

# Bar News

The JOURNAL of the NSW BAR ASSOCIATION

Summer 2000/2001

## Editorial Board

*Justin Gleeson S.C. (Editor)*

*Andrew Bell*

*James Renwick*

*Chris Winslow*

*(Bar Association)*

## Editorial Print/Production

*Rodenprint*

## Layout

*Hartrick's Design Office Pty Ltd*

ISSN 0817-002

Views expressed by contributors to *Bar News* are not necessarily those of the Bar Association of NSW.

Contributions are welcome and should be addressed to the Editor, Justin Gleeson S.C., 7th Floor, Wentworth Chambers, 180 Phillip Street, Sydney, NSW 2000. DX 399 Sydney or email: [gleesonsc@sevenwentworth.com.au](mailto:gleesonsc@sevenwentworth.com.au)

Barristers wishing to join the Editorial Committee are invited to write to the Editor indicating the areas in which they are interested in assisting.

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At the time when this edition was being compiled, *Bar News* learned that The Hon. Justice John Lehane of the Federal Court had been admitted to hospital and was seriously ill.

Justice Lehane made the transition from solicitor to Federal Court judge in October 1995, in a manner which barristers, solicitors and the Court alike have acknowledged displayed enormous learning, skill and courtesy. His Honour has delivered many clearly reasoned and compelling judgments and presided with dignity over lengthy and difficult trials. The Bar extends best wishes to His Honour, his family and close friends.

This issue of *Bar News* includes the excellent address, delivered by Sir Gerard Brennan AC as the inaugural Sir Maurice Byers Lecture. Also, there is the speech delivered by Sir Anthony Mason AC at the opening of Maurice Byers Chambers.

William Walsh gives us a critical, but highly powerful opinion piece on the problems faced by District Court users in regional New South Wales. Those problems arise mainly from the closure of courthouses and the procedure for listing trials. Readers are invited to contribute to subsequent issues of *Bar News* with any particular problems faced by members of the Bar or their clients, particularly in rural or regional areas.

It is hoped that the following issue of *Bar News* will examine the pros and cons of specialisation at the Bar. Readers are encouraged to submit contributions on this or other topics.

*Justin Gleeson S.C.*

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Dear Sir

While recently staying with lawyer friends on a farm in the Southern Highlands, I happened to read a copy of an article entitled 'Juniors' written by one Lee Aitken. The article appeared in the Spring 2000 issue of *Bar News*, a copy of which was hanging behind the door of the outhouse on our friend's rural property.

As the wife of Bullfry QC, I feel compelled to draw the following matters to your readers' attention.

Firstly, my husband vehemently denies the accuracy of virtually all of the claims made about him by Aitken. Bullfry has never met Lee Aitken and was not given an opportunity to comment on the article before it was published.

Secondly, based on inquiries we have made about Lee Aitken, I have to question his credentials to opine on the subject matters of the article, with the following two notable exceptions:

(a) I gather that Aitken is singularly well qualified to ask the question posed in the article as to whether anywhere else but in the legal profession could 'you be overgenerously paid for talking, and drinking coffee'; and

(b) the subject of 'disappearing juniors' is very familiar to Aitken. Some years ago he was involved as junior in Federal Court proceedings in Canberra. Aitken's leader announced his appearance at 10.15am on the first day of the three day hearing. At 10.18am Aitken inexplicably left the court room, never to return. On the final day of the hearing, the presiding judge expressed surprise to Aitken's leader that Aitken had not been sighted since his brief appearance on the first day, apart that is from the fleeting glimpse on the previous night's television news footage showing him entering the ACT Supreme Court in connection with an entirely unrelated matter. Aitken's leader was as surprised as the judge with Aitken's Houdini-like performance.

I also note that the cartoon caricatures of my husband were penned by some individual called 'Poulos'. I know nothing about 'Poulos', but given the remarkable dissimilarities in each of the three portrayals of Bullfry, I hope that Poulos does not give up his day job (whatever that might be).

Finally, Aitken's dismal misunderstanding of the real Bullfry is no more clearly evident than in his claim that I was personally involved in selecting Bullfry's current secretary. The fact is that I

personally have been Bullfry's full-time secretary for many years. This will come as no surprise to your many readers who have similar arrangements with their spouses (and for the same reason that our friends have a rural property in the Southern Highlands).

Yours sincerely,  
(Mrs) Alice Bullfry

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Dear Sir,

Thank you for drawing my attention to the article of Mr Lee Aitken in the Spring 2000 issue of *Bar News*. I know of Mr Aitken through his work with Maxwell House.

Thank you also for sending me the letter of Mrs Alice Bullfry in advance of publication. Let me say at once that her attack on Mr Aitken was scandalous and everything that your modest correspondent said about my first husband was quite true. He is an ogre.

I also greatly admired Mr Aitken's obvious commitment to a plain English style of prose.

Yours faithfully,  
Winifred Bullfry (Mrs)

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# A truly common law



Ruth McColl S.C.

On 1 January 2001 Australia celebrated the centenary of the establishment of the Commonwealth of Australia.

The common law system, which was in existence in the Commonwealth at the inception of federation in 1901, had endured in substantially the same form for centuries although, in England, it had recently been the subject of substantial reform through the passing of the *Judicature Act* of 1873. As Chief Justice Gleeson remarked recently, we inherited the common law of Australia from the common law of England at the time of European settlement. 'The word 'common' was a reference to the rules that applied to all citizens, the laws all people had in common...'<sup>1</sup>

Recognition of the desirability of eliminating formal obstacles to the substantial delivery of justice to the greatest extent possible was a pervasive theme of twentieth century justice. Procedural reforms were made directed to the manifestly admirable principle of improving the efficient delivery of justice. The most significant of these in New South Wales was the passing of the *Supreme Court Act 1970*. That Act was the product of a work by the New South Wales Law Reform Commission directed to achieving:

- the simplification of court procedures;
- the reduction of technicalities
- eliminating unnecessary work in the conduct of proceedings in the court; and
- to have regard to the desirability of reducing the costs of court proceedings.<sup>2</sup>

One of the principal barriers to justice, which the new Act was intended to overcome, arose from the division of the civil jurisdiction of the Supreme Court into various 'sub-jurisdictions': common law, equity, matrimonial causes, probate, protective and admiralty. A plaintiff failed if proceedings were commenced in the wrong jurisdiction, could only obtain the relief which was available in that jurisdiction and could not obtain incidental relief

outside the jurisdiction.<sup>3</sup> This technical obstacle to obtaining substantial justice was overcome by s51, s54 and s55.

Further recognition of the need to deliver substantial justice 'in one line' can be seen in s32 of the *Federal Court of Australia Act 1976* (Cth). It conferred jurisdiction on the Court 'in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked'.

Reforms which recognised the necessity to deliver substantive justice, unimpeded by formal obstacles, were an important step in ensuring public acceptance of the justice system. Litigation has increased, we are told, to an extent which is placing great strains on the justice system. No doubt that increase reflects a society which has become

increasingly conscious of individual rights and their judicial enforcement. Reforms to minimize such strains have also been implemented: the substantial elimination of juries in civil cases and even some criminal cases (in the Supreme Court). In 1983 the *Arbitration (Civil Claims) Act* (NSW) was passed, empowering the Supreme, District and Local courts to appoint arbitrators who could hear matters referred under the legislation of each court. Last year the Supreme Court adopted an overriding purpose requiring litigation to be dealt with in a 'just, quick and cheap' manner. Case management has become a high priority: judges are charged with the responsibility of ensuring the expeditious dispatch of litigation.

With the exception of the introduction of the statutory arbitration procedure, the reforms which have been implemented have been effected within the court system. Although there have been complaints that case management increases the cost of litigation, there is no empirical evidence, as far as I am aware, of this assertion. Proponents of case management tend to the view that efficient case management ensures better definition of issues, fewer surprises in the conduct of cases and fewer

'Excessive reliance on ADR carries the further risk that the development of legal principle will be stultified.'

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adjourned hearings. Properly administered, that is no doubt the case.

The introduction of the statutory arbitration system heralded the arrival of alternative dispute resolution – the buzzword of the nineteen nineties in particular. The objectives of ADR are commendable. The Bar has supported it. Each year the Bar Association nominates arbitrators and more recently mediators and early neutral evaluators to participate in such processes. The Association has taken the view that, within reasonable limits, the use of such processes enhances the courts' ability to administer justice efficiently.

At the same time, the Association is concerned that the development of such processes should not supplant the delivery of justice through the court system. The importance of a strong, independent and open court system cannot be under-estimated. To quote Chief Justice Gleeson again:

The rule of law depends upon the impartial administration of justice according to law. Citizens, in the last resort, look to the courts to uphold their rights, and to enforce their lawful claims against other citizens, or against governments. Governments look to the courts to enforce the obligations of citizens and to restrain – and where necessary, punish – unlawful behaviour.<sup>4</sup>

Excessive reliance on ADR carries with it risks that the courts will only hear the largest cases and that the public will lose touch with the courts as a mechanism through which their rights can be vindicated. Cases disposed of through ADR take place in an environment far removed from modern demands of transparency and accountability. They take place in private. The arbitrators, mediators and evaluators are not subject to the *Judicial Officers Act 1986* nor, most probably, to Part 10 of the *Legal Profession Act 1987*. They also carry the risk of increasing the cost burden, because the first effective challenge to an arbitration is a rehearing which takes place on the assumption the arbitration did not happen. (That in itself would leave the more cynical gasping!)

Excessive reliance on ADR carries the further risk that the development of legal principle will be stultified.

While some may regard these risks as more apparent than real, or indeed as 'unreal', they pose challenges to a country which, since European

settlement, has accepted the common law system as one of the cornerstones of society. That system of law depends upon the development of case-based precedent. Removing substantial numbers of cases from the system, particularly those which impact upon the lives of the average member of the community, carries the risk that their cases will be judged, as time passes, by potentially out-dated standards. This should be avoided.

It should not be necessary to refer cases to ADR excessively if courts engage in effective case management, if governments recognise their responsibility to fund the court system effectively and if the legal profession co-operates in abiding by the Supreme Court's 'just, quick and cheap' guideline.

In that way we can ensure, in the twenty-first century, that the common law is still something the people have in common.

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1 2000 Boyer Lecture one 'A Country Planted Thick with Laws.'

2 Introduction, *Ritchie's Supreme Court Procedure* [1003].

3 *Ibid*, [1012]

4 2000 Boyer Lecture six - *The Judiciary*.

# Sexual assault communications privilege under siege

by Glenn Bartley

## Introduction

In criminal proceedings, sexual assault communications privilege (SACP) prevents the disclosure of communications made for the purpose of counselling a complainant of sexual assault in the circumstances prescribed by Part 7 of the *Criminal Procedure Act 1986* (NSW) (CPA).

It is a statutory innovation that has surprised and perturbed many legal practitioners and judicial officers. There is continuing tension between the attempts of Parliament to implement a strong, broad, effective SACP and restrictive interpretations of the legislation by the NSW Court of Criminal Appeal (CCA).

This article outlines:

- The origins of SACP;
- Some underlying policy considerations;
- The legislative rationale of SACP;
- The short but turbulent legislative history of SACP;
- The provisions of Part 7 of the CPA; and
- *R v Norman Lee*<sup>1</sup>, a recent decision of the CCA, which may have made Part 7 unworkable.

Most of the policy material on SACP that is readily available to legal practitioners emphasises arguments against the privilege<sup>2</sup>. This article collects together arguments and reference material favouring the privilege in order to balance the debate and enhance understanding of why the privilege has been introduced.

Emphasis in *italics* has been added by the author.

## Origins of SACP

For centuries at common law there has been no doctor/patient, including no psychiatrist/patient, privilege.<sup>3</sup>

In the 1960s and 1970s the phenomenon of sexual assault became recognised as widespread and frequently occurring. It became a social issue. The treatment of victims and complainants by the criminal justice system became an issue. In the late 1970s and 1980s, several laws and procedures were introduced to ameliorate the ways in which complainants of sexual

assault were treated in police investigations and criminal courts.

Among such laws were ‘rape shield laws’ such as s105 of the CPA (formerly s409B of the *Crimes Act 1900* (NSW)), which largely prevents the use of ‘sexual reputation’ and sexual experience to discredit a complainant in cross-examination. Whether s105 has caused injustice to some accused persons or whether the CCA ‘has significantly eroded the protection afforded to complainants’<sup>4</sup> under the section has been the subject of robust debate.<sup>5</sup> Nevertheless, many complainants have benefited from the protection given by s105.

In recent decades the number of sexual assault counselling services has increased considerably as a result of increasing social and political recognition of the nature, extent and effects of sexual assault. However, complainants and counsellors became increasingly concerned that the effectiveness of sexual assault counselling was being impaired by the invasion of the privacy and confidentiality of counselling as a result of the subpoenaing of counsellors’ notes.

Sexual assault was seen as involving violations more intimate, causing injury more intimate, and resulting in communications with therapists more intensely intimate and private, than when a purely ‘physical’ assault causes organic injury and results in communications about such assault and injury between patient and doctor. As the Supreme Court of Canada said:

A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong.<sup>6</sup>

Concerns about the use of subpoenas in criminal proceedings increased as complainants and sexual assault counsellors reached the view that defence lawyers were attempting to circumvent rape shield laws by accessing subpoenaed counsellors’ notes in order to smear complainants as persons of bad character, by ventilating such details of their personal history as:

- past psychiatric treatment, psychotherapy or counselling;
- other aspects of their medical and psychological history;
- drug and alcohol problems;
- relationship problems, including ill-advised behaviour during times of conflict;
- terminations of pregnancies;
- having born ex-nuptial children; and
- rebellious childhood history.<sup>7</sup>

In *O'Connor v The Queen*, L'Heureux-Dube J observed that sexual assault complainants face psychological trauma from:

... the threat of disclosing to the very person accused of assaulting them in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of friends or family.<sup>8</sup>

Anger and distress at such perceived subpoena strategies continued to increase. Boiling point was reached in December 1995 when Ms Di Lucas, Coordinator of the Canberra Rape Crisis Centre, was imprisoned for contempt of Queanbeyan Local Court for refusing to produce the counselling file in relation to a sexual assault complainant.<sup>9</sup> This received much publicity and generated much public debate, which culminated in the introduction of a statutory SACP.

### Other Policy Considerations

In 1998, 14,568 reports of sexual assault were recorded by police in Australia.<sup>10</sup> The NSW Government probably took the view that the true incidence of sexual assault was substantially higher, as it is notoriously under-reported and therefore there probably are several thousand sexual assaults committed in NSW each year.<sup>11</sup> It appeared that the criminal justice system may have been coming into increasing disrepute amongst several thousand complainants, counsellors and others whose confidence in it is necessary for its effectiveness.

The NSW Bar Association strongly opposes SACP<sup>12</sup> as 'it involves a substantial infringement on the rights of accused persons and carries with it a grave risk of miscarriages of justice.'<sup>13</sup>

The Association argued:

Those persons who might choose not to seek counselling where they know their files may be disclosed will be in no different position. They will have no guarantee that a court will not find the requirements of the legislation satisfied and order disclosure. Thus, they will continue to avoid counselling (assuming that is presently the case) and no benefit is gained.<sup>14</sup>

The Supreme Court of Canada had a different view:

It must be conceded that a test for privilege which permits the court to occasionally reject an otherwise well-founded claim for privilege in the interests of getting at the truth may not offer patients a guarantee that communications with their psychiatrists will never be disclosed. On the other hand, the assurance that disclosure will be ordered only where clearly necessary and then only to the extent

necessary is likely to permit many to avail themselves of psychiatric counselling when certain disclosure might make them hesitate or decline. The facts in this case demonstrate as much.<sup>15</sup>

The Bar Association's November 1999 submission gave a number of hypothetical examples of injustices resulting from the privilege. One was that Part 7 of the CPA would prevent disclosure of a complainant's statement to a counsellor that she was assaulted not only by the accused, but also by 'little green men from Mars'.<sup>16</sup>

A common criticism of the privilege, encountered by the author, is that it would prevent disclosure of a counselling note revealing that the complaint of sexual assault was a 'recovered memory', which arose after hypnotherapy. However, these cases do not occur often and in nearly all of them there is other evidence of hypnotherapy having led to a recovered memory. Where the counselling note is the only record of the hypnotherapy, the judge reading the subpoenaed notes in order to determine objections to disclosure should be alert to identify such material and seek submissions from the holder of the records as to why the note should not be produced.

In response to the Bar Association submission, the then attorney general, the Hon. Jeff Shaw QC MLC, said:

While I am not minded to alter the legislation on the basis of hypothetical examples, I would, of course, be happy to consider further amendments should significant issues arise once the operation of the Act has been tested by the courts.<sup>17</sup>

The quantitative policy question posed in the Bar Association submission was, how many innocent defendants unjustly convicted are too many to justify the proposed legislation?<sup>18</sup> The competing quantitative policy question might be: how many tens of thousands of innocent sexual assault victims deterred from reporting the crimes committed against them or from maintaining their complaints, or traumatically humiliated in court, are sufficient to justify the legislation?

Furthermore, how many more men, women and children are sexually assaulted by perpetrators whose earlier victims did not make or maintain their complaints because they felt that they could not cope with attempts to destroy them in criminal proceedings?

In *O'Connor v R*, Major J concluded:

What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice.<sup>19</sup>

In New South Wales, the question may be whether the statutory balancing exercise (discussed below) meets this standard.

Further policy considerations are elucidated in the legislative rationale of SACP, which is set out below.

### Rationale of SACP

The rationale of SACP is enunciated in the second reading speech of the then attorney general of NSW The Hon. Jeff Shaw QC MLC in relation to the *Evidence Amendment (Confidential*

*Communications) Act 1997*, which introduced the original Division 1B of the *Evidence Act 1995* (NSW) (EA) containing the original version of the privilege. The attorney general said:

It goes without saying that a person who has suffered the grave trauma of sexual assault will often be assisted in recovery by seeking counselling. The counselling relationship, built on confidentiality, privacy and trust, enables a victim to explore major issues concerning her sense of safety, privacy and self-esteem. The knowledge that details of a victim's conversations with her therapist may be used against her in subsequent criminal proceedings can inhibit the counselling process and undermine its efficacy. One counsellor has said:

When I have told clients that the counselling notes of our session may be subpoenaed, I have had experience of clients leaving counselling, and in another case a client deliberately censored herself in discussing issues in counselling.

Knowing that a perpetrator has had access to counselling files can further traumatise victims and increase their sense of powerlessness. One victim said:

My files were subpoenaed. It wasn't the court seeing them, the judge and the lawyers, that worried me so much because I knew that they could only support my case if I was given a chance to speak about them. What made me feel really upset was that my stepfather, who had raped me, would see them. He was lying about not having done it and I could just imagine him going through my personal records. It was like having him invade my life again.

...

I received more than 80 submissions in relation to that discussion paper and considerable support was received for the proposal outlined. However, a majority of the submissions argued in favour of an additional specialised privilege for sexual assault counselling communications.

...

The arguments in favour of a specialised privilege which I have found particularly persuasive include the following.

Firstly, it was argued that [professional confidential relationship privilege in Division 1A of Part 3.10 of the EA] would fail to provide sufficient protection to such communications. ...

Secondly, the primary purpose of counselling is not investigative, it is therapeutic. ... As part of the counselling process, the complainant is encouraged to release emotions and talk unhindered, and yet the complainant has no legal right to review the notes to see whether they are an accurate reflection of his/her version of the events. Nevertheless, these notes can be used to claim that the complainant has made prior inconsistent statements and has feelings of shame and guilt which are consistent with a motive to lie.

Thirdly, it was argued that the failure to accord counselling records a privilege has had the following consequences:

- some victims choose not to obtain counselling;
- some obtain counselling but are guarded about what they reveal;
- some victims refuse to report the crime or be a witness for the prosecution;
- some counsellors do not take notes;
- some counsellors take notes which are cryptic and cannot be understood by others; and
- some counsellors refuse to hand over the notes and are charged with contempt.

These are undesirable outcomes. When a victim refuses to

initiate court proceedings or undergo counselling, or to the extent to which the openness of the counselling relationship is constrained, both the interests of the victim and the interests of the community in general are harmed.

Fourthly, many of the submissions suggested that defence counsel are increasingly using subpoenas for the production of counselling records as a weapon to intimidate the complainant. This is not a justifiable use of the laws of evidence.

Finally, a common concern expressed in the submissions related to the fact that being a victim of sexual assault can be a humiliating and/or terrifying experience. It was argued that allowing the accused and defence counsel to have access to all the victims thoughts, feelings, insecurities and the recounting of painful past experiences as revealed in counselling sessions may exacerbate this trauma.

In the light of these arguments, I propose in the legislation to supplement [professional confidential relationship privilege] with a more specific privilege.<sup>20</sup>

### Legislative turbulence

In *R v Young*<sup>21</sup> a five-judge bench of the CCA held that the SACP, then in Division 1B of Part 3.10 of the EA, could be claimed only at the adduction of evidence stage and not at the earlier stage, when documents are produced upon subpoena.<sup>22</sup> In effect, that decision negated the purposes of the privilege.

The essence of privacy, however, is that once invaded, it can seldom be regained. For this reason, it is all the more important for reasonable expectations of privacy to be protected at the point of disclosure.<sup>23</sup>

*R v Young* was reversed by the *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999* (the Amendment Act). That Act inserted a new Part 13 (ss57-69) into the *Criminal Procedure Act 1986*, and also amended other statutes.

The Amendment Act attempted to strengthen SACP in criminal proceedings by the broadening of several important definitions and by other provisions which were intended to prevent it being negated. The privilege now expressly and irrefutably applies to the production of documents upon subpoena.

The strengthened privilege was introduced by the attorney general, who made his second reading speech in relation to the Amendment Act on 20 October 1999.<sup>24</sup> The legislation received no opposition in Parliament and had a speedy passage. It was supported by the Opposition, the Australian Democrats, the Greens and the Hon. R. Jones MLC. It commenced on 5 November 1999.

Subsequently, the *Crimes Legislation Amendment (Sentencing) Act 1999* (Schedule 2 [43]-[47]) re-numbered Part 13 of the CPA as Part 7 and ss57-69 as ss147-159.

The provisions of Part 7 are discussed below. The decision of the CCA in *R v Norman Lee* on 18 October 2000 is then considered.

### Criminal proceedings

SACP (against disclosure of 'protected confidences') is available primarily in 'criminal proceedings', which are defined to include apprehended violence proceedings: s147(1). In those proceedings, the court must conduct the balancing exercise discussed below. Care of children proceedings

are not included in the definition of ‘criminal proceedings’.

In committal proceedings and bail proceedings (defined as ‘preliminary criminal proceedings’) there is an absolute privilege against production of documents or adduction of evidence revealing protected confidences: s149.

### Protected confidences

SACP may be claimed to prevent production of a document recording a protected confidence (s150(1)) or the adducing of evidence disclosing a protected confidence (s150(4)).

A protected confidence is a ‘counselling communication’ that is made *by, to or about* a victim or alleged victim of a sexual assault offence: s148(1). (For brevity in this article, such victims are referred to as either ‘alleged victims’ or ‘complainants’.)

Such a communication is a protected confidence, even if it was made *before* the relevant alleged sexual assault and even if the communication was *not* made in connection with the alleged sexual assault or any condition arising from it: s148(2).

A communication may be made in confidence even if it is made in the presence of a third party if the third party is present to facilitate communication, or to otherwise further the counselling process: s148(3). The example of such a third party, given by the attorney general in his second reading speech in relation to the Amendment Act, is the non-abusive parent of a child sexual assault victim.<sup>25</sup>

### Counselling communications

It is relatively common for counselling sessions to be attended by the non-offending parent of a child complainant, another care giver, or a sibling of the complainant. Those persons often make intimate, personal observations about the complainant.<sup>26</sup>

The attorney general, in his second reading speech in relation to the Amendment Act<sup>27</sup>, said that potential access by defendants to the views of others involved in the process of sexual assault counselling will result in the therapeutic basis for the counselling being undermined in just the same way as if the alleged victim’s own ruminations were accessible.

Therefore, the definition of ‘counselling communication’ has been expanded in s148(4) to incorporate all communications by, to or about the alleged victim made in confidence in the course of counselling, including those:

- by a counsellor to the alleged victim;
- by a counsellor about the alleged victim (for example, in a report: s147(2)(a));
- between counsellors; and
- between a counsellor and ‘a person who is *present* to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process’: s148(4)(c).

It would appear from the word ‘present’ in s148(4)(c) that an observation about a complainant

made by the complainant’s parent by telephone to a counsellor, in the absence of the complainant, would not be a counselling communication and would not be protected by SACP.

The central relationship giving rise to SACP must be one in which the counsellor is *counselling, giving therapy to or treating* the counselled person for *any* emotional or psychological condition: s148(4)(a).

The provisions of Part 7 noted so far appear to be in part a response to *obiter dicta* of the CCA in *R v N*<sup>28</sup> which suggested that communications during counselling by a school counsellor may not be protected by SACP.

The expanded definitions in ss147 and 148 also reflect the submission to the attorney general of the NSW Working Party on the Confidentiality of Counsellors’ Notes (NSW WPCCN), August 1999.

The submission observed<sup>29</sup> that the majority of counsellors employed in sexual assault counselling services are social workers, not psychiatrists or psychologists. (Social workers were understood to be professionals who had completed the four-year university BSW degree or an equivalent.) The submission added that school counsellors often are called upon to counsel a child who has been sexually assaulted in a way that is analogous to the counselling the child would receive from a sexual assault counsellor; and that within hospitals and other psychiatric institutions appropriately qualified psychiatric nurses play an important therapeutic role in relation to the mental health of patients.

### The balancing exercise

In criminal proceedings other than bail and committal proceedings, the balancing exercise applicable is the same as that which applied in the former Division 1B of Part 3.10 of the EA.

A document recording a protected confidence cannot be produced and evidence disclosing a protected confidence or the contents of a document recording a protected confidence cannot be adduced unless the court is satisfied that:

- the contents of the document or the evidence have *substantial* probative value;
- other evidence of the protected confidence is *not* available; and
- ‘the public interest in preserving the confidentiality of protected confidences *and* protecting the principal protected confider from *harm* is *substantially* outweighed by the public interest in allowing inspection of the document [or admission of the tendered evidence]’: s150(1), (4).

Of great significance is the requirement that there be a substantial outweighing, not (as in public interest immunity) a mere outweighing.

In carrying out the balancing exercise the court must take into account the likelihood, and the nature or extent, of the *harm* that would be caused to the alleged victim if the document is produced or the evidence adduced: s150(2), (5). As in the former

Division 1B, harm is defined to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear): s147(1).

The court may inspect a subpoenaed or tendered document to determine any question arising under Part 7: ss150(1)(a), 156.

### Notice

It has been common in the past for private mental health practitioners (and occasionally agencies of the Department of Health) to produce counselling records without any objection and without informing the complainant that details of his or her innermost thoughts, feelings and insecurities are being disclosed to the defence. Notice provisions have been introduced to give complainants an opportunity to be consulted and to exercise their rights in relation to such proposed disclosures.

A party requiring production of a document recording a protected confidence for inspection must give reasonable notice that production has been sought to each other party and the protected confider (a person who made a protected confidence): s151(1). Similarly, evidence of a protected confidence is not to be adduced unless such notice is given: s151(2).

Such notice must advise the protected confider of the date on which the document is to be produced or the hearing day of proceedings in which evidence of a protected confidence is to be adduced and that he or she may, with the leave of the court, appear in the proceedings: s151(3).

It is sufficient compliance with the requirement to give such notice to a principal protected confider (the alleged victim) if reasonable notice is given to the (*Justices Act 1902* (NSW)) informant and the informant gives, or uses his/her best endeavours to give, a copy of the notice to the principal protected confider within a reasonable time after the informant receives the notice: s151(4).

The court may give leave to dispense with the notice requirements where the protected confider is not a principal protected confider: s151(5).

### Ancillary orders

Section 154 empowers a court to limit the harm likely to be caused by the disclosure of a protected confidence by such measures as hearing evidence in camera, non-publication orders and orders suppressing 'protected identity information' (the contact details of a 'protected confider').

It is submitted that the statutory scheme of Part 7 is that there must be a balancing exercise and that s154 does not enable a court to disregard and not apply the provisions of s150.

### Consent

The facts of *R v Young* also have given rise to tougher requirements for establishing consent by a principal protected confider to production or adduction of a protected confidence. Such consent is not effective unless it is given by the principal

protected confider in writing and it expressly relates to the production of a document or adducing of evidence that is privileged under Part 7 of the CPA: s152(2).

Thus, it is insufficient for a principal protected confider to state orally in court 'on the record' that s/he so consents. Consent in writing is required.

### Prohibition on Production of VCT Files

The submission of the NSW WPCCN said<sup>30</sup>:

Private medical practitioners and the Victims Compensation Tribunal frequently produce [counselling notes and other medical or psychological records] without any objection and without informing the complainant that their intimate and personal details have been disclosed to the defence.

In his second reading speech in relation to the Amendment Act<sup>31</sup>, attorney general Shaw said:

It has become apparent that it is relatively common for defence counsel in sexual assault matters to seek access to material used in an application for victims compensation. This material may include information arising from a counselling relationship. A cognate amendment to the Victims Compensation Act seeks to categorically close this avenue of investigation.

Thus, schedule 2 of the Amendment Act attempted to introduce absolute prohibitions on requirements to produce documents in VCT files in any criminal proceedings (other than a prosecution of a complainant).

It did so by adding s84(2) to s84(1) of the *Victims Support and Rehabilitation Act 1996* and by, in effect, adding s25(2) to s25(1) of the *Victims Compensation Act 1987*. The resultant sections were not entirely clear. Their meaning has been contested in *R v Kremmer*, which was heard by the NSW Court of Criminal Appeal on 28 August 2000, on which day the court reserved its judgment.<sup>32</sup>

During the hearing, senior counsel for the Victims Compensation Tribunal, Mr Ian Temby QC, told the court that the tribunal receives about two subpoenas 'of this sort' per week.

### R v Norman Lee

In this case, the subpoenaed records comprised 73 pages of notes of communications about the problems of a complainant of sexual assault. The communications took place between the complainant and a 'youth support worker', and other officers, of the Sydney City Mission. Such workers did not themselves give, but instead arranged referrals of the complainant for, counselling, therapy or treatment.

It is not surprising that the CCA held that the subpoenaed communications did not fall within s148(4)(a).

However, Heydon JA, with whom Mason P and Wood CJ at CL agreed, construed s148(4) in ways which in turn may be construed to prevent the applicability of the privilege to communications with such qualified mental health professionals as social workers, school counsellors and psychiatric nurses.

Section 148(4) relevantly provides:

'In this section:

*counselling communication* means a communication: (a) made in confidence by a person (the *counselled*

*person*) to another person (the *counsellor*) in the course of a relationship in which the counsellor is counselling, giving therapy to or treating the counselled person for any emotional or psychological condition, or

(b) made in confidence to or about the counselled person by the counsellor in the course of that relationship, or ...'

### 'Any emotional or psychological condition'

In *R v Norman Lee*<sup>33</sup>, Heydon JA said:

[It] seems to me that the meaning of 'counselling, giving therapy to or treating the counselled person for any emotional or psychological condition' must depend significantly on the meaning of 'any emotional or psychological condition'. An emotional condition is a state of consciousness turning on emotions like pleasure, pain, desire, aversion, surprise, hope, joy, sorrow, fear or hate (as distinct from cognitive and volitional states of consciousness) which reveals or reflects *some defect or illness or disease or abnormality*. Similarly, a psychological condition refers to a particular condition of health - a state of health *which is poor or abnormal or diseased or otherwise defective from the emotional or psychological point of view*. Psychology is the science of mind and of mental states and processes; a psychological condition is a state of mind in which there is *some defect or illness or disease or abnormality in the victim's mental states and processes*.

'Some defect or illness or disease or abnormality', on one view, is reminiscent of the *McNaghton*<sup>34</sup> definition of insanity ('... such a defect of reason, from disease of the mind, ...').

The passage from *R v Norman Lee*, extracted above, may give considerable force to a submission on behalf of an accused person who has subpoenaed counselling records that, as required to make out nervous shock at common law, s148(4)(a) requires that a recognisable psychiatric illness be established - for which one needs a diagnosis of such a condition. Yet most sexual assault counsellors (who are qualified, experienced social workers) do not make or record such diagnoses, and it is impracticable and too expensive to obtain a diagnosis from a psychiatrist or clinical psychologist years after the records have been made.

Moreover, many survivors of sexual assault do not develop a recognisable psychiatric illness but simply experience normal (not 'abnormal') reactions, such as shame, humiliation and fear which, under s147(1), amount to 'harm'. The author understands that those involved in formulating the present legislation considered that s147(1) 'harm' would amount to 'any emotional condition' if not 'any psychological condition'.<sup>35</sup> It is now arguable that an 'emotional condition' has been equated with a 'psychological condition' and that 'harm' cannot be weighed in the balancing exercises prescribed by s150(1)(b)(iii) and (4)(c) unless the gateway of s148(4) is passed through by proof of a recognisable psychiatric illness (and, as discussed below, the occurrence of 'counselling').

### 'Counselling'

In *R v Norman Lee*<sup>36</sup> Heydon JA enunciated the following in relation to counselling:

Therapy is the curative medical or psychiatric treatment

of diseases, disorders and defects and is administered by a therapist, being a person trained to give therapy by physical, psychological or psychiatric methods. To treat an emotional or psychological condition is to deal with it by examination, diagnosis, application of remedies, care and otherwise in order to relieve or cure it. While 'counselling' can have quite wide meanings, and the argument propounded on behalf of the complainant appealed to them, in this context the word means advising with a view to relieving or curing an emotional or psychological condition from which the counselled person is suffering. In this sense a counsellor must possess some substantial skill acquired by training or experience. Accordingly, the expression 'counselling, giving therapy to or treating the counselled person for any emotional or psychological condition' refers to *the provision of expert advice and procedures by persons skilled, by training or experience, in the treatment of mental or emotional disease or trouble*. The expression does not include persons who merely seek to assist others suffering from an emotional or psychological condition. A confidante or friend or relative does not, by reason of those circumstances alone, fall within s148(4)(a).

One would not cavil with the last two sentences of this passage, but what of the rest?

The apparently narrow construction of 'counselling' does not sit well with the empathic, reactive listening and drawing out of innermost thoughts, feelings and insecurities, and the subtle guiding of the counselled person towards identifying options and making choices, which often constitute sexual assault counselling. Do such processes constitute 'the provision of expert advice'?

As it now may be held that they do not, sexual assault counsellors may feel that they need to give some prescriptive advice in each counselling session (inappropriate and ineffective as that may be in a particular case) in order to trigger the legislation. Otherwise, there would appear to be significant potential for defence counsel to persuade courts at first instance to restrict the ambit of the privilege to an extent more limited than that actually intended by the Attorney General and the legislature.

### Reaction to *R v Norman Lee*

The Women's Legal Resources Centre at North Lidcombe regularly advises sexual assault counsellors whose records have been subpoenaed. In late November 2000, it advised the author:

- It is alerting counsellors who receive subpoenas to *R v Norman Lee*. Most of those counsellors appear in court to resist subpoenas without legal representation.
- The counsellors are being advised of ways to distinguish *R v Norman Lee* or, alternatively, fit within it.
- Most counsellors are exasperated with the continuing uncertainty as to the effectiveness of the legislation and increasingly are tending not to make counselling notes.
- A significant proportion of complainants are not undergoing counselling when advised of the renewed uncertainty as to whether the records of their counselling may be disclosed.
- When so advised, other women are undergoing counselling but not pressing charges.
- Reflecting that exasperation and those difficulties, the Women's Legal Resources Centre has foreshadowed to the Attorney General's Department submissions that not only do the definitions in ss147 and 148 need augmentation but also that an absolute privilege should be introduced at the subpoena stage.

- The Attorney General's Department has advised the centre that Parliament will not resume until April 2001.

It is likely that, unless another decision of the CCA reformulates the ex tempore interpretations enunciated in *R v Norman Lee*, several months of perplexing interlocutory disputes in trial courts lie ahead.

### Civil Proceedings

The original Division 1B of Part 3.10 of the EA was repealed by schedule 2 of the Amendment Act and a replacement Division 1B (ss126G - 126I) was inserted. The replacement Division 1B applies to civil proceedings.

It is evident from the new s126H(2) that sexual assault communications privilege is available in civil proceedings only where there have already been criminal proceedings on the same facts *and* a sexual assault communications privilege claim has been made *and* that claim has been successful. Those prerequisites did not apply to civil proceedings in the original Division 1B.

In contrast with apprehended violence proceedings, care of children proceedings are not included in the definition of 'criminal proceedings'. Thus 'care' cases are civil proceedings, in which the privilege is available only in the narrow range of circumstances permitted by s126H.

Furthermore, in any civil proceedings the privilege is available only at the adduction stage. It is not available to resist production of documents upon subpoena: s126H(2) 'adduced'; *R v Young*.<sup>37</sup>

### Preparation and conduct of an SACP claim

Practical advice on the preparation and conduct of an SACP claim, commencing with the initial stage of demonstrating a legitimate forensic purpose, is set out in a paper presented to the Criminal Law Section of the Bar Association on 10 October 2000 (and thus it pre-dates *R v Norman Lee*). The article can soon be found at the Bar Association's web site at [www.nswbar.asn.au](http://www.nswbar.asn.au).

### Conclusion

In two rounds of legislation, Parliament has attempted to implement a strong, broad, effective SACP. The CCA has interpreted each round restrictively. No doubt better legislation ultimately will result from this creative tension.

So far, however, the experience of SACP legislation has been that almost nothing is as it seems. In particular, the meaning of Part 7 and its ambit of operation now are not clear. The purposes of the legislation again may not have been achieved. Indeed, Part 7 may now be unworkable in many cases. In the interests of complainants, accused, courts and the public, another round of clarifying amendments is desirable in 2001.

- [2000] NSW CCA 444.
- Eg, see *R v Young* (1999) 46 NSWLR 681 per Spigelman CJ (cf Beazley JA) and Odgers, *Uniform Evidence Law*, (4th ed), LBC 2000, pp. 505-518.
- Ibid, *R v Young*, 699 [89]. However, see now professional confidential relationship privilege in Div 1A, Pt 3.10, *Evidence Act 1995* (NSW).
- Parliament of New South Wales, Legislative Council, Standing Committee on Social Issues, *Sexual Violence: Addressing the Crime (Inquiry into the Incidence of Sexual Offences: Part II)*, 1996 at 25-26, cited in Cossins and Pilkington, 'Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials', 1996 UNSWLJ Vol 19(2), 222 at 260, fn 182.
- Eg, ibid, Cossins and Pilkington, at 258-261.
- M(A) v Ryan* (1997) 143 D.L.R. (4th) 1 at 11(h)-12(a) per McLachlin J (La Forest, Sopinka, Cory, Iacobucci and Mayor JJ concurring).
- Cossins and Pilkington, above n4 at 235-240.
- (1995) 130 D.L.R. (4th) 235 at 288.
- Liverani 'Confidential Communications', *Law Society Journal*, April 1998, 42.
- R v Young*, above n2 at 718 [199].
- See also *R v Beharriell* (1995) 130 D.L.R. (4th) 422 [58].
- New South Wales Bar Association, *Submissions on Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill 1999*, p.1.
- Letter from Bar Association Acting President, Ruth McColl S.C. to NSW Attorney General Shaw QC MLC, 11 November 1999.
- Above n12 at 5
- Above n6 at 13f
- Above n12 at 7
- Letter from NSW Attorney General Jeff Shaw QC MLC to New South Wales Bar Association President, Ruth McColl S.C., 3 April 2000.
- Above n12 at 11
- O'Connor v R* (1995) 130 D.L.R. (4th) 235 at 313 [193].
- NSW Parliamentary Debates (Hansard), Legislative Council, 22 October 1997, pp. 1120-1121.
- Above n2
- See Butterworths' 1999 *Direct Link*, Vol 3 No. 12, DL 4, 7 and 1999 *Criminal Law News*, Vol 6 No 1, 55-60.
- Above n19 at 290 [119]
- NSW Parliamentary Debates (Hansard), Legislative Council, 20 October 1999, pp.1594-1596.
- Ibid, p.1595.
- Submission of the NSW Working Party on Confidentiality of Counsellors' Notes, August 1999, p.5. The submission was written for the working party by S. Blazey and A. Cossins.
- Above n24 at 1595
- Unreported, 21 July 1998, p.5.2.
- Above n26 at 6-7
- Above n26 at 1
- Above n24 at 1596
- The judgment had not been handed down as of the date of settling this article, 30 November 2000.
- Above n1 [23]
- R v McNaghton* (1843) 8 ER 718.
- From July to October 1999, the author was given near-contemporaneous accounts of dialogue between representatives of the NSW WPCCN and the Attorney General's policy advisers.
- Above n1 [23]
- Above n2

# Military aid to the civil power

By James Renwick

Military aid to the civil power involving the use of force is a common, and to that extent, unremarkable, occurrence in many countries. This is not so in Australia. While before federation soldiers were commonly used in the colonies as gaolers for the convict settlements, and later to deal with unrest at the Eureka Stockade in 1854 and in the 1891 shearers' strike,<sup>1</sup> since federation there has only been a call out of the army in 1970 on the island of New Britain (then part of the Australian Territory of Papua New Guinea) and in 1978 following the Hilton Hotel bombing. In the first case the troops were not needed, and in the latter no force was used.<sup>2</sup> Nevertheless, the latter case provoked public discussion on the topic of military aid to the civil power, and this was considered by Mr Justice Hope in his *Protective Security Review Report* issued the following year, which made a number of recommendations on the topic.<sup>3</sup> But it was not until 12 September 2000, three days before the opening of the Sydney 2000 Olympic Games that the *Defence Legislation Amendment (Aid to Civil Authorities) Act 2000* (Cth) ('the amendments'), which deals in detail with this topic, and also with protection to those Defence Force members involved in anti-terrorist operations, came into force.<sup>4</sup> The passage of the Bill for the amending Act, although initially uncontroversial, later become so.<sup>5</sup>

This article notes the constitutional foundations for the Act, and explains its essential structure.

## The Constitution

Before federation, the colonies had limited local responsibility, under the United Kingdom, for defence. At federation, the Department of Defence was established under s64 of the Constitution, and within a few weeks, the former colonial departments of Naval and Military Defence were transferred to the Commonwealth.<sup>6</sup> The Command in Chief of the naval and military forces was vested in the Governor-General by s68 of the Constitution. (The Governor-General also exercises the executive power of the Commonwealth which, under s61, extends to the execution and maintenance of the laws of the Commonwealth.) By operation of s114 of the Constitution, the States were prohibited from raising or maintaining any naval or military force without the consent of the Commonwealth Parliament.

The principal source of Commonwealth legislative power in this respect is s51(vi) of the Constitution, which gives the Parliament power to make laws with respect to 'the naval and military defence of the Commonwealth and of the several States and the control of the forces to execute and maintain the laws of the Commonwealth'.

Finally, s119 of the Constitution states: 'The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.' Section 119 finds a parallel in Article IV, s4 of the Constitution of the United States, except that under the latter, the application to the Federal Government is to be made by the State Legislature, or, if it cannot be convened, the State Executive.<sup>7</sup> The United States provision has been invoked on many occasions.<sup>8</sup>

The current terms of s119 appeared in the 1891 Draft Bill for the Constitution. The draft terms were not subsequently altered, and the debate throughout the constitutional conventions concerning s119 was almost non-existent (although see below).<sup>9</sup>

In nearly 100 years of federation, there has never been a call out of the Defence Force for the purposes of s119. Although there were requests to the Commonwealth by Queensland in 1912, Tasmania in 1916, Western Australia in 1919, Victoria in 1923 and South Australia in 1928, only the first of those was expressly made under s119. All of the requests were declined.<sup>10</sup>

The mechanism for invoking s119 was amplified by s51 of the Act in its original form, which required a proclamation by a State Governor that domestic violence existed in a State and for the Governor-General to make a corresponding proclamation and then to call out the permanent Defence Forces.<sup>11</sup> Section 51 also provided a limitation on that power, namely a prohibition on the emergency or Reserve Defence Forces being called out or utilised in connection with an industrial dispute. All of s51 bar that prohibition has been replaced by the amendments.

The amendments have three main aspects, namely, call out of the Defence Force at the requests of the States (and the self-governing Territories) for protection against domestic violence, call out of the Defence Force by the Commonwealth to protect its own interests, and the powers and immunities given to members of the Defence Force when called out in

each case, and in dealing with terrorist incidents.

### **The Defence Force protecting States against domestic violence**

Under the amendments, a State Government can apply for protection against actual or probable domestic violence within the State: s51B.<sup>12</sup> The Prime Minister, the Attorney-General and the Defence Minister must then consider whether they should form the opinion that the State is not, or is unlikely to be, able to protect itself from the violence and that the Defence Force should be called out and utilised to protect the State against the domestic violence. If the opinion is formed, the Governor-General, on that advice, so orders. The order can only last for 20 days, although further orders can be made: s51B(4)(d), (9).

Although in the 1898 convention debates Mr Barton said, ‘...the State should be entitled to demand protection’, the Commonwealth has taken the view, notwithstanding the use of the word ‘shall’ in s119, that it is not obliged, legally, to respond to every such request by providing military aid. So, when the State of Queensland invoked s119 in 1912, the Governor-General, on advice, responded that:

...whilst the Commonwealth Government is quite prepared to fulfil its obligations to the States if ever the occasion should arise, they [sic] do not admit of the right of any State to call for their[sic] assistance under circumstances which are proper to be dealt with by the Police Forces of the States.<sup>13</sup>

Section 51B also provides a discretion whether to accede to the request, so that even if a court regarded the formation of the s51B(1) opinion as justiciable, and it may not, a court could not, in a judicial review application, compel the making of a call out order.

After call out, the Chief of the Defence Force, who commands the Defence Force,<sup>14</sup> is to utilise the defence force, *inter alia*, ‘in such manner as is reasonable and necessary’ for the purpose of protecting the specified State against the specified domestic violence: s51D.

The Chief of the Defence Force is required as far as practicable to ensure the Defence Force co-operates with the State Police Force and only acts in accordance with its requests, although the Defence Force is neither required nor permitted to be placed ‘to any extent’ under the command of the Police Force or one of its members: s51F.

There is a civil liberties protection under s51G, in that while utilising the Defence Force the Chief of the Defence Force must not ‘stop or restrict any protest, dissent, assembly or industrial action, except where there is a reasonable likelihood of the death of, or serious injury to, persons or serious damage to property’.<sup>15</sup>

Finally, when the State request for assistance is withdrawn, the call out order must be revoked: s51B(5).

It was emphasised in evidence by Defence Force members before the Senate Foreign Affairs Defence and Trade Legislation Committee which examined the Bill, that a call out under the Act is likely to be wholly exceptional and would only arise where the State Police Force (if necessary supplemented by the

Federal Police) was dealing with a violent situation which was beyond its control and needed to request military aid.<sup>16</sup>

### **The Commonwealth protecting its own interests**

Section 119 of the Constitution says nothing about the Commonwealth protecting its own interests. As mentioned above, the executive power of the Commonwealth mentioned in s61 of the Constitution extends to the execution and maintenance of the Constitution and the laws made under it and the defence power under s51(vi) permits legislation for the control of the Defence Force to that end.

Section 51A of the Act permits the three authorising Commonwealth ministers mentioned above, acting through the Governor-General, to have the Defence Force called out to protect ‘Commonwealth interests’ located in a State or self governing Territory from domestic violence against which the State or Territory is, or is likely to be, unable to protect the Commonwealth interests.

Some State Governments, making submissions to the Senate Committee considering the Bill, criticised the lack of a definition of ‘Commonwealth interests’ in the Bill. They submitted that some ‘Commonwealth interests’ may be so tenuous as to fail to provide a constitutional underpinning for a particular order under s51A. That submission may underestimate the wide scope of Commonwealth interests which could justify intervention. As Dixon J put it in *R v Sharkey* (1949) 79 CLR 121 at 151:

If ... domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of Federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the Federal mails, or with interstate commerce, or with the right of an elector to record his vote at Federal elections, the Federal Government could use all the force at its disposal, not to protect the State, but to protect itself. Were it otherwise the Federal Government would be dependant on the Governments’ of the States for the effective exercise of its powers.<sup>17</sup>

Further, as Isaacs J put it in *Farey v Burvett* (1916) 21 CLR 433 at 451: ‘The Constitution is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled.’

In addition to the matters referred to by Dixon J, one can imagine ‘Commonwealth interests’ encompassing Commonwealth property, including buildings and indeed Parliament House itself or, as in the aftermath of the Hilton Hotel bombing, the interest it has in giving effect to its international law obligations to protect internationally protected persons.<sup>18</sup>

To say this is not to deny that the use of this power might not be politically controversial, but the history of federation suggests that the extreme reluctance to call out the Defence Force by the Commonwealth is likely to continue.

## **Movement Control, the power to recapture buildings and free hostages and protection of Defence Force Members from the consequences of the use of deadly force**

Perhaps the most dramatic part of the Bill is the anti-terrorist aspect whereby, when the Defence Force is called out to protect Commonwealth interests or the State or Territory from domestic violence, members of the Defence Force may be used to:

- i recapture premises or means of transport (for example an aircraft);
- ii detain persons found on those premises reasonably suspected of having committed an offence against the law of the Commonwealth, a State or a Territory for the purpose of placing them in Police custody as soon as possible;
- iii freeing any hostage;
- iv evacuating anyone from the premises; and
- v searching for dangerous things and seizing any dangerous things found.<sup>19</sup>

Furthermore, there are powers when the Defence Force is called out to create a 'general security area' within which premises and means of transport can be entered and searched, or a 'designated area' within which movement by people and vehicles can be controlled or prohibited.<sup>20</sup>

In all of these situations, members of the Defence Force are given authority under s51T to use 'such force against persons and things as is reasonable and necessary in the circumstances'. The section anticipates the possibility of lethal force being used, although such force is not to be used unless the Defence member 'believes on reasonable grounds that [the action likely to cause death or grievous bodily harm] is necessary to protect the life of, or to prevent serious injury to another person, including the member'.

That protection is, however, lost if an obligation imposed under specified divisions of the Statute, for example wearing a uniform together with an identifying name tag and number,<sup>21</sup> is not complied with.

Finally, there are provisions in the Act for independent review of the operation of the amendments within three years from the time the amendments came into force: s51XA.

There are a number of legal questions thrown up by the Act:

- 1 Is the formation of an opinion by the three authorising Commonwealth Ministers likely to be judicially reviewable in the judicial review context?
- 2 Is the exercise of powers by the Defence Force under a call out order justiciable in the judicial review context and if so who has standing to make a challenge, for example:
  - a State or Territory which is dissatisfied with the terms of a call out order;
  - protesters who assert their protests are lawful and peaceful and thus within s51G of the Act.
- 3 Will the Courts give an expansive or a restrictive interpretation to the s51T immunity?

Overall, in the view of the author, the call out powers themselves cannot be regarded as an expansion of existing powers. What is new is the limited but necessary protection given to defence members in carrying out a role under the amendments to the Act. While close scrutiny by Parliament and commentators of the Bill was understandable, the capabilities confirmed by the Act and the protection conferred by it, are necessary and appropriate

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- 1 See *The Soldier's Dilemma – When to Use Force in Australia*, G J Cartledge, Department of Defence 1990, p.144.
  - 2 While troops were, for example, used in the 1949 coal strike and the 1953 maritime strike these were not examples of military aid to the civil power in the sense now being discussed.
  - 3 AGPS, Canberra, 1979. These are discussed in the standard work on this topic, namely, HP Lee, *Emergency Powers*, LBC, 1984, Ch VI.
  - 4 This Act amends the *Defence Act 1903* (Cth) ('the Act').
  - 5 See, eg, *Report of the Senate Foreign Affairs, Defence and Trade Legislation Committee on the Defence Legislation Amendment (Aid to Civil Authorities) Bill 2000*, Parliament of Australia, August, 2000.
  - 6 *Re Residential Tenancies Tribunal of New South Wales & Henderson*, (1997) 190 CLR 410, 435; Constitution, s69.
  - 7 Furthermore, this article provides a guarantee by the United States of a form of republican government in each State of the Union.
  - 8 See 'Riot Control and the Use of Federal Troops', (1967) 81 *Harvard Law Review* 637.
  - 9 *Official Record of the Debates of the Australasian Convention*, Third Session, Melbourne 1898, Legal Books, pp.691-2.
  - 10 Lee, above n3 at 201-202
  - 11 Of course s119 itself is the key to the matter and contains all that is necessary for a request to be made.
  - 12 There are similar provisions for the self-governing territories.
  - 13 Lee, above n3 at 202.
  - 14 The actual as opposed to the titular command.
  - 15 Cf s17A of the *Australian Security Intelligence Organisation Act 1979* (Cth) which states: 'This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly'.
  - 16 Senate Report, above n5
  - 17 Cf Quick & Garren, *The Annotated Constitution of the Australian Commonwealth*, pp.964-5.
  - 18 Cf *Crimes (Internationally Protected Persons) Act 1976* (Cth), Lee, above n3 at 210-211.
  - 19 ss51H-V.
  - 20 Ibid.
  - 21 s51W

# International perspectives on mandatory sentencing

*A paper delivered by Sarah Pritchard at the symposium 'Mandatory Sentencing: Rights and Wrongs', University of New South Wales, 28 October 2000*

## Introduction

In 1991, the Royal Commission into Aboriginal Deaths in Custody ('RCADIC') recommended 'that governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort' (recommendation 92). Since the RCADIC reported in 1991, two Australian jurisdictions, Western Australia and the Northern Territory, have introduced mandatory sentencing legislation.

In 1996, the West Australian Parliament introduced mandatory sentencing laws through amendments to the *Criminal Code 1913* (WA). In 1997, the Northern Territory Legislative Assembly enacted amendments to the *Sentencing Act 1995* (NT) and *Juvenile Justice Act 1993* (NT). The West Australian regime provides for a mandatory minimum term of twelve months detention upon conviction for a third time for home burglary. Under the Northern Territory regime, adults face a mandatory sentence of imprisonment upon conviction for certain property offences, including for a first offence. Originally, the Northern Territory regime provided for mandatory imprisonment of juveniles with at least one prior conviction. The legislation has since been amended to provide for diversionary arrangements and greater police discretion in relation to juvenile offenders.

In these remarks, I address three questions:

- international standards of relevance to mandatory sentencing;
- observations by international human rights bodies upon Australia's mandatory sentencing laws; and
- responses by Australian governments to international human rights scrutiny of Australia's mandatory sentencing laws.

## International standards of relevance to mandatory sentencing

International human rights standards relevant to mandatory sentencing include the following.

## Prohibition of cruel, inhuman or degrading treatment or punishment

Article seven of the International Covenant on Civil and Political Rights ('ICCPR') provides that 'No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.' It is settled that in some cases, imprisonment or a disproportionate sentence of imprisonment for a trivial offence can amount to cruel, inhuman or degrading treatment or punishment. The United Nations Human Rights Committee, the body responsible for supervision of States' parties implementation of their obligations under the ICCPR, had adopted a General Comment on article seven. This General Comment refers to severity of punishment as a factor relevant in determining whether there is violation of the prohibition or cruel, inhuman or degrading treatment or punishment.

## Prohibition of arbitrary arrest or detention

Article 9(a) of the International Covenant on Civil and Political Rights provides that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

In 1990, the Human Rights Committee confirmed in the case of *Van Alphen v The Netherlands* that 'arbitrariness' must be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability. This means that deprivation of liberty provided for by law must not be manifestly disproportionate, unjust or unpredictable. That is, detention must be a proportionate means to achieve a legitimate aim, having regard to whether or not there are alternative means available, which are less restrictive of rights.

It can be said that mandatory sentencing is arbitrary because:

- it allows no differentiation between serious and minor offending;
- it allows no differentiation between those for whom offending is out of character and those

who display elements of recidivism;

- it does not allow courts to sentence individuals according to the circumstances of the particular case; and
- it does not allow courts to sentence individuals according to the circumstances of the particular offender.

In the case of Aboriginal offenders, arbitrariness is particularly manifest because mandatory sentencing laws prevent courts taking account of the cultural background and responsibilities of offenders, and the economic and social difficulties often associated with Aboriginality.

A further element of arbitrariness arises in that the exercise of police and prosecutorial discretion effectively means that whether or not an offender is subject to a period of imprisonment is determined outside of court proceedings. In relation to such decision-making there is no transparency or public scrutiny.

### **Treatment of persons deprived of their liberty with humanity**

Article 10 of the International Covenant on Civil and Political Rights provides that:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
- ...
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Numerous commentators have suggested that the mandatory detention of Aboriginal offenders is inhumane because they are:

- subjected to overcrowded conditions resulting from a dramatic increase in the number of prisoners; and
- separated by huge distances from their families and communities.

### **Right to a hearing before an independent tribunal and to review of sentence by a higher tribunal**

Article 14 of the International Covenant on Civil and Political Rights provides that:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, ... everyone shall be entitled to a fair and public hearing. ...
- ...
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

It can be said that mandatory sentencing violates the right to a hearing before an independent tribunal and to review of sentence by a higher tribunal because:

- the sentence is effectively imposed by the legislature and not subject to judicial control; and
- there is no system for review of sentences.

There are particular concerns in relation to the availability of interpreters for Aboriginal people appearing before the courts under mandatory sentencing laws.

### **Right to the enjoyment of culture**

Article 27 of the International Covenant on Civil and Political Rights provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Aboriginal organisations have argued that the mandatory imprisonment of indigenous children and adults hundreds, in some cases thousands, of kilometres from family and country raises concerns in relation to the implementation of article 27 of the ICCPR. There are particular concerns in relation to the impact of imprisonment upon young people at an age when they would normally be participating in ceremonies and assuming responsibilities in their communities.

### **Prohibition of racial discrimination**

The prohibition of racial discrimination is found in a range of human rights instruments, including the ICCPR, the Convention on the Elimination of All Forms of Racial Discrimination ('CERD') and the Convention on the Rights of the Child ('CROC'). There can be little doubt that the impact of mandatory sentencing laws upon indigenous Australians amounts to an egregious violation of the prohibition of racial discrimination. The evidence is unequivocal: mandatory sentencing laws lead to disproportionately high rates of detention for Aboriginal offenders.

In a submission to the Senate Legal and Constitutional References Committee, the North Australian Aboriginal Legal Aid Service ('NAALAS') adduced the following statistics:

- the Northern Territory imprisons four times as many of its citizens than any other State;
- Aboriginal people make up 73 per cent of the Northern Territory's prison population;
- between June 1996 and March 1999 adult imprisonment increased by 40 per cent;
- Aboriginal juveniles make up over 75 per cent of those detained in juvenile detention; and

- in 1997-98, the number of juvenile detainees increased by 53.3 per cent;

The impact of mandatory sentencing laws upon Aboriginal women has been particularly devastating. NAALAS has suggested that the number of women in prison in the Northern Territory has increased by 485 per cent since the laws were introduced.

The discrimination is exacerbated because:

- mandatory sentencing legislation targets property offences which indigenous Australians are more likely to commit; and
- judicial discretion is retained in sentencing in relation to other property offences and more serious crimes such as crimes of violence.

For example, crimes not subject to the Northern Territory's mandatory sentencing regime include obtaining credit by deception (s63 *Summary Offences Act 1996*), false statements of officers of corporations (s234 *Criminal Code Act 1983*), and false accounting (s233 *Criminal Code Act 1983*).

### **Equal treatment before the tribunals and or gans administering justice**

Article 5 of CERD provides that:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) the right to equal treatment before the tribunals and all other organs administering justice ...

### **The rights of the child**

Article 37 of the Convention on the Rights of the Child specifies that States Parties shall ensure that:

...  
(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

Article 40 of the Convention on the Rights of the Child provides:

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. ... States Parties shall, in particular, ensure that:

...  
(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

...  
(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence

thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

...

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

### **Observations by international human rights bodies upon Australia's mandatory sentencing laws**

Australia's mandatory sentencing laws have been examined by three of the United Nations independent human rights treaty bodies: the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination and the Human Rights Committee. Each has concluded that the laws violate Australia's obligations under relevant international human rights instruments.

On 10 October 1997, the Committee on the Rights of the Child adopted, amongst others, the following Concluding Observations in relation to Australia:

22. The Committee is also concerned about the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system, and that there is a tendency normally to refuse applications for bail for them. The Committee is particularly concerned at the enactment of new legislation in two states where a high percentage of Aboriginal people live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention.

...

32. ...The Committee is also of the view that there is a need for measures to address the causes of the high rate of incarceration of Aboriginal and Torres Strait Islander children. It further suggests that research be continued to identify the reasons behind this disproportionately high rate, including investigation into the possibility that attitudes of law enforcement officers towards these children because of their ethnic origin may be contributing factors.

On 24 March 2000, the CERD Committee adopted, amongst others, the following Concluding Observations:

15. The Committee notes with grave concern that the rate of incarceration of indigenous people is disproportionately high compared with the general population. Concern is also expressed that the provision of appropriate interpretation services is not always fully guaranteed to indigenous people in the criminal process. The Committee recommends that the State party increase its efforts to seek effective measures to address socio-economic marginalisation, the discriminatory approach to law enforcement and the lack of sufficient diversionary programmes.

16. The Committee expresses its concern about the minimum mandatory sentencing schemes with regard to minor property offences enacted in Western Australia, and in particular in the Northern Territory. The mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends to the State party to review all laws and practices in this field.

On 28 July 2000, the Human Right Committee adopted, amongst others, the following Concluding Observations:

17. Legislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system, raises serious issues of compliance with various articles in the Covenant.

The State party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.

### **Responses of Australian Governments to international human rights scrutiny**

It cannot be said that the responses of Australian governments to concerns expressed by international human rights bodies has been particularly positive. In March 2000, the United Nations Secretary General Kofi Annan asked UNICEF and the UN High Commissioner for Human Rights to prepare a reference paper on international standards relevant to mandatory sentencing. On 13 March 2000, the Foreign Minister Alexander Downer released the paper, announcing that it confirmed the 'view expressed by the Secretary General during his recent visit that the mandatory sentencing issue remains one of domestic responsibility.'

With all due respect to the Foreign Minister, it is difficult to see how one could possibly draw such a conclusion from the UN reference paper. After a detailed enumeration of numerous of the human rights standards referred to above, the reference paper concluded:

This matter is a very important one from the human rights perspective and all States should give the principles involved the closest attention in both legislation and practice. In those cases where the meaning of the international standards is not clear, a request should be considered to the appropriate body for clarification and/or technical assistance. The OHCHR and UNICEF stand ready to provide whatever assistance is possible in light of their mandates regarding the rights and welfare of children.

It was subsequently revealed that the reference paper released by the Foreign Minister had been revised by the Office of the High Commissioner for Human Rights in response to pressure placed upon it by the Australian Government.

Australia's relations with the CERD Committee have been more than a little strained since the adoption by that Committee on 18 March 1999 of an 'early warning' procedure in relation to the 1998 amendments to the *Native Title Act 1993* (Cth). On that occasion, the Attorney-General rejected the Committee's conclusions as:

...an insult to Australia and all Australians as they are unbalanced and do not refer to the submission made by the Australian Government on the issue. ... It is up to the Australian courts and the Australian Parliament to determine the validity of native title legislation. The comments made by the Committee are unbalanced and fail to understand Australia's system of democracy.

Despite the Federal Government's hostile response,

the CERD Committee reiterated its conclusions pursuant to the early warning procedure on 16 August 1999 and again on 24 March 2000. The response of the Foreign Minister was that if the United Nations continued to 'meddle' in Australia's domestic affairs, it would get its 'nose bloodied'. On 30 March 2000, the Foreign Minister announced 'a whole-of-government review of the operation of the UN treaty committee system as it affects Australia.' The Government 'was appalled at the blatantly political and partisan approach' taken by the CERD Committee in examining Australia's periodic report.

The response of former prime minister the Rt Hon. Malcolm Fraser to the conclusions of the CERD Committee has been somewhat more measured:

I have read the comments contained in the report of the Committee on the Elimination of Racial Discrimination. If those comments had been made by any person in Australia, the Government would have had to regard them as reasoned and thoughtful. They were not offensive.

In the opinion of this writer, it is a matter of regret that whilst numerous members of the Federal Government have recorded their personal opposition to mandatory sentencing laws, the Government as a whole has declined to show any leadership on the issue. All three United Nations human rights bodies which have considered Australia's mandatory sentencing laws have concluded that these laws involve serious violations of Australia's international human rights obligations. From the perspective of the international legal regime, it is no defence to a charge of breaches of international obligations to defer to federal sensitivities and the concerns of some domestic constituencies. Both the CERD Committee and the Human Rights Committee have recently reminded the Federal Government of its obligation to ensure the application of international human rights instruments at all levels of government, including States and Territories, if necessary by calling on its power to override Territory laws and using the external affairs power with regard to State laws.

Again The Rt Hon Malcolm Fraser in his recent Vincent Lingiari lecture:

Let me speak to the role of Government. ... mandatory sentencing is one issue where only the government can act. ... If ever there was a case for the use of our External Affairs Power, it was surely in relation to a matter of 'human rights' which affects in particular the condition of the indigenous minority.

Why, at the end of the day, does it matter that there has been such a falling out between Australia and the United Nations in relation to the human rights of indigenous Australians, including through mandatory sentencing laws? One reason might be that many Australians derive considerable pride from the leading role played by Australia in the establishment of the United Nations. Australia has an outstanding record of participation in UN human rights treaty regimes. We have previously taken a vigorous approach to the protection of human rights in Australia and abroad. Our representations in relation to other countries human rights situations have been listened to because we have been seen as serious in acknowledging and

addressing our own imperfections.

There is also a double standard in the rejection of international concerns in relation to mandatory sentencing. It is surely inconsistent to say that we live in a globalised world economy and that our financial market places must be open and transparent, and at the same time to reject the inevitable consequences of internationalisation in relation to matters such of human rights.

These altercations with the UN's human rights bodies not only diminish Australia and our capacity to offer credible commentary on matters of international

concern, they also threaten the principle of universality of human rights and the integrity of the UN human rights system. It must be in Australia's best interests to assist the United Nations and its bodies in establishing an international rule of law which applies to the powerful, as well as the weak. Whatever the imperfections of the international legal order, we do not advance the international rule of law by heaping scorn on the instruments and bodies of international order.

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## RECENT DEVELOPMENTS

# Appeals from the Court of Arbitration for Sport

## Angela Raguz v Rebecca Sullivan & Ors [2000] NSWCA 240

By Robert Glasson

Ms Rebecca Sullivan competed in the women's under 52kg judo category at the Sydney Olympics after the Court of Appeal (Spigelman CJ and Mason P, Priestley JA agreeing) declined to adjudicate in a dispute concerning her selection in the Australian Olympic team. In doing so, the Court considered:

- the law as to multipartite agreements;
- the arbitral role of Court of Arbitration for Sport ('CAS');
- the concept of the juridical 'seat' or 'place' of arbitration as distinct from the place of hearing of an arbitration; and
- the changing attitudes of judges and the common law towards arbitration generally and in particular to arbitration agreements that attempted to oust the jurisdiction of the courts.

In May 2000 the Judo Federation of Australia Inc ('JFA') nominated Ms Angela Raguz for selection as a member of the Australian Olympic team in the women's under 52kg judo category. Ms Raguz's nomination was challenged by Ms Sullivan, who appealed to the JFA Appeal Tribunal

claiming that, applying the selection criteria, she ranked higher than Ms Raguz. That appeal was dismissed, but Ms Sullivan succeeded in her subsequent appeal to the CAS (Oceanic Registry), which was heard in Sydney pursuant to the *Code of Sports-Related Arbitration*. The CAS made an award in her favour, on the ground that the nomination criteria had not been properly followed and implemented and that, if properly followed, Ms Sullivan would have been the nominated athlete. Ms Raguz then sought leave to appeal on a question of law arising out of the decision of the CAS, which application was removed to the Court of Appeal.

Ultimately, the Court did not consider the merits of the dispute. It decided that the jurisdiction of the Supreme Court had been excluded by the combined effect of various interlocking agreements signed by Ms Raguz, Ms Sullivan and the JFA with the Australian Olympic Committee Inc ('AOC'), including athlete's nomination forms, concerning participation of athletes in the Sydney Olympics. Together, those agreements submitted all disputes concerning team selection exclusively to arbitration, including appellate arbitration, before the CAS in

accordance with the *Code of Sports-Related Arbitration*.

Before the jurisdiction of the Supreme Court to review questions of law arising from arbitrations is ousted by s40 of the *Commercial Arbitration Act 1984* (NSW) ('Act'), it must be shown:

- that there was an agreement 'between the parties to the arbitration agreement' which excluded the right of appeal under s38 of the Act, or the right to seek a preliminary determination under s39 of the Act; and
- that the arbitration did not take place under a 'domestic arbitration agreement'.

The Court concluded that the various agreements signed by the parties constituted a single, multipartite arbitration agreement between the JFA and the AOC, on the one hand, and all the relevant athletes, on the other. The athletes became parties to this agreement by signing their nomination forms and the mutual promises to submit to arbitration in those forms were considered to be the consideration passing from each athlete to the other.

The single arbitration agreement also constituted, in the view of the Court, an 'exclusion agreement' within s40 of the Act, which had the effect of ousting the jurisdiction of the Supreme Court. The agreements signed by the athletes included an express surrender of the right to commence proceedings or to seek to appeal, including relevantly that neither party would have any rights to appeal or apply for determinations of questions of law under s38 and s39 of the Act. Further, the arbitration had also not taken place under a 'domestic arbitration agreement' as Lausanne, Switzerland had been specified as the 'seat' or 'place' of the arbitration before the CAS and accordingly the arbitration did 'provide' for arbitration 'in a country other than Australia', despite the fact of the hearing taking place in Sydney and the merits were governed by the law of NSW.

The Court noted that the seat of arbitration is not necessarily where it is held, although where the parties have failed to choose the law governing the conduct of the arbitration, it will prima facie be the law of the country in which the arbitration is held because that is the country most closely connected with the proceeding. Nonetheless, the express choice of a seat in a place other than the place of hearing meant that the arbitration agreement in fact 'provided for' arbitration in a country other than Australia within s40(7) of the Act. In doing so, the Court rejected Ms Raguz's submissions to the effect that the words 'arbitration in a country other than Australia' within s40(7) of the Act should be construed to refer to the stipulated place of hearing of the particular arbitration. The Court concluded that the legislature was concerned with the legal and

not physical place of the arbitration. This construction was said to better advance the purpose of the Act which, amongst other things, was to encourage arbitration to resolve disputes thereby reducing the demand on courts to do so.

It is not uncommon, for example, for the parties to a contract expressly to choose, for whatever reason, a system of law to govern the substantive rights and obligations under that contract which has no connection with the contract other than the parties' express choice of that system. Nonetheless, it may appear to be an artificial result that the express choice of Lausanne, Switzerland as the 'seat' of the arbitration had the effect of excluding a party's right of review to the Supreme Court from an arbitration conducted in NSW, the merits of which were governed by the law of NSW, by reason of that choice meaning that the arbitration could have been heard in Lausanne as opposed to Sydney. It is doubted whether Ms Raguz, when signing her nomination form, was aware of the subsequent effect of that express choice on her ability to seek review in NSW Courts of the decision of CAS against her.

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# Access to quality justice

By Bill Walsh

In the President's Report in the New South Wales Bar Association's *Sixty Fourth Annual Report*, Ruth McColl S.C. concluded with a wise and timely reminder:

The role of our judicial system is to dispense justice and not to dispatch business. The speed at which a case progresses is not, thankfully, the true measure of whether justice has been done...curing Court delay must be done without destroying the quality of the end product.

These words are worth remembering, if for no other reason than to ensure that statistics demonstrating a high rate of case disposition do not become a greater badge of honour than the delivery of justice.

Nothing short of a crisis in the administration of justice in regional New South Wales is developing as a result of decisions being made in relation to where and how justice is being dispensed. I speak in particular of the removal of District Court sittings in country areas and the instructions issued in relation to case disposition in that Court.

## Removal of court sittings

Since 1990 over twenty country towns have 'lost' their District Court sittings altogether and many more have lost either their criminal or civil sittings. Many of these towns have populations of between 8,000 and 20,000 people. Not small towns by any stretch of the imagination. The idea is to 'regionalise' sittings into a few large provincial towns with populations in excess of 30,000.

The decision to 'regionalise' country sittings of the District Court is to deny country people of New South Wales ready access to quality justice. To 'regionalise' the District Court sittings in country New South Wales to a few very large provincial towns fails to recognise that people in country New South Wales face real expenses and inconvenience in having to travel from their nearest court house to one in some distant provincial town. Public transport is virtually non-existent. Fuel costs are exorbitantly high. Yet people are now being forced to travel vast distances to provincial centres with the associated time and costs involved, as well as to seek and pay for accommodation. When I say 'people', I not only refer to accused persons or plaintiffs and defendants, but to all types of witnesses – prosecution/plaintiff, defence, expert, police, victims of crime - and, of course, the legal profession.

Decisions seem to be made without any appreciation of the needs of people or practical

realities and certainly without local community consultation. The marginalised, the poor and our Indigenous people cannot cope with such a situation. Nor can the average citizen. Let me give a classic example. The District Court sittings at Condobolin were removed – within twelve months of Condobolin Court House being air-conditioned. The people at Lake Cargelligo, including the large Indigenous population there, were users of the Condobolin District Court, as were the people of Condobolin, including its own significant Indigenous population. Lake Cargelligo is one hour's drive from Condobolin. The criminal sittings went to Parkes – one hour from Condobolin and two hours drive from Lake Cargelligo. Of course, Parkes Court House was not air-conditioned when the decision was made. So for a few years, the Parkes Court House remained without air-conditioning until a judge in the February sittings of 1999 (in the midst of the summer heat) found that the 45°C temperature inside the courtroom was unbearable and hardly conducive to quality justice. So now a court user from Lake Cargelligo spends four hours per day travelling to and from the Parkes District Court or the Forbes District Court (to where the civil sittings from Condobolin District Court were transferred).

Then there is the equally remarkable decision made in relation to the Cowra Court House, which had been refurbished and air-conditioned in recent years at the cost of about \$700,000. The sittings of the Cowra District Court have been removed. Criminal matters have been transferred to Bathurst District Court while its civil matters have gone to the Orange District Court. The Orange Court House is being remodelled and is temporarily unsuitable for sittings of the District Court. Due to this unavailability, the Cowra Court House has been 'resurrected' for the criminal sittings of the Orange District Court. So the people of Cowra and district are forced to travel past their own Cowra Court House for 111kms to get to Bathurst, whilst the people of Orange use the Cowra Court House! So accused persons from Orange are being tried by the citizens of Cowra and the citizens of Cowra are being tried by the citizens of Bathurst. Makes sense? When it was announced that the District Court sittings were resuming at Cowra, the local State Member was ecstatic until he realised that it was not for the benefit of the people of Cowra and district. Cowra, by the way, has a significant Indigenous population. If it is good enough for the Cowra Court House to be used

for the people of Orange, then surely it is good enough to be used by and for its own citizens.

However, the people of Cowra have had some good news. A Supreme Court action involving citizens, witnesses and members of the legal profession from the Cowra district recently was part-heard from Sydney for a week's hearing at the Cowra Court House because the judge considered it appropriate. At last, some sense! Of course, it should not be forgotten that in very recent times the Court of Criminal Appeal has made history by sitting outside 'the big smoke'.

The transfer of criminal sittings from other towns to provincial centres raises other problems. According to tradition, one of the main strengths of our jury system is that a person is tried by his or her own peers – not by people of some distant provincial centre. Yet the populations of the provincial centres are not large enough to be able to carry the role of providing sufficient jurors for the 'out of town' trials without placing an enormous burden of frequent jury service upon the citizens of the provincial centres, which will soon develop a reputation of being 'jury towns', perhaps much in the same way we once had 'railway towns' in country New South Wales.

It should be borne in mind that the loss of court sittings from all these country towns over the past ten or so years has occurred under both Liberal-National Party and Labor governments. One would have thought that the National Party and the new 'Country' Labor would have been so strenuous in resisting such moves that the bureaucracy would have been halted in its march to deny the citizens of country New South Wales their access to quality justice.

The real danger is that country people will abandon their legal rights and their pursuit of justice through the court system because justice, for them, is surely too expensive and too inconvenient. Equality before the law is passing by the people of country New South Wales.

### Case management directions

Recent Practice Directions issued out of the District Court discriminate against country people and have meant that listing procedures have become a nightmare for litigants, witnesses and members of the legal profession. The item in *Bar Brief* (September 2000) of the Sydney barrister being required at country sittings at very short notice, highlights the problems which members of the Bar and solicitors face. The public and solicitors are surely entitled to counsel of their choice and to be able, except in unusual circumstances, to have their counsel appear in the very case for which he

or she has prepared, in most instances, for some considerable time. We know that there is no substitute for proper preparation. Counsel develops a rapport with and understanding of the client and his or her instructing solicitor in the course of preparation of a case. Counsel, over a period of time, is able to master the facts and have a real feel for the case. This rapport and understanding helps the client to come to an appreciation of and a confidence in our system of justice.

In particular, I refer to *District Court Practice Note No.55*, 'Listing at Country Circuit Criminal Sittings', issued on 10 July 2000. As the Practice Note states in paragraph 5: 'In the ordinary course of events no trial will be marked not reached until the last week of the sittings'. So who is going to pay for counsel and his or her instructing solicitor as well as the accused, witnesses, victims of crime and members of the DPP staff to sit around for two or three weeks until a judge is permitted to decide that a trial can finally be given a 'not reached' marking and so removed from the list of the sittings? Certainly the Legal Aid Commission will not pay for such 'stand by' time and if the State, through the Legal Aid Commission, will not pay then neither should privately funded litigants be expected to pay. The system proposed by *District Court Practice Note No. 55* is designed to make it all look good 'on paper', namely, so that trials are not given a 'not reached' marking until the death knell no matter how inconvenient and how expensive it might be to achieve this administrative nicety.

Paragraph 6 of the Practice Note offends commonsense and, one might argue, the provisions of s22 of the *Crimes (Sentencing Procedure) Act 1999*. Paragraph 6 says that: 'The purpose of this listing is to enable an accused to get the benefit of an early plea...!' The accused is the last person who benefits from the administrative arrangements of the District Court in its criminal jurisdiction. The 'benefit' is to the bureaucracy to enable it to administer its outstanding trials. It goes on to say: 'Practitioners should be in a position to indicate the anticipated plea to the Court'. How can that occur when legal aid is not granted to counsel until after it has been decided that an accused desires a trial? An accused is expected to indicate any early plea without the benefit of proper legal advice. But then the Practice Note goes on to place pressure on accused persons to enter a plea of guilty as early as possible when it states: 'An indication the accused will plead not guilty at this mention when, in fact, the accused pleads guilty to the



Cowra Court House

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same charge at the subsequent sittings can be expected to be a factor taken into account in deciding what discount will be given on the sentence for the plea of guilty'. This is nothing short of outrageous. It is suggested, that is not what s22 of the Crimes (Sentencing Procedure) Act says, nor was it the intention of Parliament in respect of that section.

Accused persons, who live in country New South Wales have had their District Courts closed down, are now forced to travel long distances where public transport is not practically available and have been waiting two to three years for their trials to be disposed of. For such, they have been rewarded with the 'benefits' of Practice Note No.55.

It is now frequently stated by the District Court bureaucracy that: 'The unavailability of counsel is not sufficient reason for not setting a matter down for trial'. As often happens, an accused person may have 'had' a particular counsel for some years (particularly, if the accused is from the country). Accused persons are surely entitled to 'their' counsel, especially when, through no fault of the accused, or 'his or her' counsel, the trial has not been heard or disposed of on previous occasions, or not even listed for trial for a long period of time. Wheelahan QC (*Bar News*, September 1999), in referring to this problem, stated: 'Listing a matter during a period in which counsel is available is not primarily for counsel's convenience, but to enable a litigant to be represented by counsel of their choice.' We must all understand and appreciate that the administration of justice relies heavily on the availability, co-operation and assistance of the legal profession.

The effects of *District Court Practice No.55* were highlighted very recently. Defence counsel was conducting a criminal trial in town A during a particular week (Week 1). The same counsel was due to appear in the following week (Week 2) as counsel in a criminal trial in town B. Such latter trial was listed as the No.1 trial on the Monday of the following week (Week 2). But the judge presiding over the sittings in town B wanted to 'expedite his list' so he ordered, at short notice, that the No.1 trial in week 2 be brought forward to commence on the Friday of week 1. The counsel was still involved in the trial in town A on the Friday of week 1. What was that counsel's ethical and professional position? Such a situation should never have been forced upon counsel. What chaos for the other people intimately involved in the trial - the accused, witnesses, victim, Crown Prosecutor, prosecution and defence solicitors as well as the jury panel, which had no doubt been on 'standby' for a number of days as would be the case in a country town if a trial was to commence on a Friday. In another country town, a judge, to comply with the Practice Note, held two jury panels on 'stand-by' for one and a half weeks and one week respectively until the last day of the sittings, while a two week trial was in progress.

Also, but not least importantly, the State must consider the health and well being of our judicial officers of the District Court, who are at real risk as increasing stress is placed upon them. The workload of

District Court judges has increased significantly in recent years. Whilst the judges are on circuit in country towns, they are renowned for the long hours of sitting time. To be able to dispense quality justice, judges must not be faced with the pressure of 'getting through' big lists and not be expected to deal with court lists without sufficient time for proper consideration and, as is often the case, appropriate research. Remarkably, in this great technological age, District Court judges still do not have the benefit of a daily transcript of the proceedings.

Unfortunately, the Attorney General's media release of 15 November 2000, boasting of the 'highest on record' allocation of country sittings of the District Court for 2001, did nothing to address the problems raised in this article. In fact, the media release confirmed that yet another two significant country towns, namely Deniliquin and Narrabri, appear to have lost their criminal sittings for the year 2001. The additional allocation of country sittings for 2001 has come about out of sheer necessity, as a result of the totally unacceptable delays, which have plagued the District Court in the country for many years, with criminal trials taking two or three years to be disposed of. Traditionally, the District Court of New South Wales has enjoyed a fine reputation of providing quality justice and, in respect of regional New South Wales, of serving the people by 'going on circuit'. Let us hope, using the words of McColl S.C., that the pursuit of 'statistics demonstrating a high rate of case disposition do not become a greater badge of honour than the delivery of justice'.

### **A final word**

No doubt there will be some persons who will have much criticism about what has been written in this article. But let me assure them that the criticisms expressed in this article are being discussed with considerable concern and vehemence in the corridors of country courthouses of New South Wales. This article has been written to stimulate discussion with a view to seeking solutions so that access to quality justice is available to all on an equal basis. I have written this article as 'the servant of all yet of none' in the genuine hope of contributing in some way to improving access to and delivery of, quality justice in country New South Wales. The Compensation Court in this State serves the country people very well by 'going out' on circuit to very many country towns. The listing procedures in the Compensation Court provide certainty and avoid chaos. The Local Court also provides certainty through its existing listing procedures. District Court procedures must be improved.

An interview with the Chief Justice of NSW,

# The Hon. J J Spigelman AC

By Justin Gleeson S.C.

*Gleeson S.C.:* Chief Justice, thank you for agreeing to being interviewed by *Bar News*. Your predecessor Chief Justice Gleeson was interviewed in 1988 shortly after he had taken office and then subsequently mid-term in 1994. We thank you for giving *Bar News* this interview.

Could I start by taking up one of the points you mentioned on your swearing-in, that you would now be dedicating your life to the law to a degree that you had managed to avoid up to that time. A quick glance at the Supreme Court web-site shows that you have been prolific in the speeches that you have delivered since taking office. Could you tell us where you see the role of public address as fitting with your office as Chief Justice?

*Chief Justice:* I regard the institutional position of the Court as critical to public confidence in the administration of justice. Obviously the primary way that is maintained is by the judgements of the Court on a day in, day out basis. However, there are many occasions on which public perception of justice is best served by engaging in or contributing to some kind of public discussion. Almost all of them are legal occasions, but not exclusively so.

## Law and the market

*Gleeson S.C.:* One of the addresses you have given recently was the 14th Lionel Murphy Memorial Lecture which you entitled 'Economic Rationalism and the Law'. The topic of the market and its intrusion into legal institutions is one that has been of interest to you for some period of time. Could you indicate where your



The Hon. JJ Spigelman AC and the Editor.

thinking on that topic first developed?

*Chief Justice:* I have Economics Honours qualifications from university and regard myself in many ways as economically literate. Most people would probably regard me as an economic rationalist. However, the application of market principles has gone beyond the area which I think is appropriate, particularly in the area of legal structures and institutions - by that I mean both courts and the profession. If taken too far it may threaten, in some respects, fundamental values of the administration of justice. The purpose of various comments I have made on that subject, of which that is the most recent, is to indicate that there is a line beyond which economic market ideology has nothing useful or interesting to say.

*Gleeson S.C.:* In that speech and others you have referred to the schools of law and economics which are very firmly established in the United States. Do you see in our universities there is a similar school of law and economics which has been strengthened by court decisions in Australia?

*Chief Justice:* Nothing like to the extent in the United States, but obviously anything from the United States has an influence here. Quite a number of Australian academics have studied in the United States. It is an approach to jurisprudence which I personally have not found very fruitful, but I can't say that I am as familiar with it as, no doubt, some Australian academics would be.

*Gleeson S.C.:* What of Richard Posner, now a Federal Court judge in the United States, who, although one of the foremost advocates of that school, has on occasion acknowledged some of the values of the English, Canadian or Australian legal systems, which cannot be reduced solely to economics?

*Chief Justice:* I think he acknowledges that in some respects the American system can't be either. Posner is a great polymath and what he writes is always worth reading, except in areas where he talks about the economics of rape and the like.

*Gleeson S.C.:* Just finally on that speech, there is a section in it where you describe some of the views that you have expressed on the importance of historical continuity in our government and legal institutions as being a conservative position. Does it trouble you at all to have to acknowledge that your views are conservative on this matter?

*Chief Justice:* No, it doesn't trouble me. I don't know if you are referring to my dim distant past when I may not have always been as conservative on many issues as I am today. I think part of my institutional position involves a requirement to advance a conservative position with respect to the administration of justice. I don't think it is the job of a Chief Justice to be in the forefront of radical reform.

### **The late Charles Perkins**

*Gleeson S.C.:* Could I then ask you about the public address which you gave at the recent moving State Funeral for Charles Perkins. Could you tell us about your relationship to Charles Perkins and your feelings about his life and the passing of his life?

*Chief Justice:* As I said in the address, Australia is a better and a fairer place for his life. He made a very significant contribution to this country, particularly the contribution to his own people, but also in combating racial discrimination generally and encouraging understanding of other groups of people. My own association with him goes back to the early days in university in the Freedom Ride. It was a period of my life which I recall with great fondness, and it was the period which first drew Charlie to national prominence, a position which he never relinquished. I wasn't as close to him over the entire 35 years as I was at that stage, but we maintained a personal contact throughout.

### **Aspects of the office**

*Gleeson S.C.:* If I could then ask you some questions more closely related to your first 2½ years in office, what are some of the major areas where you have been devoting your energies in that period of time?

*Chief Justice:* The major area is the writing of judgements. I thought I would enjoy that intellectual process and I do. Within that area, I think I have found the greatest degree of new intellectual stimulation from sitting in the Court of Criminal Appeal. I had a limited criminal practice at the Bar. I have found that the work in the Court of Criminal Appeal is wide ranging, stimulating and in many respects new. I am assured by my predecessor that this might change. The job also carries with it an administrative and policy type of role which I have found interesting, but not as intellectually exciting as judgment writing.

*Gleeson S.C.:* How does your time balance out between the Court of Appeal and the Court of Criminal Appeal?

*Chief Justice:* I probably spend about the same amount of time in each. The administrative and policy load fluctuates during the year. It is about a third of my time.

*Gleeson S.C.:* Would it be your intention ever to sit in trials at first instance?

*Chief Justice:* I have no present intention of doing so. My predecessor did on a number of occasions and I may well, but at the moment I have no plans to do so.

### **Acting Judges**

*Gleeson S.C.:* The topic of acting judges has been a vexed one. The Bar has taken a consistent stance of opposition, but the force of Government and necessity has led to many acting judges sitting on the Court of Appeal, on the Supreme Court and also on the District Court. Where do we stand on this issue for the immediate future?

*Chief Justice:* At the present time, for some years now, and for some the foreseeable future, I expect the only persons to be appointed as acting judges, at Supreme Court level, will be retired judges, either of this Court or of the Federal Court.

### **Changes to the Court Rules**

*Gleeson S.C.:* One of the changes that you, not single-handedly, but largely, have brought about is amendments to the Court rules, including rules designed to make justice 'just, cheap and efficient'.

*Chief Justice:* 'Just, cheap and quick'.

*Gleeson S.C.:* Thank you for the correction. And also some changes relating to the ability to make cost orders against practitioners personally. Could you comment on where you see those changes have taken the system, or where they are likely to take the system?

*Chief Justice:* I think we are moving in the right direction in the sense that a number of decisions have

'I don't think it is the job of a Chief Justice to be in the forefront of radical reform.'

been made and there is a growing awareness of the new rules. I don't maintain close monitoring of the number of such decisions, I simply become aware of them from time to time in the normal course. There seems to be a greater preparedness on the part of judges, and I believe practitioners, to understand that there is a very real problem and cases have to be run as efficiently and expeditiously as possible. As for the cost orders against practitioners, as you know, for a long time there have been rules which permitted that. A few amendments were made to those rules at the beginning of this year. There have been a number of orders made under those rules, although I don't monitor in any way the frequency with which orders of that character are made. It's a power which will coincide pretty well, I think, with the Bar's own adoption of new advocacy rules with respect to matters of this character. I would have thought that if a person is obeying the Barristers' Rules, they wouldn't run any risk of an order as to costs.

### **Court Technology**

*Gleeson S.C.:* Our readers will be comforted by that. Could I move from that draconian subject to the question of technology? We have at least one court in the Supreme Court which has been set up as a technology court, and a great deal of effort and cost is spent in large cases in equipping them to be conducted in an efficient way with computers. However, are we still in a halfway house where there is a very lengthy duplication of the material through the paper? Can we really hope to move to a stage where large trials will be conducted with virtually no paper at all?

*Chief Justice:* I doubt if it will move to that point because the familiarity of many practitioners with paper will continue to make that the preferred form of handling information. There is no doubt that a very large volume of what is now produced in paper form can be more efficiently dealt with in electronic form. In all cases, however, there is a core bundle of documents that you have to go back to again and again. I anticipate for the foreseeable future most people will continue to require that in paper form.

Technology in court is not something that we have adopted as effectively as we should have. For a large number of uses, particularly information retrieval, I think Australians are extremely well served by a range of services of an electronic character, both CD and online. There is nothing remotely like that in England. By and large I don't think that what they have in the United States is of any higher quality or greater breadth.

In terms of the actual conduct of the trials, I think there is a lot more use that can be made, particularly in lower courts, of video conferencing, and the remote taking of evidence from all sorts of people like police officers and even medical practitioners. This would substantially improve the efficiency of the overall system in the sense that it will minimise the cost which the legal process imposes on other parties. We are only starting off with that. We do a lot of that already here in terms of bail applications. To a substantial extent evidence of witnesses is taken by video in the civil proceedings. That will become more common for a

whole range of uses where currently face to face meetings and hearings occur. It could be used for directions hearings, as well as witnesses.

The other area in which we really have to develop a system is in the transition to filing and handling documentation in electronic form, right throughout the system. We are not as far advanced in that here as I believe we should be. Where the real efficiencies however will lie is when electronic files within courts are common throughout the court structure in the sense that a case starting in the District Court will have an electronic file created and that file may come to the Court of Appeal or the Court of Criminal Appeal. Once we get to that stage, when we aren't re-opening files at each stage up the hierarchy and when persons can file documents in court without having to deliver them by carrier pigeon, then I think some very real efficiencies to the system will occur.

They won't be efficiencies to the court. The court is not going to be saving any money, but it will be a substantial advantage in terms of reducing the amount of resources that the court demands be expended by litigants and by practitioners.

*Gleeson S.C.:* In the area of electronic filing, are there other countries or jurisdictions which are truly ahead of us and have implemented these systems, or are we at the forefront of what is developing?

*Chief Justice:* There are some in the United States. The Federal Court of Australia has a staged plan for implementing electronic filing. Other States have advanced plans for electronic filing, I think West Australia will be online before we will be. It's a direction which technology will inevitably drive us. The efficiencies are so clear that we just have to adapt and go in that direction. It is something that I would hope there can be some national perspective on and there is already discussion amongst courts and at the level of the Chief Justices Council to ensure some degree of uniformity. I would expect that Australia would be in the forefront of that with the United States. I think Singapore is quite advanced in that as well, and there may be a few other nations that have done so. But we are well ahead of, for example, England on all matters of this kind.

*Gleeson S.C.:* Speaking for a moment with your economic rationalist's hat on, assuming Australia develops such technology or other efficiency advantages, do you think we are more likely to see litigation associated in some way with the region being brought in Australia, as opposed to perhaps Singapore, Hong Kong, Malaysia or other such countries?

*Chief Justice:* We have a lot to offer in that regard. One of the difficulties we face is that it is so easy also to go to London or Paris for these purposes. In terms of dispute resolution the region's propinquity isn't of such great significance. It may be with respect to other services, where speed and immediacy of access is more significant. I would expect that we can develop the real strength that we have in terms of the quality and independence of the profession and of the judiciary and other forms of dispute resolution, particularly commercial arbitration. Our strength in that will, in a

sense, make us an exporter of services. I know that a number of people think that can be quite significant. I must admit I have no feeling about how significant it could become in terms of developing the profession and the infrastructure for alternative dispute resolution on a regional basis.

*Gleeson S.C.:* One of the other matters you mentioned a few minutes ago was the increasing use of video conferencing. Many traditional barristers would probably subscribe to the view that for a difficult cross-examination, one involving credit or taking longer than an hour or so, they would be significantly disadvantaged by doing that over the television screen.

*Chief Justice:* There is no doubt that is right. If there is any difficult questioning then video conferencing, save in exceptional circumstances, is not an alternative one should consider. A lot of evidence is not of that character. I am thinking particularly of the mechanical rote evidence that police frequently give in magistrates' courts, where there is never any cross-examination and never likely to be any cross examination. That is the kind of thing that I think is particularly appropriate for video presentation.

### Sentencing Regimes

*Gleeson S.C.:* You recently gave the opening address at the seminar at New South Wales University in relation to mandatory sentencing. In that address you made the points that the existence of the sentencing discretion is an essential component to the fairness of our criminal justice system; and that practical experience over centuries has led to the conclusion that the difficult process of weighing and balancing the various considerations (including deterrence, rehabilitation, denunciation, punishment and restorative justice) is best done by the impartial, experienced professional judge. With that in mind, the Court of Criminal Appeal has now delivered sentence guidelines in a number of areas. Where do you see the role of sentencing guidelines fitting with the importance of the broad discretion of the trial judge?

*Chief Justice:* Sentencing guidelines are expressly, and each of the decisions have said so, not binding in any formal sense. They don't have to be followed. However, what a guideline does do is to bring together what an appellate court believes is the relevant range in a quantitative sense or the relevant list of considerations, when a qualitative guideline. They don't in my view bind a sentencing judge in any formal way. I regard them as completely consistent with the existence of the

wide ranging discretion. What one hopes they do is to provide a set of guidelines which indicates to sentencing judges that if they sentence outside those guidelines, then the Court of Criminal Appeal will be looking very carefully at why that has been done. The feedback I get from sentencing judges has been that the guidelines have been generally welcomed for providing guidance of a non-binding character.

They contrast with the kinds of statutory regimes that were under consideration at the conference.

*Gleeson S.C.:* One of the points that you made about the statutory regimes is that to some extent they are encouraged by the inadequate reporting one receives through the media of the sentences which day in, day out are imposed in a careful fashion by sentencing judges. Indeed, you lamented that, although there is an important task of educating the public about the actual

level of sentencing imposed, the media with its understandable focus on high profile cases fails to inform the public about what judges are actually doing in the normal line of case. Is there any role for the courts, through their media officers, or for any other branch of government, to attempt to more accurately inform the public about the good work done?

*Chief Justice:* I would hope that there are such means. I do not know what they would be myself, but I wouldn't expect that they could successfully compete with the populist rhetoric that is overwhelmed by individual cases. It is an area in which people can and will and always have differed.

The most one could expect in sentencing in any particular case is that the proportion of the population that thinks a sentence is too high is something like the proportion of the population that think it is too low. The public thinks that the judiciary sentences in a lenient fashion to a degree that is simply not an accurate reflection of what actually happens in sentencing practice. How one gets across the normal run of actual sentencing to the public is something that I don't really know. The only thing I can suggest is that the statistics of what actually happens in sentencing be distributed on a regular basis and one hopes that they become more generally known.

### Judicial Workload

*Gleeson S.C.:* One of the points that your predecessor made when he was interviewed in 1988 was that notwithstanding his extensive experience as a barrister, he did not fully appreciate the workload of many of the judges, especially in the Court of Criminal



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Appeal with the number of appeals listed every day. Is that a matter which also took you by surprise?

*Chief Justice:* Yes. Although I had at the Bar appeared in the Court of Criminal Appeal on a few occasions, it was not enough to really get a feel for it. I now have a better understanding of the workload. I have witnessed the quite extraordinary amount of work that the judges are called upon to do. Plainly, as with barristers, some do it more quickly than others, some are able to produce a number of judgments in a small period of time, exactly the same as barristers with opinions in that respect. However, the pressures are quite unremitting. A significant concern, particularly for intermediate appellate courts, is whether or not the pressures are such that there is insufficient time for reflection. It is a difficult balance.

*Gleeson S.C.:* Is there an ever increasing problem with New South Wales, being the most populous and litigious State in Australia, with a vast amount of appeals necessarily coming to a limited number of judges who can hear them in the Court of Appeal?

*Chief Justice:* We have made progress with the backlog in the Court of Appeal. What has happened in the Court of Criminal Appeal is that there have been two significant expansions in recent years. In 1998 there was a very large blow out in the number of appeals. This year the number of appeals has increased again by ten per cent, so that the Court of Criminal Appeal has to sit more. From next year and for the foreseeable future the Court of Criminal Appeal will be sitting continuously. That means that the Common Law division judges will be sitting more often than they have in the past. The Court of Appeal judges will now sit more often in the Court of Criminal Appeal than in the past. We have to adjust in that way because the workload in the Court has increased substantially over the last three years.

### **Barrister to Judge**

*Gleeson S.C.:* How have you found the transition from the life of barrister to the life of a judge and Chief Justice?

*Chief Justice:* Well it now feels a substantial time ago. I do recollect a precipitous decline in the quantity of scotch and there is no doubt that the camaraderie of a floor of barristers is not replicated in judicial life. That is not to say there isn't some social interaction, but it is not as regular or as intense as I fondly recollect the Bar was. It is lonelier.

### **Medieval history**

*Gleeson S.C.:* You have delivered a number of addresses on various topics displaying your continued interest in medieval history, including a first and a second lecture on Becket and Henry II. You have also delivered a speech in May of this year to the Seldon Society on the succession at York in the 12th century. For those who know you, that would be no surprise. But for others, could you explain a little of where your interest in medieval history was first nurtured.

*Chief Justice:* I decided long ago if you try to read everything you learn nothing. So I specialised in one or

two subjects and researched them in depth and this happened to be one. There is no particular reason why it emerged, rather than others. When I gave myself a sabbatical from the Bar in 1992 I went to England. We were away some seven months in total and I wrote a first draft of a book on Becket. It was not really a book, it was organised research notes. It has never seen the light of day until John McCarthy asked me to address the Thomas More Society. I told him that actually I would address the society but on a very specific subject. So one lecture has now become a promise of five. The lecture to the Seldon Society was really the introductory chapter to the background of the Becket story. It is a hobby and I thank the Thomas More Society for allowing me to indulge it from time to time.

*Gleeson S.C.:* Where did you find in Sydney the primary sources and the materials to draw upon?

*Chief Justice:* I am quite confident that no new primary sources have been discovered for several centuries now. I don't expect any surprises in that. But many are available in Sydney because there was a time when our libraries bought virtually everything published in England. There were other sources, particularly translations which were not available here, but which I was able to pick up on various overseas trips at various libraries. This research project has been going on for about 15 years and in that time I have looked at libraries in Paris, New York and London and various other places.

### **Bill of Rights**

*Gleeson S.C.:* Just finally, the topic of the Bill of Rights for New South Wales is one which you are now regarded as having had a significant role in instigating. You must be tempted perhaps following the introduction into law of the *Human Rights Act 1998 (UK)* on 2 October 2000 to make further comment on that issue. Is that something that is appropriate for you to do in your office as Chief Justice?

*Chief Justice:* I think I will resist the temptation at this point. But may I say this, it was the introduction of the English Act in 1998 that led me to indicate that Australia would lose England as a source of inspiration and of precedent once this Act was implemented and that that would happen across a very wide area of the law, not just the criminal law, but administrative law and many aspects of civil procedure, also family law and industrial law and various other areas. So it was that event which prompted my interest in the subject a few years ago. There is a parliamentary committee looking at this. It is now primarily a political process and looks as if it might take some time.

*Gleeson S.C.:* Since I have received a cautious answer to that last question, I won't ask my final question which concerned a matter dear to the heart of barristers, namely the recent House of Lords decision concerning advocate's immunity from suit. Thank you, Chief Justice.

# Jeff Shaw QC returns to the Bar

*In 1990 Jeff Shaw QC was elected to the Legislative Council. After five years in opposition, followed by five years as attorney general, Shaw QC has returned to the Bar. He recently offered some reflections in an interview with John Feron.*

**Feron:** After ten years in Parliament, five as attorney general, have you noticed any changes in the barrister's work?

**Shaw QC:** There are changes. The environment is somewhat freer, the competition is fiercer but the essential task of the advocate remains, that is to present a case competently before a court. That is the challenge that I am looking forward to in future years. I have got to come to grips with variable practices of the courts' requirements of wigs and gowns, but these are trivial matters in the broader context of things. My view is that, in substance, the same obligations and roles that I assumed in 1976 when I first came to the Bar are still in place in 2000.

**Feron:** When you first entered Parliament you then had an established and successful career at the Bar. What were some of the things that motivated you at that time to change your direction to take on the political career?

**Shaw QC:** I had been practising at the Bar since 1976 and took silk in 1986. When an opportunity came up in 1990 I thought it was time to seize it and to take the chance. It was not without regrets and not without some sense of apprehension but I took the view that many barristers had played a role in public life and given the chance placed before me, I should do likewise. I don't regret that for a minute and although the five years in opposition were hard, combining the role of a shadow minister with the role of practitioner at the Bar, the five years between 1996 and 2000 as attorney general were very satisfying. I was motivated to take a position in the Parliament by seeking to pursue some reformist ideas about the law and the legal system, to strive, however difficult the task is, to make the law more accessible to ordinary people. Hence, it was satisfying to me that I was able to persuade the Treasury in each of the five years in office to not only maintain but actually increase the amount of legal aid available from the New South Wales budget. I also took the view that it was useful to be able to persuade a government to maintain fundamental legal principles in the criminal justice system and to avoid the intervention by politicians into, for example, sentencing processes or other aspects of the legal system.

**Feron:** Did your experience as a barrister assist you perform the role of politician?

**Shaw QC:** Although most politicians would

probably disagree, I found the background of being a barrister useful in terms of being able to argue a brief, whether in the Parliament or the media. From time to time I had to argue a position that was not entirely in conformity with my own views; that is often the role of the barrister. Also while I felt generally comfortable with the positions the Government took in the five years that I was attorney general I was able to moderate or liberalise various populist pressures that impacted upon the Government and come to a resolution that I was satisfied with in terms of legal principle. For example, I was able to persuade the Government against adopting mandatory sentencing and American style grid sentencing and maintain the concept of a broad judicial discretion. So, when I was put out into the public arena to argue for the government's position, I felt that I was putting something that was consistent with traditional legal principle. I wasn't pushed into the position of advocating something dangerous.

**Feron:** In what way were the pressures on Jeff Shaw the politician different from those on Jeff Shaw the barrister?

**Shaw QC:** As a politician there is constant pressure within the Government and the media. There is expectation of being available to the media 24 hours a day, seven days a week, to deal with supposed crises as they arise. The luxury of a barrister is to accept a brief, run a case and then send the papers back to the instructing solicitor. There are obviously significant pressures at the Bar, but they are intermittent rather than constant. There are more intellectual challenges for a barrister. The constant pressure to be available to argue the Government's position is obviously a burden that those who assume the office of the Attorney General have to undertake. For me, five years of that was, although satisfying, enough.

**Feron:** Looking back do you have any disappointments?

**Shaw QC:** The role of reformer is hard. You are facing forces of conservatism. Obviously I think I could have pursued reform in more areas and further than we actually achieved, but the fact that we revised and reviewed the sentencing laws in a way which seemed to be broadly acceptable, enacted non-discriminatory property laws, developed privacy legislation and changes to the court system whereby,

particularly in the civil lists, old matters were moved rapidly through by the devolution of cases to the District Court from the Supreme Court were, I think tangible things.

*Fernon:* What lessons do you think you've learnt from your time in politics?

*Shaw QC:* I have become a little more world weary and sceptical, but nonetheless there are ideals that are worth fighting for and I have come away from public life with the idea that, despite popular prejudice to the contrary, there are many people in the Parliament, indeed most of them, who are well intentioned and who are receptive to reasoned views from the community. Indeed, I think the great preponderance of people who go into public life are motivated by the idea of doing good things and that this is probably not sufficiently appreciated. The legal profession needs to understand, I think, that the politicians on both sides of the Parliament are receptive to rational argument and although there are occasionally some primitive anti-lawyer prejudices, mostly the members of parliament have regard to the views propounded by the barristers and solicitors of New South Wales, especially when under pressure and in need of good advice.

*Fernon:* During your tenure as attorney general, one issue of controversy between the Government and the Bar Association was the appointment of acting judges. Looking back, how do you see that issue?

*Shaw QC:* That issue has been resolved. The acting judges were appointed on the recommendation on the heads of jurisdiction and the salutary result of their appointment was to clear up the huge backlog of civil lists. No longer do plaintiffs' claims need to languish for five to ten years in the Supreme Court. That was a temporary measure, adopted on the recommendation and with the support of the judiciary. It has now ceased and the only acting judges, with a few exceptions, are retired judges who want to give the community some further service and as I apprehend it, there is no significant objection to that. So, this was a finite process, designed to address a particular and significant problem. And so I think the controversy has been quelled.

*Fernon:* It was once not uncommon for barristers to have a political career. Why do you think it's so uncommon now?

*Shaw QC:* The rewards and virtues of practice at the Bar are attractive, and the remuneration and other aspects of political life are relatively unattractive. I do not think that that should preclude other barristers from having a go at politics and I know that a number of them are keen to do so, those with some ideals to pursue. There are some barristers

on both sides of politics who would aspire to the position of the Attorney General. That is a legitimate aspiration and I would encourage them to pursue that. But it is true, despite popular misconceptions, that there are relatively few people in the Parliament, State and Federal, who have actually practised law. That should not dissuade other people from taking the opportunities when they arise, because I really do think that members of the Bar can make a contribution to public life; they understand that in the debates that occur in the political process, facts are important, principles are important; that there

needs to be focus on what is relevant rather than what is extraneous or misleading. The virtues of disinterested debate and objective consideration of the issues I think flow from an experience of practising law, and can contribute to the level of our political discourse in Australia.

*Fernon:* A former politician who returned to the Bar some time ago once said that it was gratifying to return to the Bar from politics - in court there was a sense of being listened to; there was no such sense in Parliament. Was that your experience of Parliament?

*Shaw QC:* There is sometimes an artificiality about Parliamentary debate and certainly in the late hours of the night when a parliamentarian is addressing some topic, whether a broad question of public policy or something quite esoteric, there is the feeling that no one is listening. At least at the Bar, one assumes that a judge is listening and, from time to time, the opponent is listening. Although sometimes as an opponent it's tempting not to listen too carefully.

*Fernon:* Jeff Shaw's current ambitions?

*Shaw QC:* For the foreseeable future to simply apply myself to the day to day practise of law in a variety of courts and tribunals and in a variety of areas of the law and to do the best I can for my clients. That may seem a pretty basic aspiration but it really is what I want to do for the next few years.

*Fernon:* Welcome back to the Bar!

'At least at the Bar, one assumes that a judge is listening and, from time to time, the opponent is listening.'

## Inaugural Sir Maurice Byers Lecture

# Strength and perils: the Bar at the turn of the century

By The Hon. Sir Gerard Brennan AC KBE. Delivered at the New South Wales Bar Association, 30 November 2000.

Maurice Byers was one of the towering figures of the Bar. His distinguished career included a remarkable decade as solicitor-general for the Commonwealth. When he died, leaders of the profession, as well as the media, paid eloquent tributes to his record of advocacy. He was described as ‘the finest lawyer never to have been appointed to the High Court’.<sup>1</sup> Though there were good grounds for expecting on more than one occasion that an appointment was imminent, ‘strategically located smaller minds’, Gareth Evens said ‘. . . made its attainment impossible’.<sup>2</sup> The High Court was his milieu. He knew its members well – indeed, he had led several of us at the Bar. He knew its cast of mind and, I suspect, its internal dynamics. His enjoyment of advocacy there evoked a corresponding judicial response. His forensic triumphs were notable. May I repeat the estimate I made from the bench on an earlier occasion: ‘His participation in the work of this Court was perhaps no less on that side of the Bar table than it would have been on this’.<sup>3</sup>

His professional eminence and success do not explain why the Bar Association of New South Wales commissioned his portrait to hang in these rooms and created an annual lecture to be delivered in his honour. Professional eminence and success are not alone sufficient to produce, or are even conducive to the production of, the fond response of colleagues. That response reflects a peer group’s appreciation of a mind and manner and disposition which commanded affection as well as a profound respect. Tom Hughes identified these qualities in an obituary<sup>4</sup> in which he



The Hon. Sir Gerard Brennan AC KBE

said that Maurice was –

...the quintessential barrister... possess[ing] a combination of admirable and lovable qualities seldom found together in one individual and, unlike many others in his profession, his intellectual interests extended well beyond the law... He had the gift of urbane charm; he was suave without being slippery. He was of a kindly disposition and had a gently mischievous sense of humour. He had the blessing of a happy marriage and a close-knit family.... He was endowed with a deep, but not unquestioning, religious faith which he practised throughout his life.

Byers came to the Bar in 1944, without the professional or familial connections that might have eased his entrance to this most competitive of professions. Sir Anthony Mason has told us that Byers ‘had to make his own way at

the Bar, relying on work from less fashionable and smaller firms of solicitors whose clients needed a clever but responsible counsel to argue a legal point when very often that was all that there was to go on.’ He was available to appear for anybody who had need of his services. It would seem that his clients of that time were not the large corporations. His talents were sharpened on the intricacies of the *Fisheries and Oyster Farms Act*<sup>5</sup> and on the law which the authorities believed to be inimical to the sale of liquor at the Black Tulip Restaurant<sup>6</sup>. He took silk in 1960, before the risks of that step were minimised by the abolition of the two counsel and two-thirds rule. As with many of the towering figures of the Bar, the quest for financial security was suppressed in favour of the passion for advocacy. That was a symptom of the rugged individualism which is characteristic of the Bar’s leaders. Chief Justice Gleeson has noted<sup>7</sup> that ‘Maurice Byers belonged to the legal profession before some

people gained the insight that it would serve the public better if it were a business.’

Rugged individualism is essential to the barrister’s assumption of personal responsibility for the advice given or the course of advocacy pursued. David Bennett, sometime Byers’ junior and now his successor as Solicitor-General, tells of the occasion when he suggested to his leader that they should take instructions on some question of policy that would be affected by the litigation. Byers’ reply was: ‘I don’t take instructions – I give them’. His constitutional arguments in the High Court were developed according to his view of the Constitution, whether or not that view was preferred by the Government of the day. Gareth Evans MP, then attorney-general for the Commonwealth, speaking at a testimonial dinner on Byers’ retirement from the office of solicitor-general, acknowledged that Maurice, in his role as Second Law officer of the Commonwealth had ‘displayed outstanding qualities of objectivity and courage’. The attorney no doubt had in mind Byers’ appearance before the Senate Committee into the Loans Affair. There he displayed a great deal of courage in refusing to disclose the secret counsels of the Crown – but, as Simos QC (as he then was) observed at the Bench and Bar Dinner in honour of Byers in 1994<sup>8</sup> ‘such courage is characteristic of our guest of honour’.

Of course, objectivity and courage are esteemed in a barrister because they are conducive to the giving of advice that is correct and to advocacy that is relevant, cogent and persuasive. What the Bar offers to its clients – both solicitor and lay clients - is a high level of expertise in the provision of advisory and advocacy services. That calls for a complex of capacities in the practising barrister: knowledge of the law, a facility for research, analytical skill, tremendous commitment and energy and a familiarity with the courts before which the barrister appears and with modes of judicial thinking. Byers exhibited these capacities to an outstanding degree. Simos knew him to have a phenomenal and detailed memory of decided cases and to have been a prodigious worker<sup>9</sup>. Justice Gummow remembers that his submissions were ‘preceded by reflection and speculation’ and were calculated to draw the Court into the heart of the matter. Alan Robertson speaks of his intellectual curiosity which led him to look radically at each problem and to re-examine the fundamentals. And he remembers Maurice seeking to enlist the support of a waitress in a French restaurant in Canberra for the proposition that French was the language of reason – a proposition which elicited only a look of profound consternation.

He was an agreeable and entertaining companion whose conversation ranged over music and philosophy and a notion of the cosmic God. Byers’ curial

arguments, delivered with a ‘mellifluous voice’ and ‘courtly gestures’<sup>10</sup>, were always directed to ‘the critical grey area of the case’<sup>11</sup> As Sir Harry Gibbs noted, Byers identified ‘the point or points on which the decision will rest and advance[d] clearly and strongly, but without undue repetition, the arguments directed to those points, keeping to the main road and not wandering off into side tracks and blind alleys, however attractive they may seem from a distance.’<sup>12</sup> Byers’ own opinion was ‘the isolation of the matter [for decision] is the most demanding and the most essential of all legal skills. Presenting it clearly, concisely and attractively is the summit of oral advocacy’.<sup>13</sup> Of course, as Gareth Evans remarked: ‘The counterpoint to brevity, that which sets it off... is style and that’s a quality that Maurice has in abundance.’ Sir Anthony Mason remembers a style of his advocacy which Byers described to a junior counsel: ‘Put the ball into the scrum and let the politics of the court take over.’ Sir Anthony<sup>14</sup> comments that ‘he apparently omitted to tell the junior that in feeding the scrum he put the ball into the second row’. Although Byers was a consummate practitioner of the arts of advocacy, the practice of these arts was only a means to his end. Chief Justice Gleeson remembers him as ‘a man who hungered, and thirsted, after justice’.<sup>15</sup> It was a concatenation of capacities and personal qualities that endeared Maurice to the Bar and earned him the plethora of accolades that accompanied him in life and on

his death – capacities and qualities that commanded the affectionate respect of his clients, who to use Gareth Evans’ words, ‘valued enormously the wisdom, experience, integrity and objectivity of Maurice Byers’.<sup>16</sup>

Not every barrister can exhibit the style and affability of Byers, not every barrister will be as easily available for his or her fellows as Byers was for other barristers who sought his advice. Not every barrister will be blessed with the same acuity of mind or will burn with the same passion for the constitutional truths which he was briefed to advance. But there are some capacities and qualities which are characteristic of the Bar and which maintain public confidence in the institution. They are objectivity and competence in legal advice, skill and effectiveness in legal advocacy, fearless independence and a commitment to justice according to law. These are the strengths on which the Bar’s institutional reputation depends. They are sustained by the structure of the justice system and by the Bar’s rules and practices.

The public administration of justice by the courts ensures that advocacy is open to critical evaluation and the validity of legal advice is publicly tested. The fearlessness and independence of the barrister - qualities that stand high in public estimation as Mortimer’s Rumpole demonstrates - can be assessed by court and client and, significantly, by peer-group. So

‘Not every barrister can exhibit the style and affability of Byers.’

can the barrister's commitment to justice according to law. Publicity and individual responsibility produce the competition which stimulates a high level of professional service.

The strengths of the Bar are buttressed by its rules and practices. Partnerships have not been acceptable at the Bar, so that each barrister must take individual responsibility for his or her advice and advocacy. The conventional view has been that solicitors facilitate the objectivity of the barrister by providing a *cordon sanitaire* which keeps the barrister at a certain distance from the lay client. A brief is not accepted if the advice or advocacy for which the barrister is retained would be compromised by personal or commercial relationships or by knowledge acquired elsewhere. The confidentiality and commitment which are offered by a barrister to a client are secured by more than a Chinese wall<sup>17</sup>.

Touting for work has been frowned upon and the barrister's remuneration has been confined to payment for specific work done on the solicitor's instructions. In the jurisdictions where an independent Bar has been established, whether by law or in practice, the remuneration of the practising barrister has never been a wage paid by a solicitors' firm or a proportion of the firm's profits<sup>18</sup>. The piecemeal nature of the solicitor-barrister relationship relieves the barrister from an ongoing concern about the lay client's non-legal objectives. The barrister's attention is focussed on the application of the law, not on the consequences of the law's application. Hence the duty in advocacy is to assist the court to a conclusion that is legally correct, even to the disadvantage of the client. The duty in advising is to be legally objective, not to furnish an opinion which gladdens the client's heart. And when a person who offers a reasonable fee, seeks the barrister's services in an area in which the barrister ordinarily practises, the barrister must accept the brief even though he or she would not wish to do so. That is the cab-rank rule which secures both the reasonable availability of the Bar's services and the independence of its individual members.

These are not merely the rules and practices of an exclusive club. They are calculated to ensure that the barrister is able to perform, efficiently and with objectivity, the function of assisting in the administration of justice according to law. The lofty words of Lord Eldon<sup>19</sup> are worth repeating, if only to restate the reason why the Bar exists:

He lends his exertions to all, himself to none. The result of the cause is to him a matter of indifference. It is for the court to decide. It is for him to argue. He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression, that truth is best discovered by powerful statements on both sides of the question.

The sentiment was echoed when Byers responded to his toast at the Bench and Bar Dinner in 1994:

When we appear before the courts we are engaged in the administration of justice and thus owe to the courts in this ministerial undertaking a duty which prevails over our duty to our client. The practice of the law is thus radically and essentially different from the practice of

other professions or callings. We participate and they do not in the administration of justice to the same extent as the judge, though our function differs.<sup>20</sup>

A separate and independent Bar provides not only an organised structure in which individuals can conveniently and efficiently carry on their practices. The primary purpose of an organised Bar is to ensure the existence of a college of advisers and advocates who act in the belief that their chief function is to assist in the administration of justice according to the law. Without that collegial ethos, the individual barrister is hard put to characterise himself or herself as a professional. And were that character to be forsaken, the objectivity of advice and the efficacy of advocacy would be lost, to the disadvantage of client and community alike.

The rules and practices of the Bar that buttress its professional objectives are still the respected modes of professional behaviour and have great attractive force for those who, for whatever reason (or for no good reason at all) seek to practise in this most competitive, uncertain and sometimes cruel profession. But now, facing the reality of a rapidly changing society, is the Bar able to – indeed, does it wish to – retain the character it has had and about which it has boasted in the past?

As the worth of a barrister's services has come to be appreciated by the commercial community, the work of the Bar has changed from what it was in the days when Byers commenced practice. The private litigant is represented by a barrister in the criminal court and often in the Family Court and in other jurisdictions in which legal aid is available, but private litigants do not now constitute the same proportion of a barrister's lay clientele as in earlier times. In the lesser cases of earlier times – the fencing disputes, the minor statutory offences, the applications for testator's family maintenance in small estates, the run of the mill accident cases – the barrister built up a large constituency of goodwill. The services of the Bar have been increasingly devoted to service of the corporate and government sectors. The soaring cost of litigation has removed a large part of the public constituency of the Bar. Perhaps it has also given the Bar the image of an institution of and for the affluent. That is an image cultivated by the media as they focus on the fees of the most distinguished or fashionable leaders. Regrettably, the *pro bono* work of the barrister, especially the *pro bono* work of the leaders, receives little publicity and lacks the recognition it deserves. I fear that the Bar has lost some of the public support it once enjoyed and, however illogically, that could reduce the high conceit which the Bar holds of its professional standing and could lead some barristers to suspect that (to adapt Chief Justice Gleeson's phrase) 'it would serve the public better if [the Bar] were a business.'

The strength, indeed the very viability, of an independent Bar depends primarily on its internal ethos. If its members are conscious that they are participants in the high social function of doing justice according to law, the community of the Bar is bonded by a common sense of public service and by mutual

respect among its members. Of course the noble aspiration of justice for all is never fully achieved but, if the aspiration be forsaken, the professional character of the barrister's work would be lost. It would then be a business, the chief purpose of which would be the efficient delivery of advisory and advocacy services to the economic advantage of the practitioner. Then public service would be subordinated to self interest, except to the extent that the rendering of some public service would be deemed to enhance the goodwill of the business. Pro bono work would cease to be a professional obligation and a necessary element of practice. The limitation on fees, imposed by the reasonableness requirement of the cab-rank rule, would cease to apply. Indeed, the cab-rank rule would lose its obligatory force. Nor would there be an incentive to assist the court on issues of either law or fact if the assistance might prejudice the barrister's business connections. The courts would question their faith in the integrity of a barrister's submissions, to the detriment of the administration of justice.

The differences between a profession and a business may not always be obvious to the superficial observer; nevertheless, the distinction is substantial. True, a rough measure of a barrister's progress in the profession is the volume and importance of the briefs delivered and his or her ability to command a higher fee. Those would be the criteria of success in a business also. In a profession, however, they are the consequence not only of technical competence but also of the judicial and peer group's appreciation of the barrister's adherence to the ethical standards of the Bar. Again, competent and efficient service of a client's interests is or should be the outcome of a barrister's work, whether the barrister is conducting a business or a profession, but in a profession that service is only a particular instance of, and is qualified by, a wider public service that ensures the due application of the law to all aspects of a free and ordered society. And the professional barrister provides that service from time to time to those who, being unable to afford representation, would or might suffer significant injustice if representation is denied them. The expansion of the independent Bar in every State and Territory indicates not only the economic viability of a barrister's practice but the attractive force of the Bar's professional standards and the collegiality of Bar membership.

However, the development of new technology may force some contraction of Bar numbers and could require further consideration of the Bar's rules and practices. The implications of technological development are, I venture to think, greater than the Bar or other sections of the legal profession presently appreciate.

'The implications of technological development are, I venture to think, greater than the Bar or other sections of the legal profession presently appreciate.'

When Lord Woolf conducted his inquiry into Access to Justice, he had as an Information Technology Adviser Professor R E Susskind, legal scholar, editor of the *International Journal of Law and Information Technology* and author of several texts including *The Future of Law*. In that book, the author points out that, with the advent of print, the quantity of legal materials was increased and was capable of widespread dissemination. In that milieu, the doctrine of precedent developed. With the advent of massive data bases, the available bodies of law have become more complex and the specificity and detail of the mass of material often renders the law impenetrable. Current technology has been devoted to data processing giving access to this mass, which needs then to be sifted and analysed by experienced legal practitioners. There is much work to be done by the practising lawyer, but

developing technology is directed not only to data processing; it is directed also to knowledge processing so that the user is able to pinpoint *all but only* the material relevant to the solution of a problem. When that technology is combined with the public's ability to seek information by operating a television set interactively, there is likely to be a significant alteration in what might be termed the advisory market.

Susskind foresees massive investment, perhaps by legal publishers, in the development of legal information products and services which will provide solutions to many legal problems. Lawyers will be employed as legal engineers, engaged because of their analytical skills and specialist knowledge, in the creation of programmes from which advice can be obtained. The programmes will be cost effective, for the advice will not be sought by, and given to, a single client but will be devised for and sold to many. The legal engineer will be called on to think in more general terms than the adviser to a particular client but the programmes will be sufficiently detailed to resolve specific legal issues. If simple-to-operate but technically complex and legally sophisticated information services become the most familiar way in which the public obtains legal advice, situations which presently lead to litigation may be prevented from arising or may be solved without litigation. Court lists may well contract. One can foresee that much advisory work of the simpler kind will no longer require the services of the Bar.

However, technology cannot cope with the infinite variety of human situations which might call for a legal solution. Susskind points out that computers deal only with natural language which may be ambiguous and in which unspoken implications may reside. Priorities between possible solutions may have to be determined and there will always be lacunae which can be filled

only by displaying what Susskind describes as ‘the creativity, individuality, intuition, and common sense that we expect of judges acting in their official role.’ As moral and ethical judgments will always have to be made about the circumstances of individuals or the interests of society more generally, judges of ‘integrity, knowledge and experience acting as impartial arbiters’ will always be needed. And if they be needed, the objective barrister of integrity, knowledge and experience will be needed to participate helpfully in the judicial function. There may be a change in the number of barristers needed and in the skills they will require to perform their function. New legal questions may arise from the use of technology. For example, if information services utilise knowledge processing technology, will the general use of a programme over a period give it some force as an authority? What will be the effect on the doctrine of precedent and the manner in which previous authorities are cited to and considered by a court?

The court lists of the future, from which the simpler cases will probably have disappeared, will contain a greater proportion of cases the solution of which is legally problematic. If these be cases which are too sophisticated for the legal information service to solve, they will be cases calling for familiarity with the underlying principles of the relevant law, precise analysis and a sensitivity to the values which can inform the development of new legal principle. The courts' need for the Bar's assistance will certainly be no less than it is today. Whatever may be the cost-effectiveness of new technology in the delivery of legal services, I cannot conceive of a transformation which would eliminate the demand for the functions presently discharged by the independent Bar.

But will those functions continue to be discharged by an independent Bar or will they be an aspect of the functions of large firms or corporations? Will the comparatively meagre resources of the individual barrister withstand the competitive pressures of firms or corporations that can offer the lay client a range of interlocking services including, but not limited to, legal advice and advocacy? That question must cross the mind of many in the legal profession who read the recently-issued discussion paper published by the Law Council of Australia entitled *Multi-Disciplinary Practices: Legal Professional Privilege and Conflict of Interest*<sup>21</sup>. The Law Council's paper observes:

The perceived dichotomy between business and the professions is regarded by many as being outdated, and the legal profession is recognising that ethical and

commercial issues can and must be dealt with simultaneously.

As commercial transactions become increasingly complex, the need to establish multidisciplinary teams is growing. Clients are increasingly demanding more integrated professional services to meet their financial and legal needs. Big firms (and governments) are streamlining their staffing down to ‘core business’ functions and outsourcing entire programs.

The movement towards Multi Disciplinary Practices, or MDPs, is widespread and, many would say, commercially irresistible. The Report of the American Bar Association's Commission on Multi Disciplinary Practices reached this conclusion:

The forces of change are bearing down on society and the legal profession with an unprecedented intensity. They include: continued client interest in more efficient and less costly legal services; client dissatisfaction with the delays and outcomes in the legal system as they affect both



Left to right: The President of the Bar Association, Ruth McColl S.C., with Lady Patricia Byers and Sir Gerard Brennan

dispute resolution and transactions; advances in technology and telecommunications; globalization; new competition through services such as computerized self-help legal software, legal advice sites on the Internet, and the wide-reaching, stepped-up activities of banks, investment companies, and financial planners providing products that embody a significant amount of legal engineering; and the strategy of Big Five professional services firms and their smaller-size counterparts that has resulted in thousands of lawyers providing services to the public while denying their accountability to the lawyer regulatory system.

One of the ‘Big Five’, Price Waterhouse Coopers, is said to have 1600 lawyers employed in 42 different countries<sup>22</sup>. Anderson Legal and Pricewaterhouse Coopers Legal are now the third and fourth biggest legal firms worldwide.<sup>23</sup> England and Canada are moving in the direction of multi-disciplinary practices and, as you know, New South Wales is perhaps leading the movement with the enactment of the *Legal Profession Amendment (Incorporation of Practices) Act 2000*.

If this is the general movement of the legal profession in common law countries, can an independent Bar reasonably anticipate a long term future? The individual barrister is poorly resourced in comparison with the large solicitors' firms of today;

the poverty of those resources will be far more dramatic in comparison with those of the large multi-disciplinary partnerships of tomorrow. The large legal firms of today offer expert advice and, if the members of the Bar were to join the firms, would offer advocacy at the highest level of expertise. The one-stop shop for clients must have great attraction, particularly if the shop is a department store rather than a small boutique. And, for the overworked barrister, the prospect of a partnership and shared responsibility might have both financial and life-style advantages. Those advantages would be the greater if the reasoning in *Gianarelli v Wraith*<sup>24</sup> were to yield to the reasoning of the House of Lords in *Arthur J.S.Hall & Co v Simons (A.P.)*<sup>25</sup>. As you know, their Lordships held that a barrister is liable in damages for in court negligence, whether in criminal or in civil proceedings. A minority of the House would not have withdrawn the immunity in relation to criminal cases, but the majority thought that so long as a conviction stood, an action by the convicted person would usually be an abuse of process. I would not presume to speculate on whether the High Court would reconsider *Gianarelli v Wraith*, but I would draw attention to the speeches in *Arthur J.S.Hall & Co v Simons* in which their Lordships estimate the effect of that judgment on some of the fundamental rules and practices of the Bar.

Although Lord Steyn regarded it as ‘essential that nothing should be done which might undermine the overriding duty of an advocate to the court’, he thought that in the world of today ‘there are substantial grounds for questioning whether immunity is needed to ensure that barristers will respect their duty to the court.’ Lord Hoffman did not think that a loss of immunity would tempt barristers to ignore their duty to the court. After all, he said, most are ‘honest, conscientious people...[who] wish to enjoy a good reputation among [their] peers and the judiciary’ and ‘[i]t cannot possibly be negligent to act in accordance with one’s duty to the court.’ These were the leading majority judgments and others of their Lordships agreed with the general approach. Lord Steyn accepted that the cab-rank rule is a valuable professional rule ‘[b]ut its impact on the administration of justice in England is not great. In real life a barrister has a clerk whose enthusiasm for the unwanted brief may not be great and he is free to raise the fee within limits.’ Lord Hoffman dismisses the argument that the imposition of liability for a barrister’s in court negligence would affect the operation of the cab-rank rule by saying that the argument is ‘incapable of empirical verification’ and, in any event, ‘vexatious actions are an occupational hazard of professional men and... we are improving our ways of dealing with them.’

Of course, if the Bar did not subject the duty to the client to an overriding duty to the court and if the cab-rank rule were abandoned, the argument against barristers’ immunity would be extremely powerful, but their Lordships do not contemplate that the Bar’s standards in those respects will be affected. The confidence which their Lordships place in the ability of

barristers to adhere to traditional ethical standards – standards which are essential to the maintenance of the rule of law and the administration of justice – even though the traditional safeguard of immunity be withdrawn is a tribute to the English Bar.

Their Lordship’s confidence in the Bar’s ability to adhere to its traditional obligations despite the loss of immunity is exceeded by the Law Council’s confidence in the ability of lawyers generally to adhere to their traditional obligations while practising in partnership with other professions. The Law Council proposes Model Rules which state:

1. A lawyer practising within an MDP, whether as a partner, director, employee or in any other capacity, shall ensure that any legal services provided by the lawyer are delivered in accordance with his or her obligations under the applicable legal practice legislation and professional conduct rules.
2. No commercial or other dealing relating to the sharing of profits shall diminish in any respect the ethical and professional responsibilities of a lawyer.

The Issues Paper contains three ‘principles [which] enshrine the Law Council policy’, the first two of which are:

- a) that the regulatory regime should be directed to the individual lawyer who is bound by ethical obligations and professional responsibilities;
- b) that the regulatory regime should be directed to the individual lawyer who is bound by ethical obligations and professional responsibilities; that regulation of business structures should no longer be regarded as critical or necessary to the maintenance of professional standards’

Of course, ethical obligations and professional responsibilities can be maintained by an individual lawyer in any environment, just as religious convictions can be maintained by an individual even in a hostile environment. The Colosseum was witness to thousands who did so, though the number of those who survived the lions was small indeed. The structures of a profession may differ from the structures of a business precisely in order to facilitate the maintenance of ethical and professional responsibilities. And that seems to be acknowledged by the third of the Law Council’s principles.

- c) that individual lawyers should be free to choose the manner and style in which they wish to practice law, including the right to choose to practice at an independent Bar, which requires practice as a sole practitioner and adherence to the cab-rank rule, recognising the importance of the sole practice rule in the administration of justice.

In other words, the unique structure of the independent Bar can be preserved and its preservation will continue to assist in the administration of justice.

The objectivity of an independent barrister’s advice or advocacy will not be influenced by the commercial or other aspects of a client’s interests which might be the overall concern of a multi-disciplinary partnership. Nor will the barrister be influenced by the commercial interests of such a partnership. There will be no risk of a barrister acting for conflicting interests or breaching the confidentiality of any client’s communication. The barrister will accept individual responsibility because he or she will be free of relevant commitments to anybody other than court and client.

The Law Council's recognition of the survival of an independent Bar is to be welcomed for another reason. Although the work of the independent Bar is symbiotically related to the work of the courts, the barrister is independent of the judge. Ill-temper or petulance, arrogance or ignorance or self-indulgence on the part of a judge will be met by calm, courteous but unyielding insistence by the barrister that such judicial conduct be rectified. And the stalwart protection of a client's legal interests even in unpopular causes against unprofessional demands by a client, overreaching by an opponent or even unacceptable conduct by a judge will strengthen in a barrister that courage which equips him or her to assume in due course the responsibilities of an independent and impartial judge. The maintenance of an independent Bar will be essential to ensure a training ground for at least a majority of an independent and fearless judiciary.

I suggest that the functions of an independent Bar will be more significant in the future than in the past. If multi-disciplinary partnerships become the norm and an increasing proportion of lawyers are engaged in those firms and as legal engineers, the need for an independent Bar will be the greater. Its numbers may be fewer than today, its work more complex and sophisticated. Yet it will be a more important participant in the work of the courts and in the administration of justice according to law. Its capacity to perform those functions depends on the maintenance of its own standards, on the strengthening of its collegial ethos and fidelity to its rules and practices. If the independent Bar, forgetful of Lord Eldon's definition of its purpose, were to think that its strength could be measured solely in commercial terms, its privileges would rightly be short-lived and its very existence would be in jeopardy. This was the view of Maurice Byers who, responding as Guest of Honour at the 1994 Bench and Bar Dinner said this:

An independent Bar has become an essential feature of the administration of justice in every court, State or federal. If we maintain our rights, accept our responsibilities and realise that accountability for what we do is the price of control of our destiny, all will be well.

Indeed, the Bar is right to honour his memory.

- Ruthning (a firm)* (1991) Qd R 558 and *Bolkiah v KPMG* (1999) 2 AC 222 with *Australian Commercial Research and Development Limited v Hampson* (1991) 1 Qd R 508;
- 18 Cf the position of 'in house' counsel discussed in *Law Society of the Australian Capital Territory v Lardner and Andrews* [1998] ACTSC 24.
- 19 Reported as a note in *Ex parte Elsee* (1830) Mont. 69,70n at72.
- 20 *Bar News* Spring/summer 1994 p.23
- 21 Hereafter LCA/MDP
- 22 Appendix to Report, section C(1).
- 23 LCA/MDP p 10 quoting *Business Review Weekly* 18 February 2000 p 76
- 24 (1988) 165 CLR 543
- 25 (2000) UKHL 38; (2000) 3 WLR 543.

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1 *The Age*, 27 January 1999

2 Speech at the Attorney-General's dinner in honour of Byers 8 February 1984

3 (1988) 193 CLR vi

4 *The Australian*, 26 January 1999

5 Jacqueline Gleeson *NSW Bar News* Spring/Summer 1994 p 19

6 McHugh QC (as he then was) at the Attorney-General's Dinner in honour of Byers 8 February 1984

7 *73 Australian Law Journal* 380, 382.

8 *NSW Bar News* Spring/Summer 1994 p 18

9 *Ibid.*

10 Gummow J 73 ALJ 382

11 Sir Anthony Mason 73 ALJ 382

12 Attorney-General's Dinner in honour of Byers 8 February 1984, p17.

13 10 *UNSW Law Journal* 179, 180

14 *Encounters with the Australian Constitution* p 195.

15 73 ALJ 382

16 Attorney-General's Dinner in honour of Byers 8 February 1984, p 7.

17 Compare *Fruehauf Finance Corporation Pty Ltd v Feez*

# The Hon. R J Ellicott QC: 50 years at the Bar

*A speech delivered by The Hon. Justice R V Gyles AO at a dinner to celebrate Ellicott QC's 50 years at the Bar, Westin Sydney, 17 November 2000*

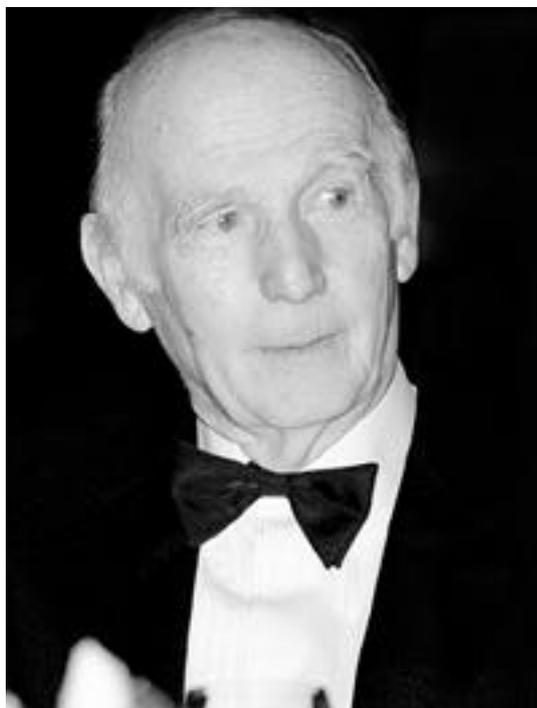
**Y**ou can take the boy out of the bush, but not the bush out of the boy.

Bob Ellicott was born and raised in Moree, the son of a shearer turned wool classer. Rural interests have been one abiding theme of his life. Since his days as a junior barrister, he has owned rural properties (not always with Colleen's full approval). When in comparative penury whilst in public service, he persuaded Trevor Morling to subsidise his interest by entering into partnership.

That long-term friendship had begun when each attended Fort Street High School, along with other future barristers. Bob, down from Moree, boarded on a verandah at Summer Hill during school term. I am reliably informed that he still regularly takes his family for views of that location. Morling was one year behind Ellicott. In an arrangement which tells us something of the shrewd, if not frugal, approach of each of them, Morling paid Ellicott £1 per annum for the bailment of his discarded textbooks each year.

His rural background has contributed to his independence of mind and determination to succeed against the odds.

Another abiding theme of Ellicott's life has been a social conscience reflected in his public and community service. This has included his activities with the Baulkham Hills Methodist Church whilst residing in the Hills District, and his association with the Reverend Ted Noffs and the Wayside Chapel



The Hon. RJ Ellicott QC

when he moved to Elizabeth Bay. He is presently Chairman of Life Education Australia, which does much good work with drug education programmes for Australian school students.

He spent 14 years in public life as solicitor-general, a Member of the House of Representatives, in various ministerial portfolios, and as a Federal Court judge.

He had, and has, a genuine fascination for public affairs. He resigned from the Bench in part because he retained this interest and did not wish to shut himself out of participation in public issues and public debate in the way he did not think proper for a serving judge. Whether

his services have subsequently been adequately availed of is, perhaps, questionable.

It will be recalled that he had earlier resigned his office as attorney-general, for which he was ideally fitted and which he much enjoyed, on an issue of principle as to the exercise of the discretions of that office.

I know that, in addition to service as attorney-general, he obtained much satisfaction from the other portfolios that he held. He was involved in developing constitutional arrangements for some of the External Territories, in the establishment of the Institute for Sport, and in devising the scheme for encouragement of Australian films amongst many other activities. His service to sport has continued, with his involvement in arbitration in connection with the Olympic movement.

Of course, in his public life he has been no stranger to controversy. He was involved in 'the

Dismissal'. One of the myths which have grown up about that event was that there was a conspiracy between Ellicott, his cousin, Sir Garfield Barwick, and The Hon. Sir John Kerr. It seems to me that, in addition to the integrity of those concerned, there are at least two good reasons for doubting this theory. The first is that Ellicott was telling everybody who would listen, whether in public or private, his opinion as to what the governor general would be bound to do in certain eventualities. Indeed, one of his opinions was, as I recollect, made public. There were letters to the newspapers arguing his views one way or the other. Nobody was in doubt as to Ellicott's view. The second reason is that whilst Sir Garfield Barwick was a cousin of Ellicott's, and they were no doubt on cordial terms, they were not close. I am reliably informed (not by Bob) that when the young Ellicott first came to the Bar and sought to see the great man, he was told that he was too busy. I can recall being briefed with Ellicott, when he was solicitor-general for the Commonwealth, to intervene in the High Court in a case involving complicated issues concerning the constitutional treatment of Commonwealth places. We worked the case up from all angles for several days. We lasted approximately 30 seconds in the High Court until dispatched at the hands of Sir Garfield Barwick. It was at about that time that a very valuable piece of High Court transcript became available. A verbatim transcript was taken from the tapes and normally revised before publication. On this occasion the following appeared in the transcript, which somehow was released. What follows is not a lapse from taste, it is the contents of the transcript. The transcript recorded Barwick CJ (who sat next to Sir Douglas Menzies) as follows: 'Doug, watch me piss this bloke off'. The transcript was recalled, but some copies were not returned.

It is not for me to comment upon speculation which has occurred at various time as to whether Ellicott was not offered the chief justiceship of the High Court in breach of an understanding with the prime minister, or whether he rejected an offer for an ordinary seat in the High Court. I do say that he would have served in either office with distinction.

Another abiding theme of Bob's life has been his

family. Colleen, his wife of 50 years, is here tonight. He is, of course, proud of all of his children, and one of them, Michael, has his own well-established practice at the Bar. I am informed that some of the habits of his shearer/wool classer grandfather have skipped a generation, including an interest in horse racing. The farm and a place at Mission Beach have been family escapes from the pressures of practise over the years.

I now turn to Bob's career in the law. It can be described as stellar and can only be sketched in outline tonight.

He attained First Class Honours in Law at Sydney University (together with an Arts degree), served articles of clerkship with Henry Davis York, and was a researcher with Minter Simpson. He was an associate to Sugerman J, then of the Land & Valuation Court, later president of the New South Wales Court of Appeal.

I first met him in 1964, when I took a chair in the corner of the chambers of MJ Clarke on 10 Selborne. In about 1962 that floor had come from Denman Chambers, where Bob had, for some time in his early days, shared chambers with Alroy Cohen. Alroy could properly be described as old, eccentric and rich. He treated chambers as a comfortable place in which to open dividend cheques and to have naps (with blankets), from which he was awakened by alarm clocks and cups of tea made by the redoubtable Dorothy Slater. I do not know that Alroy Cohen did what Trevor Ziems is reputed to have done, and offered his hand in marriage to Dorothy.

The leader of 10 Selborne Chambers then was Nigel Bowen QC, one of the doyens of the equity and commercial Bar, and a mentor of Bob's. He did much work with him, he followed him

into politics and as attorney-general, and had the pleasure of appointing him as the first chief judge of the newly established Federal Court.

My meeting with Bob in 1964 was most propitious for me. He was, by then, a leading junior in his field, including intellectual property, tax and general equity and commercial work, including some work in the Land & Valuation Court. He agreed to accept me as a reader, and that commenced a relationship which has lasted to today, to my great



The Hon. Justice R V Gyles AO

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advantage professionally and personally. I appeared with him on many occasions, I appeared before him when he was a judge, I was against him in a number of memorable cases. In a remarkable irony, he has appeared before me sitting both as a single judge and as a member of the Full Court. I might say there have been mixed results in all capacities. We have been together in places as disparate as the Gove Peninsula in the Northern Territory and the fleshpots of Mayfair in the United Kingdom. He has been a good companion and a wise and loyal friend to me.

He took silk in the middle of my reading period. Callaway, at the time, was unkind enough to say that it was to avoid the responsibility of looking after me. Mind you, Callaway said the same thing when I disappeared to become Master in Equity for six months during the tenure of Francis Douglas as a reader with me.

It is interesting to recall the other silk appointed from the private bar that year. In order of seniority they were: EA Lusher – feared defendant’s counsel (McHugh J still trembles at his name), Royal Commissioner, Supreme Court judge; DG McGregor – president of this Association and Federal Court judge; KJ Holland – one of the great all-rounders of his day (who I must also say was good to me) and a Supreme Court judge; and last, but by no means least, GJ Samuels – another president of this Association, a Supreme Court judge and now Governor of this State. A strong group, particularly when it is recalled that others in Bob’s field such as AF Mason, LW Street and RW Fox took silk at much the same time.

Shortly after taking silk, Bob disappeared into the Rheem case. He then became solicitor-general from 1969. In that capacity, he appeared in many important cases, including the proceedings in the International Court in relation to French nuclear tests. He served as attorney-general of the Commonwealth between 1975 and 1977, and amongst many important activities was instrumental in having the Parliament pass the administrative law reforms and establish the Federal Court. I was reminded of the former only a few days ago, when reading a recent article by Sir Anthony Mason, who stressed that getting those reforms through depended in large measure upon the efforts of Ellicott as attorney-general.

As a judge, Bob participated in establishing the reputation and jurisprudence of what was then a small, but talented, Federal Court.

It is impossible to list the important cases, both at first instance and on appeal, in which he has led since his return to the Bar, together with the significant work in which he has participated as an arbitrator. He surely must be neck and neck with his chamber companion, TEF Hughes QC, in this respect.

I finish these remarks by referring to Ellicott the advocate. I do so advisedly. Although his knowledge of many areas of the law is without peer (I do not include the rules of evidence in that comment), his real skill is advocacy in the broad sense. He has a great instinct for the point of a case, and then sets about shaping it to his vision – in preparation, in court, in interlocutory proceedings and at the final hearing. He then sets about selling his vision. Whether against him or as a judge (and as his junior), you know to fasten your seat belt when Ellicott fixes his blue eyes on the judge and his tone of voice suggests both the Methodist lay preacher and the honest tiller of the soil.

I have noticed no waning in his capacity. The only change is that it is now even harder than it was to induce him to resume his seat if he thinks he is losing – whether a point or a case. As somebody tonight here has said to me, the most difficult thing to extract from Ellicott are the words: ‘I close my case’.

I also notice no diminution in his motivation. My conclusion is that in addition to his normal practice, he is determined to do all the good cases that he missed out on during his 14 years of public service.

*The following is an edited version of the speech delivered by Ellicott QC.*

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## The Hon. RJ Ellicott QC

Chief Justice, your Honours, colleagues, you have done me proud. May I thank all of you for coming tonight, I know that I am amongst friends, and that goes from the Chief Justice, the former chief justice, right through to the most junior person here. I feel at home. I want to thank you for doing this. I was somewhat shy of having it because I thought somebody like Roger might be the person who would speak. I suppose he hasn’t been as difficult as I thought he might have been. He has kept back a few secrets about the fleshpots of Soho and he hasn’t made up any stories about our trip to Darwin.

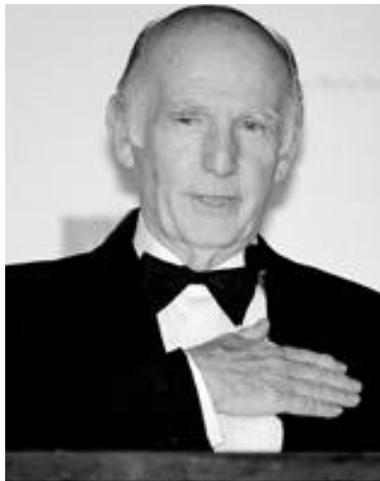
‘Although his knowledge of many areas of the law is without peer (I do not include the rules of evidence in that comment), his real skill is advocacy in the broad sense.’

### Denman Chambers

When thinking about tonight, I thought of the people who were in Denman Chambers, when I first went to the Bar. One particular person came to mind. Clive Teece KC was a grey headed man, who usually wore a light coloured suit with a red rose in his buttonhole, a monocle, and a pork-pie hat. I used to think what a very old, old man that is, as he walked along the street and went to deliver the course in legal ethics. I asked if Philip Selth could get some information about him, because I thought I might like to talk about him. I decided I won't, because when I looked up the biography, I discovered that when I first observed him he was the same age as I am now! Never mind - he went on to live until he was 88 and he was the first president of the New South Wales Bar Association and, I think, the first president of the Law Council of Australia.

I originally found a resting place in Denman Chambers, at a small table in Nigel Bowen's room. On the floor at that time was Ken Pawley, who shared chambers with Gough Whitlam and became a senior judge of the Family Court. Alongside him was Trevor Ziems who, as you probably know, was the barrister found guilty of manslaughter before Adrian Curlewis and went to gaol for 12 months. Trevor, whom I visited in gaol, felt that he had been badly done by, and I think he was. You will read a judgement by one of the great judges of the High Court, Sir Wilfred Fullagar and another by Sir Frank Kitto, which exonerated him. There was no doubt that Trevor came to the rescue of a woman in a hotel in Newcastle, was bashed by a seaman, and left with blood streaming from his face. He staggered out of the hotel - he had been drinking, got into a car, drove along the street and ran down somebody and killed him. However, when he came back from gaol he won the lottery and he survived. The most fortunate thing that happened was that Dorothy Slater didn't accept his proposal of marriage, because I can assure you Dotty, who is still alive (she is about 86 and lives at Potts Point), would have put him in his place! She was a match for any male clerk in Phillip Street, both in terms of language and in terms of her capacity to get you a brief.

Then there was Bill Perignon, who became a Judge of the Industrial Court, Nigel Bowen and, dare I mention his name, Freddie Myers. Freddie Myers did terrorise us somewhat at the junior Bar. All of us learned a lot. I think he made us better counsel in a way, but he did make us tremor. One day I was stupid enough to accept on the run a brief in front of Myers. It was about interpreting an order he had made. In the way that Gyles described, I said, 'Maybe Your Honour



meant this, or perhaps Your Honour meant that?' I tried to get some response from the Judge, but he suddenly said: 'I'm not here to be cross-examined by you.' Whereupon the great friendship was destroyed, because I said, 'We wouldn't be here at all, Your Honour, if Your Honour had made Your Honour's order clear in the first place'. That started a beautiful relationship, I can assure you, and it didn't end there.

The best person in handling Freddie Myers was Michael Helsham. 'Yes Your Honour; Of course Your Honour; 'Oh don't you worry about that Your Honour; Yes, I'll fix it up today Your Honour.' That was the Victorian style. Nigel and I first noticed it in a famous patent case, HPM Industries, which we couldn't possibly win. We were against Douglas Menzies and Keith Aitken. It was all about a hole in a plate that covers a switch and we were trying to show that it was patentable. Needless to say, we lost the case. But all the time it was 'Yes Your Honour; No, Your Honour; Of course, Your Honour'. That was where we learned the Victorian style!

Bob Smith, who wrote the book on the Stamp Duties Act, was in Denman Chambers and, of course, there was Alroy Cohen. Alroy was a wonderful man. Apart from my parents, I have only been left something in a will by one person, and that was Alroy Cohen, who left me £20. I tell those on my floor who borrow my full bottomed wig, that it was Elroy's wig, which he left me in his will.

One of the truly great people I have been associated with is Nigel Bowen. The person who is your master can be important in your life. I am grateful to Roger that he thinks I've been important in his life. My life would have been entirely different, if it had not been for Nigel Bowen. He was one of the great all-rounders, but he was also one of the great lawyers of the last [twentieth] century. He would have graced the High Court. He was a magnificent first chief justice of the Federal Court. Most of you have experienced him and you know that what I am saying is true. As a friend, as a man, he was a person of immense honesty. He was immensely trustworthy. He was a person who seemed unmoved, yet he was capable of great emotion. Nevertheless, he seemed always to be unruffled. He was a person who, if you were his friend, would stick by you. He was loyal. There is something about Nigel Bowen that was unique and, looking back, I think people will see him in a light of greater magnificence than perhaps we see him, even now.

We had lots of cases together. I think the strangest one we had was appearing for the madam of a house up in Brisbane. She had been assessed to £12,000 extra income from her brothel and our task was to appear in

Brisbane in front of the Taxation Board of Review and cross-examine each of the prostitutes. We had to ask them all sorts of personal details: about how many times and the like! If you can imagine Nigel and this Methodist local preacher asking these questions for four or five days before the Taxation Board of Review - well you might smile a rye smile.

I think our greatest treasure as barristers is the independence of the Bar and the sense of independence that it gives us. Apart from its role in the rule of law, it enables us to go away and do something else and come back. I don't know whether all of you appreciate that. But if you are a successful barrister, you can go away and do something else and come back. It's a remarkable gift that all of us have. All you have to do is to have the courage and the will to do it. That is one of the most important things that I have discovered in my life. It also enables you, I have found, to confront the demagogue and damn his treacherous flattery. That is part of the independence that we have. This is a remarkable profession. It must be the only profession that still has that sense of independence. It is not only important to the rule of law, it is important to us as people.

### Barwick

I decided to be a barrister at the age of eight. There is a story in our family of a boy who, with his seemingly interminable conversation, constantly interrupted a couple who were canoodling on a gas box on the verandah of a terrace in Paddo. He only gave up when the male got up and gave him what was then called 'a boy-proof watch'. The boy was named Garfield Barwick and the couple happened to be my parents.

I was born in Moree and the bush has meant a lot to me and I guess the bush is still in the boy. They were fairly pioneering days. The success of my cousin, the young barrister Barwick, was interminably repeated in the home. It was the challenge that suddenly caused me to say to myself 'that's what I'm going to be'.

I first went to the Privy Council in 1958. For all my days at the Bar, I didn't appear very much with Barwick. On this occasion, I thought I would stretch the cousinly relationship a bit. I had eight hundred pounds in order to pay our costs getting to the United Kingdom. Bill Cole, from Moree, was my instructing solicitor. He said, 'The client can only afford eight hundred pounds'. So I said to Garfield, 'Look, you

take three hundred and I'll take five hundred and then I can take Colleen'. He said, 'Oh, all right' and off we went to the Privy Council on five hundred pounds!

Barwick was the greatest advocate I saw. He was simple, straightforward, emotive where necessary and able to charm judges. In fact, some of the judges used to say, 'Don't give an ex-tempore judgement, because you need to get off the bench to see things in the clear light of day'. I think that is how Barwick was - immensely convincing. I saw him in all courts, right up to the Privy Council.

There were other great advocates. Douglas Menzies was one of them. He was better than Keith Aitken, I thought, and much closer to Barwick. Lord Roskill, whom I had a lot to do with in the Bass Strait arbitration, said that in more recent years Murray Gleeson and Tom Hughes were two of the best counsel he had ever seen. That, I thought, was a magnificent tribute to the Australian Bar, apart from being a tribute to those two people. We have a lot to be proud of in our Bar.



McHugh J and Hughes QC

### Passage to politics

During the War, as a teenager, I was constantly listening to the radio and hearing people like Churchill and Curtin. They were strong, emotional orators and delivered well-presented speeches. They moved me a great deal, and for some reason I made up my mind - some day I was going to be a politician.

I started my political career at university. For all those who belonged to the Liberal Party, please close your ears! I agreed to be the treasurer of the University Labor Club! It only lasted about three months, because I was a member of the Student Christian Movement, and when I went to conferences at the Labor Club I felt there was a great divide between their rationalisation of philosophy and my view of the Christian faith. I realised that probably I didn't fit, and probably they did too. So shortly after that I ceased to be the treasurer of the Labor Club. But never mind. That has happened to others. May I say that it stamped me in a way where I would be in politics. I was never on the 'right wing' of anything. I was on the 'left wing' of the Liberal Party, if there is such a thing. I tried to be a true liberal, if I could.

### The nuclear test case

During the Nuclear Test Case, in which I appeared, a lot of things happened. The preparation of it started late in 1972, when the Labor Government came to

power. There was a book published by Professor Sternglass, which suggested that by the year 1988 thousands of children would be killed by atmospheric nuclear testing, if it went on. There was, on the other hand, a United Nations Committee that put out a report, which said there will be 'four or five who will be killed by 1988'. In preparing the case, I decided to go for the lower number, because I thought the World Court would be more likely to listen. If we relied on the higher numbers suggested by Sternglass, and we tried to scare them, they wouldn't listen.

During the early period of Lionel Murphy's ministry, he brought to Canberra Professor Harry Messel to be on his staff as his nuclear adviser. He also brought in Leslie from our Bar and Colin Howard to advise him on constitutional law. That created somewhat of a divide between the solicitor-general and the attorney-general! I didn't quite see what my role was. Very quickly, Professor Harry became his de facto secretary and, so far as I could observe, had little time to advise on nuclear testing.

In order to take France to the World Court we had to generate a dispute with them about the testing. In April 1973, Lionel Murphy and I went to Paris to do just that. On Good Friday 1973, Murphy was talking to the French foreign minister and having the final discussions that generated the dispute. At that stage, while I was standing outside the room, Harry Messel came up to me and said, 'Lionel says that Stevens has to go'. Stevens was our man on the United Nations committee, which said four people were going to be killed by 1998. We had quite a loud discussion, in the course of which I said: 'If Stevens goes, I go! Harry, today is Good Friday and you are trying to crucify another man'.

After that loud discussion ended, we went back to our embassy and Murphy called me in. He said to me, 'If you want to resign as solicitor-general, you resign in front of me'.

I replied, 'Well Murph I'm not resigning, so don't have any wishful thinking. I was just indicating I would hand over the brief'.

When Murphy and I left Paris, there was clearly a dispute with France. I retained the brief and the case was heard in May 1973, at The Hague. That's when he took off his wig and the rest of us kept ours on. I said to him, 'Murph, I'm not going to take mine off. If you want to take your wig off, you take it off in front of the

High Court, do it there, but don't do it here and embarrass this court, which expects you to wear your traditional dress.' When the case ended the counsel sat down, like you may do now after appearing in the High Court, and asked, 'how have we gone?' You may reply, 'we won five to two' or 'three to four', or 'I think that fellow McHugh, he might go either way, we can't say.' Well, we did that with the World Court and we decided that we ought to succeed by nine to six. I was fairly close to Whitlam in those days and he called me round to the Lodge after I returned and said, 'How did you go?' I said, 'We think we will win by nine to six'.

Shortly after, Gough went down to Melbourne to the Victorian Law Society. Somebody asked 'How's the case going?' He said 'I think we are going to win by nine to six.' Unfortunately, it got out into the press and, of course, at that point all hell broke loose. An inquiry was undertaken in the Court. The French judge said that Barwick, the ad hoc judge, had leaked it. When the decision came out, we did in fact win by eight to seven. It was slightly different, but we had won.

Can I just take you forward to April 2000? It was our 50th wedding anniversary party. An old friend, who is a builder, was there and he had been to Eucumbene with me in 1974, where we had a cottage. I don't know how it happened, but apparently, at that time a telegram I had received, but not opened, had fallen on the ground and he had picked it up but he had never given it to me. He gave it to me in April 2000 and this is what it said:

Mr R.J. Ellicott, Redhill ACT. I express my personal appreciation to you and to all who participated in the preparation and presentation of this great case to the International Court of Justice. I am especially grateful to you for your advice and assistance to me. The result of the case completely justifies the initiative taken by the Australian Government and is a fitting reward to your efforts.

Thank you.

Senator Lionel Murphy, QC, Attorney General of Australia.

That is a piece of paper of which I can be proud, but it is also a happy ending to a part of a relationship which I can assure you was, from time to time, not very happy.

At one stage we were walking across the lawn outside Parliament House in Canberra. He said, 'Come and see me in my office'. We were coming from a meeting with Whitlam. At that meeting there was a decision made that I should go to London,

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did, then he became  
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of a person and a capacity  
that was immense. I regret  
that it has had that effect.'*

because the State premiers were going there to try and lobby against the Government getting a Bill through the British Parliament to stop appeals to the Privy Council. A decision was made that I should go back. I had been in England for three months and I didn't want to go back, but that was the decision.

Murphy called me in and said: 'Next time you want to offer to go overseas, you speak to me first. Anyhow, they tell me you have been leaking things to the Liberal Party.' Now, I of course denied that, because it wasn't true. That was the lowest point in our relationship, and it was at that moment that I decided it was time that I ceased to be solicitor-general. I stayed for the purposes of doing the memorial for the case and after that I went off into politics.

### The Dismissal

Can I talk a little bit about law and politics? It's a funny game. I won't say much about 1975. I will only say this: I was in the thick of it and I have to bear the burden or the joy, or however you look at it, of my involvement. I don't have any regrets, I may say. I did what I did, Fraser did what he did and Whitlam did what he did. It was essentially a battle between two political forces and Kerr was caught in the middle. You can read about it, you can discuss it. All I ask you to do is put yourself in Kerr's place, and ask yourself what you would have done.

People had to make judgements about others. I had to make a judgement about Gough Whitlam, somebody I had had a close relationship with. In 1964 Whitlam said to me, when we were talking about Labor politics, 'You don't want to go into politics - concentrate on the High Court'. We discussed these things. In 1975 I was observing somebody I had known for a long time. I had to make a judgement about how he was acting, and if I made a bad judgment I made it. If Fraser misjudged whether they were exemplary circumstances, he misjudged it. If Whitlam misjudged the power of the Senate, he misjudged it. If Whitlam became messianic, as I believe he did, then he became messianic. If the events of his dismissal have affected the rest of his life in a way that I think is somewhat tragic, then it has robbed us of a person and a capacity that was immense. I regret that it has had that effect. I regret it, but don't blame John Kerr, that is all I say.

John Kerr is entitled to be judged by his own

achievements. You can read his book, and what he says he did. He was the president of this Bar Council, he was responsible for LawAsia, he was the one who was behind the Administrative Law Reforms. He was the Kerr Committee in effect. I was on it, Tony Mason was on it, Harry Whitmore was on it too. At the end of the day judge him on the whole score, and please try and put yourself where he was because I don't believe that justice has been done to him. He was a barrister, he was a lawyer and he was a judge as well and may be I have to say, he was also a friend.



Walker S.C., Gyles J, Barker QC

### Lawyers in politics

You have to take your moment in politics if you are a lawyer. One day a colleague said, 'Oh we have to do something about Jim Staples, he is being a nuisance, John Moore can't get on with him, he is refusing to do this and he is doing that'. I thought, Jim Staples is a great champion of human rights, and on my agenda I had a proposal for a human rights commission. So I said, 'Malcolm why

don't we send Jim on a trip for a couple of years to study human rights, and we'll set up a Human Rights Commission?' They grabbed it and sent Jim off to study human rights. You will find that there was introduced into Parliament in May 1977 a Human Rights Commission Bill, which is basically equivalent to the one that is now in force. You have to take your moment in politics.

When we were discussing the 1977 referendum, to make sure that you couldn't appoint senators the way that Field had been appointed, Anthony and Fraser said to me, 'I wonder if there is anything else'. It was another moment, because in the Judiciary Act Committee, and at a recent constitutional convention, we had recommended that judges should be appointed to the age of 70. That is how that provision became part of that referendum, and that is why judges are now only appointed in the Commonwealth area to the age of 70. You have to take your moment. If you are a lawyer in politics, that's sometimes how things will happen, because politicians aren't thinking about law reform. That is often the last thing that they think about.

The most enjoyable thing I did in politics was setting up the Institute of Sport. I discovered what I should do when I went on a ministerial visit to China. I

thought I was pretty good at table tennis and they took me out to an institute where they trained teachers. I found they were in residence, learning skills in sport and also being trained as physical education teachers. I said to the old man in charge, who was then about 73, 'I'll give you a game of table tennis'. Needless to say, he beat me 21:2. This gave me the idea of the Institute of Sport. I was minister to the Australian Capital Territory and I was minister for sport, so I could actually make it happen on a rather modest budget by setting it up in Canberra. I could put empty residences to work at the Canberra College and the Australian National University, by putting the athletes in there. We could build another stadium - an indoor stadium. We were able to put it together because I had the two ministries. I could take the land because I was the one who 'owned' the land. All the land was vested in the minister. That is how the Institute of Sport got going.

When they were building the new Parliament House, I became responsible for getting that through the Government. Before the 1980 election, a union boss in Canberra threatened to go on strike, I said to him: 'For heaven's sake, what are you doing? Get the top off Capital Hill first and then go on strike'. I knew that once that happened, the new and permanent Parliament House would be built, because no politician would leave the top of Capital Hill shaven off. That is exactly what happened.

Politics is malleable. Not in a way that is wrong or dishonest, but it is a very, very interesting area of life and it opens up creativity!

### The Sankey Case

Thank you very much for the night, I will treasure it very much. I thank my wife, for 50 years of being my wife, but also for being a barrister's wife. Not easy, I think. We are working all day and all night and all weekends. It is a reason for having a break now and again - a big break. It is not good for family life and if you can knock up 50 years you are doing pretty good and I am very grateful to my wife for those 50 years. Plus, I am looking forward to a lot more. Thank you very much, thank you Madam President, and thanks to the Bar Association. Thank you for standing by me in 1977, when I resigned in relation to the taking over of the Sankey case. That wasn't easy. Yet, it wasn't quite as you put it.

It happened a different way. It happened because the prime minister was trying to get my officers, Frank

Mahoney, the deputy secretary and the secretary of my department, Clarrie Harders, to give an opinion against me. Maurice Byers had already given an opinion against me. Fraser had gone to him behind my back and found out what his advice was going to be and then said to me: 'Why don't you consult the solicitor-general?' I said: 'I didn't consult the solicitor-general for this reason - he was a witness to the events of 13 December 1974' and I told him that when I became attorney-general I wouldn't embarrass him by involving him. Needless to say it didn't impress me that this had happened. I then went overseas having said to Fraser, 'Well, we'll forget it and just let the case go on'.

When I came back I was greeted by Clarrie Harders at the airport and he said 'Fraser has been trying to get me and Frank Mahoney to give an opinion against you'. At that moment I started to realise that I couldn't stay as attorney-general because the prime minister was trying to undermine me. Those aspects of my resignation are not widely known, but that is why I resigned. I couldn't allow a prime minister to do that sort of thing.

One thing I did not learn until recently was that during September 1977, the attorney-general who succeeded me sought the advice of Professor Edwards, who was a leading authority in the common law world on the role of attorneys-general. Apparently his advice basically supported my stance, namely that I should not step in and terminate Sankey proceedings without having access to all the

evidence. That advice was given about three or four weeks after I had resigned. I was never told that. I found that out when reading Clarrie Harders personal memoirs a few months ago. But that is why I resigned. And that's why I was grateful at the time that the Bar stood behind me. I still believe that the attorney-general's role is the most significant in government. I see it being frittered away. And as it is frittered away, so the independence of the law and the rule of law are frittered away. That is something we can't afford. Thanks for standing by me then. I appreciate tonight very much.

*'I still believe that the attorney-general's role is the most significant in government. I see it being frittered away. And as it is frittered away, so the independence of the law and the rule of law are frittered away. That is something we can't afford.'*

# 20 years at the Land & Environment Court

Ceremonial sitting to celebrate the 20th anniversary of the Land and Environment Court, – Friday, 1 September 2000

*Address by Bob Debus MP, Attorney General, Minister for the Environment, Minister for Emergency Services, Minister for Corrective Services and Minister Assisting the Premier on the Arts, 1 September 2000*

It was twenty years ago today that the Land and Environment Court came into existence by virtue of the *Land and Environment Court Act 1979*. The creation of the Court was part of a number of major reforms introduced by the Wran Labor government in 1979 and 1980. These reforms completely changed the face of environmental planning decision making in NSW. Prior to the reforms it is generally agreed that there was an inadequate planning framework. The previous system had failed to demarcate the respective responsibilities of State and local governments; it had failed to provide a uniform and rationalised code for development control; it had failed to integrate land use planning with environmental assessment and protection; and it had failed to give members of the public any meaningful opportunity to participate in planning decision-making.

At the time of the reforms, the Government's key objects for the new system were to satisfy the current and future needs of the State in respect of planned development and economic growth, whilst enhancing the social environment. This balance was to be achieved by the proper management, development and conservation of the State's natural and human-made resources.

The new system shared responsibility for



The Hon. Bob Debus MP

environmental planning between the State and local governments and greatly increased the opportunity for community involvement.

The centrepiece of this new regime is, of course, the Land and Environment Court, a specialised superior court of record with comprehensive jurisdiction in matters affecting the value and development of land and the enforcement of planning and related laws.

The superior status granted to the Court reflected the community's growing awareness of the importance of planning and the environment.

At the time of its creation, the Land and

Environment Court was unique in Australia. The idea of bringing together in one body the best attributes of a traditional court and of a lay tribunal, functioning with the benefits of procedural reform and as few legal technicalities as possible, was a novel one in 1980.

The Land and Environment Court took on this pioneering role with great skill, making the Court a model for environmental protection both interstate and internationally.

Planning and development decisions are often hotly contested in the community, which can make the Court's position a very difficult one. Yet, since its inception, the Court has consistently managed to assess matters objectively and independently, deciding each case according to the law and evidence presented.

Any organisation that plays such an important role within the community will often be criticised.

In the case of the Land and Environment Court, many of these criticisms are ill-informed and misconceived. However, as it is unlikely that any system will ever be perfect, some fine tuning will always be necessary.

In this regard, I note that the Chief Judge has made a number of positive reforms in recent times, including procedures for consultation with court users and major stakeholders, the adoption of time standards and the promotion of alternative dispute resolution.

In addition to the internal reforms, the previous attorney general set up an independent Working

- finally the Working Party will consider whether greater reliance can be placed on alternative dispute resolution mechanisms in resolving disputes.

During the course of the review the Working Party will be assisted by a reference group made up of a number of experts in environmental and planning law. These experts are drawn from a cross section of organisations with an interest in the Court. These include organisations such as the Property Council of NSW, the Environmental Defender's Office, the Environment and Planning Law Association, Royal Australian Planning Institute, Total Environment Centre, the Urban Development



Back row, left to right: Judges Sheahan, Talbot, Bignold, Lloyd, Cowdroy. Middle row: The Chief Justice of NSW, The Hon. JJ Spigelman AC, The Hon. Pearlman AM, Chief Judge of the Land & Environment Court, Jerold Cripps. Front row: Commissioners Nott, Watts, Bly, and Roseth.

Party to look at how the Land and Environment Court reviews decisions in relation to development applications. The Working Party is chaired by Mr Jerrold Cripps, a former chief judge of the Land and Environment Court, and includes representative from the Department of Local Government, the Department of Urban Affairs and Planning, the Local Government and Shires Association, the Attorney General's Department and the Land and Environment Court.

The terms of reference for the Working Party include:

- consideration of the manner in which decisions of local councils in relation to development applications should be reviewed;
- the constitution of the Land and Environment Court, and the matters to which it should have regard in reviewing decisions;
- ways in which to streamline the processing of development applications, and ways in which to reduce the number of appeals to the Court; and

Institute and Justice Paul Stein of the Supreme Court.

There has been an overwhelming public response to the Working Party's call for submissions, with more than 200 submissions received to date.

This demonstrates the importance that the community places on environmental and planning law and the continuing importance and relevance of the Court today. I look forward to receiving the report of the Working Party in due course.

In conclusion, I am optimistic that these ongoing reforms will continue to ensure that NSW remains at the forefront of environmental and planning law reform and that the Land and Environment Court will continue to be as effective and important in twenty years time as it is today.

## Ruth McColl S.C.

*President of the New South Wales Bar Association*

It is my privilege to speak today on behalf of the barristers of New South Wales in offering our congratulations to this Court on attaining its 20th anniversary.

The conception of the Land and Environment Court is well known. It was the product of a review by the then Labor Government in the 1970s of existing legislation relating to town and country planning and environment assessment.

That review had revealed a number of deficiencies, all of which caused unnecessary delays and costs in the development process.

In the words of the minister for planning and environment, Mr. Paul Landa: ‘the proposed new court is a somewhat innovative experiment in dispute resolution mechanisms. It attempts to combine judicial and administrative dispute-resolving techniques and it will utilise non-legal experts as technical and conciliation assessors.’

This point was developed by Mr Justice Cripps, as he then was, in a paper delivered in 1982 when he pointed out that:

It is the intention of the legislature that the Court combine the characteristics of the superior Courts and the expert administrative tribunals in a manner designed to permit the discharge of its business by judges and assessors. The new Court exercises a more comprehensive jurisdiction in relation to planning and environmental matters than has hitherto been vested in any one appellate body.

### Public Participation

One of the most significant aspects of the new scheme was the emphasis it gave to public participation in the development of environmental plans and enforcement of the legislation.

The new legislation was intended to confer equal opportunity on all members of the community to participate in decision-making concerning the contents of environmental studies, the aims and objectives and contents of

draft planning instruments and many other matters.

As Justice Stein, formerly of this Court has said, the public involvement in the Court’s work reflected the increasing recognition in the 1970s that the content of Environmental Law, while it may involve many private disputes, in its substance and content is indubitably that of Public Law. The decisions of this Court have implications, not only for the immediate parties, but also for the broader community and the environment itself.

In recognition of this fact, a significant part of the new scheme enabled objectors to applications for designated development to appeal to the new Court against the grant of development consent. Furthermore, any member of the public was given legal standing to bring proceedings in the Court to enforce compliance with the new planning laws and to remedy any breaches of those laws.

Significantly, s123 of the *Environmental Planning and Assessment Act* (1979) (NSW) gave ‘any person the right to bring proceedings in this Court for an order to remedy or restrain a breach of the Act, whether or not any right of that person had been infringed by or as a consequence of that breach.’ This provision, as chief justice Street was later to emphasise (*Hannan v. Elcom*), recognised that the task of the court was to administer social justice in a manner that travelled beyond administering justice *inter partes*.

From the outset, the Court made it clear that it would not read down the broad standing provisions nor, would it set up barriers which would limit the intention of public participation in the process. Early in the piece, arguments that the ‘any person’ provision still required the applicant to prove a ‘relevant interest’ in the subject matter of the proceedings were sternly rejected.

These provisions have been a notable success. Contrary to the doomsayers who foresaw that such provisions would open the floodgates of litigation, the number of cases brought on the basis of such provisions has not been sufficient



McColl S.C., President of the New South Wales Bar Association

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as one former judge of this Court has observed, to ‘wet a pair of wellies’

The success of the operation of such provisions in this Court has led to the adoption of similar open standing provisions in Queensland, Victoria, South Australia and Tasmania.

The intention of public involvement has been enhanced by decisions such as *Oshlack* in which the High Court upheld a decision of Justice Stein that a party legitimately claiming to represent the public interest may not be ordered to pay the costs of the successful party.

### **Involvement of the Bar Association**

The Bar Association can proudly claim a role in the new Court. It established a small committee to prepare submissions to be made to the then minister for planning and environment, Mr. Paul Landa, concerning the terms of the proposed package of legislation. The committee included the then Mr Murray Wilcox QC who, at that stage, had been active in environmental and planning cases for some years. The Bar Association’s submission clearly made a substantial impact as is evident from Hansard of the day when the bills were read for the second time in the Upper House.

As a result of the Bar Association’s submission, provisions which would have meant that appeals would be way of stated case, were amended to ensure that they were by way of normal appeal on questions of law. Secondly, the Bar Association’s submission that appeals against demolition orders under s317B of the then *Local Government Act* [1919] which were then vested in the District Court, should be vested in the new Land and Environment Court, was also adopted.

The Bar was also concerned that the Bills did not provide for mandatory public participation for State planning policies in contrast to the extensive requirements for public participation in the preparation of regional and local plans. Amendments were made to ensure such consultation.

The Bar Association also criticised the proposal that the Land and Environment Court was be separate from the Supreme Court of New South Wales. We were concerned that true rationalisation demanded that the various functions which had previously been exercised by a variety of courts and tribunals should be vested in the Supreme Court. One of the reasons for that submission was an opinion expressed by the then chief justice, Sir Laurence Street concerning the increased costs of an entirely new court structure and the danger that the ‘fragmentation inherent in [specialist tribunals] weakened the

whole fabric of what ought to be regarded as an integrated and all embracing system of regular courts’. We were also concerned about the risks attendant on a court of limited jurisdiction not being able to provide all relief arising from the same factual matrix.

This last criticism proved to have force. In *National Parks and Wildlife Service and Another v Stables Perisher Pty. Ltd* (1990) 20 NSWLR 573 the Court of Appeal made it clear that this Court had no pendant or accrued jurisdiction of a like nature of that enjoyed by the Federal Court.

The Act was amended in 1993 by the addition of s16 (1A), which purports to grant that pendant jurisdiction. Whether or not it has truly had that effect is something which is yet to be worked out.

This year a Working Party has been convened to review the State’s planning laws and the role of this Court in development applications. As the present Attorney General’s predecessor, the Hon. Jeff Shaw QC MLC made clear he believed ‘the Land and Environment Court objectively and independently decides matters before it according to law and the evidence. Some criticisms of the Court have been ill-informed and misconceived. However some reform may be appropriate.’

It would hardly be surprising if an innovative and youthful court such as this was not the subject of criticism however founded, particularly having regard to the way its jurisdiction touches so closely upon public matters as I have already indicated. The Bar has already made a submission to the Working Party, once again prepared by a small committee of dedicated Land and Environment practitioners.

We are confident any review will only lead to a strengthened jurisdiction which will continue to serve the people of NSW in the sterling manner it has done so for the last 20 years.

We wish the Court many happy returns.

# Opening of Maurice Byers Chambers

*An address by The Hon. Sir Anthony Mason AC KBE, 4 August 2000 on the opening of new chambers at Level 60 MLC Centre.*

Only two months ago I attended the opening of a set of chambers in Hong Kong. There, as in mainland China, great deference is extended to the feng shui man. A feng shui man is invariably consulted in China as to the siting of a building and its internal arrangements, particularly the location of windows, with a view to fending off unfavourable vibes and spirits. In the case of the Hong Kong chambers, the feng shui man had advised that the architect's location of a window be altered or at least blocked out. He predicted that, if it were not altered, counsels' fees would be spirited through the window into the hands of competitors below.

Whether he was referring to another set of chambers below, or to the solicitors who are claiming equal rights of advocacy in Hong Kong with members of the Bar, was not clear. Such was the authority and influence of the feng shui man that his advice was taken.

It would be too much to expect that those who have set up these chambers to have consulted the local equivalent of a *feng shui* man. But they have done the next best thing by naming the chambers after Sir Maurice Byers. The magic of his name should ward off evil spirits and other satanic emanations like solicitors-general for the State of Victoria, for whom Sir Maurice had a healthy and undisguised contempt.

It is very appropriate that a set of chambers be named after a distinguished member of the Bar, rather than a judge and it is all the more appropriate when that member of the Bar commanded the deep affection and great respect which was always accorded to Maurice Byers.



The Hon. Sir Anthony Mason AC KBE

Maurice's qualities were legion. On this occasion, I shall endeavour to capture some of them in the hope that those who inhabit these chambers in the years to come will exhibit similar qualities.

Maurice began his career as a smart point-taker, briefed by astute but not leading solicitors, on behalf of clients who, if not shady, did not always appear to advantage in full sunlight. In those days, he was given, indeed compelled, to argue technical, sometimes specious points, but he managed to do so in a manner that conveyed that he was engaged in a virtuous enterprise that attracted the goodwill, rather than the asperity, of the judge.

Whenever I argued such a point, I excited a tidal wave of judicial scorn.

Maurice ended his career as a Queen's Counsel who appeared for government and large corporations. He was then, more often than not, called upon to present constructive rather than destructive arguments. Constructive argument is a greater test of ability than destructive argument. Some of Australia's outstanding counsel were noted for their destructive ability. They were not quite so impressive when it came to constructive ability.

That was not so of Maurice. He was a counsel for all seasons, able to handle a wide range of cases and a miscellany of judges of varying dispositions and competence. And, like Sir Garfield Barwick, he never forgot those who supported him in his early days.

Maurice was at all times generous in the advice and assistance that he gave to other members of the Bar. One of the Bar's finest traditions is that each and every

member is ready to assist others, to pass on the fruits of his or her experience to others. Maurice was an exemplar of this tradition. More than once I was a beneficiary of his generosity in this respect. In the first case in which I appeared in the High Court as solicitor-general after my appointment, he appeared with me. In fact he had been briefed to lead me. The reversal of roles made no difference whatsoever to him except that he gave me invaluable support and advice for which I always remained indebted to him.

He had an abiding sense of justice. He was of course a great servant and respecter of the law. But he believed that the law was moving in the wrong direction if it failed to take account of the justice of the case. His sharp criticism of the High Court's decision in *Kruger's Case*, the case concerning the stolen children, which he described as 'an extraordinary, indeed a shocking decision', conveys some sense of the purpose of law as he saw it and how it is to be applied. If you have not read what he wrote, you should do so. It was published in volume 8 of the *Public Law Review* at page 224.

Maurice epitomised the conversational style of advocacy. He invited the court to engage in a dialogue about the issues in the case. This style has its advantages and disadvantages. It does not make for eloquence and Maurice's arguments were intricate rather than clear. There is some truth in what Justice McHugh once said of him, namely that his great strength as an advocate was that you never quite knew what his argument was. So if you were his opponent, it was difficult to devise an effective reply.

Maurice was not without artifice. He knew that all judges are vain, some more so than others, and that sometimes it is good advocacy to let the judge think that he has discovered the answer himself. At other times, Maurice would appreciate that clarification of argument might spell the end of his client's case. Not that he would resort to obfuscation but a measure of complexity would not go amiss and it would give the judge something to work out. After all, that is what the judge was paid to do.

I do not suggest that Maurice failed in his duty to the court but he strongly believed in his duty to the client. There is a tension between the two and they cannot be reconciled quite as easily or as glibly as the House of Lords sought to do in their recent decision on the advocate's immunity from negligence.

Maurice was extremely literate and a lovable and lively companion, all being qualities we like to see in a barrister. So with his spirit hovering over the inmates of these chambers, I am sure that the members will enjoy themselves. Hopefully they will also enjoy

success and prosperity.

I conclude with two stories about the Law Lords. There is a strange convention that Law Lords include in their title the name of a place with which they are closely associated. So if I were raised to the peerage I might call myself Lord Mason of Mosman, just as in the 1970s Lord Justice Salmon, when elevated to the peerage, chose to call himself Lord Salmon of Sandwich. The alternative is to omit the place name. In that event I would call myself *The* Lord Mason. When Lord Justice Jenkins was elevated to the peerage in the 1960s, he elected to call himself Lord Jenkins of No. 9 Elmsley Gardens or similar address), that being an undistinguished apartment in an obscure suburb of London where he lived. He was prevailed upon to abandon this egalitarian enterprise.

When I first sat with Sir Robin Cooke, the President of the New Zealand Court of Appeal, in the Supreme Court of Fiji, he signed the Court judgments as Robin Cooke. After his elevation to the House of Lords, his signature took the form of 'Cooke of Thorndon', 'Thorndon', being a small suburb in Wellington, New Zealand. When I asked Sir Gerard Brennan whether I should sign a judgment as 'Mason of Mosman', Sir Gerard advised against that course. 'People will think you are a small suburban store or a second hand car dealer' he said.

In passing, I should mention that many years ago when the High Court were sitting in Perth the management of the Sheraton Hotel, labouring under the mistaken belief that I was Lord Mason, put my wife and myself into a luxurious suite and treated us in regal style. Unfortunately Lionel Murphy, who was on the Court at the time, informed the hotel that I was masquerading as a peer with the result that we were relegated to

being commoners - but we still retained the suite.

Viscount Dunedin was a Scottish judge who became a member of the House of Lords and the Privy Council in the first quarter of this century. According to legend, he is chiefly remembered for not only sleeping but also snoring during the course of argument. As one Lord Chancellor is reputed to have said, it was thought discourteous to awaken him. That extreme course was resorted to only when his snoring became so loud that it awakened other Law Lords from their slumber.

I shall conclude lest by speaking instead of snoring I send you into a slumber. I now declare these chambers open.



Sir Anthony Mason  
and Lady Patricia Byers

'he believed that  
the law was moving  
in the wrong direction  
if it failed to take  
account of the  
justice of the case'

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## APPOINTMENTS

### Richard Conti QC

On 15 August Richard Conti QC was appointed as a judge of the Federal Court. He was admitted as a solicitor in 1960 and became a partner in the firm of Arthur Pritchard & Co. until 1967. He was admitted to the Bar in July 1967 and joined the eleventh floor of Wentworth Chambers, where he remained until his appointment to the Bench. He took silk in November 1977.

Since the outset of his practice, he took on an enormous workload, which spanned a broad spectrum including tax, trade practices, all matters commercial, intellectual property, corporations law, administrative. His diverse practice took him to the Privy Council and all courts in Australia.

He was seen by many as the archetypal barrister, with a profound knowledge of the law, great cross-examining skills, an acute sense of tactics, absolute integrity and unfailing courtesy. He was respected for the great support given to the junior Bar. He mentored a large number of barristers, taking them on board soon after they came to the Bar, encouraging, supporting and promoting their careers. He sought to impart to them an approach to the law from first principles, by advising them in one of many 'Contiisms': 'Don't try to learn all the law. Just know where to look for it.' He also tried to instill in them a fundamental credo which has stood him in such good stead in remaining on favourable terms with his opponents: 'Barristers are briefed to fight their client's cause, not to fight each other.'

He was one of the Bar Association appointments to the Legal Profession Disciplinary Tribunal and sat on the Board of Counsels Chambers from 1997 until the day before his appointment.

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### Stephen Norrish QC

On 3 October 2000, Stephen Norrish QC was appointed as a judge of the New South Wales District Court. He was admitted as a solicitor in 1974 and worked for two Aboriginal legal services, until coming to the Bar in 1980 as a public defender. He was deputy senior public defender in 1987, when he took silk. In 1988 he became senior counsel assisting the Royal Commission into Aboriginal Deaths in Custody and also conducted a report for the International Commission of Jurists in 1990 on the impact of the criminal justice system upon Aborigines in north-west New South Wales.

He returned to the Bar in 1990 and rapidly became a leading criminal silk, although he only appeared for the defence.

His contribution to the work of the New South Wales Bar Association included being a member of the Bar's Aboriginal Education Committee in 1992, the Criminal Law Sub-Committees in 1993 and chairing the Bar's Legal Aid Committee in 1998, together with long service on a Professional Conduct Committee.

### Roderick Howie QC

On 11 October 2000, Roderick Howie QC was appointed as a judge of the Supreme Court of New South Wales. His Honour was admitted as a solicitor in 1974 and went to Hickson, Lakeman & Holcombe. Between 1976 and 1980 he worked in the Public Solicitors Office, before coming to the Bar as a Public Defender in June 1980. In November 1986 he took silk.

Between 1984 and 1987 he was Director of the Criminal Law Review Division, in the NSW Attorney General's Department. During 1987 to 1992 he occupied the post of Deputy Director of Public Prosecutions and in May 1993 he became Crown Advocate, serving in that capacity until 1995. It was during this time that he began his long and dedicated involvement in the drafting of the Model Criminal Code as Chairman of the Model Criminal Code Officers Committee (MCCOC). His Chairmanship has witnessed the completion of the bulk of the Code, which has received widespread recognition in the US, Canada and the United Kingdom.

On 15 May 1996 Howie QC was appointed as a District Court Judge and served as an Acting Judge of the Supreme Court of New South Wales from September to December of 1997.

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### Michael Finnane QC

On 20 October 2000 Michael Finnane QC was appointed as a judge of the New South Wales District Court. His Honour was admitted to the Bar in February 1969 and took silk in October 1982.

His Honour had a diverse practice. As a silk, he was counsel assisting in many important inquiries such as the Ananda Marga and Kalazich inquiries. He was counsel for the Police Service in the Royal Commission into the NSW Police Service, and he was senior counsel for the Department of Transport in the Special Commission of Inquiry into the Glenbrook rail accident.

He gave his time to many worthy causes. He was involved in the advancement of the Aboriginal community. He provided much assistance to the Bar Association Readers Course and to advocacy training programs in and outside Australia. He was an experienced Army legal officer, retiring with the rank of colonel in 1998 and at that time also holding the appointment of a judge advocate and Defence Force magistrate.

He was an acting judge of the District Court on two occasions, of the Supreme Court on one occasion, and was a member of the Legal Services Division of the Administrative Decisions Tribunal.

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## APPOINTMENTS

### 2000 senior counsel appointments



Back row, left to right: Michael Bozic, Robert Goot, Geoffrey Petty, Graeme Little, Justin Gleeson, Peter Berman, Stephen Odgers, Stephen Rushton, Harry Dixon, Jonathan Simpkins, David Hammerschlag. Front row, left to right: Stuart Donaldson, Peter Zahra, John Dailly, Francesco Corsaro, Stephen Epstein, Robin Margo. Absent: Stephen Gageler and Roderick Cordara

On 26 October the President of the New South Wales Bar Association, Ruth McColl S.C., announced the appointment of 19 senior counsel.

The successful applicants for 2000, in order of seniority, are: Geoffrey Petty, John Dailly, Michael Bozic, Robert Goot AM, Stephen Epstein, Graeme

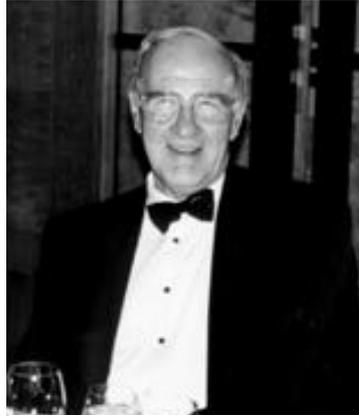
Little, Jonathan Simpkins, Robin Margo, Francesco Corsaro, Stephen Rushton, Stuart Donaldson, Peter Berman, Peter Zahra, Stephen Odgers, Justin Gleeson, Stephen Gageler, David Hammerschlag, Harry Dixon, Roderick Cordara.

Peter Michael Seery 6 February 1933 – 22 October 2000 *By His Honour Judge Peter Dent QC*

Peter Michael Seery was admitted to the New South Wales Bar on 1 July 1967, in fulfilment of a burning ambition to be a barrister. He carried to its ranks great personal qualifications of honesty, integrity and deep compassion for his fellow man.

He was tutored by Ernie Knoblanche QC and by him trained to be a barrister's barrister. He eschewed the fast turnover approach of many of his contemporaries and insisted upon mastering his client's case at the first opportunity and pursuing that case wisely and vigorously, to secure for every client the best result that could be achieved in the circumstances.

Seery avoided specialisation because of his personal belief that counsel should be able to acquit themselves competently in every jurisdiction and with that talent he was of enormous assistance, in particular, to country solicitors and clients on the circuits where he appeared. Once Seery accepted a brief it was rapidly put in order and thereafter it stayed in order until finally disposed of.



Peter Seery

Peter suffered more than his fair share of life's adversities and bore them manfully. When others brought their problems to him, and many did, he counselled them with wisdom and kindness.

Irish-Australian to the core, he was gifted with a splendid sense of humour and a laugh that could be heard blocks away.

He served with distinction as an acting judge of the District Court of New South Wales and as an arbitrator. He retired from active practice in 2000, to be sadly taken

from this life too swiftly thereafter, to the great sorrow of his widow Moira and their children, who's comfort and welfare had been Peter's first priority throughout his life.

Should I in future encounter a child frightened by the sounds of thunder, I will explain that 'It's nothing to worry about, it's only Peter Seery laughing in heaven'. His colleagues in Wentworth, University and Henry Parkes Chambers will understand that well.

FEATURES

# The Barristers' Benevolent Association

*By a member of Bar Council*

Every year there are barristers who encounter personal misfortune or require some form of assistance in order to overcome a problem. At least once a year a barrister or a member of their family suffers a catastrophe.

Sudden deaths, serious illness, accident, refusal of indemnity by an insurer, mental illness, cancers, suicides, HIV/AIDS, alcoholism, families of deceased members who have some need and serious financial misfortune are all problems which have been addressed by the Barristers' Benevolent Association over the last few years.

In each case, the barrister, former barrister or family member has been provided with assistance. The Association can respond to calls for assistance without formality and without delays. There are no formal applications, forms, waiting periods, means tests or other predetermined administrative requirements.

There have been times when assistance has been provided on the same day as information about a problem became known.

The assistance given is generally financial, but it is not limited to money. Arrangements have been made for legal assistance, for independent psychiatric assessment, for negotiating housing, negotiating with banks, preparing financial position statements, or dealing with other aspects of members' financial problems and intervening with creditors where that becomes necessary.

Every aspect of the operation of the Benevolent Association, from the donations made to the Association, notification that a member is in difficulty, or assessing and providing assistance, is an expression of the collegiate nature of the life of a group of independent individuals collectively operating as the Bar.

The Association is generously supported by the Bar and its former members, is active, efficiently run and extremely effective in the assistance it provides.

### **Background of the Association**

The Association was started in about 1936. Because of the state of the records of the early decades of the Bar, it is difficult to precisely identify the circumstances that brought it into existence. The copy of the last printed version of the Rules and Regulations is dated 1939 and refers to amendments of 1938. The Hon. Secretary noted on the document was A B Kerrigan and the Treasurer was A E Rainbow.

The Object of the Association 'is to afford assistance in necessitous and deserving cases' to members and former members of the Bar, their family and other dependents. At the moment, the language of the Objects speak of wives, widows and others determined to be dependents of barristers, but following last year's renovation of the Memorandum and Articles of the Bar Association, a similar renovation is under way with the Barristers' Benevolent Association.

The Committee of Management of the Association consists of the members of the Bar Council. By convention, the President of the Bar Council is the chair of meetings of the Benevolent Association. By decision of the Committee of Management, the five office holders of the Bar Council (President, Senior and Junior Vice-Presidents, Treasurer and Secretary) have delegated to them a power to provide assistance in cases of emergency, should a need arise between scheduled meetings. Situations of that type often arise.

Financial reports of the Association are audited every year, but the funds of the Association are professionally managed. A review of management strategies was conducted last year by the Executive Director and his staff, and as a result a change of investment manager occurred to ensure a lower cost to the Association and a better administrative response to the requirements of the Committee of Management.

Although there have at times been heavy demands on the funds of the Barristers' Benevolent Association, it has steadily grown as a result of the generosity of donors to the Association on the one hand, and successful investment on the other. Contributions from members and former members totalled almost \$60,000 in the year ended 30 June 2000. The fund presently stands at about \$1.9 million. Its accounts are published in the annual report of the Bar Association.

Because the Association is a charitable trust, donations are tax deductible.

### **Provision of assistance**

Information that a member is in difficulty can come from any source. The most common source of information is from barristers who are aware that a floor member is in difficulty. Very often clerks will make contact, but sometimes family members will make an approach, either direct to a member of the Bar Council or Executive Director or through a floor member or clerk. Sometimes, but much less frequently,

the barrister will make a direct approach. Often understandable but unnecessary embarrassment will make members reluctant to seek assistance. Numerous barristers and their families have had assistance of one kind or another from the Benevolent Association.

A telephone call or a letter to the Executive Director or to any member of the Bar Council is all that is needed to start the process and it is treated with the utmost confidentiality. Usually, some member of the Council or the Executive Director makes enquiries on behalf of the Committee of Management to whatever sources are both necessary and authorised by the person seeking assistance. Because the Committee of Management has the duties of a trustee, proper enquiries are made, but privacy, confidentiality and promptness have always been the hallmarks of the Association's activities.

Naturally the first person contacted, where possible, is the one needing assistance. That may be the barrister, a surviving partner, or the children of a barrister or former barrister who is ill or has died.

A first report by the member or Executive Director to the Committee of Management is often oral but, where necessary, documents evidencing the problem are provided or a written report is prepared.

The Fund will provide interest free loans but is reluctant to be treated as a bank or a source of bridging or short term finance. Wherever there is a real need and the Benevolent Association can provide useful help, it will be provided.

Generally, effective assistance can be provided and the Fund is large enough to meet the more urgent problems that can arise. There are some widows of members who have been provided with regular assistance over a prolonged period. Most financial assistance, however, is provided in the form of a lump sum loan or grant rather than ongoing payments.

Assistance has been provided to meet living expenses, funeral expenses and moving costs. Money has been lent to obtain transcript to defend private proceedings and to give assistance to a child of a deceased member who was then able to complete some studies. Money has been advanced to meet debts before the sale of chambers or some other asset and money has been provided for ordinary expenses when a spouse or child has died.

## Barristers Hockey Match – New South Wales v Victoria

By Andrew Scotting

The NSW Bar has a long tradition of playing hockey, having fielded a regular team since the late 1950s for the Gordon club and keenly contesting the annual Barristers v Solicitors game. The team has contained many eminent silks and judges, both past and present. Unfortunately, eminence in the law has not always been reflected in skill on the hockey field, but the team has secured a number of premierships and appearances in finals, particularly in recent years.

The team's spirit is renowned, some may say notorious. It is embodied in the members such as our founder The Hon. Justice CLD 'Shagger' Meares and the patron of our team spirit trophy, 'Bunter' Johnson.

On 14 October 2000, the NSW Barristers hockey team travelled to Melbourne to take on the Victorian Bar. Fresh from the annual Solicitors game on 7 October 2000, played in 35°C heat, we were confident, but wary of an opponent that we had not faced since 1989.

We were met by wet, Arctic conditions but the rain cleared for the game itself. Players were left to warm up and mentally prepare for the game in their own way. Worthy of note, Bellanto QC, Ireland QC and Callaghan S.C. enjoyed a bottle of red at a Lygon Street restaurant. On the way to the game, concerns were raised that the Victorians may require urine tests from our players. It was thought that Bellanto QC and Ireland QC would probably return a positive result, but that Callaghan S.C. may not be able to provide a sample.

NSW reached an early lead, as the best-dressed team, resplendent in blue with the Waratah over their hearts. Sadly, it did not take long for the Victorians to establish that they had the younger, fitter players, especially when they failed to field a silk at any time during the game. In response, Larkin and Mallon were our fittest players, who did everything in their power to be everywhere. Mallon, named as on-field captain for the day, was inspirational in command and in attack. Moen was superb in defence and was acknowledged by the Victorians as a force to be reckoned with.

Katzmann S.C., playing in goal, was called on to make a number of quality saves and was certainly equal to the task. A



Left to right: Giagios, Pritchard, Scotting, Mallon, Ireland QC, Moen, Bellanto QC, Callaghan S.C., Larkin, Katzmann S.C., McManamey, Robertson (ring-in), Warburton



Our Silks, left to right: Callaghan S.C., Ireland QC, Bellanto QC, Katzmann S.C.



Mallon laying down the law at half-time warm up.

brilliant save in the early part of the game caused her a nasty injury but she felt no pain as the ball was deflected wide. I understand that the injury now causes considerable disability and someone really should pay for that.

Unfortunately, the Victorians were too strong on the day and we were well beaten, 6-2. Ours was a similar fate to the 1989 team.

A great night in hockey history was celebrated at a dinner hosted by the Victorians, where we managed to exact sweet revenge on the bar tab.

Sunday was spent in recovery, and in transit back to Sydney. On St Kilda Beach, the 2001 Match Committee (Ireland QC, Callaghan S.C., Katzmann S.C. and Scotting) pondered, over a dose of anti-inflammatories and an excellent Sauvignon Blanc, the need for the recruitment of younger, fitter players.

Thanks to our Victorian hosts and in particular to Phillip Burchardt for organising the local content of the game.

## Sterling struggle for Shaw Shield

By Paul R Glissan - Captain, Bench and Bar Chess Team

In the advent of the new millennium and the centenary of federation, a sterling struggle for the Terrey Shaw Memorial Shield took place on 17 November 2000 at the Law Society's Lounge and Dining Room. The Shield is the prize for the winner of the annual Bench and Bar v Solicitors chess match, in memory of the late esteemed Terrey Shaw (formerly of Culwulla Chambers), who died in 1997.

The Shield has been a resident of the trophy cabinet in the Bar Common Room since the inception of the match in 1993. This year, however, the task of maintaining its residency there was made herculean by the simultaneous absence from the Bench and Bar team of many of its strongest players. The Hon. Justice J S Purdy of the Family Court of Australia (multiple former Australian Chess Champion) was on circuit in Queensland. Tim Reilly (Observer of the Australian Chess Team at the recent International Chess Olympiad in Istanbul) was still overseas. Ben Ingram had a professional commitment. Steven Rares S.C. was celebrating Ellicott QC's magnificent half century at the Bar. Michael Hall was recuperating from his final submissions on behalf of John Marsden. Bullfry QC, having had too many doubles, was attempting to take advantage of the cab-rank rule at the taxi rank opposite the Law Courts.

On the other hand, the Solicitors were strengthened by the recent return from London of their former Captain Malcolm Stephens (one of Australia's strongest players), who drew with Shaw in his last game, on board one, in the Bar Common Room in 1996. Indeed, so strong were the Solicitors this year that their current Captain, the aptly named Adrian Chek (who has defeated Australia's second strongest player, Grand Master Darryl Johansen), was playing on board three.

This year's match was played on 13 boards, arranged in order of descending strength according to current ratings or recent performance, with a limit of one hour per player to complete the game. A thrilling struggle ensued.

Bob Colquhoun (former Australian Chess Federation President) got the Bench and Bar off to a good start with a win on board seven. The Solicitors then drew ahead with wins on boards 12 and 13. The Bench and Bar then won on boards six, eight, nine, 10 and 11, but lost on boards two and four. In the opinion of Director of Play, Morris Needleman, Ken Pryde, with the white pieces on board one, 'never quite equalised' against Stephens, and eventually lost his first game against the Solicitors in the history of the match, in a classic pawn ending. With minutes remaining on his clock, Malcolm Broun QC judiciously agreed to a draw on board five, resulting in an unlosable lead of 6½ - 5½ in favour of the Bench and Bar, but with one game remaining, on board three.

Could the Bench and Bar win? Horst Bleicher had been recruited from retirement from practice at the Bar to play on board three. With two or three minutes remaining on his and Chek's clocks, his position looked equal, if not slightly superior. Everybody clustered around to watch the unfolding drama. Not realising the score, Chek (as he revealed later) mulled over the possibility of offering a draw, which would have resulted in a win for the Bench and Bar by 7 - 6. But he played on. Then a truly 'Hickory Dickory' thing happened. Without



Glissan and Chek with the Shaw Shield.

human intervention, Chek's clock suddenly retreated 20 minutes. Nobody saw it happen. Nobody can explain how it happened. Nobody has ever seen it happen before. Bleicher pointed out that Chek's flag appeared to have fallen. Because of the clock malfunction, the Director of Play stopped the game, removed the erratic clock, replaced it with another (after resetting it to the times displayed on the original clock before its malfunction) and restarted the game.

The atmosphere was now akin to that during the bowling of the last ball of the last over in the famous tied test against the West Indies, 40 years ago. Everybody was rivetted by the rapid progress of the pieces, as the remaining seconds ticked away. Then chess's equivalent to a cricket run-out happened - Bleicher's flag fell. Chek had won on time, and the match was tied 6½ - 6½! Silver cups were presented to both Chek and Bleicher for their sterling game. Copious quantities of red were consumed to restore everybody's nervous equilibrium.

The consensus is that this was the best match yet played. Unlike the Bledisloe Cup, the Shield will spend six months with the Solicitors and six months back in the trophy cabinet in the Bar Common Room.

In this Olympic year, it is appropriate to recall that Terrey Shaw represented Australia in no less than nine consecutive International Chess Olympiads, from 1968 to 1984, and won the gold medal for the best percentage score on board six in Yugoslavia in 1972. He was an International Chess Master, and was an authoritative, entertaining and widely read Chess Writer for the Sydney Morning Herald and The Bulletin magazine for many years.

In the 1993 *Bar News* Shaw, with characteristic modesty, wrote: 'The handsome perpetual shield ... is now on display in the common room trophy cabinet. Have a look at it quickly, as we may not be able to hang onto it next year.'

In true gladiatorial spirit, the Bench and Bar have not yet relinquished their grip on the Shield, which is pictured in the hands of both Team Captains in the Bar Common Room following this year's match.

Congratulations are due to the Solicitors for sharing the Shield this year.

## Edmund Barton: 'The one man for the job'

By Geoffrey Bolton AO  
Allen & Unwin, 2000

Sir Edmund Barton's entry in the index to Crisp's *Parliamentary Government of the Commonwealth of Australia*<sup>1</sup> reads '1849-1920; (A, B, D, F, G, H, J, K)'. The letters A-K are used as a shorthand description of the principal offices attained, and mean in this case that Barton was a member of both New South Wales and Commonwealth Parliaments, a New South Wales minister, a Commonwealth cabinet member and prime minister, a justice of the High Court, and a member of the first and second national federal conventions of 1891 and 1897-8.

No other person in that index of distinguished Australians achieved so many offices. Even then, Barton's importance is understated. Barton was no ordinary delegate to the 1891 convention, but a member (with Griffith and Kingston) of the informal but enormously influential working party on the Lucinda in 1891, which first drafted the document which became the Australian Constitution. He played a key role at both conventions in securing the acceptance of the crucial compromise that became s53, qualifying the Senate's power to deal with money bills.<sup>2</sup> Without this, the entire federation movement could easily have foundered through lack of agreement between large and small colonies. As a New South Wales politician, he was the attorney general who introduced legislation for universal male suffrage and single member seats, and the acting premier during the Broken Hill miners strike in 1892 who refused the employers' demands to send in military forces. While the federation movement was becalmed in the mid 1890s, he spent much time cultivating and encouraging what would now be called 'grass-roots' organisations supportive of federation. He was the most popular of all the elected delegates to the second federal convention of 1897-8, and was elected its leader as well as chair of its Constitutional Committee and convener of its Drafting Committee. And his role (in part clandestine) between 1897 and 1900 in obtaining a Constitution which was acceptable, both to the Australian colonies and the Colonial Office, was vital. More than any other single individual, Barton caused the Australian colonies to federate.

Yet it seems that in large measure Barton's considerable intellectual gifts (he was dux of his school and obtained a First in Classics and a special prize from Sydney University) were squandered. He became known as an indolent epicure, a man who preferred to spend long hours in the Athenaeum Club rather than in Parliament or his chambers or with his family. His career at the Bar was not a great success. His nickname 'Tosspot Toby' stuck, and his physique, too, approached that of Sir Toby Belch from an early age.

Barton's story is described sympathetically and enthusiastically by Emeritus Professor Bolton, whose clear

prose shows an obvious familiarity with most of the available primary materials, but without the constrictions of complete scholarly apparatus. There are points of interest and insight on most pages.

Strangely, no mention is made of Martha Rutledge's slim monograph on Barton,<sup>3</sup> which discloses the irony that the man who, more than any other, was responsible for the drafting of the Commonwealth Constitution, failed in his application as a young barrister in 1874 to become parliamentary draftsman in New South Wales.<sup>4</sup>

Inevitably, Bolton focuses on the political aspects of his subject's career. A legal biographer might have given more prominence to Barton's experiences with the Privy Council, which culminated, of course, in his successful brokering of the compromise in 1900 with the Colonial Office whereby the High Court was the final court of appeal in relation to *inter se* appeals, but the Privy Council's position was otherwise preserved. As a barrister, Barton never appeared in the Privy Council, although much later he sat on some commercial appeals.<sup>5</sup> However, as a litigant, Barton himself brought appeals to the Privy Council twice. His first encounter occurred during his four year tenure as speaker of the Legislative Assembly (the only years during which his attendance in the chamber was other than desultory), when he had suspended the notorious journalist Adolphus Taylor for a week for disruptive behaviour. After a second suspension (for re-entering the chamber before the first suspension had expired), Taylor commenced proceedings for assault against Barton, and demurred to Barton's defence on the basis that the Standing Orders pursuant to which he had acted (which adopted those in force from time to time at Westminster) were invalid and moreover that the chamber's only inherent power was to suspend for a single sitting. The Supreme Court of New South Wales agreed and Barton's appeal (on behalf of the chamber) to the Privy Council was dismissed.<sup>6</sup> There is not a trace of bitterness in his reasons when the same issue came before him as a justice of the High Court (in this case, the member's disorderliness lay in the failure to uncover his head and make obeisance to the chair when leaving the chamber).<sup>7</sup> The powers of the New South Wales chambers have not to this day been entirely defined, although the facts on which such issues are now presented are of more moment than a century ago.<sup>8</sup>

Bolton's account of the above is short and non-legal (which is no criticism). He also provides a sympathetic and probably over-generous portrayal of Barton's other appeal to the Privy Council. Barton's father had speculated in land and, by 1874, had mortgaged the entirety of his holdings to the Bank of New South Wales, which took possession. In December 1884, the Full Court of the Supreme Court of New South Wales held that the bank lacked a power of foreclosing. Immediately thereafter, Barton commenced proceedings on behalf of his father's estate seeking to redeem the old mortgage and regain lands which, by this time, had dramatically increased in value on account of Sydney's growth, relying on the Full Court decision. His success at first instance was short-lived: the Privy Council,

not unpredictably, allowed an appeal from the original decision,<sup>9</sup> after which the bank's success on appeal against Barton, and Barton's failure on subsequent appeal to the Privy Council,<sup>10</sup> were equally certain. Bolton describes the episode as ill-fortune, but it is hard not to agree with the Full Court's assessment of Barton's litigation: 'This suit had its origins solely in, and was never contemplated until, [the earlier Full Court] decision'.<sup>11</sup>

No doubt Barton's lack of success as a party to litigation before the Privy Council moulded his desire - not satisfied until 1986 - to establish the High Court as the ultimate Australian appellate court.

Barton's subsequent impecuniosity in the mid 1890s was solved in a way which enabled him to participate in the second federal convention. The 'workaholic' silk Charles Gilbert Heydon - described in the *Australian Dictionary of Biography* as 'the most inveterate worker that ever wore a wig' - accepted the task of reviewing the whole of New South Wales statute law for repeal, consolidation and simplification, and turned away a railway arbitration over which Barton was then asked to preside. The arbitration lasted 323 hearing days, but with adjournments whenever the convention was sitting (Barton's great friend and fellow delegate Richard O'Connor who was appearing before him was similarly advantaged by this arrangement).

It was at the second convention that Barton's skills both as chair and on the Drafting Committee were most needed. In addition to pushing through debate on the hundreds of amendments which the colonial legislatures had proposed, he, together with Reid, caused to be incorporated amendments prompted by secret memoranda which Reid had received from the Colonial Office when he had visited London to participate in the Jubilee celebrations.<sup>7</sup> For example, the Colonial Office required the removal of references to 'treaties made by the Commonwealth', because the Commonwealth was not contemplated to be a sovereign entity; accordingly, Barton had moved this amendment in the Legislative Council, and Barton and Reid put the argument for the deletion, successfully, in the convention. On less important matters, amendments were inserted by Barton's Drafting Committee without debate. Many more of the proposed amendments were pedantic, and were ignored by Barton, who in relation to one wrote 'This is a Constitution, not a Dog Act'.

In Bolton's book, one will read little of Barton's 16 years of service on the High Court, the judgments from this period being covered in fewer than 10 pages within a short concluding chapter (although even this slight coverage is far superior to all alternative accounts). Nonetheless, the conventional implied criticism that he failed to dissent from Griffith CJ in the first eight years of the Court's existence is repeated; one asks why is it necessarily a bad thing for an appellate court to be in agreement? Together with Griffith and O'Connor, he introduced underlying doctrines from United States constitutional law into Australian constitutional jurisprudence (see eg *D'Emden v Pedder*<sup>13</sup> and *Duncan v State of Queensland*<sup>14</sup>), an approach in part eschewed by the majority of the court shortly after his

death in *Engineers*.<sup>15</sup> But many United States doctrines remained unquestioned. In particular, Australia did not need a chief justice of the legal and political skill of John Marshall to establish the applicability of the principles in *Marbury v Madison* - more important than the early decisions of the High Court in this regard was the work undertaken by Barton and others in the preceding decade.

In private law, Barton J's judgments continue to carry weight. In *Perpetual Executors and Trustees Association of Australia Ltd v Wright* he showed how the presumption of advancement may be rebutted when a transfer of property is made in an illegal attempt to defraud creditors, that illegal purpose not having been carried into effect.<sup>16</sup> His analysis was cited with approval by the English Court of Appeal in *Tribe v Tribe*,<sup>17</sup> and remains authoritative in Australia, notwithstanding *Nelson v Nelson*.<sup>18</sup>

As a political biography, the work is lucid, fascinating and first-rate, and benefits from more thorough research (partly from sources not previously available) than that used by earlier biographers. It will become the standard work. Although there are some shortcomings in Bolton's treatment of Barton's contribution to the law, it does not purport to be a legal biography, and doubtless it is churlish to criticise the book on this ground in the absence of legal biographies of Australian judges of far greater significance.<sup>19</sup>

Reviewed by Mark Leeming

- 1 Longmans, Green & Co (London), 1954 2nd ed.
- 2 For the origins of this clause, see Leeming, 'Something that will appeal to the people at the hustings: Paragraph 3 of section 53 of the Constitution' (1995) 6 PLR 131 and Schoff, 'Charge or burden on the people: Third paragraph s53 of the Constitution' (1996) 24 *Fed L Rev* 43.
- 3 *Edmund Barton*, Oxford University Press (Melbourne), 1974.
- 4 Barton made application on 23 November 1874, and wrote further letters dated 7 December 1874 and 11 March 1875 (personal communication, Mr Dennis Murphy QC, Parliamentary Counsel).
- 5 Including *The Odessa* [1916] 1 AC 145 and *The Roumanian* [1916] 1 AC 124.
- 6 *Taylor v Barton* (1884) 6 NSWLR 1; *Barton v Taylor* (1886) 11 App Cas 197.
- 7 *Willis and Christie v Perry* (1912) 13 CLR 592.
- 8 See *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563.
- 9 *Bank of New South Wales v Campbell* (1886) 11 App Cas 192. (1890) 15 App Cas 379.
- 10 By coincidence, Taylor's and the Bank's successes are reported on consecutive pages of the Appeal Cases, and the Solicitor-General, Sir Horace, later Lord, Davey appeared for the appellant on both occasions.
- 11 This was first pointed out by de Garis and La Nauze: B K de Garis, 'The Colonial Office and the Commonwealth Constitution Bill' in Martin, *Essays in Australian Federation* (Melbourne University Press, 1969), pp94-121; La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972), pp172-221.
- 12 (1904) 1 CLR 91.
- 13 (1916) 22 CLR 556.
- 14 (1920) 28 CLR 129 esp at 146.
- 15 (1917) 23 CLR 185.
- 16 [1996] Ch 107.
- 17 (1995) 184 CLR 538.
- 18 Notably, Sir Owen Dixon. Grant Anderson's excellent but unpublished monograph (1991) on Dixon (from which was derived his ADB entry) demonstrates how informative such a biography would be.

## Human Rights in International and Australian Law

By Ryszard Piotrowicz and Stuart Kaye  
Sydney, Butterworths, 2000

At the time of writing this review, the Senate was undertaking an inquiry into the whether the *Sex Discrimination Act 1984* (Cth) should be amended in order to allow for the lawful discrimination against women on the basis of their marital status in respect of access to artificial reproductive technology (for example, in-vitro fertilisation). Such an amendment is clearly contrary to the objectives of the Act.<sup>1</sup> If passed, it will arguably put Australia in breach of its international human rights obligations.<sup>2</sup> That it could even be contemplated today, sixteen years after the legislation was passed, is remarkable and nicely illustrates the tension between the place of human rights in an international as opposed to domestic context. While the book touches upon this issue, it fails ultimately to adequately explore it, notwithstanding its title and its target audience.

The book purports to be designed for students and to this end it is accessible and general enough in its scope to give, as Professor Ivan Shearer AM aptly described in the Foreword, 'the shape of the woods' without descending into the often tangled thicket of human rights. Accordingly, for those practitioners for whom human rights law is not their area of speciality, this book provides a good introduction to the various international and local instruments governing this field of law and the framework within which they operate.

The book is divided into three parts and contains an excellent set of reference tables (to cases, statutes, conventions and other relevant instruments) together with a well-constructed index. Part I of the book gives a broad but solid overview of the nature and origin of human rights law and the measures that comprise international human rights, including their enforcement. Of particular interest is Part II, which is devoted to international humanitarian law, an often overlooked but nonetheless important part of human rights law. For as the authors emphasise, it is precisely in times of conflict and war that adherence to human rights becomes of critical importance. Part III deals with human rights in an Australian context and examines the means by which Australia fulfils its international human rights obligations within the limitations imposed by the Constitution and also examines the various legislative mechanisms for the protection of human rights at a local level.

It is, however, in this latter section where the book disappoints. Put simply, much more time and detail ought to have been allocated to examining the treatment of human rights within Australia. As it stands, the title is somewhat misleading when a little under a third of the text is devoted to this topic (for example, discussion of the *Sex Discrimination Act* is limited to less than one

page). Consequently, only the most limited discussion of the importance of administrative law as a bulwark against human rights violations occurs and scant, if any, reference is made to Commonwealth and State industrial relations legislation which have done much to protect human rights in the sphere of employment.

Equally lacking is any real analysis of Australia's attempt to implement its international human rights obligations at a national level. In the current atmosphere of mandatory sentencing and the attempted abrogation of women's human rights under the *Sex Discrimination Act*, this is a critical omission. While it is acknowledged that the stated aim of the authors was not to provide a single comprehensive guide to human rights within Australia, in order to provide anything other than the most cursory coverage of such rights more material is required. In sacrificing detail the authors have equally sacrificed any meaningful articulation of the tension between Australia's human rights obligations abroad and the political reality of their implementation and enforcement at home. A tension which must be appreciated by practitioners and students of human rights alike and which, as recent events have demonstrated, is far from resolved.

Reviewed by Rachel Pepper

- 1 See s3(b) of the *Sex Discrimination Act 1984* (Cth).
- 2 Articles 2 and 26 respectively of the International Covenant on Civil and Political Rights and the Convention on the Elimination of all Forms of Discrimination Against Women.

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## Agency Law

By Simon Fisher  
Butterworths 2000

The stated aim of *Agency Law* is to present a modern and up-to-date account of agency law, written specifically for an Australian audience, drawing primarily (but not exclusively) on Australian authority. That said, the book necessarily draws heavily on English case law and commentary from *Bowstead & Reynolds on Agency*.

The book is easy to read and understand, as the author has gone to the trouble of assuming that the reader may be one that is not knowledgeable as to basic concepts.

The book is divided into six parts and twelve chapters. Parts one and two of *Agency Law* contain repetition of some matters and a dispersal of topics, which may have been more conveniently covered in one area. The index is useful in attempting to locate material. This allows a practitioner (as is our want) to dip in and out of the book, safe in the knowledge that all the relevant material has been located.

However, there was one example where the index did not lead to the Promised Land. A direction led the

user to paragraph 4.1.1 for the meaning of ‘constructive authority’. The label was not familiar, and I was eager to learn more. When I located the correct paragraph the author, rather disappointingly, states that ‘constructive authority’ is more commonly known as ‘ostensible’ or ‘apparent authority’, and he also groups agency by ratification under this so-called authority. The wisdom of introducing yet another label for a well understood concept escapes me, particularly when the author otherwise continues to use the common labels.

The author deals with the subject of agents as fiduciaries in, rather confusingly, two separate places. Firstly under the heading of ‘The points of similarity between bailment and agency’, and then in the chapter headed ‘Duties of the agent to the principal’. The subject of the existence and scope of the fiduciary duties is covered too briefly.

Further, the book deals too briefly with Crown agents and the subject the principal’s vicarious liability for the action of its agent. As McHugh J recently commented, vicarious liability is an important area of the law, which is evolving under circumstances where the contracting out of work has become commonplace. The High Court decision in *Travis Kane Scott v Geoffrey Arthur Davis* [2000] HCA 52 (5 October 2000) is an extremely good read for those who wish to explore the current thinking of the High Court on vicarious liability and the history and development of agency principles with respect to owners and drivers of motor vehicles.

On balance, this book fulfils its purpose to provide a book within ‘a moderate compass, avoiding the intricacies of detail that tend to obscure’. It is a useful addition to a practitioner’s library on the law of agency in Australia.

*Reviewed by Sheila Kaur-Bains*

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## Outline of Succession (2nd Edition)

By Ken Mackie and Mark Burton  
*Butterworths Australia 2000*

According to its preface, *Outline of Succession* is intended as an introduction to the law of succession aimed primarily at the undergraduate law student embarking upon the subject for the first time.

As its title suggests, *Outline of Succession* is not, and does not purport to be, an exhaustive analysis of succession law. It seeks rather to provide a general overview of the basic features of the legislation and case law in each of the Australian jurisdictions.

The book is wide in its scope, seeking to deal with the laws of succession in each of the Australian jurisdictions. As the authors themselves point out more than once in the book, the absence of uniformity across the Australian jurisdictions renders it impossible in a

work of this size to canvass in any detail the legislative provisions and case law of each of the states. The reader is frequently advised to consider for him or herself the specific legislation of interest or to refer to other texts in the area. Such an approach is unlikely to find favour with students who, due to limited time and resources, would be inclined to prefer a text which could be used as a ‘stand alone’ reference. Without consulting the legislation itself or the various other texts referred to, it is unlikely that a student reading this book alone would be capable of answering the questions which appear at the end of each chapter.

Whilst the authors generally do identify the key cases in each area, there is on the whole scant reference to Australian authority, with most references being to English decisions. Peculiarly, where the legislation of each of the Australian jurisdictions resembles the United Kingdom *Wills Act 1837*, the provisions of that Act are cited in preference to those of any of the Australian jurisdictions.

Whilst the book is written in a readily understandable style, there is excessive use of somewhat simplistic ‘Samuel is the owner of a property called ‘Redacre’ type illustrations. Explanation by reference to the facts of reported cases may have been more instructive.

For practitioners, *Outline of Succession* provides at best a starting point for research. It must be said that the book does not profess to be of more than occasional use to practitioners. This is particularly the case for practitioners in New South Wales, as many of the more difficult and commonly encountered areas of the law of succession in this state are glossed over in the book. For example, in Chapter 9 ‘Distribution on Intestacy’, only passing reference is made to s61D of the *Wills Probate and Administration Act 1898*, pursuant to which a surviving spouse has a right to acquire the appropriation of the matrimonial home.

The discussion in Chapter 10 ‘Family Provision’, in relation to the matters to be considered by the court in the exercise of its discretion as to what provision, if any, ought to be made in favour of an applicant is of such brevity and superficiality that it would offer no real assistance to a practitioner considering whether such an application would be likely to succeed. The complicated provisions in Division 2 of Part II of the *Family Provision Act 1982* relating to notional estate are given only cursory attention. Typically of the book as a whole, the chapter offers little in the way of guidance as to procedural matters.

In summary, *Outline of Succession* is unlikely to be of great assistance to practitioners. It may, however, provide a useful overview of the laws of succession for students.

*Reviewed by Elizabeth Frizell*

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## Invalidation of Securities upon Insolvency

By G Hamilton

The Federation Press, 2000

This book is part of the *Australian Legal Monographs*, a series of short legal treatises, the stated intention of which is to provide an avenue for publication of scholarly works which might otherwise not be available because of their brevity and narrow subject matter.

The author is a well-known insolvency practitioner. The treatise originally comprised the dissertation component of an SJD (Doctor of Juridical Science) completed by the author at the Queensland University of Technology. The focus of the book is the various legislative provisions which operate to invalidate securities granted in favour of individuals or companies who later become insolvent.

The book provides a good analysis of the relevant legislative provisions under the Corporations Law and the *Bankruptcy Act 1966* (Cth) both current and prior to recent amendments (see the *Corporation Law Reform Act 1992* (Cth), and the *Bankruptcy Legislation Amendment Act 1996* (Cth)). The general layout of the book is good, the table of contents is clear and the subject heading references provide a useful guide throughout the text.

The author examines in detail many of the difficult issues of statutory construction and the practical legal consequences of invalidation provisions. This involves a detailed analysis of the relevant statutory provisions, and highlighting gaps and apparent anomalies in the legislation.

Some of the questions raised by the author in respect of the Corporations Law, might be considered to have been determined by earlier authority. For example, at pages 38 – 39 the author refers to the statement by Burley J in *Olifent v Australian Wine Industries Pty Ltd* (1996) 14 ACLC 510 at 516, that the former case law did not offer any assistance on the question of whether under s588FA(3) of the Corporations Law a liquidator is entitled to choose any point during the six month preference period in his endeavour to show that, from that point on, there was a preference payment.

However, this issue had been settled under the earlier companies legislation by Barwick CJ in *Rees v Bank of New South Wales* (1964) 111 CLR 210 at 221, where it was held that the liquidator can choose any point during the statutory period, including the point of peak indebtedness, as the point from which there was a preferential payment. To the extent that choosing the point of peak indebtedness involves a degree of arbitrariness (particularly where there is a 'running account' between the debtor and creditor), then the connection between the alleged preferential payments and dealings prior to the chosen date are not to be

ignored. It is appropriate to have regard to the substance and reality of the debtor/creditor relationship, to choose a period which is a realistic unity (see *M & R Jones Shopfitting Co Pty Ltd (in liq) v National Bank of Australasia Ltd* (1983) 7 ACLR 445 per Wootten J; and *Hamilton v Commonwealth Bank of Australia* (1992) 9 ACSR 90 at 110 per Hodgson J (as he then was)).

There is a very good analysis of the question whether the various statutory provisions under the law which invalidate securities as against a liquidator, administrator of the company, or the Deed's administrator, have any application where the property the subject of the security is realised by the creditor prior to the appointment of the liquidator or administrator of the company.

The authorities in relation to earlier companies legislation, suggested that avoidance of the security upon insolvency, for example, for non-registration (see now s266 of the Corporations Law), or in respect of a floating charge (see now s566 and s588FJ), had no effect on the secured creditor to the extent that he or she had realised his or her security or otherwise obtained payment before the commencement of the insolvency proceeding which rendered the security vulnerable. This was because the security had already been satisfied and there was nothing for the secured creditor to enforce, and the invalidation of the security interest was not retrospective (see *Re Row Dal Construction Pty Ltd* (1996) VR 249; *Mace Builders (Glasgow) Ltd v Lunn* [1987] Ch 191). The author suggests that some of the current invalidating statutory provisions may now have retrospective effect (namely, ss267, 566 and 588FF of the Corporations Law), whilst noting the introduction of s588FJ(6) to reverse the effect of *Mace Builders* in respect of floating charges. The author provides a very useful and insightful analysis of the question of retrospective invalidity, an issue not often considered by other commentators.

Although the book is a specialised work, it is a useful contribution to the legal analysis of the vulnerability of securities upon insolvency. This will always be a topical area.

Reviewed by Fabian Gleeson