers at the Bar, what would it be? Don't limit yourself. Try your hand at different things—you never know what you might learn if you step outside your comfort zone.

Emily Porter SC

How did you celebrate the news of your appointment? An impromptu dinner at MoVida Aqui with 17 dear friends who were available at the last minute.
Who has been a legal idol or mentor of influence to you? Portia (Phyllida Erskine-Brown) from *Rumpole of the Bailey*, and my mentor Richard Niall, who impressed upon me that a barrister needs two characteristics to succeed: envy and schadenfreude.
Who would play you in a movie, and why? Reese Witherspoon because Elle Woods in Legally Blonde demonstrated that lawyers can enjoy fashion and frivolity.
What do you like most about the Bar? Gallows humour, and Bar Mums. Oh, and my husband, Pat. I note you didn't ask me what I like the least!
If you had to offer one tip to new barristers at the Bar, what would it be? Treat everyone the way you would like to be treated, from silks and judges to paralegals and mail clerks. And having children at the Bar doesn't mean the end of your career.

Patrick Doyle SC

How did you celebrate the news of your appointment? Initially, by hugging Emily Porter, who was next to me in our study at the time.
Who has been a legal idol or mentor of influence to you? There have been many, but none more influential than the late, great, Jim Kennan SC. Jim was tough, clever, dogged, fun to work with, and a genuine all-rounder. All the things I aspire to be.
Who would play you in a movie, and why? David Wenham. Because he could do every shade.
What do you like most about the Bar? De-briefing with my colleagues; win, loss or adjournment.
If you had to offer one tip to new barristers at the Bar, what would it be? I would decline to offer a single tip and offer two instead. First, stand your ground. Second, spend time thinking. Preparation is more than reading, noting and writing. (Those two tips are related, if you think about it).

Elizabeth Bennett SC

How did you celebrate the news of your appointment? I had the night off reading "Grug" stories to the kids before bed.
Who has been a legal idol or mentor of influence to you? Pretty much anyone I have ever shared a floor with.
Who would play you in a movie, and why? Rachel Griffith. Because the wishful thinking is strong in this one.
What do you like most about the Bar? The people: they are quick witted and interesting.
If you had to offer one tip to new barristers at the Bar, what would it be? Celebrate the good days, and don't forget them when you (inevitably) have a bad day.

Charles Parkinson SC

How did you celebrate the news of your appointment? My current readers bought me a bottle of champagne, which we shared.
Who has been a legal idol or mentor of influence to you? Ken Hayne.
What do you like most about the Bar? The independence.
If you had to offer one tip to new barristers at the Bar, what would it be? Look for the fun in your work.

Ruth Shann SC

How did you celebrate the news of your appointment? By taking two snotty children for a Covid-19 test and then watching *Frozen 2*.
Who has been a legal idol or mentor of influence to you? PG Priest.
Who would play you in a movie, and why? The Rock.
What do you like most about the Bar? The privilege of fighting for people who haven't had anyone fight for them before.
If you had to offer one tip to new barristers at the Bar, what would it be? Prepare thoroughly and then back yourself.

Barbara Myers SC

How did you celebrate the news of your appointment? With a glass of champagne in my favourite club—the Essoign.
Who has been a legal idol or mentor of influence to you? The late Sir Michael Turner, a former judge of the High Court, Queen's Bench Division.
Who would play you in a movie, and why? Vanessa Kirby. She's also a Londoner—fitter and 'cooler' than me, but an aspirational choice!
What do you like most about the Bar? Being paid to cross-examine.
If you had to offer one tip to new barristers at the Bar, what would it be? Read all the material—always.

Emily Porter SC and Patrick Doyle SC

Recently, Kris Hanscombe QC wrote to *Bar News*:

> Dear Editors
>
> Last week's silk appointments included what I think must be a first; the appointment at the same time of a couple. Emily Porter and Patrick Doyle are married. This seems to me to merit a piece in the *Bar News*. We need to mark these things as they happen.
>
> Kris.

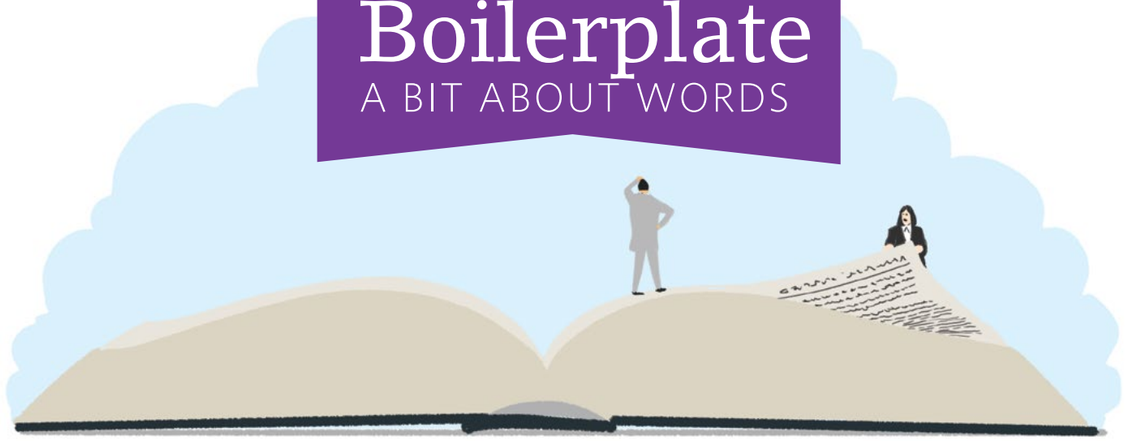
Kris, we agree. In the context of a nuanced postscript provided by Kris, we have been unable to find a record of any other couple, in a relationship, appointed silk at the same time. Readers, please enlighten us if we should mark any such prior occasions! In the meantime, Emily and Pat were good enough to respond to our questions – The Editors

You both practise in different fields, Pat in criminal law, Emily in planning and environment law. How did you meet?
EP: Pat remembers it differently, but I remember meeting Pat on the first day of law school at the University of Melbourne in 1997. I was wearing a bright orange vintage skirt, tights patterned with butterflies, and 14-up Doc Marten boots. Pat was wearing trackies.
PD: We actually first met at a school debating final in year 12. I can't have made much of an impression. At Uni, it must have been the trackies.
Was law something that drew you together? We'd like to say no, but then, we studied law together, mooted together, were Judges' Associates at the same time and signed the Bar Roll together, so we guess that's a yes!
There are numerous romantic movies where competitors fall in love—e.g. *The Hunger Games, You've Got Mail, A Star is Born*, or *10 Things I Hate About You*. Did the Silks' process bring any of these to mind?
No, because we practise in such entirely different areas, so we never regarded ourselves as competitors. *The Hunger Games* only occurs when there is chocolate in the house.
Is there a tip, suggestion or approach that has worked for you in maintaining work/life balance and your successful careers?
When you're a couple at the Bar with kids (we have two, 11yo Gus and 9yo Molly), you have to function as a team. We have both made it our practice to get home every night by 6pm, cook dinner together and eat together as a family. It also really helps to have a partner who understands what it is we, as barristers, do. After all, it's a pretty weird job.

Emily and Pat's wedding day on April Fools' Day 2006

Emily says ,"This is our Readers' group photo from November 2007, helpfully annotated by some Bar Mums."

Boilerplate
A BIT ABOUT WORDS



Legal Language

JULIAN BURNSIDE

This is the 50th anniversary of the first *Bar News*. I wrote my first "A Bit About Words" in 1980, four years after I came to the Bar. The standards of the *Bar News* were lower back then.

Originally, the *Bar News* was a simple roneoed sheet of a page or two. As it expanded, it became a stapled set of pages, actually resembling a real publication. Then it became the glamorous object it is these days, with an apparent aspiration to rival the *Law Institute Journal*, and yet it still publishes "A Bit About Words"—I guess it's an advantage of being rusted on.

Given the significance of this 50th anniversary issue, I did a bit of research in my language library. Of my 419 books on the English language, just six of them have *law* or *lawyers* in the title. Of those six, the most interesting is *The Law in Shakespeare*. It has a fascinating range of law words used by Shakespeare (some quite common, others much less so), including:

subornation (procuring another to commit a crime)—*Henry VI* (part 2), Act 3, scene 1

feoffment (a grant of land to another, in fee)—*Henry IV* (part 1), Act 2, scene 2

to afeere (to confirm)—*Macbeth,* Act 4, scene 3, and (much more familiar)

I was then advised by my learned friend (it has the same meaning today as when Falstaff used it)—*Henry IV* (part 1), Act 1, scene 2.

Lawyers use language; it is the principal tool of our trade. But we commonly misuse it. Let the following example stand for the rest:

> Upon the written request of any holder of the Class A Interests, the Company shall redeem such holder's Class A Interests in exchange for equity interests of the limited liability companies, partnerships or other entities that are the direct owners of one or more Pool A Properties, the immediate parent of such entities or one or more individual Pool A Properties as elected by such redeeming holder; provided, that the fair market value of the assets used to redeem such holder's interests shall not be greater than the fair market value of the interests being redeemed as determined in good faith by the officers of the Company; provided, further, that in the event that there is more than one person or entity holding Class A Interests at the time of such redemption, then such redemption shall not be made with individual properties or property owners or their parents but shall be made with interests in all property owning entities (or their parents) that own Pool A Properties; provided, further, prior to any such redemption, if the Class A Members are New Plan Debt Members, the redeeming Class A Member shall repay its allocated portion of the New Plan Debt;

Note: that is just one sentence; well, part of one sentence—note that it ends with a semi-colon. It is unforgivable, and no less so for the fact that it comes from an American contract. There is no justification for such a sentence.

Although most advocates probably do not plumb the depths established by that passage, the fact remains that any day, in any court, you will hear lawyers using language with equal lack of grace and style. It invites the irresistible thought that the writer or speaker has not, even for a moment, considered the effect of his or her words on the intended audience.

The purpose of advocacy is to persuade the listener. The advocate's task is to persuade. A large part of the task lies in putting the facts in front of the listener, and then to advance the legal consequence of those facts. It all sounds quite simple.

But facts can be explained clearly or less so; arguments can be persuasive or less so. Most people have an attention span which is geared to commercial TV programming. In Lincoln's day, the standard public speech was two hours; now a politician's success may hang on their ability to compress the message to a 10-second sound bite.

It is common to think that advocacy is all about submissions. A moment's reflection shows why this is not so. Most cases these days are heard by judge alone. Typically, the judge will read the pleadings and any affidavits or witness statements before the trial begins. If your pleadings tell a clear story, and if your affidavits are easily read and understood, the task of persuasion has already begun. You have advanced your client's case further than you would have if the statement of claim induced sleep or nausea.

Some might doubt that pleadings offer room for advocacy, and a quick read of most modern pleadings is unlikely to turn up many examples of persuasive advocacy. But consider the first paragraph of this statement of claim in a personal injuries case. I don't know if it's real or invented. I hope it's real:

1. Until the 1st of June 1975, the Plaintiff was an able-bodied carpenter with two arms ...

How often does the first paragraph of a statement of claim make you want to read on, to see what happened?

Our task as advocates is to persuade. For that purpose, we use language. Any technique which makes our use of language more persuasive is worth thinking about. More than that: it obliges us to think about our use of language if we are to do our job as well as we are able.

Given that language is the advocate's main tool of trade, it is surprising to see so little attention paid to it. The fact is that almost every day, in almost every court, it is possible to hear advocates using language carelessly, as if their audience will be sufficiently impressed by the content to be unconcerned by any other consideration. A playwright with the same attitude would not long survive.

Skilled use of language has its place in all areas of the law, even judgment writing. Meagher JA gave a paper on judgment writing some years ago. His paper began this way:

> I do not see why writing a judgment is any different, or should be judged any differently, from writing anything else—like an essay on economics or philosophy. The normal rules of English prose composition apply just the same. Clarity is the principal virtue; and brevity, so far as the subject permits, is the next one. There are two ways, it seems to me, that judges in fact go about writing their judgments. One is the way sometimes favoured by our president, Mr Justice Kirby, and others, which is to throw your mind into neutral, close your eyes, open your mouth, and let it all come out. This is particularly the way which finds favour with the members of the present High Court.

It is interesting that Kirby P (as he then was) was part of the audience, so as an exercise in advocacy this paper may have run into other problems. Nevertheless, it captures well an important point about the use of language. The criticism of Kirby was unfair and was doubtless intended for effect.

If we, as advocates, eventually rise to the task of trying to express ourselves clearly, and as briefly as the subject matter allows, perhaps judges will respond in kind. On recent indications, both hopes seem somewhat forlorn.

One of the strengths of English comes from its wanton borrowing from other languages. The most obvious examples are French (from the Norman Conquest in 1066: more than 1200 words, including the original words for *action*, *contract*, *crime*, *damage*, *judge*, *juror* and *infant*) and, to a lesser extent, German (putting to one side the fact that the Anglo-Saxons came from the northern part of what is now Germany, and the Hanoverian kings George I to George IV were all German monarchs of Britain; and the English Royal family did not get rid of their German names until the 20th century). We also borrowed words from India (107 words, including *jodhpurs* and *verandah*).

Added to all of this, lawyers have always been anxious that their words should not be misunderstood. So the practice emerged to a duplication of near-synonyms, to ensure that the intended meaning was clear. It is a practice no longer needed, and should be avoided.

The Law Reform Commission prepared a report in 1987 called *Plain English and the Law*. It includes this quotation from Maitland and Pollock (in *The History of English Law*):

> One indelible mark [the Norman Conquest] has stamped forever on the whole body of our law. It would be hardly too much to say that at the present day almost all our words that have a definite legal import are in a certain sense French words. The German jurist is able to expound the doctrines of Roman law in genuinely German words. On many a theme, an English man of letters may, by way of exploit, write a paragraph or a page and use no word that is not in every sense a genuinely English word; but an English or American lawyer who attempted this puritanical feat would find himself doomed to silence.

The message: if we want to persuade people, we lawyers should try to speak English, and we should learn to love it, if we don't already.

ILLUSTRATION BY GUY SHIELD

ILLUSTRATION BY GUY SHIELD

LANGUAGE MATTERS

Beyond Reasonable Doubt?

PETER GRAY

The formula

How should a judge explain to a jury the standard of proof that the prosecution must meet in a criminal trial? The High Court of Australia has always taken a strong line. The standard is to be expressed by the formula *satisfied beyond reasonable doubt*. The judge must not seek to explain this formula. Even if the jury asks what it means, the answer must be that it means what it says: *beyond reasonable doubt*. This consistent line is based on old authority, in which the High Court asserted that the formula was a phrase well understood in the community.[1] It is also based on the assumption that any attempt to explain the standard is more likely to confuse jurors than to help them.

In 2017, in *Dookheea*,[2] the High Court made one small concession. In its unanimous judgment, the court said that a judge is entitled to compare the criminal standard with the civil standard of proof, on the balance of probabilities.[3] The court also forgave the trial judge's small slip in distinguishing between a reasonable doubt and any doubt.[4] The trial judge had only said this once, while repeating the formula many times. The High Court engaged in a long discussion of the history of the formula, including an examination of its religious origins, to conclude that there is a difference between a doubt and a reasonable doubt.[5]

The appellant in *Dookheea* did not ask the court to depart from its strong and consistent line on the formula. In one paragraph,[6] however, the court did express the view that opinions might reasonably differ on whether the formula remains as well understood as it was once thought to be. The court referred to experience in the UK, Canada and New Zealand, suggesting that juries needed more explanation of the formula.

A complete discussion about whether juries understand the formula requires looking at two historical developments. The first is debate among judges and legal academics as to the adequacy of the formula to express the criminal standard of proof in a way that juries would understand. This was agitated by no less a legal scholar than Zelman Cowen, in his joint essays with Peter Carter, first published in 1956.[7] It was taken up in successive editions of *Cross on Evidence*,[8] the leading textbook on the law of evidence for many years. While the cases that led to the abandonment of the formula in England and Wales (see below) had already begun to appear, the influence of legal academics who doubted the appropriateness of the formula was probably important in securing that abandonment.

The second influential development is the very considerable amount of empirical work on whether jurors actually do understand the formula.[9] Most of this work has been done in the USA. Some of it is by psychologists. A good deal is by linguists. In the 1970s, two linguists invited people who had been summoned for jury duty in California to paraphrase some standard directions for civil juries.[10] The linguists then rewrote the directions and repeated the survey with another group of potential jurors. Not surprisingly, they found that expressing the directions in simple language helped the potential jurors to understand them. The linguists were thus able to isolate some linguistic obstacles to comprehension. Their work has been very influential. It has led to many more studies, some using mock jurors, others using real jurors. No study has demonstrated that jurors have very good understanding of judges' directions.

> "No study has demonstrated that jurors have very good understanding of judges' directions."

There is one very important study, conducted in Australia in 2014.[11] Researchers were allowed to survey people who had served as jurors in criminal trials in the Supreme Court and the District Court in Queensland. The survey focussed on the standard directions about the burden of proof and the standard of proof. It asked jurors to assess their own level of understanding of those directions. It also objectively tested their understanding of each of the directions, by means of asking the jurors to explain in their own words what the directions meant. Thirty-three jurors responded to the survey. Only 20 of them demonstrated an understanding of the direction about who bore the burden of proof. Their subjective assessments of their understanding correlated reasonably well with actual understanding. Only 11 respondents demonstrated an understanding of *beyond reasonable doubt*. There was no correlation between their subjective assessments of understanding and their demonstrated understanding, in relation to the standard of proof.

The results of the Queensland study at least cast considerable doubt on the proposition that there is any sort of general understanding of the formula in Australia. What should we do? Is it helpful to look at what others have done?

England and Wales

In England and Wales, no particular form of words is required.[12] It is not a misdirection for the judge to tell the jury that that they must be satisfied beyond reasonable doubt.[13] The preferred wording, however, is to tell the jury that the prosecution must prove that the accused is guilty by making the jury *sure* that the accused is guilty.[14] The sample direction provided by the Judicial College includes the word *sure* three times.[15] The Judicial College tells judges in England and Wales that, if any advocate says *beyond reasonable doubt* to the jury, the judge is to tell the jury that this *means the same as being sure*.[16]

The obvious problem with adopting *sure* as an expression of the standard of proof is that *sure* can be qualified by an adverb. We can be *fairly sure*, *pretty sure*, *very sure*, *absolutely sure*, or (ambiguously) *quite sure*. The standard is at least as flexible as the word *reasonable* in our formula, and arguably more so.

In a recent English case,[17] the jury sent the judge a note in the following terms:

> We are directed to be 'sure' of guilt. How sure do we have to be? Do we have to be 100 per cent with no doubt? Would 99 per cent sure be acceptable for example?

The judge responded:

> The simple answer to your question is no, you are not required to be 100 per cent sure with no doubt.
>
> The Courts do not place percentages on the word 'sure'. What I can say is that you should use 'sure' in your deliberations as you would in your day-to-day lives, when making decisions in matters of importance in your own affairs in your own lives or those of your loved ones.

BOILERPLATE

This kind of explanation is also problematic.[18] When we are making decisions about our own lives, we are looking to the future. We know that, if we choose one path and find that we are unsuccessful, or unhappy with the choice, we can always change again. The decision whether someone is guilty of a criminal offence is not like that. It involves reconstructing past events from the evidence. Jurors cannot change the decision if they later change their minds. Also, if we think back on the crucial decisions of our own lives, such as where and what to study, what career to pursue, whether to marry, or whether to buy a house, how sure were we in making those decisions? Did we never take a punt and hope it worked out?

This direction is the subject of an appeal pending in the Court of Criminal Appeal, in which the appellant will seek to avail himself of the linguistic expertise of Professor Malcolm Coulthard. It will be interesting to see the result.

Victoria

The Parliament of Victoria has chosen to provide five scripted explanations of the formula.[19] Space does not permit me to quote them here, but they are worth looking at. They are much more likely to help a jury to understand the formula than to increase confusion. The catch is that the judge can only give any of these explanations if the jury has asked a question about the formula. If we can rely on the Queensland study, it might be that the jurors most confident of their own understanding, who therefore do not ask a question, are in fact the ones who least understand and are therefore most in need of an explanation.

> “The five scripted explanations in Victoria are a good start. There is no reason why every jury should not have the benefit of all five of them.”

Conclusion

For the reasons I have given, I do not favour replacing *beyond reasonable doubt* with *sure*. Paradoxically, *sure* would introduce greater uncertainty about meaning. I would stick with the formula. I do think, however, that jurors need more help than we give them to understand the formula. The five scripted explanations in Victoria are a good start. There is no reason why every jury should not have the benefit of all five of them. The requirement that the jury ask a question should be repealed.

The best explanation of the formula I ever saw came from Peter Boshier,[20] when we were training non-lawyer magistrates in the Pacific Islands. He had all the trainees stand and stretch their arms out horizontally. Tilting one arm slightly up and the other slightly down, he said, “That is the balance of probabilities”. Then raising one arm and lowering the other, so that both were almost vertical, he said, “And that is beyond reasonable doubt”. Such an explanation would probably benefit a jury more than any other. The High Court is unlikely to approve it.

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 *Brown v The King* (1913) 17 CLR 570, at 584 per Barton ACJ, 594 per Isaacs and Powers JJ.

2 *The Queen v Dookheea* [2017] HCA 36.

3 *Dookheea*, at [41].

4 *Dookheea*, at [38]-[39].

5 *Dookheea*, at [29]-[37].

6 Dookheea, at [27].

7 Cowen, Z and Carter, P (1956) *Essays on the Law of Evidence*. Oxford: Clarendon Press. Pp 245-249.

8 For example, Cross, R (1974) *Evidence* (4th ed). London: Butterworths. Pp 93-99.

9 Devine, D (2012) *Jury Decision Making: The State of the Science*. New York: New York University Press. Pp 55-56.

10 Charrow, P and Charrow, V, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions* (1979) 79 Columbia Law Review, 1306-1374.

11 McKimmie, B, Antrobus, E and Baguley, C, *Objective and Subjective Comprehension of Jury Instructions in Criminal Trials* (2014) 17 New Criminal Law Review, 163-183.

12 Judicial College (2018) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up*, p 5-1.

13 *R v Majid* [2009] EWCA Crim 2563.

14 Judicial College (2018) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up*, p 5-2.

15 Ibid, p 5-3.

16 Ibid, p 5-3.

17 My knowledge about this case comes from personal communications with Professor Malcolm Coulthard. I do not know the name of the case.

18 Interestingly, the High Court in Brown held that the trial judge had misdirected the jury by saying that a reasonable doubt is a doubt that would influence them in the ordinary affairs of life.

19 *Jury Directions Act* 2015 (Vic), s 64(1). Although the five scripted explanations are separated by the word or, it is unlikely to be suggested that the judge can only give one of the explanations.

20 Formerly Principal Family Court Judge, then a Law Commissioner, and now the Chief Ombudsman, of New Zealand.

BOOK REVIEWS

Mostly Guilty: A low-flying barrister’s working life

By Michael Challinger

LUKE SIMPSON

The first thing to say is that *Mostly Guilty* is a terrific read. While not exactly a memoir, it recounts a barrister’s life in the Magistrates’ Courts. Anybody who practises in summary crime will immediately recognise the clients, the situations and the difficulties. In fact, the accounts are so accurate and authentic that when anyone in my family asks me about my work, I now just refer them to the book.

Mostly Guilty works its way through the familiar scenarios of the Magistrates’ Court. It follows a rough pattern with a chapter addressing a particular type of offence—assault, shop theft, driving offences etc—followed by another, dealing with a particular instance in more detail. The author is extremely candid in his assessment of some jurisdictions, and many will sympathise with his experiences in intervention order matters.

There are two autobiographical interludes of the author’s legal career in London and Port Moresby.

There are also chapters on dealing with police prosecutors and the Bench, and tips to give your clients: no T-shirts with ‘Born to be Pissed’ on them. And don’t forget to tell your schizophrenic clients to keep taking their medication—at least till the hearing day.

The author has been around the courts for a long time and unpretentiously describes himself as low-flying. He claims he got stuck in the lower jurisdictions after losing his wig in William Street. (“It probably met its fate in a Melbourne City Council road-sweeping machine. Lying in the gutter it must have looked like a run-over cat, a rough haired variety.”)

The book is witty; indeed, in places, it’s laugh-out-loud funny. The chapters are short and the style punchy. But among the laughs it raises serious concerns and offers sensible suggestions about drugs, alcohol and mental health and gambling addiction.

The author comes across as a wry observer, but also as a decent person with a lot of sympathy for the underdog and the plight of many of his clients. *Mostly Guilty* distils humour from the daily events of the Magistrates’ Court. It is a timely reminder of the colourful characters and their implausible instructions that have been a hallmark of court foyers.

One of my colleagues suggested the book should be compulsory reading for law students or young people contemplating a career in the law. I agree entirely.

Mostly Guilty
A low-flying barrister’s working life
By Michael Challinger
New Holland Publishers
228 Pages

The Brilliant Boy – Doc Evatt and The Great Australian Dissent

by Gideon Haigh

JOHN GORDON

The Brilliant Boy – Doc Evatt And The Great Australian Dissent,
Gideon Haigh

In one of the many fascinating glimpses behind the scenes in the life of Herbert Vere Evatt uncovered by Gideon Haigh for his recent book *The Brilliant Boy. Doc Evatt and the Great Australian Dissent*, Haigh tells of a summons by Evatt, returned late in his career to the judiciary as chief justice in New South Wales, to the 21-year-old editor of the *Sydney Law Review*, an articled clerk named Murray Gleeson, later of course to become chief justice of the High Court of Australia.

The Privy Council had just handed down judgment in *The Wagon Mound (No 1)*,[1] a decision that all lawyers will remember from their study of the law of torts at law school, which elevated reasonable foreseeability of loss as the determinant of liability where breach of duty was established. As Viscount Simonds said in delivering the opinion of the Judicial Committee:

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Gideon Haigh

IMAGE COURTESY OF GIDEON HAIGH

The essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general view thus stated by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580: "The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay." It is a departure from this sovereign principle if liability is made to depend solely on the damage being the "direct" or "natural" consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural," equally it would be wrong that he should escape liability, however "indirect" the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done: cf *Woods v Duncan* [1946] AC 401, 442. Thus foreseeability becomes the effective test.

In stating that conclusion, Viscount Simonds had observed that "We have come back to the plain common sense stated by Lord Russell of Killowen in *Bourhill v Young* [1943] AC 92, 101. As Denning L.J. said in *King v Phillips* [1953] 1 QB 429, 441: "there can be no doubt since *Bourhill v Young* that the test of liability for shock is foreseeability of injury by shock." Their Lordships substitute the word "fire" for "shock" and endorse this statement of the law."

Haigh discloses that Evatt wanted Gleeson to write an article for the *Sydney Law Review* demonstrating that Evatt's dissenting judgment in *Chester v Waverley Municipal Council*[2] had been vindicated by the Privy Council's decision.

Chester had been a decision of the High Court 22 years earlier when Evatt had been a judge on the High Court. The fact that his judgment had been the lone dissent was plainly still troubling him all these years later. And Gideon Haigh in *Brilliant Boy* sets out to understand why.

It emerges that Evatt's judgment is the titular "great Australian dissent" due to the nature of the expression of Evatt's views, its reflection of the philosophies and experience which governed Evatt's life in the law and in politics, and, ultimately, the acceptance by the highest courts in the UK and Australia of Evatt's judgment and their endorsement of its ratio and principles in the area of tortious liability for nervous shock and psychiatric injury.[3] With painstaking research, Mr Haigh traces each of those tributaries into the enunciation of Evatt's decision and beyond.

And while Evatt is also the "brilliant boy" referred to in the book's title—a reflection on the massive promise and potential displayed by Evatt in his early life as a student and then at the Bar (resulting in his being honoured at 24 with a rare doctorate in jurisprudence, hence "Doc" Evatt)—the description is chosen for the title because of the fate of another "brilliant boy" inextricably bound with Evatt's legacy in the law reflected in the dissenting judgment; Maxie Chester, then aged seven, was the young boy who, in 1937, had drowned in the trench dug by the Waverley Council, and whose death had precipitated the severe nervous shock and depression to his mother that had resulted in the claim brought before a judge and jury in the Supreme Court of New South Wales which ultimately ended up before Evatt in the High Court.

Maxie Chester, Haigh tells us, was one of three children of a Polish Jewish family that had emigrated to Sydney in 1937. At some point one Saturday afternoon, he had separated from his older siblings and gone missing for many hours. The Council had been digging a deep trench in the street to install PMG phone cables but the trench had filled with rainwater. It was left for the weekend with some drums around it on which the council workers had placed a few planks, in a devastating display of a lack of reasonable care for the safety of anyone who might be attracted to the water-filled trench. Inevitably the local children played around it. Maxie was last seen alive by eight-year-old Ken McCaffery who saw him in the water in the trench, but Ken had been sent to the local cinema where most of the other children had gone. After a long search, in the early evening, Maxie's body was pulled from the deep trench in front of his mother Golda and was not able to be revived. In evidence at the trial, explaining the traumatic effect that all of this had on Golda Chester, her doctor said that Maxie had been to Golda "a particularly brilliant boy … the hope of her family".

> "Egos, jealousies, resentments, ambitions and antecedent attitudes uncovered by Mr Haigh clearly beset the court and make for fascinating reading."

By this serendipitous description, which mirrored Evatt's mother's view of her own son, Gideon Haigh joins the lives of the two "brilliant boys".

It is a fascinating exposition.

Most of the previous biographies of Evatt have, understandably, focussed on his political career and his role in the establishment of the United Nations, in the promulgation of the Universal Declaration of Human Rights and in the creation of the State of Israel. Haigh does chart the political path here but only as context for the formation and expression of the ideals which underpin the judgment in *Chester*. But Haigh also explores Evatt's less travelled biographical paths, including his family life and fondness for his children, his love of sport, his career at the Bar, his admiration of Lord Atkin[4] (Australian by birth) and US Justice Benjamin Cardozo, his immersion in and advocacy for modern art and Australian literature, and his travel, especially to the USA whilst on sabbatical from the High Court. All of these are important in understanding the strong principles invoked in the great Australian dissent.

One product of Haigh's astonishing research that will particularly intrigue lawyers is the insight into relations between the judges on the High Court bench during Evatt's short tenure. It came as a surprise to understand that, although only 36 when appointed in 1930, Evatt was only on the bench for 10 years before returning to politics. When he was appointed, notwithstanding a stellar career at the Sydney Bar, his appointment was regarded by many as political. Haigh records the Victorian Bar as deploring "the degradation of judicial office" on his appointment!

Haigh mines contemporary diaries, memoirs and records to understand how this played into the dynamic between the judges and reveals a side of the court to which we were never introduced at law school: egos, jealousies, resentments, ambitions and antecedent attitudes uncovered by Mr Haigh clearly beset the court and make for fascinating reading. The glimpses of the characters behind the well-known judicial names are revelatory and put some of the decisions they arrived at into an entirely new light. I am still shocked by the notion that Justice Rich asked Sir Owen Dixon to write some of Rich J's judgments for him.

One aspect of the great dissent that Haigh admires was the use by Evatt of literary references to make a point about the profound suffering from the loss of a child. Evatt had observed:

> Not only its poets and novelists but, at any rate in recent years, those engaged in the administration of the common law of England have recognized that shock of the most grievous character can be sustained in circumstances analogous to those of the present case.

Evatt quotes William Blake and Australian author Tom Collins to this end. In doing so, he draws together the threads of literature and law.

Haigh goes further and examines the cultural and historical notion of the lost child in Australian experience and literature, before concluding, "Some have remained critical of Evatt's approach, finding the [literary] references [in the judgment] obtrusive and unnecessary". But, Haigh argues, compellingly I think, that the literary allusions applied by Evatt:

> Are not, however, ornamental. They are guides to cultural inheritance. They bring Golda Chester's suffering into the range of normal human *Australian* responses. They seek to bridge a gap in the reasoning of judges as they explore this area.

But the greatest impact he shares is undoubtedly that on Maxie's mother Golda, the plaintiff in the claim.

Mr Haigh, now a famous writer of observational biography and historical events, as well as, of course, on cricket, writes beautifully. It is no less so in this book. His description of the scene in the office of Chester's solicitor Abe Landa after the judge had directed a verdict for the defendant will be familiar to many at the Bar, but is a perfect example of the quality of the evocative writing in this excellent work:

> For client and lawyer, there would have existed a shared sense of crusade, of extending Maxie's life at least in memory. But its cost was measurable in the silence of Talbot Flats, where even the sound of [Maxie's siblings] Benny and Rosie singing was for Golda too much to bear, while outside lay the earth that had swallowed her "particularly brilliant boy".

Evatt's great dissent was vindicated and his often diminished legacy will be enhanced by this book. Hopefully, it will also serve as a memorial for the other brilliant boy.

1 *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* (Wagon Mound No 1) [1961] UKPC 2, [1961] AC 388; (on appeal from NSWSC).

2 [1939] HCA 25; (1939) 62 CLR 1 (6 June 1939).

3 In Australia in *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383, *Jaensch v Coffey* (1984) 155 CLR 549 and *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 and in the UK in *McLoughlin v O Brian* [1983] 1 AC 410 and *Page v Smith* [1996] 1AC 155.

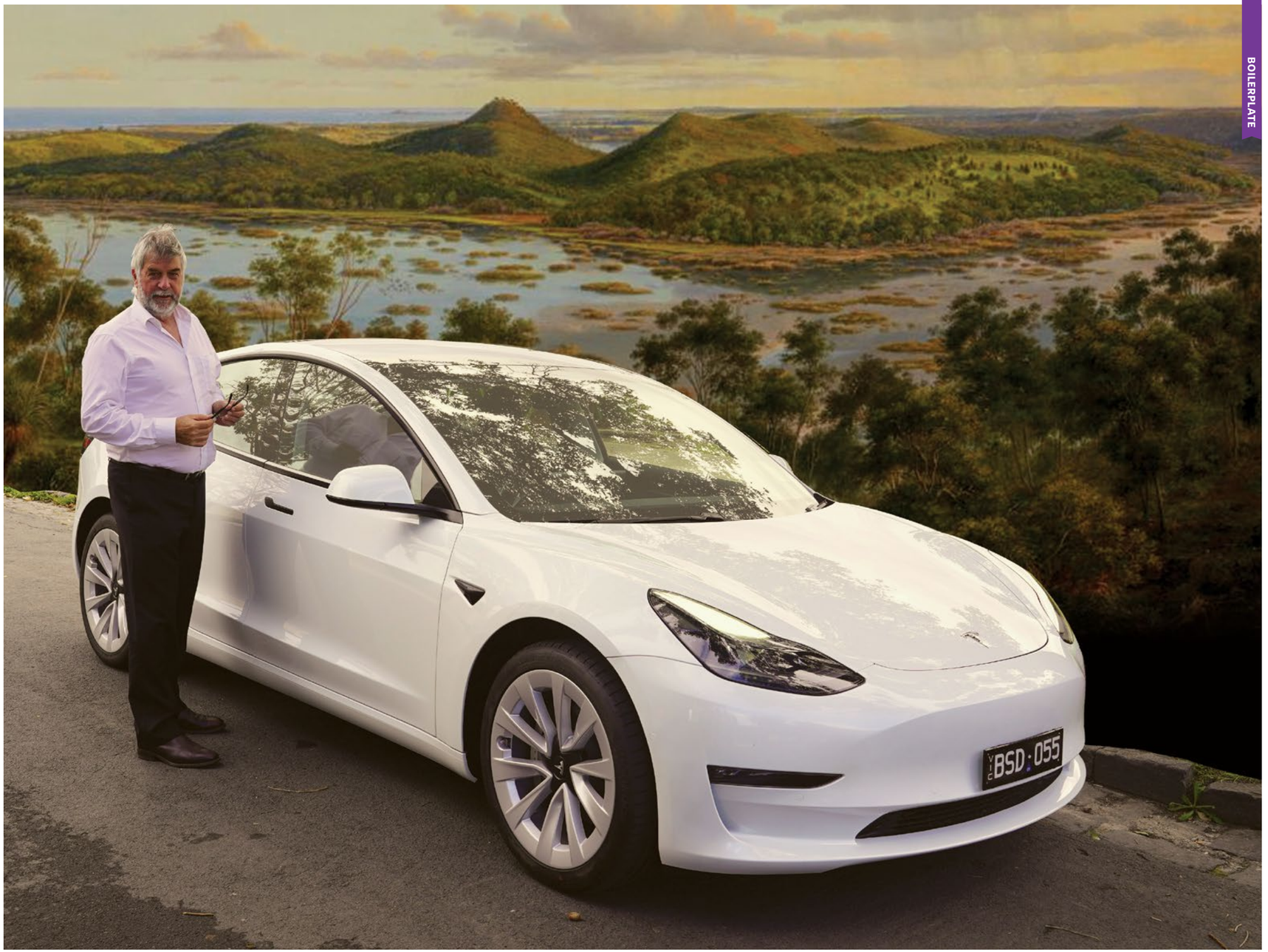
4 Who famously asked "who in law is my neighbour?" in enunciating the duty of care underpinning the law of negligence in *Donoghue v Stevenson* [1932] AC 562.

BOILERPLATE

CAR REVIEW

Looking forward to circuit trials

JOHN LAVERY



In August, I was briefed to return to Warrnambool, an old favourite. After such a long period of conducting practice online, it seemed the perfect time to evaluate a Tesla Model 3 and embrace a new lower carbon future.

The usual route from Melbourne to Warrnambool is straight down the Princes Highway, but a more interesting course involves travelling via Geelong, and the backroads through Shelford, Cressy, Camperdown and Cobden. Between Shelford and Cressy, the road follows an old gold rush track and is bordered on both sides by the old dry-stone walls. Driving through the fairly remote open spaces in an electric car was a new experience for me. Although the car was not silent, the complete lack of engine noise made it slightly surreal.

Arriving at Warrnambool Court was familiar and selecting a jury of 12 was a welcome return to the days of old, even though the jury panel appeared remotely from another court room. I managed to include a very enjoyable lunch at Wyton's Café in Kepler St and felt the twinge of nostalgia walking past the old court building on the corner of Timor and Gilles Streets, where I had conducted some of my first trials as a much younger barrister many years ago.

One memory which sticks in my mind is of Judge Hart charging a jury in that court on a 40° day with no air conditioning. It certainly seems to me that circuit practice has become more luxurious!

I had arranged lodgings in nearby Port Fairy, like the rest of the legal profession who appear on circuit in Warrnambool, it seems. For those who aren't familiar with it, Port Fairy features a gorgeous coastline, a village atmosphere with historic bluestone buildings, and very pleasant walking opportunities along the Moyne river. I also took the opportunity to revisit Tower Hill reserve, a recently extinct volcano which has been revegetated to its pre-European settlement state. My visit included an encounter with an overly inquisitive emu, which attempted to put its head through the open car window.

At the end of a satisfying case, it was time to head home. My first destination was the Tesla fast charge station in Colac. Travelling on the Princes Highway gave me an opportunity to experience the Tesla's extensive technology. In addition to excellent adaptive cruise control, the auto pilot function is amazing, keeping the car centred in its lane with the driver acting as a mere safety monitor. The Bluetooth is outstanding, and the overall experience is one of serenity.

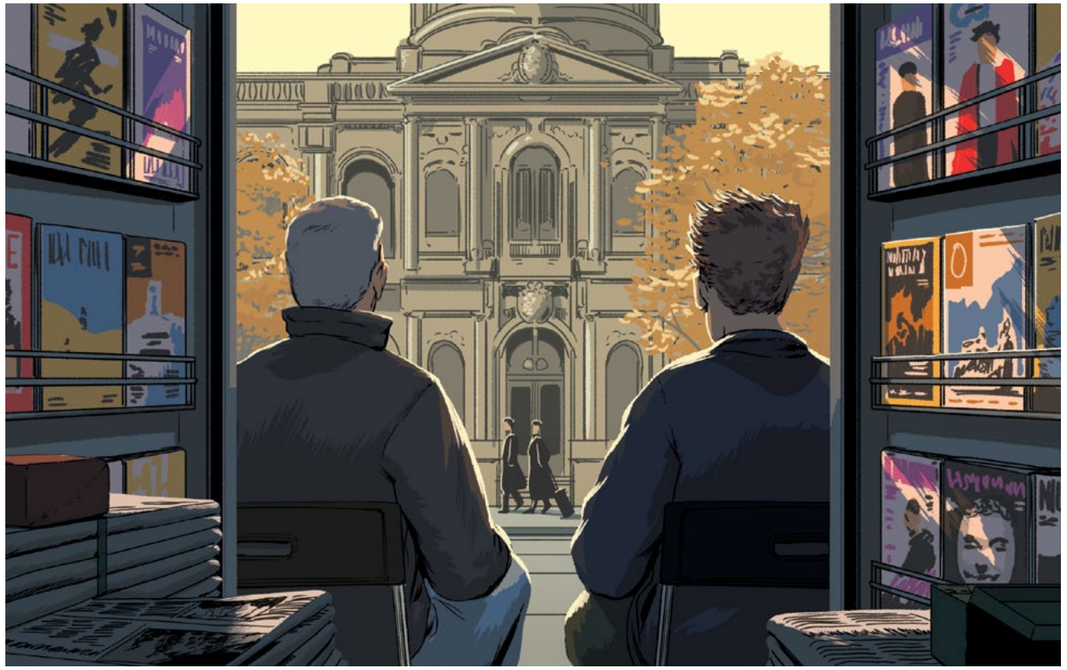
I had embarked on my evaluation of Tesla curious to discover whether it would suit circuit work. Its advantages in the city are clear: the promise of low running costs, and the opportunity to reduce your consumption of fossil fuel. With a small degree of planning, it is also easily capable of being a long-distance circuit vehicle. The car is refined, comfortable, and technologically advanced. It provides a composed ride with excellent road holding and handling characteristics, and its ability to accelerate is truly breathtaking.

If you have been reading about the impending demise of fossil fuel vehicles with dread, you may be surprised, as I was, that the green future is looking promising.

Technical information.

Tesla model 3 long range has a list price of $74,925, and an official fuel consumption range of 580km. The car can be charged slowly from household power points and more quickly from generic electric chargers which can be found in many locations, including Port Fairy and Warrnambool. Tesla Superchargers capable of adding significant charge in a short time (15 minutes to half an hour) were available for my trip in Melbourne, Geelong, Torquay and Colac. Tesla's mobile phone app and the car's satnav identifies charging point locations.

BOILERPLATE



Ron Senior: the last of the "paper boys"

DAVID GILBERTSON

Ron Senior, the last of the two "paper boys", passed away on 4 October 2021, aged 72.

Ron and his late brother, John, sold papers and magazines for many years from a stand on William Street. Lots of barristers and judges stopped by their stand in the morning to buy papers—or just for a chat.

Ron Senior was born in Melbourne in 1948, after the family moved from Hobart. John was 13 at the time. After they finished school, the two of them worked for a time at the Postmaster General's Office (the forerunner of Australia Post).

In 1986, John saw an advertisement for a newspaper seller. After working in a couple of different locations, John moved into the courts precinct in the late 1980s. He stood at a fold-up stand outside the steps of the former entrance to Owen Dixon Chambers East. Ron joined him in 1994.

There then began a long period of friendships with many barristers, judges and other people in the area. Getting the paper from John and Ron was an experience; it was something to look forward to in the morning. These men didn't sell papers for the money: the commissions they earned were next-to-nothing. They did it because they loved it.

In 2008, Ron issued a press release. It announced the appointment of a royal commission to inquire into John's treatment of him as a co-worker on the newsstand. A royal commissioner was appointed. John engaged senior and junior counsel to appear on his behalf. After lengthy deliberations,
the royal commissioner made an open finding.

If ever you wanted gossip about a barrister, Ron and John were the ones to talk to. They knew a lot about barristers—and judges for that matter.

Both brothers were passionate Footscray—and then Western Bulldogs—supporters. They studied the horseracing form on most days. Ron loved films, especially old Westerns, and he used to be an avid watcher of wrestling.

I always thought that the two brothers would have made a great comedy duo. John as the straight man—the Bud Abbott; Ron, the clown—the Lou Costello. John saw the world largely in black and white. That enabled people to stir him up.

John passed away in 2010, after a long battle with bowel cancer.

Ron returned to the newsstand. Shortly afterwards, unfortunately, the news agency shut it down.

A number of barristers kept in touch with Ron, until recently when he went into a nursing home.

William Street is not quite the same without them.

ILLUSTRATION BY GUY SHIELD

My alternative career as a DJ

FABIAN BRIMFIELD

A good friend of mine who is a partner in a large firm tells people that he is a tiler. If pressed with a few more questions after this career reveal, he can bluff his way through because he once tiled his own bathroom.

My alternative career is that I tell people I am a DJ.

But it is true, I am a DJ.

I've played at festivals, clubs overseas, and run my own successful events for years.

I'm also a commercial barrister. It's a combination that has raised an eyebrow or two.

In fact, I've been a DJ longer than I've been a practising lawyer. This year I'll have been spinning tunes for almost 13 years, which is five years longer than I've been plying the legal trade.

So how did I get into it?

I grew up with a very hip mother who ran what was the coolest café in Hobart in the 1990's called Kafe Kara. Back then it was the trendiest place in what was a very untrendy city. Contributing to its cool vibe was the music that would always play in the background, which was an ever-changing rotation of funky soul, house and lounge music (think St Germain, Massive Attack, Gotan Project, Thievery Corporation and the like). After school, I would go into the café and wait for my mum in an upstairs room to finish trade. I got very used to hearing that style of music.

In my room at the top of the café, I had a record player and a few disco records such as Boney M's *Nightflight to Venus*.

By the time I was in college I wanted to try my hand at DJ'ing. I saved up some money and bought myself a set of decks from a Cash Converters near the family home. They were poor quality, in desperate need of a service and would often lose power spontaneously. But I persisted. When I was 17 years old, I organised my first show at the back of an old theatre. I invited everyone I knew. Six people came.

During my college years I worked as a casual roadie, helping set up sound and lighting for music festivals and shows. Through that work I got a regular job at a Hobart nightclub, setting up for the bands on Friday night. As part of that, I was invited to DJ before the bands started every Friday night for about a year. I was underage but the bar staff didn't know that. ►

PHOTOS COURTESY OF ASH CAREY

I took a break from DJing after I started university and started to study law. It was not until Hong Kong and Singapore, where I studied for some time, that I picked up gigs.

I've been lucky enough to be busy during the pandemic, both with legal work, and DJ work. I have spent a lot of time in Tasmania during the pandemic (my native home and where I also keep chambers). Restrictions down south have been light, and venues have remained open.

I performed three very busy shows during Dark Mofo this year, a festival that was touch and go about whether it would proceed after the arrival of Delta. Many other Melbourne and Sydney DJs have not been so fortunate.

DJing, like any form of musical performance, is deeply rewarding. It is not easy, and takes a lot of practice. Many people think modern DJs just press a few buttons on a laptop, but that couldn't be further from the truth (always be skeptical when you see a laptop open in front of a DJ).

Many DJs still adhere to mixing vinyl records, and doing everything by ear (not with the assistance of the now very high-tech decks with touch screens and buttons galore).

It's also an expensive business. A good DJ will constantly be on the lookout for new music, keeping an ear (pardon the pun) to the ground on new and upcoming local artists who are producing music that is worth introducing audiences too. But it costs money to buy new music (a good DJ will *never* rip or pirate music), and vinyl records especially are not cheap.

DJing is not particularly well remunerated, unless you are famous and can command thousands of dollars per performance. Most DJs are paid a fairly paltry hourly rate, with no prep time (which, like with court work, must be done).

I'm often asked how DJing fits in with my career as a barrister. It doesn't really, although I can happily report that the two can co-exist.

I am often booked to play very late slots beginning at 2am, which means getting home at around 6am on a Sunday morning. If a trial is starting on a Monday, I have to say 'no' to late night shows the previous Saturday.

Once in a while, my career-de-jour leads to referrals for DJ work. I played at the Tasmanian Law Society's opening of the legal year dinner earlier this year (I am told the chief justice was quite complimentary of my music selection), the Svenson List Dinner, and was until the most recent lockdown in Melbourne slated to play an event for the Victorian Magistrates Association.

I certainly don't do it for the double income—any fees I earn as a DJ I donate to Canteen or NAAJA (two very worthwhile charitable organisations). But our work in the law is often oppressively stressful, and having a creative outlet is, in my humble view, extremely important for any barrister's mental health.

I mainly do it for that irreplaceable feeling that I get when I'm on stage. There is nothing more exhilarating than having a room of 500-plus people moving in unison and cheering you on as you go from song to song. There's nothing more flattering than having people crowd you after you finish and ask what songs you were playing and where you get your music from. There is nothing more rewarding than simply making people dance.

The Fabian playlist

Fabian has prepared a list of 10 songs he has been getting a lot of mileage out of lately, all available on Spotify. They represent his DJ sound. He hopes you take a listen.

- "Equinox (Heavenly Club Mix) — Code 718
- "Cada Vez (Grant Nelson Edit)"— Negrocan
- "Akoa (Tribal Edit)" —Mara Lakour
- "Native Revolution" —Trinidadian Deep
- "Heard It" —Madcat
- "Fadjamou (St Germain Remix)"— Oumou Sangare
- "Crisis" —Sondrio
- "I'm in Love (Caught up Version)" — Sha-Lor
- "Ti Chung (Musumeci Supernatural Remix)" —Emmanuel Jal & Nyaruach
- "Bitumen" —LNS

VICTORIAN BAR NEWS

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The Newsletter

"What's the Bar Council doing about it?" has long been the cry of members of the Bar. This question has often been provoked by a desire to know about the ethics rulings, investigations, representations to various authorities, procedural problems and sundry matters affecting counsel which have been or ought to have been the subject of the Council's attention.

By means of this quarterly publication the Bar Council hope to keep the Bar informed of these matters. This will be done by providing a brief account of the rulings made and other matters of interest.

Counsels' Fees

A committee has been appointed by the Bar Council to review the County Court scale of counsels' fees. It is now nearing completion of its work.

The committee will be in a position to expedite its recommendations if members of the Bar take the time and trouble to give their opinions in the questionnaire being circulated with the approval of the Bar Council.

The questionnaire raises issues of principle relevant to fees in all courts.

It is desirable that views on this questionnaire be given by all members of the Bar wherever they practice.

Victorian County Court fees have fallen far behind those in equivalent interstate courts - some examples:-

Scale	Brief Fee			Percentage Above Vic.
Over $1,500 to $2,000	Vic. $54	N.S.W.	$77.00	43%
		Qld.	$78.75	46%
Over $2,000 to 4,000	Vic. $65	Qld.	$105.00	62%
Over $5,000 to $8,000	Vic. $80	Qld.	$126.00	58%
		S.A.	$170.00	113%

Page 1 of the first issue of Bar News published in Easter 1971

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