Bar News

The journal of the NSW Bar Association

Reinventing the Courts

Crisis in the Law

Memorial Service for David Yeldham QC

Summer 1996

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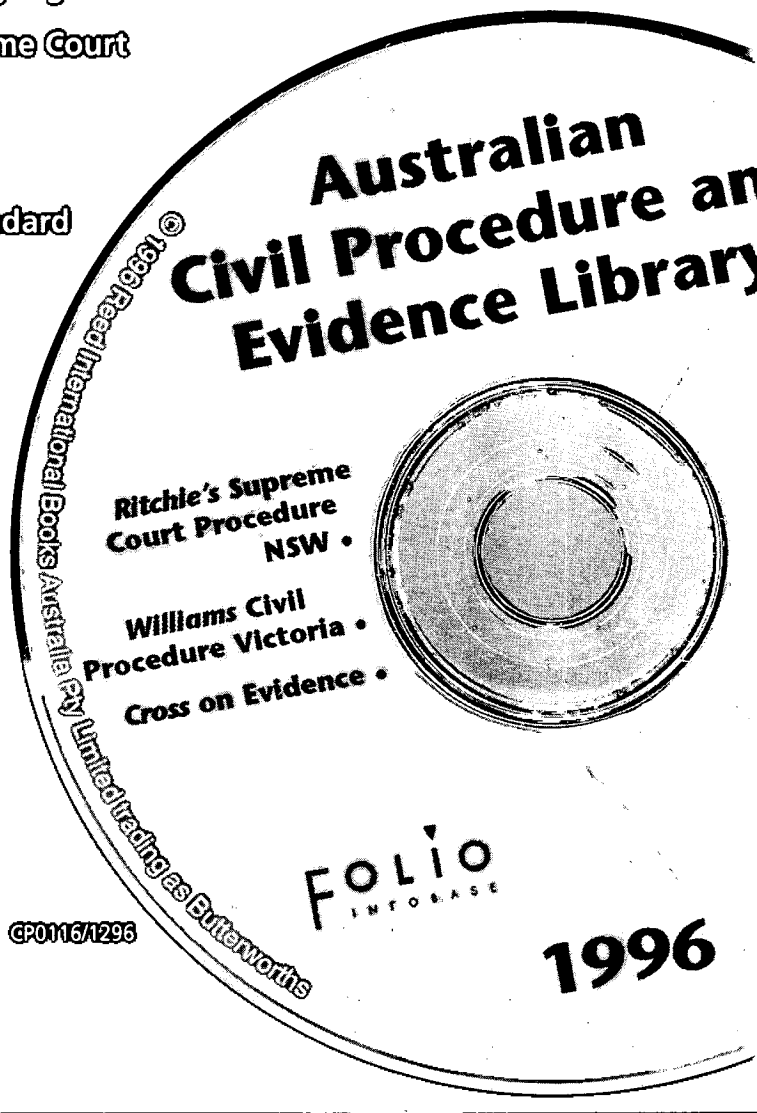

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Barristers wishing to join the Editorial Committee are invited to write to the Editor indicating the areas in which they are interested in assisting.

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in this issue ...

Bar Notes

1996 Senior Counsel

On 1 November 1996 the President of the New South Wales Bar Association, David Bennett QC, announced the appointment of the following persons as Senior Counsel, effective immediately.

1. Raymond Ronald BARTLETT
2. Nigel Anthony COTMAN
3. David Lloyd DAVIES
4. Gregory Scott HOSKING
5. Peter William NEIL
6. Leonard Ari LEVY
7. Winston Charles TERRACINI
8. Peter Michael KITE
9. Noel Charles HUTLEY
10. Alexander Whistler STREET
11. Anthony Joseph Leo BANNON
12. Bruce Roland McCLINTOCK
13. Timothy Aylward GAME

Reality Bites

" In deciding what reasons are to be given and to be given under pain of being found guilty of an error of law, it is in my respectful opinion proper that the law have regard to reality and not to concepts. The law is not a game. It is not an academic exercise in which the Judge is required by way of a schematic statement of the dispute to itemise exclusively or to exhaustion all of the points which may be of relevance in relation to the case. A judgment is a practical working document. Judgment writing now occupies a great deal of public time and requires the expenditure of a great deal of public money. A Court must, of course, do what justice requires and time and money must be sufficiently provided to allow justice to be achieved. But if there is to be a great expenditure of judicial time and expense and so public time and expense, it is proper that the courts have regard to what in reality justice now requires.

In view of the current tendencies in the law, this is I think becoming more and more important. The time taken in judgment writing in a Court will, of course, vary with the course of the case but my own experience over a period of years is that judgment writing in the superior Courts occupies something of the order of 100 to 150 per cent of the time taken to hear a case. I do not speak for the District Court or other Courts at that level, but I suspect that the time taken, though it may perhaps be somewhat less, is not greatly less. That matter is to be taken into account in assessing what is to be required of a Court in the statement of its reasons.

It is also to be borne in mind what in fact Courts in this State are now required to do. In deciding what reasons to be given one will have regard to the place which a Court occupies in the judicial structure. One does not expect from a Court at the lower end of the structure a detailed statement of reasoning in relation to each of the many cases that has come before it during the day.

Also regard is to be had to the number of cases which a Court is now expected to deal with in the course of its daily activities. In deciding what reasons a Judge must give the law will, in my opinion, as a matter of simple common sense take into account what the Court of which he is a member is and what it is expected to do.

I emphasis again that what a Court can do and is expected to do in detailing its reasons for judgment is at all times to be subordinate to the requirements of justice. But that Court, and this Court which reviews what is to be expected of a Court, is entitled to take into account the burden which is now imposed upon Courts." ❑

(*Liberty Investments Pty Limited v Sakatic Pty Limited,* Court of Appeal, unreported, per Priestley JA.)

Election of Members of the Bar Council for the Year 1996/1997

The results of the 1996 Bar Council elections were announced on 27 November 1996. The following were elected:

Inner Bar
Burbidge QC
Bennett QC
Murray QC
Hely QC
James QC
Bellanto QC
Poulos QC
Walker QC
McColl SC

Outer Bar

(a) Three members of less than five years's standing:
Perram
Kerr
Babb

(b) Members of any length of standing:
Delaney
McIlwaine
Letherbarrow
Katzmann
Maiden
Toner
Greenwood
Gormly
Needham

Bar Council Executive

The following were elected as office holders on 28 November 1996:

President:	David Bennett QC
Senior Vice-President:	Rick Burbidge QC
Junior Vice-President:	Breet Walker SC
Honorary Treasurer:	Ruth McColl SC
Honorary Secretary:	Bob Toner

From the President

Litigation Reform

For most of this year, and no doubt for much of the next few years, litigation reform has been and will be the flavour of the month. The Bar's attitude towards it is very simple. It supports any initiatives which improve access to the courts and increases the efficiency of litigation so long as there is no reduction in the quality of justice.

One of the problems with litigation reform is that many of its advocates take unnecessarily extreme positions. The contrast between the rhetoric and the reality was vividly illustrated at an all day seminar during November entitled "Re-inventing the Courts". The seminar was sponsored by the Bar Association as part of the NSW Legal Convention.

Setting to one side the addresses by Bret Walker and myself, the presentations fell into two categories. The first category consisted of assurances that there was a "crisis in the courts", that "the justice system could not cope" and that "radical change is essential".

The fervour of these remarks stood in stark contrast to the reports from the coalface. That coalface was represented by Justice Mahoney, the President of the New South Wales Court of Appeal (and, at the time, Acting Chief Justice of New South Wales), Judge Jones of the County Court of Victoria, Judge Garling of the District Court of New South Wales and Mr Ian Pike, the Chief Magistrate of the Local Court of New South Wales. These four judicial officers reported on the extent to which their courts had, during the last twelve months, substantially reduced the enormous backlogs of cases. This was achieved, in each case, by a series of practical and sensible case management measures. In no case was there "radical reform". None of the courts sought to substitute an inquisitorial system for an adversary system. None adopted the ultimate bête noir of the New South Wales Bar, running lists.

It is easy in this area to trade clichés. The favoured phrase when a radical reformer is describing the activities of a moderate reformer is "band-aid solutions", a cliché which tends to inhibit discussion. The truth is that here are many things which can be done and which are being done to improve the efficiency of the courts. Call overs and listing systems can always be improved. Discovery can be streamlined so as to concentrate on essential issues. Steps can be taken to require the parties at an early stage to focus on the real issues in the litigation. Mediation and other forms of alternate dispute resolution can be encouraged ("the multi-door courthouse"). It is this type of measure which has been so successful in reducing existing backlogs.

It is unnecessary to destroy a system which fundamentally takes account of the innate human need that in some circumstances there must be winners and losers. The adversary system, unlike the inquisitorial system, is admirably suited for the determination of truth where disputes of fact exist. Cross-examination and the calling of evidence by a part with an interest to present is far more likely to expose error of dishonesty on the part of the other side than inquisitorial intervention by a professional judge who has never practised law and who is (and is intended to be) impartial. Impartiality is vital for decision-making; it is highly inappropriate for investigation and the exposure of lying or error.

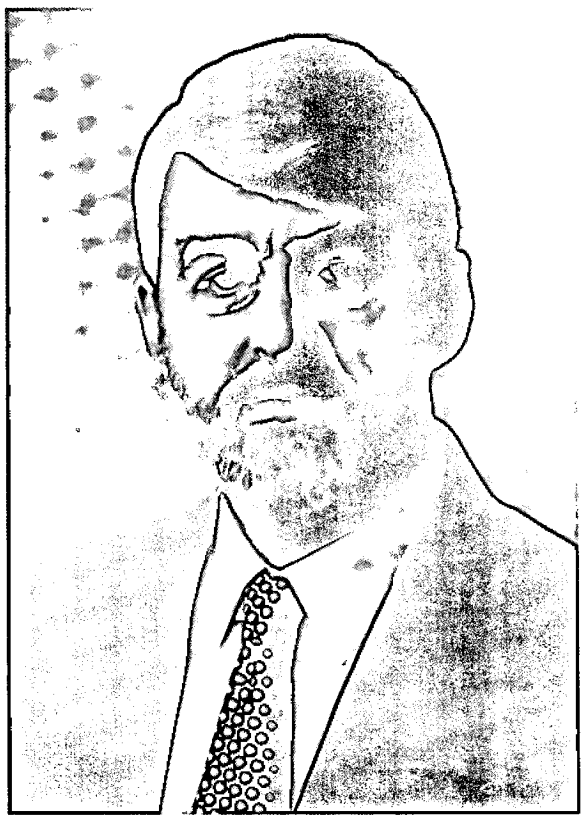
We have, in general, a system of which we can be proud. By all means, let us improve it, but we must also defend it against unwarranted destruction. ❑ D.M.J. Bennett QC

DPP Update

Legal Aid

There has been much publicity given already to the Federal Government's proposed cuts to legal aid. True it is, that those in society who are least able to carry it will be burdened further. True it is, that they will be likely to suffer injustice. True it is, that the justice system itself will become even less accessible than at present - even more the preserve of the well-off.

I have contributed to the public fuss with comments from the point of view of the prosecutor - the representative of the whole community in criminal matters (including but not limited to legal aid contenders).



Dietrich's case will require some cases to be adjourned, some to be stayed temporarily and some permanently. One must accept that at least some contenders for legal aid are guilty. Whether guilty or not, some will be imprisoned for longer awaiting trial and some will be released on bail or unconditionally with possibly undesirable social consequences.

With a cap on funds for trials some accused will manufacture longer hearings. There being no legal aid for retrials, some will seek to manufacture jury disagreements. Jury tampering may increase.

There will be pressure on the Crown to enter inappropriate charge bargains. If that is resisted (as it should be) pleas of guilty will decline. Delays will increase, with all the adverse consequences they bring.

Litigants in person present additional problems for all other participants in the proceedings, especially the tribunal. District Court appeals are really trials by judge alone. The Court of Criminal Appeal and the High Court interpret the law for all courts. If proceedings in these courts become one-sided contests the whole criminal justice system will be at risk of becoming skewed.

The Europeans refer to "equality of arms" in legal contests. That means lawyers for both sides, especially in serious criminal cases.

Governments must ensure that occurs so that the essential public service of the justice system can operate effectively. Legal aid is a necessity.

This is not just an issue for the Federal Government. It is our tax money that must be applied for our benefit, whichever government actually writes the cheque.

Jury Survey

There is presently under way, with the approval of the Attorney General, a survey of juries who are unable to agree on verdicts. The Bureau of Crime Statistics and Research will report the results in due course and is conducting the survey with all appropriate safeguards.

The principal aim of the survey (as I understand it) is to obtain data on the jury split. In the debate about majority verdicts a great unknown at present is whether hung juries divide 11:1 or any other way with any frequency. Obtaining such information will lead, hopefully, to a debate that is at least better informed.

Summary Prosecutions

On 1 July 1996 my Office took over from the Police Service the functions of police prosecutors at the Campbelltown and Dubbo Local Courts.

The pilot schemes at both courts are running well. They are being evaluated by the Premier's Department, assisted by Mr K Waller (retired Coroner). The Police Royal Commission is keeping a close eye on events.

I have made no secret of the fact that I intend to see this function transferred from the Police Service to my Office where, as a matter of principle, it belongs. The Royal Commission has received submissions supporting that view from, inter alia, the Bar Association, the Law Society and the Local Court. All that remains is to work out the "how" and "when".

Victoria and Western Australia are closely watching events.

It could be that barristers may have a role as counsel briefed to prosecute at country sittings of the Local Court. This is one issue being explored in the evaluation which is looking at the whole process statewide from charge to final disposition.

Be that as it may, the transfer of function will release 234 officers back to their core duties of policing. ❑

N R Cowdery QC

Reinventing the Courts

The Australian Law Reform Commission has been asked to look at the advantages and disadvantages of the present adversarial system of conducting civil, administrative review and family law proceedings before Courts and Tribunals exercising Federal jurisdiction. The inquiry arose from concerns that legal proceedings in Australia are excessively adversarial and that this is having a damaging effect. The aim of the inquiry is to assess whether any changes should be made to practices and procedures in Federal proceedings to address those concerns.

In the light of that inquiry it was particularly appropriate that the Bar Association hosted a seminar on "Reinventing the Courts" on 1 November 1996 as part of the 1996 New South Wales Legal Convention. There were a number of notable speakers including the Honourable Jeff Shaw QC MLC, Attorney General of New South Wales, Mr Alan Rose AO, President of the Australian Law Reform Commission and the Honourable Justice D Mahoney AO, Acting Chief Justice of New South Wales.

It is not possible to reproduce all of the papers which were delivered on the day. Bar News has selected two, in particular, to provide a beneficial insight into the question of reforming the legal system. The first, by the Honourable G L Davies of the Queensland Court of Appeal, describes reforms which have taken place in Queensland as well as affording some insights on the prospect of moving the Australian legal system towards an inquisitorial mode. The second, by his Honour Judge A F Garling of the District Court of New South Wales, provides an illuminating account of the substantial changes which have taken place in that Court in recent years which have had the effect of transforming its civil jurisdiction. Judge Garling's paper provides an account for all practitioners in that jurisdiction of the philosophy behind the radical changes which have taken place. Bret Walker SC, wearing both his Law Council and Bar Association hats, responded to the papers delivered in the morning session, one of which was Justice Davies'. Judge Garling's paper was delivered in the afternoon session.

Justice Reform: A Personal Perspective - The Hon Justice G L Davies *

1. Introduction

There has been a good deal of discussion recently about the adversarial and inquisitorial systems of justice, no doubt in part because of the Australian Law Reform Commission reference on that question. Much of that discussion has been misconceived because it has assumed two opposite mutually exclusive systems. Nothing could be further from the truth. The reality is, as I have said before, rather like a spectrum. Our system is towards the adversarial end, the French, for example, is towards the inquisitorial end and the German is somewhere in the middle. It is ironic that whilst many Australian lawyers would call the German system inquisitorial, the Germans themselves consider it to be adversarial. It all depends on where you stand in the spectrum.

I make this point at the outset for two reasons. The first is that reforms which I have been proposing over the last few years, many of which have been implemented by the Litigation Reform Commission of Queensland, of which I have been Chairman, will move our system towards the middle of that spectrum as I shall endeavour to show this morning. The second is that, even if it were thought desirable to move our system right through to the other end of that spectrum, neither government nor the legal profession would tolerate it because it would require a massive increase in the number of judicial officers and support staff and a corresponding decrease in the number of practising lawyers.

What I have to say this morning is a personal perspective on justice reform, both civil and criminal, although many of my views are reflected in the work of my Commission.

The objects of civil justice reform must be cheaper, quicker and fairer justice. What I have, in the past, called the adversarial imperative, the urge to win rather than to reach a fair resolution of a dispute, stands in the way of those objects and the system which we have had in the past encourages that imperative. Consequently, worthwhile civil justice reform will inevitably make proceedings less adversarial[1].

The primary object of criminal justice reform must be the maintenance or restoration of a balance of interests; on the one hand, of the accused to be treated fairly during the course of investigation, interrogation and trial and, on the other, of the community represented by the prosecuting authority, primarily in ensuring that criminals are brought to justice. And it seems to me that some of the rules once thought necessary to protect accused persons from unfairness need to be reconsidered in the light of changes which have occurred in the increased educational level in the community, in the means of ensuring more reliable evidence and in the greater independence of prosecuting authorities. There is now, in my view, an imbalance in favour of accused persons and

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* Judge of Appeal, Court of Appeal, Queensland, Australia.

1. I have explored the reasons for this in previous papers. See, for example, "A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale", G L Davies (1996) 5 JJA 201.

against the interests of the community. The proposals which I shall mention are aimed at restoring that balance[2].

2. Civil Justice Reform

My own view, and the rationale of reforms until recently implemented and proposed by my Commission, is that the objects to which I have referred - cheaper, quicker and fairer civil justice - can be achieved only if each of four specific objects is achieved.

First, the existing litigation process must be simplified and accelerated.

Secondly, alternative means must be provided for resolving disputes and, in appropriate cases, parties encouraged to use them.

Thirdly, the existing costs system must be changed in two respects. The first is to abandon a system which fixes costs by reference to the time spent or the number of items of service rendered, for that is to reward incompetence, inefficiency, over-servicing and overcharging, in favour of one which fixes costs by reference to the amount of work reasonably required to be done. The second is to make costs more predictable so that a potential litigant may obtain a firm quote before embarking upon litigation.

The fourth, and perhaps most difficult to achieve, is to change the existing mindset of many litigation lawyers that their role is to win the case for their client, and of many judges that their role is to merely decide that case; to one that it is the role of each to facilitate resolution of a dispute in the fairest way which, in many cases, will not be by litigation.

I propose first to say something about how I would accomplish those objects and how my Commission sought to do so. But I emphasise that I do not think that the civil dispute system can be made quicker, cheaper and fairer unless all of those objects are pursued and, at least in part, achieved[3].

(a) Simplifying and accelerating the existing litigation process

Two related features of our traditional litigation system work together against its simplification. One is the encouragement it gives to the adversarial imperative; it is designed along the lines of trial by battle. The other is the encouragement it gives to leaving no stone unturned; for if you leave one unturned and your opponent does not, you may lose the case and your client may sue you. Together these features encourage the contesting of too many issues, the discovery of too many documents and a huge amount of duplication of work by opposing lawyers.

The first way in which my commission sought to overcome these problems was by tightening up the pleadings rules; in particular to prevent one party from simply denying or not admitting the allegations of the other. Under the Commission's proposal, if you do not admit an allegation, you must state positively that it is untrue or that you do not know whether it is true or not. In complex cases parties should be required to agree upon a statement of issues; and should be compelled, on pain of substantial costs orders, to abandon those issues kept alive merely for some forensic advantage.

Secondly, we sought to limit discovery. Our belief after talking to many solicitors was that, except in fairly simple cases, the discovery process was the single most expensive aspect of the litigation. And the *Peruvian Guano* test, together with the no-stone-unturned mentality, often resulted in over discovery. Moreover, in some cases discovery was deliberately used as an instrument of oppression by a richer litigant upon a poorer one. We have abandoned the *Peruvian Guano* test in favour of one requiring discovery only of documents directly relevant to an issue in the proceeding. Solicitors say that the change has worked well.

A third way in which we have sought to simplify the process by preventing duplication, at the same time reducing the element of surprise, is by requiring parties, as part of the discovery process, to disclose to one another the names and addresses of relevant witnesses of whom they know. This does not impose any obligation on either party to go and search for witnesses but it imposes a continuing obligation to disclose relevant known witnesses as they find them.

Case management is the other major tool now used in many jurisdictions in Australia, including my own, to simplify and accelerate the litigation process. Whilst I am generally in favour of case management, and my Commission has been instrumental in developing rules for it, there is, I believe, a danger in individual management of cases, particularly smaller ones, that it will increase rather than reduce costs. The extent to which cases are individually managed during the pre-trial process should reflect their complexity and size. But with that qualification, individual case management, especially where it is by the judge allocated to try the action, can be very effective in reducing the issues in dispute and the evidence to be called and in accelerating the time between issue of proceedings and trial.

There should be no such concern that case management at trial will increase costs. My Commission earlier this year produced draft rules for case management at trial, that is provisions allowing a trial judge to control the manner and extent of evidence; whether evidence should be given orally or in writing, how many witnesses may be called on any issue,

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2. Nothing in what I say, however, should be construed as limiting the function of courts to the fulfilment of these objects; it includes the definition and development of the law and the maintenance of the rule of law.
3. I do not propose, except in passing, to say anything about the effect which the use of modern technology will have in the achievement of these objects. It is substantial but is outside the scope of this paper.

whether, and if so, how examination-in-chief or cross-examination should be limited; and the manner and extent of submissions. These were generally welcomed by the profession.

There are a number of less extensive changes which we have made which will nevertheless simplify and reduce the cost of the litigation process. We have developed rules to enable many matters to be determined entirely on the papers, that is by sending in written evidence and submissions without the need for parties or lawyers to come to court. We have implemented rules enabling evidence and submissions to be made by videolink or telephone. We have implemented rules enabling all court documents to be filed by post and we proposed a scheme for electronic filing of documents.

Two more controversial proposals, one of them already in force, complete our reforms in this area[4]. The first is a rule giving the court power to dispense with rules of evidence where these would cause unnecessary expense or delay. This is now commonly used and I have heard no complaints about it.

On the contrary, we received a great deal of opposition from the profession to our proposal for court-appointed experts. I suspect that this was at least partly because of two misunderstandings about the proposal; the first, that the court might have the opinion of only one expert when there were two opposing views fairly open; the second, that the court expert would be appointed after the parties had appointed theirs and consequently too late to effect any savings in costs.

As to the first of these, it was never intended that the court should be limited to the appointment of only one expert. If it appeared that there was a genuine difference in views then two such experts would be appointed, directed to confer and to produce a joint report stating where they agree, where they disagree, and why.

Secondly, the Commission was conscious of the need, in many cases, to appoint experts well before litigation commences. Consequently our proposal included legislative provisions enabling parties to a dispute to agree upon an expert or more than one expert and to apply to the court for their appointment before litigation commenced; with the consequence that, if litigation did commence, those persons would be court-appointed experts in the trial. And it must be remembered that cost saving is not the only object of this proposal. It is also to overcome the adversarial nature of expert evidence, a proposition which can hardly be denied.

I turn now to the second of the objects to which I referred earlier.

4. This is not strictly correct. Some of the reforms discussed under the next heading will also have this effect. There is inevitably overlapping and the inclusion of some reforms under one heading rather than another may be somewhat arbitrary.

(b) Providing alternative means for resolving disputes and encouraging their use

An informed agreement will often be the best resolution of a dispute, not least because it will be one chosen by the parties. It is important that, within the court system, there are a number of ways in which that can be achieved.

The most important of these is mediation. Because you are all familiar with its virtues I wish to make only two points about it. The first is that, whilst I see nothing wrong with private enterprise mediation, if that is what the parties want, I think it important that mediation also be part of the court system as it is in my State and I think yours. Parties to a dispute will often have more confidence in a process which they know is part of the court system. My second point is that, because some disputes are best resolved by agreement before litigation commences and adversarial attitudes have hardened, the court system of mediation should be available to parties to a dispute before litigation has commenced. The scheme which my Commission has developed enables that to be done.

Sometimes, as we all know, a party to a dispute may need to have pointed out, by some objective means, the weaknesses of its case, the strengths of its opponent's case, and how a court is likely to resolve the dispute before that party will make a realistic assessment. Consequently, case appraisal, arbitration and the mini trial, all of which are I think offered in your system and in mine are important aids to dispute resolution by informed agreement. But it is important that some of these should also be available, within the court system, to parties to a dispute before litigation has commenced and the scheme developed by my Commission allows this to be done.

For a number of reasons, some of them having no apparent legal basis, the resolution by a court of one of a number of questions in a dispute will result in the parties reaching agreement on the rest. There is therefore much to be said for encouraging that course. My Commission initiated two reforms designed to enable and encourage that to be done where that is possible at relatively little expense. One was to widen the existing provisions providing for the trial of separate issues. The other was to enable a judge, on the hearing of a summary judgment application, to decide any question finally even if summary judgment is refused.

Neither the changes to which I have referred under the first heading above nor those to the costs system to which I shall shortly refer will be enough to bring the costs of small cases within the means of many who would wish to litigate them. It is therefore important, I think, that there be a cheaper alternative trial system for those cases. The Small Claims Tribunal provides a useful model for this. Based on that model my Commission developed a statutory scheme pursuant to which parties to any action in the Magistrates Court could agree or the magistrate, on the application of either party, could, in his or her discretion, decide to adopt a process which is a mixture of mediation and investigatory adjudication

without the need to adhere to rules of evidence. The proceedings would be shortened and the costs accordingly reduced.

In consequence of the changes which I have mentioned so far, litigation will be less adversarial. Parties will not have the same opportunity to contest irrelevant issues, conceal relevant witnesses, shop around for witnesses, delay or unnecessarily build up costs. Courts will be more likely to find the true facts; and they will generally have greater, and the parties less, control over the pace and shape of the dispute resolution process. The changes will also encourage the use of dispute resolution procedures which are even less adversarial than litigation will become.

I am inclined to think that these changes will take our system about as far along the path away from the adversarial end of the spectrum as one can go without requiring government to incur substantially increased recurring expenditure. For example, to take fact gathering out of the hands of the parties and place it in the hands of the court, as occurs in many continental systems, would require a massive increase in court resources, the cost of which governments are unlikely to accept.

I turn now to costs.

(c) A new costs system

May I, at the outset, explain my concern. It is not that lawyers' fees are generally too high for the work which they do. I do not believe that generally either the rate at which lawyers are paid is too high or the incomes of lawyers are too high. My main concern is rather that our system in general and our costs system in particular discourage efficiency and, on the contrary, offer incentives to inefficiency and over-servicing. The related features to which I referred earlier, the encouragement which our system gives to the adversarial imperative and the encouragement which it gives to leaving no stone unturned are powerful disincentives to efficient and economical conduct of a case. A costs system which allows lawyers to charge either by time spent or items of work done offers an additional disincentive. Notwithstanding the changes which I have proposed and my Commission made to the system, these disincentives cannot be overcome without also changing the costs system so that it is based on the amount of work which should be done rather than on the amount of work which is in fact done. Moreover, where costs are based on the amount of work in fact done, most litigants have no way of judging how much of the work done was worthwhile or, indeed, how much of the work charged for was actually done.

My second concern is that the existing costs system makes costs so unpredictable. A client should be able to obtain a firm quote from his or her lawyer on the basis of the estimated length of trial with an additional estimate for each extra day of trial.

Both of my concerns would be answered by a fixed costs system. Prima facie costs, both party and party and solicitor and client could be fixed by a scale. This occurs in some foreign systems and has existed in some courts of limited jurisdiction in Australia.

One version of this would be to classify actions into categories by reference both to amount involved and complexity with a separate scale for each category; the scale in each case fixing a lump sum fee for each stage of the action - from instructions to sue or defend to issue of proceedings, from issue of proceedings to close of pleadings, from close of pleadings to trial and for trial. It must be accepted, of course, that such a scale would in some cases result in fees which were either unfairly high or unfairly low. There therefore needs to be a mechanism by which application may be made to a court assessor for variation of the amount, either up or down, because of the greater complexity (or simplicity) or the greater (or lesser) volume of work. The court assessor should be a person skilled in costs assessing such as a practising or retired litigation solicitor or a practising or retired costs assessor.

Moreover, solicitors and their clients should be able to contract out of the scale for solicitor and client costs. The only qualification which I would make to this would be that the client should first be fully informed. This may be unnecessary in the case of repeat litigants such as insurance companies or financiers but is undoubtedly necessary in the case of first time litigants. Litigants should know what the scale fee would be before they agree to pay on some other basis. They should know that there are other lawyers, and who those lawyers are, who would conduct the case for them at the scale fee. And even where a client agrees to pay on an hourly or item basis he or she should be given an estimate of total cost with a right to a review of costs charged if they are substantially in excess of the estimate. Of course, whatever agreement may be made with respect to solicitor and client costs cannot affect the calculation of party and party costs and the client should also know what that difference is likely to be before making the agreement.

Scales such as I have envisaged would not result in any reduction of the fees earned by honest, competent and efficient lawyers. Nor should they. Indeed, they should be based on the fees which would be earned by such lawyers in a procedural system of the kind I have outlined. What they would do, primarily, is ensure that the incompetent or inefficient lawyer, or the lawyer who over-services, is not paid for incompetence, inefficiency or over-servicing. They would also make costs predictable and enable a lawyer to give a firm quote at the time of taking instructions.

There is one other aspect of costs, which I would call incentive costs, which I think is worth considering and which I will consider under the following heading, to which I now turn.

(d) Changing the mindset of lawyers and judges

We are all, practising lawyers and judges, inclined to see ourselves as litigators. The title of this morning's session, litigation reform, is some indication of this. What we need to

do, to make the necessary change in thinking, is to see ourselves as dispute resolvers, litigation by trial being one of the means, but only that of last resort, for achieving that resolution. We need to make this change because that is what the public whom we serve expect and are entitled to expect from us - the resolution of their disputes at a reasonable cost in a fair way.

There are several impediments to that change. The first is our training. From the cradle of the university we are taught about legal rights, how they are established by proof in our system and how the skills of advocacy enable us to establish them.

I do not criticise that teaching as far as it goes. It is necessary to know your clients' rights in order to advise them what is in their best interests; and, in the end, courts must uphold rights. But you also need to know that your clients' best interests may not be served by your unqualified pursuit of their legal rights or, more accurately, your perception of them which, for factual or legal reasons, may not be correct. You need to know, realistically, where those interests lie.

Your client's financial interest may best be served by a negotiated solution because of the desirability of getting or maintaining a good relationship with the opponent. And your client's interests may be best served by a solution different from your perception of the correct legal one. It is necessary to look at the wider picture of your client's business or personality including his or her relationship with the opponent in order to see where those interests lie. And of course the cost to your client, not only the legal cost but that of the time lost and anxiety caused by the dispute are factors which must be considered. The skills necessary to understand these questions and to achieve your client's best interests in every case need to be acquired and should be taught.

There are also psychological inhibitions upon this change. One is a natural resistance which we all have to change if it affects the way we do things, that resistance being all the greater if it requires us to acquire new skills. And the older we get the less we like it.

A more specific inhibition is the adversarial imperative. It is difficult to convert a warrior into a pacifist. That is not quite what I have in mind but it makes my point. Litigation is about winning. Dispute resolution should be about finding the best solution to a dispute; and what may be in your client's best interest may also be in the opponent's.

I said earlier I thought that of the four objects which, in my view, must be achieved to make dispute resolution cheaper, quicker and fairer, this might be the most difficult to achieve. And I think that the greatest problem is the adversarial imperative. That is not to say that there aren't many sensible lawyers who seek to resolve disputes by agreement at an early stage. My experience has been that those who habitually do so are generally the best and the most successful. But there are still many, far too many, who see their role, from the time they are engaged, as litigating for their clients, often with exaggerated views of what that litigation will achieve, encouraging rather than discouraging an adversarial attitude in their clients, and consequently often causing their clients considerable harm.

I do not intend to exclude judges from my criticism, for the adversarial imperative affects many of them too. Many of them do not see their function as the resolution of the dispute before them but as, in the interlocutory phase, getting the matter ready for trial and, at the trial phase, hearing it until judgment.

What can be done about this? A broader approach to legal training must be taken in the universities. And both practising lawyers and judges should evolve continuing education courses to enable them to perceive and perform a wider role as dispute resolvers[5]. I would also favour costs incentives to encourage lawyers to use alternative dispute resolution and other cost and time saving procedures and, more generally, to obtain an early resolution of a dispute. There is a good deal to be said, in my view, for the payment of a fee uplift of up to 100% to a lawyer whose skill and efficiency has enabled a client to resolve a dispute reasonably and quickly, and consequently at a substantial costs saving; the percentage uplift should be determined by the court assessor depending on the stage at which the dispute is resolved and the quality of the work done.

Some lawyers in the United States have found a new market for their services in implementing for their clients programs designed to enable them to avoid or quickly resolve disputes. That is a worthwhile cause as well as a remuneration field of activity. Lawyers should be expert in dispute prevention at least in the kinds of commercial disputes which commonly end in litigation.

(e) Civil litigation in jeopardy

The judiciary and the legal profession, together with government, have failed the public in their expectation that their disputes will be resolved at a reasonable cost in a fair way. That expectation cannot be fulfilled if the only or even the primary way of achieving resolution is by trial. Although trial may establish the parties' rights, that may not be in either party's interests and it may be at a cost which neither can afford.

Unless we cheapen the means of resolution by trial, provide more interest based solutions to disputes, make costs transparently fair and reasonably predictable and become active in promoting a wider range of dispute resolution services we will all become increasingly irrelevant to the process of civil dispute resolution.

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5. I do not mean to imply that judges should themselves be involved in the resolution of disputes otherwise than by trial; but they should be aware of the advantages and of the means of doing so and should, where appropriate, facilitate those means.

3. Criminal Justice Reform

The object here, as I have said, is the maintenance of a fair balance between the interests of a person suspected or accused of a crime and the public interest in having criminals brought to justice. Whether such a balance is being maintained is a subject which lawyers almost never discuss. I propose to mention four areas in which, in particular, I think there is an imbalance in favour of accused persons which should be redressed.

The first is the right to silence. The question is not, of course, the right of persons suspected or accused of crimes to decline to answer questions or to decline to give evidence. Those rights are absolute. It is whether, at trial, a jury should be able to draw such inferences from that failure as appear proper. I suspect that most non-lawyers would see nothing wrong with that. But the prohibition against the drawing of such inferences is defended by some lawyers with religious fervour.

The second issue involves pre-trial disclosure. There does not seem to be any dispute that the prosecution should disclose its case, including its witness statements, to an accused before trial. Why should not an accused do likewise? Of course, that cannot be compelled; nor should it. But the question again is whether the jury should be able to draw such inferences from the failure to do so as appears proper.

The third issue involves the discretionary exclusion of evidence illegally or improperly obtained. The main object of this discretion is to mark the court's disapproval of illegal or improper conduct by those whose duty it is to enforce the law. But it may be questioned whether the exercise of this discretion is effective to do that or to eliminate unfairness or whether, on the contrary, its effect is merely to punish the public for the wrongs of the police. In a case where, for example, an electronically recorded admission of guilt is excluded on the basis that it was illegally or improperly obtained, especially where that is the only or principal evidence against an accused, it is difficult not to think that the public are made to suffer because the police have acted wrongly. That impression is often strengthened by the knowledge that the police are unlikely to be punished for their conduct. Is there an alternative which would allow such evidence to be admitted but ensure that the offending police are punished?

The fourth issue is whether committals should be retained. Full committals are, in my State, now less common than they were but the question is whether they should be retained at all. Is it necessary, given the independence of a director of prosecutions, that there be such a proceeding; and does it do any more than provide, at considerable expense, an opportunity for the defence to have a practice run?

My purpose this morning is not to discuss these issues in depth, nor to attempt to provide final solutions to the questions which they raise. It is to provoke wider discussion of important issues which appear to be ignored by lawyers.

(a) The right to silence

The term is a misnomer. The so-called right is an immunity against the judge or prosecutor commenting on the failure of an accused, either when being interviewed by police or at trial, to answer the allegations made against him or her or the jury drawing an adverse inference from that failure. I am unable to find a rational explanation for the current rule. I tend to agree with Jeremy Bentham that an innocent person's highest interest and most ardent wish would surely be "to dissipate the cloud which surrounds his conduct and give every explanation which may set it in its true light". Moreover, it is generally not the weak and unwary suspect who is likely to exploit that right but rather the strong and cunning practised offender.

Whilst courts in recent years have made a number of inroads into the rule[6] I think we need wholesale legislative change. Somewhat surprisingly, but spurred on by their terrorism problems, the British have taken this step. Their legislation deals with the question both at the interrogation stage and in court[7].

In the first of these situations, where an accused fails to mention a fact later relied on in his or her defence in circumstances in which the accused ought reasonably to have mentioned it or fails to account for the presence of an object or substance or mark which a police officer reasonably believes may be attributable to the participation of the accused in the commission of an offence, or fails to account for his or her presence at a particular place where a police officer reasonably believes that that presence may be attributable to that person's participation in the commission of an offence, the court may draw any proper inferences from any such failure.

In court, at the conclusion of evidence for the prosecution, the judge may now tell the accused not only that he or she may give evidence, but that if the choice is made not to give evidence the jury may be asked to draw such inferences from the failure to do so as appear proper. One result of this change, I am told, is that now many more accused persons give evidence in their own defence.

What can be wrong with these changes if procedural fairness is accorded to the accused at all times? Indeed it is said, by those more experienced in the criminal law than I, that juries will often draw such inferences even when told they cannot do so.

I wonder even whether we should go further than this. Why should not a judge, in some cases in which an accused declines to give evidence, nevertheless ask him or her some questions. The accused could not, of course, be compelled to

6. *Weissensteiner v The Queen* (1993) 178 CLR 217 being the most significant.
7. *Criminal Justice and Public Order Act* 1994, which came into force in April last year.

answer them but shouldn't the jury be able to draw such inferences as are proper from the failure to do so?

None of these changes would affect either the burden or the standard of proof. At present the so-called right to silence, it seems to me, remains a sanctuary for the sophisticated or practised offender. It no longer serves, if it ever did, the interests of the weak, the confused or the nervous who are the least likely to have the presence of mind to assert the right.

(b) Disclosure by an accused

It is now accepted that the prosecution should not only particularise its case against an accused, but should also provide the accused with statements of witnesses it proposes to call. Why should not the accused reciprocate? That question has also recently been addressed by the British[8]. Under their legislation, where the prosecution has given specified documents to the accused, the accused must give a written statement to the court and the prosecutor setting out in general terms the nature of the accused's defence, indicating the matters on which the accused takes issue with the prosecution and setting out, in the case of each such matter, the reason why issue is taken. Where an alibi is relied on, particulars of the alibi must be given, as in most Australian jurisdictions. If the accused fails to give such a statement, sets out inconsistent defences in the statement or puts forward at trial a defence which is different from any defence set out in the statement, the judge, or the prosecutor by leave, may make any comment as appears appropriate and the jury may draw such inferences as appear to be proper. Except with respect to alibi these provisions do not require disclosure of witnesses. I cannot see why an accused person should not have to disclose at least the names and addresses of the witnesses he or she proposes to call. That would at least give the prosecution an opportunity to interview them.

An accused person should retain the benefit of proof against him or her beyond reasonable doubt. But should an accused also be able to maintain an element of surprise? Apart from alibi, that is certainly the present system.

(c) Evidence illegally or improperly obtained

The admissibility of such evidence most frequently arises in the context of confessional evidence. But it may arise in search and seizure cases or where law enforcement officers may have participated in an offence[9].

I propose to discuss only the first of these, that is confessional evidence, although a good deal of what I say will apply also the others. The discretionary exclusion of confessional evidence illegally or improperly obtained arises most frequently these days in a context in which the evidence has been electronically recorded so that, unlike situations which arose frequently in the past, there is little likelihood that there can be any real dispute about the reliability of the evidence; interception devices are frequently used, undercover police and others are frequently "wired for sound" and most police interviews whether at the police station or in the field are now electronically recorded. Consequently, in this context, the question of fabrication of evidence, once common, is now rare.

Why should reliable confessional evidence ever be excluded? It is difficult to see what can be unfair about it in the context of the investigation and prosecution of crime, especially serious crime. It is not a game of cricket. The only serious objection can be that referred to earlier; that it is necessary to mark the court's disapproval of illegal or improper conduct by those whose duty it is to enforce the law and thereby to discourage such conduct. But there is not the slightest evidence that excluding evidence illegally or improperly obtained does discourage such conduct. Statistical studies in the United States indicate rather that it does not[10]. On the other hand, exclusion can often result in a plainly guilty person going free.

Courts can hardly be blamed for attempting, however vainly, to ensure that law enforcement officers themselves obey the law and rules of propriety where there are no other effective means of ensuring this. It seems that police are rarely punished for their transgressions[11]. What is needed is a statutory code of conduct for law enforcement officers and power given to an independent body to ensure its enforcement. If that were done there would be no need for courts to exclude apparently reliable confessional evidence in order to attempt to deter illegality or impropriety by police.

(d) Committals

In my own State most committals are now a formality. But there are still some which occupy a great deal of the time of the Magistrates Court, not because there is any real question that there might not be a prima facie case, but because the defence team would like a trial run, to ask the questions they would not risk asking in front of the jury.

An independent director of prosecutions should not prosecute unless satisfied that there is a prima facie case. I can see little point in having the need for some further person determine the same question. But if that solution is thought too radical then why should it not be sufficient for the determination to be made on the papers with a discretion in exceptional cases to hear evidence?

I have not selected the four questions which I have just

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8. *Criminal Procedure and Investigations Act* 1996, to come into force next year.
9. As in *Ridgeway v The Queen* (1995) 184 CLR 19. See also the case where there has been illegality in the apprehension of an offender, as in *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42.
10. Schlesinger, *Exclusionary Injustice*, Marcel Dekker Inc., at 50 ff.
11. See, for example, *Ridgeway* supra n 7.

discussed because I think that they are the only questions requiring discussion on this topic. A number of the reforms to which I have referred in the civil area could also be made here; court-appointed experts and the rule allowing judges to dispense with the rules of evidence are obvious examples. No doubt there are others. But each of the four I have mentioned appears to raise a question of imbalance; at the very least they require serious consideration. The aim must be, as I have said, to find the appropriate balance. No doubt many defence lawyers would say that we have it now. I doubt that there are many non-lawyers who would agree.

4. Conclusion

It is understandable that criminal lawyers are even more adversarial than civil lawyers. There is usually no other solution to the dispute than conviction or acquittal. But that does not mean that the criminal justice system must remain as adversarial as it is; to the point where an accused may, without fear of adverse comment, refuse to answer questions or explain incriminating marks or explain his presence at the scene of the crime and may conceal his defence, if any, until all of the prosecution evidence has been given. And, as I have already pointed out, there is no possible justification for the civil justice system remaining as adversarial as it has been.

My own Commission, which has embarked on changing all that, has been recently abolished. In some other States, and recently in the federal area, there appear to be bodies capable of pursuing this task in the civil area. But I can see no sign of criminal justice reform. Unless both are pursued, courts, lawyers and government will fail to fulfil the legitimate expectations of the community we serve. ❑

Litigation Reform: The New South Wales Experience

- His Honour Judge A F Garling, District Court of New South Wales

On 1 February 1994 the District Court of New South Wales in its Sydney Civil Jurisdiction had a median delay between filing of the Praecipe for Trial and disposition by a Judge of 50.8 months. On 1 February 1997 the District Court in its Sydney Civil Jurisdiction will have no backlog. All cases which were commenced prior to 1 January 1996 and in which a Praecipe for Trial has been filed will have either been heard or they are not ready for hearing despite the Court's efforts. Those cases not ready to proceed should number no more than 100 cases. Many of these are infant cases in which the plaintiff's injuries have not stabilised.

The Court has a case management system for all cases commenced on or after 1 January 1996 which offers a hearing date within a 12 month period of the filing of the Statement of Claim. The Court still has some backlog in some country areas and in Sydney West. Steps are being taken to quickly dispose of that backlog. The Chief Judge has already invited those regional courts with long cases to transfer them to Sydney for immediate hearing. Additional sittings have been allocated to the country next year. Audits are being carried out in Sydney West and country areas to find out how many cases are still in the list and this will allow the Court to allocate additional sittings. The Chief Judge has already allocated sittings in January 1997 to some of the larger centres which have a backlog. These steps should ensure that any backlog outside Sydney will quickly be eliminated.

Prior to 1992 the Court lists were in an unacceptable state. It was taking many years for cases to come on for hearing. The profession had developed a way of preparing cases which reflected the long delays within the Court system. It was not only the District Court but also the Supreme Court and other courts where there were long delays. The profession, not unnaturally, developed a negative attitude towards the preparation of cases. In the District Court a Praecipe for Trial would be filed at an early stage and nothing further would be done to prepare the case for hearing. Eventually, a call-over would be held, perhaps many call-overs would be held over a period of time. It was not uncommon to go to a call-over only to be told that no hearing dates were available or to be allocated a hearing date a year or more in advance. It was not uncommon, having had a hearing date allocated well in advance, to then be "not reached" and to have a further hearing date allocated many, many months after the not reached hearing date. It is a matter of record that numerous cases were neglected and many were allowed to be stood over generally. They fell into a hole and nothing further was done.

I well recall in those desperate times the birth of the arbitration system. The profession really had to do something to get cases heard and the Law Society of New South Wales, along with Ted O'Grady and others, worked extremely hard in developing the arbitration system and then bringing in the Philadelphia arbitration system. The District Court co-operated with the Law Society and the Attorney-General's Department and there was brought into place a system which allowed, in some cases, the speedy disposal of a case. Unfortunately, where a re-hearing was requested, the case then went back to take its normal place in the list and it often would not receive a hearing date for some years after the arbitration hearing. There was also set up in the District Court a type of specialist managed list in which certain cases were managed

by Judges in that list. In addition to that, a number of Associate Judges were appointed and, whilst those steps helped, there was no dramatic turnaround in the backlog.

The real change, in my view, started with the introduction of the Motor Accidents List in 1992. The Chief Judge, James Staunton, created a list for the hearing of *Motor Accidents Act* cases filed after a certain date. Three Acting Judges were appointed and the Chief Judge then selected three Judges to sit exclusively in that list and to control their own list. The creation of that list gave the Court an opportunity for a change of philosophy. In the past there had been a very negative attitude to the preparation of cases and allocation of hearing dates as there were few dates available. The creation of this list immediately provided hearing dates for a certain class of cases. In addition to that, the Court started to manage its list and the Judges took an active part in case management. A different philosophy started to emerge. Cases came on for call-over and were immediately offered a hearing date. In fact, during the first six months period it was difficult to find cases which were ready for hearing. It took some time for the Judges to convince the profession that they needed to change, that they needed to immediately prepare their cases for hearing, that they would be given an early hearing date and that their cases would be reached. The system was quite successful. Its importance was that it allowed the Court to develop a positive attitude to the early disposal of cases. It was also an important period because it allowed the Judges to experiment in case management and to develop the most satisfactory way to manage cases in the District Court.

"A different philosophy started to emerge ... It took some time for the Judges to convince the profession that they needed to change ..."

In the middle of 1994 Chief Judge Staunton introduced a system to further eliminate the backlog. It was known as the GIO Tail Project. It was a list in which old motor accident cases were given an early date. Other personal injury cases were still subject to long delays. On 1 August 1994 the District Court began to hear old motor accident personal injury cases. The project involved the disposal of about 4,000 personal injury cases. The Defendant was the Government Insurance Office of New South Wales or the New South Wales Insurance Ministerial Corporation as it became known. It should be remembered that this project involved some of the most difficult cases in the Court. A number of these cases were cases which had fallen to the bottom of the pile because they were so difficult. The majority had been in the Court system for seven years or more. The oldest involved an accident 30 years ago and the majority were accidents which occurred between seven and eight years ago. Many involved accidents which occurred 10, 15 or 20 years ago. Some involved traffic law which no longer exists and which had not existed for many years. Again, three Acting Judges were appointed and that allowed three experienced Judges to be made available to hear these cases. In the end 4,204 cases were included in this project. 4,021 were disposed of within about one year of the project commencing.

Case management had become very important. There was, at the time, a lot of debate as to whether Judges of the Court should involve themselves in case management, but it soon became apparent to those running the various lists that the only successful method of disposal of cases was by case management and the most successful method of disposal of cases was by Judges managing the list. I am not suggesting that the other officers of the Court were not doing an excellent job in allocating hearing dates, but the fact was that they did not have the power to be able to persuade the various parties that they had to get their cases ready for hearing.

Case management developed along very simple lines. The system used was basically to allocate a hearing date and to advise the parties that they had to be ready for hearing on that date. We did not make long or involved orders or bring the case back before the Court a number of times before the hearing. The case was simply allocated a hearing date. If the case was to be adjourned then the solicitor had to convince the Court that he or she should not personally pay any costs relating to the adjournment. The first call-over was before an Assistant Registrar, parties were offered a hearing date before an arbitrator or before a Judge. If the case was not ready to take a hearing date it was referred to the List Judge. A deliberate decision was made not to give the Assistant Registrar power to adjourn cases. That meant that a date for hearing could be taken or the parties would have to go before the List Judge. The Assistant Registrar had no other choice. When the matter then went before the List Judge the Court's policy was very simple: the parties were offered a range of hearing dates, if they were not ready without very good reason, then the case was stood over to show cause why it should not be struck out for want of prosecution, cases were not adjourned unless there was a legitimate reason - they were stood over only to be ready to take a hearing date on risk of being struck out. This was an important part of case management as a habit had developed in which the parties began to prepare their cases for hearing after a call-over. The Court was told that, by consent, cases were to be adjourned and when they came back they were still not ready and adjourned again. This had to be stopped.

When this system of case management commenced we still found that when the parties came before the List Judge they were not ready. The next step was to have the Assistant Registrar list the case before the List Judge to strike out for want of prosecution. Many members of the profession did

not realise that it was a serious matter and so a printed form was handed to the parties' legal representatives which made it quite clear.

Case management by Judges is an area which needs a lot of thought. Where you are managing a large number of cases you cannot afford to stand cases over to another date. You have to limit the number of appearances before the Court. If I can give a simple example: if 5,000 cases come before a List Judge who grants each one an adjournment, then 10,000 cases will come before that Judge and if the Judge gives more than one adjournment it becomes worse and, in fact, impossible. If a case is listed before a List Judge it must be for a serious reason and if it has to be listed a second time it must be to strike out the case if it is not ready.

We also used a "not ready" list for cases in which injuries had not stabilised. The cases in that list are reviewed by the Court on a regular basis.

The attitude of the profession towards the hearing of cases had to be changed. They had, through no fault of theirs, got into a negative attitude and that had to be changed into a positive attitude. There were a large number of cases to be heard, the Court had only limited resources and it became important that as many cases as possible be heard on the day they were listed for hearing. The Court had to prove to the profession that it was capable of hearing these cases and of quickly disposing of them.

Judges' time spent sitting in Court hearing cases became the most important asset we had and a system was developed to protect that valuable time.

An attempt was made to shorten the length of cases. Various orders were made at the time a case was set down for hearing and those orders were aimed to guard against waste of Judges' sitting time.

The first order was for the preparation of a chronology which had to be read by the plaintiff before the plaintiff gave evidence. The plaintiff could then simply say under oath in the witness box that the facts contained in the chronology were correct and the plaintiff, of course, could be cross-examined on those matters.

The real purpose behind the ordering of the preparation of a chronology was to save Judges' time. It soon became obvious that there were other benefits. We had found that Judges were sitting in Court furiously taking notes as a plaintiff was led through his or her past history. Counsel who were leading the plaintiff through that history had all those facts written out in front of them. They were not controversial, they were usually a matter of history and there was no reason why the Judge should have to sit there and take notes when the simplest way of dealing with it was to hand the plaintiff the chronology and then to have it tendered as an exhibit in the case. This saved a lot of Judges' time and saved Judges from having to take down all that history. It is interesting to watch the way that the chronologies have developed. Most of them are full, informative and helpful. Some are virtually useless but, generally, it is an area in which the profession have reacted in a very positive manner. I recall hearing one case, a most complex case, in which the chronology extended over 40 or 50 pages and in which Senior Counsel for the plaintiff spent only about 15 minutes with his client in evidence in chief before sitting down and allowing her to be cross-examined. He had, of course, ensured that counsel for the defendant had the chronology prior to the day of hearing. The result was that a very complicated plaintiff's case really became relatively simple.

Parties were directed to draw up schedules of medical reports and to attach the original and a copy of their reports to those schedules. This was usually done, although too often a copy is not available for the Judge. The purpose of the schedule was to save time so as reports did not have to be read onto the record.

The most significant change was that all cases which were not allocated to a Judge to start at 10.00 am were placed before the List Judge at 9.30 am, counsel were required to appear instructed by their solicitors and to fill in a reserve matters hearing status sheet which requires the parties to agree or to attempt to agree, at least mathematically, the out-of-pocket expenses, loss of income claimed together with other monetary claims. Medical reports and other documents to be tendered had to be attached to enable both parties to be clearly aware of what the other party intended to tender. The parties were required to actively discuss the shortening of the case. In other words, to try and agree between them as to what the real issues were and were encouraged to actively discuss settlement.

The first aim was to bring barristers and solicitors together to enable them to immediately start discussing the case. The Court made available the subpoenaed documents and allowed both parties to have access to them. Any application for an adjournment had to be made to the List Judge before the case was allocated to a Judge for hearing.

It was very important that we had Judges sitting in Court for as long as possible. Too often in the past Judges were asked to wait in chambers while settlement was discussed, while subpoenaed documents were inspected or while one party or the other formulated their case and then, when all that was done and the case finally started, the Judge had to sit there whilst counsel inspected medical reports, often a large number of medical reports, to see whether they had been served and, when there was some argument, solicitors had to go through files, often bulky files, trying to find letters serving medical reports. When other documents were tendered the same sort of thing occurred. There was no necessity for this, it could be done before the matter got to a Judge. The form required the parties to consider each other's reports and to note on the form any to which they took objection. That matter could then be dealt with at an early stage.

At the reserve matters call-over counsel were able to provide accurate estimates of the length of a case and if it could not be provided immediately, after discussions with the other party and after the narrowing of issues, an accurate

estimate could be provided. Discussions could be held as to the number of doctors to be called and as to other witnesses who may be necessary. In the past too much Judges' time had been wasted. This new system saved that time and, just as importantly, it brought the legal profession together to discuss their cases.

One of the other advantages of the system was that settlement was fully discussed. A number of cases were settled before they were allocated to a Judge but, just as importantly, the serious part of the settlement negotiations was carried out before allocation to a Judge. Sometimes settlement was not complete until the case was allocated to a Judge but, once a Judge was nominated to hear the case, cases often settled quite quickly because the preliminary work had been done. The fact was that the system worked. A large number of cases were disposed of.

"... by the end of this year there will be no backlog in the Sydney civil list"

When Justice Blanch was appointed Chief Judge of the Court he immediately took steps to alleviate the Court's civil backlog. It was a daunting task. At the beginning of 1996 there were 11,726 cases in the Sydney civil list. During 1995 the Chief Judge had decided that all efforts were to be made to dispose of that backlog. It was agreed that a set number of Judges would be allocated each week to the Sydney civil list which would allow certainty in the allocation of cases for hearing. When the Court made their attack on the Motor Accidents List and the GIO Tail three Judges had been allocated and those three Judges were always available to do that work. The task now facing the Court was a much larger one. It was at first decided that at least seven Judges would be allocated each week. The Chief Judge, however, has been able to increase that number and we now on a regular basis have more than ten Judges hearing civil cases in Sydney each week.

Since the beginning of 1996 one Judge has been allocated to hear industrial deafness cases both in Sydney and in the country and at the present time two Judges are now hearing those cases. One Judge is allocated whenever it is necessary to spend a whole week hearing victims compensation appeals and each Thursday a Judge hears the *Motor Accidents Act* motions and on Friday another Judge hears the Court motions. In addition to that, the Court has also been able to carry on and keep up to date with its tribunal work. The result, as I said earlier, is that by the end of this year there will be no backlog in the Sydney civil list. In effect, within a period of three years, a very large backlog has been disposed of but I believe it is important that we look to see how that was done.

I believe that the most important reason for the success was the change in philosophy. That is, the change from a totally negative philosophy to a positive philosophy. We have been fortunate in having two Chief Judges were were prepared to encourage the Court to change and were prepared to make Judges available to allow that philosophy to be put into place. The government made available Acting Judges, it was fully supported by Claude Wotton, the Chief Executive Officer of the Court, and by a number of the Court staff and it was achieved with Judges who were prepared to work hard, to work long hours and, indeed, to change their own philosophy. It is important to recognise the part played by the Judges. The system demanded that Judges not only work long hours, but they spent long hours in Court. It has, over that period, been rare to find a Judge finishing before 4.00 pm, that is, the Judges are in Court hearing cases all day, every day. Judgments often have to be done at night or at the weekends. During 1996 and up to 18 October the Judges have themselves disposed of 3,600 cases. These cases were actually listed before Judges for hearing. There is a lot of pressure on Judges at the moment, and I believe that steps will have to be taken to ease that pressure. This is not something I need to discuss in this paper but it is important.

The arbitration system has played a vital part in the elimination of the backlog. The system has been accepted by the profession. Solicitors and barristers have generously given of their time to ensure the success of the system and it was a very important factor in the elimination of the backlog. About 80% of cases referred to arbitration do not come back into the Court system. Part of the system the Court developed was very important in supporting the arbitration system. It was decided that, where a party requested a re-hearing of an arbitration, they would be immediately allocated a date for hearing and allocated a date within three months of the request for the re-hearing. That meant that arbitrations were attractive. Parties knew that, even if their case was not finalised at arbitration, it would very soon thereafter be before a Judge of the Court. It also meant that parties could not use the arbitration system for a "dry run" to gauge the strength or weakness of their case as the parties were not given the opportunity to prepare a case for hearing after an arbitration. The arbitration hearing became a serious hearing and I believe that the statistics show that the number of requests for re-hearing fell. It is important that the Judges of the Court hear the same case that the arbitrator heard.

The management of cases by the Court has been very important in the elimination of the backlog. Whilst the management generally is minimal it is important. The Court had to convince the profession to accept early hearing dates and to prepare cases for hearing. The profession have not completely changed their attitude towards the early listing of cases. A number of members of the profession are unable to quickly prepare a case for hearing. The old ways are often so ingrained that it is difficult to change, but slowly people are changing. More and more cases are ready to take an arbitration

or hearing date when they first come before the Court. In my opinion the Court must now always manage cases to some limited extent. The provision of a set number of Judges each week was very important. The Chief Judge has worked miracles in providing those Judges. It is very important to any system that, when cases are allocated a hearing date, the number of Judges available to hear cases is known. In the past it was often the Sydney civil list which suffered when Judges had to be sent elsewhere and so it was difficult to know whether there would be one or ten Judges available. With certainty of Judges you can have certainty of listing and so be confident that most cases will be reached.

The profession have played an extremely important part in the elimination of the backlog. I accept that it is inconvenient to have to come to Court at 9.30 in the morning before your case has been listed before a Judge. I accept that it is inconvenient to leave the comfort of chambers for the uncomfortable surroundings of the John Maddison Tower, but it is vital to the system. If we do not have barristers and solicitors at Court to discuss settlement, to narrow the issues and to allow the Judges more time in Court then the system, in my view, will return to where it was some years ago. It is not uncommon for barristers and solicitors to work together all morning and even up to 4.00 pm before they finally settle a case. Barristers generally have to be complimented on the way they have presented their cases to the Court. Generally, they do not waste time, they narrow the issues and cases do not take as long to hear.

"A backlog will build up if the Court is not constantly vigilant."

I should stress that the Court has not altered the way in which cases have been traditionally heard. All the Court has tried to do is to reduce the time spent in Court yet, at the same time, allowing the important issues to be fully litigated. There has been no dramatic change in the way in which cases are heard.

The listing system was changed as we had certainty of numbers of Judges. In the past, if a case was listed for three days, for example, then three spaces on consecutive days were ruled out of the diary. If it settled or was adjourned, three blank spaces appeared in the diary. A system was developed whereby each case or group of cases to be heard together were classified as one unit and a set number of units, depending on the number of Judges sitting, were listed each day. A set number of units were set aside for priority cases.

A number of cases have not been reached on the first occasion they were listed this year and that is regrettable, however that number is still under 10% of cases listed for hearing before Judges. I believe that that is an acceptable number. We would like to have all cases reached on the first occasion but it is not possible if we are to keep the Judges fully occupied hearing cases. We have had a number of cases not ready to proceed after a hearing date has been allocated. Applications for an adjournment are made at such a time that the hearing which has to be vacated cannot be re-allocated and so extra cases have to be listed to cover these cases and so, from time to time, there will be cases which are not reached. However, we offer those cases the earliest possible date for another hearing and it is extremely rare to see a case not reached on the second occasion.

The system has also been changed to allow the List Judge input in the allocation of cases in the reserve hearing list. Basically, cases are allocated by the List Clerk but the List Judge and List Clerk are in constant contact during the day. A phone has been installed in the List Judge's Court and it has proved invaluable.

A change in policy relating to the listing of jury actions also took place. Jury cases were, in the past, put in the reserve list. That was altered to list jury cases first. It was easier to find available Judges and those cases often settle once they get a start and, in fact, that has happened. These cases used to clog the list but that no longer happens and there is no backlog of the jury cases.

There are a number of areas in which we need to take action if we are to continue to quickly hear cases and to ensure that we never again have a substantial backlog. Firstly, we have to guard against any future backlog building up. A backlog will build up if the Court is not constantly vigilant. It can build up quickly and it can get out of control. We need sufficient numbers of Judges available to hear cases.

Secondly, we need more co-operation in some areas. In the Motor Accidents List a recent problem has started to cause delays. Some insurers refuse to consent to extended jurisdiction. It is not uncommon for a case to be set down for four or five days or more and then a short time before it is to be heard it has to be adjourned to allow the plaintiff to apply to the Supreme Court for permission to transfer his or her case to that Court. There is one motor accidents insurer who I have noticed does it on a regular basis. It causes a great problem in our list. We have set aside valuable time for a case to be heard, the case is taken out of the list and it cannot be replaced. I have to ask what reason the motor accident insurer would have for not consenting to unlimited jurisdiction? The case has a hearing date, it is prepared and the Court is ready to hear it. The Court on a daily basis hears cases which exceed the jurisdiction of the Court. By not consenting to extended jurisdiction the Court's time is wasted, there is the cost of an application to the Supreme Court, the

extra costs in transferring it to the Supreme Court, the extra costs involved in running a case before the Supreme Court and the extra cost to the Supreme Court itself and one has to ask why. I have asked and ask again: Should an insurer be allowed to waste the motorists' moneys in this way? The costs of refusal to consent to extended jurisdiction have to be passed on to the motorists of this State. It is a constant source of problems in our Court. I should add that this refusal to consent to extended jurisdiction is not confined to motor accident insurers. Other insurers at times do not consent. I should also say that many insurers do consent and readily consent to extend the jurisdiction. It is a problem which I believe can be simply remedied by giving the Judges of this Court power in the appropriate case to extend the jurisdiction.

Thirdly, solicitors in particular have to be prepared not to start a case until it is ready to proceed to a hearing. Once they start a case then they must quickly have it ready for hearing as the case will be disposed of by the Court within a period of 12 months. Too often cases are not ready to proceed when they are commenced and I personally believe that the Court will have to have a system whereby cases which are not ready are struck out. If we do not have such a system I fear that we may develop a backlog of cases not ready to proceed. There really needs to be a change of attitude and a change in the way in which cases are prepared but I have confidence that, providing the Court insists on the speedy preparation of cases, the profession will respond.

It is important that we look at what has happened over the last three years, that we take forward with us the most important aspects of case management which we have found have worked. It is important that we maintain a positive attitude. It is, in my view, important that we constantly look to ways to improve our system. There are several areas I believe we can look at straightaway:-

1. We should carefully consider the calling of doctors to give evidence. Generally speaking, doctors provide very helpful reports. It is unusual to see a doctor who has considered his or her opinion change that opinion under cross-examination. Often doctors are called because they have been given an inaccurate history and it is, of course, important that the correct history be put to them. Too often, even though it is obvious that a doctor has been given an incorrect history, steps are not taken to put before the doctor an accurate history to allow the doctor to give an opinion in relation to that accurate history and to avoid having to call the doctor to give evidence in Court.

2. Quite often experts are called to give evidence, even though they do not add to the plaintiff's or defendant's case and I believe careful thought has to be given by the Courts to allowing the cost of the calling of doctors and experts who are not going to advance the plaintiff's or defendant's cases.

3. One of the major problems the Judges have is the requirement for often lengthy judgments which, in the end, are not necessary. It is, of course, important that a party to an action knows the reasons the Judge has arrived at his or her decision, however judgments, and often very lengthy judgments, often have to be prepared when, in the end, the parties would be more than content with simply knowing the result and very brief reasons as to why the Judge arrived at that decision. I believe that careful thought has to be given to this area and that, where possible, some relief has to be provided to Judges and this would result in a great saving of Court time.

4. Judges, and certainly Judges of the District Court, need help if they are to work long and constant hours. The Judges in civil cases rarely, if ever, get a transcript. They have to prepare their judgments from their own notes taken in Court. It really is ludicrous to think that the finest shorthand writers are employed to take down an accurate transcript of evidence in Court and yet a Judge is expected to take down the same evidence and to prepare his or her judgment from those notes. True it is, a Judge can, after a number of weeks, obtain a transcript, but by that time the Judge has heard many cases and it is very difficult to wait for a transcript before doing the judgment and it is also unfair to the parties to ask them to wait. Judges are given help but if we are to modernise our Court system and to keep hearing cases at the rate we are hearing them now, we need help. If we do not get that help then I believe that the Court will lose Judges who simply are not prepared to keep working at the pace required of them without assistance.

5. We have to consider whether further steps should be taken to shorten the hearing of cases. I know that it has been discussed in the past as to whether the evidence-in-chief of witnesses should not be put in statement form in all cases. I must say I have never supported that suggestion in the past, but I am certainly more prepared to consider it now as I know are other Judges as it may shorten the length of cases and also give the Judge some assistance by having a typewritten document in front of the Judge when the Judge comes to consider his or her decision.

The District Court of New South Wales has shown that, at least in its jurisdiction, providing you have a positive attitude towards the elimination of a backlog and particularly towards providing hearing dates, you can eliminate even a very large backlog.

The Court now has to work very hard at keeping a positive attitude and of ensuring that never again do we have a backlog. We have to ensure that at least 90% of cases commenced in the Court's civil jurisdiction are concluded within 12 months. We are now in a position where we can control our future. ❑

Response - Bret Walker SC

The Law Council of Australia has established a small task force to contribute to the Australian Law Reform Commission's enquiry into the adversarial system. The task force consists of myself as convenor and two other members of the profession, namely Tony Abbott from South Australia and Rod Smith from Victoria, both of whom bring a considerable breadth of experience in different jurisdictions. In addition to the task force, the Law Council has established a larger reference group which contains solicitors and barristers drawn from around the country. At this early stage of the ALRC reference there is no group view and, as you can imagine, achieving a national group view on such topics is a very difficult matter. Nothing I say today should be taken as representing a Law Council of Australia view, or at least not yet.

We intend to contribute to the ALRC enquiry in a helpful fashion. To coin a phrase, we wish to be co-operative rather than adversary. But we also intend to start pushing at some of those labels. We will, of course, have different points of view among ourselves as well as against some of those tentative views expressed by Mr Rose and Justice Davies today. Above all else however, and whatever the fate of the ALRC reference, the Law Council and the New South Wales Bar Association intend to contribute practical suggestions for the improvement of the justice system. And we are not ashamed of being accused of resorting to a band-aid method. The reforms in Victoria which Judge Jones has described could equally be regarded as the application of a band-aid. Even if it is conceded that the reforms in Victoria are more radical than that description, nevertheless, they are recognisable as an improvement to a recognisable system. The revelation provided by a national perspective today is that reforms already operating in New South Wales are similar to those we have heard described in Queensland from Justice Davies and to those described by Judge Jones which have taken place in Victoria. This is not to suggest that New South Wales set the lead, but the national perspective reveals how Australia can sometimes suffer from federalism. It takes a seminar such as this to demonstrate that the various jurisdictions are unaware of what is occurring in other States. There is a lack of national intelligence about the litigation process which is to our detriment. It is hoped that the investigation made by the ALRC, and the Law Council's initiative in responding to it, will ultimately overcome this disadvantage.

The Law Council does not believe that because the system needs improving it necessarily follows that it is in crisis. Nor that it should be described as a bad system. We do not believe that it demonstrates there are defects in the adversarial culture or in the adversarial imperative. In a civilised democracy, it is axiomatic that all institutions will need improving. Improvements need to be continuously discussed and anticipated. Where the institution being appraised is not responsive to popular voice by a simple popular vote, it is even more essential that we continue to keep it under review. That is not a sign of crisis. It is not a sign of inherent vice. Nor is it retrograde to understand that we benefit not only from anticipating future needs but also from comprehending the past. The 19th century was the great era of law reform. Procedures were instituted then, as reforms, which we still use today. In their time *Judicature Act* pleadings were the best and most intellectually rigorous way of bringing a case to trial. The relevant issues, only those truly in contest, were isolated for investigation and decision. Pleadings still conceptually and therefore intellectually track our causes of action. They were once ideal for Common Law actions but we must recognise that as the causes for action become more discretionary, more dependent on individual cases of conscionability, *Judicature Act* pleadings are revealed as out of date. In short, it may not be the system which is at fault, but rather that we are asking it to do so much more than it was ever designed to encompass.

Another example is the balancing act, which is attempted by the great Evidence Acts, where the discovery of truth on the one hand is offset by expediency - "let us have an end to the case" - on the other. It is a balance which continually needs to be struck and restruck. It is not a cause for us to beat our breasts with self-criticism. The task of establishing balance is something we will always have to undertake. We should not be daunted by the size of it.

We reject the idea that the legal profession is conservative. The law is subject to constant change both procedurally and substantively. Lawyers deal with changes more often than anyone else. But lawyers also hear from clients, particularly business clients, about the need for stability. They are told of the attraction, compared with some others, of the Australian legal system which operates with relative predictability. It follows that incremental change should be be disparaged as timid and insufficient, but as beneficial. Disruptive reform comes at too high a price, particularly in relation to business.

Social demands embodied in legislation, rather than lawyers, have over-strained the legal system. Sophisticated taxation laws and the Corporations Law require a sophisticated legal system to deal with them. Just as you cannot have clean water without paying for dams, nor can you cope with complex modern laws in courts which are not properly resourced.

For all these reasons the Law Council will argue against any radical "Year Zero" approach which erases the past and the present in the name of the future. Reinventing the courts, in short, must not be reinventing the wheel. Calls to revolution often end very quickly as calls to the barricades, ie conflict and resistance. Incremental change will not encounter the same resistance. The last 15 years' experience in Queensland, Victoria and New South Wales has demonstrated that considerable changes can be achieved within the existing system and the profession will be among the first to welcome them. It is the profession who then introduce the benefits of these changes to their clients.

Nor should it be forgotten how much parliamentarians have pushed courts beyond their capacity to meet expectations. Legislation has added enormously to the substantive rights and obligations of a citizen of Australia, or of a corporation doing business in Australia. But rights and obligations are worthless unless they can be enforced. They cannot be enforced unless they are justiciable. And in a civilised democracy they are justiciable only in courts. In our system, courts are expected to make case law not only to fill the gaps but also to satisfy an innate sense of justice. That is Common Law. That is Equity. The combined effect of community expectations, if you assume that parliament reflects the people's will, results in courts being required to do more and more. Laws such as the *Trade Practices Act, Contracts Review Act*, the *Family Provision Act* and the *Family Law Act* are increasingly designed to introduce discretions and fine gradations of judgment for individual circumstances. Fewer and fewer cases are being determined by black and white rules. More and more evidence must be considered to arrive at an individual outcome. Yet we are still working with the structure envisaged by the 19th century law reformers.

Reinventing the Courts should be interpreted, first, as re-endowing the courts. They must be given resources commensurate with their present task, on a scale proportionate to the resources made available to meet their 19th century tasks. In the days of pen, ink and paper last century, the resources allocated to the courts were not dissimilar to the resources available then to the highest reaches of executive government and business. Today there is an appalling gap between the logistic and information services available to the courts and those which serve the highest levels of executive government and business. Yet courts are still expected to perform the same adjudicatory role in relation to executive government and business in this century as they were in the last. Indeed, they are expected to interact at a more complex level.

Once again, it is clear that just as you cannot have clean water without paying for your dams, you cannot have a proper justice system, which adjudicates on the community's rights and obligations, without providing the primary resource of more judges. The public cannot expect more justice from fewer judges. Politicians have an obligation to educate the electorate that just as you cannot have medicine without doctors, so you cannot have justice without judges. And the profession must join with the politicians to educate the community to understand how changes in the legal system change the nature and style of the judges' workload.

There are fewer cases now in the civil jurisdiction which are decided by juries. That requires more reasoned judgments, and so judges must do more writing. There is more written evidence-in-chief and this will increase if some of the planned reforms are carried out. That means more reading for judges. There is more written argument and there will be a great deal more written argument at all levels of the system. That, also, is more reading for the judges. Nothing is more lowering than the spectacle of a quiet courtroom in which, if there was a real clock, you could hear the tick while a judge reads a document in the presence of parties, witnesses, court staff and lawyers. It is a sorry spectacle, and yet the pressure on the judge merely to skim read makes it even worse. Time is wasted, and not used well.

Judges must be able to read these papers out of court, with an appropriate amount of time, at a proper time of the day and of the week. It is monstrous to expect our judges to get up at dawn and stay till midnight and to work at the weekends reading documents so that they can then put on a performance during the week. The public must be educated out of the notion that unless a judge is sitting in court, the

Members' Suggestions Invited

The Law Council of Australia effort to contribute to the ALRC inquiry into the adversarial system needs your help. The purpose of having the wider reference group drawn from the bodies which constitute the Law Council - ie the various Bar Associations and Law Societies - is to enlist the collective thinking of experienced practitioners. The emphasis is on our practical experience and the valuable perspective it should give to what might otherwise by an excessively academic, theoretical or sociological exercise.

Ruth McColl SC is our representative on that wider reference group. With Walker SC, she will co-ordinate the collation of members' suggestions and the presentation of our collective views. All suggestions are very welcome. They will all be carefully considered. We hope to arrange interim drafts for discussion in the new term. Please send your suggestions, in writing, to Ruth McColl SC, DX 399 Sydney. If you wish to discuss the matter before going to print, Walker SC (02 9233 8760) and McColl SC (02 9233 2847) will be happy to receive your calls.

What kind of suggestions do we want? Anything of any kind which you think could improve our present system of civil litigation. (Criminal justice cannot be dealt with by the ALRC because of its limited terms of reference stemming from the Commonwealth's limited role in crime.) You might find it useful, say, to list three areas where in your experience doing things differently would make litigation quicker to conclude, less costly to conduct and more calculated to achieve fair justice. Preferably, you would describe each suggested improvement, with brief reasons for its adoption. ❑

public's money is being wasted and a scandal is being perpetrated. Judging has to be understood as something which largely involves quiet reflection in chambers, both before and after the oral occasion. The latter must be seen as a small, very important, but peak experience in litigation and by no means the whole of the judging task.

May I turn very briefly to questions about the adversarial system in itself. Today we have heard a couple of definitions of what "inquisitorial" may mean and how it may compare to "adversarial". Adversarial is used, I suggest to you, because of its propagandist purposes. It makes it sound like a combat and a brawl and that is nasty, or so we are told. Inquisitorial, I have to say, also sounds like interrogation or torture. That is nasty too. At least you can say, if you want to trade connotations, that an inquisitorial process sounds like one where the judge wields the red hot pincers. By contrast, even its critics concede that the adversarial process is defined by the aloofness of the judge - ie his or her impartiality. I think these labels, particularly the connotations that are sought to be drawn from them, are quite useless. Worse than that, they confuse and delay the analysis we all need.

It seems to me that Mr Rose's definition of inquisitorial is something which really doesn't go beyond what all of us, at least in New South Wales, are used to, as a proper measure of judicial activism in litigation. Unless and until you forbid parties bringing the fruits of their private investigations to court in a relevant, ordered, timely and efficient fashion, then our system of justice will still possess the true essence of an adversarial system, namely that the State appointee, the judge, is not a sole ringmaster of the material that can be considered to determine the dispute.

There are some fundamental values about the function of the courts which should inform us when we talk about something as radical as reinventing them. There are some things that courts are not and must never pretend to be. Courts are not wide-ranging debating clubs. They are not public policy forums. They are not endless, private Royal Commissions. Everyone can agree on these. But I would stress also that courts are not social workers. They are not community counsellors and they are certainly not priests, or for the secular they are not your venerable uncle or aunt. They are there to determine those disputes which remain after those which can be settled have been screened out by all the other mechanisms. Courts will decide them according to law, not according to palm tree justice or what seems to the judge to be in the so-called interests of parties, but according to the rights and obligations which parliament and the common law accord to the community. If we refuse to adjudicate these rights and obligations properly, then we betray them by revealing they have no force.

When we talk about a court's role in dispute resolution, we must remember that there are, first, disputes and, second, resolutions. The courts are only a small part of the dispute resolution business. If the adversary system is something which is seen as bad, because it is bad to be adversarial, then behind it all must be some notion that being in dispute is bad. We should reject that. In a civilised democracy, differences of opinion in business, differences of interest, and above all, in the dealings between citizen and State differences of perception, are the mark of a healthy society. Colloquially, Australians are stroppy enough to claim their rights. Of course, they are only perceived rights when an individual claims them. That is why we have courts: to determine which side's perception is correct. If rights and obligations are worth having at all, they must be capable of being enforced. The court's role, therefore, must be to decide them when they have to be decided.

The better courts do that, we may rest assured, the more business courts will have. Courts are going to be the victims of their own success. For those reasons, the crisis of which the Chief Justice speaks is, in my view, a phoney one. It is, after all, a curious crisis which has persisted for so long. Or is there someone who says it has arisen only in the last year or so? If we improve the system as we all wish, so that people aren't put off disputing their rights because dispute resolution is barbarous - if we improve the system, we will have those people in the lists, as it were. A better way of looking at it, in my view, is that they will be asking for justice in a way which should not be a matter of shame in a civilised society. The better service we give litigants, the less disincentive there will be for litigants. We have to get used to that paradox. It means that we will never be satisfactory to everybody.

Grievances or disagreements cannot be prevented by pretending that they have no right to exist. Talk of consensus models must not degenerate into the farce of insisting that people must be forced to agree. That would amount to denying people the full measure of their rights and obligations by traducing them as anti-social and adversarial. Nor can we allow the idea to develop that to push a dispute to a final decision will result in the complainant being punished by costs or some other sanction. That would be an abrogation of the justice which the system should provide for the public.

This does not mean that we are against compromise. Every litigator knows that without compromises the system would grind to a halt. The adversarial system is characterised by huge settlement rates in the vicinity of 90%. This is a percentage from the total of cases which are commenced in the first place. Yet some people would assert that the adversarial system foments disputes, or maintains or prolongs them. On the contrary, the evidence of high settlement rates suggests that the system is very, very unsuccessful at any such thing. Not only do 90% of cases commenced, settle. Every solicitor knows that those which are actually commenced are themselves a small percentage of the disputes that arose in the first place. It is time we were less apologetic about the litigation system and the rate of its dispute resolution. Litigation is only the most spectacular form of dispute resolution. It must never be seen as the most important. The aim should be to shrink the tip of the iceberg, ie the unsettled cases. The techniques used in Victoria and Queensland as

well as those in New South Wales lend themselves to that goal. On its own behalf and in the interests of its clients, the profession supports those reforms.

The terms of reference of the ALRC include the requirement to canvass the advantages and disadvantages of the adversarial system. It is notable that there is so far great reticence from the ALRC as to the advantages of the present system. That suggests two possibilities. First, that the advantages are so obvious they go without saying. Alternatively, it suggests that the ALRC has pre-determined that the adversarial system is one which has only disadvantages. That might be true, as I suggested earlier, if you regard disputation as inherently bad, or if the resolution of disputes must never be in accordance with an individual's insistence on rights or obligations but always result in compromise. If so, it would logically follow that any dispute resolution which resulted in winners and losers was detrimental. But lawyers, particularly those of the profession who are litigators, should not see themselves as workers in some social abattoirs because they participate in occasions where there are winners and losers.

If someone has a right which is being denied, are we too coy to maintain that it is the proper outcome of justice for that person to win a case against the individual who is denying their right, or refusing to discharge an obligation? To achieve compromise, someone must always pay the price of not obtaining their full rights. We should not cast a sentimental glow over compromise. Or feel that agreement is always better than a dispute. The small citizen oppressed by the large State may have rights which ought to be fully vindicated. That does not mean there is not a place for compromise, but we should not take pride in a system which pushes people into compromise simply because it is seen as socially divisive to have winners and losers. We ought to be proud that there is no recourse to firearms, no reliance on bribery, but trust in an impartial justice system to determine those cases which really do need to be decided. Every barrister who has ever urged compromise, every solicitor who has ever urged settling before the barristers are involved, knows that the way you persuade your client is to say that there is certainty by compromise which will otherwise not be achieved until final appellate judgment in litigation. But you buy certainty at a price, and that price is giving up something to which you believe you are entitled. Compromise is entirely healthy - but it must be recognised as very different from the vindication of rights and enforcement of obligations.

There are fundamentals which ought to be considered in the context of reinventing the courts, particularly if criticising the adversarial system, or seeking to change it more towards the inquisitorial method.

"To achieve compromise, someone must always pay the price of not obtaining their full rights."

The first question which must be raised by any would-be reformer is what we want from a justice system. In other words, what are the values of the administration of justice? I suggest they are to be deduced from the nature of our society as a civilised democracy, civilised in the sense of being sophisticated and encompassing disparate interests. A democracy because every citizen has an essential equality before the law and a voice in government. On that high plane, it is possible to discern values which place the adversarial system in a good light. We want truth as to the facts. Furthermore, our adversarial system is not just about winning. It is about persuading the impartial adjudicator by a mixture of inherent credibility, among other things, and by cogent criticisms of the other side's version, that the truth is more likely to lie with one side than the other. Any litigator knows that, at the end of the day, what we sometimes laughingly call the merits have more than a passing resemblance to what we also suspect may be the truth. That is the first value: truth as to the facts.

The second value is an obvious one in a society governed by the rule of law. There has to be some predictability and equality of application as to the law. Parliament plays a role there. Perhaps there should now be litigation impact statements for parliamentarians. Every time they legislate they should ask themselves what it is which has now become justiciable which was not formerly justiciable. What can now be argued about which was not formerly argued about? What circumstances are now relevant as evidence, not formerly relevant as evidence? It would be a very long catalogue if one did that backwards for the last 25 years.

Finally, the third value ought to go without saying, but if we are talking about inquisitorial models, shouldn't go without repeating. The adjudicator must be impartial. Every step the court takes closer to preventing a party challenging a prima facie view of the facts, or not being permitted to argue an unpopular view of the law, is a step the court takes closer actually, not just apparently to being identified with one side or another. And at that point, I suggest, such social consensus as we have about the administration of justice will start to unravel.

From time to time, each generation will need to work out its own principles to achieve these values, or at least to come as close as mankind can. The cardinal principle, it would seem to me, which needs to be retained while we experience what some call a crisis, is that procedural and substantive fairness must be preserved. There must also be a reasonable opportunity for parties to present cases, although with a closer scrutiny on what reasonable means. There must be value for money. And of course, there must be early or faster

determination.

Concern for a faster process is presently focussed on time limits: pre-trial limits on what the parties can do, and time limits during a case. The judiciary must also be aware that sooner or later it will be suggested that there is a third phase which has not been touched. Pre-trial, during the trial, and (next) after the trial. Sooner or later someone is going to say early determination means early decision. Judges will have to understand that for them to propose time limits for the other players in litigation means they may need to propose time limits overtly for themselves. I am not proposing that there should be time limits. I am suggesting that the rhetoric which often accompanies judges' criticisms of parties making their own decisions about what should or should not be done is rhetoric which can very easily, word for word, be turned against them.

Fundamental among the policies by which we seek to implement these values must be the recognition that change needs to be incremental. This must be a persuasive exercise. Clients, who are consumers of the legal system, will need persuading that they will receive better value for money when their lawyers are required to do more and different things pre-trial than is presently required. Personally, I am a partisan for very intensive case management before and during a trial, but it must be recognised by those of us who litigate at the big end of town that large commercial cases do not resemble the average case, and should not be allowed to skew the reform agenda. Too much discussion about litigation reform is based on the notoriously large cases. They are the atypical cases, and thus the worst possible bases for reform. Any civilised system would rather pitch the level of its resources to the ordinary case.

Thus, for example, concerns about discovery, at least in New South Wales, are perhaps overstated. I personally believe that discovery, like interrogatories in New South Wales, should be transformed. Discovery should be upon demand, on demonstrated need only and then by a fairly limited period of "hits" on particular issues, or categories of documents. We have done it with interrogatories. When I started at the Bar, interrogatories were 19th century and atavistic - and very common. We have got rid of them. We don't have US-style depositions of witnesses. We seem to get on well without them. A huge number of cases in New South Wales have no discovery at all. Many in the Supreme Court don't have it, and no case in the Local Court. We are kidding ourselves if we think that discovery is essential to the efficient adjudication of the facts, but it has to be said that discovery features in the complaints of practically everyone who talks about the spectacular cases that reach the newspapers. Discovery can be a most terrible weapon used by the rich against the poor - and the other rich. It has to be recalled, however, that it is a weapon that is used in most cases to improve our approach to determining the truth.

There are no easy answers. We cannot evade the prospect that the better the courts are at deciding disputes the more likely they are to be utilised by a free citizenry. What some people call the crisis in our system is probably more accurately the natural rhythm of social discontent with imperfect institutions. The rhythm becomes urgent from time to time, but we should certainly not see the system as one which must be castigated as malign or as exhibiting an anti-social tendency.

There are huge tensions in this area, and in my view working out how those tensions are to be balanced from time to time will be the task of the law reformers. But all law reformers must accept that their solutions are essentially temporary, because the tensions need to be struck in different places at different times. For example, we all wish that litigation would as closely as possible ascertain the truth of the facts in question, but none of us wishes to spend years and years investigating people and, then, reinvestigating them to see what they say six months later about the same events. And yet, can it be doubted that if you could have somebody back on a weekly basis for a year, you might have a better idea of what really happened if you could interrogate them every week? That is a caricature of the kind of tension that governs the subject. It is an example of how we must be very careful that we don't claim our reforms are more likely, for example, to uncover the truth. That is a very slippery slope towards returning to a 19th century no-holds-barred system. Another example is time limits, which in my personal view ought to be applied much more than they are now. There ought to be bids for the available time which has been set aside for the trial. The bids should be agreed initially by the parties and finally adjudicated by the case management judges. Time will be divided up and where people can't agree on how to divide it, the judge can rule. Good advocates and good litigators can work out in advance how to allocate time and resources to realise those limits. It is another part of the professional skill of the litigator. There should be more emphasis on forcing people, in advance, to set down a timetable within the trial - a process which is now second nature to all of us before the trial.

There ought to be positive encouragement from appellate tribunals for trial judges to be much more interventionist in their critical comments during cross-examination - argument too, for that matter, but particularly cross-examination. We have the tools now: section 41, paragraph 135(c) of the *Evidence Act*, and we've had precursors of them for decades. Judges should be much more free to say, "I don't think I have been helped by that Mr Walker" or "Do you really think pursuing that line is going to help?" And half an hour later when Mr Walker has not taken the hint, to simply say "You've got two minutes on that issue". I appal some of my colleagues by suggesting this should happen, but if one trusts the judges it is very difficult to see how that would cut across the proper determination of issues. Bearing in mind that advocacy is meant to be the art of persuasion, it is very difficult to see how one could resist the persuasive force of such judicial intervention. It is entirely proper for a judge to be able to

look at his or her watch and say, "I think I have heard enough on that issue". Of course, it will not happen unless, or until, the appellate tribunals make it quite plain that the judges will not cross the illegitimate line, down into the arena, by making comments about what they need in order to make a fair decision.

The final suggestion for reform today is to echo what has been said by a number of speakers this morning about the appalling deficiency in the collection of data about our justice system. All talk of law reform and particularly litigation reform is cursed by anecdotal material. Our opinions of what should or should not be done in court are all skewed by the last big or horrendous case in which we appeared or adjudicated.

Very few of us have time to remind ourselves, by talking to others or finding out about other cases, that the horrible case in which we appeared is exceptional and that lessons learned from it should not be extrapolated to the rest of the justice system. We need proper data collection, and we need it on a national basis so that the jurisdictions can learn from each other, rather than by just telling stories at forums like this one. We need a national data system which is created by all the judges reaching agreement among themselves on how the information can best be gathered, analysed and made available. We cannot afford four more years of committees before the courts get their national data in some consistent and compatible form. It really just ought to be done by courts having the courage to know that they won't sacrifice autonomy by allowing somebody to be a dictator and say, "Your software must be this, must be that, and cannot be this other thing". We can no longer manage with statistics which only allow us to know the plaint number, the date it was lodged, perhaps the way the case was disposed of, and the date this occurred, but practically nothing qualitative in between. Nothing about how many experts, and what kind of experts, nothing about the extent to which there was any actual dispute about the primary facts - and nothing about how long it took to cross-examine on elaborate witness statements, rather than on evidence-in-chief presented briefly by the witness speaking himself or herself.

For all those reasons, it seems to me that we ought not be embarrassed about the state of our litigation system to the point of regarding it as riddled with inherent vice. Rather, we should see it as a case of us using the 19th century model for too long and needing to adapt it for a 21st century model, understanding that it should be a child recognisable to its 19th century parent. Clichés, as we all know, are often used because, to use one myself, they hit the nail on the head. Litigation reform is an area where there is a constant danger of throwing the baby out with the bath water, where there is a danger of seeing justice as just another market commodity, or service, which it manifestly is not. There is also a danger that we may treat reinventing the courts as simply an expensive and embarrassing reinventing of the wheel. ❑

Reality Revisited -
The Repressed Memory Controversy

"If there is one area of Psychiatry where truth really matters, this is it! One only has to deal with a few families torn apart by allegations of abuse, with or without subsequent litigation, to appreciate the level of our responsibility in these cases." (Dr J Gelb.)

At the June 1996 Scientific Meeting of the Medico-Legal Society of New South Wales, the medical and legal controversies surrounding repressed memory as reality and as evidence, were discussed and debated.

The evening's two speakers were Dr Jerome Gelb, a Consultant Psychiatrist from Melbourne and Mr Charles Waterstreet, a barrister in the Supreme Court of New South Wales. Both speakers have considerable experience on this topic from their respective medical and legal perspectives. From Dr Gelb's presentation we heard that:

- There is no scientifically sound evidence of repression.
- False memories can be easily created.
- Memories, both true or false, are responded to as if they were true.
- Therapists cannot distinguish true, false or mixed memories.

Mr Waterstreet commenced his paper by reminding us that in recent years trial lawyers have been "confronted with a disturbing phenomenon that seemingly contradicts the received wisdom of years of legal practice". He said, "traditionally, it was a forensic rule of thumb that memory fades with time. ... However, in the last decade or so, victims of sexual abuse have emerged claiming that they have recently remembered events from many years before that were unconsciously repressed." This evidence has, on occasion, been used to convict persons of these alleged offences and send them to gaol.

Mr Waterstreet spoke about the Tillot Guidelines and their application by the courts.

During question time, Forensic Psychiatrist Dr Bob Strum likened the prosecution of alleged perpetrators of abuse akin to the acts portrayed in Arthur Miller's play *"The Crucible"*. On the other hand, barrister Glen Bartley stated that he had a case "where there was spontaneous retrieval and the perpetrator subsequently admitted it, despite about 15 years of loss of the memory".

The vigorous nature of the questioning demonstrated the great interest that the medical and legal professions have in this topic.

All members of the Medico-Legal Society of New South Wales receive the full text of the proceedings of the Quarterly Medico-Legal Society Scientific Meetings.

To join the Medico-Legal Society of New South Wales, contact the Executive Secretary, Ms Janet Burke, PO Box 1215 Double Bay NSW 2028, or telephone (02) 9363 9488. ❑

First We Count All the Lawyers

A new report from the Centre for Legal Education dispels the myth that Australian universities are producing too many lawyers.

Career Intentions of Australian Law Students surveyed more than 4,000 final year students at 26 universities. Less than half gave as their first preference for a career practising as a solicitor or barrister in the private profession. The study shows that the broader benefits of a law degree are well understood by today's students who look to their legal knowledge to enhance their career options.

It is often said that young people enter the legal profession because it will bring "high income" and "high status". In this survey, while these issues were mentioned, the most popular reason for studying law was "an interest in the subject matter of law".

A surprisingly large number of respondents (22%) planned to work in the private legal profession for not more than five years - again showing the tendency for the law to be the underpinning of a broad range of careers.

For one quarter of the respondents, law was a graduate degree and 34% were mature age students. More than a quarter of the students were enrolled in law combined with "business-related" studies.

Career Intentions of Australian Law Students is the latest report from the Law Foundation's Centre for Legal Education. The CLE promotes and advances legal education by conducting policy oriented research, collecting and disseminating information and providing support to other bodies involved in legal education.

They produce a quarterly newsletter and regular digests and reports. For more information about *Career Intentions of Australian Law Students* or any other publication, you can contact the Centre on (02) 9221 3699, fax (02) 9221 6280 or email cle@fl.asn.au. Copies of the report are $30. ❑

Letter to the Editor

Dear Editor,

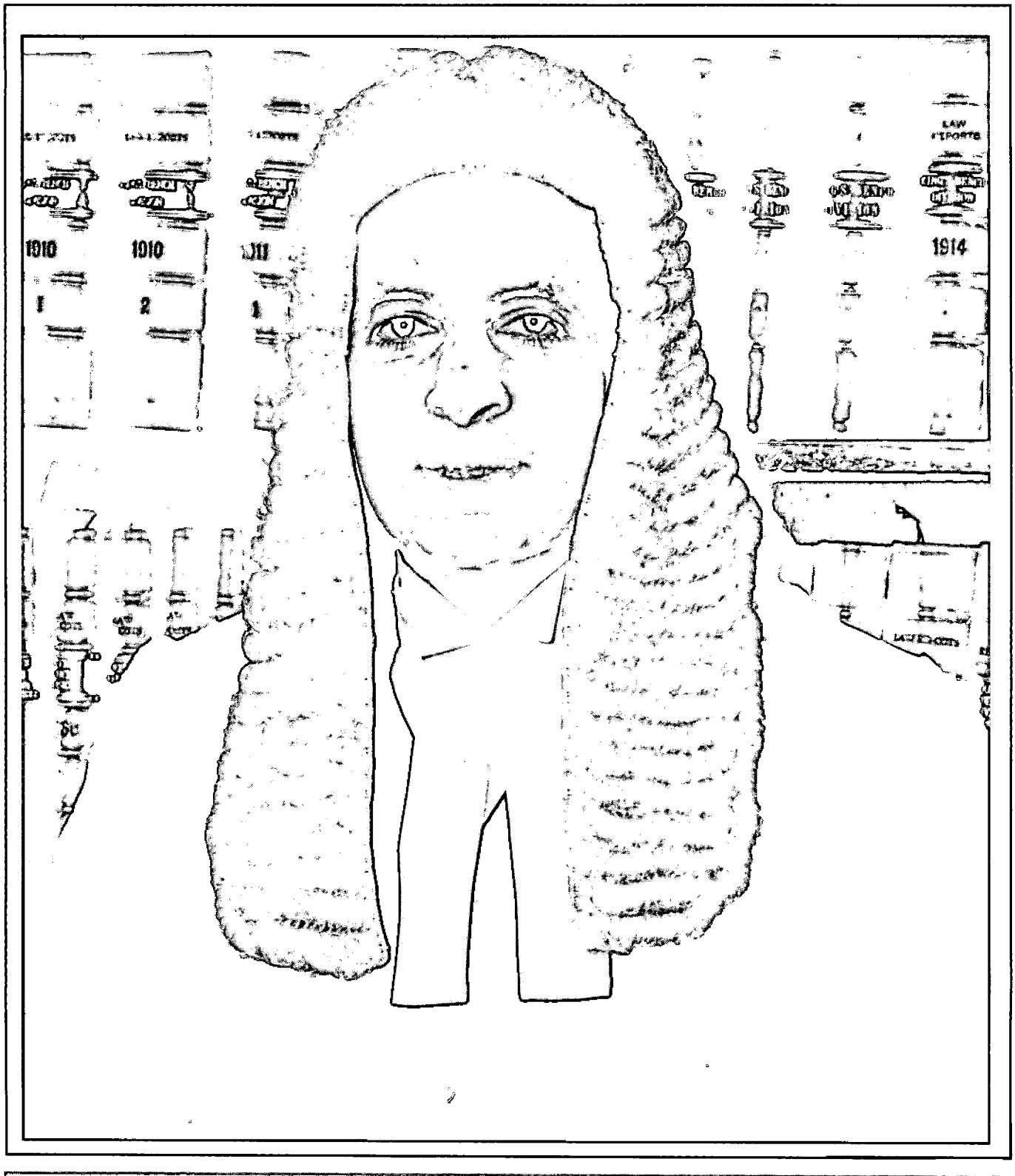
No-one loves a pedant, I know, but I can't resist the temptation: reference 'From the President' Winter '96 issue.

Shakespeare didn't say "first thing, let's kill all the lawyers"; he said (or wrote) "The first thing we do, lets kill all the lawyers". See Second Part of *King Henry the Sixth*, Act IV, Sc. II, lines 86-7.

Regards,
Michael O'Brien

Memorial Service for David Albert Yeldham QC

David Yeldham QC died on 4 November 1996. A service of thanksgiving was held in his memory at the Parish Church of St James at King Street in Sydney on Thursday 21 November 1996. Three eulogies were delivered during the service. Bar News reproduces them in their entirety in honour of his memory.



Justice M J R Clarke

It is a signal honour to be invited to pay a tribute to a great friend of forty years and to salute a lifetime of achievement and service.

David Yeldham was always going to be a leader, and as a boy the most obvious choice as the student most likely to succeed. I was not at school with at Knox but not only was he foremost amongst students as the School Captain and the winner of the Sports and Studies Prize, but he was also popular amongst the students and the teachers.

One anomaly in his career is the poor pass that he gained in the Leaving Certificate. His closest friend, Justice Morris Ireland, has told me that is explained quite simply. The Headmaster had such faith in David that he delegated duties to him far beyond those normally entrusted to a schoolboy. As a result of these extensive civic duties he was unable to devote time to study. The trust that the Headmaster reposed in him resulted, according to another master of the time, from his extraordinary capacity to listen, digest the facts, analyse the problem and then speak with authority. A capacity which he carried through his life.

I first met him when he was in his last year of an Arts/ Law Degree course and I was in my final year at school. He was already something of a cult hero to the students at the school and I suspect that was because he was held up to us as an example by our teachers. I was at that time contemplating studying Law but was somewhat uncertain about my capacity to succeed in that area. David would have none of it and that was the first occasion on which he encouraged me, as in his lifetime he encouraged so many others, to "give it a go". He, of course, went on to graduate soon after with First Class Honours in Law and the John George Dalley Prize.

His mother died when he was a young boy and he went to Knox Grammar School at a very early age. In order to put himself through university he worked as an articled clerk for his uncle, John Yeldham, who was himself a very highly respected solicitor at North Sydney. Even at that time his remarkable energy was evident. Apart from his work and his legal studies he took on the job as Secretary of the Knox Old Boys Association, then a rather languid organisation, and was responsible, almost single-handedly, for setting it on track to becoming a very active and worthwhile association of ex-students of the school. As a result of this involvement he also became a member of the School Council during the early fifties, which was a very difficult time for the school.

After his graduation he worked for his uncle as a solicitor for two years and was admitted to the Bar in 1955. Upon admission to the Bar he took up chambers in the basement of Denman Chambers, now sadly demolished. According to Mr Alan Loxton, President of the Law Society, speaking at David's swearing-in as a judge, the basement was known as 'The Dungeon' and his chambers were described as "The Broom Cupboard". It was there that he practised for the next seven or eight years having, in 1957, unsurprisingly, been elected to the Bar Council, a body on which he served for many years thereafter.

I saw David from time to time in these years, usually at a new club known as the Associated Schools Club in which David and John Kearney, later to become a judge, were prominent. At that time my University career was coming to an end and I was contemplating going to the Bar. A number of young barristers from whom I sought advice had spoken in discouraging terms. I sought advice from David. Again he was full of encouragement but not only that, knowing that I had very limited contacts and no chambers, he agreed to help me and to permit me to sit in his already overcrowded chambers. I frankly doubt whether I would have been bold enough to take the step without his encouragement and assistance. I did not read with him because at that time he was helping another new barrister, the distinguished Naval Officer, Rear Admiral Harold Farncombe. Nonetheless, I sat at a very small desk in his chambers for nearly a year and the lessons I there learned were fundamental to my advancement at the Bar.

David had been at the Bar for about four years when I joined him in his chambers. He then had one of the top Landlord and Tenant practices in Sydney. To observe him working was an eye-opener. He was in court virtually every day of the week and spent the evenings preparing for the next case and writing myriad advices. He also devoted much time to those bodies I have already mentioned. I suppose the greatest lesson that I learned in his chambers was the critical importance of preparation. David's was thorough and inventive. I was trying to recall some examples of the extent of his preparation when I read the recent article by his brother, Peter. He wrote of a small case which David handled as a young solicitor. His client was alleged to have committed an offence and this had been reported by a witness who claimed to have seen the offence by the local street lights. It seemed a simple open and shut case, but David went down to this particular street and he found it was a new street and that no lights had been installed. He took photographs showing the absence of lights and at the hearing destroyed the witness. He had a compelling need to know all the facts concerning the cases which he was to present and that instance stands as one small example of the extent of his preparation.

The other thing I remember clearly about David during the time I sat in his chambers was his decision to cease practising in the Landlord and Tenant jurisdiction. Having made the decision, he determined on a particular day never to take another brief in that area and, with the exception of one brief accepted as a favour to a friend, I do not think he ever did accept another brief in that jurisdiction. I remember thinking at the time it was a brave but silly act. How wrong I was. Within a very short time he was again in court every day of the week. This time in the Supreme Court in the Common Law, the Commercial and the Admiralty jurisdictions. It was then that he started developing his formidable practice.

In 1959 he married Anne and they moved into a lovely house at St Ives. He loved Anne, he loved married life, he loved his home and he loved the prospect of having a family. When his children, Bruce, Belinda and James arrived, he was devoted to them and loved them with all his heart. The legacy of the love and affection that David and Anne gave to their children is evident in the three marvellous young persons we see today, of whom both parents were justly very proud. Our families had many wonderful times together around the swimming pool or on the tennis court in the house at Hayden Avenue, Warrawee, to which they had moved or at our place at Killara. They were great days.

David was also extraordinarily generous to his friends. He was generous in a material sense but, more importantly, with his encouragement, his friendship and his affection. I sought his advice and his assistance on many occasions. I know Morris Ireland did also, particularly when David was helping him in his courageous and, I am glad to say, successful venture in studying Law when he was in his late 30s and going to the Bar. I have thought long and hard to recall when he ever asked me for any help. All that I can recall is that he did me the honour of asking me to be Bruce's Godfather, a task I willingly accepted and from which I was later to derive great pleasure.

David himself at this time had in excess of 20 Godchildren. This is an alarming thought, knowing his generosity, but it reflects his wide popularity and the genuine interest in, and affection for, the children of his friends which he retained to the day he died.

In the 1960s we witnessed the sad demolition of Denman Chambers and we all moved from there into various parts of Wentworth and Selborne. By then David was well and truly one of the leading juniors of the Bar, a situation which went on and on and on. People began to wonder whether he would ever take Silk and, indeed, some who were junior to him felt that they should delay applying for Silk themselves until he had become a Queen's Counsel.

During his time as a junior he appeared regularly with the leading Silks of the day, in particular J W Smyth QC, C L D Meares QC, R G Reynolds QC and Gordon Samuels QC. It was then evident that he was one of a very small and decreasing group whom they always sought as their juniors. He was also retained, almost from the time he was admitted, as counsel for the Law Society - a retainer that continued until he took Silk.

In 1969 he was appointed Procurator of the Presbyterian Church of Australia in New South Wales, a position he occupied until his elevation to the Bench. He occupied that office at a crucial time leading to the inauguration of the Uniting Church and he was heavily involved in giving counsel to the Moderator General. It was particularly interesting to me to hear the Headmaster of Knox say that David's great concern at that time was the protection of minority interests.

David took Silk in 1973 but after only one year was appointed to the Supreme Court. Upon his swearing-in he referred to the President of the Bar's description of him as "a bird of passage at the Inner Bar". He served as a judge in the Common Law Division, including in the Commercial List, and as the Admiralty Judge. He handled a variety of cases - difficult, complex Commercial and Admiralty cases; Criminal cases both at trial level and on appeal; Libel cases; indeed all cases, including the most run-of-the-mill. He had no airs or graces. For him there was a job to be done and he was there to do it. No matter the nature of the case if he was available he would hear it. On occasions he would deal with his case and move the whole of the reserve list as he called up case after case.

An extract from an article in the 1990 *Bar News* about a Readers' Course is illuminating. The grand finale of the course was the opportunity for readers to run a case in court all day in front of a Supreme Court judge. A number of judges offered their services, as did David Yeldham, who by then had retired. The article proceeds:

> ""The hearing commenced at 10 am. As the morning proceeded, a new threat emerged (which should have been fully foreseen) - the Yeldham factor. There was every danger that the case before his Honour would conclude a good three hours ahead of the rest."

He never shirked work, nor did he take time off to write judgments. The incredible speed with which his mind worked when coupled with his enormous energy enabled him to write a far greater volume of judgments than any other judge. This is in evidence in the Supreme Court Library where there are 53 volumes of his judgments and summings-up.

It has been said the he was a conservative judge. That he was sometimes rigid in his outlook. I do not fully understand the notion of a conservative judge, nor do I accept that he was not flexible. On the other hand, I do believe that he was a traditionalist judge who was of the firm conviction that it was the duty of judges to apply established principles and precedents. That did not, however, mean that where new territory had to be explored he held back. He did not. He was as inventive as any other judge on the Court. He would, for instance, have agreed with the following parts on an article written by a senior lecturer in law which appeared in the press only about two weeks ago:

> "Judges who are seen as activist, adventurously discovering rights, refusing to be bound by 'out of date' precedents and replacing strict rules with flexible standards based on reasonableness and fairness are coming to epitomise the proper judicial role.
>
> Nothing could be more mistaken. Judicial activism is bad. It inevitably eats the hand of those who nurture it. It involves judges in activities for which they are unsuited, it is profoundly anti-democratic, it acts as a disincentive for good politics and it destroys public respect for what judges are supposed to do ...
>
> Judicial activism involves judges in the political process but a career spent arguing and reading law cases is hardly appropriate training for making broad political

judgments. Nor is the judiciary well placed institutionally for making political decisions. Judges do not have the facilities to conduct research and they cannot conduct hearings to gather information and views from the public on contentious matters. They are also severely constrained in their ability to participate in and benefit from robust public debate and criticism."

I can hear him now firmly expressing his approval. There is no doubt that he was very quick in court. Nor did he suffer fools gladly. If, however, counsel had prepared their brief and had a genuine point there was no better judge. It should not be thought, however, that there were not moments of humour in David's court. Late in December one year he refused a prisoner's bail application and suffered the retort, "Well, your Honour, you are off my list for Christmas cards this year".

His retirement from the Bench was a sad occasion for all those who served with him and for those at the Bar who knew just what a good judge he was. Indeed, when the Chief Justice wrote to him he said he thought that he might need three new judges to replace him - not, I might add an inaccurate statement. In his retirement he worked for charities, conducted some arbitrations and, most of all, devoted himself to his family. Grandchildren were now on the scene and it was apparent to all his friends that they gave David the greatest joy. Most of us saw less of him after his retirement although there is a group, all of whom are here today, with whom he lunched virtually every Thursday during the legal term. These lunches started back in the '70s and it is somehow fitting that this service is taking place at lunchtime on Thursday.

David Yeldham was a man of formidable intellect, of enormous energy, of high integrity, of courage, resourcefulness and imagination but he was also a humble and generous man. His death was a tragedy.

Those of us who were privileged to know him well have a lost a friend for whom we had enormous respect and affection and who we knew was the best friend a person could have. I will remember only a marvellous man who led by example and who was an inspiration to me throughout his life.

We will all sadly miss him, but today we join with Anne, Bruce and Sue, Belinda, James and Desley and David's wider family, in remembering one of the finest men that the law and our community has known. ❑

David Bennett QC

The death of David Yeldham is a great tragedy for his family, the legal profession and the community.

So far as his family are concerned, I can do no better than quote his own words at his swearing-in as a Judge of the Supreme Court of New South Wales on 22 October 1974. He said:-

"The Bar, as most of us know, is a hard taskmaster. The life of the average barrister necessarily involves long and arduous hours of work and, with the possible exception of the medical profession, there is no other profession or calling which gives rise to such worry or concern to those engaged in its practice. The burden of this of necessity falls heavily upon the wife of a busy barrister. In my case I have indeed been fortunate in the sympathy, understanding and encouragement which I have always received from my wife and I would like to publicly acknowledge it and thank her most sincerely for it."

That sympathy, understanding and encouragement continued throughout David's judicial career and I am sure that he would have wished that gratitude to be at the forefront of the tributes being paid to him today.

Secondly, David Yeldham was a great member of the legal profession. After a period as an articled clerk and then a solicitor, he came to the Bar in 1955. While there he became one of the most eminent juniors the Bar has seen. As a senior junior he practised very much as a Silk. Those who appeared as his juniors and those who had the good fortune to share his floor during those years tell me that he was always available to hear and solve their problems and that he was never too busy to assist in the development and education of barristers junior to him. Frequently, when a case was over, he would detain his junior for some time while he explained the reasons for decisions made in the case, and discussed tactics and other aspects for the benefit of that junior's experience.

He had an enormous practice in Common Law, Defamation, Commercial Law and particularly Shipping and Admiralty, an area of law the mere mention of which has an effect on most landlubbers like myself akin to seasickness. As the de facto leader of the Admiralty Bar, he maintained the pre-eminence of the New South Wales Bar in that area. He held retainers for all the leading protection and indemnity clubs. His opinions, typed by his secretary for many years and later his associate, Betty Carr, were scholarly and well-researched. His chamber work was often returned the same day, and that included some of his opinions. He had one of the best libraries in Phillip Street and was a regular customer of both bookbinders and bookshelf manufacturers.

Notwithstanding the frenetic pace of his practice, he found time to serve on the Bar Council for 14 years, from 1957 when he was a junior of two years standing until 1970. Council meetings have always taken place on Thursdays and this provides another reason why this day of the week is so appropriate.

He took Silk in late 1973, less than a year before his appointment to the Bench and 18 years after his admission to the Bar. He could, of course, have done so much earlier.

In fact, it was only his own modesty which delayed for many years his inevitable successful application for Silk. Had he seen the size of the attendance here today, I am sure that that modesty would have led him to express surprise that

so many people had come to his memorial service rather than accept invitations to have lunch with the President of the United States. The fact is that the esteem in which he was held makes that fact anything but surprising.

On the Bench he was a judge ahead of his time. We hear today much about efficiency, case management and judicial control of the pace of litigation. David Yeldham did all those things 20 years ago. He would always bring a case straight to the real point and gently but firmly prod counsel who was acting inefficiently or stressing unimportant issues.

One of his regular phrases to cross-examining counsel was, "What more do you need?". Cases before him almost always finished on time, indeed they often finished early.

He had great practical wisdom. In one case which was reported to me there was an insurance claim by a farmer for some hay destroyed in a bushfire. The farmer calculated the quantity by reference to the length of the pieces of string he had used to tie the hay into sheaves before the fire. The insurance company was ill-advised enough to call a young agricultural economist who gave evidence by reference to a text book which he took with him to the witness box. Justice Yeldham asked him whether he could justify his propositions without reference to the book and he uttered an embarrassed "No". The judge gave his usual indication by looking pointedly at the ceiling and subsequently delivered a judgment totally accepting the practical method used by the farmer.

He had a prodigious memory. A week before his death I was privileged to be seated next to him at the Ebsworth & Ebsworth centenary dinner. Being a typical barrister, I started to discuss a case in which I had appeared before him as a junior in 1978. He remembered every detail of the hearing and was fascinated to hear my breaches of confidence about the settlement negotiations of 18 years ago. He filed it away as part of his overall understanding of the dynamics of that otherwise long-forgotten case. Sadly, the information is once more concealed unless revealed by Chief Justice Gleeson or Mr Lyall who were at the same table and who were on the other side in that case.

Thirdly, he was a leading citizen whose activities mark him as a renaissance man of a high order. He was very active in his church. He was the Procurator of the NSW Branch of the Presbyterian Church of Australia from 1969 to 1974, at the time when it was moving towards full union with the Methodist and Congregational Churches and he played a significant role in facilitating that union. He has been a member of the Committee of Independent Schools, Chairman of the Institute of Law and Medicine of the James McGrath Foundation, Chairman of the Proctorial Board, Chairman of the School Appeals Tribunal, Chairman of the National Elicos Accreditation Scheme, a member of the Child Accident Prevention Foundation Australia, a member of the Knox Grammar School Foundation and a Director of the National Association for Prevention of Child Abuse and Neglect. Even the armed forces were not immune from his interest. He was a senior officer in the Naval Legal Service.

The gap left in his family, in the legal profession and in the community by his tragic and untimely death will not be filled. Our sympathy must go out to all of them. ❑

Norman Lyall

It is a privilege for me to speak today not only as the President of the Law Society of New South Wales representing the solicitors of New South Wales, but also as an old friend of David Yeldham, Anne and their children, Bruce, Belinda and James.

I first met David when my firm commenced to brief him shortly after he was called to the Bar in 1955. We held our conferences in what served as his chambers but was in fact almost a broom cupboard. I can remember that my clients and I used to spill out into the vestibule. I was the first member of our firm to brief David. Our initial involvement was mainly in stevedoring personal injury cases and defending prosecutions of stevedoring companies under the Navigation Legislation. Our connection with David continued to develop. He was briefed in shipping collision cases by John Bowen and later I briefed him in defamation cases I was handling for David Syme and Company Limited, the publishers of the *Melbourne Age*. Together we were involved in many cases, some of which became leading cases in the area of shipping law and defamation law.

It was my experience, and I believe it was the experience of all solicitors who briefed him, that David was always well prepared before a conference and before he went to court. He was also demanding of his instructing solicitor in a quiet way. I was always impressed with the manner he, as a junior, assisted his leader. Feeding them with the cases during argument and materially contributing to the presentation of the case.

He became the leader of the Admiralty Bar and then an outstanding Judge in Admiralty. Significant cases he decided which come to mind are "*The Cobargo*" and "*The Mineral Transporter*", both of which went to the Privy Council which substantially upheld his decisions. As a judge he was always prompt delivering judgments. This was an attribute very much admired by solicitors who always have difficulty explaining court delays to anxious clients.

He had a good sense of humour. We all often laughed about a case involving Mrs Page Wainwright. She had sued P & O in respect of some injuries she had received on one of their vessels and when she was unsuccessful she vented her spleen by reporting us to the Law Society, the Chief Justice, and even the Queen of England. She described David Yeldham in the most unflattering terms. He found the names she gave him most entertaining and so did we all. We have laughed about it many times since.

He was a brilliant barrister and judge and I knew him as a generous, compassionate, warm and caring person. Speaking for the solicitors of New South Wales and myself, I pay tribute to him and say that we will miss him dearly. ❑

A Note on the Taxation of Section 94 "Interest"

"Fruit of the Tree or Just a Taller Tree"?

Bryan Pape

"The fundamental relation of 'capital' to 'income' has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop: the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time." Per Pitney J in *Elsner v Macomber* (1919) 252 US 189 at 206-7.

The decision of the Federal Court in *Whitaker v Commissioner of Taxation* on 21 August 1996, [1996] 2 ATC 4823 (appeal pending) is important for lawyers practising in the personal injury field. Briefly, interest under section 94 of the *Supreme Court Act* 1970 (NSW) was held to be assessable income under section 25(1) of the *Income Tax Assessment Act* 1936 (the Act) and part of legal costs were held to be an outgoing incurred in gaining assessable income and hence an allowable deduction under section 51(1) of the Act. Interest imposed under section 95 of the *Supreme Court Act* 1970 (NSW) was also affirmed as assessable income.

The amount of the so-called section 94 "interest" was $65,514 in a judgment debt of $808,564 arising from a verdict of negligence against a surgeon. The $65,514 "interest" amount was agreed between the parties to the common law action and was the subject of a consent order. There was no evidence of the rate of interest, the sum to bear interest or the period for which interest accrued.

Campbell J in the Supreme Court of New South Wales in *Whitaker v Rogers* (1990) Aust Torts Reports 81-062 at p.68,337 summarised the heads of damages as follows:

A.	Loss of economic capacity for the past	$ 78,074
B.	Loss of economic capacity for the future	104,059
C.	Past medical expenses	4,203
D.	Future medical expenses	38,464
E.	Care	346,768
F.	Home renovation	30,000
G.	Activity equipment	15,545
H.	Transport costs	5,937
I.	General Damages ($50,000 for the past)	120,000
	Total	$ 743,050

The general form of judgment set out in Form 50 in Schedule F of the *Supreme Court Rules* provides: "that the defendant pay to the plaintiff $ damages and $ costs". No reference is made to section 94 or other rights of action as all rights merge in the judgment debt.

The amount of section 94 interest "by way of damages is an integer to be included in the sum for which judgment is given".

In the course of his reasons in *Whitaker's* case Hill J referred to the decision of the Court of Appeal in *Pheeney v Doolan* [1977] 1 NSWLR 601 and cited the following passages: per Moffit P at p. 604 supra:

> "... (the interest) was not designed to compensate a plaintiff for loss arising out of the cause of action but to provide compensation when a sum of money has been outstanding for a period of time. This follows because of the nature of the payment provided. It is 'interest' which may be awarded on the whole or part of the money recovered by the judgment. It presupposes a determination at some time of the amount of money to which the plaintiff is entitled by reason of his cause of action against the defendant."

Later, at p.605, his Honour said:

> "While the essential nature of the award is to compensate a plaintiff by reason of delay in payment of moneys there is no entitlement to interest. The Court must be persuaded that it is just, between the plaintiff and the defendant, to make an award of interest in relation to each of the elements referred to in the section, namely the rate, the sum to bear interest and the period for which the interest is to accrue." [My emphasis.]

In the same case Reynolds JA said at p. 613 supra:

> "In my view, the provision in section 94 is properly to be regarded as adjectival in character; see per Gibbs J, *Ruby v Marsh* (1975) 132 CLR 642 at p. 656. It provides an ancillary power akin to an order for costs and its purpose is to aid the court to do more complete justice between the parties than is otherwise possible. It does not confer a substantive right to interest upon creditors and persons who have suffered injury to personal property and its application is dependent upon proceedings being instituted in the Supreme Court and continuing to judgment. It is not designed to compensate a plaintiff for loss arising out of the cause of action, but to provide compensation where it is otherwise appropriate to do so for the circumstance that a sum of money has been outstanding to him for a period of time. One, but not necessarily the only factor is the inevitable delay between the cause of action, or institution of proceedings, and judgment. While the delay is inevitable, nevertheless the defendant has the use of the money during the period. A rate of interest for the period of delay affords the fair legal measure of compensation." [My emphasis.]

It is clear that the interest under section 94 is a notional amount which is determined in the discretion of the Court. It is not an amount which accrues as of right at periodic rests. Put another way, it is a lump sum equal to the accumulated notional interest between the date when the cause of action accrued to the date of judgment. It is "as if" interest had been charged during this period. When added to the common law damages of $743,050 it established the judgment debt of $808,564. Common law and statutory damages have been

blended or fused together to establish an indivisible debt. The amount paid to Mrs Whitaker in satisfaction of the judgment debt was a lump sum payment equal to this amount. Is it correct to say that part of this lump sum receipt attributable to the section 94 so-called interest "by way of statutory damages" was income derived by her?

What she received was a sum in discharge of a judgment debt being the sum of common law and statutory damages. Is there any warrant under section 25(1) of the Act to attribute part of the receipt as being income derived? For example, in the case of a liquidator's distribution, section 47(1) of the Act attributes part of it to be a dividend (income). Contrary to what Hill J said, no amount is payable as such under section 94. Section 25(1) of the Act says nothing about the apportionment or attribution of a gross receipt between income and a non-income amount. Menzies J in *Federal Commissioner of Taxation v Hatchett* (1971) 71 ATC 4184 said at p. 4186 "in the field of taxation, as in the field of business, capital is used in contrast with revenue; it has no reference to a man's body mind or capacity". It is submitted the essential character of the receipt of $808,564 was of a non-income nature. In short, it is contended that for income to exist it must be a discrete and detachable item. Section 94 "interest" does not satisfy this criterion.

The decision in *Federal Wharf Co Ltd v Deputy Federal Commissioner of Taxation* (1930) 44 CLR 24 as explained by Hill J in *Whitaker's* case seems to be more relevant to section 95 of the Supreme Court Act 1970 (NSW) than to section 94. The contest in *Federal Wharf* case between the taxpayer and the Commissioner involved nine years of income (1920-1928) in which interest seems to have been received by the taxpayer in each of the years, albeit on a tentative compensation figure of £125,000, agreed in 1991 but later fixed at £159,580 in 1928. If 4% was the rate applied then initially £5,000 per annum would have been included as assessable income in each of the nine years of assessment. This appears to be more analogous to the operation of section 95 than section 94. Unlike the *Federal Wharf* case and section 95, no interest is payable as such under section 94. The only amount which is payable is an amount for damages being the judgment debt. The distinction between section 95 of the *Supreme Court Act*, section 26 of the *Harbors Act* 1913 (SA) is that the interest calculation is or was exclusive and payable separately, whereas under section 94 it is inclusive and neither severable nor separately payable.

If the decision in *Whitaker's* case was overruled then there may be scope for the application of the principle in *British Transport Commission v Gourley* [1956] AC 185. This may already have been the case because in determining the interest rate for past pain and suffering income tax appears to have been a factor taken into account when arriving at the commonly applied 4% interest rate.

> "In the circumstances the use of the 4% figure seems to us to be more likely to achieve fair and reasonable compensation for plaintiffs than the use of the real rate of interest figure - which may result at times in a plaintiff obtaining no or little interest and at other times an amount of interest greater than the return which could be achieved by real life investors (on a comparable sum after the incidence of income tax) see *MBP(SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at p. 666."

Hill J at p. 23 of his reasons seems to have averted to this possibility when he said:

> "Since the amount in essence reimburses a successful plaintiff in respect of the time in which the plaintiff has been out of pocket and at rates of interest equivalent, more or less, to commercial rates, not to charge tax upon the interest in fact operates to over-reimburse the successful plaintiff."

If *Whitaker's* case is not overruled then in the end the issue can only be resolved as a matter of public policy. That is whether interest by way of damages on common law damages for personal injuries should be subject to income tax. The United Kingdom has answered this question in the negative. Section 329 of the *Income and Corporation Taxes Act* 1988 (UK) provides as follows:

"(1) The following interest shall not be regarded as income for any income tax purposes -

(a) Any interest on damages in respect of personal injuries to a plaintiff or any other person or in respect of a person's death which is included in any sum for which judgment is given by virtue of a provision to which this paragraph applies; and"

In the United States interest awarded in a judgment is generally considered ordinary income regardless of how the judgment itself is taxed. See *Wheeler v Commissioner of Internal Revenue* 58 T. 459; and *Aames v Commissioner of Internal Revenue* 94 US TC 189.

Whitaker's case appears to raise at least one possible ground of appeal, namely whether there is any warrant under section 25(1) of the Act to attribute part of a receipt of a judgment debt for damages for personal injury referable to section 94 "interest" by way of damages, the character of income derived. If the decision stands, it begs the question as to why the loss of past income (loss of economic capacity for the past) should not also be characterised as assessable income.

To resolve such doubt Parliament should intervene to enact that all damages including "interest" arising from personal injuries are not assessable income. See section 104(a)(2) of the US *Internal Revenue Code* which excludes from gross income "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness". ❑

The Crisis in the Law - Continued

The Hon Justice Michael Kirby AC CMG*

Putting it in Context

There are four matters which I wish to mention in order to place my remarks in their contemporary context:

1. The first is the "crisis" facing the justice system. In a joint paper[1] presented to a New Zealand legal convention, the Chief Justice of Australia (Sir Gerard Brennan) and the Chief Justice of New Zealand (Sir Thomas Eichelbaum) warned of the serious problems facing the courts and the administration of justice:

> "Consider the present situation. The courts are over-burdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally aided litigant. Governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an over-statement to say that the system of administering justice is in crisis. ... Ordinary people cannot afford to protect their rights or litigate to protect their immunities. To that extent, the coercive force of the law is undermined."[2]

These remarks, by the heads of the Australian and New Zealand judiciaries, not given to extravagant language, captured much attention in the media and in the community. Every lawyer and every judge has the obligation to heed the Chief Justices' words and, to the fullest extent possible, to respond to the crisis they describe.

2. Coinciding with this crisis and with a potential to exacerbate it, has been the announcement of the reduction of federal funding from legal aid in Australia. At present this runs at approximately $263 million per year, shared in proportions long settled between the Commonwealth and the States of 55:45. The new Federal government is determined to change this. It objects to carrying the burden of funding legal aid for matters which are exclusively within the constitutional responsibilities of the States and Territories. A reduction has been announced of $40 million over three years, ie $120 million in the triennium[3]. The end of the current ratio of federal funding has also been foreshadowed.

3. The crisis and these changes are occurring in a community which is very conscious of the difficulties which ordinary people have in getting at justice. It is one thing to refuse public legal assistance. It is another thing to take it away where it has been previously established. Citizens are now much more questioning of the law and of all forms of authority, including the courts. The denial of justice because of the incapacity of the legal system to deliver it in a particular case is not now accepted with a shrug. It causes attacks on the legal system, media programs and demands for political solutions.

4. Finally, there is the growing evidence of dissatisfaction in the legal profession, particularly amongst young lawyers[4]. In part, this dissatisfaction probably derives from the lower self-esteem felt by members of the legal profession as a result of the constant barrage of attacks upon them. In part, it may derive from the growing numbers of lawyers and their inability to gain employment which fulfils their expectations. In part, it may flow from the inability of lawyers to respond, in a way that satisfies them, to the needs for justice. This malaise is not confined to Australia. It is found in other countries[5].

The Legal Aid Cuts

The government justifies its reduction in federal funding for legal aid in various ways. It points to the need to reduce the $8 billion budget deficit which suggests that Australia is living beyond its means. It argues for greater responsibility and accountability in the use of government funds. Users of the justice system should share an appropriate part of the cost of providing services. The provision of free services can lead to abuse and reduced efficiency. Furthermore, the shift of responsibility for funding legal aid in non-federal areas back to the States and Territories will, it is said, increase accountability. Those who spend taxpayers' funds should be accountable to the voters in the appropriate polity who elect them.

These arguments of necessity and of political and economic theory cut little ice with the critics of the reduction of legal aid in Australia. They point out that Australia is already, by world standards, a low spending country in the field of public legal assistance. Whereas Australia spends approximately $13 per person per year, New Zealand spends $16; Canada $18; the Netherlands $22; and the United Kingdom $65 in public legal aid. The differences between

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* Justice of the High Court of Australia, President of the International Commission of Jurists. This speech was given by his Honour at the Law Society's Annual Dinner on 31 October 1996.

1. F G Brennan and T Eichelbaum, "Key Issues in Judicial Administration", Address to the 15th Annual Conference of the Australian Institute of Judicial Administration, Wellington, 20 September 1996.
2. *Ibid* at 3-4.
3. D Williams, "Law and Justice for Australians - 1996-97 Budget", News Release, 20 August 1996.
4. Victorian Law Foundation, Survey Extracted from *The Australian*, 11 March 1996 at 19. See also V Palestrant, "Lawyers, Doctors are Doing it Tough" in *Sydney Morning Herald*, 19 September 1995 at 31.
5. A T Kronman, *The Lost Lawyer - Failing Ideals of the Legal Profession*, Harvard University Press, Cambridge, Massachusetts, 1993. See also D M Dawson, "The Legal Services Market" (1965) 5 JJA at 147.

those countries do not appear to justify the different figures[6].

Critics of the proposed reduced funding range from Sir Ronald Wilson, through to those working in Legal Aid Commissions and community bodies who are serving in the front line. Sir Ronald told a recent seminar in Melbourne that the proposed reduction threatened the "inherent dignity of all human beings and the right to equality before the law"[7]. He said:

> "A fundamental characteristic of [our] society is its respect for the rule of law and for the equality of all in citizens before the law. This must mean that no person is above the law. Neither is any person outside the law. This can only be true if access to the law is secure to every person."[8]

Mr Bernard Bongiorno QC, former Director of Public Prosecutions for Victoria, told the same seminar that without legal aid there was no doubt that "more people will be convicted - and unjustly convicted"[9].

Whilst acknowledging the arguments about accountability, Chief Justice Doyle, in a recent paper in Adelaide[10] cautioned against the shedding by governments of their responsibilities in the "core" activities of government. These, it was suggested, included the provision of the justice system. Whilst Chief Justice Doyle was not specifically addressing the budget cuts, his point is pertinent to the extent to which responsibility for legal assistance can be diverted from the public purse to the private pocket and to private sacrifice.

The proposed cuts in the legal aid budget come at a time when there are many other pressures on the justice system. These include the insistence of the courts upon the right of the individual to have a fair trial when facing serious criminal charges[11]; the increase in fees for filing process in State and federal courts and in federal tribunals[12]; and the introduction of charges and costs for family law counsellors and for official services in bankruptcy[13].

The justice system may be in crisis. But those concerned with access to justice in Australia argue that the crisis will not be helped by a pincer movement involving the effective reduction of public legal aid and the contemporaneous increase of costs which will inevitably be passed on to the user.

Long term Solutions

Naturally, governments and the experts who advise them are looking for the solutions which may be offered to respond to the crisis of which Chief Justice Brennan spoke. Amongst the proposals made have been the following:

1. The introduction of mediation and of other forms of alternative dispute resolution to reduce the delays and costs of formal litigation in the courts and tribunals of Australia[14]. The use of alternative dispute resolution is now well advanced in this country. It has many advantages. But in the same speech in Adelaide, Chief Justice Doyle cautioned against putting excessive faith in these alternatives. Whereas a court has, or should have, the will to do justice according to law, the pressure upon mediators will often be to get through more cases. Courts strive to equalise those of unequal power before them. Mediation, and other forms of alternative dispute resolution, may sometimes put undue pressure on the powerless to sanction the will of the powerful. It is somewhat ironic that, at the time when, in industrial relations, procedures for formal conciliation of industrial disputes are being rejected, in other areas of the law's operation, we are being urged to return to more conciliation and more non-court arbitration.
2. Then it is said that systems of insurance should be available so that middle-class people can protect themselves in advance against the risks of litigation. The analogy of medical insurance is often cited. Proposals for legal insurance have been made for many years[15]. The idea deserves exploration. But it seems scarcely likely to cover the range of needs, particularly those of poor and disadvantaged groups.
3. A third possibility is a shift of funding from the federal to State or Territory governments. This is obviously what the federal government wants. But State governments have limited sources for budgetary allocations. Far from rushing to fill the void left by the planned departure of federal funding of legal aid, some States have even publicly contemplated a pull-out of legal assistance in order to force the hand of the federal authorities.
4. Finally, the Australian Law Reform Commission has been asked to investigate the adversarial system of justice in federal courts and tribunals, other than in areas of criminal law. The Commission has appointed a number of experienced consultants, including former Chief Justices Mason and Street and former Justice Andrew Rogers. Assuming modification of the adversarial system to be possible in federal courts (a question which raises potential constitutional difficulties) the re-examination of the way in which justice is delivered to the

6. Law Council of Australia, Report, March 1994. See eg Paul McInerney, "Regions Legal Aid Service in Jeopardy" in *Illawarra Mercury,* 7 September 1996 at 4.
7. C Laird, "Legal Aid Cuts Condemned" in (1996) 70 *Law Inst J (Vic)* No 10 at 10.
8. *Loc cit.*
9. *Loc cit.*
10. J J Doyle, Address to Australasian Law Teachers' Association, Adelaide, 11 July 1996.
11. See *Dietrich v The Queen* (1992) 177 CLR 292; cf *New South Wales v Cannellis* (1994) 181 CLR 309.
12. Attorney-General's Portfolio - 1996-1997 Budget Summary at 2.
13. *Loc cit* at 3-4.
14. F G Brennan and T Eichelbaum, above n 1, 6-8.
15. The Law Council of Australia has put forward a proposal for legal insurance.

litigant could be beneficial. However, I would caution against undue confidence in the inquisitorial system of the civil law countries. A recent case before the European Court of Human Rights, to challenge the process of litigation in France, revealed an appalling story of neglect and delay in administrative courts which may not be unique[16]. At least the adversary system, coupled with pro-active judges, tends to stimulate the progress of litigation through the courts. When the system is bureaucratised, the only stimulation may come from within the courts themselves. And that may not be enough.

Short term Solutions

The immediate crisis cannot wait for these long term solutions. There is an urgent need to respond to the reduction in public legal assistance in Australia. Already proposals have been made to cap the funding available for trials. A cap of $80,000 for criminal trials has been proposed in New South Wales. Other proposals include the withdrawal of assistance for any retrial and a reduction, still further, in the funding available in civil cases, including Family Court disputes. A further immediate consequence is that the Legal Aid Commissions, which feel that their forward funding (as reduced) is already committed, are reportedly reducing the funds available for legal aid in the coming year.

The Australian legal profession understands that it cannot simply look to government to solve the growing gap between public needs and expectations (on the one hand) and available public funds (on the other). The profession, in the past two decades especially, has responded in many ways to improve the delivery of legal services in this country. It has introduced the system of duty solicitors. It has established Community Justice Centres. It has adopted procedures for specialist accreditation so that specialists can process disputed cases more efficiently. It has provided specialist and sometimes in-house lawyers to work in fields advising and representing the disadvantaged: children, people with handicaps, refugees and migrants. These and other initiates bring credit on the legal profession.

But Australian lawyers have also generously provided free legal advice and representation to the needy. They have not done so under compulsion, as sometimes applies in the United States. The burden has not fallen evenly. Some large firms have adopted arrangements for the provision of pro bono assistance out of a sense of professional duty and also out of a realisation that this can help to retain the best and brightest lawyers in their ranks. Sole practitioners and members of the Bar have a long tradition of providing legal assistance in worthy cases. In my own life I did so as a solicitor and later as counsel for university students, for the Council for Civil Liberties and for trade unions and their members. Many of those who gave such assistance in those days are now leaders of the Australian legal profession.

Pro bono is nothing new in the law. What is new is the increasing need for it and the belated willingness to recognise it and to honour those who set a good example to the whole legal profession. In the current times that need will increase. I do not doubt that the legal profession will respond.

The original motivation of most of us was in joining a profession with a noble cause, was the righting of wrongs and the doing of justice, according to law. A civilised society will recognise that the demands on volunteers will soon reach their limits. Australians must ensure that access to justice is not just a pious myth, told at dinners such as this, but a reality in every community and in every courthouse of this land. Lawyers, who know how vitally important legal aid is to the attainment of equal justice and human rights, should lift their voices to convince their fellow citizens, and their government, that this is so. Otherwise, the crisis in the administration of justice in this country will deepen and many wrongs will be done that we should not allow. ❑

16. See *Phocas v France*, decision of the European Court of Human Rights, unreported, 23 April 1996 noted in *Release by the Court*, 23-25 April 1996. Mr Phocas' dispute with the French administration began with the adoption of a road development scheme in May 1960. He applied for a planning consent in March 1965. There followed an astonishing saga of disputes, appeals to the Administrative Court (on four occasions) and eventually to the Conseil D'Etat of France. The application to the Conseil was made on 11 August 1986. It did not deliver its judgment (against Mr Phocas) until 25 May 1990. The European Court of Human Rights found no violation of Article 6 paragraph 1 (by five judges to four) apparently on the ground that Mr Phocas had not made any special effort to speed up the proceedings.

Plaintiff Lawyers Unite

Peter Semmler QC

Plaintiff lawyers are the keepers of the common law. They have now united to oppose the further capping and curtailment of common law rights. The Australian Plaintiff Lawyers' Association (APLA) is a national organisation of nearly 600 barristers and solicitors who act for plaintiffs in personal injury and public interest litigation. In addition to the preservation of the common law itself, the other main aim of APLA is to share information and expertise which can be used in the prosecution of common law rights by accident victims.

Over 100 barristers are currently members of the association. The barristers who are members do not, of course, act exclusively for plaintiffs. Indeed, the obligation of barristers to adhere to the "cab rank" rule is acknowledged by APLA. Nevertheless, those who join the association are sympathetic to its aims. These include faster and cheaper access to justice for personal injury litigants, and the retention of the right to jury trials in civil cases.

APLA was formed because of a perceived imbalance between the resources available to defendants including insurers, medical defence unions and government instrumentalities on the one hand, and those available to individual plaintiffs on the other. The imbalance has become particularly acute recently, with the Federal Government's decision to cut more than $120 million over three years from an already inadequate legal aid budget. While the popular myth may be that the cost of common law compensation is caused by the avarice of lawyers who act for plaintiffs, the reality is quite different. In this country lawyers who act for accident victims are increasingly required to bear the costs of our civil justice system, at least until a successful verdict is achieved. In difficult cases the only way in which deserving personal injury plaintiffs can achieve justice is through the preparedness of their lawyers to bear the financial risk of the litigation. APLA's aim is to make life for those litigants, and their lawyers, a little easier.

APLA members recognise that the special needs of lawyers who act for accident victims are not being met by the various Law Societies and Bar Associations in this country. Because such associations represent lawyers who act on both sides of personal injury litigation, they cannot provide the special services and expertise which an association of lawyers representing the injured can achieve. Nor are the Law Societies and Bar Associations able to lobby governments and make submissions to enquiries exclusively from the plaintiff's perspective with the same focus and force as APLA.

APLA's lobbying efforts to date have been particularly successful. It was because of APLA's successful lobbying of independent and Labor members of the Legislative Council that a Bill which would have severely curtailed the rights of personal injury plaintiffs to have their cases determined by juries in New South Wales did not become law. An APLA delegation, led by Barry Hall QC, prevailed upon the Reverend Fred Nile and his wife Elaine to oppose the legislation. Their votes were crucial in ensuring that the legislation was not passed in the Upper House.

Howard F Twiggs, President of the Association of Trial Lawyers of America, is thanked by Peter Semmler QC, President of the Australian Plaintiff Lawyers Association (APLA).

Earlier this year, as APLA's National President, I made submissions to the Public Accounts Committee's Review of Customer Service in Courts Administration, particularly highlighting the problems for plaintiffs caused by court delays and stressing the need for appointment of more full-time judges. I also made submissions on behalf of APLA at the end of August 1996 to the New South Wales Legislative Council's Standing Committee on Law and Justice in its enquiry into the role of insurers participating in the Motor Accidents Scheme, stressing the need to tighten provisions such as s.45(2) of the *Motor Accidents Act*.

In Queensland APLA has been leading the opposition in recent months to the implementation of the recommendations of the Kennedy Commission of Inquiry which would severely restrict the rights of injured workers to claim common law damages in that State. Because of this opposition, the legislation in question has stalled.

On a national level, APLA representatives met with Dr Fiona Tito in the course of her Review of Professional Indemnity Arrangements for Health Care Professionals. Up until our input Dr Tito had mainly received submissions from the medical profession and the Medical Defence Unions. I believe that our face-to-face meeting with Dr Tito was critical to her understanding of the importance of the common law medical negligence action to maintaining standards in the health care industry in this country. APLA has also made submissions to the Australian Law Reform Commission's review of the litigation cost rules.

Most recently, APLA has made submissions in relation

to the interim report by the Heads of Workers Compensation Authorities to the Labour Ministers Council which has recommended the abolition of common law entitlements for workplace injuries and a move to a national compensation scheme. APLA has vigorously opposed such proposals.

APLA was one of the first bodies of lawyers to condemn the enactment of the *Health and Other Services (Compensation) Act* 1955. Within a week of the commencement of the legislation in February this year, APLA had made detailed submissions to the Federal Minister for Health and the Federal Attorney General protesting about the impact the legislation would have upon plaintiffs. More recently, APLA was the first association of lawyers publicly to criticise suggestions that the Australian Taxation Office might seek to tax interest on past personal injury damages verdicts.

APLA was inspired by similar associations overseas, namely the Association of Personal Injury Lawyers (APIL) in the United Kingdom and the Association of Trial Lawyers of America (ATLA) in the United States. The latter association was conceived by a meeting of 11 workers' compensation lawyers who acted primarily for claimants in Portland, Oregon in 1946. In August this year it celebrated its 50th Anniversary. It now has over 55,000 members and is regarded as the second most powerful lobby group in Washington, after the National Rifle Association. However, unlike the NRA, it has never been defeated in its lobbying efforts. It has recently successfully sidelined the "tort reform" legislation put forward by the Republican Party in Congress which would have seen caps on verdicts and the elimination of punitive damages and other entitlements of plaintiffs in the United States similar to restrictions we have seen in this country in recent years.

The President of the Association of Trial Lawyers of America, Mr Howard Twiggs, delivered the Civil Justice Address at APLA's inaugural national conference in Noosa Heads in October 1996. The conference was extraordinarily successful and attracted more than 200 delegates from around the country. The quality of the papers delivered by experts in various fields from here and overseas was extremely high. The enthusiasm of those who attended the conference demonstrated how great is the need in this country for an organisation such as APLA which caters for the needs of plaintiff lawyers both in individual cases and in the bigger political picture.

In addition to the annual conference, each State branch of APLA hosts regular seminars. The New South Wales branch, in conjunction with the United States Information Service, has held a number of breakfast seminars involving prominent American speakers on issues of relevance to lawyers who act for accident victims in both countries. More recent seminars in New South Wales have covered issues such as medical records ("What plaintiff lawyers overlook"), advocacy, Medicare and Social Security deductions from damages verdicts, and the preparation and presentation of a complex economic loss claim for a plaintiff. APLA also publishes a bi-monthly newsletter, the *APLA Update*. This contains state-of-the-art information of practical relevance to those who act for plaintiffs.

Members can also access an expert database containing the names of over 300 experts in various fields who have been personally recommended by other APLA members. Membership enquiries may be directed to APLA's Executive Officer, John Peacock, at (02) 9415 4233. ❑

Light Work - if you can get it!

Mr X is 5 feet 3 inches tall. He was employed in a factory where, as part of his duties, he was required, about 100 times per day, to lift 50 litre cylinders weighing 17.5 kgs and place them on a hook which was 7 feet 6 inches above the floor. In doing this on one occasion he missed the hook and, in attempting to save the cylinder from falling, suffered an injury to his neck.

The employer engaged a qualified engineer to give expert evidence as to the work system. The engineer thought that the system of work provided by the employer was safe. His report included the following:-

> "The task as assessed by the writer is well within the physical and lifting capabilities of even the short in stature Plaintiff. The Plaintiff simply needed to hold one hand on the bar attachment to the cylinder and stretch up keeping the relatively light (17 kilograms) load close into the body and using kinetic energy, simply extend the toes, take a very small 20cm jump and land safely on the ground.
>
> Therefore the Plaintiff only had to lift a further 20cm and this could be achieved easily by a slight jump action (as in basketball or Australian Rules football). In fact, by standing on his toes (as in ballet dancing) without jumping would have added almost sufficient height."

❑

Change for What Sake?

"Committals may be slow, cumbersome and costly. So are the proceedings of Parliament. That is scarcely an adequate reason for their abolition."

Ian Barker QC "In Defence of Committal Proceedings", a paper delivered at the Sixth International Criminal Law Congress, October 1996. ❑

A Judge-Made Bill of Rights?
Opportunities and Objections*

Justice Murray Wilcox

You will note the question mark in the title. To those who, like me, on balance favour the development of an Australian Bill (or Charter) of Rights, there is some attraction in the possibility of a Bill being developed incrementally by decisions of the High Court of Australia. Given our lamentable record in keeping our Constitution up to date and the current lack of interest at a political level in amendments expressly protecting human rights, it is easy to believe that judicial creativity represents the only chance that any of us will live to see constitutional protection like that which is now commonplace throughout the world. But there are difficulties about that solution. In my opinion, they outweigh the benefits.

The story so far

Before referring to advantages and disadvantages, it is perhaps useful to sketch in some background. I do not propose to go to cases in detail. They are well known.

The reasons for decisions announced by the High Court on 30 September 1992 in *Nationwide News Pty Ltd v Wills*[1] and *Australian Capital Television Pty Ltd v Commwealth*[2] caused a political outcry. In each case members of the Court held that legislation duly enacted by the Commonwealth Parliament pursuant to its s 51 powers was invalid because of infringement of the implied constitutional right of free communication about political matters. However, as Deane and Toohey JJ pointed out[3], there was nothing novel about the proposition that the Constitution contained implied rights. They went back to Quick and Garran and, even further, to an 1867 decision of the United States Supreme Court[4]. They cited High Court decisions from 1912 to 1992. So what caused the stir? Primarily, I suspect, the fact that, in *Australian Capital Television,* the Justices intruded into a subject with a high political content: election campaign broadcasts.

The politicians were hardly placated when, in October 1994, the Court took the further step[5] of limiting their right to recover defamation damages on the basis of the implied constitutional right. That step is currently subject to reconsideration. However, as the High Court found in relation to the Territory senators, it is difficult to reverse a significant constitutional decision without discrediting the Court itself.

You may recall that in 1975, by a four to three majority, the High Court upheld the validity of 1973 legislation providing for the election of two senators for the Australian Capital Territory and two senators for the Northern Territory[6]. In 1977 the Court reconsidered that decision. Despite the fact that only three of the seven Justices thought the 1975 decision correct, it was reaffirmed by a five to two majority. Gibbs and Stephens JJ, who had dissented in 1975, joined the remnant of the 1975 majority[7] in rejecting the fresh challenge to validity[8]. After making the point that the doctrine of *stare decisis* does not rigidly apply to constitutional decisions, Gibbs J eloquently expressed his dilemma[9]:

> *"No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a program of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court."*

He said it was not enough that a member of the earlier majority[10] had retired and been replaced by a Justice[11] with a different view about validity.

I mention this experience because it is something to bear in mind in considering the advantages and disadvantages of the Court attempting to fill the constitutional rights gap by teasing implications out of the Constitution. It is essential that the Court be quite clear about what it wishes to do; once a right is proclaimed, it is difficult for the Court to go back without undermining itself.

A few days after the *Nationwide News* and *Australian Capital Television* decisions, Justice Toohey presented a conference paper in which he discussed the potential for the High Court to develop an implied bill of rights[12]. He referred to the traditional approach of courts: to read a statute narrowly where it potentially curtailed basic common law liberties, but to give a wide construction to the constitutional heads of power pursuant to which the statute was purportedly enacted. So the Commonwealth Parliament's capacity to curtail common law liberty by legislation relating to the subjects of its legislative power was unlimited - it just had to do so unambiguously.

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* Paper presented at Bar Association CLE Seminar on 11 November 1996.

1 (1992) 177 CLR 1.

2 (1992) 177 CLR 106.

3. In *Nationwide News* at 70-72.

4. *Crandall v Nevada* (1867) 73 US 35.

5. See *Theophanous v The Herald and Weekly Times Limited* (1994) 182 CLR 104 and *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211.

6. See *Western Australia v The Commonwealth* (1975) 134 CLR 201.

7. Mason, Jacobs and Murphy JJ.

8. See *Queensland v The Commonwealth* (1977) 139 CLR 585.

9. At 599.

10. McTiernan J.

11. Aickin J.

12. *"A Government of Laws, and Not of Men?"*, a paper delivered at the Conference on Constitutional Change in the 1990s, Darwin, 4-6 October 1992.

Having stated that traditional position, Justice Toohey put a novel proposition:

> *"... it might be contended that the courts should take the issue a step higher and conclude that where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties - a presumption only rebuttable by express authorisation in the constitutional document. Just as Parliament must make unambiguous the expression of its legislative will to permit executive infringement of fundamental liberties before the courts will hold that it has done so, it might be considered that the people must make unambiguous the expression of their constitutional will to permit Parliament to enact such laws before the courts will hold that those laws are valid.*
>
> *If such an approach to constitutional adjudication were adopted, the courts would over time articulate the content of the limits on power arising from fundamental common law liberties and it would then be a matter for the Australian people whether they wished to amend their Constitution to modify those limits. In that sense, an implied 'bill of rights' might be constructed."*

Opportunities for an implied bill of rights

Many discussions about the advantages and disadvantages of a bill of rights quickly become quarrels about entrenching particular rights. I do not wish to fall into that trap. Yet the case for a bill of rights cannot be separated entirely from its likely content. It is not really possible to consider what scope there may be for a judicially-created implied bill of rights without considering, at least in broad terms, what rights we wish to protect. That subject has been examined in Australia from time to time[13], most recently by the Constitutional Commission which reported in 1988. But it cannot be said that the public debate on these occasions was extensive or informed, or resulted in consensus as to the desirable content of a bill of rights, if one was to be enacted by statute or constitutionally enshrined. Consequently, I will discuss scope by reference to the Canadian Charter of Rights and Freedoms, the instrument the Commission thought to be the best model for Australia.

Leaving aside language rights which are not relevant here, the Canadian Charter deals with five categories of rights (or freedoms). First, fundamental freedoms: freedom of conscience and religion, freedom of thought, belief, opinion and expression (including freedom of the press), freedom of peaceful assembly and freedom of association. Second, democratic rights. Third, mobility rights. Fourth, legal rights and, fifth, equality rights.

In terms of court caseloads, the dominant category is legal rights. These rights mainly concern the criminal process. They cover the full continuum from initial arrest to punishment after conviction. Some are stated in fairly general terms, some are highly specific. The protected rights are of great importance and have enabled the Canadian Supreme Court to build up a considerable body of jurisprudence about the treatment of people suspected of crime. However, the Australian experience suggests that, for the most part, it was not essential to put these protections in constitutional form. In recent years, the High Court has insisted on observance of similar rules, not in its capacity as interpreter of the Australian Constitution, but in its capacity as supreme arbiter of the Australian common law[14]. However, there are exceptions. Section 7 of the Canadian Charter is in very general terms. It provides:

> *"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."*

This provision has been used to strike down legislation; for example, there are decisions invalidating legislation placing on an accused person an onus of proof and legislation limiting the circumstances under which abortion was lawful[15]. The course proposed by Justice Toohey might enable the High Court to emulate the former decision. The second is more problematical.

The first-mentioned category, fundamental freedoms, is the area where the Australian High Court has been most active - especially in relation to freedom of expression. Yet decisions like *Australian Capital Television* and *Theophanous* depend upon the freedom of citizens to participate in the political process. They are concerned with communications concerning public issues. Section 2 of the Canadian Charter goes further. It includes what the Canadians call *"commercial speech"*, primarily advertising. Is there a basis for finding such a freedom in our Constitution?

It might have been thought that the next Canadian category, democratic rights, was an area offering substantial scope for the implication of constitutional rights. What could be more fundamental to the democratic notions embraced in *Australian Capital Television* etc than equality of voting power, within reasonable margins? However, in *McGinty v Western Australia*[16] the High Court rejected the argument that the Australian Constitution implies voting parity.

The fourth Canadian category, mobility rights, may be

13. See the 1973 *Human Rights Bill* and the 1985 *Australian Bill of Rights Bill*. Both these Bills stalled in the Senate and lapsed when Parliament was prorogued. Both sought to embody into Australian domestic law most of the provisions of the International Covenant on Civil and Political Rights.
14. See for example *Dietrich v The Queen* (1992) 177 CLR 292.
15. See the discussion of s 7 in my book *"An Australian Charter of Rights?"* at 90-114.
16. (1996) 134 ALR 289.

susceptible of development of an implied right in Australia. I suppose the argument is that it is inherent in the notion of Australia as a federation that citizens of one State are free to move to another State and there pursue their vocations. Of course, s 117, interpreted as in *Street v Queensland Bar Association*[17], in any event substantially covers this ground.

The fifth Canadian category is the one that, to my mind, most demonstrates the case for a bill of rights.

Section 15(1) of the Canadian Charter provides:

> *"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."*

Subsection (2) excludes laws, programs and activities directed to the amelioration of disadvantage.

There is not time to go into the cases that have arisen under s 15. It is sufficient to say it has given a major impetus to people working on behalf of people in disadvantaged groups: women, the disabled, indigenous people, minority language groups, homosexuals, prisoners, people suffering extreme poverty. The story is an exciting one, although there is still a long way to go. But this is also an area where it is difficult to envisage the development of implied constitutional protections. It lies well beyond Justice Toohey's concept of protecting *"fundamental common law liberties"*. What is there in the Australian Constitution to preclude discrimination against minority groups? After all, we have practised it ever since federation.

In summary, it seems to me that there is relatively little scope for implied rights to provide the protections for Australians that have been provided in Canada, and many other countries, by constitutional provisions.

Objections

The major objection to developing a judge-made bill of rights concerns the legitimacy of the undertaking. Australian judges are not elected. We are accountable for our decisions, in the sense that we may be reversed on appeal or criticised by commentators, but we are not politically accountable. In making decisions, we do not consult public opinion. A judge who makes a decision that is at odds with public sentiment is not required to resign or liable to be dismissed. This is, of course, as it should be. Without such independence, it would be impossible for judges satisfactorily to determine disputes involving governments or powerful people. However, the flip side of this situation is that judges have no mandate to determine what values are so important to the community as to warrant constitutional protection. It is one thing to give to judges the task of construing, and applying principles of proportionality to, expressions of values adopted by the people or the Parliament; it is another thing for them also to select the values.

Most judges would be conscious of this point. Once again, the Canadian experience is instructive. In 1960 the Canadian Parliament enacted a statute called the *Canadian Bill of Rights*. It set out some general principles concerning rights and freedoms. It provided that, unless Parliament expressly declared otherwise, every law of Canada - that is, every federal law - should be so construed and applied as not to abrogate those principles. Although Justice Laskin[18] described the Bill in one case as a *"quasi-constitutional instrument"*, it was in law an ordinary statute. This fact, combined with the generality of its terms, seriously undermined its value. Perhaps personalities played a part, but the fact is that, in the 22 years that passed between its enactment and the commencement of the *Canadian Charter of Rights and Freedoms,* the 1960 statute was successfully invoked on only one occasion. The reasons for judgment in the unsuccessful cases make plain the inhibition felt by judges, even at Supreme Court level, in striking down legislation pursuant to such a general authority. Under the Charter, in contrast, the judges have felt no inhibition. The recent Supreme Court judges have taken courage from the fact that the Charter is a constitutional instrument, in the full sense of the word, and is more specific.

A second objection relates to the first. A protection introduced into the law by constitutional amendment or statute may readily be preceded by a widespread inquiry as to its ramifications and consultation with affected interest groups. Although American and Canadian courts liberally allow interventions in constitutional cases, a court intervention falls well short of the degree of consultation available to Parliament.

Finally, judicial development of any set of principles depends upon the vagaries of the list. No pronouncement may be made until a suitable case presents itself; even then, it may go away, as we saw in the recent abortion case. So an important issue may be left unresolved for many years. Or it may be determined in advance of other issues that are logically related to it.

Conclusion

My comments are not intended to be critical of the decisions so far taken by the High Court concerning implied constitutional rights. I seek merely to point out the limited scope for extending that process, so as to embrace all the rights and freedoms most of us hold dear, and the substantial objections to requiring judges to develop the list of protections. This step ought to be taken at the political level, with strong government and parliamentary leadership, and widespread public debate. If that is done, and we achieve a constitutionally inscribed bill of rights, or even a strong and specific statute, the judges may be trusted to do their part in its construction and application. ❑

17. (1989) 168 CLR 461.
18. Later Laskin CJ. See *Hogan v The Queen* [1975] 2 SCR 574 at 597.

Links with London

Reproduced below and published in The Times on 9 November 1996 is an article reporting a speech by one of our members, Sir Michael Davies. It provides a refreshing insight into problems which obviously exist in English Courts, as well as our own.

"Former judge tells expert witnesses to cut the waffle

By Richard Ford, Home Correspondent

A former High Court judge gave expert witnesses some blunt advice yesterday on giving evidence in court: "Straight talking, no bullshit."

Sir Michael Davies, who was speaking at a conference in London, also warned of the risks involved in anyone trying to bring a little light relief to legal proceedings by putting jokes in a report or offering a quip from the dock. "Witnesses should not make jokes. The judge likes to make the jokes in court," he said.

Sir Michael, 75, who retired in July, criticised experts who tried to impress judges by peppering their reports with Latin phrases or fashionable "buzz words".

The former judge of the Queen's Bench Division advised them against producing overwritten documents in which they pontificated or tried to blind the judiciary with science. Contrary to what the "gutter press" sometimes said, expert witnesses must assume that the judges reading reports were neither lazy nor stupid.

He told a conference in London on specialist evidence in criminal and civil cases that experts should be on their guard against advising the judge on the correct verdict, or producing "a load of bullshit - defined by *Chambers Dictionary* as 'deceitful humbug'. Please remember that."

Sir Michael added: "Don't use buzz words or words you think are impressive. The latest buzz word is 'paradigm'. 'Parameter' used to be a favourite word a few years ago; I still don't know what it means.

"Why use Latin when English will do? Don't use *in situ* when you can use 'in position'. If you go to any of my judgments, they may be absolute rubbish, but you won't see any buzz words or Latin," Sir Michael told the Expert Witness Institute at Church House in Westminster. When experts write reports for court proceedings they should attempt to interest the judge with "pithy documents" and should avoid pages about their qualifications and conferences attended in exotic places such as Bangkok.

"Judges like a clear report, written in plain English and no waffling. Self-importance can show in a report as well as in the witness box. Do not try to put yourself over as self-important, don't try to put yourself over as condescending and do not pontificate," he said.

Sir Michael, who was a High Court judge for 23 years, is to be the chairman of the institute, which was launched yesterday. Its aim is to educate, train and certify experts, and to provide lawyers with information that would put them in touch with specialists in particular fields. "

Sir Michael was admitted to our Bar this year, having retired as a Justice of the High Court of Justice. His farewell was attended by two of our members, namely Dennis Cowdroy QC and Mr Geoffrey Jacques, a Bencher of Lincolns Inn who was admitted to our Bar in 1990. Pictured below are our three members at the farewell in London. ❑

(L to R) Sir Michael Davies, Dennis Cowdroy, Geoffrey Jaques)

Celebration Food

The coincidence of the party of the second part's birthday and the 5th anniversary of the surgery on my neck got us thinking of special celebrations.

The first round was Kable's at the Regent of Sydney. It is a light and airy space, sumptuously but comfortably furnished and thus suitable for middle-aged hip joints. Drinks and bread were prompt and the service excellent; both waiters within eye range, but not hovering, is a big plus.

We were four and did an entrée tasting. Leek soup, with fresh asparagus tips braised and dropped in, was delicious and creamy. Freshly shucked Sydney Rock and Pacific oysters natural with balsamic vinegar to dip in, and lemon, were simple and superb.

A Thai-style squid salad was cool, and hot enough with lemon grass, chilli and shallot greens. Best of all was a spinach tart filled with a scrambled egg and crab mixture. Delicious.

For mains, three had Illabo lamb roasted to pink perfection and served with yellow squash, baby roast potatoes and sugar snap peas. Conventional, but perfect.

I had barramundi pan-fried. It came in a "net" of potato strings, very finely cut and cooked into the fish, which was delicately fried and delicious, sitting on a skordalia mash and the same vegetables.

Bollinger by the glass, Leonay Riesling by Leo Buring and Yarra Glen Shiraz of 1991 washed it down.

We shared between four a chocolate mud pudding with de Bortoli Noble One "sticky".

A great meal, not too heavy for lunch time. Also not cheap ($550 for four, including tip) but you only live once!

A different kind of celebration took Tamworth circuiteers, plus a few, to Manfredi's new extravaganza at the Argyle Cut old Bond Stores. On the third level of Argyle Department Store, Bel Mondo is big, high-ceilinged, modern plus plus in eclectic style and, my only criticism, noisy. On the Friday of its first week it was packed, but the service was still attentive.

We ate at the table, not at the bar, and everything was cooked to order - so not quick. The deep-fried zucchini flowers stuffed with gruyere by Heidi were fabulous - crisp and very hot, which is the trick - soggy they are ordinary.

Others had a daily special of scallops in a Portuguese-style sauce of tomato, garlic, coriander and shallots which were excellent.

A stack of sweetbread slices pan-fried, crisp, but soft inside and not at all leathery, a brown sauce complementing perfectly, settled me down just nicely.

Others had the Illabo lamb which is the spring rage, roasted and good, and I sampled someone's roast duck which was crisp outside, pink inside and not oily at all. Wunderbar.

We drank Pipers Brook Pinot Gris (lots!) and Diamond Valley Cabernet and finished with a platter of great Australian cheeses. The bill? Ouch! $1,500 for eight, including a 10% tip - but we were drunk!

A great-grandfather outing took a group of his best friends and the No 1 son to Encore at the Sebel Town House. Now this is a value bet with super service, valet parking and marvellous food for $32.50 for two courses including selected wines until 3 pm - Basedow red and white in our case.

Superb were oysters natural with sour cream and caviar, hot and cold smoked salmon (sliced cold smoked and a piece of Tasmanian Atlantic hot smoked but served cold) and char-grilled scallops and baby octopus on rocket with a Thai sweet chilli sauce.

Of the mains, Western Australia red snapper fillet baked with ginger garlic attracted three of those who had mains and all pronounced it excellent. One had the corn-fed chicken char-grilled on tofu and didn't leave a skerrick. Glasses were unobtrusively kept topped up.

I think this is a new find of an old favourite, so if your ship comes in, or you have a big win, all three are great celebration places. For noise, Bel Mondo; for quiet, either of the others - but great, great food. ❑ John Coombs QC

Kable's
The Regent
George Street
Sydney
Telephone 9238 0000

Bel Mondo
Level 3
12 Argyle Street
The Rocks
Telephone 9241 3700

Encore
Sebel Town House
23 Elizabeth Bay Road
Elizabeth Bay
Telephone 9358 3244

Book Review

Ethics in the Law - Lawyers' Responsibility and Accountability in Australia
Stan Ross
Butterworths, 1995
RRP S.C. $72.00

We live in times of increasing concern about the ethics and principles of practice. Not only the judges of the High Court concern themselves with changes brought by the practice of law becoming businesslike and client-orientated. Practitioners with any sense of history of the role the profession has played within society, and the relations between fellow practitioners, are concerned with changes which threaten the contribution the profession has made to the maintenance of a stable and relatively harmonious society.

When asked to provide a review of this text I accepted, expecting the exercise to be both enjoyable and rewarding. The breadth of coverage and handy summation of authorities in a variety of areas make it worthwhile, but the author's attitude and the manner in which much of the material is presented is a cause for angst in a practitioner seeking a ready reckoner or quick guidance.

Remembering the price Mr Leo Schofield had to pay for describing some pitiful serve of lobster (who remembers now whether it was cooked, off or tasteless?), one is conscious of the need to be circumspect.

Stan Ross is well placed to compile relevant material for *Ethics in Law in Australia*, having been the co-founder in 1973 of a UNSW course subject *Law Lawyers in Society*. The course resulted in the publication of *Lawyers* in 1977 (and 1986), of which Ross was co-author with Julian Disney, John Basten and Paul Redmond. This new text is an update of that earlier work; a chapter on *Tax Ethics* is a compilation of another work by Ross, *Ethics for Tax Practitioners*.

An overview is given of the formalities and controls of the legal profession in Australia, admission to it and discipline within it. The usual categories of consideration of the relationship of the practitioner with clients are addressed (care, confidentiality and conflict), and the relationship of the practitioner with the courts (fairness and candour).

Unfortunately, this new text omits coverage of topics of regular concern to practitioners - fees, advertising, legal aid and contempt.

Unfortunately, the text is flawed by typographical errors and errors of blocking. There are also regular intrusions of a textbook nature - factual scenarios followed by *Discuss*. Whilst much is repetitive of the original publication *Lawyers*, nonetheless the areas covered have been expanded to cover up-to-date authority and articles. There are interesting references to US, UK and Canadian decisions and the ABA model code.

Some of the opinions and observations of the author are wrong, or at least misguided. For example:

- *Lawyers guard with vigilance their special knowledge and try to prevent the dissemination of this knowledge throughout the mass media.*

- *... Peter Clyne never showed any contrition or understanding that he had done wrong.* In November 1981 Clyne circularised members of the Bar with a lengthy affidavit, supporting his application for re-admission, in which he acknowledged that the judgments relating to his being struck off the Rolls were correctly based.

- *Barristers' clerks have the authority to accept briefs for the barristers and to mark the fees.* This may have been a rule of practice 20 years ago, but has long since gone.

- *One of the justifications (for the rule that barristers who settle a case immediately before trial will usually receive their full fee for the first day of the trial) is that it reduces the likelihood of failure by barristers to inform clients of a settlement offer. This is because they would lose their fee if the offer is accepted and the trial aborted.* Most would regard this as a nonsense.

- *The modern version (of the basis of the rule of legal professional privilege) is that the privilege serves the interests of clients to obtain effective legal advice.* Rather, it serves the administration of justice in allowing both the innocent and guilty to obtain advice in all circumstances.

- *Should every interest be heard? For example, do nazis, serial killers or child pornographers have the right to present their views and have lawyers represent them?* Practitioners do not present the views of their clients - rather, they represent them within the strictures of the legal system - luckily we have not got to the point of adopting the view of William Kunstler, who only represented *clients he loved.*

If one puts aside the unease and discontent caused by the errors and partiality, the book is a useful update (in part) of the original publication. ❑ Peter McEwen

Superannuation 1997

Superannuation 1997 - A National Conference for Lawyers - will be held on the Gold Coast, Queensland between 26 and 28 February 1997.

Enquiries should be directed to Dianne Rooney - telephone (03) 9602 3111 or fax (03) 9670 3242. ❑

International Bar Association Conference New York - 11 to 13 June 1997

The IBA is returning to New York to celebrate its 50th Anniversary in June 1997. The IBA was founded in New York in 1947 at the New York City Bar Association. It how has 166 Bar Associations and Law Societies and over 18,000 individual members.

Key note speakers invited include Albert Gore Jr, Vice-President of the United States of America and Boutros Boutros-Ghali, Secretary General of the United Nations. The United Nations will host the session on the "Legal Profession and Human Rights".

Contact the International Bar Association, 271 Regent Street, London W1R 7PA, United Kingdom, telephone (044) (0) 171 629 1206, fax 044 (0) 171 409 0456, E-mail: confs@int.bar.org. ❑

AIJA Asia/Pacific Courts Conference 22-24 August 1997 - Sydney

The Australian Institute of Judicial Administration is conducting a conference on the theme of "Managing Change" in Sydney from 22-24 August. For further details contact:

AIJA/Asia Pacific Courts Conference Secretariat, GPO Box 2609, Sydney NSW 2001 , telephone 612 9241 1478, fax 612 9251 355, E-mail: reply@icmsaust.com.au. ❑

Further conferences which may be of interest to members of the Bar in 1997 are:

January 11-18
Cortina D'Ampezzo, Italy
Australasian Europe Medico-Legal and Industrial Law Conference.
Contact Karen Prior, telephone (07) 3839 6233, fax (07) 3832 2209.

March 3-5
Canberra
Second National Outlook Symposium
Crime in Australia Conference.
Contact Conference Administration, Australian Institute of Criminology, GPO Box 2944, Canberra ACT 2601. Telephone (06) 260 9200, fax (06) 260 9201, E-mail: sylviam@act.crime.oz.au.

June 1-6
Thessaloniki (Salonica)/Gallipolli
6th Greek/Australian International Legal and Medical Conference.
Contact Jenny Crofts Consulting, 41 Davison Street, Richmond Victoria 3121. Telephone (03) 9429 2140, fax (03) 9429 2140.

June 3-7
San Francisco
Second World Congress on Family Law and Children's and Youths' Rights.
Contact Ms Gail Hawke, Capital Conferences, Level 5, 210 George Street, Sydney NSW 2000. Telephone (02) 9252 3388, fax (02) 9241 5282.

July 12-19
Bali
Advanced Mediation Conference.
Contact Rona Bowrey, Creative Conference Management. Telephone (02) 9692 9022, fax (02) 9660 3446.

August 27-31
Manila
15th Biennial LAWASIA Conference.
Contact LAWASIA Secretariat, GPO Box 3275, Darwin NT 0800. Telephone (089) 469 500, fax (089) 469 505.

September 1-7
Florence
35th Annual Congress,
International Association of Young Lawyers.
Contact Michelle Sindler, Minter Ellison, 44 Martin Place, Sydney NSW 2000 Telephone (02) 9210 4444, fax (02) 9235 2711.

September 14-19
Melbourne
30th Australian Legal Convention.
Contact Pat Hogan, Law Institute of Victoria, 470 Bourke Street, Melbourne Victoria 3000. Telephone (03) 9607 9311, fax (03) 9607 9558. ❑

This Sporting Life

Council of Professions Golf Day 21 November 1996

Despite extensive publicity, only half a team of Barristers attended this annual event.

As a result, the Bar was at a serious disadvantage, but approached its task, as always, with boundless optimism.

Unfortunately, this optimism was quickly dashed when J Harris and N Delaney (playing in the vogue of Tiger Woods' 8 over par rather than Greg Norman's 5 under par) were soundly thrashed by the septuagenarian retired Veterinary Surgeons.

Harris brought much of his cricket skills to bear off the tee but, at Monash Golf Club, his length was defeated by the many huge rocks and unwelcoming trees.

Delaney never hit far enough to even reach the rocks or trees at any stage.

The only bright spot in the day came from Flaherty and Gray who showed that the Bar could, at least, dominate Architects as they had a scintillating victory which, unfortunately, still left the Bar way down the bottom of the list.

This is an excellent day and, hopefully, next year there will be more participants and the Bar can put up a better show. ❑

Barristers v Solicitors Hockey 1996

On Sunday 8 September at Queen Elizabeth Park, West Lindfield, the Bar's hockey team took the field with great determination to atone for last year's defeat by the Solicitors and to retrieve the coveted Noonan Trophy. Nevertheless, that determination, and the valour and skill of Anna Katzmann in goal, were not enough to stop our youthful opponents belting in a few early goals. Play then settled down a bit as we restored some balance with Philip Durack, David Pritchard and Geoff Warburton featuring in the forwards along with Ian Harvey and Bruce McManamey in the half-back line. At the end of the first half the score was 4-0 against us.

Whether it was because of helpful umpiring or the fact that we had a greater number of players on the bench than the Solicitors and were able to interchange more regularly, or whether we just played better, we had a good second half, holding our opponents in that stanza to 3-2. The final score was 7-2 to the Solicitors.

New players turning out for the Bar were Rashda Rana, Angus Ridley and Ellissa Moen. Phil Greenwood was prominent among the Bar's many supporters. Lengthy and exuberant festivities took place after the match.

Our team was (in alphabetical order) Callaghan SC (Captain), Cooper (non-practising), Philip Durack, Lachlan Gyles, Harvey, Ireland QC, Katzmann, Larkin, McManamey, Moen, Pritchard, Rana, Ridley and Warburton. ❑

(L to R) Elissa Moen, Anna Katzmann, Phillip Durack, Lachlan Gyles, Lyn Cooper, Peter Callagham SC, Bruce McManamey, Rashda Rana, Geoff Warburton, Angus Ridley, Patrick Larkin, "ring-in", Ian Harvey, John Ireland QC, David Pritchard.