



Bar Association hosts book launch by Kirby J

Justice Michael Kirby was the Guest of Honour at the launch of *Criminal law and procedure in New South Wales* by Michael Eburn and Robert Hayes, in the Bar Association Common Room on 29 August 2002. In his address: 'Why has the High Court become more involved in criminal appeals?' Justice Kirby explored several possible reasons why 'a significant disinclination in the High Court to receive criminal or sentencing appeals' during the first 75 years of federation has been reversed in recent times.

The judge noted that as late as 1970 there were only 14 applications for special leave to appeal in criminal cases, only three of which were granted. For such an appeal to be heard, it had to involve 'substantial and grave injustice' or a 'gross violation of principles'. By 2001-2002 the number stood at 86, of which 19 were granted.

Justice Kirby cited several reasons for the increase, including:

- broader criteria for special leave;
- the establishment of intermediate courts of criminal appeals in the states and territories;
- the appointment of judges with more interest in criminal appeals;
- the provision of legal aid;
- specialisation at the Bar; and
- a judiciary that recognises 'complexities that [its] predecessors either ignored or did not think worth exploring'.

Further, Kirby J argued that powerful forces outside the judicial branch of government exert 'external and not too subtle pressure on judicial officers to perform their functions other than strictly in accordance with the law and the evidence and merits of the particular case'. Against this backdrop, participation in criminal appeals by the High Court is an important institutional guarantee of judicial independence as well as individual rights and liberties. A copy of the speech held in the Bar Library.



Walker SC addresses joint session of NSW Parliament

The President of the Bar Association, Bret Walker SC, addressed a special joint sitting of the NSW Parliament on 18 September 2002. Other guest speakers at the parliamentary seminar on reform of the law of negligence were Professor Peter Cane from the Australian National University's Research School of Social Science, Mr Michael Gill, a partner with Phillips Fox and Mr Geoff Atkins, an actuary and a director of the firm Trowbridge-Deloitte.

Walker SC provided members of Parliament with an overview of the legal history and key principles involved in the liability of public authorities. The key concern should

be one of social justice. Statutory authorities and government utilities, authorised by Parliament to perform tasks for the benefit of the public or to regulate for the prevention of accidents, must be liable for harm which is caused by negligence in the course of their duties.

However, Walker SC pointed out that such simple concepts become 'strained and fragile' because of the complexity of modern government and policy issues relating to the allocation of resources. To illustrate this point, he drew upon a

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Sir Maurice Byers Lecture

The 2002 Lecture will be delivered by Emeritus Professor Leslie Zines, Visiting Fellow, Research School of Social Sciences, Australian National University, on Wednesday, 16 October 2002 at 5.15 pm in the Bar Association Common Room. The title of the lecture, is 'Legalism, realism and judicial rhetoric in constitutional law'.

Admission is \$10.00. The Lecture is CPD accredited: two points in the substantive law strand.

To register for the Lecture, contact:
Travis Drummond at the Bar Association on
ph: (02) 9229 1720
e-mail: tdrummond@nswbar.asn.au

Continuing Professional Development Programme

Visit the Bar Association's web site at:

<http://www.nswbar.asn.au/database/cpd/index.php> to obtain the latest information on CPD events

CPD mini conferences

The Continuing Professional Development Programme is about to feature six mini-conferences in downtown Sydney, regional NSW and Canberra.

Full attendance at one of these mini-conferences will attract eight CPD points. Barristers will receive additional points for preparation and delivery of seminar papers.

Each of these events will be conducted in partnership with, and hosted by, local universities. A secondary objective of the mini-conferences is to give law students who may be interested in coming to the Bar the opportunity to network with barristers.

The first mini-conference will be held at the University of Technology, Sydney on the weekend of 8-9 November. Members

interested in contributing papers or commentary should contact:

Director of Studies

Robert Hayes

on ph: (02) 9229 1722 or

e-mail: rhayes@nswbar.asn.au

Details of this and subsequent conferences will be posted on the Bar Association's web site as soon as they are finalised.



Mediation: first port of call or the times they are a-changing?

(Consumer law and the NSW tribunal system)

The Bar Association's Mediation Committee will become regular contributors to a mediation column in Bar Brief. In the first such column, Geraldine Hoeben argues that consumers are demanding a simpler dispute resolution system.

Well, it's finally happened! It's taken over a decade but now it is accepted that litigation is not always the way to go when communication breaks down. When I first became involved in mediation in 1993 I was considered 'unusual' by my fellow practitioners at the Bar.

A stint of five years as Deputy Chairman of the Commercial Tribunal of NSW over that decade made me appreciate the benefits of a more flexible approach to resolving disputes where costs were substantially reduced and the parties participated actively in a consensual dispute resolution process.

Since those early days NSW has seen the introduction of a number of tribunals, all of which have contained alternate dispute resolution processes (ADR) - to a greater or lesser extent. A substantial part of the Fair Trading Tribunal (FTT), although only having a brief life, nevertheless contained effective conciliation and mediation processes while the bulk of its hearings reflected a more approachable and informal attitude to the substantive hearing process.

The Administrative Decisions Tribunal (ADT), whilst basically a tribunal of merit review of administrative decisions, also has jurisdiction over some significant consumer areas involving first tier hearings, not the least of which is retail leases (RL). The ADT in dealing with RL matters requires all parties to a RL 'dispute' to be referred to mediation before first proceeding to

hearing. Indeed, RL disputes cannot be heard unless the RL Tenancy Dispute Unit, as a service provided through the ADT, produces a certificate which states that mediation has failed to resolve the dispute.

Tribunals of even more recent history such as the Consumer, Trader and Tenancy Tribunal (CTTT), which took over from the FTT on 25 February 2002, whilst not insisting on mandatory mediation, assumes that the parties have turned their minds to ADR or early neutral evaluation as a means of dispute resolution before proceeding to hearing.

All of this is playing to a back drop where consumers involved in disputes are demanding value for money and a more down to earth resolution system that makes access to justice a basic entitlement and not a privilege of just the few who can afford it.

By Geraldine Hoeben

Concurrent evidence in the AAT

Practitioners may be aware that, from time to time, the Administrative Appeals Tribunal uses concurrent evidence procedures in hearings. Concurrent evidence (CE), colloquially sometimes known as 'hot tubs', involves the taking of sworn evidence of more than one expert at the same time. It provides a forum in which, in addition to providing their own evidence, expert witnesses can listen to, question and critically evaluate other experts' evidence. The potential benefits of CE are that it can reduce hearing time, narrow the issues in dispute and may reduce any partisanship on the part of experts.

Under section 33(1) of the *Administrative Appeals Tribunal Act 1975* the Tribunal is empowered to conduct proceedings with as little formality and technicality and with as much expedition as possible, within the requirements of the law. The Tribunal is not bound by the rules of evidence and may hear evidence in such manner as it thinks appropriate.

Cases in which CE may be useful include those where:

- the major issues in the case turn upon the expert evidence, or, if some of the facts are in dispute, where different possible fact scenarios can be put to the experts by the Tribunal;
- the experts are commenting upon the same issues;
- the experts are of like disciplines; and
- the experts have similar levels of expertise.

The Sydney registry is conducting a study of the efficiency and effectiveness of CE procedures. The Tribunal seeks the assistance of practitioners in NSW in making the study a success. It is expected that cases that go to hearing between December 2002 and June 2003 will be included in the study, and that 50–100 cases will use CE procedures during that time. Only those matters that are heard in NSW where both parties are represented and each party has at least one expert will be requested to give expert evidence using CE procedures.

In order to facilitate the CE process, practitioners in NSW are now being asked to submit hearing certificates that contain the date(s) upon which expert witnesses are available to give evidence using CE procedures, if appropriate. Parties will therefore need to confer with each other prior to submitting a hearing certificate to ascertain dates when all experts are available to give evidence concurrently. At the call-over, the Tribunal will allocate a hearing date(s) where CE procedures can be used, if considered appropriate by the Tribunal. After a decision has been handed down, parties' representatives will be asked to complete a survey that evaluates the quality of the evidence presented to the Tribunal, parties' satisfaction with and perceptions of the fairness of the CE process.

If you would like further information or if you have comments or questions about the use of CE procedures in the Tribunal, please contact:

Sofia Frew, Research Officer,
Administrative Appeals Tribunal,
Level 7, 55 Market Street, Sydney,
(02) 9391 2538 or e-mail sofia.frew@aat.gov.au.

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2002 Senior Counsel Appointments

John Webster

6/7 St James Hall Chambers

John Webster began practising at the NSW Bar on 27 November 1970. His principal areas of practice include valuation, local government, planning and environment law and administrative law. He is a founding member of the Environment and Planning Law Association and has been its Vice-President since 1995. [Dip L (BAB)]

Tom Molomby

Frederick Jordan Chambers

Tom Molomby was admitted to the NSW Bar on 14 March 1975. His principal areas of practice include crime, defamation, discrimination and administrative law. In addition to a number of articles in law journals, he has written books on Australian criminal cases, including *Ratten: The web of circumstance* (1978), *Who killed Hannah Jane* (1981) and *Spies, bombs and the path of bliss* (1986). [BA LLB (Melbourne University)]

Don Colagiuri

Parliamentary Counsels' Chambers

Don Colagiuri began practising at the NSW Bar on 5 December 1975. Since that time he has practised exclusively as a parliamentary counsel, drafting legislation and providing legal advice for the NSW Government and Members of Parliament. In February 2001 he was appointed as Head of the Office of the Parliamentary Counsel. [BA LLB (University of Sydney)]

Patrick Power

Crown Prosecutors' Chambers

Patrick Power began practising at the NSW Bar on 11 February 1977. In 1987 Mr Power was appointed as a crown prosecutor. In 1991 he was appointed Deputy Senior Crown Prosecutor. For the last five years he has been the Chairperson of the NSW Youth Justice Advisory Committee, established under the *Young Offenders Act 1997*, which advises the Government on youth conferencing and diversion from full-time custody. [BA LLB LLM MBA PhD (ANU, University of Sydney, University of New South Wales)]

Robert Harding

Culwulla Chambers

Robert Harding began practising at the NSW Bar on 11 March 1977. His area of practise is family law. [BA LLB (University of Sydney)]

David Russell

7 Garfield Barwick Chambers

David Russell began practising at the NSW Bar on 22 July 1977. His principal areas of practice include common law, dust diseases, equity and probate, and professional negligence. In 1998 – 1999 he held a commission as an acting judge of the NSW District Court. [BA LLB (University of Sydney)]

Christopher Leahy

Sir James Martin Chambers.

Christopher Leahy began practising at the NSW Bar on 14 July 1978. His principal area of practice is personal injury. [BA LLB (ANU)]

Michael Williams

William Deane Chambers

Michael Williams began practising at the NSW Bar on 9 November 1979. His principal areas of practice include medical negligence, common law and criminal law. [LLB (Auckland University)]

Michael Elkaim

William Deane Chambers

Michael Elkaim began practising at the NSW Bar on 13 June 1980. His principal area of practice is common law. Mr Elkaim is a member of the 2002 Bar Council. [LLB LLM Dip Air & Space Law (University of Rhodesia, University of London)]

David McGovern

11 St James' Hall Chambers

David McGovern began practising at the NSW Bar on 8 May 1981. His principal areas of practice include commercial and bankruptcy law. [LLB LLM (University of Sydney)]

John Harris SC

Blackburn Chambers, Canberra

John Harris began practising at the NSW Bar in 1981. He practices in both the ACT and New South Wales. Mr Harris was appointed Senior Counsel in the ACT on 1 August 2002. His principal areas of practice are commercial law, common law and criminal law. Mr Harris has been a member of the Council of the ACT Bar Association since 1994 and is currently its President. [LLB (The Australian National University)]

James Bennett

National Crime Authority

James Bennett began practising at the NSW Bar on 10 August 1981. His principal area of practice is criminal law. In 1997 Mr Bennett was appointed as Acting Crown Prosecutor and in June 1998 he accepted a permanent appointment as Crown Prosecutor. He became a Deputy Senior Crown Prosecutor in November 1999. In April 2000 he was appointed for a three-year term as a member of the National Crime Authority. [LLB (University of New South Wales)]

Frank Lever

Blackstone Chambers

Frank Lever began practising at the NSW Bar on 16 December 1981, after practising as an advocate in Zambia in the mid 1970s. His principal areas of practice include commercial law, equity and trade practices. [LLB BEc LLM (University of Sydney)]

Garry Hatcher

Frederick Jordan Chambers

Garry Hatcher began practising at the NSW Bar on 11 February 1983. His principal areas of practice include industrial law, employment law, unfair contracts and occupational health and safety. [B Leg S B Comm MBA (Macquarie, University of New South Wales, Deakin University)]

Peter Dare

Crown Prosecutors' Chambers

Peter Dare began practising at the NSW Bar on 16 February 1983. Dare was appointed as a crown prosecutor in 1988. Between 1989 and 1994 he coordinated the criminal reading programme of the Bar Association's Readers course at Parramatta District Court. In December 2001 he was appointed Acting Deputy Senior Crown Prosecutor. Following the introduction of pre-trial disclosure, Mr Dare was appointed to lead the Trial Preparation Unit. [LLB Dip Crim (NSW Inst Tech, University of Sydney)]

Ian Faulkner

9 Selborne Chambers

Ian Faulkner began practising at the NSW Bar on 6 May 1983. His areas of practice are commercial, trade practices and construction. [LLB (Hons(I)) (University of Tasmania)]

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2002 Senior Counsel Appointments

Continued from page 6

Garth Blake

8 Wentworth Chambers

Garth Blake began practising at the NSW Bar on 10 February 1984. His principal areas of practice include equity and commercial law. Since 1995 he has held the office of the Advocate of the Anglican Church's Sydney Diocese. Mr Blake is the Chairperson of the Anglican Church's Child Protection Committee, responsible for preparing protocols for dealing with the issue of child sexual abuse. In June 2002 he was awarded a Churchill Fellowship to investigate the equivalent policies in overseas churches. [BA LLB LLM (University of Sydney)]

Richard Seton

Maurice Byers Chambers

Richard Seton began practising at the NSW Bar on 6 July 1984. His principal areas of practice include insurance law, professional negligence, personal injury, building and construction law. He is a member of the Bar Association's Personal Injuries Litigation Committee. [BA LLB (University of New South Wales)]

Geoffrey Watson

7 Wentworth Chambers

Geoffrey Watson began practising at the NSW Bar on 31 August 1984. His main areas of practice include product liability, professional indemnity and insurance. [LLB MA (University of Sydney)]

David Campbell

11 Garfield Barwick

David Campbell began practising at the NSW Bar on 2 November 1984. His principal areas of practice include personal injury, medical negligence, defamation, criminal law and administrative law. [LLB (University of Sydney)]

Alison Stenmark

11 Garfield Barwick

Alison Stenmark began practising at the NSW Bar on 8 February 1985. Her principal areas of practice include royal commissions and tribunals of inquiry, common law, criminal law and general work for government departments. Ms Stenmark has been briefed to appear in the Royal Commission into the Chelmsford Private Hospital, the Gyles Royal Commission into the Building Industry, the Wood Royal Commission into the New

South Wales Police Service and in the Police Integrity Commission. She is a member of the Bar Council. [LLB (University of Sydney)]

Stephen Campbell

William Deane Chamber

Stephen Campbell began practising at the NSW Bar on 1 November 1985. His principal areas of practice include common law and insurance cases. [Dip L (BAB)]

Ian McClintock

Forbes Chambers

Ian McClintock began practising at the NSW Bar on 7 November 1986. His principal areas of practice include criminal law and royal commissions and inquiries. [BA LLB (University of New South Wales)]

John Marshall

6 Selborne Chambers

John Marshall began practising at the NSW Bar on 18 December 1987. His principal areas of practice include commercial law, insurance, banking and trade practices. [BSc LLB (University of New South Wales)]

Ronald Webb

Nigel Bowen Chambers

Ronald Webb began practising at the NSW Bar on 8 April 1988. His principal areas of practice include commercial law, equity, intellectual property and trade practices. [LLB B Comm MA (University of New South Wales, University of Sheffield)]

Brian Knox

44 Edmund Barton Chambers

Brian Knox began practising at the NSW Bar on 7 April 1989. His main areas of practice include family law, de facto relationships, equity and family provision act matters. Prior to practising at the Bar, Mr Knox was the Principal Registrar of the Family Court of Australia between 1983 and 1986 and was the Commonwealth Director of Legal Services (Australian Government Solicitor) for NSW between 1987 and 1989. Mr Knox has served on the Bar Association's Family Law Committee for the last seven years and various PCCs for the last four years. He is the author of the Bar Association's *Guidelines for barristers on dealing with self-represented litigants* (2001). [BA LLB (The Australian National University) MPA (Harvard University)]

Ian Jackman

8 Selborne Chambers

Ian Jackman began practising at the NSW Bar on 20 December 1989. His main areas of practice include commercial, equity, trade practices and competition law. Mr Jackman, a Rhodes Scholar in 1985, is the author of a number of articles in the *Cambridge Law Journal*, the *Australian Law Journal*, *Halsbury's Laws of Australia*, and of *The Varieties of Restitution* (The Federation Press, 1998). [BA MA BCL (University of Sydney, Oxford University)]

Robert Hulme

Crown Prosecutors' Chambers

Robert Hulme began practising at the NSW Bar on 6 April 1990, and accepted an appointment as a crown prosecutor in June of that year. His principal area of practice is in the criminal appellate field. In 2002 he was appointed a Deputy Senior Crown Prosecutor. Mr Hulme is also an advocacy skills instructor with the Australian Advocacy Institute. [Dip Law, Dip Criminology, (SAB, University of Sydney)]



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Appointments

Supreme Court of NSW

The Hon Acting Justice David Ipp has been appointed as a judge of the Supreme Court of New South Wales and as a judge of appeal, effective 21 October 2002.

District Court of NSW

Peter Berman SC has been appointed as a judge of the District Court of New South Wales, effective 13 September 2002.

The Hon Barrie Hungerford QC has been appointed as an acting judge of the District Court of New South Wales, effective 12 September 2002 – 30 June 2003.

Local Court of NSW

His Honour Judge Derek Price has been appointed as Chief Magistrate of the Local Court of New South Wales, effective 12 September 2002. His Honour has also been appointed as a mining warden.

Graeme Curran has been appointed as a magistrate and as a mining warden, effective 30 September 2002.

Licensing Court of NSW

Peter Ashton has been appointed as a licensing magistrate, effective 23 September 2002 – 22 September 2007.

Administrative Decisions Tribunal

The Hon Acting Judge Nader RFD QC has been appointed as Deputy President of the Administrative Decisions Tribunal of New South Wales and as the Divisional Head of the Legal Services Division of the Tribunal for the period 1 September 2002 to 31 August 2005.



Court ceremonies: to stand or not to stand?

Several members have recently asked whether barristers should stand or remain seated during an address to the Bench by the Bar's representative at a ceremonial sitting of a court.

The practice is as follows:

When the President or the President's nominee rises to speak on behalf of the Bar at a swearing in or other ceremonial occasion in a federal or state court, members of the Association present should rise and remain standing during the President's or nominee's speech.

This is a courtesy to the court and to the judge the occasion of the celebration. It reflects and demonstrates the unity and collegiality of the Bar.

Crown prosecutors

Patrick Barrett, Robert Hulme SC, Mark Marien and Daniel Howard have been appointed as deputy senior crown prosecutors, effective 3 September 2002.

The following persons have been appointed as crown prosecutors commencing on and from the dates shown:

| | |
|------------------|-------------------|
| Virginia Lydiard | 8 August 2002 |
| Jane Culver | 30 September 2002 |
| Paul Leask | 26 September 2002 |
| Wayne Roser | 26 September 2002 |
| Brian Knox SC | 4 November 2002 |
| Keith Alder | 26 September 2002 |
| John Pickering | 26 September 2002 |
| David Brack | 26 September 2002 |
| Maxim Pincott | 26 September 2002 |
| Darryl Wilson | 26 September 2002 |

Margaret Cunneen and Peter Dare SC have been appointed as acting deputy senior crown prosecutors, effective 3 September 2002 – 13 December 2002 and 3 September 2002 – 31 March 2003 respectively.

Wayne Roser has been appointed as an acting deputy senior crown prosecutor effective 3 September 2002 – 13 December 2002.

The following persons have been appointed as acting crown prosecutors for the periods shown:

| | |
|----------------|--------------------------------------|
| Simon Apps | 1 October 2002 – 28 February 2003 |
| Gary Corr | 7 October 2002 – 28 February 2003 |
| Jillian Cash | 1 October 2002 – 28 March 2003 |
| Raymond Willis | 22 October 2002 – 28 March 2003 |
| Gina O'Rourke | 7 October 2002 – 28 March 2003 |
| John Favretto | 22 October 2002 – 31 January 2003 |

Australian Advocacy Institute

Elizabeth Fullerton SC has been re-appointed as a director of the Australian Advocacy Institute for a further term of 2 years, effective 1 April 2002.

AusAID, the Australian Agency for International Development, manages the Australian Government's official overseas aid program. AusAID is looking for organisations to manage the following development activity in Papua New Guinea.



Papua New Guinea Justice Advisory Group (JAG)

The objectives of the JAG are to (upon request):

- support the Government of PNG ('GoPNG') in its role of Sector monitoring and evaluation by providing independent advice to both GoPNG and AusAID on the performance of the law and justice Sector, including the impact and outcomes of donor and government funding and the links to poverty reduction;
- advise on any policy, structural, financial or other issues for the Sector, which may include advice on broader social, political and economic conditions, policies and/or institutions outside the formal law and justice framework;
- provide specialist technical advice in relation to policy, management and/or operational matters, including in the context of specific AusAID activities in the Sector;
- assist in the promotion of Sector coordination through a consistent and collaborative approach to Sector monitoring, in the development of agreed Sector outcomes and indicators, and in the collection of Sector performance information;
- support the building of GoPNG and AusAID capacity to undertake Sectoral monitoring; and
- monitor and evaluate Managing Contractor performance in relation to the proposed AusAID-funded Law and Justice Sector Program.

It is anticipated that the JAG will commence about January 2003 and will continue over a three-year period.

Selection will be on a one-step basis. The closing date for submission of the tender documents is 2pm Canberra time Monday 11 November 2002.

Tender documents are available on the AusAID internet site <http://www.ausaid.gov.au/business/tenders/index.cfm> or requests for tender documentation must be made in writing (letter or facsimile) to Jan Goldsworthy, PNG CS, AusAID, GPO Box 887, CANBERRA ACT 2601, facsimile (02) 6206 4877. Alternatively,

Enquiries about the JAG: Debbie Bowman, phone (02) 6206 4964.

Enquiries about contract and tender procedures: Jan Goldsworthy, phone (02) 6206 4236.

Eligibility criteria: To be eligible for AusAID consultancy work, organisations must carry on business in Australia or New Zealand, have a headquarters, organisation and associated facilities in Australia or New Zealand and be registered with the Australian Securities Commission or New Zealand Companies Office. The majority of the team, who perform the services, including the team leader, must be Australian or New Zealand citizens or permanent residents with relevant qualifications recognised in Australia or New Zealand.

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Failure to pay another barrister for requested services

The 'open door' policy of the Bar is rightly regarded as fundamental to the education and advancement of the junior Bar. Its characteristic give and take nature promotes the collegiate atmosphere of the Bar and is the envy of many a solicitor! However, there is a line where a request for advice or assistance goes beyond what is reasonable without proper remuneration (leaving to one side the requirements of reading unless otherwise agreed). In such circumstances where the junior party seeks the senior's time, the junior should take steps to have the senior properly briefed by the solicitor or the client. Where the senior seeks the assistance of the junior, the senior should pay for the work personally or, if appropriate, have the junior formerly briefed as well.

Where there is (or should be) an arrangement for the junior party to be paid by the senior and those fees are not paid by the senior, the senior risks not only the condemnation of his or her peers but disciplinary action, as such conduct may well fall into the categories of unsatisfactory professional conduct or professional misconduct – see the definitions in sec 127 *Legal Profession Act 1987*.

Wheelahan QC, in an earlier *Bar Brief*, helpfully outlined the tradition in relation to devilling and it is appropriate to repeat that article in full.

Devilling

By Dennis Wheelahan QC

Most barristers regard it as part of Bar etiquette that if a junior, particularly of reader status or similar, is asked to do work on a brief in the form of drafting pleadings, preparing advices or undertaking research, then he/she ought to be paid immediately upon production of the work.

Justice Ken Handley of the NSW Court of Appeal describes his understanding of the tradition as follows:

The practice of devilling is one of mutual accommodation. If the senior person asks a junior to devil work for him then the following apply:

- If the work is unsatisfactory, it is sent back. If, on its return, it is still unsatisfactory the work is not paid for.
- If the work is satisfactory and is used by the senior person, either with or without amendment, then the junior person is paid half the fee, which the senior person charges for the work and paid immediately.¹

The arrangement works to the benefit of the senior person because that person is in due course paid the appropriate fee for the work having been supervised and taken responsibility for it.

The senior person is able to produce chamber work sooner than would have otherwise been possible, maintaining goodwill of solicitors and, if the devilling is done in connection with court work, the senior can concentrate on other matters or, shock horror, even a little leisure.

The junior person benefits because it means immediate payment for work. The junior also gains experience in work that might not have ordinarily come that person's way and the junior person has an opportunity to prove that person's mettle. It is generally beneficial. It will be a sad day for the Bar if this tradition dies out and the whole Bar, including senior members, will be the poorer in every sense.

Juniors complain that the tradition is more honoured in the breach than the observance.

When asking junior barristers to undertake work it is important that they be informed when the work is required and the arrangements for payment.

If nothing is said by the senior person at the time the understanding should be that the tradition should apply.

Whilst the barrister providing the work must be prepared to wait until paid by the solicitor it is unreasonable and unfair for junior barristers, without an established cash flow, to be asked to wait.

Serious considerations should be given to honouring the tradition described above and ensuring that juniors are paid on completion of satisfactory work.

¹ Regard must be had to New South Wales Barristers' Rule 83 when charging for devilled work.



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Black and White

Directed by Craig Lahiff

Written by Louis Nowra

Set in Adelaide in 1958, an excitable young lawyer, David O'Sullivan (Robert Carlyle), is given the news that he has been given a legal aid case to defend a young Aboriginal man (David Ngoombujarra) who has been arrested for the rape and murder of a nine year old girl. O'Sullivan soon concludes that Stuart has been framed by the local police and decides he must take a stand. O'Sullivan finds himself pitted against Roderic Chamberlain (Charles Dance), South Australia's Crown Prosecutor, a forbidding but tremendously charismatic character. Aided by the young Rupert Murdoch (Ben Mendelsohn), who is fast making a name for himself with his paper, *The Adelaide News*, and his partner Helen Devaney (Kerry Fox), O'Sullivan takes the case to the highest courts in the Commonwealth.

Black and white is based on one of Australia's most compelling and controversial court cases that contributed to major changes to legal and judicial practice in Australia. The *Stuart Case* was one of several landmark cases that were instrumental in abolishing the involvement of the Privy Council in the Australian legal system. The High Court of Australia later became the final Court of Appeal in 1968. The case also hastened the end of capital punishment in Australia by provoking vigorous divisive controversy about the policy and was pivotal in focusing the nation's attention to the status of Aboriginal peoples and contributed to their enfranchisement through a national referendum in 1967. The Aboriginal Legal Service was established and proper representation became possible through the establishment of legal aid.

In a speech to the Local Court of New South Wales Annual Conference, 29 July



From left: Charles Dance as South Australian Crown Prosecutor, Roderic Chamberlain; Robert Carlyle as David O'Sullivan; Kerry Fox as Helen Devaney)

2002, the Hon Justice Michael Kirby commented:

The film is of special interest to a judicial officer and a lawyer because it tells the story of the Stuart affair... My proposition is that every Australian judicial officer should see this film. It is a reminder to us of the dangers of formalism and blindness to prejudice that can be inherent in our work unless we are on guard. Although there have been great improvements in the courts of our country since the proceedings portrayed in *Black and white*, we the judicial officers of Australia today should watch the film to reinforce our commitment to the avoidance of errors of the kind that the film chronicles.



Walker SC addresses joint session of NSW Parliament

Continued from page 1

selection of notable cases, dating from the nineteenth century through to such present day cases as *Brodie*, *Pyrenees* and *Ryan*. In conclusion, Walker SC left open the question of 'whether statutory liability of public authorities will be set by a parliament, complete with parliamentary limitations on the calls on the public purse by reason of its activities or will it be

allowed to be worked out case by case by common law courts?'

'As always', he said, 'being a lawyer, I would suggest that there is much to be said on both sides'.

The Hansard transcript of the special joint sitting may be obtained from state parliament's web site at

www.parliament.nsw.gov.au

Free tickets!

One hundred double passes to a sneak preview are available to members of the Bar Association. The first 100 to RSVP to info@hopsotchfilms.com.au with their names and addresses will be posted a double pass for the sneak preview screenings of the film (valid in Sydney, Melbourne, Brisbane, Canberra, Adelaide and Perth for the sneak previews on Saturday 26 October and Sunday 27 October).

ST James' Church Quiet Garden

Members may have noticed the recent advertisement in *Bar Brief* for the Quiet Garden at St James' Church in King Street. There has been a long and close connection between St James' and the legal profession and the Association encourages members to make use of this free and central facility. If any member wishes to make a contribution to the Quiet Garden, this is also encouraged and cheques payable to 'St James Church' may be sent to L1 169-171 Phillip St Sydney 2000.

Speeches to note

'Native title: The next 10 years - Moving forward by agreement,' speech to the Native Title Conference 2002: Outcomes and possibilities, by the Hon Daryl Williams AM QC MP, 4 September 2002. The Attorney-General summarised the legislative and legal developments on this 'difficult' matter since *Mabo*, highlighting the indigenous land use agreements as having gained broad acceptance. He then dwelt on the government's approach to the other key mechanism in achieving negotiated agreement, Consent Determinations, listing the four main principles that should be applied as: certainty of rights recognised, reflection of common law, compliance with the *Native Title Act 1993* and transparency of process. He sees both mechanisms as different and usefully employed together. Noting evidence of an increasing attitudinal shift from confrontation and denial to negotiation and mutual benefits, he commented that court decisions have contributed to 'a more certain and predictable native title environment', whilst not being welcomed by all. Ongoing fine-tuning of the system, but no overhaul, is the Government's attitude. In summary, the Attorney-General acknowledged that all Australians want progress on the resolution of native title and affirmed the government's commitment to ensuring that the Act 'retains a balance between certainty and fairness for all parties', that 'costly and time-consuming litigation is avoided' and that funding to all elements of the system is adequate. A copy of the speech is available at www.ag.gov.au/ministers/attorney-general and also from the Bar Library.



Opening address to the 6th National Mediation Conference, by the Hon Daryl Williams AM QC MP, 18 September 2002. The Attorney-General stressed that mediation and the courts must be seen as complementary systems, and that the challenge was to make people aware of these options. He noted that NADRAC is working on the many challenges being faced, such as defining ADR, establishing common terms and standards of services and keeping up with technology as a communication tool for ADR. He said that

legislation must keep up with mediation on matters such as mediator immunity, confidentiality and enforceability, and the courts must refer cases to ADR. He cited Family Law as one especially appropriate area, where the government has developed programs to make greater use of PDR, and native title as another, with increasing ILUAs. For international trade disputes, the UN is developing a model for conciliation, but the Attorney-General noted that ADR was still not commonly used in business. He concluded that 'mediation recognises and responds' to the 'human dimension' in our justice system. A copy of the speech is available at www.ag.gov.au/ministers/attorney-general and also from the Bar Library.



The next generation of bankruptcy law and practice', address to the 4th Biennial Insolvency Trustee Service Australia Bankruptcy Congress, by the Hon Daryl Williams AM QC MP, 20 September 2002. The Attorney-General said that the government's role was to maintain an effective system for handling bankruptcy, that had the confidence of the public. To this end, in a landscape clearly dominated by non-business bankruptcies, it was pursuing reforms in three areas: the reform of the personal insolvency system to provide a better balance between the interests of debtors and creditors; the encouragement of debtors to use alternatives to bankruptcy, such as debt agreements, where appropriate; and the initiation of measures, such as a review of Part X of the *Bankruptcy Act 1988* and a joint taskforce on the tensions between Family Law and Bankruptcy Law, to eliminate abuse or manipulation of the system. A copy of the speech is available at www.ag.gov.au/ministers/attorney-general and also from the Bar Library.



Address at the Inaugural John Lehane Memorial Lecture, by the Hon Justice J D Heydon, 24 September 2002. Justice Heydon gave a summary of the life and work of John Lehane, praising his perseverance with many extra duties, such as teaching equity at University of Sydney

Law School for 28 years, regardless of the pressures of health, weather or clients. He noted John Lehane's high national reputation as a solicitor in commercial law, with his 'extraordinary skill in lucidly and dispassionately setting out the elements of a problem and going to the core in such a way as to point ineluctably towards its solution'. Justice Heydon said that, as a Federal Court Judge, Lehane was 'a conspicuous success from the start', and that his work on the first three editions of Meagher Gummow and Lehane, *Equity: Doctrines and Remedies*, was outstanding and memorable. He concludes with praise for the man, for his warmth, geniality, tolerance, appreciation, amusement and goodwill. A copy of the speech is available at www.lawlink.nsw.gov.au/sc and also from the Bar Library.



Address at the Inaugural John Lehane Memorial Lecture, by the Hon Justice R P Meagher, 24 September 2002. Justice Meagher applauded John Lehane's excellence in statutory interpretation, such as shown in chapters 6 and 7 of Meagher Gummow and Lehane, *Equity*, with his 'immense skill in teasing out every nuance of each word'. He was also, said Justice Meagher, a 'brilliant scholar... a gifted classicist, an outstanding solicitor... a great judge... a very fine person,' and 'one of those rare people, sincere and unostentatious, to whom the conduct of life was *ars artium*.' A copy of the speech is available at www.lawlink.nsw.gov.au/sc and also from the Bar Library.

'Commercial Law: Private Business / Public Concern', address to the Commercial Law Conference 2002, by the Hon Justice K M Hayne AC, 30 September 2002. Noting that the once radically different approaches to commercial law have irrevocably become more complicated, as exemplified by the increasing importance of and changes in statute law, Justice Hayne focused on the influence of the application of equitable principles to commercial dealings, and problems and questions arising from doing so. A copy of the speech is available at www.hcourt.gov.au/speeches and also from the Bar Library.

Professional conduct update

Clarence James Stevens

On 10 October 2002, pursuant to s 38FC(1)(b) and s 38FD(1) of the *Legal Profession Act 1987*, the Bar Council of the New South Wales Bar Association cancelled the practising certificate of Clarence James Stevens, effective from midnight on Friday 29 November 2002 to enable the proper arrangement of the barrister's affairs.

Robert William Cameron

On 1 November 2001 the Bar Council resolved, pursuant to s38FC of the *Legal Profession Act 1987*, to cancel the practising certificate of Robert William Cameron, with effect from midnight on Saturday 1 December 2001. Robert William Cameron appealed against the cancellation of his practising certificate. On 12 December 2001 Justice McClellan granted Mr Cameron leave to discontinue his appeal. The Court further ordered that Mr Cameron pay the Bar Association's costs.

On 8 March 2002, Mr Cameron commenced fresh proceedings in the Supreme Court of NSW seeking orders which provided for the restoration of his practising certificate, which had been cancelled on 1 November 2001. Those proceedings were heard by Justice Simpson on that day. On 20 March 2002, Justice Simpson delivered judgment and declined to uphold Mr Cameron's claims for the restoration of his practising certificate. Formal orders of the Court have been made which include an order that Mr Cameron's claim for an immediate restoration of his practising certificate was dismissed and an order that Mr Cameron pay the costs of the Bar Association. Mr Cameron filed a summons for leave to appeal against the decision of Justice Simpson. He also filed a notice of motion seeking an order that the appeal be expedited and that the appeal be heard with the application for leave to appeal and seeking an order for the issuing of a practising certificate pending the hearing of the summons for leave to appeal and determination of any appeal.

On 9 May 2002, the Court of Appeal (Justice Meagher and Justice Heydon) made orders that:

- Leave is granted for the claimant to appeal the orders made by Her Honour Justice Simpson on 20 March 2002 (22 March 2002);
- Appeal to be expedited upon the undertaking that the claimant will not do anything to stand in the way of the hearing of the appeal being expedited;

- Opponent is to issue a practising certificate to the claimant, pending the hearing of the appeal, or further order;
- Costs of the summons to be costs in the appeal;
- liberty for both sides to apply on seven days notice.

On 11 September 2002 the Court of Appeal made the following orders and notations by consent:

1. Appeal allowed.
2. Orders 2 and 3 made on 25 March 2002 by Simpson J be set aside.
3.
 - (a) No order as to the costs of the appeal.
 - (b) All previous costs orders including the order in favour of the respondent made on 12 December 2001 in proceedings No. 13646 of 2001 be vacated.

4. It is noted that:

The Appellant will take no point in the sec 38B appeal or in this Court or in any other Court or Tribunal to the effect that the practising certificate issued to the Appellant pursuant to the order of this Court on 9 May 2002, nor the practising certificate issued to the Appellant on 1 July 2002 were other than in lieu of a stay of the Bar Council's resolution of 1 November 2001 to cancel the Appellant's practising certificate and agrees that the Appellant's entitlement to a practising certificate will be determined on the merits in his sec 38B appeal and not by reference to any point as to the status of the certificate.

5. The Respondent, subject to 4, agrees to the continuance of the present practising certificate until the determination of the sec 38B appeal or until further order.

6. The parties agree that no estoppel arises either way from the decision of Simpson J.

On 16 September 2002, two Notices of Motion filed in Mr Cameron's sec 38B Appeal were listed before Justice James. By consent, a Notice of Motion filed by Mr Cameron seeking a separate trial of certain issues (including an issue relating to the status of a Practising Certificate issued to him on 1 July 2002) was dismissed. James J ordered Mr Cameron to pay the Bar Association's costs of that Motion.

On a Notice of Motion filed by the Bar Association, an order was made, by consent, that the Section 38B Appeal be expedited.

Bar Council business for August – September

Matters arising

Indigenous Barristers Trust Fund

The Junior Vice-President reported on the current status of the proceedings brought by the Bar Association against the Australian Taxation Office in relation to the ATO's refusal to allow the Trust to be endorsed as a tax deductible gift recipient. These proceedings were listed for hearing on Friday 6 September before Gyles J. John Durack SC and David Charles are generously representing the Association in the proceedings on a pro bono basis. The Bar Association's counsel have indicated that the ATO are taking issue with the Trust's claim to eligibility as a 'public benevolent institution' and specifically that the Trust is not an 'institution'.

The Trust was founded last year by the Association to assist Indigenous Australians who are studying law to overcome financial hardship to enable them to complete their legal education, enter the profession and establish a practice at the Bar. It is a most worthy cause which provides a very practical means for helping Indigenous Australians to advance into the profession. The silk of 2000 have adopted the Trust as their charity.

President's report

Civil Liability (Personal Responsibility) Bill 2002

The President advised that the Association would be making a submission to the Government proposing changes to the draft Bill. This submission would be based on previous discussions by the Bar Council of relevant issues, and the examination of the Bill being undertaken by the Personal Injury Litigation Committee.

Items for consideration

Draft ballot paper for Bar Council elections.

Bar Council resolved to approve the draft ballot paper pursuant to clause 11.4.3 of the Constitution of the New South Wales Bar Association.

Bar Council noted that the Annual General Meeting would be held on 8 November 2002, the day the poll would close.

Media briefing

Excerpts from recent interviews given by the President and Senior Vice President of the Bar Association

Ian Harrison SC, regarding the extradition to the Northern Territory of Bradley John Murdoch, The Philip Clark Show, 2GB, 10 October 2002.

'There does need to be, obviously, a set of arrangements and it's not unknown for people to be released from one sentence in one place, to be extradited to another part of Australia to stand trial and if convicted then to serve a sentence there. It's also not unknown for people to finish serving their sentence in one place and then be sent off to another place to commence serving the sentence following a prior conviction in that other place', Bret Walker SC regarding the extradition to the Northern Territory of Bradley John Murdoch, The Philip Clark Show, 2GB, 17 September 2002.

'The notion of an overall view of leniency is very often a myth. Sentences have been becoming more severe in New South Wales, as a discernible pattern for quite some time. I don't know quite where people want the process to end - everybody being jailed for life?', Bret Walker SC, regarding minimum sentencing legislation, The Philip Clark Show, 2GB, 5 September 2002.

'Some of the features that are boasted about this new bill really are not new. The idea that judges give reasons for selecting the sentence they're going to impose, I've

got to tell you that's not new' Bret Walker SC, regarding minimum sentencing legislation, interview with Angela Catterns, 2BL, 5 September 2002.

Media releases issued by the Law Council of Australia

NSW threatens national approach to negligence reform, 2 October 2002

Ministers urged to reject knee-jerk solutions to negligence reform, 27 September 2002

Policy not politics should drive medical negligence reform, 18 September 2002

New Law Council President ...the power and the passion, 16 September 2002

Law Council recommends strong negligence test, 3 September 2002

Visit the Law Council's web site at www.lawcouncil.asn.au to obtain the full text of all media releases and letters to the editor.

Law Council submissions

The Law Council made submissions to the Ipp Committee's Review of the Law of Negligence on 2 September, 28 August and 20 August 2002. To obtain the full text of these and other LCA submissions, visit the Law Council's web site at www.lawcouncil.asn.au



Personal injury mentoring scheme to be expanded

An article in the April / May edition of *Bar Brief* announced the creation of a mentoring scheme for barristers whose practices are centred around common law and workers compensation. The object of the scheme is for senior practitioners to provide advice and practical assistance to participants who wish to redeploy their skills in other areas of practice.

The scheme was initially offered for twelve months to barristers who have been admitted for five to ten years. The Bar Council has advised that it will now be

made available to *all* junior counsel who specialise predominantly in personal injuries work. Applications will be accepted on a 'first come first served basis' until all the available spots are taken.

Any member wishing to apply should send their resume, together with an indication of their preferred areas of practice, to Anna Katzmann SC at a.katzmann@mauricebyers.com or call her on ph: (02) 8233 0301.

Papers to note

The Australian Health Ministers Advisory Council (AHMAC) Legal Process Reform Group, *Responding to the medical indemnity crisis: An integrated reform package*, September 2002. A copy of the report may be obtained from the ACT Department of Health web site at www.health.act.gov.au/publications/medicalindemnity/index.html

Second report of the review on the law of negligence, 2 October 2002. A copy of the report may be obtained from the Commonwealth Treasury's web site at revofneg.treasury.gov.au/content/reports.asp A copy of the report is held in the Bar Library.

Australian Competition and Consumer Commission, *Second insurance industry market pricing review*, September 2002. Among the issues examined were the factors driving increased premiums for public liability insurance. The report concluded that 'the link between the advertising of legal services and increases in unmeritorious claims has not yet been established.' A copy of the report may be obtained from the ACCC web site at www.accc.gov.au/

A copy is also held in the Bar Library.

New South Wales Law Reform Commission, *Discussion Paper 44: Review of the Property (Relationships) Act 1984*. A copy of the report is held in the Bar Library.

A statistical profile of the NSW Bar, Volume 3, August 2002. The report is available from the Bar Association's web site at www.nswbar.asn.au under 'Bar statistics'.



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EO gathering discusses strategies for success

On 9 April 2002, Angela Pearman hosted an evening for women barristers who had recently finished their reader's courses to discuss strategies for success at the Bar. The evening was organised by the Bar Association's Equal Opportunity Committee.

The purpose of the gathering was to assist the career development of women who have just come to the Bar by giving them an opportunity to meet with and discuss the career paths of successful women in business and the law. This is one of a number of steps which the New South Wales Bar Association is now taking to increase the numbers of women practising at the Bar.

The barristers attending heard both from the Hon Justice Catherine Branson and Ms Carla Zampatti AM who each spoke about career challenges and successes. It was a unique and rewarding experience for those in the audience.

The discussion during the evening was based on the idea that there were clear parallels between developing a new practice as a barrister and starting out in many other kinds of business.

A principal message emerging from the evening was that success, both in business and the law, requires hard work, tenacity, confidence, creative energy, contacts and some well thought out strategies to meet the competition.

New President of the Clerks Association



On 18 September 2002 Paul Daley was elected President of the Clerks Association.

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Fax: (02) 9555 7861

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Editorial Contributions to:

Public Affairs Officer,
New South Wales Bar Association,
LG Floor, Selborne Chambers,
174 Phillip Street, Sydney 2000
DX 1204 Sydney

E-mail: mediainquiries@nswbar.asn.au

Fax: (02) 9221 1149

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Association e-mail Directory

Administration

administration@nswbar.asn.au

Accounts Department

accounts@nswbar.asn.au

BarCare

barcare@nswbar.asn.au

Practising Certificates

certification@nswbar.asn.au

Professional Development Department

education@nswbar.asn.au

Executive Director

executivedirector@nswbar.asn.au

Legal Assistance Scheme

legalassist@nswbar.asn.au

Library

library@nswbar.asn.au

Media Inquiries

mediainquiries@nswbar.asn.au

Membership Inquiries

certification@nswbar.asn.au

Professional Conduct Department

pcd@nswbar.asn.au

Sickness & Accidents Inquiries

sickacc@nswbar.asn.au

Bar Council regional representatives

| Name | Address | Phone/Fax | E-mail |
|----------------|--|---|--|
| Stuart Hill | Hargraves Chambers Cnr of Church & Crown Streets Wollongong NSW 2500 | ph: (02) 4228 8977 fax: (02) 4226 3947 | harlaw@hotkey.net.au |
| Rob O'Neill | Lachlan Macquarie Chambers 16 George Street Parramatta NSW 2150 | ph: (02) 9635 1000 fax: (02) 9891 1989 | ro'neill@lacmac.com.au |
| Bill Walsh | William Owen Chambers 121A Byng Street Orange NSW 2800 | ph: (02) 6361 7959 fax: (02) 6361 7921 | |
| Geoff Radburn | Lismore Chambers 32 Molesworth Street Lismore NSW 2480 | ph: (02) 6621 2854 fax: (02) 6621 3898 | radburn@nor.com.au |
| Stewart Austin | Chambers 30 Church Street Newcastle NSW 2300 | ph: (02) 4926 2844 fax: (02) 4926 2841 | sca371@ozemail.com.au |